

**BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of the Rezoning Hearing
Stream 12 – (Upper
Clutha mapping)

**OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR
QUEENSTOWN LAKES DISTRICT COUNCIL**

Hearing Stream 12 – Upper Clutha Mapping

12 May 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of Hearing Stream 12, the Upper Clutha mapping hearing, of the Proposed District Plan (**PDP**). This hearing is concerned with the submissions on planning map annotations such as landscape lines and zone boundaries in the Upper Clutha area, for land that has been notified in Stage 1.

1.2 For efficiency reasons, the Upper Clutha submissions have been split into the following four geographic sub-areas and are addressed in this way in the s42A reports / evidence of Mr Craig Barr for 1A, 2 and 3, and Ms Vicki Jones for 1B:

- (a) 1A Wanaka Urban and Lake Hāwea;
- (b) 1B Wanaka and Lake Hāwea Business;
- (c) 2 Wanaka Urban Fringe; and
- (d) 3 Rural.

1.3 These opening submissions address the following matters:

- (a) strategic overview;
- (b) submissions transferred from other hearings;
- (c) requests for Operative District Plan (**ODP**) zones;
- (d) Wanaka Urban Fringe legal issues;
- (e) Rural legal issues;

1.4 These opening submissions address key legal issues that have been raised in the course of submissions and evidence filed by submitters. They do not address the Council's position on each and every rezoning, and are not a comprehensive response to all evidence that has been filed. Given the number and breadth of rezoning submissions being heard through the course of this hearing, which totals 116, it is anticipated that additional legal issues will arise that will need to be addressed in the Council's reply. Because a rezoning has been addressed in these opening submissions, this does not

mean the Council has focused more or less on that particular rezoning through this process.

- 1.5** An exhaustive critique of every submitter's case has not been undertaken in these legal submissions. This is due to the immense amount of resource required to review the high number of submissions received, cover the submissions in the Council's evidence and also respond in rebuttal. Given experience in previous hearings, it is likely that other counsel will undertake such a critique of the Council's evidence in their own legal submissions, however, the Council does not have the capacity to respond in kind. In the Council's submission, the evidence before the Panel must be read in totality and with the context and strategic framework in which it has been prepared in mind, and we suggest the Panel needs to approach with caution, any cherry picking or selective criticism of Council's evidence.

2. STRATEGIC OVERVIEW

- 2.1** Council's approach is embedded within the objectives and policies of the Strategic Direction chapter, and the statutory framework under the Resource Management Act 1991 (**RMA**). Council's objective is to ensure urban development occurs in a logical manner that promotes a compact, well designed and integrated form, manages the cost of infrastructure, and protects the District's rural landscapes from sporadic and sprawling development.¹
- 2.2** The strategic and integrated management of urban growth in Wanaka involves the use of an Urban Growth Boundary (**UGB**).² This is not a new concept for Wanaka, and was introduced into the non-statutory Wanaka 2020 and Wanaka Structure Plan 2007 strategic planning documents. The intention is to enable and intensify development within those boundaries, co-ordinate and integrate development, and discourage urban development outside of them.³ The Council is seeking to move towards a greater level of certainty in its growth management approach, and the use of UGBs, along with a variety of

1 Objective 3.2.2.1.

2 Policy 3.2.2.1.1

3 Policy 3.2.5.3.1 and Objective 4.2.3.

zones including housing choice within them, assists the Council in achieving the RMA's overall purpose of sustainable management. On the other hand, the finite capacity of rural areas to absorb residential development must be considered so as to protect the qualities of the District's landscapes.⁴

2.3 This approach is also central to the objectives and policies of the Urban Development Chapter 4, this chapter also being located within the strategic section of the PDP. That chapter addresses key urban growth management issues and sets out the tools for managing the spatial location and layout of urban development. This chapter addresses the need for integrated development, provides that urban development be integrated with infrastructure and services, and is undertaken in a manner that protects the environment, rural amenity and outstanding natural landscapes and features.

2.4 In light of this, one of the elements of the Council's assessment of the rezoning submissions has been the impact on infrastructure networks and ensuring that there is a coordinated and integrated provision of infrastructure within these locations. Mr Glasner's evidence for the Council is that it is much more efficient to service new developments where capacity already exists. It is not in the Council's best interest for its water and wastewater networks to extend further into currently zoned rural land outside the urban limits, as this will result in increased operational, maintenance and renewal costs for QLDC over the long term.

2.5 Important themes in Chapter 4 are the avoidance of sporadic urban development that would adversely affect the natural environment, rural amenity or landscape values, the efficiency and functionality of infrastructure or compromise the viability of a nearby township,⁵ a compact and integrated urban form, maximising efficiency of infrastructure operation and provision,⁶ and specifically to Wanaka.⁷

4 Objective 3.2.5.4

5 Policy 4.2.1.6.

6 Objective 4.2.3.

7 Policies 4.2.8.1 and 4.2.8.2.

- (a) a distinction between urban and rural areas is maintained to protect the quality and character of the environment and visual amenity;
- (b) ad hoc development of rural land is avoided;
- (c) Outstanding Natural Landscapes (**ONLs**) and Outstanding Natural Features (**ONFs**) are protected from encroachment by urban development;
- (d) development supports increased density through greenfield and infill development, in appropriate locations, to avoid sprawling into surrounding rural areas; and
- (e) rural land outside of the UGB is not developed until further investigations indicate that more land is needed to meet demand.

2.6 In addition, Chapter 6 Landscapes balances Chapter 4 Urban Development in order to ensure that the qualities of our landscapes are protected. The Landscape chapter expands Strategic Objective 3.2.5.1, which seeks to protect the ONLs and ONFs from inappropriate subdivision, use and development. The Chapter provides a more detailed policy framework to recognise the significant conservation, economic and intrinsic value the landscape has to the District.

2.7 In order to provide certainty as to the importance of the landscapes to the District, they are categorised as ONLs or ONFs, which are matters of national importance. The rest of the Rural Zone, which is not classified as an ONL or ONF, is classified as Rural Landscape (**RLC**), which has varying types of landscape character and amenity values. Specific policy and assessment matters are provided to manage the potential effects of subdivision and development in these locations.

2.8 Rural Chapter 21 develops detailed policies that relate to the relevant Goals and Strategic Direction objectives outlined in Chapter 3 of the PDP. The policies seek to ensure that growth can be accommodated in a sustainable way that does not have significant impacts on the natural values that draw people to the area, and drive the local economy.

- 2.9** The Rural chapter also expands on Strategic Objective 3.2.5.1 and the Landscape chapter, by providing detailed landscape assessment matters for the three landscape classifications.
- 2.10** The Council's approach to the rezoning submissions is based firmly on the strategic approach to urban development as set out in the Strategic Direction chapter, and the PDP as a whole. The Strategic Direction chapter provides the overarching direction for the other chapters within the plan and sets out high-level, strategic objectives and policies for each of the seven goals listed.⁸ This 'hierarchy' within the plan means that the zones and their associated rules need to achieve the relevant zone's objectives and policies, which in turn need to achieve the higher order objectives and policies as set out in the Strategic Direction chapter.
- 2.11** To assist the Panel in making its recommendations, the Council's expert planners (Mr Craig Barr and Ms Vicki Jones) have undertaken a weighting exercise for each submission in a thorough and careful manner. This exercise is supported by the expert Council evidence in the nature of landscape, ecology, transport, urban design, infrastructure, dwelling capacity, and retail economics, where such expert evidence is relevant.

Dwelling Capacity

- 2.12** Memoranda have been filed for the Council in relation to the National Policy Statement on Urban Development Capacity (**NPSUDC**) on 3 March and 19 April 2017. Subsequently, Mr Osborne and Mr Barr have filed evidence in relation to dwelling capacity. The Council and Property Economics have focused on updating and refining the updated DCM for the notified PDP as it relates to residential dwelling capacity for the Upper Clutha area. Although the DCM has been completed for the Queenstown and Wakatipu Basins as well, the equivalent level of refinement, specifically relating to operative Rural Visitor Zones has not been completed at this point in time. Ms

⁸ See 3.1 Purpose that relevantly states: *This chapter sets out the over-arching strategic direction for the management of growth, land use and development...This direction is provided through a set of Strategic Goals, Objectives and Policies which provide the direction for the more detailed provisions related to zones and specific topics contained elsewhere in the District Plan.*

Osborne addresses the 'work in progress' in his evidence. Council's evidence is therefore that:

- (a) the projected dwelling demand for Upper Clutha to 2048 is expected to be approximately 5,000 dwellings;
- (b) the final capacity resulting from the model parameters for Upper Clutha is 6,566 dwellings; and
- (c) on the basis of the DCM output, the PDP Strategic Directions (Chapters 3-6) and the spatial application of recommended zonings and overlays in terms of the Stage 1 PDP zones and the Wanaka UGB, are appropriate and no alternative response are required to address the dwelling capacity as it relates to the Upper Clutha.

2.13 Ms Hampson's evidence on dwelling capacity has been received shortly before filing these legal submissions, and will be addressed during the course of the Council's case by its experts.

Statutory test for rezonings

2.14 The Council refers to and adopts the opening legal submissions presented at the Strategic Direction hearing, in terms of Council's functions and statutory obligations (section 3) and relevant legal considerations (section 4).⁹ This extract is provided at **Appendix 1**. Those submissions are not repeated here, but in summary, the Environment Court gave a comprehensive analysis of the mandatory requirements in *Long Bay-Okura Great Park Society v North Shore City Council*.¹⁰ Subsequent cases have updated the *Long Bay* summary following amendments to the RMA in 2005, the most recent and comprehensive of which was provided by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council*.¹¹

2.15 What this means is that for each rezoning or annotation change submission, the question before the Panel is what is the most appropriate zoning for an area of land? With regard to landscape classifications, the question is what, for example, is the most

⁹ Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B - Strategic Chapters in Part B of the Proposed District Plan, dated 4 March 2016, at parts 4 and 5.

¹⁰ *Long Bay-Okura Great Park Society v North Shore City Council* Auckland A078/08, 16 July 2008 at [34].

¹¹ *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

appropriate location of the ONL boundary? In both instances however, the outcome must achieve the relevant objectives of the PDP, including the strategic direction objectives given in the PDP that provide the over-arching strategic direction.

- 2.16** The Council, and subsequently the Panel, must have regard to the actual or potential effects on the environment of any activities that would apply through the application of a rule within a rezoning request.¹² Submitters need to provide a level of detail that corresponds to the scale and significance of the environmental effects that are anticipated from the implementation of the new zone,¹³ and in the Council's submission, need to provide sufficient evidence to assist the Panel in considering whether actual or potential adverse effects are satisfactory, before it makes a recommendation that the zone is more appropriate than the notified zone.
- 2.17** The Council generally does not support rezonings where a reason advanced as to why the rezoning is more appropriate, is reliance on the PDP's matters of discretion or control being sufficient to assess adverse effects at the consent application stage. It is submitted that such an approach does not correspond with the requirements of s 32(1)(c) and may otherwise undermine the *Colonial Vineyards* approach. The issues of site access and traffic safety appear to be examples where submitters are looking to rely on matters of control or discretion to get their requested rezonings "across the line", without providing any evidence at this stage as to the significance of actual or potential effects. Transport issues should be treated no differently to other effects on the environment such as landscape effects and ecology.
- 2.18** Following *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd*,¹⁴ there is a presumption that where higher order planning documents are established (in the case of *King Salmon*, the New Zealand Coastal Policy Statement 2010 (**NZCPS**)), they can in certain circumstances be assumed to be in accordance with Part 2. Since district plans are at the end of the chain of

¹² RMA, section 76(3).

¹³ RMA, section 32(1)(c).

¹⁴ [2014] NZSC 38 at [85].

statutory planning documents, it could be argued that the findings of *King Salmon* imply that the focus of a district plan review should be on giving effect to the provisions of documents further up in the hierarchy (where those documents are established and settled), rather than on Part 2.

2.19 In the Queenstown context, and more specifically the Upper Clutha, the relevant higher order regional planning document is under review (being the Otago Regional Policy Statement (**RPS**)). Relevant objectives are identified in Mr Barr's strategic evidence, and none of these are highly specific nor directive (in the *King Salmon* sense) in relation to the issues at hand. The applicability of *King Salmon* depends on the particular wording of the higher order national planning documents, and the RPS is generally not worded in the same manner as the NZCPS. Consequently, the *King Salmon* principle (namely, that resorting to Part 2 is not appropriate in giving effect to a higher order document, unless one of the three exceptions¹⁵ apply) is not binding on the Panel. It is both permissible and appropriate that the Panel has regard to Part 2 in its evaluation of relief.

2.20 The proposed Regional Policy Statement remains under appeal, and therefore is not an *established* higher order planning document. This also distinguishes the current situation from the *King Salmon* principle.

2.21 Therefore it is submitted that it is appropriate to have regard to Part 2, in making recommendations on rezonings and planning map annotations within the scope of this hearing.

Application of Definitions Chapter

2.22 The Council also notes that for any new specific zones that are being sought by submitters, or new site specific rules, the PDP definitions in Chapter 2 will apply whenever a defined term is used in the PDP, unless the context otherwise requires.

¹⁵ Where there is illegality, incomplete coverage of an issue, or uncertainty of meaning in a higher order planning document, Part 2 will still be relevant. See *King Salmon* at [88].

3. SUBMISSIONS TRANSFERRED FROM OTHER HEARINGS

Transferred from Business Hearing

3.1 In Hearing Stream 8 Business Zones, the Panel directed that the following submissions and further submissions be transferred to this hearing:

- (a) Pinfolds and Satomi (622);
- (b) Susan Meyer (274);
- (c) Aspiring Lifestyle Retirement Village (FS1101); and
- (d) Wanaka Lakes Health Centre (FS1212).

3.2 This direction was in response to the Council's opening legal submissions in that hearing, where it was submitted that these submissions raised matters that were intrinsically related to the size of the Local Shopping Centre Zone (**LSCZ**) at Cardrona Valley Road and they needed to be considered together.

3.3 The submissions listed above are therefore addressed through the Council's evidence and are to be determined by the Panel in this hearing.

Transferred from Rural Hearing

3.4 In Hearing Stream 2, Rural, the Panel directed that submissions seeking to alter the boundaries of Significant Natural Areas (**SNAs**) as shown on the Planning Maps should be heard as part of the hearings on map changes.¹⁶ The Council notes this for the assistance of the Panel, and that evidence on any complete removal of an SNA was to be presented in the Rural Hearing Stream.

4. REQUESTS FOR OPERATIVE DISTRICT PLAN ZONES

4.1 A number of submitters have sought that their land, which was notified in Stage 1 of the PDP process, be rezoned to an ODP zone, for example to an Industrial zone which is being reviewed through a

16 Fifth Procedural Minute - Submissions concerning Significant Natural Areas dated 19 April 2016, at paragraph 1.

later stage of the review. As the land in question has been notified with a proposed zone on the Stage 1 PDP planning maps, these submissions are 'on' a Stage 1 area of land, and must be considered by the Panel in Stage 1.

- 4.2** However, neither these ODP zones, nor any framework of a similar nature, have been notified in Stage 1 and therefore they do not exist in the PDP at this time. The Council has addressed this in its evidence and expressed real concerns that if the Panel were to accept such a rezoning submission in full, and simply copy the ODP zone over into its recommendations, this could result in a bespoke zone for the particular area of land, and could also mean that the zone type would come into the PDP without a wider, more comprehensive review and s 32 consideration of the specific objectives, policies, rules and standards that are most appropriate for that zone type. For example, a District-wide Industrial land needs assessment as to capacity across the District is currently under way, and there needs to be a comprehensive analysis of how to deal with Visitor Accommodation across the District. The Council respectfully submits it would be poor planning practice, to bring bespoke ODP zones into the PDP, prior to the relevant zone and provisions having undergone a full review through a later stage of the PDP process.
- 4.3** This is not to say that such rezoning requests to the general zone type being pursued might not be appropriate in s32 terms. The Council does not wish to prevent a rezoning, simply because of the difficulties of a staged review. Consequently, if the Panel were to accept these types of submissions then the Council's position is that they should be accepted in part and would need to be revisited in a subsequent stage of the review process via a variation.
- 4.4** Neither the Council nor the Panel have jurisdiction to transfer a submission over to a later *stage* of the plan review. Consequently, its position is that, if the Panel accepts submissions to rezone land to zones currently contained in the ODP, and still to be notified through this review process, the land should be re-notified in a later stage by way of a variation.

4.5 In the sections to come, these legal submissions address a number of submissions where legal issues of scope have arisen. It is anticipated that further matters relating to scope may arise during the course of the hearing, and Council reserves its right to address these through its legal right of reply, if necessary.

4.6 By way of example, the relief sought by Duncan White for Burdon (282) and Glen Dene (384) for the subject land to retain the ODP Rural Visitor zoning, and with new rules inserted into the ODP to provide for the Lake Hāwea Holiday Park, is an example that falls into this category and in the Council's view would need to be addressed via the variation process discussed above.

5. WANAKA URBAN FRINGE

Michael Beresford (149)

5.1 Mr Beresford's submission relates to a site in Wanaka known as "The Plantation", covering approximately 50 hectares north of Aubrey Road and Kirimoko Crescent.

5.2 The Plantation is held by the Crown on trust for the descendants of the 57 original intended owners, who were to have had land transferred to them under the South Island Landless Natives Act 1906 (**SILNA**). Mr Beresford is one of the beneficial owners and is part of a Working Group established by the Māori Land Court to create a more up-to-date beneficiary list and to investigate potential options for use of the site. Mr Beresford explains in his evidence that title is anticipated to pass to the beneficiaries by the end of 2017 or early 2018.

5.3 The site was originally part of a larger title that was transferred by the Crown in the late 1990s to Ngāi Tahu Property Group Limited and then subdivided in 1999, leaving The Plantation without legal road access. It is currently planted in forestry and contains numerous mountain bike tracks used by the public, accessed from neighbouring public land.

- 5.4** A key thread running through the submitter's evidence and underlying the requested rezoning is that the Crown's purpose in transferring The Plantation to the beneficial owners is to provide economic redress for past wrongs. The submitter therefore seeks a zoning that will provide economic benefits.
- 5.5** The primary submission sought rezoning of the entire site from Rural Zone to Low Density Residential. This relief was amended through the submitter's evidence, and is now seeking rezoning of approximately 20 ha of the south east portion of the site, to a mix of Large Lot Residential B (2000m² lots) and Low Density Residential. The Rural Zone is requested to be retained over the remainder of the site, although the submitter seeks amendments to the ONL line.
- 5.6** The Council is sympathetic to the submitter and the beneficial owners, and cognisant of the complex history described in the submitter's evidence. However, the Council's position is that economic factors should not trump all other considerations in determining the most appropriate zoning for the site.
- 5.7** The elements of Part 2 of the RMA relating to Māori interests are "*strong directions, to be borne in mind at every stage of the planning process*", particularly s 6(e), 7(a) and 8.¹⁷
- 5.8** However, consideration of tangata whenua matters under ss 6, 7 and 8 do not trump other values that are relevant to achieving the purpose of the RMA.¹⁸
- 5.9** In these particular circumstances s 6(e)¹⁹ is not relevant. Mr Chrystal's evidence explains that the block of land originally intended to be transferred under SILNA was located at the Neck (between Lakes Wanaka and Hawea). This land was later leased to a third party and so The Plantation was substituted for it under the Ngāi Tahu Settlement Act 1998. Mr Chrystal states at his paragraph 81

¹⁷ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC).

¹⁸ *Water Care Services Ltd v Minihinnick* [1998] 1 NZLR 294 (CA); *Whangamata Marina Society Inc v Attorney-General* [2007] 1 NZLR 252 (HC); *Waikanae Christian Holiday Park v Kapiti Coast District Council* HC Wellington CIV-2003-485-1764, 27 October 2004. See also *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2017] NZEnvC 53 at [308].

¹⁹ Under s 6(e), the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga is a matter of national importance.

that the site is not considered to have any cultural values to the beneficial owners, nor is it considered to be ancestral land.

- 5.10** It is also submitted, based on the same facts and logic, that s 7(a)²⁰ cannot be relevant in this instance.
- 5.11** The Plantation thus presents a somewhat unusual set of circumstances in that neither of the more specific provisions in ss 6(e) or 7(a) are relevant when taking Treaty principles into account under s 8.
- 5.12** While s 8 requires local authorities to take Treaty principles into account, it does not impose on them the obligations of the Crown under the Treaty.²¹ The Crown's obligations to redress past breaches of Treaty principles stand apart from the RMA process.²²
- 5.13** Under the RMA, the s 8 duty is to weigh the principles of the Treaty with all other matters being considered, and in coming to a decision, effect a balance. All relevant matters must be identified and weighed.²³
- 5.14** Mr Barr has undertaken that weighing exercise in a thorough and careful manner, supported by expert Council evidence in relation to landscape, traffic and infrastructure, and relying also on his own evidence on housing capacity.²⁴
- 5.15** In considering relevant aspects of the planning framework, Mr Barr notes that it does not anticipate a situation where s 8 is relevant but ss 6(e) and 7(a) are not.²⁵ In Mr Barr's view, the PDP Tangata Whenua Chapter 5 and the Operative Otago Regional Policy Statement are framed in terms of giving effect to s 6(e).²⁶ Similarly,

20 Under s 7(a), kaitiakitanga is one of a list of "Other matters" to which particular regard shall be had.

21 *Hanton v Auckland City Council* [1994] NZRMA 289.

22 *Ngati Rangi Trust v Manawatu-Wanganui Regional Council* EnvC Auckland, A067/04, 18 May 2004.

23 *Minister of Conservation v Federated Farmers of New Zealand (Southland Province) Inc* EnvC Auckland A039/01, 19 April 2001 at [107]-[108]; *Freda Pene Reweti Whanau Trust v Auckland Regional Council* HC Auckland CIV-2005-404-356, 9 December 2005.

24 Evidence of Mr Craig Barr on Housing Capacity (Upper Clutha Area) dated 1 May 2017.

25 Rebuttal evidence of Mr Craig Barr dated 5 May 2017 at paragraph 11.8.

26 At paragraphs 11.9-11.13 and 11.16-11.23.

relevant parts of the Strategic Direction Chapter 3 are directed at s 6(e) and at consultation.²⁷

- 5.16** Mr Barr acknowledges that relevant parts of the Proposed Regional Policy Statement for Otago are more directive in terms of requiring district plans to have regard to settlement land. In taking the decisions version into account, he has also noted that document is currently under appeal.²⁸
- 5.17** Mr Barr has considered the benefits that would arise from having regard to Treaty principles. His view is that economic benefit to the beneficial owners should not outweigh other relevant Part 2 considerations.²⁹ The Council submits that Mr Barr's approach is correct, in that he is entitled to give weight to other Part 2 matters including the protection of ONL's from inappropriate subdivision, use and development (s 6(b)), roading, and infrastructure issues.
- 5.18** Mr Barr has recommended that the most appropriate zone for the site is Rural, with the exception of an amendment to the ONL boundary that has been agreed by the landscape experts for the Council and the submitter.³⁰
- 5.19** The Council's position is that Mr Barr's recommendation was reached by the weighing and balancing process required under the RMA, including in particular considering the provisions of the operative and proposed regional policy statements, as well as the strategic chapters of the proposed plan. It is submitted that his recommendation represents the appropriate balance between Part 2 elements in this complex and unusual set of circumstances.
- 5.20** If however the Panel is minded to accept the rezoning, Mr Barr recommends limiting the urban zoning and extension of the UGB to a reduced area of land, as recommended by the Council's landscape expert. The interaction with the development restrictions placed on adjacent rezoned land would also require careful consideration by the

27 At paragraphs 11.14-11.15.

28 At paragraphs 11.24-11.30.

29 At paragraph 11.33.

30 At paragraphs 11.79-11.80.

Panel, in order to ensure that there was consistent treatment of similar factors and resources.

Allenby Farms Limited (502)

5.21 Allenby Farms Ltd (**Allenby**) seeks to rezone land on Mt Iron from Rural Zone within an ONF to Rural Lifestyle Zone, and amendments to SNA E 18C and the Building Restriction Area adjoining State Highway 84.

5.22 **Appendix 2** sets out the legal principles on scope.

5.23 The Council understands that the Chair has already requested that Allenby address, as part of its legal submissions, the jurisdiction of the Panel to entertain the relief now sought given that, among other things, Allenby now appears to be seeking amendments to different parts of the PDP from those subject of its original submission and to be seeking relief in respect of different areas of land from those the subject of its submission.

5.24 The Council reserves its position on the issue of scope and the Panel's jurisdiction until it has heard Allenby's legal submissions at the hearing and will respond in its right of reply.

Ranch Royale (412)

5.25 The relief sought by Ranch Royale has been amended from that sought in the original submission. This is assumed to be at least in part because Ranch Royale has assumed the rights of the original submitter (Sir Clifford and Marie Lady Skeggs) after purchasing the submission site.

5.26 The original submission sought that the UGB be amended to include the subject land and for that land to be rezoned to Three Parks Special Zone and within a Tourism and Community Facilities subzone (**TP Tourism**). Through Mr Duncan White's evidence, the submitter now seeks the ODP Three Parks Special Zone Low Density

Residential sub-zone (**TP LDR**) instead, and continues to seek to amend the UGB to include the subject land.

5.27 The issue here is whether the amended relief, to now seek TP LDR, is within scope of the original submission that sought TP Tourism. That is, to be in scope and available to the Panel, the TP LDR planning framework and the activities it provides for, must sit somewhere between the notified Rural zone, and the TP LDR zone that was originally sought.

5.28 The purposes of the two subzones are:

(a) TP LDR subzone, to provide a range of housing densities, including clusters of higher density housing located adjacent to open spaces and within walking distance of other amenities in order to provide for a range of residents and levels of affordability.³¹

(b) TP Tourism subzone, to provide for tourist facilities, conference centres, community facilities, commercial recreation activities, and visitor accommodation including ancillary uses).³²

5.29 The TP LDR maximum building coverage standard in this zone is 40%.³³ In contrast, in the TP Tourism subzone maximum building coverage standard in this zone is 25%.³⁴ Both subzones have the same residential density standard, which is no more than 1 residential unit per site (unless approved by an Outline Development Plan).³⁵

5.30 It is apparent from these standards that the TP Tourism subzone is the same, or more intensive, than the TP LDR subzone, which is now being pursued by the submitter. It therefore follows that, as the TP Tourism subzone provides for more intensive zoning than the TP LDR subzone, the latter is within scope of the original submission.

31 ODP 12.26.4.1 i.

32 ODP 12.26.5.1.

33 ODP 12.26.4.3 Ref 13.

34 ODP 12.26.5.3 Ref 9.

35 ODP 12.26.4.3 Ref 18 and 12.26.5.3 Ref 12.

Upper Clutha Environmental Society (UCES) (145)

- 5.31** The UCES filed a memorandum in relation to the Resource Legislation Amendment Bill (**RLAB**) – Changes to Public Notification Provisions on 27 April 2017. In the memorandum, the UCES express their concern about the amendments to s95A of the RMA. Specifically, the UCES is concerned with the new s 95(5)(b)(ii), which provides that if the application is for the subdivision of land with a discretionary activity status, then it cannot be publicly notified unless there are special circumstances. In response to this amendment, the UCES seeks (again) that all rural subdivision be non-complying in order to ensure that s 95(5)(b)(ii) does not apply and an assessment is undertaken about whether the activity will have, or is likely to have, adverse effects on the environment that are more than minor. If the answer is yes, then public notification would be required.
- 5.32** The effect of Clause 13, Schedule 2 of the Resource Legislation Amendment Act 2017 (**RLA Act**) is that Stage 1 of the PDP, as it was notified prior to the commencement of the RLA Act, must be determined as if the amendments made by the RLA Act had not been enacted. The consequence of this clause in the RLA Act, is that the amendments made to the RMA by the RLA Act, cannot be used to justify any recommendations on Stage 1 of the PDP
- 5.33** However, that is not to say that the implications of the RLA Act are not somewhat more complicated, in that the amendments still apply to the Council generally. Therefore the RLA Amendments (such as the changes to notification) will apply to the PDP when it takes legal effect, including the clause referred to by the UCES relating to subdivision.
- 5.34** Although it is not relevant to the Panel's recommendations, the Council notes that the summary of the effect of the new notification provisions in UCES's memorandum is not entirely correct. The case law on what constitutes special circumstances is submitted to be relatively settled and provides guidance to decision making. In addition, UCES appears to have missed the step included in the RLA

Act, where the Council needs to consider limited notification and section 95E of the RMA.

6. RURAL

Glendhu Bay Trustees Limited (581)

- 6.1 The Glendhu Bay Trustees Limited submission seeks a new Glendhu Station Zone (**GSZ**) for approximately 3,000 hectares at Glendhu Bay. The site is zoned Rural in the PDP and is entirely within an ONL.
- 6.2 Mr Ferguson's evidence describes the consenting history of the site in detail. He explains that the consent holder is in the early stages of implementing the land use consent and that the sequencing or staging of the consent '*has proven unrealistic*', requiring a range of variations and new consents. Then at his paragraph 4.12, Mr Ferguson indicates that the resource consent process has high administration and transactional costs, and that the land can be managed '*in a more practical and workable way*' than by adherence to consent conditions. His evidence goes on to give details of his proposed GSZ.
- 6.3 As mentioned earlier, the Council is required, in making a district plan rule under section 76(3) of the RMA, to have regard to the actual or potential effect on the *environment* of activities including, in particular, any adverse effect. The Council accepts that the effects associated with the consent form part of the existing environment. However, the Council's position is that the effects arising from the other activities and areas sought as part of the GSZ, have not been sufficiently quantified in the submitter's evidence. There are two elements at issue here – the activities proposed go well beyond that consented, as does the geographic area of the proposed GSZ. For example, Ms Pfluger's evidence does not address the actual or potential effects of the eight additional house sites that were previously declined by the Environment Court when considering the consent, and Mr Carr's evidence does not quantify the traffic generation and effects of the various commercial activities sought in conjunction with those already

forming the existing environment in the Lake Shore Activity Area and Farm Homestead areas.

- 6.4** The Council also has concerns around whether the existing, and complex, consent conditions have been fully reflected in the proposed GSZ, and the extent to which these can be transposed as rules. The consent conditions were designed to ensure that effects on the environment were addressed and a range of open space and walking trails were provided as part of the consented activity. The Council also holds concerns as to the complexity of the planning provisions that result from attempting to transfer these complex and detailed consent conditions, into a planning framework. The Council's comments on the proposed GSZ provisions, attached as Appendix 4 to Mr Barr's rebuttal evidence, clearly show that the proposed provisions have some gaps in this regard.

7. WITNESSES

- 7.1** The Council will be calling the following evidence in support of its position on Upper Clutha rezonings:

- (a) Helen Mellsop (Landscape);
- (b) Marion Read (Landscape – Makarora Valley, Parkins and Glendhu Bay);
- (c) Glenn Davis (Ecology);
- (d) Garth Falconer (Urban Design);
- (e) Wendy Banks (Transport);
- (f) Timothy Heath (Retail economics);
- (g) Phil Osborne (Dwelling Capacity);
- (h) Vicki Jones (Planning – Urban Business); and
- (i) Craig Barr (Planning).

DATED this 12th day of May 2017



S J Scott / C J McCallum
Counsel for the Queenstown Lakes
District Council

APPENDIX 1
EXTRACT FROM STRATEGIC DIRECTIONS OPENING LEGAL
SUBMISSIONS DATED 4 MARCH 2016

3. COUNCIL FUNCTIONS AND STATUTORY OBLIGATIONS

3.1 Under section 31 of the RMA the broad functions of the Council are the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the Queenstown Lakes District.

3.2 In addition to its obligations under the RMA, the Council also has broader powers and obligations under the Local Government Act 2002 (**LGA**) and the Land Transport Management Act 2003 (**LTMA**).

4. RELEVANT LEGAL CONSIDERATIONS

4.1 The Panel's power to make a recommendation to Council sits within a framework established under the RMA and with decisions of such significance to be made, it is helpful to outline the key parts of the RMA that lay the foundation for those recommendations.

4.2 The RMA requires that there shall at all times be one district plan for each district prepared by a territorial authority in the manner set out in Schedule 1 of the RMA.³⁶ The purpose of the preparation, implementation and administration of a district plan is to assist a territorial authority to carry out its functions in order to achieve the purpose of the RMA.³⁷

4.3 The purpose of the RMA, and therefore of this exercise, is under section 5 of the RMA, to promote the sustainable management³⁸ of natural and physical resources. It is of fundamental importance to the Panel in that it directs the goal of delivering a district plan which achieves the sustainable management of the District's natural and physical characteristics. Applying section 5 of the RMA involves an

³⁶ Section 73, RMA.

³⁷ Section 72, RMA.

³⁸ As that phrase is defined in section 5(2) of the RMA.

overall broad judgment of whether a proposal will promote sustainable management. Exercising this judgment allows for the balancing of conflicting considerations in terms of their overall relative significance or proportion in the final outcome. The appropriate outcome is ultimately an issue of weight and emphasis.

- 4.4** In light of the challenges that this District faces in terms of balancing economic and population growth, and consequential housing demand, with the use and protection of the natural environment that in turns sustains the District, it is submitted that the management function in section 5 of the RMA is of critical importance and should be given particular weight and emphasis.
- 4.5** Under section 6, identified matters of national importance³⁹ must be recognised and provided and, under section 7, particular regard is to be had to the "other matters" listed there, which include kaitiakitanga, efficiency, amenity values and ecosystems. Under section 8, the principles of the Treaty of Waitangi are to be taken into account.
- 4.6** Section 31 provides that a function of territorial authorities is, through the establishment of objectives, policies and methods, to achieve integrated management of the effects of the use, development or protection of land and natural resources.
- 4.7** Under section 32, an evaluation report on a proposed plan must examine whether proposed objectives are the most appropriate way to achieve the purpose of the RMA, and whether the provisions are the most appropriate way of achieving the objectives. To do that, the Council is to identify reasonably practicable options and is to assess the efficiency and effectiveness of the provisions through identifying the benefits and costs of the environmental, economic, social and cultural effects, including opportunities for economic growth and employment.
- 4.8** When preparing or changing a district plan the Council, in terms of section 74, *shall have regard* to the instruments listed there, which

³⁹ Relating to the protection of outstanding natural features and landscapes, significant indigenous vegetation and habitats, the maintenance and the enhancement of public access to lakes and rivers, the relationship of Māori and the culture and traditions with their ancestral lands, waters, sites, waahi tapu and other taonga and the protection of historic heritage and customary rights.

include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts. The Council *must take into account* any relevant planning document recognised by an iwi authority.

- 4.9** Under section 75 it *must give effect to* any national policy statement, any New Zealand coastal policy statement and any regional policy statement, and *must give effect to* a water conservation order or a regional plan (for any matter specified in subsection 30(1)). Finally, under section 75(1), district plan policies must *implement* objectives, while any rules must *implement* the policies. Section 76 requires rules to achieve the objectives and policies of a plan.
- 4.10** The Environment Court gave a comprehensive summary of the mandatory requirements in district plans in *Long Bay-Okura Great Park Society v North Shore City Council*.⁴⁰ Subsequent cases have updated the *Long Bay* summary following amendments to the RMA in 2005, the most recent and comprehensive of which was provided by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council*,⁴¹ the content of which is set out in **Schedule 1** to these submissions.

40 *Long Bay-Okura Great Park Society v North Shore City Council* EnvC Auckland A078/08, 16 July 2008, at [34]. This case related to the district plan provisions controlling urban development behind Long Bay and Grannie's Bay within the North Shore City.

41 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

APPENDIX 2
LEGAL PRINCIPLES ON SCOPE

5. The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:
 - 5.1 a submission must first, be *on* the proposed plan;⁴² and
 - 5.2 a decision maker is limited to making changes within the scope of *the submissions made on the proposed plan*.⁴³

6. The two limb approach endorsed in the case of *Palmerston North City Council v Motor Machinists Ltd*,⁴⁴ subject to some limitations, is relevant to the Panel's consideration of whether a submission is *on* the plan change.⁴⁵ The two limbs to be considered are:
 - 6.1 whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and
 - 6.2 whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

7. The principles that pertain to whether certain relief is within the scope of a submitter's submission can be summarised as follows:
 - 7.1 the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;⁴⁶
 - 7.2 another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought in a

42 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7.

43 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

44 [2014] NZRMA 519.

45 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at paragraph 7.3-7.12.

46 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.

submission; the scope to change a plan is not limited by the words of the submission;⁴⁷

7.3 ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter;⁴⁸

7.4 scope is an issue to be considered by the Panel both individually and collectively. There is no doubt that the Panel is able to rely on "collective scope". As to whether submitters are also able to avail themselves of the concept is less clear. However, to the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief. there is no legal constraint on them producing evidence that goes beyond the relief they have addressed in their submissions or further submissions. The Panel is entitled to receive that evidence and give it weight at its discretion, provided it is within the bounds provided by "collective scope";⁴⁹ and

7.5 that submitter could not gain standing to appeal a decision through collective scope, in relation to a matter that goes beyond relief sought in either their submission or a further submission.

47 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.

48 *Ibid*, at 574.

49 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at Part 2.