

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

**I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2020] NZEnvC 150

IN THE MATTER of the Resource Management Act 1991
AND of an application for declaration under
section 311 of the Act
BETWEEN KINGSTON LIFESTYLE PROPERTIES
LIMITED
(ENV-2020-CHC-98)
Applicant
AND QUEENSTOWN LAKES DISTRICT
COUNCIL
Respondent

Court: Environment Judge J J M Hassan
(Sitting alone pursuant to s309 of the Act)
Hearing: In Chambers at Christchurch
Date of Decision: 11 September 2020
Date of Issue: 11 September 2020

INTERIM DECISION OF THE ENVIRONMENT COURT

- A: Directions are made as to the parties notifying the court that the relevant decisions on the provisions have been made (and the provisions are in force, assuming no appeals have been made).
- B: Subject to Order A, a final declaration will be made in due course on the basis sought in the joint memorandum, such that the application for declaration is granted.
- C: There is no order for costs.



REASONS

Introduction

[1] Kingston Lifestyle Properties Limited ('KLP') is the owner of the Kingston Flyer Railway located within the boundaries of the Queenstown Lakes District at Kingston.

[2] KLP has applied for a declaration as to the long-term status of running the Kingston Flyer for restoration and maintenance activities ('the Activities'). It seeks certainty as to the future position. The Kingston Flyer land is subject to both Queenstown Lakes District operative plan ('ODP') and proposed plan review ('PDP') zonings. Some of the Kingston Flyer land zoned Township Zone under the ODP is proposed, under Stage 3b of the PDP process, to be rezoned to Settlement Zone (as notified, and through submissions by KLP).

Application for declaration

[3] KLP filed its original application for declaration on 6 July 2020 accompanied by a (since withdrawn)¹ affidavit of Mr T A Grace. KLP's application is made on the grounds that the Activities are permitted activities under the PDP, any previous rules in relation to the operation of the Kingston Flyer under the ODP are inoperative and the Activities are not for commercial purposes.²

[4] The application for declaration outlines how KLP applied for a certificate of compliance ('COC') on 9 April 2020 for "the use of the Kingston Flyer Railway (existing transport infrastructure) by trains (i.e. locomotives (or engines) and carriage (or rolling stock))". It was accepted for processing on 15 April 2020 and requests for information have resulted in communication between the parties and a further narrowing of the application for COC.

[5] Counsel for KLP says as at the date of this application for a declaration, QLDC has failed to issue a COC for the activities requested, with no clear commitment being given as to when it will provide a decision on the application for COC.

¹ It is replaced by the JWS – joint witness statement: planning matters dated 21 August 2020 at [3].
² Notice of application for declaration dated 6 July 2020.



[6] Therefore KLP considers it appropriate to seek a declaration given:³

- (a) the significant time elapsed since it originally filed its application for a COC (nearly three months);
- (b) KLP's need for certainty as to whether the important restoration and maintenance activities of the Kingston Flyer are permitted; and
- (c) should the Council refuse the COC, the desirability of having the Environment Court consider the matter as soon as practicable.

[7] Since then KLP and the Queenstown District Lakes Council ('QLDC') have been in discussions in order to provide a workable solution for both parties, as well as the court. Mr Grace for KLP and Ms E Stagg for QLDC have filed a joint witness statement to provide planning rationale agreed by the planners to support the modified declaration now sought by KLP:

Provided that decisions on submissions in respect of the Settlement Zone provisions:

- (i) confirm the parts of the Kingston Flyer land proposed for rezoning to Settlement Zone are rezoned to Settlement Zone; and
- (ii) do not modify how the district-wide transportation and noise rules apply to the Settlement Zone from the notified provision;

Then:

The running of the Kingston Flyer (ie locomotives (or engines) and carriages (or rolling stock)) on the Kingston Flyer railway for:

- (a) restoration activities; and
- (b) maintenance activities;

are permitted activities, for which no resource consent is required.

The planners' JWS

Zoning

[8] The Kingston Flyer land⁴ is subject to multiple different zonings under the ODP and the PDP summarised in the table below:⁵

³ Notice of application for declaration dated 6 July 2020 at [23].

⁴ Legally described as: Section 2 SO 10898, Lot 4 DP 318631, Section 1 SO 10898, Section 3 SO 10898, Lot 9 DP 306647, Lot 1 DP 306647, Lot 6 DP 306647, Section 1 SO 7617, Lot 2 DP 318661, and Lot 1 DP 318661.

⁵ Joint witness statement: planning matters dated 21 August 2020 at [11].



| Land Parcel | ODP | PDP |
|--|--------------------|--|
| Lot 4 DP 318631 and Section 2 SO 10898 | Rural General Zone | Rural Zone (now operative) |
| Section 1 SO 10898 | Township Zone | Not zoned (although recommended to be zoned partially Settlement Zone and partially Settlement Zone – Commercial Precinct) |
| Section 3 SO 10898 | Township Zone | Settlement Zone – Commercial Precinct |
| Lot 9 DP 306647 | Township Zone | Settlement Zone |
| Lot 1 DP 306647 | Township Zone | Settlement Zone |
| Lot 6 DP 306647 | Township Zone | Not zoned (although requested to be zoned Settlement Zone) |
| Section 1 SO 7617 | Road | Not zoned (although requested to be zoned Settlement Zone) |
| Lot 2 DP 318661 | Rural General Zone | Rural Zone (now operative) |
| Lot 1 DP 318661 | Rural General Zone | Rural Zone (now operative) |

[9] With reference to the table, the planners note that:

- (a) references to the Settlement Zone are references to a proposed PDP Zone. In some instances, KLP has requested rezoning to Settlement Zone, which is identified below where that is the case;
- (b) the Council has not yet issued decisions on the Settlement Zone and submissions on it. The amended declaration sought by KLP is premised on the decisions being issued, which confirm that zoning and do not depart from how the district-wide transportation and noise rules applied to the Settlement Zone under the notified provisions of the Zone. As notified, if an activity was permitted under the district-wide transportation and noise rules, then, unless it needed a consent for some other reason under the Settlement Zone, it would remain permitted in the Settlement Zone;



- (c) the PDP is not yet operative as it has not been adopted by Council. Where the summary below records, for example, the Rural Zone under the PDP as “now operative”, that is short-hand for it being treated as operative.

Description of activity

[10] The application describes the Activities that are the subject of the declaration as Transport Infrastructure and Transport Activities under the PDP.⁶ This description aligns with:

- (a) Rule 29.4.2 which provides that transport activities outside a road are permitted;
- (b) Rule 29.4.14 which provides that transport activities within a road are permitted; and
- (c) the definition of transport infrastructure.

[11] Those rules and definition are not subject to any outstanding appeal points. The planners agree that the Kingston Railway line and associated infrastructure is encompassed within “Transport Infrastructure”. While “Transport Activities” is not defined in the PDP, the planners agree that applying the natural meaning of the words, that use of a train on a railway line for restoration and maintenance activities associated with the Transport Infrastructure is encompassed within “Transport Activities”.

Relevant plan provisions

[12] When determining whether an activity is permitted under a plan, the planners agree that all relevant plan provision should be reviewed to ensure that the activity does not trigger any resource consent requirements.

[13] The planners set out the relevant rules⁷ from Chapter 21 – Rural and Chapter 26 – Historic Heritage and found that no consent was required under those chapters.

[14] In relation to Chapter 29 – Transport, as noted above Rule 29.4.2 identifies Transport Activities not listed in Table 29.1 as permitted activities. The use of trains for transport is not listed and the majority of the sites subject to this application are not within

⁶ Joint witness statement: planning matters dated 21 August 2020 at [12]-[17].

⁷ Joint witness statement: planning matters dated 21 August 2020 at [2].



the road. Accordingly, the planners consider the use of the Kingston Flyer for transport activities on such land to be permitted. They also note that a small section of the Kingston Flyer land is within Road Reserve but consider the proposed use and maintenance of tracks is also permitted.⁸

[15] Finally, Chapter 36 – Noise contains Rule 36.4.1 which identifies sound from trains on railway lines (including railway yards, railway sidings or station) as permitted.

[16] Therefore, the planners consider the activities to be permitted under the framework for noise in the PDP.

Discussion

[17] The court has jurisdiction to make a declaration under ss310 and 313, RMA. Under s313, the court may:

- (a) make the declaration sought, with or without modification; or
- (b) make any other declaration that it considers necessary or desirable; or
- (c) decline to make a declaration.

[18] Upon reviewing the application, I find the evidence of the planners to be reliable, However, I raised with the parties a concern that the declaration as sought might be on speculative footing. This was in a Minute to parties that proposed an alternative course as follows:⁹

- (a) issue an interim decision on the application that would set out what the proper activity classification would be for the described activity under the proposed rezoning (assuming no modification to how the district-wide transportation and noise rules apply to the Settlement Zone from the notified provision); and
- (b) complete that with a final declaration decision once parties notify the court that relevant decisions on the provisions have been made (and the provisions are in force, assuming no appeals).

[19] The parties agree with the court's proposed approach.¹⁰

⁸ Under Rule 29.4.14 PDP; joint witness statement: planning matters dated 21 August 2020 at [22] and [23].

⁹ Minute dated 28 August 2020 at [5].

¹⁰ Joint memorandum of counsel dated 4 September 2020 at [4].



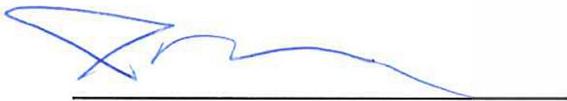
[20] On review of the application and evidence, I am satisfied that, subject to confirmation that the relevant decisions on the provisions have been made, the declaration as sought is appropriate. I agree with counsel's submissions that:¹¹

- (a) the running of the Kingston Flyer for restoration and maintenance activities qualifies as permitted transport activities or permitted use, maintenance or repair of existing transport infrastructure under the district-wide provisions of the Chapter 29 Transport of the PDP;
- (b) the noise associated with these activities is also permitted under the district-wide provisions of Chapter 36 Noise of the PDP under Rule 36.1;
- (c) the Activities do not trigger any further consent requirements under the PDP; and
- (d) there will be no consent triggers under the ODP.

Outcome

[21] It is directed that the parties notify the court **as soon as practicable** when the relevant decisions on the provisions have been made (and the provisions are in force, assuming no appeals have been made). The parties are also to confirm the final wording of the declaration sought at the time of filing. A final decision can then be issued.

[22] The parties agree the costs of this application should lie where they fall if resolved at this stage, so I will make an order to that effect.



J J M Hassan
Environment Judge



¹¹ Joint memorandum of counsel dated 21 August 2020 at [3].