

**BEFORE THE QUEENSTOWN LAKES  
DISTRICT COUNCIL**

**IN THE MATTER** of the Resource Management Act  
1991

**AND** in the matter of the Queenstown Lakes  
Proposed District Plan

**AND** in the matter of Hearing Stream 13 –  
Queenstown Mapping

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**LEGAL SUBMISSIONS FOR NOEL ROBERTSON GUTZEWITZ  
AND JOANNE ROSALIE BOYD (#328)**

**Dated this 29th day of August 2017**

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MAY IT PLEASE THE COMMISSIONERS

### **Introduction**

- [1] These legal submissions are presented on behalf of Noel Robertson Gutzewitz and Joanne Rosalie Boyd (Submitter #328) (“Submitters”) in respect of Hearing Stream 13, Queenstown Mapping of the Queenstown Lakes District Council Proposed District Plan (“PDP”).
- [2] The Submitters are the owners of land located at Boyd Road, Queenstown (“Site”).

### **Overview**

- [3] These submissions address the following matters:
- a. an overview of the relief sought;
  - b. consideration of the areas of remaining disagreement between the Submitters and Council’s planner;
  - c. consideration of the areas of disagreement between the Submitters and Queenstown Airport Corporation (“QAC”);
  - d. an assessment of Council’s planning and rebuttal evidence;
  - e. an examination of the relevant case law in respect of “spot zoning”; and
  - f. an examination of s 6(a) matters.

**Overview of relief sought**

- [4] The Submitters seek to have the Site re-zoned from Rural to Rural Lifestyle.
- [5] Planning evidence in this Hearing Stream will be provided by Nick Geddes and has already been filed on behalf of the Submitters.
- [6] The Submitters have previously presented evidence at Hearing Stream 02 – Rural Residential and Rural Lifestyle<sup>1</sup>. The Submitters requested that the minimum lot size for the Rural Lifestyle Zone be one hectare with no two-hectare average.

**Remaining areas of disagreement between the Submitters and Council's Planner**

- [7] Council's planning expert opposes the proposed rezoning of the Site on the following grounds:
- a. the requested zoning would create a "spot zone" within large landholdings. The Site is not sufficiently unique for spot zoning to apply, and similar arguments for zoning the Site within the Rural Zone would also apply to other sites of similar size;
  - b. the trees surrounding the site are characteristic of smaller rural blocks that are often used for more intensive rural activities where wind breaks are important;
  - c. the size of the Site provides a useful option for rural activity amongst large landholdings. The Site has been used as a nursery for trees, which is the type of activity a block like this can usefully provide in the rural environment; and

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<sup>1</sup> Chapter 22  
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- d. the Kawarau River lies between the land to the North is subject to a Water Conservation Order (“WCO”) and is listed as an Outstanding Natural Feature (“ONF”) in the Otago Regional Plan – Water. The character of the river is already adversely affected by intensive urban development to the north (i.e. Remarkables Park), and re-zoning the Site would add to those adverse effects.

[8] It is important to note that Council’s landscape, transport, ecology and infrastructure experts do not oppose the proposed rezoning of the Site from Rural to Rural Lifestyle.

#### **Areas of disagreement between the Submitter and QAC**

[9] Queenstown Airport Corporation (“QAC”) lodged a further submission (#1340) in opposition to the Submitters’ original submission. Put simply, QAC is opposed to any “up-zoning” of the Site.

[10] QAC’s opposition to the proposed “up-zoning” of the Site is unreasonable, and should be discounted, on the basis that:

- a. The Site is located outside the Outer Control Boundary (“OCB”).
- b. The air noise boundaries (including the OCB) were established through Plan Change 35 (“PC35”) and QAC has not sought to revise them.
- c. Land outside the OCB is considered by Council, in principle, as being appropriate for urban development.
- d. QAC must operate within its current designation and rules for noise emissions. If increased flights lead to increased noise levels beyond those permitted by PC35, QAC will need to go through an entirely separate process to expand air noise boundaries, subject

to public consultation. It is inappropriate for QAC to use the PDP review to circumvent this process.

- e. There is no guarantee that air noise boundaries will in fact be expanded in the future, at least over the Site.
- f. Queenstown Airport is not given primacy within Chapter 3 – Strategic Direction of the PDP.
- g. It is not appropriate or necessary for the PDP to go beyond PC35, particularly where QAC is not pursuing an amendment to its OCB.

[11] I note that Council opposes QAC's position for similar reasons to those set out above.<sup>2</sup> The Submitters support the position adopted by Council in respect of QAC's further submission.

### **Council's Planning Evidence and Rebuttal**

[12] Mr Buxton's consideration of the appropriateness of the proposed re-zoning of the Site is cursory. Mr Geddes undertakes a robust assessment of the proposed re-zoning and it is my submission that his evidence should be preferred in this matter.

[13] Mr Buxton's findings are contrary to those of Council's landscape expert, Ms Read<sup>3</sup> – who takes the view that the landscape of the Site and its vicinity could absorb the level of development permitted under a Rural Lifestyle zoning. In reaching her findings, Ms Read took into account the nearby Kawarau River, the highly urbanised Remarkables Park area, and acknowledges the possibility that the mature willow trees abutting the river corridor (which contribute significantly to the amenity of the Site) could be removed. Notwithstanding these

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<sup>2</sup> Please refer to Rebuttal Evidence of Kim Banks dated 7 July 2017 (at paragraphs 4.8 to 4.15) and Legal Submissions of Sarah Scott dated 21 July 2017 (at paragraphs 12.3 to 12.5).

<sup>3</sup> Statement of Evidence of Marion Read "Landscape" dated 14 May 2017 – see Paragraphs 12.1 to 12.7 on pages 54 to 56  
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matters, Ms Read still took the view that the Site has scope for further development. In my submission, the evidence of Ms Read should be preferred.

[14] Mr Buxton considers that the Site is not sufficiently unique for a “spot zoning” to apply.<sup>4</sup> In my submission, Mr Buxton’s assessment lacks sufficient analysis.

[15] Mr Buxton notes in his s 42A Report that “...*the site has been used as a nursery for trees, which is the type of activity a block like this can usefully provide for in the rural environment...*”<sup>5</sup> The Submitters response is that use of the land for a tree nursery is uneconomic, and that use has been discontinued.

### Spot Zoning

[16] A review of the relevant case law on “spot zoning” reveals that the Courts have acknowledged that there are occasions when spot zoning is appropriate, particularly where a site has unique characteristics. A spot zoning needs to better achieve the objectives and policies of the Proposed District Plan (and ultimately the purpose of the Act) than the alternative zoning promoted by the relevant local authority.

[17] In *Mullen v Auckland City Council*<sup>6</sup> the Court observed that it has no difficulty with spot zoning in appropriate places and that there are occasions when integrated management requires a spot zoning because of a site's unique characteristics.<sup>7</sup>

[18] The Court in *Mullen* relied on the earlier Environment Court decisions of *Horrocks v Auckland City Council*<sup>8</sup> and *Kamo Veterinary Holdings*

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<sup>4</sup> Rebuttal Evidence of Robert Bruce Buxton “Queenstown Mapping – Group 2 Rural” dated 7 July 2017- see Paragraph 8.4 on Page 19

<sup>5</sup> S 42A Report / Statement of Evidence of Robert Buxton “Group 2 Rural” dated 24 May 2017 – See Paragraph 18.12 on Pages 66 and 67

<sup>6</sup>RMA5421/02 (Decision A129/2004)

<sup>7</sup> At paragraph 19

<sup>8</sup> RMA 476/95 (Decision A140/99)

*Ltd and Northland Shelf Company No 9 v Whangarei District Council.*<sup>9</sup>

[19] In *Horrocks* the Court observed at page 2:

*“... Although in terms of the RMA a system of zoning backed by rules is necessary to assist the Council to carry out its function of controlling effects by preserving the amenities which the neighbourhood seeks to protect, and thus necessary in achieving the purpose of the Act, yet it is inevitable that there will be some properties which will not fit easily within a general structure and it is necessary to examine, as we will in the course of this decision whether special treatment of such a property will challenge the integrity of the whole zone or will have but a peripheral effect...”*

[20] The Court in *Horrocks* held at page 14:

*“.... The living environment which s 5 seeks to protect is not however intended to be rigidly controlled by set zone boundary lines as was the case with previous enactments. Effects must be looked at and adjustments made where zones blend one into the other... Whilst the concept of spot zones is generally undesirable, and authorities were quoted to us in that regard, small transition zones are appropriate in resource management terms enabling as they do protection of amenities on the one hand and the reasonable use of properties on the other. Indeed an examination of this general area shows that there are many small pockets of zoning which, depending on their extent, could be described as “spot zoning”. They nevertheless have a function of recognising what is there already physically or topographically...”*

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<sup>9</sup> RMA762/01, 763/01 (Decision A161/03)  
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[21] The Court noted at pages 16 and 17 of *Kamo*:

*“[47] We should mention at this juncture a criticism of the references made on behalf of the Council, that “spot zoning” was being advocated, and that that was in some way undesirable. We do not consider that such criticism is warranted, whether in connection with a complete change of zoning, or the use of the scheduling technique.*

*[48] First, the Act does not employ the terms “spot zoning”, “specific zoning”, or anything similar. The terminology had currency in decisions made under the former Town and Country Planning Acts, but has little relevance and a regime where enquiries are substantially directed to the sustainable management of natural and physical resources and effects on the environment.”*

[22] Related to these statements of legal principle is the zone purpose of the Rural Residential and Rural Lifestyle Zone. The zone purpose is stated to be:

*“22.1 Zone Purpose<sup>10</sup>*

*The Rural Residential and Rural Lifestyle Zones provide residential living opportunities on the periphery of urban area and within specific locations amidst the Rural Zone. In both zones a minimum allotment size is necessary to maintain the character and quality of the zones, and the open space, rural and natural landscape values of the surrounding Rural Zone...” (emphasis mine)*

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<sup>10</sup> Council’s reply version  
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The essence of the Rural Residential and Rural Lifestyle Zones is that they occur at urban edges (as is the case here) and in specific places within the Rural Zone. There is nothing in the Plan provisions to support the notion of a minimum size landholding before the zone is applied to it. Objective 22.2.1 supports this, by enabling rural living opportunities in areas that can absorb development.

[23] In my submission, Mr Geddes has demonstrated that a Rural Lifestyle zoning for the Site better achieves the objectives and policies of the PDP (and ultimately the purpose of the Resource Management Act 1991) than the Rural zoning promoted by Council.

#### **Relevance of s 6(a) of the Act**

[24] Mr Buxton comments in his Rebuttal Evidence<sup>11</sup> that Mr Geddes omitted to mention in his evidence that the Kawarau River, which is near the Site, is the subject of a WCO and is listed as an ONF in the Otago Regional Plan – Water. Mr Buxton further notes that the preservation of the Kawarau River and its margins from inappropriate use, subdivision and development is a matter of national importance in accordance with s 6(a) of the Act. Mr Buxton considers that the character of the Kawarau River is already adversely affected by intensive urban development to the north (i.e. Remarkables Park), and re-zoning the Site would add to those adverse effects.

[25] In my submission:

- a. The Site is landward of the Kawarau River and its margins, meaning that no development will physically take place within the river or margins.
- b. Mr Geddes took account of the Kawarau River and its margins in reaching a decision to support the proposed re-zoning of the Site.

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<sup>11</sup> At Paragraph 8.2.  
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- c. Mr Geddes' assessment of potential effects on the Kawarau River and margins was not challenged by Council's expert landscape architect.

[26] The Environment Court considered the meaning of "margin"<sup>12</sup> (amongst other matters) in its recent decision *Save Wanaka Lakefront Reserve Incorporated v Queenstown Lakes District Council*.<sup>13</sup> The Court concluded that a margin goes slightly beyond the water's typical influence, by way of reference to physical markers such as lips, rims (or in this case, the steep escarpment which forms part of the Site).

[27] The Court thereafter took a two-pronged approach to assessing effects on natural character – "biophysical" and "perception".

[28] In the present case, there ought not be any "biophysical" effects as any development on the Site will be set back at least 10m from the riverside boundary of the Site (in accordance with rules 22.5.4 and 22.5.5), which in turn is setback 20m from the river itself. As such, there will not be any development taking place within the river margins.

[29] In terms of the assessment of "natural character perception" effects, the proposed re-zoning of the Site is to be viewed in the broader context of the area surrounding the river, including the Remarkables Park development. In my submission, Mr Geddes has demonstrated in his evidence<sup>14</sup> that the landscape of the Site and its vicinity can absorb increased development. Mr Geddes identified that:

- a. The land to the north of the site is zoned Remarkables Park Zone where built form is expected to a maximum height of 10m to 21m in height;

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<sup>12</sup> At paragraphs [153] to [170].

<sup>13</sup> [2017] NZEnvC 88

<sup>14</sup> At 5.1 to 5.3

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- b. Existing vegetation on the Site removes any visual perspective from public land; and
- c. The configuration of the existing boundary coupled with the topography of the Site enables building platforms to be located where they will not be seen above skylines or ridgelines.

### **Conclusion**

[30] In my submission, a Rural Lifestyle zoning is the most appropriate zoning for the Site on the basis that:

- a. Council's transport, ecology, infrastructure – and most importantly, landscape - experts do not oppose the proposed rezoning of the Site;
- b. the assessment of the re-zoning proposal by Council's expert planner is cursory and lacking in detail; and
- c. the Submitters' planner has undertaken a robust assessment of the proposed re-zoning, and has demonstrated that the Site possesses characteristics that make it suitable for "spot-zoning" and that a Rural Lifestyle Zone better achieves the objectives and policies of the PDP (and ultimately the purpose of the Resource Management Act 1991) than the Rural zoning promoted by Council.

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