

**BEFORE THE HEARINGS PANEL
FOR THE PROPOSED TE TAI O POUTINI PLAN**

UNDER the Resource Management Act 1991

IN THE MATTER OF a submission on a Plan Change under
clause 6 of Schedule 1 of the Act

BETWEEN **SKYLINE ENTERPRISES LIMITED**

Submitter

REPLY INFORMATION FOR SEL (S502)

Dated: 29 October 2024

MAY IT PLEASE THE PANEL

Introduction

- [1] This reply information is prepared on behalf of Submitter S250 (Skyline Enterprises Limited (**SEL**)) in respect of the hearing material presented on 8 October in relation to the Special Purposes Zones and Franz Josef topics.
- [2] As discussed with the hearings Panel in that hearing, a number of questions were raised requiring further information from SEL in terms of its relief sought for a Special Purpose Zone (the Franz Josef Amenities Area).
- [3] This reply information generally covers the following:
- (a) **Response to legal questions on the approach to rezoning under s32 and relevance of ‘consenting efficiency’ across the TTPP**
 - (b) **The need for an ongoing zone after consenting**
 - (c) **Issues as to precedent of the special zone relief sought**
 - (d) **Analysis of the planning standards direction for special zones and ‘impracticality’**
 - (e) **Revised relief on the FJAAZ and drafting amendments**
 - (f) **Alternative options to FJAAZ and further s32AA analysis, including on:**
 - (i) **Revised definition of recreation activity and associated objective and policy amendments in NOSZ**
 - (ii) **Precinct overlay in NOSZ**

Summary

- [4] SEL maintains the position that the proposed FJAAZ is the most appropriate zoning option to achieve the higher order and strategic

objectives of the TTPP, having regard to alternative zoning options and their efficiency and effectiveness of achieving those provisions, and the relative costs and benefits of the options.

- [5] The uncontested evidence from SEL is that the development of a proposed aerial cableway in the 'corridor' identified is likely to have minor or less effects on landscape and visual amenity values, biodiversity, heritage and culture, and natural hazards. It will have significant one off, and long term consequential, positive economic impacts within a town, district, and region, which is reliant on tourism industry / glacier tourism, and which will benefit from the cableway's ability to diversify current tourism offerings. It will also have net overall recreation benefits.
- [6] It is with this evidence in hand, that consideration of the ways in which to achieve all provisions of the TTPP assessed holistically has been made.
- [7] It is entirely appropriate that such a unique, regionally (and potentially nationally significant) and likely net positive, proposal be recognised in the planning framework with a potential consenting pathway, albeit precautionary, with a fully discretionary activity status.
- [8] The proposal from SEL is a truly exceptional proposition for Franz Josef. SEL has put significant time and expense into preparing expert evidence in support of the potential proposal, and recognises the utility in continuing the conversation with the community rather than alternative legislative options which may bypass that.
- [9] For these reasons the FJAAZ remains SEL's primary relief sought (subject to amended provisions in response to the Panel's questions). However, in order to demonstrate and assess other reasonably practicable options for the Panel's section 32AA determination, Mr Dent has set out a further assessment of alternative relief that would also achieve the intent of SEL's relief sought. For the avoidance of doubt, Counsel considers the alternative options presented in Mr Dent's section 32AA assessment are within the scope of the SEL submission (which sought alternative, consequential, or other forms of relief to give effect

to the intent of the SEL submission, being to create an aerial cableway zone or consenting pathway in the area identified).¹

- [10] Without any certainty over the potential consenting pathway (currently undisputed between Mr Dent and Ms Easton that an aerial cableway would be unlikely to be granted consent)², this unique recreational and economic proposition may be less likely to be progressed. Such large scale tourism infrastructure require a level of policy recognition to give confidence in investment into a consenting process. There is nothing unusual about a district plan recognising those bespoke and district-specific requirements.³
- [11] In reliance on Mr Dent's evidence, the relief sought by SEL for the FJAAZ can be preferred in a 'section 32 sense' as it better achieves the objectives of the TTPP (considered holistically) the relevant higher order policy directions from the RPS and other planning and policy documents, and the purpose of the Act. The alternative options now progressed in Mr Dent's s32AA assessment are also considered (though to a lesser degree) to be preferred in a 'section 32 sense' as compared to the notified TTPP provisions.

Approach to rezoning under s32

- [12] Counsel was asked a number of questions relating to the legal approach underpinning SEL's evidence and submissions supporting a rezoning from NOSZ to the FJAAZ.
- [13] A key theme of those questions related to whether SEL was approaching the rezoning analysis from the perspective of solely seeking to create efficiency and effectiveness for its future consenting of an aerial cableway, rather than efficiency and effectiveness of achieving the proposed plan objectives under the FJAAZ as compared to the notified TTPP provisions.

¹ If the Panel would like a more detailed analysis of scope for the section 32AA alternatives considered, Counsel will happily oblige.

² Opening submissions of Counsel for SEL, at [85].

³ Exemplified in Counsel's opening by reference to the Queenstown Lakes District Council's restricted discretionary consenting pathway for passenger lift systems within section 6b landscapes.

[14] Counsel reiterates here that the correct approach to assessing a rezoning proposal is to determine what is the most appropriate zoning, being a blank sheet of paper exercise, which requires consideration of what is 'suitable':

[15] "Appropriate" does not mean "superior", and no additional gloss on that word is required:

Section 32 requires a value judgment as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior.⁴

[16] The decision as to which zoning option is more suitable is a matter of judgment and based on the evidence before the Hearings Panel.

[17] That consideration is made with regard to an efficiency and effectiveness analysis under the lens of section 32 which requires consideration of:

- (a) An evaluation of the differing planning outcomes sought by submissions and further submissions for the most appropriate provisions (which includes zoning options) for achieving the related TTPP objectives.
- (b) That encompasses consideration of the importance of maintaining the overall integrity and coherence of the Plan.
- (c) The Panel must abide relevant RMA directions, including that District Plans must give effect to higher order instruments (notably, including the operative RPS and relevant instruments of national direction).
- (d) Section 32(2) requires that an assessment under subsection (1)(b)(ii) must identify and assess the costs and benefits of the **environmental, economic, social and cultural effects** that are anticipated from the implementation of the provisions.

⁴ *Rational Transport Society Incorporated v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].

[18] It is trite to say that tourism is a vital player in the West Coast regional economy. As discussed in the uncontested evidence presented by Mr Colegrave, that importance becomes even more magnified when looking at the district context, and again, for Glacier Country.⁵ The statutory planning context now recognises that pivotal role of tourism, as well as specifically, the Franz Josef township to the tourism economy:

Objective ED – O5 The strategic importance of Fox Glacier/Weheka, Franz Josef/Waiau and Punakaiki townships for the tourism industry is recognised.⁶

[19] The evidence of Mr Colegrave,⁷ Mr Greenaway,⁸ and Mr Dent⁹ all assess the strategic direction objectives and policies of the TTPP related to tourism and economic development, the operative RPS, and other potentially relevant policy materials such as the Destination Management Plan (DMP). Equally, potential adverse effects can be satisfactorily avoided, remedied, or mitigated to a minor or less degree under the discretionary provisions of the FJAAZ. To this end, SEL has taken a balanced approach when looking at the most appropriate zoning options to achieve all relevant objectives of the TTPP assessed holistically, and the notified NOSZ zoning is not considered to be the most appropriate for consideration of a sustainable tourism development of this scale and importance. Mr Dent assesses the relative costs of retention of that zoning in his further s32AA assessment.

[20] It was submitted orally that, the requisite analysis is not just of the environmentally protective provisions of the TTPP, but also the enabling. Of course, where protective provisions set a hard 'bottom line' – that will need to be very carefully examined (and may be given greater weight) against any proposed rezoning option. Mr Dent's Section 32AA

⁵ Evidence of Mr Colegrave, at [23] – [25], and summary of oral evidence to Panel, 8th October 2024.

⁶ S42A report reply to Minute 22. Noting that this is only one strategic objective (yet to be determined by the Hearings Panel), in a matrix of other relevant provisions to be assessed.

⁷ At [35] – [41].

⁸ At [54] – [62].

⁹ At [204] – [272].

assessment in both his evidence as well as the reply information has done this.

- [21] Development of a planning instrument only focussed on protective elements will not serve to achieve the collective (and balanced) direction of the TTPP, and in turn, the enabling elements of part 2 of the Act. It may also result in greater costs in terms of the assessments required under s32(2)(a) as to opportunities for economic growth anticipated to be provided (or reduced) and employment to be provided (or reduced) by the relative zoning options.
- [22] Counsel provided background context and examples of the inefficiencies of consenting a large scale tourism project (like a gondola) without a clear policy or consenting pathway. That inefficiency and complexity was also observed by the Environment Court. That submission was not intended to be taken as the sole purpose of justification for SEL's requested rezoning. It did not focus its case on the consenting efficiency only. Rather, it produced significant evidence to demonstrate likely adverse effects of a proposal (required in terms of s76(3) RMA), and with that context, addressed the ways in which the FJAAZ to deliver that overall significant positive effect (and no more than minor adverse effect) outcome would achieve relative efficiencies and effectiveness in plan administration to achieve higher order objectives, as compared to the notified NOSZ.
- [23] Counsel observed that, from recent higher court case law, it is increasingly common that a district plan will carefully and intentionally create a planning pathway for district-specific issues that ensures a potential planning pathway even in the instance of national policy bottom lines. That was in reference to the observations of the recent Supreme Court 'East West Link' case. The intent of that submission was an observation of how recently drafted planning instruments can carefully calibrate planning provisions to ensure a consenting pathway for activities likely to be important for economic, social, and cultural wellbeing, even in very sensitive receiving environments.
- [24] In this instance, the most relevant national direction is the NPS-IB, which as submitted is a balanced instrument creating the direction to achieve

overall no net loss in biodiversity. Moreover, the evidence of Dr Wells under questioning assured that there was a very certain degree of comfort in terms of his conclusions as to likely minor or less adverse effects on biodiversity.

Section 32AA costs and benefits

[25] Mr Dent's additional s32AA analysis recognises there will be costs associated with retaining the NOSZ (with amendments for a recreation activity pathway) given that there would be significant uncertainty in a policy context for a cableway to construct in these zones, and less certainty in terms of spatial direction as compared to the FJAAZ or a precinct overlay.

[26] In summary, his further s32AA assessment demonstrates that applying a FJAAZ rezoning in the corridor identified is the most efficient, effective, and therefore appropriate way to achieve the objectives of the TTPP, in particular achieving significant diversification for an existing icon tourism destination, and which better recognises the significance of tourism to the West Coast/Te Tai o Poutini economy by providing for sustainable tourism development while managing the adverse effects on the environment, communities and infrastructure.¹⁰

[27] In terms of section 32(2)(a), the costs and benefits of the proposed FJAAZ amendments to the TTPP, as supported by the evidence of Mr Dent are:

- (a) There are no costs in terms of lost opportunities for considering consenting of an economically and recreationally significant tourism opportunity in an existing icon tourism destination;
- (b) There is no risk that the FJAAZ designed to support the tourism economy would undermine TTPP integrity with a special zone for a very unique proposal, which is locationally constrained¹¹;

¹⁰ A conclusion made with regard to Mr Dent's analysis of higher order and strategic provisions of the TTPP holistically, as set out from para [204] of his evidence in chief, as well as his further s32AA assessment table.

¹¹ See submissions below in respect of other locationally constrained special zones of the TTPP

- (c) The FJAAZ will assist with achieving sustainable tourism development and diversification, while managing the adverse effects on the environment in a discretionary (publicly notified) consent context.
- (d) The benefits of the FJAAZ will likely result in net recreation, tourism, and economic benefits for Glacier Country, and outcome specifically now identified by tourism-specific strategic direction provisions.
- (e) While strategic direction and biodiversity, and landscape provisions require protection of landscapes, the landscape evidence for SEL is that a carefully design cableway in this particular location is likely to be able to achieve minor or less effects. To provide further comfort on that conclusion the FJAAZ provides clear landscape direction to maintain values and achieve no net loss of biodiversity.

[28] If the Panel remains concerned as to the FJAAZ as a bespoke zone, SEL supports the alternative precinct overlay approach tabled by Mr Dent in the further s32AA analysis as a more appropriate zoning outcome than retention of NOSZ with bespoke policies and a revised recreation activity definition.

[29] The revised definition of recreational activity potentially has plan integrity issues as:

- (a) It could open a greater possible consenting pathway across a number of areas in the NOSZ for large scale recreation facilities and associated buildings and structures, with potential adverse effects that were not anticipated in the Skyline submission (depending on the specificity of any bespoke objectives and policies supported in tandem with the revised definition).
- (b) It does not, as currently drafted, provide certainty in terms of construction, maintenance, and potentially decommissioning, of such structures and facilities (rather seems posed towards the actual activity / operation).

(c) Given the SEL evidence as to adverse effects of an aerial cableway has focussed on a particular corridor location, and based upon particular concept designs, it may be more appropriate (efficient and effective) to provide for a more confined relief outcome in the form of the FJAAZ corridor, or otherwise, a specific precinct overlay option – as set out in Mr Dent’s further analysis.

[30] As detailed in Counsel’s opening submissions, the main hesitations of Ms Easton on the SEL relief sought, do not go the heart of section 32AA matters. Rather, they seemed to show a preference to use an existing zone in the TTPP and providing for bespoke objectives and policies within that, rather than create a new zone. For the reasons set out above, and in the evidence of SEL, it remains concerned that these options would be impractical given the unique nature (and benefits) of an aerial cableway. Moreover, this response from Ms Easton is not a thorough section 32AA analysis detailing countering costs and benefits of the relief sought by SEL.

Ongoing zoning

[31] Commissioners questioned the need for a zoning approach to ‘live on’ past the consenting stage of a proposed aerial cableway, and rather, whether it was more appropriate to be provided for through a consent given a number of proposed FJAAZ provisions appeared to be in terms of the construction phase only.

[32] For the reasons expressed in Mr Dent and Mr MacDonald’s evidence, an ongoing zoning framework is appropriate for such significant and large-scale infrastructure, taking into account a potential need for ongoing future operation, repair, maintenance, or minor upgrades to the cableway in the future.

[33] Moreover, the FJAAZ zoning would serve to assist in community confidence and certainty as to understanding and engaging in a spatially defined location for a future cableway, rather than having no understanding or guidance as to such potential activities in Glacier Country.

- [34] Similar to any other zoning, such as a Stadium or Port Zone, once constructed – the appropriateness of the plan recognising their continuing operational nature does not fall away once consented or built. The same goes for a residential zone once houses are built.
- [35] Given the highly dynamic nature of the receiving environment, and the interface of the cableway with a range of users accessing alpine territory, a zone provides an appropriate long term planning approach that can respond to such issues in a more nimble and specific way than just relying on a consent and potential review conditions or subsequent variations as required. The Mineral Extraction zones provide a good analogy in terms of managing reverse sensitivity effects – similarly the FJAAZ has the ability to manage competing recreational user expectations and effects.

Precedent issues in rezoning

- [36] Commissioners raised the concern that many submitters would like efficiencies in their consenting projects by a bespoke / special zone framework, and the concern that the FJAAZ could lead to such an outcome. For the reasons explained above, the SEL evidence has not approached rezoning in this way- rather it has undertaken a thorough assessment of potential effects of the proposed FJAAZ provisions and the way in which those are most appropriate to achieve the TTPP strategic directions.
- [37] Counsel notes that precedent concern is an unlikely and an irrelevant effect for the following reasons:
- (a) For the reasons set out in SEL's evidence, the FJAAZ proposal is unique within the region and will likely deliver significant net benefits. Any similar proposal that could deliver equivalent benefits, and in an area that can still be considered to achieve minor or less adverse environmental effects, may well exist, but is not before the hearings panel at the moment in submissions to the TTPP.

- (b) If future, if private plan changes are sought to achieve a similar amenities area special zone construct, then those proposals will require careful assessment in terms of effects, and the appropriateness to achieve the direction of the TTPP, on their own merits and evidence.
- (c) Counsel is not aware of authority for a 'precedent' being an adverse effect for consideration in a plan review context. Counsel is however aware of the need for ensuring plan integrity and coherence, by providing for a zoning regime that accords with higher order direction. For the reasons set out in Mr Dent's evidence and further analysis, the FJAAZ achieves that.
- (d) The likelihood of another similar scaled proposal, locationally constrained to an existing recreational / icon tourism destination which is fixed, is very low.
- (e) The FJAAZ is predicated on a fixed resource, which is recognised as an icon destination. That is another unique factor unlikely replicated elsewhere to support a special zone.

[38] There is no risk of the FJAAZ 'opening the floodgates' to a proliferation of other activities in the NOSZ from establishing, because of the very tightly defined spatial location, purpose, objectives, and policies of the zone specific to an aerial cableway. This further supports the appropriateness of a 'self-contained' zone rather than requiring assessment of all landscape objectives and policies, because the zone would only potentially anticipate a cableway (and no other activities) after a discretionary consenting framework is worked through. That activity has been assessed (and that evidence is not specifically contested), to determine that such a proposal in the context would have minor or less adverse effects on character and landscape values.

Planning Standards and impracticality

[39] Similar to a mineral zone or a stadium or port zone, a regionally (and in the case of the SEL evidence, possibly nationally) significant resource management matter may, on the evidence, be entirely befitting of a

special zone. The National Planning Standards clearly anticipate a range of special purpose zones which might be appropriate in particular districts. The listed examples in the Planning Standards are not exhaustive. Just as the mineral extraction zone and Buller Coalfield zone in the TTPP are recognised as special zones, that does not necessarily create a precedent for other desirable mining operations to apply for, and obtain, a future specific special zone status:

Special purpose zones	Airport zone
	Corrections zone
	Future urban zone
	Hospital zone
	Māori purpose zone
	Port zone
	Stadium zone
	Tertiary education zone
	[Additional special purpose zone]

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[40] To qualify for the 'need' for an additional special zone in this category, it is to be assessed that the anticipated outcomes of the additional zone meet all of the following criteria:

- (a) *Are significant to the district, region or country;*
- (b) *Are impractical to be managed through another zone; and*
- (c) *Are impractical to be managed through a combination of spatial layers*

[41] Under questioning, Mr Dent referred to the ordinary dictionary definition of impractical as:

not adapted for use or action; not sensible or realistic.¹³

¹² Extract from Planning Standards.

¹³ Oxford Dictionary definition

- [42] It is submitted that no higher bar or stricter lens is required to be applied over that ordinary definition. In the circumstances of Mr Dent's section 32AA assessment, it is clear that the existing zoning options are not sensible or realistic, nor adapted to the potential consenting use, when compared to the FJAAZ because of the relative costs, inefficiencies, and uncertainties. Counsel has found no further Court authority on the interpretation of what is 'impractical' in the Planning Standards Context, beyond the MfE guidance document which Mr Dent has assessed in evidence (and in reply information)¹⁴. In such circumstances, it is most appropriate to apply an ordinary dictionary definition, as above.
- [43] The district plan review exercise is a forward-looking one, requiring consideration of the ways in which resources are to be managed for the needs of future generations over (at least) the lifetime of the plan. Nothing in the Planning Standards suggests that a Special Zone is only appropriate for an existing established activity (such as an existing mine or port), rather than one yet to be consented (but which has extensive supporting evidence as to its anticipated effects in a specifically confined location).
- [44] The FJAAZ would serve to acknowledge the important role that tourism plays in the social and economic wellbeing of the West Coast Region, and the importance of Glacier Country / Franz Josef in particular, while also controlling related effects of landscape, biodiversity, hazards, and recreational amenity. This is in a similar vein to the bespoke mineral extraction zones in the TTPP that do not exist in other district plans nationally.
- [45] The Mineral Extraction s32 report, page 7, considers the extent to which those special zones achieve the planning standards' three criteria. That report considers:
- (a) *The zones contain a range of different types of extraction sites which are locationally fixed.* In response:

¹⁴ <https://environment.govt.nz/assets/Publications/Files/guidance-for-zone-framework-and-district-spatial-layers-standards.pdf>

- (i) Just as a mineral deposit is locationally fixed, so to is an international icon destination like the Franz Josef Glacier. The FJAAZ is similarly fixed to a discreet geographic location.
- (b) *These mines meet the national planning standards requirements as they are fixed in location (due to the location of the mineral resource) and it is impractical they be managed through another zone and have a distinct set of objectives and policies.* In response:
 - (i) Similarly, due to the complex and dynamic nature of an aerial cableway, its ongoing operational elements, and the dynamic receiving environment, it would not be practical (in the sense of sensible or realistic or adapted to intended use) to consent, manage, operate, upgrade, maintain the cableway without a distinct set of objectives and policies.

[46] The section 32 analysis for Mineral Extraction special zones against the Planning Standards Criteria is wholly contained in one page of the report. The matters addressed as to impracticality are extremely high level. It is submitted that the Commission's interpretation of impracticality and the interpretations of the same for SEL, potentially represent a significantly different threshold to what has otherwise been assessed through the TTPP.

[47] For these reasons, and based on Mr Dent's evidence, SEL maintains the suitability of a FJAAZ special zone consistent with the Planning Standards.

Amended provisions of the FJAAZ

[48] SEL has taken on board the themes of commissioner questioning the proposed FJAAZ provisions as tabled in the hearing. Mr Dent has provided an updated chapter of amended provisions in reply.

[49] Rather than summarising each of those changes in these legal submissions, the key themes that have been responded to are:

- (a) Simplifying the length and complexity and total number of policies to only those necessary for policy direction.
- (b) Ensuring no policies are beyond the remit of the district plan and otherwise provide clarity in advice notes as to the regional council jurisdiction.
- (c) Removing policies that are more operational in nature, or in the nature of an information requirement for a resource consent.
- (d) Ensuring sufficient direction is provided in respect of maintenance of landscape values.
- (e) Ensuring sufficient direction is provided in respect of biodiversity compensation as well as other mitigation and offsetting measures

Conclusion

[50] The FJAAZ amended relief, or the alternatives presented in Mr Dent's further s32AA analysis (precinct followed by NOSZ amendments for a recreation activity) provide comparatively more appropriate zoning outcomes for a regionally significant tourism opportunity than the notified TTPP provisions.

[51] Any future aerial cable way for the Franz Josef Glacier will need to be extremely closely examined, even under a discretionary consenting pathway. Far from approving such an outcome, the SEL relief if approved, would only allow for the consenting door to remain open and feasibly explored from an investment perspective.

[52] SEL will happily provide any other or further information in respect of the relief sought, as might assist the Panel.

Dated 29 October 2024

A handwritten signature in black ink, consisting of a large, stylized initial 'S' followed by a cursive name.

.....
G M Todd / R E M Hill
Counsel for the Submitter