

Before the Hearing Panel

Under the Resource Management Act 1991 (**Act**)

In the matter of Priority Area Landscape Schedules Variation to the
Queenstown Lakes Proposed District Plan

**Legal Submissions on behalf of Passion Developments Limited (Submitter #186
'Richard Kemp')**

16 October 2023

Submitter's solicitors:

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May it please the Panel

- 1 These legal submissions are provided on behalf of Passion Development Limited (**PDL**) in relation to the variation to introduce landscape schedules 21.22 and 21.23 into Chapter 21 Rural Zone of the Queenstown Lakes Proposed District Plan (**PDP**) (**Variation**).
- 2 PDL is the entity pursuing submission #186 (lodged by Richard Kemp, planning consultant for PDL)¹, which seeks:
 - (a) Amendments to the mapping of the Western Whakatipu Basin Outstanding Natural Landscape (**ONL**) Priority Area (**PA**) (**Western Whakatipu Basin PA**);
 - (b) Consequential amendments to the ONL Boundary identified on the PDP planning maps in relation to the Site; and
 - (c) Amendments to the notified text of Landscape Schedule 21.22.12.
- 3 These legal submissions address:
 - (a) Introduction of site and surrounds;
 - (b) Relief sought and evidence;
 - (c) Scope for submissions "on" a plan variation;
 - (d) Scope for ONL, ONF, and PA overlay changes through the Variation;
 - (e) Evidence supporting an amended PA overlay and ONL classification;
 - (f) Secondary relief sought in submission.

Introduction of site and surrounds

- 4 PDL has an interest in land at Wynyard Crescent, Fernhill, legally described as Lot 1 DP 20613 and held in Record of Title 838157 (**Site**). The Site is zoned Rural Zone and included within the ONL classification, as demonstrated on Figure 1 below (from PDP planning maps):

¹Submission #186 was originally lodged under Mr Kemp's name, rather than PDL's name, because final determinations on the entity to progress the submission was not yet made, at the time of lodging submissions with Council.

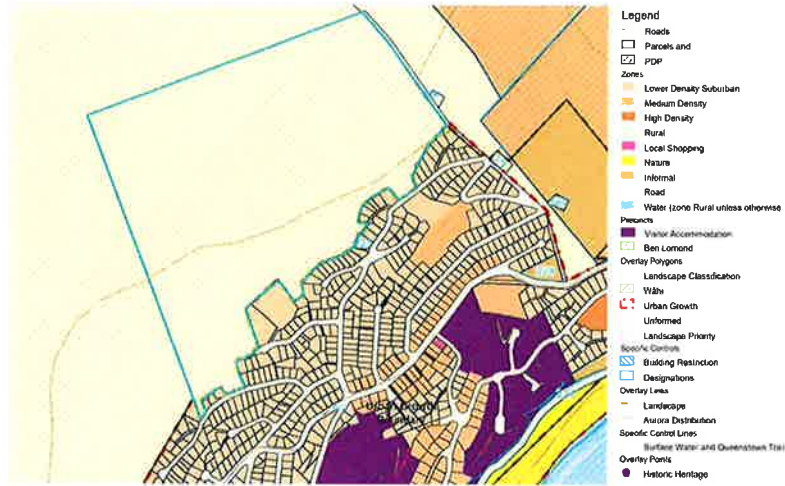


Figure 1 (Site outlined in teal)

- 5 The Site is included within the (yellow layer) of the Western Wakatipu Basin PA overlay, as demonstrated on Figure 2 below (from Council's web link embedded in its notification page for the Variation, [here](#)):



Figure 2 (Site outlined in teal)

- 6 Within the same web link, there are two spatial 'layers' available for viewing. The yellow layer is identified as the "Landscape Priority Area" and the green layer is identified as the "ONF and ONL Priority Areas". These appear in slightly different locations with respect to the Site, as demonstrated in Figure 3 below. Council's notification page does not state which layer applies for the purposes of the Variation and its notified 29 priority area

schedules across the District. The PDP mapping included in Figure 1 identifies the priority areas by pink hatching. This overlay appears to correspond to the yellow, rather than the green layer, of the Council's weblink embedded in the Variation notice.



Figure 3 (Site outlined in teal)

- 7 The Site is immediately adjacent to land zoned Lower Density Suburban Residential Zone (**LDSRZ**)². The PA boundary (according to the 'yellow layer' in Figure 3 above), ONL boundary and Urban Growth Boundary (**UGB**) currently follow the cadastral Site boundary, rather than any geographical or topographical features³. The Site is connected to three waters infrastructure, the existing road network (the Site adjoins Wynyard Crescent, Bird Place and Dart Place), and is within a five minute walk of the bus stop.⁴
- 8 The Site is identified as containing LUC Classes 6 and 7 soils on the Manaaki Whenua Landcare Research Map, meaning the National Policy Statement for Highly Productive Land does not apply, as demonstrated on Figure 4 below:

² The future urban form and density (including height) of which is proposed to benefit from more enabling provisions under the Urban Intensification Variation (**Intensification Variation**) recently notified by Council.

³ Mr Skelton's evidence at [27].

⁴ Appendix 2 to Statement of Evidence of Richard Kemp at 22.

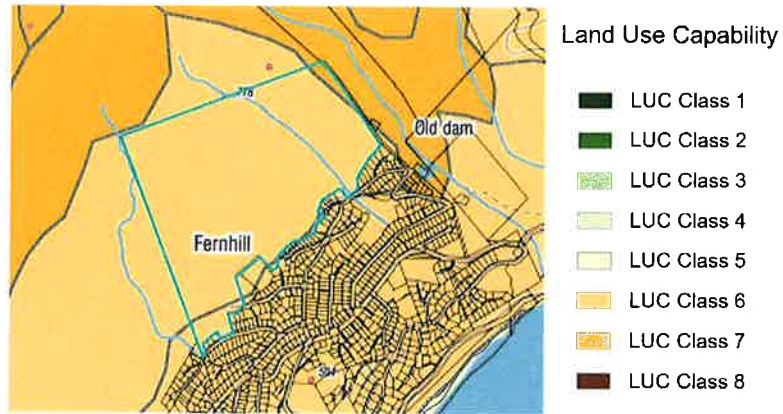


Figure 4 (Site outlined in teal)

Relief sought and evidence

- 9 The primary relief PDL seeks through these legal submissions and evidence, is that the PA overlay and ONL boundaries identified on planning maps be amended to exclude parts of the Site, and revised according to Mr Skelton's Attachment B, depicted below in Figure 5. In its submission, there is scope and jurisdiction within this Variation to make mapping adjustments. This amendment is supported by expert evidence and provides for the most logical, coherent, and defensible landscape outcomes in this instance.



Figure 5 (Site outlined in teal) – brown line indicating Mr Skelton's preferred ONL and PA Boundary line in relation to the Site.

- 10 PDL's secondary relief is to amend the text of the Landscape Schedule 21.22.12, particularly in relation to urban expansion capacity, as supported by Mr Skelton and Mr Kemp's evidence.

Scope for submission to amend mapping – general case law

Validity of notification

- 11 To be valid, public notification of a plan change must be "fair and accurate and certainly not misleading".⁵ It does not "have to be detailed".⁶ However, if Council does elect to supply additional information beyond that required under the Act, there is an obligation on it to ensure the additional information is "not materially misleading".⁷

Submitter Perceptions

- 12 In my submission, QLDC's notification of this Variation has resulted in a common public / submitter perception and understanding that the mapping of PA boundaries and ONL boundaries are indeed the subject of submissions and the Variation. If that is a misunderstanding, it is plausible that this is the result of a misleading Schedule 1 notification process.
- 13 In these circumstances, many submitters were led to believe that the PA mapping link, and in particular the PA boundaries, were able to be the subject of the submissions. In particular:
- (a) The pre-consultation information on QLDC's "Let's Talk" page included a link to the "ONF and ONL Priority Areas" map (extent indicated in green), which matches the "Topic 2 JWS Landscape Priority Area Schedules" map, being the map determined by Judge Hassan's division of the Environment Court as part of the Topic 2 PDP appeal decisions. It did not contain draft versions of the text of the schedules, potentially leading consultees to believe they were being consulted on the maps rather than the schedules.
 - (b) The subsequent formal Schedule 1 notification of the Variation included a link to mapping, with two 'spatial layers' that are not further explained. These differ in many locations including in relation to the Site, as demonstrated on Figure 6 below (and Figure 3 above).⁸

⁵ *Hodge v Christchurch City Council* [1996] NZRMA 127 (PT) citing *Ronaki Limited v No 1 Town and Country Planning Appeal Board and Others* [1977] NZLR174.

⁶ *Milne v Northland Regional Council* ENC Auckland A086/2004, 30 June 2004 at [48].

⁷ *Creswick Valley Residents Association Inc v Wellington City Council* [2012] NZHC 644 at [64].

⁸ The Shotover River ONF, Central Whakatipu Basin Coronet Area, Peninsula Hill ONF, Morven Hill ONF, Kawarau River ONF and Northern Remarkables PA overlays were also amended compared to the green ONF and ONL PA mapping.



Figure 6 (Site boundary indicated in teal) (Mapping amendments indicated in red)

- (c) These amendments could further reinforce submitters' belief that the PA overlay was able to be, and was in fact being, notified as part of the Variation, and amendable to submissions seeking amendments.
- (d) There is a potentially unfair and misleading contradiction as a result of the notification process. In particular, the accompanying Section 32 and 42A Reports state:
 - (i) Section 32 Report:⁹

This variation does not change any objectives or policies in the PDP or seek to introduce new objectives or policies. It does not change any aspect of the identification or mapping of the Priority Areas themselves, nor does it seek to introduce new Priority Areas or delete identified Priority Areas. Identification and mapping of the Priority Areas has already occurred and is already set out in Chapter 3 of the PDP and the web mapping application.

⁹ Section 32 Report at 1.6.

(ii) Section 42A Report:¹⁰

The variation has been prepared to give effect to the strategic objectives and policies in Chapter 3 of the PDP. The variation does not change any objectives, policies, rules or other provisions in the PDP. The variation does not propose to make any changes to the mapping of PAs (or the ONF/L or RCL) that has been endorsed by the Environment Court.

- (e) As demonstrated in figures 3 and 4 above, there are in fact, a number of changes that have occurred to the PA mapping¹¹, depending on which coloured spatial layer is being considered in the notified Variation web link.
- (f) At least 20 submitters that Counsel has counted, understood the PA overlay was included in the Variation and sought amendments to the Yellow Layer from the web link, which supports the public perception of the Variation as including jurisdiction over mapping amendments.¹²

Legal Status of the PA Maps

- 14 Putting aside concerns with respect to fairness and natural justice arising from the confusion above, Counsel's understanding is that the PA maps from the Court-endorsed Joint Witness Statement¹³, i.e. the Green Layer, were directed by Judge Hassan's division to be incorporated into the PDP as 'material incorporated by reference', in Interim Decisions 2.5, 2.7 and 2.12.
- 15 What is less clear is the status of the Yellow Layer. The Yellow Layer maps appear be amended versions of material to be incorporated by reference, and therefore they appear to have been notified as part of the Variation, as changing material incorporated by reference requires a plan change or variation in accordance with clause 34 Schedule 1 of the RMA.

¹⁰ Section 42A Report at 3.2.

¹¹ As compared the Court Topic 2 JWS Green Layer, the spatial layers included in informal consultation, and what is currently identified as an overlay in the PDP planning maps.

¹² The following submitters sought their land be removed from the PA overlay: #3; #16; #17; #93; #94; #95; #103; #120; #124; #134; #139; #140; #142; #145; #146; #149; #178; #181; #183; and #188.

¹³ Joint Statement Arising from Expert Planner and Landscape Conferencing in Relation to Strategic Policies and Priority Area Expert Conferencing Topic 2: Rural Landscapes, 29 October 2020.

Whether submissions seeking amendments to the boundaries are "on" the Variation

- 16 The leading authority on whether a submission is "on a plan change" is *Clearwater Resort Ltd v Christchurch City Council*.¹⁴ In this case, The High Court stated its preferred approach as:¹⁵

A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.

But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.

- 17 Judge Jackson's division of the Environment Court in *High Country Rosehip Orchards Ltd v MacKenzie District Council* articulated the first limb of the test in *Clearwater* as:¹⁶

[27] ... We respectfully think that the first point being made by William Young J can be elaborated on by observing that a plan change may be narrow or broad and/or at a high or low level. It may involve objectives, policies and methods of implementation, or only policies and/or methods (it is more difficult to change objectives and not policies and/or methods). Then the point of *Clearwater* is that it is the extent to which the variation or plan change differs from the status quo which sets the scope of the plan change. If the proposed change to the plan is minor, then any submission is similarly limited. For example, if a plan change sought only to amend a rule then a submission seeking to change a policy above that rule would not be "fairly and reasonably" on the subject of the plan change, to adopt the words of the Full Court in *Countdown Properties (Northlands) Limited v Dunedin City Council*.

[28] Mr Hardie also referred to *Avon Hotel Limited v Christchurch City Council* where the court suggested a third test, being "That the submission should not open up for relitigation aspects of the plan which have previously passed the point of challenge". On

¹⁴ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

¹⁵ *Ibid*, at [66].

¹⁶ *High Country Rosehip Orchards Ltd v MacKenzie District Council* [2011] NZEnvC 387.

reflection we consider that is probably just an aspect of Clearwater's first point.

[emphasis added]

- 18 The High Court in *Palmerston North City Council v Motor Machinists Ltd* endorsed the approach in *Clearwater Resort Ltd*.¹⁷

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. The first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

...

[91] To sum up:

(a) This judgment endorses the bipartite approach taken by William Young J in *Clearwater Christchurch City Council* in analysing whether a submission made under Schedule 1, clause 6(1) of the Act is 'on' a proposed plan change. That approach requires analysis as to whether, first, the submission addresses the change to the status quo advanced by the proposed plan change and, secondly, there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.

...

(d) The first limb of the Clearwater test requires that the submission address the alteration to the status quo entailed in the proposed plan change. The submission must reasonably be said to fall within the ambit of that plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to

¹⁷ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

be 'on' the plan change, unless the change is merely incidental or consequential.

(e) The second limb of the *Clearwater* test asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

(emphasis added)

- 19 In terms of the first limb of the *Clearwater* test (as summarised in *Motor Machinists*), it is submitted that this Variation is not a "narrow" or "minor" change to the PDP. It introduces an entirely new section of the PDP, in the form of landscape schedule text in Chapter 21 for 29 priority areas in the District, in order to implement the directives in Strategic Policies 3.3.36 – 3.3.42. The Priority Areas are subject to an additional and new step of planning assessment, against identified values and capacity. Consequently, submissions on this new management regime must be able to critique the spatial areas.
- 20 The link to the spatial layers demonstrating the Priority Areas (which if looking at the Yellow Layer / the PDP pink hatched layer) have been amended compared to the Green Layer in the Joint Witness Statement confirmed as part of the Topic 2 Court decisions. For affected landowners this represents a significant alteration to the status quo of the PDP, which in turn is relevant to the scope of the Variation capable of being submitted "on".
- 21 Submissions seeking amendments to the PA overlay and ONL boundaries are not an attempt to "re-litigate" aspects of the PDP "which have previously passed the point of challenge".¹⁸ The PA overlay boundaries are by no means "passed the point of challenge".¹⁹ This process of identifying important attributes, character and visual amenity values (**values and attributes**) and related capacity, is a core foundational question in determining whether landscapes should qualify and be categorised as outstanding within section 6b of the Act²⁰. The values and attributes

¹⁸ Per *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 at [28] citing *Avon Hotel Limited v Christchurch City Council*.

¹⁹ *Ibid.*

²⁰ *High Country Rosehip Orchards Ltd v MacKenzie District Council* [2011] NZEnvC 387, and per *Hawthenden v QLDC* at [80] (a)(ii) ..."An assessment of the landscape or feature, and its relevant values (biophysical, sensory, associative), is a necessary prerequisite to a reliable opinion on whether land at issue in an appeal should be part of an ONL or ONF or excluded from it".

assessment is the focus of the Council's s32 assessment, and as discussed in Mr Skelton's expert evidence, this Variation is the first time the values, attributes, character, and related capacity of a number of already identified ONLs and ONFs are being considered in detail, and best practice is for that assessment to inform mapped boundaries²¹. Capacity ratings "change over time"²², and it follows that a more detailed assessment undertaken as part of the Variation may also lead to a better and more defensible boundary, informed by best practice landscape assessment methodology. Assessment of values and attributes of landscapes, and consequent mapping of boundaries supported by values and attributes identification, is squarely within the ambit of the s32 report, as envisaged in the above *Clearwater* tests.

- 22 The mapping, description and justification of a landscape being identified as an ONL is an iterative process which occurs simultaneously, rather than step by step. The Council's approach to limiting scope in the Variation is not aligned with the process of identifying ONLs as outlined in the TTatM Guidelines (8.15-8.26). This is because it does not provide scope for when a later in time detailed assessment of values and attributes demonstrates that a portion of a PA / ONL does not have the important landscape attributes and values that contribute to the ONL.²³
- 23 In terms of the second *Clearwater* test, there is no risk that persons directly or potentially directly affected by the additional changes proposed in the PDL submission will be denied an effective opportunity to respond to those additional changes. Many of the Submitters understood the boundaries were subject to the Variation, and did in fact seek amendments to those boundaries. Anyone specifically interested in the ONL or PA boundary in relation to the Site could have lodged a submission or further submission as part of this process. It can hardly be said that the relief sought is a 'submissional side wind' to the Variation.

Whether the PA overlays were "notified" or "incorporated"

- 24 If Council's legal position is that the PA overlays were never formally 'notified' into the PDP, either directly, or as the Yellow Layer amended version of 'material incorporated by reference' as required by clause 31 of

²¹ Statement of Evidence of Mr Stephen Skelton, at [25].

²² Statement of Evidence of Mr Stephen Skelton at 6.

²³ Referring also to Mr Skelton's Summary statement of evidence where he concludes that a review of the attributes and values in the notified schedule against the Site support a conclusion that those are not relevant to the Site

the First Schedule RMA (and are therefore not amenable to challenge through submissions) then a number of legal issues arise:

- (a) It is unclear how the Council has had jurisdiction to make amendments between the yellow and green spatial layers above, which depart from the Court's Topic 2 directions;
 - (b) There is no record of a separate schedule 1 notification process occurring to include the Yellow Layer PA overlays into the PDP mapping as a spatial layer, or as amended material incorporated by reference, so where those differ from the Court ordered boundaries in Topic 2, landowners have had no opportunity for involvement on the regulatory change to their land.
- 25 Council's own landscape expert, Ms Bridget Gilbert appears to understand the PA overlay mapping was indeed notified as part of the Variation. Ms Gilbert refers to the "notified PA mapping" throughout her evidence and Appendix 3 is titled "Notified PA Mapping".²⁴
- 26 It is respectfully submitted that Council's position that the maps were not notified and are therefore not amenable to change through submissions on this Variation is illogical, incorrect, and not what the public reasonably would have understood or anticipated based upon the Schedule 1 public notice for the Variation.
- 27 In my submission, it is most plausible that the PA mapping has been notified through the Variation, as an amended version of the original Green Layer maps directed by the Court to be incorporated by reference in 2021, and therefore able to attract submissions on the same. And in respect of the ONFL boundaries, consequential changes to boundaries are a matter that is reasonably anticipated to be consequently amended by submissions as a result of the application of the *Clearwater* tests set out above.
- 28 Counsel filed a memorandum on behalf of various parties regarding Strategic Topic 2: Rural Landscapes Priority Areas dated 21 July 2020. The memorandum included a (non-exhaustive) list of clients with a potential interest in the identification the PAs, who were not involved in Topic 2 and submitted they should be allowed to take part through a section 293 process in respect of the identification of the same.

²⁴ Statement of Evidence of Ms Bridget Gilbert at 3.4, 3.9, 5.2 and 5.5.

- 29 Judge Hassan's division of the Environment Court responded to that memorandum in its fifth interim decision on Topic 2:²⁵

[33] On behalf of several clients who were not parties for Decision 2.2, Ms Baker-Galloway submits that the court should instigate a process to allow for their participation, at this stage, as parties. In essence, Ms Baker-Galloway submits that those clients ought to have the opportunity to present their position on whether or not their land should be included within a PA, notwithstanding that they are not parties. Ms Baker-Galloway lists her relevant clients having interests and concerns as follows:

...

[68] We respectfully observe that parties who raise jurisdictional objections would appear to have misunderstood both the intentions expressed in Decision 2.2 for the listing of PAs and the related matters of scope. As to those intentions, the listing of PAs is purely to serve the drafting of new Strategic Policies that are to apply to QLDC's subsequent Sch 1 plan change or variation processes. Those processes allow for participation by those who seek to make submissions or further submissions, and attendant appeal rights. The intended SPs seek to assist to remediate the DV-PDP's identified flaws in regard to its treatment of ONF/Ls and RCLs. As noted, that is in terms of their lack of proper identification of ONF/L values and in RCL character areas, landscape character and visual amenity values...

- 30 It is submitted that para 68 of His Honour's determinations on this PA and Landscape Schedules process anticipated that the PA maps and related text in the Schedules 21.22 and 23 would be matters that affected parties would have the right to subsequently submit on – hence he declined to notify the PAs to affected landowners using section 293 in 2021, because of his clear understanding that affected parties would be able to participate in this process, as to the effects of the nature and extent of the PA overlay and Landscape Schedule on parties' interests.

²⁵ *Upper Clutha Environmental Society v Queenstown Lakes District Council* [2020] NZEnvC 158.

Evidence supporting amended PA boundary and ONL classification

- 31 There is a concern from the submitter in this case that a detailed analysis of the southern boundary of the ONL in relation to the Site (resulting from Stage 1 of the PDP mapping process) likely never occurred, and in addition, is not a coherent and defensible landscape boundary now remaining.
- 32 Mr Skelton's expert evidence at paragraphs [24] – [27] is that it is best practice to undertake a values and attributes assessment at an appropriate scale before determining landscape boundaries, and that the PA boundary in relation to this Site could better follow landscape patterns, rather than cadastral boundaries. At para [28 -30] Mr Skelton summarises the values assessment of this site, when compared to the values of the notified schedules, concluding that a topographical boundary at the 560masl contour is a defensible boundary which would follow landform and existing patterns.
- 33 Counsel has reviewed records of the notified stage 1 PDP submissions, Independent Hearing Panel decisions, and appeals to analyse the origin of the ONL boundary in relation to the southern edge of the Site. It seems that there was no particular submission or hearing on this ONL / UGB boundary as part of the stage 1 hearings (and consequently no expert evidence, Independent Hearing Panel analysis or appeals²⁶). It is Counsel's recollection of the stage 1 PDP process, that a number of the ONLs mapped were identified by following existing zoning patterns and cadastral boundaries demarcating the edge of those, rather than necessarily based upon landscape principles. As noted in para 4.3 of Mr Kemp's evidence, the owner of this Site was not aware of, or involved in, that foundational ONL mapping of the PDP, notified some 8 years ago.
- 34 Counsel has also considered the previous series of Judge Jackson decisions identifying ONLs across the District (and those which were subsequently attached to the Operative District Plan (**ODP**)). No Court determination appears to exist in respect of the southern ONL boundary of what is now termed the western Wakatipu ONL, in relation to the Site. The ODP ONL boundary in relation to the site is identified by a dotted line, indicating it was not final and subject to further analysis.²⁷ The legend description for the dotted line in the ODP states:

²⁶ For completeness, there appear to have been four submissions relating to the mapping of the urban part of Fernhill – none of which are relevant to this Site, or more generically, the lower slopes of Ben Lomond, and no appeals.

²⁷ ODP Appendix 8A Map 1 Landscape Categorisation in the Wakatipu Basin September 2007.

These lines have not been through the Environment Court process to determine their exact location and are indicative as outlined in the Environment Court decision C180/99. These boundaries are subject to analysis of specific physical circumstances of each site and the landscape descriptions provided in the District Wide Issues (Part 4) of the District Plan. Some of these lines may have Environment Court decisions pending.

- 35 The 2014 Marion Reid landscape boundaries report, which informed the location of the PDP ONL and ONF boundaries, proposed the ONL in this location follow the boundary of the then ODP General Rural Zone:²⁸



Figure 7: Marion Reid 2014 proposed boundary

- 36 In my submission, the above leads to the conclusion that the PDP mapping of the ONL boundary in this location is not informed by landscape best practice and evidential input, the landscape values were likely never specifically assessed in terms of their section 6(b) status until now, and the PDP mapping in this instance was notified over 8 years ago, and is somewhat out of date. Judge Hassan's division of the Environment Court identified a deficiency in Council's failure to identify the landscape character and values, and associated landscape capacity, when it determined landscape boundaries as part of stage 1 of its PDP review.
- 37 Mr Skelton's evidence is that a values and attributes assessment informs conclusions as to landscape boundaries, which is consistent with

²⁸ Report to Queenstown Lakes District Council on appropriate landscape classification boundaries within the District, with particular reference to Outstanding Natural Landscapes and Features Figure 40 <<https://www.qldc.govt.nz/media/4gfeovx/68-rea-1.pdf>>

Environment Court authority²⁹ and that landscapes, and their attributes, values and capacity, "change over time".³⁰ It follows that a more detailed and up to date assessment may lead to a more defensible and credible boundary. A recent example of impending change is the urban intensification process, which will (likely) amend height and density of urban form directly adjacent to the current ONL boundary in relation to the Site. As discussed in Mr Skelton's evidence, the proximity of urban development with the ONL is part of what contributes to the recognised values of the ONL itself. If that urban form and interface changes overtime, it logically has an effect on, or could change, the ONL values.

38 As Mr Skelton summarises, these interface effects can be positive as well, and in this case, Mr Skelton supports better aligning an urban / ONL boundary according to biophysical features, such as a contour line, rather than allowing urban form to jut in and out of elevation on a hill slope³¹.

39 In my submission, the approach from Mr Skelton's evidence, and his recommended boundary adjustment for the ONL and the PA overlay is:

(a) Consistent with the leading authority in identification of section 6(b) landscapes from the Court of Appeal in *Man O'War Station Limited v Auckland Council*³²;

(b) The question of whether or not a landscape may be described as 'outstanding' necessarily involves a comparison with other landscapes. The Court also accepted that the adjective 'outstanding' is a strong one, importing the concept that the landscape in question is of special quality;³³

(c) The application of *Man o War* principles in this District was further articulated by Judge Hassan in *Hawthenden v QLDC*, including his particularisation of the agreed joint witness statement in that hearing, providing that:

We agree that ONF and ONL boundaries should be legible and coherent to the community. This is a factor against which we evaluate the expert

²⁹ *Upper Clutha Environmental Society v Queenstown Lakes District Council* [2019] NZEnvC 205 at [308] – [309] of mapping them.

³⁰ Statement of Evidence of Mr Stephen Skelton at 6.

³¹ Summary statement of Mr Stephen Skelton

³² *Man O'War Station Limited v Auckland Council* [2017] NZCA 24.

³³ *Ibid*, at [86].

evidence. Related to that, we also accept the consensus opinion in the Landscape Methodology JWS that: (i) geomorphological boundaries are a desirable first preference for determining appropriate ONL and ONF boundaries; (ii) acceptable alternative boundaries, if geomorphology does not so assist, include marked changes in land cover or use patterns (and, potentially, road corridors); and (iii) localised cut-outs from ONL or ONF boundaries, for example for developments, are not generally appropriate where evaluation demonstrates that, with the development included, the landscape or feature remains an ONL or ONF (e.g. by reason of its scale or character).³⁴

- 40 Following the *Hawthenden* approach, a first principles values assessment of landscape at an appropriate geographic scale, determines the preferred boundary of landscapes. These should be legible and coherent to the community, and as a 'desirable first preference' follow geomorphological boundaries. Accordingly, in this instance, Mr Skelton prefers a contour boundary, rather than the existing cadastral one.
- 41 Mr Skelton concludes that, the lower areas of the Site, between existing urban zoning 'cut outs' are not closely associated with those landscape values within the ONL Schedule³⁵.

Secondary relief - amendments to capacity ratings

- 42 If the Panel determines there is no scope to amend the PA overlay and / or the ONL classification through a mapping amendment, PDL seeks the Western Wakatipu Basin PA schedule be amended to recognise capacity for urban 'infill' development within the lower slopes of the Site as depicted in Mr Skelton's evidence, including by:
- (a) Adopting the recommended change removing reference to 'no landscape capacity' rating as agreed between the planning and landscape experts at the 3 October 2023 joint witness conference. PDL supports this, including on the basis that 'no landscape capacity' would effectively translate to a 'not allow' or 'avoid' regime, which seems to contradict with the 'high level' intention of the Schedules³⁶.
 - (b) Mr Skelton's preference for urban expansions is to recognise there is extremely limited to no capacity, '*except where urban development*

³⁴*Hawthenden v QLDC* [2019] NZEnvC 160, at [80b].

³⁵ Summary statement of Mr Stephen Skelton.

³⁶ Also relying on Mr Kemp's evidence in chief at 6.12 – 6.18.

will read as infill at the lower slopes of the PA adjacent too and north of Fernhill'; and

- (c) Amending the description of the values in the schedule to recognise the interface of urban development at Fernhill as contrasted with the less modified parts of the PA.
- 43 Mr Kemp's summary statement supports the urban capacity statement as proposed by Mr Skelton, and provides a planning analysis against higher order provisions of the PDP, and the NPSUD which also support the same.
- 44 In my submission, the high level and contextual nature of the landscape schedules means that in some instances, there should be capacity for urban expansions, where supported by evidence. Recognising this in the Schedule will not necessarily lead to a floodgates issue of immediate urban bleed into ONL priority areas, but rather, recognises that future zoning and planning land use changes may occur over the lifetime of the PDP, where in the future those area assessed on a detailed site or project basis and supported by necessary evidence.

Dated this 16th day of October 2023



Maree Baker-Galloway/Rosie Hill
Counsel for the Submitter