

In the Matter of

the Resource Management Act
1991 (**Act**)

And

In the Matter of

The Proposed Te Tai O Poutini
Plan – Franz Josef Area
Hearing

Further information to Matters Raised
at the Franz Josef Area Hearing.
Sean Tristan Dent
for Skyline Enterprises Limited

(Submitter 250)

Dated: 30 October 2024

Introduction

- [1] The purpose of this correspondence is to provide a planning response to Minute 49 issued by the Hearings Panel in regard to the notified definition of 'Recreation Activity' and the attached report from Ms Easton proposing changes to that definition.
- [2] Additionally, this reply will also respond to comments and questions from the Hearings Panel at the hearing on 8th October 2024 and provides the following further analysis:
- Identification of the potential Regional Council consents required for an aerial cable way.
 - An explanation of the term 'tolerable' as it relates to natural hazard risk and incorporation into the Objectives and Policies of the FJAAZ.
 - A further Section 32AA analysis of the following options to achieve the intent of the SEL submission relief sought:
 - (i) The proposed FJAAZ with amendments proposed following hearing comments and questions.
 - (ii) A potential precinct for an aerial cableway.
 - (iii) A change to the definition of 'Recreation Activity' and retention of the Natural Open Space Zone with amended provisions.
- [3] Noting that the Section 32AA analysis for the above options leads me to maintain my opinion that the proposed FJAAZ is still the most efficient and effective option, I attach to this correspondence as **Appendix [A]** a revised version of the proposed FJAAZ provisions that respond to the Hearings Panel commentary of their scope and overall extent.

The Proposed Definition of Recreation Activity

- [4] I have considered the changes to the definition of 'Recreation Activity' as proposed by Ms Easton and outlined below:

Notified Definition of Recreation Activity

"means the use of land, waterbodies and/or buildings for the active or passive enjoyment of organised sports,

recreation or leisure, whether competitive or non-competitive, and whether a charge is made for admission or not, including sporting and recreational events, but excludes gambling machines and motor sport facilities.”

Ms Easton’s Proposed Definition of Recreation Activity

“means the use of land, waterbodies and/or buildings and structures for the active or passive enjoyment of organised sports, recreation or leisure, whether competitive or non-competitive, and whether a charge is made for admission or not, including sporting and recreational events, but excludes gambling machines and motor sport facilities. Recreation activities include commercial recreation activities such as commercial guiding, training, instructing,”

- [5] I appreciate Ms Easton’s effort to amend the definition of ‘Recreation Activity’. It resolves one of the concerns I had with the notified definition being that the use of the word ‘building’ did not necessarily include an Aerial Cableway as such structures are exempt from the definition of building under the Building Act and the notified definition of building in the TTPP¹.
- [6] The definition does not however, explicitly confirm that the construction, maintenance, replacement, and repair of buildings/structures is covered by this definition. Specifically, the definition provides only for “*the use of land, waterbodies and/or buildings and structures.....*”
- [7] I also consider that there would be some confusion in applying the Rules of the NOSZ in light of this proposed definition as follows.
- [8] Rule NOSZ-R3 provides that ‘Recreation Activities’ are Permitted Activities where all the Performance Standards for Rule NOSZ-R1 are achieved. NOSZ-R1 sets the Performance Standards for ‘Park Facilities’ and ‘Park Furniture’. The notified TTPP definitions are outlined below:

“Parks Facilities

¹ Sean Dent Primary Evidence dated 9th September 2024, paragraphs 61 – 63.

Means land or structures that facilitate the management of public open space, including:

- a. vehicle, machinery and equipment depots;*
- b. Storage sheds;*
- c. Public toilets, shelters and changing facilities;*
- d. Foot bridges and boardwalks,*
- e. Jetties and pontoons;*
- f. Minor stormwater management devices such as rain gardens and swales.”*

“Parks Furniture

Means structures established for the convenience and amenity of the public including:

- a. seating, picnic tables and barbeques;*
- b. fountains, drinking fountains and water features;*
- c. public art;*
- d. pou whenua;*
- e. play spaces, playground equipment and associated safety surfacing;*
- f. cycle parking structures;*
- g. rubbish bins;*
- h. lighting structures;*
- i. shade sails;*
- j. cycleways and paths; and*
- k. gardens, landscaping and planting.”*

[9] It is my opinion that an Aerial Cableway would be well beyond the scope of the buildings, structures, and amenities anticipated by these definitions and therefore, I consider that Rule NOSZ-R1 cannot be applied to an Aerial Cableway unless consequential amendments are made to these definitions as well.

- [10] Accordingly, in my opinion this makes it questionable as to whether Rule NOSZ-R9 makes Recreational Activities a Restricted Discretionary Activity where they do not comply with Rule NOSZ-R1, can apply if the Standards in that Rule are not applicable.
- [11] In my opinion, there is a degree of uncertainty in the interpretation of the activities and built form under the above definitions and performance standards and therefore whether Rule NOSZ-R17 (that makes any activity not provided for in another Rule) a Non-Complying Activity, could still be triggered.
- [12] I have also considered the amended definition of 'Recreation Activity' against the provisions of the Open Space Zone (OSZ), and I find that there is a similar interpretation issue between Rules OSZ-R1, OSZ-R2, and OSZ-R14.
- [13] Accordingly, with the uncertainty in the interpretation of the activities and built form, Rule OSZ-R26 that makes any activity not provided for in another Rule a Non-Complying Activity, could be triggered.
- [14] Even if in both the NOSZ and OSZ it was interpreted that the Restricted Discretionary Activity Rules (NOSZ-R9 and OSZ-R14) applied for an Aerial Cableway as an RD activity, the bundling principle of the RMA would result in the overall construction and the on-going operation of an Aerial Cableway activity being either a Discretionary Activity or Non-Complying Activity through the application of other Rules in the TTPP such as:
- A **Discretionary Activity Consent** pursuant to Rule ECO-R7 for indigenous vegetation clearance not meeting the requirements of Rule ECO-R5 as the clearance will occur within an ONL/ONF.
 - A **Discretionary Activity Consent** pursuant to Rule NFL-15 for earthworks within an ONL/ONF not meeting the requirements of Rule NFL-10.
 - A **Discretionary Activity Consent** pursuant to Rule NFL-R14 for buildings and structures in ONL/ONF's not meeting the requirements of Rule NFL-R12.
- *note the activity is considered not to achieve NFL-R12(3)(e) because the proposed amended definition of 'Recreation

Activity' doesn't include the construction of buildings/structures, only their 'use'.

- A **Non-Complying Activity Consent** pursuant to Rule NOSZ-R17 for 'helicopter landing areas' as helicopters will be required to fly equipment and structures into the area during construction and helicopter landing areas are not specifically provided for in any other Rule. The amended definition of 'Recreation Activity' provides for the *use* of buildings/structures not their construction and associated methods.
- A **Non-Complying Activity Consent** pursuant to Rule OSZ-R26 for 'helicopter landing areas' as helicopters will be required to fly equipment and structures into the area during construction and helicopter landing areas are not specifically provided for in any other Rule. The amended definition of 'Recreation Activity' provides for the *use* of buildings/structures not their construction and associated methods.

[15] Accordingly, and notwithstanding the effort made to accommodate the submissions intent through the altered definition of 'Recreation Activity', I am of the opinion that the proposed FJAAZ and its all-encompassing Discretionary Activity status for the construction and subsequent operation of an Aerial Cableway is a more efficient and effective approach to achieve the objectives of the TTPP (because on the evidence from SEL, the adverse effects of the Aerial Cableway in the identified location are likely to be minor or less), and for the reasons set out in my original evidence in terms of achieving both the tourism and commercially enabling higher order provisions, as well as environmentally protective ones.

[16] Even if my analysis above is incorrect as to the interpretation of the definitions and performance standards, such that the aerial cableway would be a restricted discretionary or discretionary activity, there would be no policy and objective guidance within the NOSZ or OSZ at present that would be well catered to address and guide assessment of the complexities of the aerial cableway system, without further additions and amendments.

[17] If the definition of recreational activities were amended to include construction of buildings and structures, and policy guidance were included in the OSZ or NOSZ to guide such an assessment, this could facilitate a more appropriate zoning outcome in a section 32 sense than the current TTPP framework, as set out in the attached appendices.

Regional Council Consents

[18] The Hearings Panel questioned whether I had undertaken an analysis of the potential Regional Council consents that would be required for an Aerial Cableway noting that this would be a useful exercise and could lead to a refinement of the proposed Objectives and Policies where their jurisdiction extended into matters addressed by the Regional Plan i.e. proposed policy P26(d) that directed there be no loss of water quality.

[19] In my opinion, there is some overlap between the functions of territorial and regional consent authorities under Sections 30 and 31 of the RMA. Accordingly, it is my opinion that it is appropriate to include plan provisions that control the effects of land use activities in relation to the potential impact on surface of water.

[20] However, in recognition of this overlap, I have included at the conclusion of the revised Objectives and Policies in **Appendix [A]**, an advice note that the Operative West Coast Regional Land and Water Plan is applicable and may contain relevant provisions. A similar advice note has been included in recognition of the overlap and further management of effects beyond an Aerial Cableway structure by the Department of Conservation.

[21] While I do not have a specific proposal before me to assess, I have analysed the Operative West Coast Land and Water Plan and used my broad understanding of the likely works required for development of an aerial cableway from my involvement in other similar projects² to identify that the following resource consents may be required:

- **A Discretionary Activity Consent** pursuant to Rule 16 whereby the proposal will involve earthworks in Erosion Prone Area 2³

² *SEL Queenstown Gondola Re-Development, SOHO Ski Area passenger lift system, Cardrona Alpine Resort Willow Basin, Pringles Creek, and McDougall's passenger lift systems, and Remarkables Ski Area Curvy Basin and Sugar Basin Passenger Lift Systems.*

³ *Land with a dominant slope angle above 25 Degrees (or a 1:2.1 ratio).*

that don't meet the Permitted Activity standards in Rule 5 (more than 10m³ per landholding).

- A **Discretionary Activity Consent** pursuant to Rule 16 whereby the proposal will not meet the Permitted Activity standards in Rule 9 for vegetation clearance in Erosion Prone Area 2 (likely more than 20m²).
- A **Discretionary Activity Consent** pursuant to Rule 35 whereby the proposal will result in construction of a cable over the bed of a river that does not meet the Permitted Activity standards of Rule 21 (part (c) no part of the cable is allowed to extend below the underside of the structure to which it is attached).
- A **Discretionary Activity Consent** pursuant to Rule 58 whereby the proposal may not meet the Permitted Activity standards for temporary diversion of water during construction (if necessary) specified in Rule 47 and 51.
- A **Restricted Discretionary Activity Consent** pursuant to Rule 56 for the taking of ground water that doesn't comply with Rules 44 or 46 (i.e. if dewatering of foundations is required during construction).
- A **Discretionary Activity Consent** pursuant to Rule 71 for the discharge of any contaminant to water that doesn't comply with Rules 63 – 70. (It is possible that sediment could be discharged during construction).

[22] I have included a list of the key Objectives and Policies relevant to the above Rules in **Appendix [B]** to this reply.

An Explanation of the Term 'Tolerable'

[23] The Objectives and Policies for the proposed FJAAZ make reference to managing risk of natural hazards to a 'tolerable' level. There was some discussion at the hearing as to what 'tolerable' means and how it may be quantified in the consideration of a future consenting process for an Aerial Cableway.

[24] In my experience, assessing proposals for resource consent as to whether they represent an acceptable or tolerable level of risk is not uncommon and geotechnical and natural hazards assessments included in those proposals generally use this terminology⁴. However, I have sought guidance and an explanation on this matter directly from Mr Faulkner who advises:

“Where risks are defined as Tolerable, the development is typically considered feasible. Tolerable risk falls in a range that society can live with so as to secure certain benefits. It is a range of risk regarded as non-negligible and needing to be kept under review and reduced further where practical. The risk is managed so that it doesn’t become significant.

Tolerable risk sits between Acceptable and Significant in terms of risk level, so for clarify [sic] it can help to compare the descriptions of Acceptable and Significant.

Acceptable Risk: lowest risk levels. Risk that everyone affected is prepared to accept. Action to further reduce risk is usually not required unless reasonably practical measures are available at low cost in terms of money, time and effort. The level of risk is to be maintained.

Tolerable: Non-negligible risk levels (see above description).

Significant Risk: highest risk levels, the activity is avoided.

Each of the above 3 risk categories can also be defined by a number known as the Annual Individual Fatality Risk or AIFR. This number quantifies the annual risk of a person being killed from a hazard, or combination of hazards, whilst undertaking the activity. This number is derived by quantitatively assessing the frequency of an event, the likelihood of a person being impacted and the vulnerability of the person (user of the activity) who is most at risk. The

⁴ Skyline Direct Referral Hearings for the Queenstown Re-Development, QLDC and ORC Applications (RM240181, RM24.159, RM240333 and RM24.254) for Debris Flow Barriers in the Ben Lomond Recreation Reserve, Queenstown.

person most at risk tends to be an employee working at the activity who is therefore exposed to the hazard for a greater portion of each year when compared to other users e.g. a one off tourist user. The calculation results in a number that can be adopted to place the activity into either an Acceptable, Tolerable or Significant risk category. With respect to APP6 guidelines⁵ an AIFR number of between 1×10^{-5} and 1×10^{-4} gives a Tolerable risk. An Acceptable risk is a lower number than 1×10^{-5} and a significant risk is a number greater than 1×10^{-4} .

The number can also be used to compare the risk of undertaking the activity with other everyday risks, e.g. driving, and to assess risk to property i.e. the gondola structures.”

- [25] Based upon the above explanation from Mr Faulkner, I consider that the term ‘tolerable’ is appropriate to include in the Objective and Policy direction for the FJAAZ and can be appropriately quantified at the time of assessment of any future resource consent application.

A Proposed Precinct

- [26] As I explained during the hearing, I have relied on the Ministry for the Environment’s guidance document for District Spatial Layers and Zone Framework Standards in considering the appropriate framework for a future Aerial Cableway.

- [27] As discussed, this document outlines that using a precinct or a special purpose zone can both seem like viable options. In regard to the application of a precinct it is important to consider whether:

- (a) *To what extent the underlying zone provisions remain relevant.*
- (b) *If they remain relevant, the high-level policy intent of the zone remains the same or similar, and the introduction of complementary provisions would then enable/restrict the activities of interest, then a precinct is most suitable.*

⁵ APP6 is the Otago Regional Council Methodology for Natural Hazard Risk Assessment in the Proposed Otago Regional Policy Statement 2021.

- (c) *If the existing zone's high-level policy intent is contrary to how the activities should be managed, and few or none of the existing zone provisions would apply, and no other spatial layers can apply, then a new special purpose zone is most suitable.*
- (d) *What would be the most appropriate zone if the activity was removed, shut down or relocated from the site? For example, if a large rural industry in the middle of a rural environment were to close, or a museum in a commercial area were to relocate, what would be the most appropriate zone to manage the area into the future?*
- (e) *If the underlying zone would be the same as the adjacent land, and existing use rights and resource consents are not sufficient to manage the activity, then a precinct is most suitable.*

[28] In responding to the above questions, I consider that the underlying zone provisions for the Natural Open Space Zone (NOSZ) would remain relevant to activities other than an Aerial Cableway. These provisions apply to public conservation land including national parks, throughout the region. The NOSZ anticipates a low level of development and built form to retain the natural/biodiversity values within the natural open space area, which would be appropriate in the area identified given Ms Smetham's conclusions as to the high natural character values.

[29] Complimentary provisions would be required to ensure that an Aerial Cableway is appropriately assessed but there would potentially be conflict with Natural Open Space Zone Objective OSRZ-02 and Policies P18 – P20 which:

- OSRZ-02 - Recognise the NOSZ as having high natural values and a low level of development and built form.
- OSRZ-P18 - Suggest a low level of built form is anticipated;
- OSRZ – P19 - Require activities and facilities are consistent with the purpose, character, and qualities of the NOSZ.
- OSRZ – P20 - Provide for small-scale buildings and structures.

[30] The high-level objectives and policies are contrary to the scale of a potential Aerial Cableway and do not actively enable a policy framework well equipped to assessing such a proposal or its continued operation.

- [31] If a future Aerial Cableway never eventuated or was removed, the NOSZ (being the adjacent zone to the FJAAZ) would be the most appropriate zone to apply. However, in considering this scenario, I also note that there are no existing or anticipated activities that presently occur in the proposed FJAAZ that would be reliant on existing use rights or resource consents to continue operating because of the proposed zoning.
- [32] As the proposed FJAAZ is so specifically geared towards only the provision of an Aerial Cableway with significant recreation and economic benefits, there is unlikely to be a risk that any other unintended activities could be established if the FJAAZ remained and was undeveloped.
- [33] Additionally, regardless of the zoning that applies, the Department of Conservation can continue to undertake works on the land that are consistent with the relevant management plans without a requirement for any resource consents⁶.
- [34] Notwithstanding, I have considered the application of an Aerial Cableway Precinct using the same corridor as illustrated in the SEL submission and consider that the following Rule would need to be incorporated as a complementary provision:

Discretionary Activities	
NOSZ – R13	Aerial Cable Ways
The construction, operation, and removal of an Aerial Cable Way within the Franz Josef Aerial Cableway Precinct.	Activity Status Where Compliance Not Achieved – N/A

- [35] A tabulated Section 32AA analysis of the above option against the relevant higher order Objectives and Policies of the TTPP is contained in **Appendix [C]**.

Retention of the Natural Open Space Zone with Amended Provisions.

- [36] I have considered the option of retaining the Natural Open Space Zone (noting that this is what the Department of Conservation sought in their submission⁷). This option has been assessed with Ms Easton’s proposed definition of ‘Recreation Activity’ and on the basis that the

⁶ RMA Section 4(3)

⁷ Submission of Department of Conservation #602, page 98 – 99 Natural Open Space Zone.

Hearings Panel considers the amended definition to be broad enough as to encapsulate the construction of the Aerial Cableway structures rather than simply providing for their 'use'.

[37] Should the Hearings Panel agree with me that the amended definition does not adequately cover the construction of an Aerial Cableway, then either the definition will require further amendment or a new Discretionary Activity Rule may be required as outlined above for the precinct option.

[38] I consider that additional provisions would be necessary as follows:

New Objective

OSRZ – 03 The importance of Franz Josef / Kā Roimata-a Hinehukatere Valley to domestic and international tourism is recognised by ensuring any glacier Aerial Cableway is located and operated where landscape, cultural, and indigenous biodiversity values are maintained.

New Policy

OSRZ-P21 Within the NOSZ in the Franz Josef / Kā Roimata-a Hinehukatere Valley, provide for the construction and operation of an Aerial Cableway that:

- a. Protects the landscape values of the ONL and ONF by;
(i) avoiding adverse effects on landscape values;
and
(ii) if avoidance is not practicable due to either the functional or operational needs of the activity, remedying or mitigating, and adverse effects*
- b. Maintains and protects indigenous biodiversity values; and*

c. Recognises and protects the cultural values of Poutini Ngai Tahu.

- [39] As noted above, I consider that with the amended definition of 'Recreation Activity' there would still potentially be other consents triggered in other chapters of the TTPP and subsequently require the application of the Objectives and Policies from those other chapters. Without additional policy and objective amendments to guide assessment of an aerial cableway, there would be uncertainty in plan administration of this definition.
- [40] A tabulated Section 32AA analysis of the above option against the relevant higher order Objectives and Policies of the TTPP is contained in **Appendix [C]**.

Summary

- [41] Having undertaken the further analysis outlined above and contained in Appendices [A] – [C], I stand by the conclusion in my primary evidence that overall, the proposal for a new Special Purpose Zone (FJAAZ) is considered to represent the most efficient and effective zoning when compared to the notified TTPP provisions.
- [42] The proposed FJAAZ will spatially and geographically recognise an area where an Aerial Cableway can be developed with no more than minor effects on the environment and provide a potential consenting pathway for an iconic, sustainable tourism development that will have a profound positive effect on Franz Josef's strategic importance to the tourism industry.
- [43] Accordingly, applying the proposed FJAAZ to the Franz Josef Valley is considered appropriate in the context of the Resource Management Act 1991.



Sean Dent
30 October 2024