

Before the Hearing Panel
at Queenstown

under: the National Parks Act 1980 and Conservation Act 1987

and

in the matter submissions in relation to the Minister of Conservation's intention to grant a Concession Application by **Milford Dart Limited** to investigate, construct, operate and maintain a bus tunnel from the Routeburn Road in Mt Aspiring National Park to the Hollyford Road in Fiordland National Park

Right of Reply by Legal Counsel on behalf of Milford Dart Limited

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RIGHT OF REPLY BY LEGAL COUNSEL ON BEHALF OF MILFORD DART LIMITED

INTRODUCTION

- 1 I appear on behalf of Milford Dart Limited (*Milford Dart*) with respect to its concession application to investigate, construct, operate and maintain a bus tunnel from the Routeburn Road in Mt Aspiring National Park to the Hollyford Road in Fiordland National Park (*the Dart Passage*).
- 2 I do not propose to give a detailed project description or legal analysis of Milford Dart's proposal as this right of reply is limited to:
 - 2.1 only clarifying points we consider have been misunderstood / misrepresented or to propose solutions to matters that have been raised; and
 - 2.2 not re-presenting or expanding on the concession application or introducing new information.
- 3 As such, this right of reply will cover the following topics which have been raised by submitters and which need a reply from a legal perspective.
 - 3.1 the Minister of Conservation's (*the Minister*) discretion to grant a concession taking into account the relevant legislation and management plans – in particular, the National Parks Act 1980 and the Mt Aspiring National Park Management Plan (*Mt Aspiring NPMP*);
 - 3.2 the application in light of purpose of the National Parks Act and the Conservation Act 1987;
 - 3.3 the Minister's discretion to have regard to the effects of the concession activities on "roads" in the National Park;
 - 3.4 whether Milford Dart has provided sufficient information?
 - 3.5 the 'need' for the Dart Passage; and
 - 3.6 the Department of Conservation's (*DoC*) responsibility with respect to safety concerns.

LEGAL ISSUES

National Parks Act and Roads *Authority to grant concession*

- 4 The Minister has the ability to grant concession for a road within a National Park pursuant to the section 55 of the National Parks Act which provides that:

(1) This Act shall not confer on the Minister or the Department any jurisdiction or authority with respect to any public road that is within the boundaries of the park.

(2) Except with the consent of the Minister given in accordance with the management plan for a park, no roads may be made over or through the park.

- 5 Therefore it is the Minister who must decide whether to grant consent (through the instrument of a concession) for the activities within the concession application that are properly considered to be "roads".
- 6 Some submitters¹ have argued that from a jurisdictional point, the Minister is required to grant separate authorisations – both under the Conservation Act (for the concession – which is the subject of this hearing) and also under the National Parks Act pursuant to section 55 (which submitters contend has a higher test than for a concession). It has been argued that the Minister is only considering the concession and therefore will not have granted authorisation under the National Parks Act if the concession is granted.
- 7 I do not propose to discuss this issue any further, other than to add that:
- 7.1 the concession sought under the Conservation Act constitutes "*consent of the Minister*" under section 55(2) of the National Parks Act because section 49 of the National Parks Act allows the Minister to grant "*concessions*" for National Parks, provided this is not inconsistent with the purpose of the National Parks Act;
- 7.2 arguably the general purpose of the National Parks Act ('preserving in perpetuity') is a higher standard than under the Conservation Act ('preservation and protection of natural and historic resources...') therefore this will be taken into when making a decision to grant a concession under the National Parks Act; and
- 7.3 given the above, we trust that DoC has followed, and advised Milford Dart on the correct process for this project, particularly regarding authorisation under the National Parks Act.

¹For example, Linda Connings, Royal Forest and Bird Protection Society of New Zealand Inc

Roads in National Park Management Plans

- 8 Many submitters² have traversed some of the provisions of various Acts, Plans and Strategies to assert why Milford Dart's application should be declined. One particular focus of these submissions has been with respect to the issue of whether the Minister can grant this concession application for a road (within either of the National Parks), or whether the relevant National Park Management Plan prohibits any new roads, despite the provisions of the National Park Act which give the Minister a discretion.
- 9 The extent to which the Minister can take into account any effects that the concession activities will have on public roads within the National Parks, particularly that of the access road off Routeburn Road, will be dealt with in the next section of my reply.
- 10 Of the two National Parks at issue, it is only Mt Aspiring National Park that I will address in detail. More specifically, this section of my reply will respond to the many incorrect assertions by submitters who have said the Minister does not have the ability to grant a concession for the access road into the tunnel from the Routeburn Road end.
- 11 For completeness, I note there is nothing in the Fiordland National Park Management Plan 2007 (*Fiordland NPMP*) which could support a similar argument that a new road is prohibited in the Fiordland National Park because:
- 11.1 Milford Dart's proposed concession activities fall within the 'Milford Road Front Country' visitor setting in the Fiordland NPMP; and
- 11.2 section 5.7 of the Fiordland NPMP states that new roading should not be authorised anywhere in Fiordland National Park except in the Front Country visitor setting.
- 12 With respect to the Mt Aspiring National Park, the starting point is section 55(2) of the National Parks Act and how the Minister's consent is to be given "*in accordance with the Plan*" (that is, the Mt Aspiring NPMP.) The following provisions from Section 6.6.4 of the Mt Aspiring NPMP are relevant:
- 12.1 Objective 2: To not provide for new roads or other land transport links, except for those required to facilitate access to departmental facilities in the front country zone of Mount Aspiring National Park.

² For example, Federated Mountain Clubs of NZ (Inc), John Nankervis, Otago Conservation Board, Linda Connings, Royal Forest and Bird Protection Society of New Zealand Inc, Frana Cardno

12.2 Policy 2: A new road **should not be** authorised anywhere in the park, except in the front country zone, and then only in the following circumstances:

- a. if it would significantly enhance visitor access, and enjoyment of, Mount Aspiring National Park, without adversely impacting on other recreational opportunities and other national park values, and;
- b. it is specifically required to maintain or restore access to departmental visitor facilities, such as campsites, parking areas, toilets and walking tracks within Mount Aspiring National Park.

12.3 Policy 4: Except for a road allowed for under policy 2 (b), any proposals for roads, or monorail transport systems or aerial cableways (such as gondolas) would require:

- a. Full assessment of environmental effects on the natural, historical, cultural, recreational, landscape, natural quiet and amenity values.
- b. An audit of this assessment to determine whether the effects are either acceptable or can be adequately avoided or mitigated.
- c. Full public consultation.



Figure 1: An excerpt from Map 6b in the Mt Aspiring National Park Management Plan

- 13 Milford Dart's proposed access road will be formed just to the right of the area marked "'New' shelter" in **Figure 1** above. The green area (which does not encompass the access road) on **Figure 1** is the 'front country zone' under the Mt Aspiring NPMP. The brown area in **Figure 1** (which includes the area the access road is located in) is the 'back country zone'. From the explanation to the 'front country zone' in Section 6.6.2.4 of the Mt Aspiring NPMP it is evident that these are areas which are generally accessible by vehicles and

are where the majority of the park visitations occur, though often of a short duration.

- 14 Therefore many submitters have taken a strictly literal interpretation of Policy 2 to argue that the Minister cannot grant consent to the new access road because it does not fall in the front country zone. This interpretation is incorrect for a number of reasons discussed below.

Basic legal principle: Minister cannot disable itself

- 15 Firstly, at a higher level, it is very basic legal principle that a person such as the Minister exercising a discretion must not disable itself from exercising that discretion in individual cases. For that reason it would not be a proper interpretation of the Mt Aspiring NPMP to interpret Policy 2 in subordinate legislation as some form of overall fetter on the Minister's discretion under the National Parks Act to grant consent to a road in the Park. The policy must simply be regarded as a relevant guide to the Minister in the exercise of decision making, not a jurisdictional hurdle.
- 16 In addition, it is a well known principle that the Minister can not in any event regard Policy 2 as some form of rigid rule or regulation. When an authority is given discretionary powers each case has to be considered on its own merits and decided as the statute and public interest require. An authority must not adopt a fixed rule of policy.³
- 17 A decision-maker entrusted with a discretion must not allow a fixed rule of policy to displace personal judgment. "[T]he general rule," said Lord Reid, "[is] that anyone who has to exercise a statutory discretion must not 'shut his ears to an application'".⁴
- 18 The above is not to say that Policy 2 is irrelevant, but nevertheless some room needs to be left for judgement and discretion and one single policy in a Plan cannot be escalated to the status of a rigid rule effectively acting as a power of veto on the Minister's discretion.
- 19 In any event as a general rule the approach to legislative interpretation in today's society is to avoid an old fashioned literal approach to interpretation. The modern trend is towards a purposive approach where words in legislation are read in their fullest context and with a view to giving effect to the purpose of the legislation they are designed to achieve. This applies to both the interpretation of the Act and the Plan.

³ Constitutional and Administrative Law in New Zealand, 3rd edition, Joseph p 903.

⁴ *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 at 624 (HL), referring to *R v Port of London Authority: Ex p Kynoch Ltd* [1919] 1 KB 176 at 183 (CA), and applied in *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 at 171 (CA).

20 The Plan itself contains objectives and policies (but not actual rules). My submission is that the phrase "*in accordance with*" would be interpreted by analogy with for example Plans prepared under the Resource Management Act 1991. Those Plans also contain objectives and policies and the Act requires consent should only be given to carry out an activity if to do so is "*not contrary*" to, or is "*consistent with*" or is "*not repugnant to*" those objectives and policies of a Plan overall. It is asserted that a similar approach should be adopted to interpretation of the Plan in this case as after all the Plan is simply the mechanism by which it is envisaged the purpose of the National Parks Act will be achieved.

21 Therefore we do not believe a decision maker properly advised would adopt a strictly literal interpretation to the Plan and find that simply because the proposal includes something which may technically be a "road" outside a front country zone it is automatically inconsistent with Policy 2 and hence the entire Plan. Such an approach would be inconsistent with the principles set out above.

22 Proper principles of interpretation give the Minister a flexibility to conclude a particular Policy (such as Policy 2) should not be given an overly literal interpretation provided that a result is reached that is not inconsistent with the overall intent of the Plan, the General Policy and ultimately the purpose of the National Parks Act.

Conventions in the General Policy on National Parks 2005

23 Further to the above argument around literal interpretation, the General Policy on National Parks (particularly, Policy 1(d)), provides guidance in the form of wording conventions that are used in this General Policy, as well as the National Park Management Plans.

24 Policy 1(d) states:

The words 'will', 'should' and 'may' have the following meanings:

i. policies where legislation provides no discretion for decision-making or a deliberate decision has been made by the New Zealand Conservation Authority to direct decision-makers, state that a particular action or actions 'will' be undertaken;

ii. policies that carry with them a strong expectation of outcome, without diminishing the constitutional role of the Minister and other decision-makers, state that a particular action or actions 'should' be undertaken;

iii. policies intended to allow flexibility in decision-making, state that a particular action or actions 'may' be undertaken.'

25 The New Zealand Conservation Authority (NZCA) did not make a "*deliberate decision ... to direct decision-makers*" to prohibit roads in the Mt Aspiring National Park. If they wished to prohibit such

roads, they would have used 'will not', rather than 'should not' in Policy 2. Also as outlined above, given the Minister's discretion in section 55, I submit that there would be no scope for NZCA to make a policy that says new roads 'will not' occur in the National Park.

- 26 Regardless, it is clear from Policy 1(d)(ii) that because 'should' has been used in Policy 2 of Section 6.6.4, this creates a strong expectation of outcome in the generality of cases, without diminishing the constitutional role of the Minister and other decision-makers.
- 27 Policy 1(d) of the General Policy is duplicated in Section 6.1.1 of the Mt Aspiring NPMP, with the addition of the following explanation to the use of 'should':

ii ... When 'should' is used it is anticipated that there will only be **exceptional circumstances** where the outcome will differ from that expressed in the policies. **While it is essential to acknowledge the discretionary nature of decision making**, this plan and its policies are designed to give as much certainty as possible to management practice. [Own emphasis]

- 28 From the above, it is further evident that where 'should' is placed in a policy, this denotes the Minister has a discretion. Therefore on this basis the Minister has the ability to grant consent to the access road under the Mt Aspiring NPMP, even given the nature of Policy 2 as there was a deliberate decision to use 'should not', rather than 'will not'.

Proximity to the Front Country Zone

- 29 To further back up this argument, given the proximity of the access road to the 'front country zone' and in particular, the fact that this zone is where the majority of the park visitations occur, it would be absurd in the current situation to interpret Policy 2 as drawing such a rigid line between the front country zone and the back country zone in which the short access road is located. In particular, the access road displays the attributes of the front country zone and therefore this fits the proposal within the "exceptional circumstances" referred to in Policy 2(ii) (above).

- 30 As such, opponents cannot argue that to allow this proposal would 'open the floodgates' to allow (and justify) similar proposals in the future in back country zones. Every case will be fact specific.

Background to Mount Aspiring NPMP

- 31 Several submitters⁵ have further argued that the opinions of the NZCA in compiling the Mt Aspiring NPMP should be taken into

⁵ For example, John Nankervis and Linda Conning

account by the Minister. They are specifically pointing to the assertion that NZCA did not want the Dart Passage to go ahead.

- 32 I however submit that the background to the Mt Aspiring NPMP is irrelevant for the purposes of interpreting the Management Plan.
- 33 If the NZCA wanted to prohibit roads in the National Park through this new Management Plan, they would have expressly done so and used 'will not' rather than 'should not'. These wording conventions have already been discussed in detail in my reply. Therefore it could be concluded that NZCA did not intend to prohibit all roads in National Park.
- 34 Additional force is added to this argument as at the time the Dart Passage proposal was well known. Had there been an explicit move to prevent it then one would have expected it to be stated in the same way as gondolas.
- 35 Of course, my submission is just mere speculation on the thoughts of the NZCA and can therefore be justifiably ignored on this basis, as should the suggestion by these submitters that the Minister should take into account the notion that the NZCA intended to prohibit roads in this National Park.
- 36 What we are therefore left with is the orthodox approach to interpretation that legislation is just about interpreting the text of the relevant Management Plan in light of its stated purpose and plain meaning and not attempting to read in, through extrinsic factors, what NZCA may have intended to do. To do otherwise would undermine the entire process of having a plan in the first place.

Precedent Effect and Plan Integrity

- 37 It has been argued in submissions⁶ that because the application is inconsistent with the relevant management plans, to grant concession would undermine these documents and create a precedent allowing other commercial operators to ignore these plans in the future.
- 38 As this argument is incorrectly predicated on the belief that the application is inconsistent with the relevant plans (which I have already demonstrated is incorrect), I do not need to discuss this issue any further.
- 39 It is simply not credible that such a unique proposal could form any form of precedent.

⁶ For example, Otago Conservation Board, Mr Geoff Thomson & Southern Lakes Helicopters Limited, Frana Cardno

Purpose of National Parks Act and Conservation Act

- 40 Another issue raised in submissions⁷ is that the Minister cannot grant this application because it is inconsistent with the purpose of the National Parks Act and the Conservation Act.
- 41 This is a subjective argument based on weighing up the effects of the proposed concession activity. As Milford Dart has provided technical evidence on these effects in its application and subsequent requests for information, it is simply submitted that with the proposed mitigation, the effects of the Dart Passage will not be inconsistent with the purpose of both these Acts.
- 42 By in large none of the arguments raised by submitters have been supported by suitably qualified experts and whilst the views of submitters are undoubtedly relevant the decision maker should be very slow to discard the assessments of experts weighed against the opinion of experts.
- 43 As such, it is now up to the decision-maker to come its own conclusion based on all of the material but including Milford Dart's expert assessments.

Effects of activities in the deviations from legal road corridor

The issue

- 44 Another issue raised by submitters⁸ is whether the Minister can take into account the effects of the concession activities (widening and realignment) on Routeburn Road, in particular, because this formed Road (*the Carriageways*) deviates (*the Deviations*) from the legal road corridor (*the Legal Road*) in some places.
- 45 At already discussed, in considering Milford Dart's concession application, the Minister has jurisdiction over activities that occur within the relevant National Parks. However that jurisdiction does not extend to public roads within the National Park by virtue of the explicit wording of section 55(1) of the National Parks Act. Therefore the issue is whether these Deviations are "*public roads*" and therefore excluded from the jurisdiction of the Minister and DoC.
- 46 While the term "*public roads*" is not defined in the National Parks Act, it is submitted it is sensible to adopt the same meaning as

⁷ For example, Linda Conning, John Nankervis, Royal Forest and Bird Protection Society of New Zealand Inc, Real Journeys Limited

⁸ For example, Queenstown Lakes District Council, the Otago Conservation Board, Royal Forest and Bird Protection Society of New Zealand Inc

"road" in section 315 of the Local Government Act 1974 (the LGA).⁹
 "Road" is also defined in the Mt Aspiring NPMP.¹⁰

Are the Deviations a public road?

- 47 Roads can be created:
- 47.1 expressly – for example, through a Council acquiring the land for a road;
 - 47.2 impliedly – where the landowner expresses an intention to create a road, which is then accepted by the public using the road (perhaps the best known instance of this is the road to Stony Batter over John Spencer's land on Waiheke Island¹¹);
or
 - 47.3 in a remedial way – such as to address some informality or omission in the legalisation process.
- 48 This part of my reply will explain how the Deviations are legal roads under the doctrine of implied dedication or the remedial provisions of the LGA and Government Roding Powers Act 1989¹² and thereby excluded from DoC's jurisdiction.

Implied dedication

- 49 The *Man O'War* decisions confirm that:
- 49.1 the doctrine of implied dedication applies in New Zealand;
 - 49.2 the doctrine requires both:
 - (a) an intention by the landowner to dedicate the land as a road (*animus dedicandi*), which can either be an express action by the landowner himself or informed acquiescence by the landowner in the actions of a third party constructing a road on the landowner's property; and

⁹ Despite the enactment of the Local Government Act 2002, the provisions of the 1974 Act dealing with roads remain in force.

¹⁰ This definition is:

- (a) a road that is formed and maintained for vehicle use by the public;
- (b) a route that is marked by the department for vehicle use by the public or identified in a conservation management strategy or national park management plan for use by vehicles generally or a particular type of vehicle (e.g. a bicycle) or as a vehicle parking area.

¹¹ Reported as *Man O'War Station Ltd v Auckland City Council* [2002] 3 NZLR 584 (PC), with the substantive decision (almost entirely upheld on appeal) being *Auckland City Council v Man O'War Station Ltd* CP1355/83, High Court Auckland, 19 August 1997, Anderson J.

¹² Formerly known as the Transit New Zealand Act 1989.

- (b) acceptance of that intention by use of the road by the public;¹³ and

49.3 where it applies, the doctrine operates as an exemption to indefeasible title under the Land Transfer Act 1952, so that a landowner does not acquire title to any roads contained within his Certificate of Title.

50 It seems almost certain that the Carriageway was constructed with the permission of the then landowner (whether that was private landowner or the Crown), or at least with that owner's acquiescence. In any event the adjoining landowner to the Carriageway is the Crown as owner of the National Park and they have not to date disputed that these roads are used as roads. Rather, DoC supports the use of these roads as providing public access to the National Park for both the public and its own operations.

51 Therefore the Deviations are public roads on the basis that:

51.1 the landowner at the time impliedly dedicated the Carriageway by expressing an intention to create roads over the actual routes, and that intention was accepted by the public using the Carriageway;

51.2 the Carriageway has been maintained for the public by Queenstown Lakes District Council (QLDC) at public expense; and

51.3 an error occurred in either in the legalisation of the Carriageway or in construction processes in that the roads were not where the Legal Road was defined with the result that the actual routes of the Carriageways were not formally legalised in terms of the survey records.

Roads as defined

52 The above argument is further advanced by the definition of "road" is section 315(1) LGA as follows:

the whole of any land which is within a district, and which—

- (a) Immediately before the commencement of this Part of this Act was a road or street or public highway; or
- (b) Immediately before the inclusion of any area in the district was a public highway within that area; or
- (c) Is laid out by the council as a road or street after the commencement of this Part of this Act; or

¹³ Or, in some cases, acceptance *on behalf of the public* by the expenditure by the Council of public monies on maintenance.

- (d) Is vested in the council for the purpose of a road as shown on a deposited survey plan; or
- (e) Is vested in the council as a road or street pursuant to any other enactment;—

53 Part 21 of the LGA commenced on 1 April 1979. Given the conclusions in paragraph 51 the Deviations were roads under part (a) of the definition if they became road prior to that date, or under part (c) if they became a road after that date.

54 The Government Roading Powers Act 1989 is also relevant because it provides "*remedial*" provisions under which defects in the process of legalising land that was intended to be road can be resolved. Section 43 of the Act defines "*road*" as:

a public highway, whether carriageway, bridle path, or footpath; and includes the soil of—

- (a) Crown land over which a road is laid out and marked on the record maps:
- (b) Land over which right of way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication:

...

- (d) Land over which a road has been or is in use by the public which has been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed upon, or fenced, and a sufficient plan of which, approved by the Chief Surveyor of the land district in which such road is situated, has been or is hereafter registered by the District Land Registrar against the properties affected by it; and the Registrar is hereby authorised and required to register any such plans accordingly, anything in any other Act notwithstanding, when the plans are presented for registration by or on behalf of the Minister:
- (e) Land over which any road, notwithstanding any legal or technical informality in its taking or construction, has been taken, constructed, or used under the authority of the Government of any former province, or of any local authority, and a sufficient plan of which is registered in the manner provided for in paragraph (d) of this subsection,—

and, unless repugnant to the context, includes all roads which have been or may hereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force, and all bridges, culverts, drains, ferries, fords, gates, buildings, and other things thereto belonging, upon the line and within the limits of the road:

- 55 We note that although only the Legal Road and not the Deviations appear on Survey Office maps, the eMap software¹⁴ produced by Terralink International Ltd shows both the Legal Roads and the Carriageway, and therefore shows the Deviations. Terralink sources its roading information from Land Information New Zealand (LINZ), which therefore strongly suggests that the actual location of the Carriageways (and therefore the Deviations) must be shown on some survey plan or survey record held by LINZ.

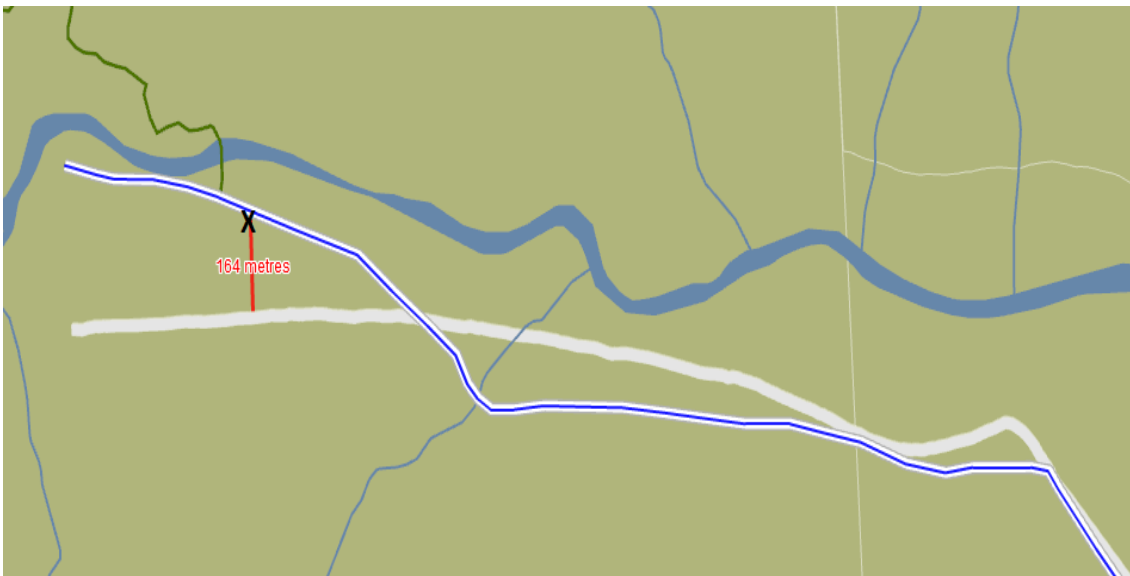


Figure 2: Excerpt from eMap of Routeburn Road

- 56 By way of example, **Figure 2** above is taken from eMap of the northern portion of the Routeburn Road. This map shows two 'roads': the formed Routeburn Road Carriageway (including the Deviations) appears as a blue line, while the Legal Road appears as a white line. The approximate point of the start of the Dart Passage access road is marked by "X" and shows there is around 164 metres between the formed and the legal road at this point. Given this information, clearly the Carriageways, Deviations and Legal Roads are known to LINZ.
- 57 The Deviations are therefore '*public road*' under several parts of the section 43 definition:
- 57.1 part (a) – as the Deviations appear to be marked on record maps;
 - 57.2 part (b) – the public has been given a right of passage over the Deviations by invitation of DoC as landowner;
 - 57.3 part (d) – public monies have been expended and a plan of the Deviations certainly exists, as noted above; or

¹⁴ Formerly known as Terralink

57.4 part (e) – a plan of the Deviations exists and the Deviations have been used under government authority (that of the Council) but there is some “*legal or technical informality*”, as the Deviations do not correspond with the Legal Road.

Conclusion

58 In summary, the Deviations:

58.1 have been impliedly dedicated by the Crown as public road under that doctrine; and/or

58.2 are road as defined by the remedial provisions section 315 LGA and/or section 43 Government Roading Powers Act.

in either case making the Deviations legal roads, having the same status as the Legal Road, albeit formed where the Legal Road is unformed in places. In that case, by virtue of section 55 National Parks Act, the Deviations do not form part of the National Parks and are explicitly outside DoC’s jurisdiction, coming under the control of the Council.

What is the width of the public road?

59 The standard practice (although not automatic) has been for a Legal Road to be one chain, or 20.12 metres (66 ft), in width and is known as the road reserve or corridor. The Carriageway (the formed road) is much narrower at around 5 – 8 metres and lies within the road corridor.

60 The Legal Road (through the road corridor) provides additional land under QLDC’s control for future road widening, safety margins, vegetation control, sight lines, maintenance access and similar issues relating to the long term management of a road.

61 As already discussed in detail, the Carriageway has been constructed outside the Legal Road in some points on Routeburn Road, resulting in the Deviations. However it is submitted that despite this, it was the intention of the relevant parties that the Carriageways (wherever they happened to be) would lie within a 20.12 metre Legal Road corridor to provide the benefits described in paragraph 60 above.

62 Therefore the Carriageway (including the Deviations) extends to a 20.12m wide (formerly 1 chain) road corridor, as intended by the vesting of the Legal Road in the QLDC.

In whom are the roads vested?

63 If the Deviations are legally roads, then they – and the corridor around them as discussed above – are vested under section 316(1) LGA in the relevant Council:

.. all roads and the soil thereof, and all materials of which they are composed, shall by force of this section vest in fee simple in the council

of the district in which they are situated. There shall also vest in the council all materials placed or laid on any road in order to be used for the purposes thereof.

- 64 QLDC would then have, under section 319 LGA, powers of control and management of the Deviations and corridors, on entirely the same basis as the Legal Roads.

Conclusions in relation to DoC's jurisdiction

- 65 DoC has no jurisdiction over the Deviations and corridor, which are under the control and management of QLDC. As such, for example, road widening activities will require resource consent from this Council.

- 66 However, DoC will be able to consider any activities related to the roading improvements or effects from those activities where they occur within the remainder of the relevant National Park. Examples of this could include any spoil disposal or land disturbance that occurs outside the 20.12 m road corridor discussed above.

Sufficient Information on Effects

- 67 Some submitters¹⁵ have contended that Milford Dart has not provided sufficient information and this is therefore grounds for the Minister to decline the application pursuant to section 17U(2) Conservation Act. We do not wish to traverse Milford Dart's concession application to assess these submitters' argument, however we do wish to point out the following:

67.1 the Officer's Report (at page 107) concludes there is sufficient information to determine this application;

67.2 regardless of the Officer's recommendation, Milford Dart has amended its application a number of times to satisfy DoC's requests for further information; and

67.3 given the large history to this application, we do not believe it would have proceeded to a hearing had DoC still considered there was insufficient information to make a decision on this application.

- 68 Nevertheless if there are areas where it is considered that further information would assist the process then that information can now be requested and will be provided in a timely fashion.

'Need' for Milford Dart

- 69 Many submitters have argued that there is no 'need' for the Dart Passage.¹⁶ In particular, the argument presented is that Milford

¹⁵ For example, the Royal Forest and Bird Protection Society of New Zealand Inc, Otago Conservation Board. Mr Geoff Thomson & Southern Lakes Helicopter Limited

¹⁶ For example, John Nankervis, Mr Geoff Thomson & Southern Lakes Helicopters Limited, Southland Conservation Board, Frana Cardno

tourism numbers are declining, so there is no interested demand (and therefore no need) for the tunnel. Also, submitters have conversely argued that should this tunnel lead to an increase in tourism numbers, this will overcrowd Milford Sound, adversely affecting this environment. Submitters are therefore presenting a no-win situation for Milford Dart.

- 70 Many submitters have posed emotive arguments on this issue. Overall, Milford Dart does not have to justify a 'need' for the Dart Passage, provided it meets the relevant tests (discussed below) to be granted a concession. "Need" is not a criteria.
- 71 Further, the Dart Passage is a commercial venture, of which Milford Dart carries the risk. It is not within DoC's ambit to assess the commercial viability of this proposal through determining 'need' and therefore the likely success of the project.¹⁷
- 72 Instead, the Minister must assess this application based on the test in section 17U(4) of the Conservation Act (to be applied pursuant to section 49 of the National Parks Act), whereby the Minister shall not grant a concession application to build a structure or facility, or to extend or add to an existing structure or facility, where he or she is satisfied that the activity—
- (a) Could reasonably be undertaken in another location that—
- (i) Is outside the conservation area to which the application relates; or
- (ii) Is in another conservation area or in another part of the conservation area to which the application relates, where the potential adverse effects would be significantly less; or
- (b) Could reasonably use an existing structure or facility or the existing structure or facility without the addition.
- 73 Milford Dart has already outlined the reasons for advancing this proposal in the concession application and supporting documentation, therefore this reply will not re-present this information. However I will note for completeness that this proposal satisfies the section 17U(4) test for the following reasons.
- 74 Firstly, the route proposed between Queenstown and Milford Sound via the Dart Passage is the shortest route available that maximises the use of existing roads and both minimises the extent of new road and tunnel required and the effects of this new infrastructure. Therefore the activity could not reasonably be undertaken in

¹⁷ Although we do note that the Fiordland National Park Management Plan, at Section 5.3.9.1, Implementation 12(e) allows the decision maker, in considering a concession application, to have regard to whether the applicant is well-enough equipped (expertise, finance etc) to carry through and complete the proposal.

another location outside the conservation area and still have the same impact and benefits.

- 75 The second reason is that the 60% reduction in journey distance, relative to the current road journey, maximises the positive impact on Milford Sound by allowing the widest possible Milford Sound arrival and departure window. This new option provides the greatest possible opportunity for reduction of congestion during the middle part of the day.
- 76 In light of this reduction in travel, arguing the existing roading infrastructure is sufficient is nonsensical. This is because the existing roads network should not be compared to the Dart Passage because the travel options are so fundamentally different, particularly when having regard to the benefits of this Passage and the different types of travellers it may attract.
- 77 **Mr Michael Sleigh** will discuss this issue further in a statement to be presented shortly.

DOC's Responsibilities

- 78 Another concern raised by submitters¹⁸ is DoC's level of responsibility for the tunnel, especially with respect to safety issues. Submitters believe that the application has not adequately dealt with safety issues and DoC have not picked this up as they lack expertise in this area.
- 79 There is little to add on this matter, as it is not the position of Milford Dart to advise DoC on its responsibilities. However it is worth noting that, because DoC acknowledges it is a conservation agency rather than the safety agency, DoC does not set safety standards. DoC instead relies on the concessionaire, as well as adherence to health and safety laws, to ensure the safety of concession activities. It is simply not credible that DoC has responsibility for the myriad of activities that occur on land in respect of which a concession is granted.
- 80 However, to satisfy DoC's requirements, Milford Dart has already committed to:
- 80.1 providing an independently audited safety plan;
 - 80.2 obtaining and complying with all the necessary authorisations or obligations required by law relating to safety; and
 - 80.3 adhering to the special conditions of the concession which have been proposed through this process.

¹⁸ For example, Otago Conservation Board, Southland Conservation Board

81 Milford Dart believes that, given the preliminary stage this project is at, there is no need, nor no benefit, in expanding further than this at this stage.

82 **Mr Michael Sleigh** will discuss this issue further in his statement.

EVIDENCE/WITNESSES TO BE PRESENTED

83 The following people will give further statements on behalf of Milford Dart:

83.1 **Mr Michael Sleigh**, director of Milford Dart, who will provide a statement on behalf of the company;

83.2 **Mr Andy Carr**, on traffic matters relating to the road; and

83.3 **Mr Ron Fleming**, who will provide a written statement replying to engineering issues raised in due course.

Dated: 20 April 2012

Jo Appleyard