

BEFORE THE ENVIRONMENT COURT

ENV-2010-CHC-

IN THE MATTER of the Resource Management Act  
1991

AND

IN THE MATTER of an Application under section 292 of  
the Act

**QUEENSTOWN-LAKES DISTRICT  
COUNCIL**

Applicant

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**AFFIDAVIT OF SCOTT FIGENSHOW IN SUPPORT OF APPLICATION UNDER  
SECTION 292 OF THE ACT**

**DATED 14th January 2011**

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**MACALISTER TODD PHILLIPS**

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*Handwritten initials*

I **SCOTT FIGENSHOW**, Policy Planner of Queenstown affirm:

- [1] I am employed as a senior policy analyst with Queenstown-Lakes District Council ("the Council") and empowered to make this affidavit on behalf of the Council.
- [2] The purpose of the Council making this application under Section 292 of the Resource Management Act 1991 ("the Act") is to seek an order reinstating in the District Plan assessment matters relating to the Low Density Residential Zone that were inadvertently removed while making Plan Change 10 operative in March 2010.
- [3] Plan Change 10: entitled "Improving Amenity in the High Density Residential Zone" concerned improvements to the amenity values of the High Density Residential Zone, located within the Queenstown and Wanaka urban areas. A copy of the public notice of Plan Change 10 (which was publicly notified on 12 October 2005) is annexed marked "A". Plan Change 10 amended the district plan in relation to objectives and policies, new sub-zones, changes to activity status, introduction of new rules and assessment matters, and changes to bulk, location and appearance standards.
- [4] Council publicly notified its decision on Plan Change 10 on 17 October 2007. A copy of the decision version of Plan Change 10 is annexed marked "B".
- [5] The decision was appealed by the following parties:
- [a] IHG Queenstown Limited and Carter Queenstown Limited v QLDC: ENV-2007-CHC-309
  - [b] Rabot v QLDC: ENV-2007-CHC-311 and Smith v QLDC: ENV-2007-CHC-313
  - [c] Peninsula Road Limited v QLDC: ENV-2008-CHC-322
  - [d] Kreft v QLDC: ENV-2007-CHC-317
  - [e] Highside and others v QLDC: ENV-2007-CHC-318

- [f] 595 Frankton Road Partnership v QLDC: ENV-2007-CHC-316
- [g] Goldfields Investments Limited v QLDC: ENV-2007-CHC-312
- [h] Queenstown Gold Limited & Med Centre Queenstown Limited v QLDC  
ENV-2007-CHC-315

[6] These appeals were either withdrawn or settled by consent. The last appeal, of Queenstown Gold Limited & Med Centre Queenstown Limited, was resolved by consent order issued by the Environment Court on 9 December 2009. Council adopted a resolution on 2 March 2010 to make Plan Change 10 operative on 18 March 2010.

[7] The scope of the changes made to the District Plan through Plan Change 10 included:

- [a] Amend section 4.9 Urban Growth.
- [b] Amend Section 7 Residential Areas-Issues, Objectives, Policies, Rules and assessment matters.
- [c] Amend the definitions section of the plan to include new definitions of "Unit" and "Visually Opaque Fence" and amended definitions of "Building Coverage" and "Setback".
- [d] Add new interpretative diagrams to Appendix 4.
- [e] Amend the following Subzone Maps:
  - Map 20
  - Map 21
  - Map 31
  - Map 31a
  - Map 32
  - Map 33
  - Map 34
  - Map 35
  - Map 36
  - Map 37

[8] During the course of preparation of the decision, and resolving appeals, it had not been noticed by any party that the effect of the change in relation to the writing of the Assessment Matters resulted in the removal of existing, operative Assessment Matters for the Low Density Residential Zone and Residential Arrowtown Historic Management Zone. The problem this Section 292 application seeks to address is restoration of these formerly operative assessment matters, as their removal was never intended by, and thus outside the scope of Plan Change 10.

[9] It is helpful to explain how the Residential Section 7 of the District Plan is structured. This section combines all provisions for the Low and High Density zones of the District (which in some cases are differentiated by Queenstown and Wanaka), as well as the Residential Arrowtown Historic Management Zone. This combination of zones with different desired environmental outcomes within one section has been commented on by numerous users, recommending that it be reorganised. Council has taken this issue on board, and will be addressing it through its review of this section of the district plan, which has already commenced. In hindsight, it would have been useful if Plan Change 10 had addressed this organisational problem within Section 7 by clearly stating the relevant assessment matters for the Low Density and High Density and Residential Arrowtown Historic Management zones within each of those zone provisions. Instead, the existing District Plan structure of Section 7-Residential identifies the location of assessment matters as follows:

*7.5 Low Density and High Density Residential Zone Rules*

...

*7.5.7 Resource Consent - Assessment Matters*

*The Assessment Matters which apply to the consideration of resource consents in the Low Density and High Density Residential Zones are specified in Rule 7.7*

And

*7.6 Residential Arrowtown Historic Management Zone Rules*

...

*7.6.7 Resource Consent - Assessment Matters*

*The Assessment Matters which apply to the consideration of resource consents in the Residential Arrowtown Historic Management Zone are specified in Rule 7.7.*

As the above rules state, the reader is directed to Rule 7.7 Assessment Matters for the Low Density, High Density, and Residential Arrowtown Historic Management zones. No further demarcation of assessment matters is indicated.

- [10] As the purpose and scope of Plan Change 10 related exclusively to the High Density Residential Zone, there was never intent to change or remove operative provisions of any kind (including assessment matters) that would have related to the Low Density Residential Zone or the Residential Arrowtown Historic Management Zone.
- [11] The Plan Change 10 Section 32 Report, prepared by Civic Corporation Ltd (now Lakes Environmental Limited) for the QLDC dated 16 September 2005 was publicly notified on 12 October 2005. It clearly stated the scope of the plan change in its paragraph 1.3 as follows:

*"1.3 SCOPE OF THE PLAN CHANGE*

*The proposed Plan Change is intended to bring about an improvement in the amenity values of the High Density Residential Zone.*

*This Plan Change is limited geographically to the High Density Residential Zone with the scope of the Plan Change extending to improving the amenity between lots; aimed at bettering the external amenity values of the Zone. Matters such as view shafts from public places, landscaping, streetscapes and building form are specifically included. Beyond the scope of this Plan Change are internal amenity values such as individual views, individual access to sunlight and outlook from living spaces.*

*Excluded from this Plan Change are the provisions for Car Parking, Access Widths, Residential Flats, Visitor Accommodation, Affordable Housing and Ground Level, as these are subject to separate Plan*

*Changes taking place. No consideration is given to extending or decreasing the extent of the High Density Residential Zone, or to whether the Zone is appropriately located.”*

- [12] The attached proposed amendments to ‘Section 7.7-Resource Consents Assessment Matters Residential Zones’ marked “C” was notified with the Section 32 report. It appears this is where the problem originated. For example, note that on page 131 in the Assessment Matter for ‘Setback from Roads’, there is no distinction that the added text should relate only to the High Density Residential Zone. By providing strike through of the existing ‘Setback from Roads’ text, Plan Change 10 had altered this assessment matter for the Low Density Residential Zone and Residential Arrowtown Historic Management Zone, an action that was not intended by the stated scope of the plan change.
- [13] The problem was first noticed by processing planners at Lakes Environmental Limited (the Council’s consents processing agent), shortly after Plan Change 10 provisions were made operative on 18 March 2010. Once planners had received their District Plan Updates and started reviewing consents for the Low Density Residential Zone and Residential Arrowtown Historic Management Zone with applicants, they discovered the operative assessment matters for these zones no longer appeared in the operative District Plan.
- [14] This is due to the manner in which QLDC publishes its plan changes in Volume 2 of the District Plan, which leaves Volume 1 as the fully operative District Plan (absent the effects of any plan changes). While the March 2010 updates correctly showed the newly operative text resulting from Plan Change 10, a consequential effect was the unintentional removal of the formerly operative assessment matters that should have remained in the operative plan. This occurred as the changes resulting from Plan Change 10 replaced the relevant assessment matters of the same name. What should have occurred was the placement of additional assessment matters related to the High Density Residential Zone (to reflect the intent of Plan Change 10), while making no change to the previously operative assessment matters which would continue to apply to the Low Density Residential zone and the Residential Arrowtown Historic Management Zone.

[15] The attached "Schedule of Corrections" marked "D" details the extent of the changes necessary in order to restore the operative assessment matters for the Low Density Residential Zone and the Residential Arrowtown Historic Management Zone and correct this error. The provisions in red and underlined are those which need to be added to distinguish between those which relate to the High Density Residential Zone and those which relate to the Low Density Residential Zone and Residential Arrowtown Historic Management Zone which need to be reinstated in the District Plan.

[16] Council has considered its options to correct this error:

- A Clause 20A correction. This option was not preferred as the provisions had been made operative and legal counsel had advised that the re-instatement of the low density residential assessment matters would not qualify as correction of a "minor error".
- No action at the current time, with the error to be corrected through the upcoming District Plan review. This option was not preferred as it would require consents in the Low Density Residential Zone and Residential Arrowtown Historic Management Zone to be subject to different assessment matters that do not align with the operative rules for these areas. In particular, it would subject applications to an assessment through the NZ Urban Design Protocol, which is not intended for these zones, and not supported by the rules. As this error has potential for confusion and increased costs to applicants, action ahead of the District Plan review is warranted.
- A Section 292 Application. Given that neither of the above two options was viable, legal counsel advised this avenue as the most appropriate process to correct the error particularly given that there had been no authority to delete the relevant provisions from the District Plan.

[17] Council is of the opinion that this application need not be publicly notified. Council has reached this view for the following reasons:

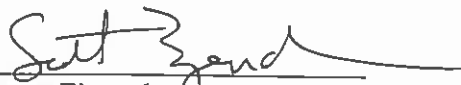
[a] The scope of Plan Change 10 never included the Low Density Residential nor the Residential Arrowtown Historic Management Zones;

- [b] The public had not anticipated any amendments to occur outside of the High Density Residential Zone, and had remained confident that none had occurred until the provisions were made operative in March 2010;
- [c] The matters of Plan Change 10 were thoroughly litigated through the plan change process, and through the mediation of all eight appeals, confirming that the scope of any changes were limited to the High Density Residential Zone;
- [d] The source of the problem has been identified as a drafting error in the headings used for assessment matters;
- [e] There is a high risk that public notification would cause confusion that Council were notifying changes to the Low Density Residential Zone and Residential Arrowtown Historic Management Zone.

[18] This last point is of great significance. In particular, the Arrowtown community has recently been through a very contentious plan change process seeking to confirm a growth boundary around the community. It would be very difficult for the Council to clearly communicate that this S292 application would restore previously operative assessment matters, as it would raise concern that they had been intentionally removed previously through some other process.

[19] The Council has also considered whether some form of limited notification would be prudent. Such limited notification would most likely be limited solely to the appellants listed above in paragraph 5. However we do not believe this to be necessary either as all appeals were for sites in the High Density Residential Zone, and the effect of this application would not compromise agreements reached on the appeals.

Affirmed at Queenstown  
 this ~~14th~~ day of January 2011  
 before me: )

  
 Scott Figenshow



**K. A. Fitzgerald**  
 Deputy Registrar  
 Queenstown District Court

A Solicitor of the High Court of New Zealand / Deputy Registrar