

# QUEENSTOWN LAKES DISTRICT COUNCIL

Hearing of Submissions on Stage 3 Proposed District Plan Provisions

Report and Recommendations of Independent Commissioners

Report: 20.7A

Walter Peak Zoning

Commissioners

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## 1. PRELIMINARY

### 1.1 Subject Matter of this Report

1. This Report deals with the zoning of a 155 hectare site at Walter Peak, together with roading within the site, an adjacent recreation reserve and lakeshore margins. These matters were the subject of a submission by Wayfare Group Limited (“Wayfare”), the owner of the Walter Peak site, and a further submission by AirBnB that were heard separately from the balance of Stage 3 matters.

### 1.2 Relevant Background

2. As above, the focus of this Report is on the submission of Wayfare seeking rezoning of its site, and adjacent public land. While, as above, AirBnB lodged a further submission in support of an aspect of Wayfare’s submission, it did not seek to be heard in respect of that further submission.
3. Report 20.1<sup>1</sup> records the circumstances leading to Wayfare’s submission being heard separately from the balance of Stage 3 matters. When Report 20.1 was written, it was envisaged that Wayfare’s submission would be heard in the week of 19 April 2021. That hearing date had to be vacated, for the reasons set out in the Chair’s Minute #45. A new hearing date of 22 June 2021 was fixed in that Minute, along with a revised timeline for Wayfare’s evidence in chief, Council’s rebuttal evidence and the legal submissions for both Council and Wayfare.
4. Prior to the 22 June hearing, the Chair issued another Minute (#46) recording his involvement (as Counsel for the then landowner) in a proposed resort development of the Walter Peak site in 1986, and requesting that the planning witnesses for Council and Wayfare familiarise themselves with the legislative framework within which that proposal was considered and the issues that were addressed in the course of the application. The Chair also requested that Counsel for Wayfare supply an updated version of the Zone provisions Wayfare was seeking.
5. The day before the hearing, the Hearing Panel undertook a site visit of Walter Peak, accompanied by Mr Richard Kemp, (consulting planner) who provided logistical assistance. A member of Wayfare’s Walter Peak staff drove the Panel to the western edge of the site, but the Panel walked around the Beach Bay (eastern) part of the site, including around the foreshore on the lakeward side of the adjacent recreation reserve.
6. The hearing proceeded on 22 June with the Hearing Panel sitting late to enable completion of Wayfare’s case that day.
7. At the opening of hearing, the Chair invited comment on his own potential conflict as summarised above. Neither party disagreed with the view set out in Minute 46 that the Chair’s involvement in development of the site was sufficiently distant in time that it did not represent a disqualifying conflict.
8. Following resolution of that preliminary issue, the Hearing Panel heard:

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<sup>1</sup> Paragraph 20

**For the Council:**

- Mike Wakefield (Counsel);
- Robert Bond;
- Helen Mellsop;
- Elias Matthee.

**For Wayfare:**

- Maree Baker-Galloway (Counsel);
- Paul Norris;
- Fiona Black;
- David Bridgman;
- Ailsa Cain;
- Stephen Skelton;
- Ben Farrell and Robert Schofield (giving planning evidence together).

9. Wayfare also pre-circulated expert evidence from Grant Meldrum, addressing hazard issues. Given the consensus arrived at in relation to hazard issues as between Messrs Bond and Meldrum, the Hearing Panel did not need to hear from Mr Meldrum.
10. Following the hearing, the Chair issued two further procedural Minutes (#47 and #48). The primary focus of those minutes was the Proposed Otago Regional Policy Statement that was publicly notified shortly after the hearing.
11. The Hearing Panel received further input from the parties in the form of:
  - Further legal submissions for Wayfare dated 25 June;
  - Reply legal submissions for Council dated 5 July accompanied by reply evidence of Ms Mellsop and Mr Matthee;
  - A Memorandum of Counsel for Wayfare dated 9 July.
12. Wayfare's further legal submissions responded to leave reserved by the Chair in order that the submitter might address a specific legal question that we will discuss further below. In the event, those legal submissions extended significantly more broadly than the leave reserved. The Chair invited advice from the Council as to whether it objected to that fact in Minute #47. The Council's reply made no reference to the issue and therefore it is presumed that, in this case at least, silence means acceptance. As noted in Minute #47, the Hearing Panel found the further legal submissions from Wayfare helpful and given the absence of any objection from Council, that procedural non-compliance is waived.
13. Although Wayfare's submission was split off for hearing separately from the balance of Stage 3, the Reports already issued by the Hearing Panel remain relevant to Wayfare's submission. We rely in particular on Reports 20.1, setting out the general framework for consideration of Stage 3 submissions, including the legal framework within which those submissions were required to be addressed, and Report 20.7, addressing submissions on Chapter 46 of the Proposed District Plan (Rural Visitor Zone or "RVZ"). We also refer the reader to the list of abbreviations and definitions in Report 20.1.
14. The Hearing Panel's recommendations (and the Council's subsequent decisions dated 18 March 2021) in relation to Chapter 46 are not open to review or amendment in this process.

That said, our recommendations, and Council's subsequent decisions specifically left open the provisions of Chapter 46 that are specific to the Walter Peak site and the associated water transport overlay as discussed in the following sections. Whether those site-specific provisions remain in Chapter 46, are amended, or are removed and substituted by a new Tourism Zone Chapter specific to the Walter Peak site and its environs is the subject of this Report.

15. First, however we should note that there were two potentially material changes to the statutory framework that we have to apply from the position set out in Report 20.1. The first arises as a result of a further resolution of Otago Regional Council in March 2021, resulting in the partially operative Otago Regional Policy Statement 2019 being expanded in scope, among other things to include provisions relating to management of ONLs, and the preceding Regional Policy Statement dated 1998 being revoked. The 2019 document remains only partially operative because provisions relating to the Port of Otago remain to be resolved in the Superior Courts. Those matters are not relevant to the issues before us and thus, to all intents and purposes, the partially operative Regional Policy Statement is a key document that we must give effect to<sup>2</sup>.
16. To the extent that the partially operative Regional Policy Statement (March 2021 version) contained additional provisions of relevance to us, those provisions were already before the Hearing Panel when Reports 20.1 and 20.7 were written, in the form of Environment Court consent orders. They were therefore effectively part of the operative Regional Policy Statement at that point and were treated as such. Thus, formalisation of the position by way of Otago Regional Council resolution is of limited significance to us. The provisions themselves, however, are a different matter, particularly given Mr Farrell's expert planning evidence for Wayfare. He suggested that the strategic provisions of the Proposed District Plan related to management of effects of activities within outstanding natural landscapes foreshadowed by the Environment Court in the decisions discussed in Report 20.1 needed to be read in the context of the Regional Policy Statement provisions, or alternatively might be seen to be inconsistent with them. We will return to discuss that issue in greater detail below.
17. The second potentially material change was the notification by Otago Regional Council of its Proposed Regional Policy Statement on 26 June 2021 (i.e. four days after our hearing). Pursuant to Section 74(2)(i) of the RMA, we are required to have regard to any Proposed Regional Policy Statement in formulating our recommendations to Council. In Minute #47, the Chair requested that counsel for the Council identify in the Council's Reply any provisions in the Proposed Regional Policy Statement of relevance to the matters before us that were materially different from the provisions of the partially operative Regional Policy Statement. The evidence of Mr Matthee in reply addressed our request. Mr Matthee's analysis identifies differences in wording related to management of ONLs as between the partially operative Regional Policy Statement and the Proposed Regional Policy Statement, drawing our attention to some strengthening of direction in the latter, but concluding that overall, the approach is very similar.
18. Mr Matthee, however, identified a more material difference as between the two superior documents as they relate to management of natural hazards. He was of the view that the Proposed Regional Policy Statement is more directive and specific than its predecessor. This

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<sup>2</sup> Pursuant to Section 75(3) of the RMA

prompted him in turn to recommend an additional policy to manage natural hazards on the Walter Peak site. We will return to that suggestion below.

19. Importantly, Mr Wakefield submitted to us on behalf of the Council that little weight should be given to the Proposed Regional Policy Statement given the very early stage it has reached in the First Schedule process.
20. In Minute #48, the Chair invited advice from Wayfare as to whether it concurred with the legal submissions and evidence of Council in relation to the Proposed Regional Policy Statement.
21. In Wayfare's response, provided by way of a Memorandum of Counsel dated 9 July, Wayfare:
  - Agreed with Mr Matthee's conclusion as set out above, while reiterating its position that Chapters 3 and 6 of the Proposed District Plan are not yet able to be regarded as 'operative' and therefore that reference must be made back to the provisions of the Proposed Regional Policy Statement and partially operative Regional Policy Statement;
  - Agreed that the Proposed Regional Policy Statement provisions related to natural hazards are more prescriptive than its predecessor, but considered that the relevant change is to provide a specific methodology for identifying the difference between different levels of natural hazard risk and that overall, it is not less enabling in terms of development opportunities involving hazard management. Wayfare's view was further that the new policy Mr Matthee had proposed was superfluous but, in the event that the Panel found that there was value in a new policy, Wayfare suggested amendments to more clearly reference the nature of the natural hazard risk at Walter Peak and to delete reference to exceedance of a tolerable level of risk;
  - Wayfare agreed with counsel for the Council that very little weight should be afforded to the Proposed Regional Policy Statement, essentially for the same reasons as Mr Wakefield had advanced.
22. We agree with the parties that the Proposed Regional Policy Statement can be given little weight generally, and that any differences in its landscape provisions compared to the partly operative Regional Policy Statement are sufficiently minor that we can focus on the latter. The difference of view as regards hazard issues means that we need to consider those matters in rather more detail below.

## 2. RELIEF SOUGHT

23. In the notified version of Stage 3, the Walter Peak site was zoned RVZ. As is envisaged by Chapter 46, the Proposed Plan maps identified areas of high landscape sensitivity and moderate-high landscape sensitivity. In broad terms, the areas that were not identified as being of high or moderate-high landscape sensitivity encompassed the flatter areas on the southern part of the site between the footslopes of Walter Peak and the southern margins of the Von Hill within which the historic station buildings at Beach Bay and more recent tourism-related structures are located, the moderate-high sensitivity areas encompassed the areas on the western margins of Von Hill including a flat area currently utilised as an air strip, with the balance of Von Hill, the lake margins and the lower slopes of Walter Peak on the southern side of the site identified as having high landscape sensitivity.

24. As with the balance of the Proposed District Plan, public roads within the site were not zoned. The adjacent Beach Bay Recreation Reserve, and the marginal strips on the lakeward sides of the site were zoned Rural. Lastly, a semi-circular area centred on the jetties at the terminus of the Von Road and extending into the lake was the subject of a Water Transport Overlay. Notified Policy 46.2.2.6 provided within that overlay for “*a jetty or wharf, weather protection features and ancillary infrastructure*” while achieving three identified environmental outcomes that we discuss further below.
25. As discussed in Report 20.1, although initially framed more widely, Wayfare revised its submission to limit its relief specifically to the Walter Peak site and its environs. The relief sought was expressed in the alternative, seeking either that Walter Peak be withdrawn from the notified RVZ provisions in order that a bespoke regime for the area might be developed in consultation with it, or that the provisions applying to the Walter Peak site in Chapter 46 be redrafted, or alternatively a bespoke Walter Peak Tourism Zone be applied, to achieve some 22 specified outcomes.
26. Among other things, material changes from the notified Chapter 46 signalled as being sought included provision for enabling residential development and permitting a number of activities, including limiting control over the location and design of buildings to those located on the lake front (but excluding Beach Bay). The proposed permitted activities also included visitor accommodation, hospitality and residential development.
27. The submission sought as associated relief:
- (a) Removal of the ONL classification from the Walter Peak RVZ<sup>3</sup>, or clarification that the ONL provisions do not apply in the bespoke zone sought;
  - (b) Expansion of the water transport infrastructure overlay to apply to the entire Beach Bay area;
  - (c) Extension of the proposed bespoke zone to include adjoining legal roads, marginal strips and Beach Bay reserves; and
  - (d) Listing of the proposed bespoke zone as an Exception Zone in Chapter 3, or amendment of the Strategic Provisions in the PDP to support the requested more specific amendments as they relate to Walter Peak.
28. Although the general thrust of the relief sought by Wayfare was clear, its submission did not provide any detail as to the content of the proposed Walter Peak Tourism Zone the submitter was seeking. In Minute #43, the Chair directed that Wayfare provide the text sought to be included in the Proposed District Plan, and a Section 32AA evaluation to support that text to provide a clear focus for the Council’s Section 42A Report.
29. Wayfare filed the text of its proposed Walter Peak Tourism Zone on 12 February, supported by a Section 32AA evaluation. The suggested purpose of the zone was as follows:
- “The purpose of the Walter Peak Tourism Zone is to complement the existing range of Visitor Industry opportunities in the District and provide for increased opportunities for people to*

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<sup>3</sup> Noting that this relief was not pursued by Wayfare at the hearing.

*experience the rural character, heritage and amenity of the rural area. The Zone provides for a range of accommodation, entertainment, cultural and recreational activities.*

*The Walter Peak Tourist Zone applies to an area of land which is recognised as having visitor interest, is isolated from town centres and can make a significant contribution to the range of accommodation and activities available within the District.*

*The principal activities in the Zone support mixed tourism activities, including visitor accommodation, commercial activities, commercial recreation, recreation activities and associated infrastructure and indigenous vegetation restoration and enhancement. Onsite staff accommodation ancillary to visitor industry activities is anticipated to support employment opportunities.”*

30. The suggested objective was relatively enabling, providing for:

*“The growth, development and consolidation of visitor industry activities and associated buildings, while adverse effects on the environment are avoided, remedied or mitigated and nature conservation values are restored and enhanced.”*

31. The suggested objective was supported by 13 policies.

32. Policy 1 seeks to enable diversification and expansion of the existing transport and tourism facilities at Walter Peak.

33. Policy 2 is also an enabling policy, focussing on visitor accommodation and commercial recreation activities, including ancillary onsite staff accommodation, but subject to protection of the landscape values of the ONL *“surrounding the zone”*.

34. Policy 3 is a reverse sensitivity provision, seeking to ensure that visitor accommodation and commercial activity activities do not compromise existing activities or those enabled by the surrounding Rural Zone.

35. Policy 4 is an enabling policy focussing on development and use of trails.

36. Policy 5 seeks to enhance nature conservation values as part of use and development of the zone, and enabling development associated with restoration and enhancement of indigenous vegetation.

37. Policy 6 provides for infrastructure, services and facilities ancillary to visitor industry activities including onsite staff accommodation so as to recognise the zone’s remote location.

38. Policy 7 focusses on enabling visitors to access and appreciate natural conservation values of the zone and the values of the surrounding ONL.

39. Policy 8 seeks to ensure that land use and development *“not otherwise anticipated in the Zone”* protects or enhances landscape values and nature conservation values.

40. Policy 9 provides for control of the visual impact of roads, buildings and infrastructure associated with visitor industry activities.

41. Policy 10 provides for management of the effects of building and development on landscape values, landscape character and visual amenity values in four specific respects. The first relates



to controlling colour, scale, design and height of buildings and associated infrastructure, vegetation and landscape elements. The second acknowledges that the existing buildings at Beach Bay are not recessive in colour, and provides that in that area building colours are sympathetic to the existing development. The third element provides for building and landscape controls that recognise the existing development facilities and are reflective of the zones' farming and visitor heritage. The fourth element seeks to encourage indigenous vegetation, restoration and enhancement associated with new building and development away from the heritage area.

42. Policy 11 relates to management and direction of lighting.
43. Policy 12 seeks to ensure adequate servicing of development with appropriate infrastructure facilities.
44. Policy 13 relates to the water transport infrastructure overlay. It provides for a wider range of activities than notified Policy 46.2.2.7 – piers, marinas, moorings, signage, storage water transport and water recreation activities – but as with the notified policy, this is subject to maintenance as far as practicable of natural character and landscape values at Beach Bay, minimising loss of public access to the lake margin and encouraging enhancement of nature conservation and natural character values.
45. The general approach of the suggested rules is to provide for a wide range of permitted activities, including informal airports. Buildings are generally controlled activities with suggested controls related to building design, density, scale and location, landform modification, landscape and planting, lighting, servicing, natural hazards and design and layout of site access, on-site parking, manoeuvring and traffic generation. Activities within the water transport infrastructure overlay provided for in the policy summarised above are restricted discretionary activities with discretion over, among other things, natural character, landscape values and amenity values.
46. The suggested rules distinguish between lakeshore buildings (within a BRA following the lake shore), and buildings in other identified BRAs (shown over the lower slopes of Walter Peak). The former are full discretionary, whereas the latter are suggested to be non-complying.
47. Farm buildings are permitted activities.
48. Residential activity other than that ancillary to visitor accommodation and recreational activities is suggested to be a full discretionary activity.
49. Industrial activities and mining are listed as non-complying and the general default for activities not listed is to full discretionary status.
50. The suggested rules provide three sets of standards. The first is for building height with the maximum height specified being 8 metres other than for wind turbines (which have a 15 metre height standard). The default is to restricted discretionary activity status.
51. The second standard relates to glare. The third provides for a minimum setback of 20 metres from any river, lake or wetland other than in relation to structures or buildings within the

water transport infrastructure overlay. The default is again to restricted discretionary activity status.

52. The suggested zone rules preclude notification for all activities other than those listed as non-complying and for breach of the standard related to setbacks from water bodies. In the latter case, the suggested rule provides that Council may determine Nga Runanga to be an affected party.
53. In other related provisions, it is suggested that the Chapter 3 provisions foreshadowed by the Environment Court provide for the Walter Peak Tourism Zone as an Exception Zone. A new policy is to be inserted in Chapter 6 noting that the Walter Peak Tourism Zone has a separate regulatory regime within which the ONL classification and Chapter 6 policies related to that do not apply.
54. Further suggested variations would provide for a 500m<sup>3</sup> maximum earthwork standard, make provision for subdivision of development within the suggested zone following approval of a land use consent as a controlled activity with no minimum lot area specified, and make small scale wind electricity generation within the Zone and signage a controlled activity other than signs for health and safety purposes (which is suggested to be permitted). Lastly, additional noise controls are proposed, with 50 dB L<sub>dn</sub> L<sub>Aeq</sub> (15 min), daytime and 40dB L<sub>dn</sub> L<sub>Aeq</sub> 15 night time standards.
55. In Mr Farrell's pre-circulated planning evidence for Wayfare, he suggested that the zone provisions that had been circulated might appropriately be amended in certain respects. Ms Baker-Galloway's legal submissions attached a marked-up version of the proposed Walter Peak Tourism Zone capturing these suggested amendments.
56. More specifically, the objective was suggested to be amended to read:  
*"The growth, development and consolidation of visitor industry activities and associated buildings, while adverse effects on the environment are avoided, remedied, or mitigated including promoting restoration and enhancement of nature conservation values."*
57. The effect of the suggested change from the February version is to soften the commitment to restoring and enhancing nature conservation values.
58. Policy 7 was suggested to be amended to refer to enabling visitors to access and appreciate the Zone's values more generally (in the February version the reference was just to the Zone's nature conservation values).
59. It was suggested that Policy 9 be expanded in scope to refer more generally to "development" associated with visitor industry activities.
60. Two additional policies were added providing for management and maintenance of existing hazard mitigation measures and providing that development for new living purposes be avoided in identified natural hazard BRAs.
61. Other suggested amendments:

- Expand the scope of the advice note cross referring relevant provisions of the Otago Regional Plan: Water;
  - Adding an additional matter of control in relation to buildings related to nature conservation values and biodiversity enhancement;
  - Providing for construction or relocation of buildings within an identified hazard management area as a controlled activity;
  - Providing for construction or relocation of buildings or structures for living purposes within the proposed natural hazard BRA as a non-complying activity, with other buildings being a restricted discretionary activity (with matters of discretion restricted to natural hazards).
62. The zone provisions proposed by Wayfare were further amended in the legal submissions circulated following the hearing and dated 25 June, to include three additional policies worded as follows:
- “Residential activity not related to ancillary onsite staff accommodation shall not compromise the Zone purpose.*
- Residential activity not related to ancillary onsite staff accommodation shall maintain an overall low average density of development of the Zone, and shall protect or enhance landscape values and nature conservation values.*
- Control the location, density and scale of buildings in order to protect or enhance landscape values and nature conservation values.*
63. The first two policies sought to address an issue we discussed with Wayfare’s counsel and witnesses, whether its proposed Zone provisions would facilitate or allow urban development of the site.
64. The purpose of the third policy was to provide policy support for the proposed controlled activity rule related to construction and relocation of buildings. This was an area where Ms Baker-Galloway and Mr Farrell accepted there was a policy gap in the proposed Zone provisions.

### 3. HISTORY OF DEVELOPMENT AT WALTER PEAK

65. Ms Baker-Galloway submitted that Wayfare had a legitimate expectation that the PDP would not alter the previous planning framework for management and development of the site. The suggested legitimate expectation was based in part on the history of development on the site, in part on the investment Wayfare had made both in relation to past development and its business planning in reliance on the existing planning framework, and in part on the absence of any evidence that the historic planning framework has proven to be a problem so far or which would otherwise justify a substantial shift in the context of a long-standing legacy zone.
66. To consider Ms Baker-Galloway’s submission, we need to review the evidence we heard both on historic use and development of the Walter Peak site, and the previous planning frameworks that have applied to it.

### 3.1 Historic Use and Development

67. Ms Fiona Black and Ms Ailsa Cain provided evidence on historic use and development of the Walter Peak site. Ms Black is a senior employee of Real Journeys Ltd (a subsidiary of Wayfare). Her evidence was mostly factual in nature, whereas Ms Cain provided additional commentary on heritage values associated with historic use and development. Ms Cain is an expert specialising, among other things, in cultural heritage.
68. Suffice it to say that use of the site since European settlement was for many years focussed on pastoral farming production. Until the late 1960s, the site formed part of Walter Peak Station and the original Colonel's house at Beach Bay was constructed in 1908 as a home for one of the McKenzie family, who farmed the Station for some 80 years from the late 1880s.
69. Ms Cain's evidence emphasises the process of indigenous forest and tussock clearance accompanying pastoralisation and, in her view, compromising its naturalness. Ms Black advised that throughout the pastoral period of the site's use, the "*TSS Earnslaw*" had called into the site, transporting sheep, cattle and passengers to and from the high-country station.
70. From Ms Black's evidence, it appears that tourism use of the site commenced in the late 1960s when a larger area of some 1300 acres (526 hectares) was purchased and rezoned for tourism purposes. We surmise that that would have to have occurred under the then Town and Country Planning Act 1953.
71. From her description, it appears that actual tourism activities were at a low level in these early years although Fiordland Travel Limited commenced operating half day trips to Walter Peak in the summer of 1972-73.
72. Significant developments in the 1970s included reconstruction of the Colonel's house, which had been damaged by fire, and subdivision of the larger site to create the current 155 hectare site.
73. Ms Black gave evidence that in the 1980s, the then owner (Walter Peak Resort Limited) formed a joint venture with another company to promote a large-scale resort development on the site. Ms Black produced a promotional brochure of that development. In summary, it included a multi-storey 300 room five-star hotel on the eastern side of Von Hill facing Queenstown, a village centre wrapped around the Colonel's house and other existing farm buildings, an 18-hole golf course designed by the Arnold Palmer Design Team and some 1000 chalets adjoining and within the golf course. Mr Farrell told us that he had spoken to someone involved in the development at the time and that he understood that the process to design and secure approval of a comprehensive development plan was very thorough, costing the developer some two million dollars. Initial approval was secured from the then Lakes County Council in 1986, and subsequently confirmed in 1991.
74. The development, however, did not proceed. Instead, Fiordland Travel Limited (renamed Real Journeys Limited) leased the site from Walter Peak Resort Limited's successor from 1991 until 2013 when Real Journeys purchased the freehold. Ms Black told us that over the period from 1991, the Company extended the Colonel's homestead and trialled a number of tourism ventures, some of which were more successful than others. She described the more significant developments since transfer of ownership to Real Journeys, including development of a master plan for the Beach Bay area of the site, further extension of the Colonel's homestead,

exchange of marginal strip land in the centre of Beach Bay for freehold on the eastern side of Von Hill (the latter since developed for camping and as a picnic area), clearance of large numbers of wilding pines and planting of the site in native trees and shrubs, construction of the amphitheatre on the site in 2017 (to allow farm demonstrations to be shifted from the former woolshed), and consenting and development of staff accommodation further west. In response to our questions, Ms Black advised that the consented staff accommodation is capped at 50 people onsite.

75. The thrust of Ms Black's evidence, based on her review of past development of the site, was that the tourism industry generally, and Wayfare's Walter Peak operation in particular, needs to constantly evolve with changing visitor expectation and that, accordingly, the planning framework governing the site needs to allow Wayfare's business to continue to grow and diversify in the same way that it has to date.
76. Ms Cain's evidence, placing a heritage lens over the process of site development Ms Black had described, was that heritage is dynamic and evolves with each generation. In her view, primacy ought not to be given to features visible on the landscape purely by virtue of them still being there. She gave evidence that it is more effective to manage heritage if it is kept 'warm' and has an income stream to enable to thrive. Her opinion was that the cultural heritage of Walter Peak includes both pastoralism and tourism.
77. This theme was also taken up by Mr Norris, Wayfare's Tourism General Manager. His evidence focussed on the importance of Wayfare's Earnslaw/Walter Peak operation within the broader operation of the company. He gave evidence on the Company's vision, and on its commitment to sustainable tourism, including reduction of its environmental footprint.
78. Mr Norris gave evidence of the extent of the financial investment the Wayfare Group has made in both the Walter Peak site and the TSS Earnslaw. That investment is substantial, and it is clear to us that Walter Peak forms an important part of Wayfare's operations.
79. Mr Norris also gave evidence on the adverse effect COVID has had on its business. That has clearly also been substantial, with a significant reduction in passengers to the site, and in Wayfare's workforce.
80. The financial aspects of Wayfare's Walter Peak operation were also the subject of evidence from Mr David Bridgman, a highly qualified corporate finance advisor, who emphasised that, while Walter Peak provides a major tourist attraction in the Queenstown region, it needs to keep evolving and diversify its tourist product. Mr Bridgman also emphasised the intrinsic link between the success of Wayfare's Walter Peak operation and its ability to continue operating TSS Earnslaw.
81. Mr Bridgman did not suggest any particular form of further development at Walter Peak that might proceed, but rather the need for flexibility to enable Wayfare to adapt to the market. He also noted that the property does have alternative uses, with tourism not necessarily representing its highest and best use. In response to our query, Mr Bridgman clarified that he was not suggesting that alternative uses might generate more income for the landowner (or the community) than Wayfare's tourist operations, but rather that the property might be valued more highly for alternative purposes by a buyer who appreciates its intrinsic qualities.

### 3.2 Legacy Planning Provisions

82. While Ms Black advised that tourism use on the Walter Peak site has been provided for as long ago as the late 1960s or early 1970s, we have no evidence of the exact nature of the regulatory instruments governing that use.
83. Mr Schofield's evidence was that the land was included under a tourism zoning in the Lakes Queenstown Wakatipu Combined District Scheme notified in 1978 pursuant to the Town and Country Planning Act 1977, and made operative in 1983.
84. We discussed with the planning witnesses the legislative framework applying to the Walter Peak Resort development plan, approved in 1986 under that zoning. Mr Farrell advised that while that proposal was the subject of a comprehensive landscape assessment, that was not in a planning or statutory context focussed on ONLs. He did not know for certain, but he also suspected that there had been no consideration of hazard issues in the 1986 proposal. Consistent with that view, Mr Matthee advised that the Council's 1986 decision emphasised economic values and conditions on sealing the Von Road. We record also that consideration of the 1986 proposal took place against a background, as advised by Ms Black, where the development was a predominant use (what we would now call a permitted activity), subject to approval of a comprehensive development plan.
85. We interpolate the observation that the concept of a predominant/permitted use subject to a requirement for a development plan approval is an interesting one, to say the least. Even under the Town and Country Planning Act 1977, there had to have been questions about the lawfulness of such a planning framework. For present purposes, it is sufficient to record that to the extent that they were considered at all at the time, ONL values did not appear to carry the significance that Section 6(b) of the RMA gives them, as interpreted by the Supreme Court's decision in *EDS v New Zealand King Salmon Company Limited*<sup>4</sup>.
86. This is reinforced by the nature and scale of the 1986 development proposal. Viewed in the context of recognition and protection of ONLs being something in the nature of an environmental bottom line<sup>5</sup>, the fact that such a development might gain regulatory approval is somewhat startling.
87. We asked Ms Mellsop and Mr Skelton, the expert landscape witnesses for the Council and Wayfare respectively, whether they thought the development illustrated in the promotional material provided by Ms Black protected ONL values. Ms Mellsop's answer was a simple negative. Mr Skelton thought that perhaps the level of development proposed behind the Colonel's house and extending up the flatter areas of the site to the west was acceptable, but the development proposed on Von Hill was more dense than he would regard as acceptable. We considered that view as being something of an understatement.
88. In summary, we find that we can place little or no weight on the planning framework applying to the site under the predecessors to the RMA other than in the very general sense of it recognising tourism on the site.

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4 [2014] NZSC 38

5 *Ibid* at [103]

89. As Mr Schofield noted, however, the notified version of the now ODP zoned the land Rural Visitor, providing a generally permissive regime for resort and tourism development with a wide range of activities including buildings for residential and visitor accommodation use being controlled activities, subject to standards.
90. Consideration of the relevance of the operative zoning needs to occur against a background where Wayfare did not pursue the suggestion implicit in its submission that the site was not an ONL.
91. Mr Skelton accepted that the Walter Peak site was part of a much larger ONL and Ms Baker-Galloway based her legal submissions on the extent of development that was appropriate in this particular ONL.
92. We therefore disregard the concern expressed by Ms Black that classification of a site as an ONL complicates consenting of development of a site and can make a resource consent untenable<sup>6</sup>.
93. As the Court of Appeal has confirmed in *Man O'War Station Limited v Auckland Council*<sup>7</sup> classification of a site as an ONL is a landscape assessment, from which planning consequences flow, rather than the reverse.
94. As above, Wayfare's legal submissions and planning evidence placed considerable emphasis on the lack of clear justification for abandoning the operative Rural Visitor Zone (or something similar to it) as it applied to the Walter Peak site. The argument was, in effect, that it had worked well to date, and there was no reason to believe that it wouldn't continue to work well into the future.
95. We agree that the existing zoning under the ODP appears to have provided a framework within which landscape values have been maintained. Ms Mellsop, for instance, told us in her rebuttal evidence that in her view recent development within Beach Bay has been sympathetic to the historic buildings and has maintained the visual coherence of the Bay<sup>8</sup>.
96. It is apparent, however, that this has not been the universal experience with the ODP Rural Visitor Zone. In Report 20.9, the Hearing Panel noted the conclusions of the Section 32 evaluation that the Operative Rural Visitor Zone had failed to produce an outcome managing landscape values or providing visitor-related activities in the rural environment at Arthurs Point North<sup>9</sup>.
97. Report 20.7 similarly pointed to residential development both at Arthurs Point North and Cardrona not having been managed under the ODP Rural Visitor Zone<sup>10</sup>.

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<sup>6</sup> Black at paragraph 7

<sup>7</sup> [2017] NZCA 24

<sup>8</sup> Mellsop Rebuttal at 5.2

<sup>9</sup> Report 20.9 at paragraph 8

<sup>10</sup> Report 20.7 at paragraphs 124-125

98. Section 10 of that Report also discusses approvals given for development at Arcadia, pursuant to the Operative Rural Visitor Zone, that failed to protect ONL values<sup>11</sup>.
99. In the Hearing Panel's view, such examples provided ample justification for a reconsideration of the zoning framework previously applying in the ODP Rural Visitor Zone to identify a framework more consistent with Section 6(b) of the RMA and the Strategic Provisions of the PDP in the process of finalisation by the Environment Court. That does not preclude recognition of Walter Peak as a stand-alone special zone, but we consider the case for such a special zone can draw little support from the extent to which development of the site has been permitted up to now under a regime that, in our view, fails adequately to address the significance of ONL values and the need to recognise and provide for their protection.
100. Wayfare's witnesses put much emphasis on the Company's environmental credentials. The argument was, in effect, that Wayfare could be trusted to do the right thing. While we do not disagree that development of the site to this point has had an appropriate focus on environmental outcomes, reflecting in turn Wayfare's corporate philosophy, we do not think we can rely on that remaining the case, or that that is an appropriate basis for determining the appropriate zoning of the site. As Ms Baker-Galloway acknowledged, Wayfare might sell the site to a third party, whose motives and objectives are necessarily unknown to us.
101. It follows that the primary relief sought in Wayfare's revised submission, of withdrawal of the Proposed RVZ provisions in order that Wayfare might engage with Council to develop a bespoke regime for the area was not a tenable position given that it would have involved reversion to the ODP Rural Visitor Zone that, as above, fails in our view to comply with Section 6(b) of the RMA, and is not consistent with the Strategic Provisions of the PDP that, although not yet operative, will clearly provide for protection of ONL values.
102. Put another way, while there might be planning options for the site other than the notified RVZ that require evaluation under Section 32, we can be reasonably confident that the operative Rural Visitor Zone is not one of those options.

#### 4. LANDSCAPE ISSUES

103. As above, Wayfare did not pursue its submission that the site was not part of an ONL, but rather sought to advance its proposal of a bespoke Walter Peak Tourism Zone on the basis that it provided appropriately for ONL values. A large part of the Council case turned on the view of its witnesses that the proposed special zone did not provide appropriately for ONL values. Accordingly, identification of what the zoning of the site is required to achieve relative to the landscape values of the site and its environs, and how well, or how poorly, the different planning frameworks before us achieve the required outcomes is a key issue that we need to address.

##### 4.1 Higher Order Provisions

104. The starting point is the partially operative Regional Policy Statement (March 2021 updated version). Mr Farrell drew our attention to Objective 1.1 and 1.2 of the partly operative Regional Policy Statement, providing for sustainable use and integrated management of

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<sup>11</sup> Report 20.7 at paragraph 241



resources, but as we discussed with him, those provisions are framed so generally as to offer little clear guidance as to how a specific site should be zoned. Mr Farrell confirmed it was the landscape provisions in the partly operative RPS that he principally relied on.

105. In that regard, that document provides as Objective 3.2:

*“Otago’s significant and highly-valued natural resources are identified and protected, or enhanced where degraded.”*

106. Specifically in relation to ONLs, Policy 3.2.4 provides:

*“Protect, enhance or restore outstanding natural features, landscapes and seascapes, by all of the following...*

*(b) Beyond the coastal environment, maintaining the values (even if those values are not themselves outstanding) that contribute to the natural feature, landscape or seascape being outstanding.”*

107. Section 6(b) of the RMA of course sits behind these provisions, but given how recently the partially operative Regional Policy Statement provisions have been confirmed by the Environment Court, we would require considerable justification before looking back to Section 6(b) or more generally to Part 2 of the Act given our legal obligation to give effect to the partially operative Regional Policy Statement, and having regard to the guidance provided by the Supreme Court in its *King Salmon* decision referred to above. As it happens, however, neither party sought to persuade us that this was a case where it was appropriate to look back to Part 2 of the RMA.

108. Before discussing the interpretation and application of Policy 3.2.4, we should discuss the current ‘state of play’ with the strategic provisions of the PDP. Finalisation of those provisions is well advanced and Mr Wakefield advised us at the hearing that he expected to be in a position to lodge a consent memorandum with the Environment Court reflecting the guidance provided in the Court’s interim decisions shortly. He provided us with the current version of those provisions and we have used those as an important reference point. This is partly because of the need for the Proposed District Plan as a whole to be consistent and coherent. However, we also note the instruction in Section 3.1B.1 that:

*“For the purpose of Plan development, including Plan changes, the Strategic Objectives and Strategic Policies in this Chapter provide direction for the development of the more detailed provisions contained elsewhere in the District Plan in relation to the Strategic Issues.”*

109. We think the need for a consistent and coherent plan is also the answer to the point made in Counsel for Wayfare’s Memorandum dated 9 July 2021 that Chapters 3 and 6 have not been confirmed to the point that they are to be regarded as operative under the RMA, and therefore the ODP is not yet to be treated as ‘inoperative’. She suggested that this creates a situation of ‘uncertainty’, requiring the Hearing Panel to look back to the partially operative Regional Policy Statement. While it is correct that Chapters 3 and 6 are not yet operative, the provisions of those Chapters tabled by Mr Wakefield are the product of a number of Environment Court interim decisions. It is clear to us that while the odd word here or there might yet be changed, the substantive form of those provisions has been resolved by the Court and will not change. Those provisions are not ‘uncertain’ in the sense Ms Baker-Galloway was suggesting.

110. We will refer in the discussion following to the objectives and policies in the form and with the numbering tabled by Mr Wakefield.
111. One feature of the management of ONLs in the Strategic Provisions is that Policy 6.3.1.1 identifies that Rural Zoned landscapes are categorised variously as ONFs, ONLs and Rural Character Landscapes. Policies 6.3.1.2-6.3.1.5 provide guidance as to how landscape issues in a number of other zones are addressed. While the latter group of policies are not a comprehensive set of zones applying in rural areas (the RVZ, for instance is not included) the effect of Policy 6.3.1.1 is to largely exclude the detailed policies in Chapter 6 from application to a site like that of Walter Peak which is not zoned Rural, and has not been zoned under any predecessors of the PDP Rural Zone for many decades. It was presumably for this reason that in his reply evidence, Mr Matthee identified Policies 6.3.2.1 to 6.3.2.7 as providing context to the Hearing Panel’s consideration of Wayfare’s submission only, and did not reference Policies 6.3.3.1-6.3.3.7 as being relevant to our inquiry. Importantly, that means the requirement contained in Policy 6.3.3.1 that subdivision or development or buildings and other structures within an ONL, among other things, must be reasonably difficult to see from beyond the boundary of the site, is not relevant to zoning of the Walter Peak site. In contrast, Lake Wakatipu and the marginal strips around the lake are zoned Rural and accordingly (as Mr Matthee noted) Section 6.3.5, related to management of activities on lakes and rivers and their margins, is relevant to our inquiry.
112. We observe that the Beach Bay Reserve is similarly zoned Rural in the notified PDP. Accordingly, Policy 6.3.3.1 is currently relevant to activities within that Reserve, and any rezoning of that reserve needs to take account of that policy.
113. Obviously, zoning of land as Rural in the PDP is not determinative of whether or not, as a matter of fact, it is an outstanding natural landscape (or outstanding natural feature). The higher-level provisions developed on the direction of the Environment Court in Chapter 3 recognise that. Accordingly, Objective 3.2.5.2 relates to new subdivision, use and development in ONLs within the Rural Zone, whereas Objective 3.2.5.3 relates to ONLs other than in the Rural Zone.
114. Focussing on the Walter Peak site specifically, it is clearly Objective 3.2.5.3 to which we should have regard. That reads:
- “In locations other than in the Rural Zone, the landscape values of Outstanding Natural Features and Outstanding Natural Landscapes are protected from inappropriate subdivision, use and development.”*
115. Supporting these objectives, the strategic policies of Chapter 3 do not draw any distinction between ONLs within the Rural Zone, or outside it. Rather, the distinction drawn is between priority areas identified in Policy 3.3.36, which do not include Walter Peak, and those outside of such priority areas.
116. In relation to the latter, Policy 3.3.29 provides:
- “For Outstanding Natural Features and Outstanding Natural Landscapes, identify landscape values and landscape capacity:...”*

- b. *Outside of identified Priority Areas, and in accordance with the landscape assessment methodology is SP 3.3.45, and through best practice landscape assessment methodology.*
117. Policy 3.3.30 further provides:
- “Protect the landscape values of Outstanding Natural Features and Outstanding Natural Landscapes.”*
118. Lastly, Policy 3.3.31 provides:
- “Avoid adverse effects on the landscape values of the District’s Outstanding Natural Features and Outstanding Natural Landscapes from residential subdivision, use and development where there is little capacity to absorb change.”*
119. Policy 3.3.45, cross referred as above, indicates that:
- “Landscape assessment shall:*
- a. For Outstanding Natural Features and Outstanding Natural Landscapes:*
    - i. identify landscape attributes and values; and*
    - ii. assess effects on those values and on related landscape capacity...*
  - c. In each case apply a consistent rating scale for attributes, values and effects.”*
120. Ms Baker-Galloway submitted in her further legal submissions dated 25 June that Policy 3.3.30 is aimed at new ‘Exception Zones’ i.e. where land is being up-zoned from Rural, whereas Walter Peak has always had the equivalent zoning of an Exception Zone. We do not accept that submission. It seems to us that the Environment Court has deliberately broadened the objectives so that they apply to ONLs both within and without Rural Zones, and therefore the policies supporting those objectives should similarly be read to apply to both unless the language of the policy makes it clear that some subset of ONLs is the focus of a particular policy.
121. We also note that while previous non-Rural Zones may have effectively operated as exceptions in the ODP, the concept of an ‘Exception Zone’ is one developed in the Strategic Provisions as notified (and significantly sharpened in the Environment Court’s resolution of appeals on those provisions) as part of the rethinking of what is required by Section 6(b) of the RMA following the Supreme Court’s *King Salmon* decision in 2014. We consider therefore that the provisions of zones in previous plans provide little assistance in the interpretation and application of the PDP strategic provisions.
122. We similarly do not accept the view of Mr Farrell that there is any material difference between the suite of strategic objectives and policies developed by the Environment Court and the higher order direction in the RPS, such that we should reference the latter in preference to the former.
123. We observe that the Environment Court was well aware of the content of the Proposed Regional Policy Statement when it formed its view as to the appropriate way in which management of ONLs should be addressed in the PDP Strategic Provisions while both documents were moving towards a resolution before different divisions of the Court. Interim

Decision 2.2<sup>12</sup> specifically refers to the then proposed Regional Policy Statement. If the Court was in any doubt as to whether the regime it had in mind was consistent with the now partially operative Regional Policy Statement, we think we can safely assume it would have discussed the point.

124. Addressing the substance, Mr Farrell's point was that the partially operative Regional Policy Statement focusses attention on a subset of landscape values (those contributing to the landscape being outstanding) whereas his characterisation of the Council's position was that it was seeking that landscape values must be protected "*without qualification*".
125. The Environment Court's Interim Decision 2.1 on the Strategic Chapter appeals<sup>13</sup> discussed the range of values/factors<sup>14</sup>, emphasising both that the judgment as to whether a landscape is sufficiently natural to be classed as an ONL is not subject to any bright-line test (but is rather one of judgement guided by contextual evaluation<sup>15</sup>) and that even significant modifications to the landscape can make a material contribution to its values<sup>16</sup>. The partially operative Regional Policy Statement reinforces that point by noting that relevant values may not necessarily be themselves outstanding.
126. There are, no doubt, some elements in a landscape that do not make a contribution (or may even make a negative contribution) to its overall quality as an ONL, so as to fall outside the focus of Policy 3.2.4 of the partially operative Regional Policy Statement. The recently installed diesel generator on the Walter Peak site provides a possible example. To our eye, when we viewed it on our site visit, it is located in a singularly utilitarian structure. However, we did not perceive it as detracting from the broader ONL because of its lack of visibility from beyond the site, dimensions and recessive colouring. It would be hard, however, to conclude that it contributes to the values that make the broader landscape outstanding. Similarly, while the values of this particular ONL are yet to be assessed in terms of Strategic Policy 3.3.45, we suspect that the characteristics of that particular structure do not form part of the landscape values whose protection from inappropriate subdivision use and development Strategic Objective 3.2.5.3 seeks to achieve.
127. However, for the reasons discussed above, we believe that elements of the landscape making no contribution to ONL values are very much the exception.
128. In summary, we consider that any distinctions that can be drawn between Regional Policy Statement Policy 3.2.4 and the Strategic Objectives and Policies developed by the Environment Court are of little or no significance in practice.
129. We have previously found Ms Baker-Galloway's submission that there is some 'uncertainty' as between the Strategic Provisions and those of the ODP that preceded it to be unfounded. Even if we were to come to a contrary view, and accept her submission<sup>17</sup> that it is not sufficient to

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<sup>12</sup> *Upper Clutha Environmental Society Inc & Others v QLDC* [2019] NZ EnvC 205

<sup>13</sup> *Hawthenden Limited & Others v QLDC* [2019] NZ EnvC 160

<sup>14</sup> *Ibid* at [39]

<sup>15</sup> *Ibid* at [62]

<sup>16</sup> *Ibid* at [105]-[109]

<sup>17</sup> Memorandum of Counsel for Wayfare Group Limited dated 9 July 2021 at 4(b)

rely on Chapters 3 and 6 as having fully and completely implemented the partially operative or Proposed Regional Policy Statement, we do not consider that is likely to make a material difference to the conclusion we reach on the appropriate Zone provisions applying to the Walter Peak site.

130. Mr Farrell suggested to us that consideration of appropriateness in the context of Strategic Objective 3.2.5.3 should take into account the Legacy Zone provisions. We queried Mr Farrell as to whether his view was consistent with the Supreme Court's *King Salmon* decision indicating that "*inappropriate*" should be interpreted in Section 6((b) of the RMA "*against the backdrop of what is sought to be protected or preserved*"<sup>18</sup>. Mr Farrell did not really answer that question, suggesting to us that if the end result was that development is precluded within the site, he thought that was not appropriate. Ms Baker-Galloway, however, sought to provide a more reasoned response in her further legal submissions dated 25 June. She submitted that the Supreme Court's finding was in the context of the New Zealand Coastal Policy Statement and Policies that provided for avoidance of adverse effects on certain aspects of the coastal environment. In her submission:

*"Protect' is a positively framed protected policy, whereas 'avoid' is a negatively framed protection."*<sup>19</sup>

131. She suggested that that difference is an important distinction in this case. Echoing Mr Farrell's reasoning, she also submitted that if protect in the context of Strategic Objective 3.2.5.3 and Strategic Policy 3.3.30 were treated as synonymous with avoid, and as a bottom line policy, the consequence is that there will be no further development or use in 97% of the Queenstown Lakes district. In her submission, that is not a logical outcome for the Plan<sup>20</sup>.
132. We have a number of issues with Ms Baker-Galloway's chain of reasoning. The first is that while the Supreme Court did indeed give careful consideration to the way the word "*inappropriate*" was used in the policies of NZCPS, its conclusion was that the term had the same meaning both in those policies and in Section 6(b) of the RMA, from which Strategic Objective 3.2.5.3 is derived.
133. We think therefore it must follow that the same interpretation should be applied to Strategic Objective 3.2.5.3. Applying that approach, we find that Strategic Objective 3.2.5.3 identifies an outcome where subdivision, use and development is appropriate if it results in (or involves) protection of the landscape values of this particular ONL, and vice versa.
134. We do not find the distinction Ms Baker-Galloway draws between protection and avoidance helpful. First, the issue is what protection involves, not whether it might be described as a positively or negatively framed provision.
135. Secondly, we are not at all sure that the distinction Ms Baker-Galloway draws is correct in any event. In *Port Otago Limited v Dunedin City Council*<sup>21</sup>, the Environment Court found that a policy directing that the existing character of part of Otago Harbour be protected meant that

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<sup>18</sup> [2014] NZSC 38 at [105]

<sup>19</sup> Wayfare Further Legal Submissions dated 25 June 2021 at paragraph 17

<sup>20</sup> Ibid at 19

<sup>21</sup> C4/2002

it be kept safe from harm or injury<sup>22</sup>. In the Court's view, it did not carry with it the concept of maintaining an original or existing state in perpetuity. The Court also noted earlier superior Court authority under the Town and Country Planning Act 1977<sup>23</sup> suggesting that protection does not have as strong a meaning as prevention or prohibition, but made no comment about whether that was the case in an RMA context.

136. Given the Supreme Court's comments in *King Salmon* that at least in the context of the NZCPS Policies it was considering, avoid meant "not allow" or "prevent the occurrence of"<sup>24</sup>, that might suggest that protection imports a somewhat lower restriction than avoidance. However, for the reasons set out in the *Port of Otago* case, we consider both are essentially negative imperatives, seeking to preclude an undesired outcome. The comparison is not between protection and avoidance, but rather between protection and maintenance. In the *Port Otago* case, the Environment Court held that the latter imported additional positive obligations, so that 'maintain' includes the meaning of 'protect'<sup>25</sup>.
137. More important, however, is what it is that is sought to be protected (or avoided). Landscape values are a human construct and effects on landscape values are assessed by experts in the field on a sliding scale (reflected in the instruction in Strategic Policy 3.3.45 that a consistent rating scale be applied). It is therefore a matter of judgement as to whether a particular activity fails to protect landscape values.
138. The definition of landscape capacity<sup>26</sup> developed by the Environment Court in order that it can be inserted in Chapter 3, turning on whether identified landscape values have been compromised, reinforces that fact. We also consider that the practical effect of a test focussing on whether landscape values are compromised is going to vary according to the value in question. Some values are more accommodating of change than others.
139. In summary, we consider that identification of inappropriate subdivision, use and development in ONLs, consistent with the Strategic Objectives and Policies we have discussed, is a matter of scale and degree, assessed with reference to the particular landscape values of the ONL in question.
140. Legacy Zones might be relevant to that assessment to the extent that those zones reflect the values of the particular landscape that is zoned, but we do not consider that they are relevant to any greater extent; that is to say a Legacy Zoning that does not appropriately reflect the values of the landscape does not influence a decision as to what is or is not appropriate in an ONL.
141. There is accordingly no risk of the scenario Ms Baker-Galloway painted, of no development being permitted anywhere within the ONLs of the district, coming to pass.

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<sup>22</sup> Ibid at [41]

<sup>23</sup> *Environmental Defence Society Inc v Mangonui County Council* [1989] 3 NZLR 257 at 262

<sup>24</sup> [2014] NZSC 38 at [96]

<sup>25</sup> C4/2002 at [42]

<sup>26</sup> In Section 3.1B.7

## 4.2 Scale of Analysis

142. In his expert landscape evidence, Mr Skelton put some emphasis on the fact that the Walter Peak site is a relatively small (5%) element of the landscape unit he identified (the Von Terraces landscape) and an even smaller element (1%) of the wider ONL in which the site is visible from the west, north and east. He referenced the Environment Court's decision in *Save Wanaka Lakefront Reserve Inc v QLDC*<sup>27</sup>, noting, in particular, findings that a site or localised landscape may not be representative of a wider ONL in terms of values and that assessment of biophysical and natural character effects should not be of a confined site or localised landscape, but rather in the context of the wider ONL of which the site or landscape is part.
143. This was brought sharply into focus by Wayfare's Proposed Policy 2 which seeks to enable visitor accommodation, ancillary onsite staff accommodation and commercial recreational activities "*where the landscape values of the Outstanding Natural Landscape surrounding the zone are protected*".
144. We record that the Environment Court's comments on which Mr Skelton relied<sup>28</sup> were in the context of plan provisions relating to whether the particular landscape is vulnerable to degradation or has capacity to absorb change, and whether the ONL has an open character 'at present'.
145. We consider, therefore, that the Environment Court's findings need to be applied with caution to the Strategic Objectives and Policies that are framed more broadly.
146. In this regard, while Mr Skelton said that he had taken into account the Environment Court's interim decision on the Strategic Objectives and Policies related to landscape<sup>29</sup>, he told us in response to our query that he had not applied the objectives and policies mandated by the Environment Court in this and other interim decisions. It is fair to say that we found that somewhat surprising. Be that as it may, it means that we also need to approach Mr Skelton's evidence with some caution as a result.
147. Focussing more specifically on the *Wanaka* decision he referred to, we asked Mr Skelton if the Walter Peak site was atypical of the broader values of the ONL in the same way that the Environment Court found Roys Bay to be the most urbanised part of the Lake Wanaka ONL. Mr Skelton identified Beach Bay as being a unique element of the Walter Peak site because there are not a lot of small coves sheltered to the west in Lake Wakatipu. Similarly, the existing buildings distinguish it from the balance of the ONL, apart perhaps from Mt Nicholas Station. We accept Mr Skelton's evidence, so far as it goes in this regard, but the elements of the Walter Peak site he pointed us to represent a relatively small and confined part of the site whose development is already provided for by the RVZ provisions in the notified Plan, given the area is not covered by the identified high or moderate-high landscape sensitivity notations.
148. We did not understand Ms Mellsop to disagree with the view that the focus needed to be on the entire landscape rather than some subset of the landscape<sup>30</sup>. In her view, however, the relative size of the respective areas is not particularly relevant to the assessment of effects on

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<sup>27</sup> [2017] NZ EnvC 88

<sup>28</sup> Ibid at [119] and [120]

<sup>29</sup> *Upper Clutha Environmental Society Inc v QLDC* [2021] NZ EnvC 60

<sup>30</sup> Mellsop Rebuttal at 3.3

landscape character and values<sup>31</sup>. More specifically, her issue was that development of the more sensitive areas of the site, particularly the Von Hill had significant potential to adversely affect the values of the broader landscape.

149. We agree that a focus on the areal extent of the site relative to the broader landscape, or some subset thereof, is a red herring. The issue is whether the values of the broader landscape of which the site forms part, are protected, which turns on the capacity of the landscape to absorb change. That is what Proposed Strategic Policy 3.3.45 requires be assessed.
150. In that regard, there was considerable unanimity as between the two landscape experts we heard from that the Von Hill was the most sensitive part of the site, the flatter areas to the west of Beach Bay including and behind the existing buildings were the least sensitive, and the area on the southern and western fringes of Von Hill were of intermediate sensitivity; that is to say, substantially as mapped in the notified Stage 3 mapping application. We say substantially because Ms Mellsoop reconsidered her view as to the appropriate definition of the area of moderate-high landscape sensitivity, and Mr Skelton told us that insufficient landscape assessment had been undertaken to define the exact boundaries between the different areas. We will come back to that.
151. Accordingly, the issue, it seems to us, is what planning framework best reflects the variations in landscape capacity across the site.

#### 4.3 The Relevance of Distance, Public Benefit and Reasonable Use

152. Before addressing the planning framework appropriate to the landscape capacity of the site, however, we need to consider Ms Baker-Galloway's legal submissions that the notified RVZ provisions sought to provide a "*distant public benefit*"<sup>32</sup>. Ms Baker-Galloway emphasised the absence of any submissions supporting the notified zoning or opposing Wayfare's submission and submitted that the RVZ provisions would "*essentially render the land incapable of reasonable use*"<sup>33</sup>.
153. Ms Baker-Galloway relied on case law suggesting that it is not the role of private landowners to provide for general open space and the recreational needs of the community and that the planning history of a site might be relevant in the context of an argument based on reasonable use of a site. Section 85 of the RMA provides a route by which planning provisions rendering an interest in land incapable of reasonable use might be challenged, but only if such a challenge is made in a submission on the Plan in question. Ms Baker-Galloway confirmed our reading that Wayfare's submission did not raise Section 85 as an issue. She said that she was not running a Section 85 argument, but did rely on the cases she had cited to provide guidance, in particular around keeping the burden on private landowners in proportion to the public benefit.
154. Section 6(b) of the RMA states that the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development is a matter of national importance. The absence of any submissions does not therefore have the same significance as it might if the only potential effects were on private interests. We also consider that while

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<sup>31</sup> Mellsoop Rebuttal at 4.3

<sup>32</sup> Wayfare legal submissions dated 18 June 2021 at paragraph 18

<sup>33</sup> Ibid at paragraph 20



the visibility of a site from close proximity might increase the sensitivity of an ONL to development, we do not think the converse follows. There are many remote locations in this district where activities in ONLs would be practically invisible other than to overflying aircraft and helicopters, but this does mean that there is no public benefit in protecting those ONLs.

155. In any event, while Mr Skelton provided us with a series of viewpoints from the other side of Lake Wakatipu to the east and north of the site, illustrating the distance to which Ms Baker-Galloway referred, he accepted that views from the lake itself were a relevant factor. He advised that the only reason he had not provided photographic evidence of those views was that he did not have any good photos of the site from the lake. We observe that Wayfare's own evidence was that it brings many thousands of people into the site by boat every year. Those people see the eastern part of the site from close range as the TSS Earnslaw pulls into Beach Bay.
156. The Environment Court decisions in *Capital Coast Limited v Wellington City Council*<sup>34</sup> on which Ms Baker-Galloway relied can readily be distinguished. The Court considered the zoning question before it on the basis that the sites in issue were not an ONL, and accordingly national interest considerations did not arise.
157. The decision in *Golf (2012) Limited v Thames-Coromandel District Council*<sup>35</sup> similarly involved open space within a semi urban settlement (Matarangi) and the Court noted<sup>36</sup> that the issues raised for determination were the application of Section 85, the maintenance and enhancement of amenity values in terms of Section 7(c) and the relative appropriateness of the zoning alternatives. Again, Section 6 matters did not arise.
158. Similarly, while Section 85 is not relevant to us, the notified RVZ provides a framework for continuation and extension of development of the site in the area traditionally the subject of development. While, understandably, Ms Baker-Galloway emphasised the non-complying status of buildings within the identified area of high landscape sensitivity that takes up the majority of the site<sup>37</sup>, there is still a material area available for development within areas not identified as high or moderate-high landscape sensitivity<sup>38</sup>.
159. Ms Baker-Galloway criticised the case for Council as not assessing the costs to Wayfare of the RVZ regime. She referred us to the evidence of Mr Bridgman in that regard. Mr Bridgman's evidence was general in nature, supporting the emphasis given in the evidence of Ms Black on the need for flexibility.
160. While Mr Bridgman identified the desirability of providing for residential activities, in terms of the contribution that would make to the economics of Wayfare's operations on the site, his evidence did not seek to quantify the extent of that contribution; it was qualitative in nature.

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<sup>34</sup> W101/98 and W4/2000

<sup>35</sup> [2019] NZ EnvC 112

<sup>36</sup> Ibid at [4]

<sup>37</sup> In his reply evidence, Mr Matthee quantified that area as 90.6 hectares or approximately 58% of the site

<sup>38</sup> Mr Matthee quantified the available site area as 16.2 hectares excluding hazard prone areas he recommended be subject to a BRA

Mr Bridgman compared, for instance, the benefits derived by Millbrook Resort from private ownership assisting in the establishment of visitor accommodation.

161. We discussed in Report 20.7 (at Section 5.6) the extent to which the RVZ should provide for residential activity other than for onsite staff, concluding that it was incompatible with the purpose of the RVZ. One of our reasons for that conclusion was that this was a point of distinction between RVZ and a Resort, the latter being larger than a RVZ and potentially including a residential component.
162. Wayfare did not suggest that what it was proposing would be a Resort. Mr Farrell told us he had not analysed that as an option, and that the Resort concept had never been front and centre in the planning of the proposed zone.
163. We conclude that Wayfare's proposed Tourism Zone does not fit into the existing structure of the PDP, and that Wayfare's lack of clarity as to what it might involve raises questions as to why being directed towards the identified area of lower landscape sensitivity pose a particular problem for it. We will return to discuss the specific issue of provision for greater residential development than the RVZ would envisage below.
164. We observe further that all of the existing built development that gives rise to the heritage values Ms Cain gave evidence about, was limited either to the foreshore (the two jetties at the terminus of the Von Road and the third jetty adjacent to the Beach Bay Recreation Reserve) or to the identified area of lower landscape sensitivity. While Ms Cain suggested to us that heritage values of the site were not limited to the built development, she did not provide evidence of any use of the balance of the site, in particular of the highly sensitive Von Hill area, other than farming. We can understand how heritage values might support a continuation of low intensity farming of those areas of the site, but not any more intensive use involving built development.

#### 4.4 Adequacy of Competing Plan Frameworks to Address Landscape Issues

165. We have already summarised the relief sought by Wayfare in Section 2 of our report. Comparing Wayfare's proposed zone provisions with the provisions of Chapter 46 as recommended by the Hearing Panel and confirmed by Council, we identify the following key differences:
  - (a) At a high-level purpose/objective level:
    - (i) The RVZ provides for development in a small scale and low intensity. Wayfare's proposed Tourism Zone gives no indication of the anticipated scale and intensity of development other than the policy proposed in Wayfare's further legal submissions dated 25 June relating to residential activity other than onsite staff accommodation. That policy directs that an overall low average density of development be maintained;
    - (ii) Objective 46.2.1 requires that protection of landscape values of ONFs and ONLs be achieved. Wayfare's proposed objective requires that adverse effects on the environment be avoided, remedied or mitigated;
    - (iii) The purpose of the RVZ refers to the division of RVZ zoned land on the basis of landscape sensitivity and introduces the concept of directing development to areas of lower landscape sensitivity identified within each zone. Wayfare's proposed Tourism Zone contains no comparable provision;

- (iv) The RVZ purpose states that residential activity is not anticipated in the RVZ other than for ancillary onsite staff accommodation and for a site-specific exception in Arcadia. The Wayfare proposed Tourism Zone implies (in the policies discussed below) that some level of residential activity over and above onsite staff accommodation is anticipated;
  - (v) RVZ Objective 46.2.1 has provisions related to maintenance of amenity values in the surrounding environment, reverse sensitivity effects both within and beyond the Zone and provision of infrastructure. Wayfare's proposed Tourist Zone has no comparable provisions in its objective, but these matters are addressed in suggested policies;
- (b) In relation to policies:
- (i) RVZ Policy 46.2.1.2 enables visitor accommodation and commercial recreation activities including ancillary onsite staff accommodation, where landscape values of ONFs and ONLs are protected. The comparable policy in Wayfare's proposed Tourism Zone qualifies the relevant landscape values to relate to the ONL surrounding the Zone. Policy 8, relating to land use and development not otherwise anticipated in the Zone, is framed more generally to require protection or enhancement of landscape values (and natural conservation values);
  - (ii) RVZ Policy 46.2.2.1 has a sliding scale provision/restriction for location of buildings and development with buildings not within high or moderate-high landscape sensitivity areas (i.e. those in lower landscape sensitivity areas) provided for, buildings within moderate-high landscape sensitivity areas restricted subject to landscape related requirements, and buildings within high landscape sensitivity areas avoided. Wayfare's proposed Tourism Zone has no comparable provision. By contrast, the suggested policies enable diversification and expansion of existing tourism facilities throughout the Zone (Policy 1) and direct 'control' of the visual impact of roads, buildings and infrastructure associated with visitor industry activities (Policy 9);
  - (iii) RVZ Policy 46.2.2.4 provides that within areas identified as moderate-high landscape sensitivity and high landscape sensitivity, open landscape character be maintained where it is open at present. Wayfare's proposed Tourism Zone has no comparable provision and Policy 10(d) encourages indigenous vegetation, restoration and enhancement in conjunction with new building and development away from the homestead area;
  - (iv) RVZ Policy 46.2.1.4 directs avoidance of residential activity other than onsite staff accommodation and a site-specific exception at Arcadia. The additional policies suggested in Wayfare's Memorandum dated 25 June would restrict residential activity not related to onsite staff accommodation so that it does not compromise the Zone purpose, maintains an overall low average density of development of the Zone and protects or enhances the landscape values and natural conservation values;
  - (v) Wayfare's proposed Tourism Zone has additional policies not addressed in Chapter 46 making provision for trails, enabling development associated with restoration and protection of indigenous vegetation and providing for infrastructure, services and facilities directly associated with and ancillary to visitor accommodation. There are no comparable policies in Chapter 46;
- (c) As regards activity rules:
- (i) In Chapter 46, the activity status of buildings generally depends on their location, with buildings in lower landscape sensitivity areas a controlled activity, buildings

- in moderate-high landscape sensitivity areas a full discretionary activity and buildings within high landscape sensitivity areas non-complying. The proposed Wayfare Tourism Zone provides for buildings generally as a controlled activity;
- (ii) RVZ Rule 46.4.8 provides specifically for farm buildings as a restricted discretionary activity. Wayfare’s proposed Tourism Zone provides for farm buildings as a permitted activity subject to the same standards as in the Rural Zone;
  - (iii) RVZ Rule 46.4.9 and 46.4.10 provide for a jetty or wharf, weather protection features and ancillary infrastructure within the Water Transport Infrastructure Overlay as a restricted discretionary activity and any other building within that area as full discretionary activity. Wayfare’s proposed Tourism Zone provides for a wider range of activities within this Overlay (a jetty, wharf, quay or pier, marina, mooring, weather protection features, signage and ancillary infrastructure) as a restricted discretionary activity;
  - (iv) RVZ Rule 46.4.14 provides for residential activity not covered by other Rules as a non-complying activity. Wayfare’s proposed Tourism Zone provides for it as a full discretionary activity;
  - (v) The Chapter 46 rules do not have a rule specifically relating to trails, although “commercial recreational activity”<sup>39</sup> is provided for as a permitted activity; Wayfare’s proposed Tourism Zone provides for construction and use of trails as a permitted activity;
  - (vi) RVZ Rule 46.4.14 provides for commercial activities, retail or service activities not included as part of visitor accommodation and commercial recreational activity as a non-complying activity, and similarly any other activity not otherwise listed (Rule 46.4.16). Wayfare’s proposed Tourism Zone provides for any activity not otherwise listed (including commercial, retail and service activities) as a full discretionary activity.
- (d) As to Rule standards:
- (i) RVZ Rule 46.5.1 provides for a maximum height of 6 metres generally, with 4 metres within the Water Transport Infrastructure Overlay, defaulting to non-complying where the standard is not met. Wayfare’s proposed Tourism Zone has a general height limit of 8 metres, with provision for 15 metres for wind turbines, defaulting to restricted discretionary status. There is no specific provision for height within the Water Transport Infrastructure Overlay;
  - (ii) RVZ Rule 46.5.2 provides for a maximum ground floor area of any building of 500m<sup>2</sup>, defaulting to restricted discretionary. There is no comparable standard in the Wayfare Tourism Zone;
  - (iii) RVZ Rule 46.5.6 provides a minimum 10 metre setback from the Zone boundary other than within the Water Transport Infrastructure Overlay. The Wayfare Tourism Zone has no comparable standard;
  - (iv) RVZ Rule 46.5.8 has a minimum standard of 15 flights per week for informal airports, defaulting to full discretionary status. The Wayfare Tourism Zone has no comparable standard;
- (e) As to notification:

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<sup>39</sup> Defined to mean “the commercial guiding, training, instructing, transportation or provision of recreation facilities to clients for recreational purposes including the use of any building or land associated with the activity, excluding ski area activities.”

- (i) RVZ Rule 46.6 provides generally for non-notification subject to specific exceptions. The Wayfare Tourism Zone has a shorter list of exceptions. Some of the differences relate to standards that the Tourism Zone does not provide for. Material differences otherwise are that the Wayfare Zone would make activities within the Water Transport Infrastructure Overlay non-notified, and would limit notification of breaches of the setback standard for water bodies to Ngā Rūnanga;
- (ii) Wayfare's proposed Tourism Zone would also expand the scope of non-notified activities to include discretionary activities. Compared to the RVZ, that would take lakeshore buildings, residential activities and buildings within the identified moderate-high and high landscape sensitivity area into the non-notified category.

166. We observe that, with the exception of greater provision for residential activities and the greater range of Water Transport Infrastructure activities anticipated in Wayfare's Walter Peak Tourism Zone, the differences between the two sets of provisions largely relate more to the scale, intensity and location of development that the Wayfare Zone anticipates and provides for, rather than the nature of that development.
167. Reflecting that, the principal concern expressed for Council was that the proposed zone fails to provide guidance on the built outcome intended or identify where buildings can appropriately be located. Mr Wakefield's legal submissions in reply in particular raised the potential for significant adverse effects and a failure to protect the landscape values of the ONL if new buildings were able to be consented under a controlled activity rule, as Wayfare proposed.
168. Ms Baker-Galloway drew support for her submissions on the adequacy of a controlled activity framework by reference to the planning framework governing the Ski Area Sub-Zones. As we observed to Ms Baker-Galloway, the Hearing Panel considering the Strategic Provisions of the PDP expressed the view that the Ski Area Sub-Zones were an anomaly, and contrary to case law regarding management of ONLs<sup>40</sup>, raising obvious questions about the extent to which it can be relied on this context<sup>41</sup>. Ms Baker-Galloway's response was to suggest that the Ski Area Sub-Zones were not the only example. She instanced the Gibbston Character Zone as providing for relatively large-scale built development. Mr Farrell provided the further example of Jacks Point as an Exception Zone.
169. We think both examples are useful. The Gibbston Character Zone provides for development that is consistent with the existing character of the floor of Gibbston Valley. The only comparable provisions in Wayfare's proposed Tourism Zone relate to built development in the near vicinity of the Beach Bay homestead area.
170. The Jacks Point Zone is also instructive. Mr Wakefield provided us with extensive information about the finalisation of the Jacks Point Zone. While it has provision for development within the ONL that the Jacks Point development area extends into, there is a very high level of definition of what development is provided for, and where. The comparison with Jacks Point emphasises, to us, the comparative lack of definition in the proposed Wayfare Tourism Zone.

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<sup>40</sup> Refer Report 3 at 1161

<sup>41</sup> Refer also the Environment Court's Decision 2.2 at [442] and [479] firstly noting the Hearing Panel's position and then apparently basing its own position on that reasoning

171. More generally, we do not find the legal submissions of Ms Baker-Galloway and the planning evidence of Mr Farrell to be persuasive in so far as they relied on the status of Walter Peak as an Exception Zone. As we understand that concept, which is close to finalisation by the Environment Court, Exception Zones do not qualify as such because they are an exception to Chapters 3 and 6, but rather because they already align with Chapters 3 and 6. Once the Zone provisions are in place, it is therefore unnecessary to refer back to the Strategic Provisions in respect of activities anticipated to occur within the Exception Zone<sup>42</sup>. The concept of an Exception Zone therefore provides little assistance when determining what zoning should apply. Either way, we need to be satisfied that the proposed zoning is consistent with Chapters 3 and 6.
172. Responding more specifically to the issues Mr Wakefield had raised, Ms Baker-Galloway referred us to case authority emphasising the scope to impose conditions controlling both the location and nature of development. Ms Baker-Galloway noted that much the same argument had been presented in the Stream 4 hearing related to Chapter 27 (Subdivision and Development) of the PDP, providing us both with the legal submissions made to that Hearing Panel and a passage from the Hearing Panel's Report. She submitted that there were important distinctions to be made between the efficacy of a controlled activity rule to ensure good subdivision design and its effectiveness in the rather different context of tourism development at Walter Peak. She submitted that in the latter case, Wayfare is incentivised to produce high quality environmental outcomes and consideration of matters of control provided in Wayfare's rule would occur against a much narrower and more focussed objective framework than is the case in Chapter 27.
173. There is some validity to Ms Baker-Galloway's observations. As already noted, Wayfare's stewardship of the site has resulted in sensitive development and improved environmental management. While Ms Baker-Galloway suggested that a successor owner would similarly be incentivised, we think that the 1986 proposal provides an example of what a different owner could come up with, suggesting the potential for quite a different tourism vision to that which Wayfare has espoused.
174. We agree also that Chapter 27 provides little policy guidance. We think, however, there are similar issues with Wayfare's proposed objective and policies. As Mr Wakefield highlights, there is little clarity as to the extent of development Wayfare actually envisages occurring, or the desired location(s) where it would occur.
175. Ms Baker-Galloway took issue with the implication in the Chapter 27 Report that the power to impose conditions could only result in a 'tweak' to the design. That description probably implies the discretion to impose conditions is more limited than the case law would support.
176. Nevertheless, we remain of the view, as set out in greater detail in Report 20.1, that the scope to impose valid conditions is an issue of scale and degree, which is materially affected in turn by the nature and scale of the application in issue. In Report 20.1, we noted a discussion we had had with counsel for Gibbston Valley Station and Malaghans Investments Limited as illustrating the point. He provided us with the hypothetical example of a condition to reduce

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<sup>42</sup> This is reinforced in the Environment Court's Minute dated 1 June 2021 that Mr Wakefield provided to us with his opening legal submissions. In that Minute, the Court noted (at [33]) the need for any amendments to the existing provisions to properly align with Chapters 3 and 6

a proposed controlled activity subdivision by one or two lots. He suggested that that was likely to be within scope if the proposal comprises a large number of lots, but outside scope if the proposal comprises a small number of lots. In other words, it is not a bright line that can be stated in the abstract<sup>43</sup>.

177. We note that the decision in *Mygind v Thames-Coromandel District Council*<sup>44</sup>, on which Ms Baker-Galloway relied, involved a 79 lot subdivision. The passage from the decision she quoted referred to the exclusion of an area of subsidence from potential development occurred between two lots. Clearly what the Environment Court was envisaging would not go to the heart of the consent, and we do not consider that it provides authority, for example, for imposition of conditions that exclude 50% of the lots sought to be consented.
178. We discussed also with Ms Baker-Galloway the potential for an applicant to circumvent the controls provided in Wayfare's proposed controlled activity rule; for instance, by defining a subset of its site within which the activities for which consent was sought would be undertaken. The argument we envisaged an applicant making, when confronted with suggestions that the activity should be moved to a location outside the defined area, was that consent could not be granted for something that had not been sought, applying the classic statement in *Darroch v Whangarei District Council*<sup>45</sup> that amendments can only be made to a proposal if they are within the scope defined by the original application. Ms Baker-Galloway submitted that the *Mygind* decision was authority for the proposition that an application cannot confine the boundaries of a development within a site. We note, however, that the application in issue in *Mygind* covered the whole site. The issue was how subdivision of the entire site might be designed, and what areas within the site the subject of application were inappropriate for development.
179. We compare *Director-General of Conservation v Marlborough District Council*<sup>46</sup> where the Environment Court found that it did not have jurisdiction to make a recommendation that the boundary of a marine farm be shifted in order to mitigate adverse effects, because that would result in the occupation of an area beyond that identified in the original application.
180. Reflecting on it further, we think a controlled activity rule could be 'gamed' in other ways. Mr Wakefield gave us the example of subdivision into a number of smaller sites followed by an application specific to one of those smaller sites in his reply submissions. More generally, we could envisage a sequential process of applications whereby development of the site proceeded incrementally, leaving no practical alternatives to proposed development in a residual area left over at the end of the sequence of applications and development.
181. Wayfare's proposed controlled activity rule was subject to more specific flaws in that it did not explicitly identify location as a matter of control that was reserved and there was no policy support for implementation of the rule through conditions requiring the location of proposed activities to be changed. We accept that these issues are readily fixed. Both Ms Baker-Galloway and Mr Farrell accepted that location needed to be added to the list of controls and

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<sup>43</sup> See Report 20.1 at 209-210

<sup>44</sup> [2010] NZ EnvC 034

<sup>45</sup> A18/93

<sup>46</sup> C123/05

Ms Baker-Galloway proposed an additional policy providing for control of the location of building to protect landscape values.

182. However, we remain concerned that a controlled activity rule would not provide sufficient control over development in areas of an ONL sensitive to such development.
183. More generally though, we consider Wayfare's proposed Zone provisions as pushing in the opposite direction to that which the Environment Court has directed in relation to the Strategic Provisions.
184. When Stage 1 of the PDP was notified, one of the significant changes from the ODP was its identification on the face of the Plan maps of where ONLs and ONFs were located in the District. Previously, some ONL and ONF boundaries had been identified in the ODP, arising from Environment Court decisions, but these were in specific locations.
185. In the first of its decisions on appeals related to the landscape provisions of the PDP<sup>47</sup>, the Environment Court considered an appeal seeking that the mapped ONL and ONF boundaries be deleted and landscape assessments left to resource consent applications. The Court specifically rejected that outcome for a number of reasons<sup>48</sup>. Further, that and the subsequent decisions of the Environment Court on PDP appeals have emphasised that mapping of ONLs and ONFs is itself insufficient and that at least where ONLs and ONFs are the subject of significant development pressure, the values of the respective ONLs and ONFs need to be identified on the face of the Plan.
186. In summary, the direction of the Strategic Provisions in relation to landscape mandated by the Environment Court is towards the Plan providing greater guidance as to the management of ONLs and ONFs, and not leaving those decisions to individual resource consent applications.
187. Mr Schofield described Wayfare's proposed Tourism Zone as having merit because it provided a "*finer-grained planning framework*" within which to assess future development proposals<sup>49</sup>. We asked him about that description and Mr Schofield clarified that what he meant was that the controlled activity rule would require that activities be subject to a case-by-case analysis.
188. We have sometimes heard of the concept of planning through resource consent decisions, but generally only pejoratively. The resource consent process may properly be described as finely-grained, but in our view, it is not a planning framework. It is also notoriously poor at managing cumulative effects when not accompanied by clear direction in a relevant Plan.
189. In Report 20.7 (at Section 9.2) we discussed the potential to utilise a structure plan type mechanism, either instead of or as well as the identification of areas of different landscape sensitivity provided for in the notified version of the RVZ. We concluded there that it was not generally appropriate to provide for a structure plan as a means to identify areas of different landscape sensitivity. However, we found it useful in the case of one new RVZ that we recommended (that for Maungawera) to supplement the landscape sensitivity mechanism.

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<sup>47</sup> *Hawthenden Limited and Others v QLDC* [2019] NZ EnvC 160

<sup>48</sup> *Ibid* at [33]

<sup>49</sup> Scofield EIC at paragraph 28



190. This case is rather different. The argument for Wayfare is that the RVZ provisions for areas of assessed high landscape sensitivity are too blunt. Mr Skelton referred to pockets of the Von Hill where development would be able to proceed with acceptable landscape outcomes. The corollary of that observation is, as we discussed with him, that there are large areas of the balance of the identified high landscape sensitivity area where development is not appropriate. It seems to us that the only way the Plan could provide adequate guidance to address such a situation is with a highly detailed structure plan identifying exactly where those ‘pockets’ are located, and the nature and scale of the development that can properly occur within them.
191. As it is, we do not have either a draft structure plan of this kind, or the evidence to support one.
192. In summary, we find Wayfare’s proposed Tourism Zone fundamentally flawed because it provides no guidance that would direct development of the site towards areas with greater landscape capacity, as that term has been defined by the Environment Court in proposed Section 3.1B.7(a), thereby increasing the likelihood that provisions seeking to protect landscape values will not be effective.
193. We also have concerns regarding the provision Wayfare proposes in its Tourism Zone for residential activity.
194. As above, the February 2021 version of Wayfare’s proposed Tourism Zone contained little or no indication as to the intensity of development proposed. This gave rise to the possibility of an urban settlement which raised, in turn, issues of potential conflict with the now settled provisions of Chapter 4 of the PDP directing that urban development is contained within defined Urban Growth Boundaries and that aside from urban development within existing towns and rural settlements, “*urban development is avoided outside of those boundaries*”<sup>50</sup>.
195. Wayfare’s position (e.g. in Ms Baker-Galloway’s further legal submissions dated 25 June 2021) was that on-site infrastructure and servicing constraints naturally limited the scale of development on the site. We accept the point in principle, but we observe also that Wayfare’s evidence did not clearly identify what those limits were. Ms Black told us that the consent recently obtained by Wayfare for on-site staff accommodation limited the number of people who could be accommodated to 50, that being the limit of current wastewater infrastructure. We do not know, however, what the theoretical limit of development on the site based on infrastructure constraints actually is.
196. Ms Baker-Galloway told us that it was obvious that any development within the site could not be of an urban nature. We might have been more ready to accept counsel’s submissions in that regard had Mr Skelton not explicitly considered the potential for “*urban type development*” in the proposed Tourism Zone to adversely affect the values of the wider ONL, concluding that development might occur in a sensitive urban form<sup>51</sup>. It was clearly not obvious to Mr Skelton that urban development was a ‘non-starter’. Similarly, although both Mr Schofield and Mr Farrell agreed that a policy precluding urban-type development was required when we discussed the matter with them, the policies suggested in the further legal

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<sup>50</sup> Policy 4.2.1.3

<sup>51</sup> Skelton at paragraphs 41-42

submissions for Wayfare dated 25 June do not actually say that. Rather, the first policy states that non-staff residential activity “*shall not compromise the Zone purpose*”. We think that that would be satisfied if tourism, including visitor accommodation, remained the principal activity. To us, that leaves ample room for significant residential development to occur.

197. The second policy talks in terms of a low average density of development of the Zone. This language is borrowed from the definition of ‘resort’ which is identified as falling outside the description of ‘urban development’ in the definition of the latter. There are other characteristics, however, of a resort that are not imported by the purpose, objective and policies of the proposed Tourism Zone, including that it is an integrated and planned development, and that residential activities are part of an overall development focused on onsite visitor activities. We observe that a low average density of development of the Zone could be achieved with intensive urban form in the 16 hectares of identified lower landscape sensitivity land. That would also address the second limb of the policy requiring that landscape values and nature conservation values be protected or enhanced.
198. We remain concerned that Wayfare’s proposed Tourism Zone permits urban development to establish, contrary to the Strategic Policy noted above.
199. The policy proposing that any residential activity protect or enhance landscape values could assist in ensuring that Strategic Policies 3.3.22 and 3.3.23 are met for a lower density of residential development appropriately categorised as “*Rural Living*”. However, when considering the appropriateness of identifying this zone for “*rural living developments*”, as required by Strategic Policy 3.3.22, we remain hindered by the lack of guidance in Wayfare’s proposed Tourism Zone that directs where and how rural living can be appropriately provided for in a way that would protect landscape values. Without greater guidance (such as through a detailed Structure Plan), those decisions would be left to individual resource consent applications which, as we have stated earlier, is not a planning framework, would not ensure appropriate management of cumulative effects on landscape values, and would not be consistent with Strategic Policy 3.3.22 which requires appropriate areas for rural living to be identified on the Plan maps.
200. The problem with lower density residential development, however, is that we heard no evidence as to the scale of further rural living development could be serviced for wastewater, drinking water etc. This of course is an issue not limited to rural living, it also applies to potential visitor accommodation, particularly if such development is identified across the site as a controlled activity. When we asked him, Mr Schofield told us that we should expect to know there is a wastewater solution in order that conditions might then be applied around the nature of that solution. We observe that Mr Schofield’s answer is consistent with Policy EIT–INF–M5 of the Proposed Regional Policy Statement, that requires district plans to ensure that development is avoided where it cannot be adequately served with infrastructure. We agree with Mr Schofield, and the evidential gap in Wayfare’s case in this regard is also a concern.
201. The combination of these considerations means that we could not recommend Wayfare’s proposed Tourism Zone as currently formulated. We had other issues with Wayfare’s proposed Tourism Zone as follows:
  - (a) While the suggested policies provide more ‘meat’, a simple “*avoid, remedy, or mitigate*” objective provides insufficient direction when the values of an ONL are in issue;

- (b) The policy providing for protection of landscape values in the context of visitor accommodation and commercial recreation to the values of the ONL “*surrounding the Zone*” is unsatisfactory. Mr Skelton agreed that there were values of the site worthy of protection. Also, the fact that Wayfare proposed a broader protection of landscape values for land use or development not anticipated in the Zone suggests an interpretation of the Exception Zone provisions of the Strategic Chapters that is contrary to our understanding of its intent, as discussed above;
- (c) We do not understand what the proposed policy enabling development associated with restoration and protection of indigenous vegetation is intended to encompass. We are concerned that it could be read to enable development that provides for restoration of indigenous vegetation as an offset, notwithstanding its potential adverse effects on landscape values. Decision 2.2 on the Strategic Provision appeals<sup>52</sup> roundly rejected suggestions that landscape values might be “traded” for biodiversity gains<sup>53</sup>;
- (d) Specific policy recognition for infrastructure services and facilities associated with and ancillary to visitor accommodation is potentially problematic, particularly in conjunction with the proposed controlled activity rule throughout the site for buildings and a 15 metre height standard for wind turbines. Wind turbines have a functional need to be located on high points where they can interact with the greatest wind speeds. Those high points, on this site, also coincide with the areas of greatest landscape sensitivity. While limited weight can be given to it at present for the reasons set out above, we also note that Policy EIT-INF-P13 of the Proposed Regional Policy Statement specifically requires all infrastructure that is not nationally or regionally significant to avoid adverse effects on the values that contribute the outstanding nature or significance of an ONL;
- (e) We heard no evidence why the Walter Peak Tourism Zone should have a general 8 metre height limit compared to 6 metres in the RVZ. We were particularly concerned by the potential for adverse effects from doubling the height standard within the Water Transport Infrastructure Overlay. We also heard no clear justification for a breaches of the standard being restricted discretionary activities, compared to non-complying in the RVZ;
- (f) Provision for an informal airport with no standards governing the number of aircraft movements is inherently unsatisfactory. Chapter 46 already provides a more relaxed standard in this regard than the Rural Zone (15 aircraft movements a week compared to 12) and we heard no evidence that a completely open-ended situation would be satisfactory, or that would enable us to fix a Walter Peak specific standard.
- (g) The general provision for activities not provided for defaulting to Full Discretionary rather than Non-Complying could potentially be justified if the objectives and policies of the proposed Tourism Zone were very clear about what is and is not provided for in the zone. We find that the opposite is the case.

202. Some of these issues could be addressed by revising Wayfare’s proposed zone provisions. We did not, however, have the evidence necessary to allow us to undertake that exercise ourselves. For all of these reasons also, we find that Wayfare’s proposed Walter Peak Tourism Zone cannot be recommended.

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<sup>52</sup> *Upper Clutha Environmental Society Inc v QLDC* [2019] NZ EnvC 205

<sup>53</sup> *Ibid* at [421]-[428]

#### 4.5 Exception Zone

203. Our conclusion that the Proposed Walter Peak Tourism Zone is not in a form that we could recommend means that the related submission seeking amendment to Chapters 3 and 6 to identify it as an “*Exception Zone*” necessarily falls away.
204. We record, however, that even if we had been satisfied as to the merits of the Proposed Zone, the submission seeking that it be identified as an Exception Zone faces a currently insuperable technical problem.
205. As discussed in Report 20.7<sup>54</sup>, the development of the Exception Zone provisions in Chapters 3 and 6 is a work in progress. As at the date of our hearing, there were no final orders, and there was accordingly nothing that we could recommend be amended. We discussed that issue with both Mr Wakefield and Ms Baker-Galloway. They agreed that any recommendations we could make in relation to Exception Zones would be conditional on the Environment Court having made final orders, directing that the PDP be amended to incorporate the Exception Zone provisions that Mr Wakefield provided to us.
206. As far as we are aware, that position has not changed since the hearing.
207. It follows that we do not recommend the amendments sought by Wayfare to Chapters 3 and 6.

#### 5. HAZARD MANAGEMENT

208. Messrs Bond and Meldrum agreed that part of the Walter Peak site is subject to a debris hazard risk. They provided evidence that debris flows down existing creek beds have occurred in the relatively recent past – in 1996, 1999 and a smaller flow in 2002. The expert witnesses also agreed that prudent hazard management would involve identification of two zones either side of the historic area of farming and tourism related development at Beach Bay (referred to as Zones A and C) where natural hazard risk was assessed at moderate to high and where buildings or structures should not be used for living purposes.
209. The experts identified the existing developed area between Zones A and C (Zone B) as being of lower risk such that management systems can appropriately address residual risk to people.
210. Both Mr Bond and Mr Meldrum relied on a 2018 Report prepared by Golder Associates. We discussed with Mr Bond the extent of an analysis Golder Associates had undertaken. He told us that he knew there had been some level of site investigations, the information on which Golder Associates had relied was well documented, and he was happy to rely on that analysis.
211. Hazard considerations prompted Mr Matthee to recommend two new Walter Peak specific policies for Chapter 46 worded as follows:

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<sup>54</sup> At Section 7

*“Ensure the ongoing management and maintenance of existing hazard mitigation measures, including management systems and evacuation plans, where new or relocated buildings within the Hazard Management Area identified on the District Plan web mapping application in the Walter Peak Rural Visitor Zone rely on those measures.*

*Avoid development for living purposes, (including visitor accommodation) in the Natural Hazard Building Restriction Areas identified on the District Plan web mapping application in the Walter Peak Rural Visitor Zone.”*

212. These were proposed to be accompanied by a new full discretionary rule for construction or relocation of buildings or structures used for living purposes within the Hazard Management Area and a new non-complying activity rule for construction or relocation of buildings or structures used for living purposes within the identified BRA.

213. The revised version of Wayfare’s proposed Tourism Zone included with Ms Baker-Galloway’s legal submissions dated 18 June included the two suggested new policies, with consequential amendments to reflect their placement in the proposed standalone Zone and made the following amendments to Mr Matthee’s proposed rules:

- Construction of or relocation of buildings or structures within the identified Hazard Management Area was proposed to be a controlled activity rather than full discretionary, with the same measures of control as for buildings elsewhere on the site;
- Construction or relocation of buildings or structures used for living purposes within the identified BRA was non-complying, as with Mr Matthee’s rule, but Wayfare’s proposed rule provided for construction or relocation of other buildings or structures on the BRA as restricted discretionary, with matters of discretion restricted to natural hazards.

214. Mr Matthee also recommended that the maps governing the site be amended. We noted some ambiguity as to exactly where the proposed zones would be located at the southern boundary of the site, but this was addressed with revised maps provided with the Council’s reply.

215. The other aspect of the Council’s reply that we need to address is the suggestion in Mr Matthee’s reply evidence that an additional policy be added, worded as follows:

*“Within the Walter Peak Rural Visitor Zone, when assessing applications for buildings, ensure that any natural hazard risk is managed, including by controlling location, scale and adopting mitigation measures where necessary, so risk from natural hazards does not exceed a tolerable level.”*

216. Mr Matthee explained that his recommendation in this regard was prompted by the Proposed Regional Policy Statement provisions related to hazard management. As already discussed, Wayfare’s view was that this additional policy was unnecessary, given the existing provisions of Chapter 28, but that if such a policy is included, it should be more specific as to the nature of the natural hazard risk requiring to be managed and should delete reference to tolerability as a standard.

217. We have a number of issues with Mr Matthee's proposed additional policy. We have already noted the agreement of counsel for both parties that the Proposed RPS can be given little weight in this process. We therefore have difficulty with the concept that it alone should prompt a new policy.
218. Secondly, the suggested policy is generally framed. Aside from the fact that we retain jurisdiction over the Walter Peak RVZ, there appears to be no reason why the Walter Peak RVZ should be singled out in this way. We might have a different view if the suggested policy had been specific to the identified higher risk hazard zones within the Walter Peak site, but that is not the case.
219. Thirdly, we think that Wayfare is correct and the policy imperatives in the suggested new policy are already contained within Chapter 28 of the PDP, the final form of which has now been settled by the Environment Court. Chapter 28 contains no rules. It is intended to provide direction at an objective and policy level across the district. Accordingly, it already applies to development on the Walter Peak site where there is discretion (or control) over natural hazard risk. That Chapter already has an objective seeking that the risk to people and the built environment posed by natural hazards is managed to a level tolerable by the community, along with guidance as to what matters should be considered in determining the tolerance to risk. To the extent that the Proposed Regional Policy Statement represents a shift from the partially operative RPS, it appears to us to be bringing regional direction more into line with what Chapter 28 already provides for, rather than striking out in a new direction.
220. In summary, we do not recommend inclusion of the additional policy contained in Mr Matthee's reply evidence.
221. As regards the balance of natural hazard provisions, there is, as above, a considerable degree of unanimity between the parties. We discussed with counsel for the Council and for Wayfare whether there was scope to add the suggested new provisions. They were agreed that there was such scope to add the provisions either in the proposed Wayfare Tourism Zone, or in the existing RVZ provisions of Chapter 46. We agree with that conclusion.
222. Further, given the clear evidence of existing natural hazard risk, we think that the further policies and consequential rules are required to manage that risk. The form of the policies is agreed, and we see no reason to differ from the parties in that regard. As above, the parties differ as to the details of some of the rules.
223. The parties agree that structures utilised for living purposes should be a non-complying activity in Zones A and C. That recommendation accords with the identified hazard risk of both experts and we agree with it.
224. Wayfare suggest a restricted discretionary rule governing structures within the identified Zones A and C that are not used for living purposes. We think that that is a sensible addition, particularly for structures located within the identified lower landscape sensitivity area that would otherwise be a controlled activity under the RVZ Rules. We consider, however, that the matters of discretion need to be extended to include the full range of issues Rule 46.4.7 provides as matters of control, and that the suggested rule be subject to any rules that would

impose a greater level of restriction on development of the site (to cover the fact that some of Zone C extends into the identified area of high landscape sensitivity).

225. The only other point in contention is whether buildings and structures within the identified Hazard Management Area, being the area of lower hazard risk, should be controlled activities or full discretionary activities.
226. We discussed the nature the hazard risk within that area with Mr Bond, and whether intolerable risk could be avoided through conditions. His answer was that it could be addressed by conditions governing the form and height of buildings and evacuation requirements.
227. We also need to take into account the fact that this is a long-standing area of built development on the site. While Wayfare's evidence was general in nature as to what additional development it might wish to undertake, the initial focus will likely be on an extension of the existing built development. We also therefore have to factor in the costs on Wayfare of a more highly regulated planning regime for that area, and whether those costs are justified by the extent of hazard risk.
228. Mr Bond's evidence clearly indicates the answer to that question is in the negative. Accordingly, we prefer the Wayfare position that buildings and structures within the identified Hazard Management Area should be controlled activities.
229. Strictly speaking, it is not necessary to insert a new rule to have that effect. Rule 46.4.7 already makes construction or relocation of buildings not provided for in other rules a controlled activity, with control *inter alia*, over natural hazards. However, we consider a specific rule would assist in highlighting the relevance of natural hazard management in this location.

## 6. PROCESS ISSUES

230. Our conclusion above is that the proposed Wayfare Tourism Zone is not in a form that we could recommend. We have also concluded above that the Operative Rural Visitor Zone is not a tenable option for the Walter Peak site. That therefore leaves the notified RVZ as the only planning option "*on the table*". Ordinarily, and in such a circumstance, confirmation of the notified provisions would follow, subject only to possible amendments on points of detail, where a case has been made out for such amendments.
231. In this case, however, Ms Baker-Galloway requested that if it was apparent to us that Wayfare's proposed Tourism Zone needed more work, we should consider issuing an interim decision, so as to give Wayfare the opportunity to work with Council on a revised set of zone provisions.
232. Ms Baker-Galloway anticipated a potential objection to that course based on the two year time limit for making decisions on the RVZ provisions the subject of this submission expiring in October of this year. She observed that that was not a significant issue. In her submission, it was just a matter of asking the Minister for additional time.

233. We asked Mr Wakefield to specifically address this request as part of his reply on behalf of the Council, advising what stance the Council took in relation to it.
234. In his reply submissions, Mr Wakefield noted a number of considerations bearing upon our response to Ms Baker-Galloway's request but ultimately advised that the Council remains neutral both in relation to the Hearing Panel issuing interim guidance, or making an application for additional time under Clause 10A of the First Schedule. Mr Wakefield, however, submitted that if we were minded to consider interim guidance along the lines Ms Baker-Galloway had suggested, such guidance should be accompanied by specific directions, including that Wayfare must, within a timeframe directed by the Panel:
- “(a) Confirm to the Panel and Council that it considers an appropriate zone framework can be developed for Walter Peak station that is in keeping with the Panel's interim guidance. This confirmation must include a substantive (albeit high level) response to the guidance, including relevant explanation where required;*
  - (b) Confirm that it will develop any new zone framework in a manner that will achieve the Strategic Directions in Chapters 3 and 6 of the PDP;*
  - (c) Commit to developing an effective zone and rule framework that responds to landscape sensitivity and characteristics across the site;*
  - (d) Confirm a date (with the Panel to confirm that it is appropriate) by which it can provide to Council: a draft structure Plan, supporting landscape assessment completed master planning for the site, updated proposed provisions and an outline of the vision for Walter Peak station.”*
235. Mr Wakefield further advised that the Council's final position on any application under Clause 10A would be linked to Wayfare's response.
236. Like the Council, we acknowledge the significant impact that Covid-19 disruptions have had on Wayfare and its operations. That factor has been one of the reasons why we agreed to deferral of hearing of Wayfare's submission so that it was not heard along with other submissions on the RVZ Zone in late July 2020, and was then deferred from the proposed April 2021 hearing date to June 2021. While we acknowledge further that Covid-19 has not gone away, and its impact on the Queenstown tourism industry generally, and Wayfare in particular, it is still very real, a delay of nearly twelve months in the hearing of a single submission on a Proposed Plan, when all other submissions have been heard and determined, and many are the subject of appeal, is extraordinary to say the least.
237. We have identified as one of the key flaws of the proposed Walter Peak Tourism Zone is its failure to clearly identify the nature and scale of development proposed across the site, in particular in areas of greater landscape sensitivity. Ms Baker-Galloway, and the representatives of Wayfare who gave evidence before us, were very open that it had not provided detailed information of that kind because it simply had not done the work to identify what it might sensibly propose, consistent with Wayfare's commercial and environmental objectives. Ms Baker-Galloway emphasised to us that formulating a structure plan is an intensive business.
238. Consistent with that position, Mr Skelton told us that he had started work on a comprehensive landscape assessment that might have fed into a detailed Structure Plan of the kind contained within the Jacks Point Zone provisions, but had stopped work on Wayfare's instructions, when



Covid-19 'hit'. We can readily understand the reasons for both that instruction, and for work not having recommenced. However, the nature of the task means that even if we gave Wayfare the opportunity, a significant period of time would likely be required to produce a Structure Plan properly addressing the landscape values of the site within the broader ONL, and then to prepare a planning framework to wrap around that Structure Plan.

239. We observe that the documentation from the resolution of the Jacks Point Zone appeals provided by Mr Wakefield indicates that a full week of planning conferencing was required to produce a revised version of those provisions that still required determination by the Court on some points of detail. We can understand Mr Wakefield seeking to get some 'buy-in' from Wayfare before the Council commits to it, but we do not think that is realistic in circumstances where the structure planning process has not even commenced. We could therefore easily foresee the process we have in mind as being required taking another 12-18 months, following which, the Hearing Panel would have to reconvene to hear any residual matters. Any final recommendation of the Hearing Panel made would then have to be considered by Council, and would still be subject to appeal.
240. Any appeal arriving in the Environment Court after such a long delay has the potential to disrupt the Environment Court's resolution of the balance of Chapter 46 (RVZ) appeals. Another reason we were prepared to countenance Wayfare's submissions being split off from the balance of Chapter 46 submissions is because we were comfortable that that kind of disruption would not be a significant issue given the number of PDP appeals awaiting determination. We do not have the same confidence if it were extended another 12-18 months.
241. It is also relevant that the Hearing Panel is not a standing Tribunal. Its non-councillor members have contracts of engagement that have a term. That term has already been extended to accommodate preparation of a recommending report arising from our June 2021 hearing. The appointments of the Hearing Panel members do not extend for the kind of time that would be required to supervise the process required from here.
242. Nor does the Hearing Panel have the tools at its disposal necessary to effectively manage such a process. To state the obvious, we are not the Environment Court.
243. Ms Baker-Galloway tells us that it would be a relatively simple task to ask the Minister for extra time to complete hearing of submissions. That may well be the case but, as Mr Wakefield observes, any extension would have a time limit. We agree with Mr Wakefield's submission that a lengthy extension of the kind that we think would be required in this case, would not be in keeping of the intent of Clause 10A. The Minister's view of a lengthy extension is also unknown.
244. In summary, we do not think it is tenable for us to make interim recommendations to be followed by a process of engagement with Council, potentially further hearing, and our writing up a second recommendatory report for Council to consider.
245. Given that our recommendation is that the PDP not be amended to establish Wayfare's proposed Tourism Zone, obviously Wayfare will have the option to appeal that recommendation (assuming it is confirmed by a Council decision). That is its right. Whether the end result is appeal and reconsideration of our recommendations by the Environment

Court, or a pause until such time as Wayfare is in a position to propose a private Plan Change for the site, we consider that the RVZ is the appropriate ‘holding’ position at this point, subject to the points we are about to discuss.

## **7. AMENDMENTS TO CHAPTER 46**

### **7.1 Identification of Landscape Capacity**

246. The way Chapter 46 identifies landscape capacity is to break the Zone down into one of three areas, being areas of moderate-high landscape sensitivity and high landscape sensitivity and areas not so identified, with a planning regime that responds to those categorisations. While Mr Skelton criticised the extent of analysis that had been undertaken to support the categorisation of areas of different landscape sensitivity on the Walter Peak site, Policy 3.3.45 directs consideration of landscape capacity, and he did not provide us with any basis on which to amend the notified maps.
247. Ms Mellsop, however, identified as part of her further review of the categorisation of the Walter Peak site the potential to expand the identified area of moderate-high landscape sensitivity, and correspondingly reduce the identified area of high landscape sensitivity. The area in question is a band extending along the southern slopes of Von Hill to the point where it meets Beach Bay.
248. Having viewed the site, we could readily understand the factors prompting Ms Mellsop to recommend a revision of the identified land sensitivity overlays. The area in question is in the lea of the hill and not readily observed from the other side of the lake. We had some concern about extending the area of moderate-high landscape sensitivity all the way to Beach Bay, given the visibility of the eastern section of the identified area to views from boats approaching Walter Peak or, potentially, from Queenstown. We asked Ms Mellsop about that possibility. She agreed that good design would be needed, and planting so that development would be difficult to see from Queenstown, but she thought that it was appropriate to include the additional area of moderate-high sensitivity adjacent to Beach Bay.
249. We had no evidence that would cause us to doubt Ms Mellsop’s expert view and given that the effect of the moderate-high landscape sensitivity notation is that built development is still a full discretionary activity, we are comfortable that her suggested amendments to the identified areas are appropriate.

### **7.2 Extending the Zone to Adjacent Reserve, Roads and Marginal Strips**

250. As above, Wayfare sought that its proposed Tourism Zone cover the adjacent Beach Bay Recreation Reserve, the public roads within the site, and the marginal strip around the lakeshore. The same considerations apply to the RVZ zoning as to the proposed Tourism Zone.
251. We were puzzled by the suggestion that the adjacent Department of Conservation Reserve should be rezoned, given that its reserve status would effectively preclude most if not all built development in any case. Mr Farrell explained that the rationale for the suggested rezoning was to enable recreational activities, in particular, to be undertaken on that land, which is effectively administered by Wayfare on behalf of the Department.
252. Mr Matthee supported the notified spatial extent of the RVZ, but we were left unclear as to the consistency of that position with the maps he produced showing the landscape sensitivity

overlay extended to the Recreation Reserve, and hazard notations also apparently shown over the Reserve.

253. Be that as it may, we think that Mr Farrell has a point. The purpose of a Recreation Reserve is to permit recreation to occur. The combination of the suggested extension of the high sensitivity landscape area, and the proposed identification of the debris hazard provides ample safeguards, over and above the provisions of the Reserves Act, to ensure satisfactory environmental outcomes.
254. While we do not know the attitude of the Department of Conservation, if it wishes, the Department can take back management of the reserve and ensure the outcomes it desires occur, irrespective of the underlying District Plan zoning.
255. Accordingly, we recommend that the RVZ be extended to include the adjacent reserve land, subject to extension of the landscape sensitivity overlay as recommended by Ms Mellsop and identification of the debris hazard, as per the map attached to Mr Matthee's reply evidence.
256. The position is less clear for the internal roading. At present, from a land use point of view, the roads are not zoned. That means that there is no constraint on the land use activities undertaken on the roadway arising from the District Plan. The constraints arise, rather, from the Council's control of the road under the Local Government Act 2002.
257. The PDP does not zone roads generally. In the light of the above, we see no reason why Walter Peak should provide an exception from that general approach.
258. Finally, the position as regards marginal strips is similarly unclear to us. They are currently zoned Rural. Ms Mellsop opposed their rezoning, but said, if they were zoned RVZ, they should be identified as having high landscape sensitivity. The latter would mean that any structures within the marginal strip would be non-complying activities under the rules of Chapter 46.
259. Mr Skelton agreed that the lake margins are natural. Section 6(a) would accordingly require the preservation of that natural character.
260. In the circumstances, we do not find the case for rezoning marginal strips around the Zone to be made out.

### 7.3 Water Transport Overlay

261. A further potential amendment to the existing RVZ that we need to consider is the extension of the area occupied by the Water Transport Infrastructure Overlay. Wayfare sought that it take up virtually the entire Beach Bay area. We discussed the potential for further development of the Beach Bay foreshore with Ms Black. It seemed to us that while Wayfare's proposed Zone refers to the potential for marina, mooring and storage facilities within the overlay area, Wayfare's current plans were much more modest, with Ms Black describing the potential for another jetty for a water taxi to accommodate more visitor accommodation on the site and a boarding facility for kayaking.
262. From Ms Black's description, the large area Wayfare has sought be identified as part of the Water Transport Infrastructure Overlay is principally prompted by the constraints the TSS Earnslaw creates, by reason of its relatively large turning circle. We have to consider the

possibility that the nature of Wayfare’s operations may change, and that the TSS Earnslaw will cease to run into Walter Peak, leaving an identified area potentially available for lakeshore development that would be significantly larger than could otherwise be justified.

- 263. We considered a more modest increase in the area of the Water Transport Infrastructure Overlay to accommodate the short term plans Ms Black identified, but Wayfare did not provide us with any evidence as to what area would be sufficient for that purpose.
- 264. Accordingly, we do not recommend an extension to the notified overlay area

#### 7.4 Provision for Trails

- 265. The final potential amendment to the existing RVZ that we need to consider is the provision for recreational trails. Wayfare’s proposed Zone included a policy to enable the ongoing development and use of trails throughout the Zone, with a permitted activity rule for the construction and use of trails. The Chapter 46 rules do not have a rule specifically relating to trails. On the face of it, Wayfare’s suggested provisions have merit, as the use of trails for outdoor recreational activity would appear to be consistent with the Purpose of the RVZ to provide *“for visitor industry activities that enable people to access and appreciate the District’s landscapes, at a small scale and low intensity”*, subject to protection of landscape values.
- 266. However, having considered this further, we do not recommend these amendments to the RVZ provisions. Chapter 46 provides for both recreational activity and commercial recreational activities as permitted activities with clear objective and policy support. We are satisfied that the development of a recreational trail would fall within the activity of *“commercial recreational activity”* being *“the provision of recreation facilities to clients for recreational purposes including the use of any building or land associated with the activity.”*. In addition, the earthworks required for the construction of trails are covered by Chapter 25 Earthworks which provide consistent direction at an objective and policy level, along with associated rules and standards for earthworks, across the district. Accordingly, we consider that additional policy direction and rules, specific to the construction and use of trails at Walter Peak, are unnecessary within the RVZ.

#### 7.5 Minor Wording/Consistency Issues

- 267. Rule 46.5.7.2 refers to “at Walter Peak”. For consistency with other areas of RVZ, that should be amended to “in the Walter Peak Rural Visitor Zone”. For the same reason, the planning maps should be annotated with “Walter Peak Rural Visitor Zone” over the zoned area

## 8. CONCLUSIONS AND RECOMMENDATIONS

- 268. For the reasons set out in our Report above, we do not recommend a stand-alone Walter Peak Tourism Zone as proposed by Wayfare.
- 269. We have considered, and rejected, the request from Wayfare that we issue an interim decision, in order to provide Wayfare with the ability to engage with Council regarding potential amendments to its proposed Walter Peak Tourism Zone in the light of the conclusions we have reached, for the reasons set out in Section 6 above.

270. It follows that we recommend the notified RVZ provisions and maps specific to Walter Peak be confirmed subject to the following amendments:
- (a) Two new policies and consequential rules to manage natural hazards on the site as per Appendix 1 to this Report, and amending the web mapping application of the site to show Hazard Zones as per the map in Appendix A to Mr Matthee’s reply evidence;
  - (b) Extend the RVZ Zone to include the adjacent Beach Bay Recreation Reserve, with the landscape sensitivity and hazard mapping over the additional zoned area shown on the map in Appendix A to Mr Matthee’s reply evidence;
  - (c) Amend the notified area of high landscape sensitivity on the web mapping application to show an additional area of moderate-high sensitivity, and a consequential reduction in the area of high landscape sensitivity as recommended in Ms Mellsop’s rebuttal evidence and shown on the map in Appendix A to Mr Matthee’s reply evidence.
  - (d) Amend Rule 46.5.7.2 to substitute “in the Walter Peak Rural Visitor Zone” for “at Walter Peak”.
  - (e) Annotate the web mapping application to insert the label “Walter Peak Rural Visitor Zone” over the area zoned.
271. Consequent on our recommendations, the italicised wording immediately following the heading to Chapter 46 (noting that Walter Peak specific provisions were not the subject of recommendation) should be deleted, and the grey shading over the relevant provisions of Chapter 46 removed.
272. To the extent that the amendments to the notified Plan provisions require evaluation under Section 32AA of the RMA, our reasons for making those recommendations are set out in our Report above.
273. We do not recommend any amendment to the Walter Peak specific provisions in Chapter 46 otherwise.



**Trevor Robinson**  
**Chair**  
**Stream 19 Hearing Panel**

**Dated:** 11 August 2021

#### **Attachments**

**Appendix 1 : Recommended Additional Amendments to Chapter 46 related to natural hazard management in the Walter Peak Rural Visitor Zone.**

## APPENDIX 1

### Amendments to Notified Chapter 46 Provisions specific to Walter Peak RVZ

Additional text shown in **bold and underlined**

Deleted text shown in ~~**bold and strikethrough**~~

Add the following Policies to 46.2 Objectives and Policies

**46.2.2.9 Ensure the ongoing management and maintenance of existing hazard mitigation measures, including management systems and evacuation plans, where new or relocated buildings within the Hazard Management Area identified on the District Plan web mapping application in the Walter Peak Rural Visitor Zone rely on those measures.**

**46.2.2.10 Avoid development for living purposes (including visitor accommodation) in the Natural Hazard Building Restriction Areas identified on the District Plan web mapping application in the Walter Peak Rural Visitor Zone.**

Amend / Add to the Rules in 46.4 Rules – Activities

46.4.7	<p>Construction of buildings</p> <p>46.4.7.1: The construction, relocation or exterior alteration of buildings (other than identified in Rules 46.4.8 to 46.4.12, <b><u>46.4.17 and 4.4.18</u></b>).</p> <p>46.4.7.2: In the Gibbston Valley Rural Visitor Zone, the construction, relocation or exterior alteration of buildings within the Developable Areas identified on the District Plan maps.</p> <p><b><u>46.4.7.3: In the Walter Peak Rural Visitor Zone, the construction or relocation of buildings or structures used for living purposes (including visitor accommodation) within an area identified on the District Plan web mapping application as a Hazard Management Area (other than identified in Rules 46.4.8 to 46.4.12).</u></b></p> <p>Control is reserved to:</p> <p>a. The compatibility of the building density, scale, design and location with landscape, cultural and heritage, and visual amenity values;</p> <p>b. Landform modification, landscaping and planting;</p>	C
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	<ul style="list-style-type: none"> <li>c. Lighting;</li> <li>d. Servicing including water supply, fire-fighting, stormwater and wastewater;</li> <li>e. Natural Hazards; and</li> <li>f. Design and layout of site access, on-site parking, manoeuvring and traffic generation.</li> </ul>	
<b><u>46.4.17</u></b>	<p><b><u>In the Walter Peak Rural Visitor Zone, the construction or relocation of buildings or structures within an area identified on the District Plan web mapping application as a Natural Hazard Building Restriction Area (NHBRA) (other than identified in Rules 46.4.11, 46.4.12 and 4.4.18)</u></b></p> <p><b><u>Discretion is restricted to:</u></b></p> <ul style="list-style-type: none"> <li>a. <b><u>The compatibility of the building density, scale, design and location with landscape, cultural and heritage, and visual amenity values;</u></b></li> <li>b. <b><u>Landform modification, landscaping and planting;</u></b></li> <li>c. <b><u>Lighting;</u></b></li> <li>d. <b><u>Servicing including water supply, fire-fighting, stormwater and wastewater;</u></b></li> <li>e. <b><u>Natural Hazards; and</u></b></li> <li>f. <b><u>Design and layout of site access, on-site parking, manoeuvring and traffic generation.</u></b></li> </ul>	<b><u>RD</u></b>
<b><u>46.4.18</u></b>	<p><b><u>In the Walter Peak Rural Visitor Zone, the construction or relocation of buildings or structures used for living purposes (including visitor accommodation) within an area identified on the District Plan web mapping application as a Natural Hazard Building Restriction Area (NHBRA).</u></b></p>	<b><u>NC</u></b>