IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2008-425-000650

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an application for review of a decision under the Resource Management Act 1991
BETWEEN	SKYLINE ENTERPRISES LIMITED Applicant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Respondent
AND	ZIPTREK ECOTOURS INCORPORATED Second Respondent

Hearing: 21 September 2009

Appearances: RJB Fowler and K Anderson for Applicant
J E MacDonald and M A Ray for First Respondent
R J Somerville QC & C D McKenzie for Second Respondent

Judgment: 6 November 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Ziptrek Ecotours Incorporated wishes to establish a commercial zipline (flying fox) operation on forested slopes in the Ben Lomond Reserve at Queenstown. It proposes to construct a series of ziplines between trees and to construct walkways linking them so customers can walk and ride the ziplines.

[2] Under the relevant District Plan, the proposed activity is a non-complying commercial recreational activity and a resource consent is required.

[3] On 26 February 2008, the Queenstown Lakes District Council granted Ziptrek a resource consent on a non-notified basis.

[4] Skyline Enterprises Limited operates the Queenstown Gondola in the reserve north of the area where Ziptrek proposes to operate its ziplines. Skyline contends the application should have been notified, and in this judicial review proceeding seeks an order quashing the consent.

[5] The key issues are:

i) whether the Council was wrong to conclude there were no adverse effects on Skyline that were more than de minimis;

ii) whether in the exercise of its discretion the Court should decline to quash the consent even if the application should have been notified.

Factual background

[6] In addition to a resource consent for its proposed operation, Ziptrek also needed Council approval under the Reserves Act 1977 to lease part of the reserve.

[7] Ziptrek made its lease application before applying for resource consent, the application for a lease being publicly notified in May 2007.

[8] Ziptrek had been in discussions with Skyline about its proposed operation for some considerable time. The first consultation had taken place in mid-2005. It was common ground these initial discussions were constructive.

[9] Skyline provided a written submission to the Council for the purposes of Ziptrek's lease application. The submission dated 14 June 2007 was generally supportive, concluding:

> In general terms, Skyline is in support of Ziptreks endeavours – conditional upon the absolute and complete consultation on all matters concerning the extent of the leased and licenced [sic] areas.

[10] The qualification reflected a concern Skyline had already expressed to Ziptrek about not wanting to be "boxed in" because it had future expansion plans of its own. Unbeknown to Ziptrek, on 20 August 2007 Skyline subsequently lodged its own application with the Council to enlarge its own lease area.

[11] On 31 August 2007, the Council granted the Ziptrek lease application, having determined it was consistent with the requirements of the Reserves Act and the Reserve Management Plan.

[12] Ziptrek then applied for a resource consent. As part of its resource consent application, Ziptrek included a copy of Skyline's supportive 14 June 2007 submission.

[13] The resource consent application was lodged on 9 November 2007 and, in accordance with the Council's standard procedure, was sent to a processing planner for assessment.

[14] In the course of the planner's preliminary assessment, Ziptrek decided to change the location of five of its ziplines, and on 5 December 2007 it presented the Council with a revised course outline. According to the evidence of Ziptrek's director, Mr Yeo, a primary reason for the change was to accommodate the interests and concerns of Skyline as they had been communicated to Ziptrek.

[15] In mid-January 2008, Mr Yeo met with Skyline's managing director, Mr Matthews, and advised the zipline layout had changed. Mr Yeo provided Mr Matthews with an aerial photograph showing the revised course and further stated that because the changes did not affect Skyline, the application lodged pre-Christmas would be able to be processed on a non-notified basis. For his part, Mr Matthews says the possible implications for Skyline were not readily apparent to him from the photo. He accordingly sent the photo to Skyline's surveyors so they could plot the revised ziplines on a survey plan showing Skyline's boundaries.

[16] Meantime, the Council's processing planner had completed her report. The report, dated 6 February 2008, included an assessment of adverse effects and recommended the application not be notified on the grounds:

- The adverse effect on the environment of the activity for which consent is sought will be less than minor.

- There are no special circumstances that warrant notification.

- No persons are considered to be adversely affected by the granting of this consent.

[17] The report (having been peer reviewed) was then forwarded to an independent Commissioner with delegated authority from the Council to make notification decisions.

[18] Initially the Commissioner did not accept the non-notification recommendation. On 13 February 2008, the Commissioner raised two concerns which she required to be addressed. The first was the issue of approval from the Council, as landowner of the reserve, and secondly assessment of the proposal on other users of the recreation reserve, specifically mountainbikers and mountainbike downhill tracks.

[19] Ziptrek responded with further information which the planning processor then incorporated into a revised report, again recommending non-notification. This time the recommendation was accepted and a decision not to notify or serve the application and to grant the resource consent was made on 26 February 2008.

[20] The day before (ie 25 February 2008) Skyline had received advice from its surveyors about Ziptrek's revised course. The advice confirmed there was now a greater overlap between the area of land sought to be used by Ziptrek and that earmarked by Skyline for future expansion and in respect of which Skyline had applied to the Council for a lease.

[21] The next relevant event was in April 2008 when the Council required Ziptrek to apply for a variation of the lease it had been granted earlier in August 2007. Council considered this was necessary because the lease did not match with the resource consent due to the changed zipline layout. The Council also resolved that the competing Skyline lease application would be heard at the same time.

[22] Skyline opposed Ziptrek's lease variation application. So too did local mountainbike clubs, on the basis that unlike the original alignment, the revised zipline course crossed and ran alongside existing mountainbike trails and public walking tracks. The concerns of the mountainbike clubs were, however, resolved by Ziptrek prior to the hearing, leaving Skyline the only submitter in opposition.

[23] The joint lease application was heard before Commissioners on 24 September 2008.

[24] The Commissioners did not issue their decision until 16 March 2009. Their decision recommended to the Council that Ziptrek's application for a variation be granted and that Skyline's application be declined.

[25] Meantime, in January 2009, Skyline had issued these proceedings.

[26] According to the affidavit evidence of Skyline's managing director, Mr Matthews:

> … at the heart of this matter is the fact that Ziptrek changed the zipline configuration from what it had first showed us and from that point either Skyline's properly informed and particularised approval/consent should have been obtained or the Council should have notified the application.

Discussion

[27] The issue of whether a resource consent application should be notified was governed at the relevant time by ss 93 and 94 of the Resource Management Act 1991:

93 When public notification of consent applications is required

(1) A consent authority must notify an application for a resource consent unless—

(a) the application is for a controlled activity; or

(b) the consent authority is satisfied that the adverse effects of the activity on the environment will be minor.

(2) If subsection (1) applies, the consent authority must notify the application by—

(a) publicly notifying it in the prescribed form; and

(b) serving notice of it on every person prescribed in regulations.

94 When public notification of consent applications is not required

(1) If notification is not required under section 93(1), the consent authority must serve notice of the application on all persons who, in the opinion of the consent authority, may be adversely affected by the activity, even if some of those persons have given their written approval to the activity.

(2) However, a consent authority is not required to serve notice of the application under subsection (1) if all persons who, in the opinion of the consent authority, may be adversely affected by the activity have given their written approval to the activity.

[28] The effect of the sections and the case law which has interpreted them is that before an application for a non-complying activity may be processed on a completely non-notified basis, the consent authority must be satisfied of three things, namely that:

(i) the adverse effects of the activity on the environment generally will be minor;

(ii) no person is adversely affected in an environmental sense (or if there is any adverse effect it is only de minimis or a remote possibility);

(iii) there are no special circumstances which would warrant notification.

[29] As emphasised to me by Skyline's counsel, Mr Fowler, the general policy of the Act is that the consent process should be public and participatory. Consent authorities must therefore take care to ensure they are adequately informed before removing the participatory right of persons who may assert an interest in the effect of the proposed activity on the environment generally, or on themselves in particular.

[30] In this case, the main focus of Skyline's argument is that it was self evidently a person adversely affected but that the Commissioner failed to consider the adverse effects on Skyline and/or did not have sufficient information to be able to make that assessment. Skyline contends that what must have happened was that the processing planner and the Commissioner wrongly assumed Skyline had no objections to the resource consent because of its supportive June 2007 submission. Yet the June 2007 submission had been provided for a different purpose (the lease application) and in respect of a different zipline course.

[31] Skyline says it is adversely affected in a number of different ways which were apparent from Ziptrek's application. Ziptrek's application set out that Ziptrek proposed to:

i) use Skyline's gondola to allow patrons to access its operations;

ii) have its patrons use the toilet facilities at the gondola (both upper and lower terminals);

iii) locate its ticketing booth and storage facilities at the upper terminal of the gondola;

iv) lease carparks from Skyline to satisfy District Plan requirements for staff carparking and bury the power cables that service the gondola.

[32] Skyline contends that in light of this it was obvious Ziptrek's operation would impact directly on Skyline's operation of its gondola and entire business activities. Skyline was thus an adversely affected person.

[33] Skyline also claims there were adverse effects on helicopter operations and mountainbike riders.

[34] Before turning to consider each of the alleged adverse effects and the sufficiency of the information before the Commissioner, I need to deal with another argument raised by Skyline: namely that, like the consent authority in the decision of *Discount Brands Limited v Westfield (New Zealand) Limited* [2005] 2 NZLR 597 (SC), the Council confused consideration of the notification issue with its decision on the substantive issue, and conflated the enquiries required under ss 93 and 94. That is to say, Skyline contends the Council failed to distinguish between adverse effects on the environment and adverse effects on any person. The distinction is important because the tests are different. As regards effects on the environment generally, the test is "no more than minor", while as regards effects on any person, it is the more stringent test of "no more than de minimis".

[35] I have carefully reviewed all of the documentation in question, including the planner's notification report, the revised notification report and the consent decision. While some aspects of the layout could have been better (as acknowledged by Mr Ray for the Council), I accept the essential elements were present. In particular, I accept the documents manifest a clear understanding of the different requirements when it came to making a decision on whether the application should be notified. I am satisfied the planner and the Commissioner did appreciate the true nature of the question they were required to address.

[36] I am also satisfied in terms of s 93(1)(b) that the Commissioner's assessment of adverse effects on the environment generally cannot be impugned. The assessment was thorough and it was based on comprehensive information which included independent landscape and environmental health reports commissioned by the Council. As Mr Ray submitted, overall the proposal was for a low-impact eco-tourism venture, and it was not unreasonable for the Council to conclude it would potentially have environmental effects which were less than minor.

[37] I turn now to consider what was the main focus of Skyline's case, namely adverse effects specific to itself and mountainbikers that were more than de minimis.

Effect on helicopter operations

[38] Since the early- to mid-1970s there has been a helipad located on Bob's Peak, within the land leased to Skyline. It appears from correspondence that Skyline was involved in the original construction. From 1975 until 1986, the helipad was used by only one helicopter company. That company had exclusive rights. Then, in 1986, a second private company was also authorised to use the helipad.

[39] Helicopters overfly four of the six ziplines, and Skyline argues there are potential safety concerns which the Council should have addressed, as well as effects specific to Skyline. According to Skyline there was no mention whatsoever of effects on helicopter operations in either the planner's report or the consent decision – an omission Mr Fowler described as the "most glaring omission" of them all.

[40] Mr Fowler acknowledged the helipad does not have resource consent. However, he contended it had acquired existing use rights and therefore did legally exist, which in turn meant the effect on helicopter operations was something the Council was obliged to consider in processing Ziptrek's application. Mr Fowler conceded that if the helicopter did not have existing use rights, then the Council was under no such obligation. That is to say, Mr Fowler did not seek to argue that the mere fact the helipad was there, albeit illegally, would be sufficient.

[41] In support of his contention that the helipad had acquired existing use rights, Mr Fowler relied on two alternative arguments. First, he submitted it had acquired existing use rights under Ord 7 of the Transitional District Plan (1983-1995), or alternatively by virtue of s 21(9) of the Town and Country Planning Act 1953.

[42] Under the district scheme that was in force at the time the helipad was first constructed in the 1970s, the land on which the helipad was sited was zoned rural. Helicopter landings were not listed as a predominant or conditional use, and therefore planning consent was required.

[43] The transitional plan on which Mr Fowler relies was in force between 1983 and 1995.

[44] Originally, in written submissions, Mr Fowler sought to rely on Ord 7.01(b) of the Transitional Plan. Introduced in 1987, Ord 7.01(b) provided as follows:

> Ord 7.01 PREDOMINANT USES – RURAL B ZONE
>
> …
>
> (b) Landing and takeoff strips for Category 8 aircraft providing public and private transport subject to the approval of the Council.

[45] However, at the time Mr Fowler prepared his written submissions he was unaware that Ord 7.01(b) had been struck down for invalidity in the decision of *Boanas & Ors v Oliver & Ors* C72/94, 28 July 1994, Judge Skelton. After being alerted to this decision, Mr Fowler conceded it was a trump card and that Ord 7.01(b) could not be invoked. Instead, undaunted, he sought to rely on another, earlier, ordinance, Ord 7.01(c).

[46] Ordinance 7.01(c) was in force between 1983 and 1987. It stated:

> Landing and takeoff strips for aircraft providing public or private transport subject to the approval of the Committee.

[47] Unlike Ord 7.01(b), Ord 7.01(c) did not contain any reference to "Category 8 aircraft", a reference which the planning tribunal in *Boanas* found in relation to Ord 7.01(b) created uncertainty because there was apparently no longer any such category in existence.

[48] However, like Ord 7.01(b), Ord 7.01(c) does contain the phrase "subject to the approval of". The tribunal in *Boanas* found that phrase also objectionable, following *Ruddlesden v Kapiti Borough Council* (1986) 11 NZTPA 301. In *Ruddlesden*, the Court held that an ordinance which empowers a Council to refuse approval to the exercise of a predominant use right is ultra vires, predominant uses being permitted as of right under the legislation. In response, Mr Fowler submitted the offending phrase is severable, leaving the remainder workable. That, in his submission, had not been possible in the case of Ord 7.01(b) because it suffered from an additional defect, namely that of uncertainty created by its reference to Category 8 aircraft, a reference which as I have mentioned is absent from Ord 7.01(c).

[49] I disagree that the phrase is severable. There is no doubt the planning tribunal in *Boanas* considered the reference to Category 8 aircraft in Ord 7.01(b) rendered the ordinance uncertain. However, my reading of the decision is that neither of the offending provisions ("Category 8" and "subject to the approval of") was considered severable. In other words, even if there had been no reference to Category 8 aircraft in Ord 7.01(b), the tribunal would still have struck it down in its entirety on the grounds it was ultra vires.

[50] The removal of the phrase "subject to the approval of" from Ord 7.01(c) would in my view create a rule different from the one contemplated by the District Plan. The phrase is therefore not severable: see the discussion about severability in *McLeod Holdings Limited v Countdown Properties Limited* (1990) 14 NZTPA 362.

[51] It follows I do not accept the helipad acquired existing use rights under the Transitional Plan.

[52] Nor do I accept the helipad acquired existing use rights as a result of s 21(9) of the Town and Country Planning Act.

[53] Section 21(9) stated:

> Where any public authority is authorised by any Act to determine the precise location, within the district of a Council, of the public utilities under its control without the approval of that Council, every such public utility shall be deemed to be a predominant use in every zone in that district.

[54] This section was still in force at the time the helipad was first constructed and used.

[55] In my view, the language of this provision is not apt to encompass a privately owned and operated facility constructed at the behest and cost of a private company. The fact the helicopter company needed a licence or landing ground authorisation from a public authority (the Ministry of Transport) under the then Civil Aviation Regulations so as to be able to use the helipad is irrelevant. Section 21(9) is clearly aimed at a very different situation where a public body has a statutory power to take land for the purpose of constructing a public utility on that land. Thus, in *Hamilton*

City v Waipa County [1969] NZLR 867, the fact the city had the power to resort to a compulsory taking of the land to build its sewage treatment plant was seen as critical. Similarly, in *Invercargill City Council v Invercargill Fire Board* (1973) 5 NZTPA 94, the public authority concerned was an urban fire authority, which was wanting to build a fire station, and which had the power to take land for that purpose.

[56] My conclusion that the helipad does not have existing use rights means the Council was under no obligation to consider the effects on helicopter operations, and its failure to do so cannot be a ground for judicial review.

[57] My conclusion on the helipad also means I am not required to address another submission raised by Mr Fowler, namely that the existence of the helipad constitutes a special feature for the purposes of s 94C(2) of the Resource Management Act requiring notification.

[58] For completeness I should record that, while the helipad remains unconsented, the Council (which now manages the helipad) has applied for a consent. That application is to be notified and accordingly the effect of the helipad on the Ziptrek operation, as well as Skyline, will come to be considered.

[59] In fairness to Ziptrek, I should also record that because Ziptrek's operation does not exceed 18 metres above the treeline or 60 metres above the ground at the location of any structures, the Civil Aviation Authority has confirmed it does not require to be notified in terms of navigable airspace safety requirements.

The proposed ticketing booth

[60] Ziptrek's application for resource consent states that Ziptrek proposes to locate its ticketing booth and storage facilities at the upper terminal of Skyline's gondola. Mr Fowler submits that Skyline was thus obviously a person adversely affected.

[61] However, the application also makes it clear that the location of the proposed booth within the terminal or on Skyline's land is entirely dependent upon Ziptrek

reaching agreement with Skyline. The application expressly states "subject to final approval by Skyline Enterprises".

[62] I therefore accept the Council's argument that Skyline controls any potential adverse effects on it arising from the location of the booth. If Skyline refuses consent, then there would be no adverse effect. If it does agree, then it would in effect be accepting any adverse effect in the same way as if it had given written approval.

Effect on Skyline's toilet facilities and other infrastructure

[63] While the ziplines are on land entirely outside the area leased to Skyline, Mr Fowler contends there will inevitably be impact on Skyline's infrastructure, increased use of its toilets and increased use of its gondola. Ziptrek's application for resource consent proposes to use the gondola to enable customers to obtain access to the ziplines and also proposes its patrons will use Skyline's toilet facilities.

[64] A complicating factor is that under the terms of its lease with the Council, Skyline is obliged to transport people on its gondola to access the reserve through its building. The lease expressly prohibits Skyline from refusing to allow a person use of its facilities unless the facilities have reached capacity. The existence of this clause means the argument about Skyline's ability to control the adverse effects is obviously weaker than it is in the case of the location of the ticketing booth. It is highly arguable the lease means Skyline has no choice but to absorb the customers generated by Ziptrek.

[65] Significantly, under the heading "Infrastructure" the planner's adverse effects assessment states:

> No adverse effects in terms of infrastructure are anticipated to result from this application. The existing infrastructure associated with the Skyline gondola is to be utilised with the proposal and no other infrastructure will be required.

[66] The Council argues that Ziptrek was not required under the District Plan to provide toilet facilities, and further submits that until capacity is reached, the impacts

on Skyline's infrastructure (increased use of existing toilets, increased use of the gondola) are not environmental effects but rather commercial effects. Legally, a consent authority's obligation to consider adverse effects is of course limited to environmental effects.

[67] There is some force in the Council's argument. However, I am not persuaded the effects can be properly characterised as exclusively commercial. In my view, they are environmental effects and they are more than de minimis. I also accept it is a reasonable inference from the documentation that the reason the Commissioner did not consider them a reason to notify the application was because of an erroneous assumption that Skyline had no objection to the application.

Effect on the power supply

[68] Ziptrek's application proposed removing the existing power lines which service the Skyline gondola and replacing them with underground cables. The application noted that the relocation of the power lines underground was not necessary to enable the proposal to proceed, but considered it had both environmental and visual amenity benefits, resulting in significant enhancement of the reserve and benefits to all parties involved.

[69] Skyline's concern relates to the construction effects – in particular, the possibility of its gondola and associated facilities being unable to operate while the works are being undertaken.

[70] However, in my view, any potential impact on Skyline is an operational matter involving the contractor and not a matter that goes to s 93(1)(b). Further there was, in any event, evidence from Ziptrek's managing director that a switchover can be achieved almost immediately after the new lines are installed and secured, without disrupting Skyline's operation. Skyline does not operate on a 24/7 basis.

[71] In my view, even if the possibility of an outage is an effect that bears on s 93(1)(b), it is in the realm of a remote possibility, and does not mean notification was required.

[72] There is the further point that Skyline will of course benefit from having the cables underground.

Vehicular access to the top gondola building

[73] The current vehicle access to Skyline's top building is by a formed gravel-surfaced right of way over the reserve. Under the terms of its lease with the Council, Skyline has exclusive access to the road, although the Council has the power to authorise other users.

[74] In its application for resource consent, Ziptrek proposed to use the road access to construct the ziplines. Skyline contends this has potential effects on it in terms of maintenance costs, security, and access in an emergency.

[75] However, if Ziptrek wishes to use the road it will need to make a publicly notified application for a right of way under s 48 of the Reserves Act. The grant of any such right of way is specifically subject to the provisions of the Resource Management Act. In those circumstances I do not accept this can be a ground for judicial review in these proceedings.

Effects from carparking

[76] In its application, Ziptrek advised it was currently in negotiation with Skyline to rent approximately five carparks from Skyline for staff use.

[77] There is some dispute as to whether the District Plan requires Ziptrek to provide staff parking. However, the consent granted is subject to a condition that the parking be provided. The consent condition reads:

> 9 A minimum of 5 staff car parks shall be provided, and shall be within close proximity to the subject site. These car parks shall be made available, and the consent holder shall provide to Council details of these car parks, including the lease arrangement, prior to construction beginning (or an alternative arrangement for parking (5 parks) for construction workers on a temporary basis, in which case the permanent arrangements for staff parking may be provided prior

to the operation of the activity). The consent holder shall provide 5 car parks for staff on an ongoing basis.

[78] The consent further states under the heading "Reasons for the Decision":

> STAFF PARKING
>
> The application states that Ziptrek "*intends to lease car parks in close vicinity to the bottom gondola terminal. Ziptrek is currently in negotiation with Skyline Enterprises to rent a number of car parks (approximately 5) behind the Skyline lower terminal building, however, most staff, as with the participants are expected to travel to the site by public transport or walk from the town centre."*
>
> It is difficult to assess the number of car parks that are required for the activity under the Partially Operative District Plan, as the activity does not easily fit into any of the categories in the parking table. However, given the amount of staff anticipated to be required to run the activity 5 parks is considered to be adequate, and it is further considered appropriate to include this as a condition of consent, to ensure the parking is provided. Therefore, the adverse effects are considered to be adequately avoided.

[79] As submitted by the Council, the wording of the condition permits Ziptrek to provide the parks elsewhere and there is nothing to suggest Skyline will be adversely affected in an environmental sense if the carparks are provided at an alternative location.

[80] In its evidence, Ziptrek says it now intends to pursue carparking direct from the Council.

Effects on mountainbikers

[81] Adverse effects on mountainbikers was a matter on which the Commissioner called for additional information.

[82] The final consent decision addresses this issue in the following terms:

> *Mountain Bike Trails*
>
> It is noted that the ziplines 1-5 are located in the general location of some of the existing mountain bike tracks which provide mountain bike access down the face of Bob's Peak from the top of the Skyline Access Road to the One Mile area. The trails include both informal trails utilised by mountain bikers and a track established by Vertigo Mountain Biking which holds a lease

> from the Queenstown Lakes District Council to operate commercially over these trails.
>
> The application includes an assessment in Section 3.7 which discusses potential effects on other users within this reserve, and makes specific mention of mountain bikers. In considering this information it is concluded that there will be no adverse effect on the use and enjoyment of the area by mountain bikers, either commercially or recreationally, due to the location of the ziplines, which, while will [sic] cross over some of the bike tracks, is extended high up off the ground from tree to tree avoiding any conflict with ground level users. The clearance of the ziplines with any trail or road within the reserve is 6 meters [sic]. It is also noted that the co-use of similar areas such as this is operational and successful in other locations around the world such as in Whistler, Canada where both ski area trails and mountain bike trails are located below ziplines. For these reasons and due to the complementary recreational nature of the activity the use and enjoyment by other users is not considered to be adversely affected and in this regard no persons are considered adversely affected in terms of recreational amenity.

[83] I am satisfied the Commissioner had sufficient information to be able to make that assessment and that it was a finding she was entitled to make.

Conclusion on adverse effects

[84] My conclusion is that Skyline was a person adversely affected in more than a de minimis way because of effects on its infrastructure but for no other reason. The Commissioner failed to address the issue of infrastructure adequately because she wrongly assumed Skyline supported the resource consent application.

[85] The application should have been notified.

The Court's residual discretion

[86] I now turn to the issue of whether in the exercise of my discretion I should quash the consent and require Ziptrek to start afresh, or whether I should allow the consent decision to stand.

[87] Where there has been a breach of the statutory requirement to notify, the usual presumption is that the consent should be quashed: see *Bayley v Manukau City Council* [1999] 1 NZLR 568; *Waiotahi Contractors Limited v Murray* [1999]

NZRMA 305(CA); *Discount Brands v Westfield (New Zealand) Limited* [2005] 2 NZLR 597(SC); *Progressive Enterprises Limited v North Shore City Council* [2006] NZRMA 72; *Rea v Wellington City Council* [2007] NZRMA 449.

[88] However, in this case, after careful consideration I have come to the conclusion that special circumstances exist which displace the usual presumption. I have come to that conclusion for the following reasons:

i) Skyline's undue delay in issuing these proceedings: the consent was granted in late-February 2008 and these proceedings were not issued until January 2009. The explanation for the delay is that Skyline was awaiting the outcome of the lease applications. However, the proceedings were actually filed before the lease decision was released, and in any event that would not provide a sufficient explanation. It was incumbent on Skyline to issue its proceedings in a timely fashion immediately it became aware of the consent decision. I accept that delay per se is insufficient, and that there must be prejudice as a result of the delay. I also accept that on the evidence some of the prejudice claimed by Ziptrek would have been suffered anyway because of delay caused by having to obtain a variation of its lease. However, for Ziptrek not to know for almost a year that it would be facing this challenge to its consent has undoubtedly had financial and strategic implications.

ii) Skyline's motivation: I am satisfied from the evidence that Skyline's real objection is based not on actual potential effects on the environment or on its existing operation, but on its competing interest in a portion of the Ben Lomond Reserve. All of the alleged effects relating to its own operation on which it now seeks to rely (use of gondola, use of toilets, location of ticketing booth, carparking and undergrounding of power cables) were part of Ziptrek's original lease application,

which Skyline supported. It had no problem with any of those matters then. The only thing that changed as a result of the revised layout was the area of land. Mr Fowler suggested the matter of the land was now historic because the lease decisions have been made. However, the grant of the lease is conditional on Ziptrek obtaining resource consent, so the issue is still alive.

iii) The fact Skyline has itself some control over the adverse effects.

iv) The fact Skyline was made aware the application was being processed on a non-notified basis before the consent was issued, yet took no steps to contact the local authority.

v) The fact the environmental effects of the Ziptrek proposal were ventilated and tested at the public Reserves Act hearing in which Skyline actively participated. While the Reserves Act process is separate to the Resource Management Act process, there is a significant level of overlap.

vi) In the circumstances, a referral back would be an exercise in futility, because the outcome would still be the same. All that would be achieved would be to cause yet further delay and put all parties to quite unnecessary expense.

[89] I am satisfied it would not be in the interests of justice for Skyline to be granted the relief it seeks. The consent decision is to stand.

Costs

[90] It is my expectation the parties will be able to agree on costs. If, however, they are not able to agree and require me to make an award then I direct the

respondents to file written submissions first, with submissions from Skyline to be filed within 10 working days thereafter.

Solicitors:
M E Parker, Queenstown
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