

# **PLAN CHANGE 11 - DEFINITION OF GROUND LEVEL**

## **Section 32 Report**

Prepared by Civic Corporation Ltd.

For the Queenstown Lakes District Council  
Dated 25 May 2005.

## EXECUTIVE SUMMARY

The Queenstown-Lakes Partially Operative District Plan contains definitions that assist users of the Plan in the interpretation of words and terms used within the Plan. The definition of 'ground level' carries considerable importance as it determines the point from which the height of buildings and structures is measured. Height rules, recession plane rules and setback rules within the plan all refer to ground level in some way and therefore it is important that ground level is clearly defined.

The current ground level definition has been the subject of dispute in several instances over its history. In a recent instance the disputes culminated in a Court case in 2003 where the Court stated that:

*'Because of the clumsy wording of the definition, and its considerable importance, the District Council should as a priority propose a professionally drafted replacement decision'.*

Problems with the current definition include:

- The fact that the definition refers to 10 October 1995.
- Limited record of ground level at 1995.
- The permitted earthworks under the Plan add to the uncertainty of determining ground level.
- The above three issues mean that surveyors cannot always determine ground level at 1995.
- The requirement for survey certificates as part of developments adds to the cost of the development and is an additional monitoring issue.
- Uncertainty as to which subdivision determines ground level if there has been more than one on the same site.
- Uncertainty as to at what stage subdivision is considered complete.
- Confusion as to whether subdivision includes unit titles and boundary adjustments when determining ground level.
- Confusion as to what level of earthworks are acceptable as part of a subdivision consent. Currently earthworks carried out on subdivisions require engineering approval if they exceed permitted earthworks under the Plan.
- The Hinsen Environment Court decision interpretation is unfair for some properties in that it does not provide an exception for earthworks associated with building activity carried out prior to 1995.
- Problem cases are often ones where there are other compliance issues as well, i.e. no resource consent or non-compliance with survey conditions.

This report has been prepared to assess the effectiveness, costs and benefits various options available to the Council in replacing the definition of ground level. The assessment concludes that the most appropriate and cost effective means of replacing the definition is to stay with the same intent of the current definition but to clarify it. This includes separating the term 'ground slope' from the definition of ground level and including it in the Plan as a definition in its own right.

The proposed replacement definition is as follows:

|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | <p>Means the actual ground level at 10 October 1995 except for:</p> <ul style="list-style-type: none"> <li>• Land in respect of which a subdivision resource consent creating additional lot(s) has been granted after 10 October 1995. In such cases ground level shall mean the actual finished ground level resulting from completion of all Subdivision Works authorised by that subdivision resource consent.</li> </ul> <p>For the purpose of this definition:</p> <ul style="list-style-type: none"> <li>• Subdivision Works means all works associated with the subdivision but does not include earthworks that are not Approved Earthworks.</li> <li>• Approved Earthworks means earthworks associated with a subdivision that has both resource consent and engineering approval.</li> <li>• Subdivision Works are deemed to be completed at the time of section 224(c) certification for the subdivision.</li> <li>• Where there has been more than one subdivision resource consent granted in respect of a particular piece of land since 10 October 1995, it is the most recent subdivision that determines the ground level.</li> </ul> <p><i>(Refer to interpretative diagrams in Appendix 4)</i></p> |
| <b>GROUND SLOPE</b> | <p>Means the slope of the ground measured across the ground level(s) as defined in this Plan.</p>  |

This definition clarifies that ground level is the ground level as at 10 October 1995. The only exception to this is for land where an approved subdivision that creates additional lot(s) has been completed since that date. It provides clear direction as to when a subdivision is deemed to be complete and clarifies that it is the most recent subdivision on the land that is to be used to determine the ground level. In addition it clarifies the meaning of the different terms used within the definition, such as Subdivision Works and Approved Earthworks.

While the new definition does not alter the reference to the 1995 date it is recognised within the report that the professional judgement of surveyors is considered acceptable by compliance officers and the Courts in cases where ground level cannot be determined at that date. Leaving the 1995 date within the definition ensures that all practicable steps are carried out to find the 1995 ground level and it provides assurance over time to the community as to what developments can and cannot take place on neighbouring sites as of right.

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## 1.0 BACKGROUND

### 1.1 Introduction

This Plan Change has been initiated as a result of continuing problems experienced with the interpretation of the current definition of ground level. In a Court case in 2003 (Hinsen v The Queenstown-Lakes District Council – ref. A150/2003) the Environment Court determined that the wording of the current definition was clumsy and that the drafting of a replacement definition should be a priority.

### 1.2 Scope of the Plan Change

The Plan Change is solely concerned with the definition of ground level. This definition does affect other parts of the Partially Operative District Plan; in particular ground level is the point from which the height of buildings and structures is measured. This is used in determining compliance with relevant District Plan rules and resource consents.

The current definition is below:

|                     |   |
|---------------------|---|
| <b>GROUND LEVEL</b> | Means the actual ground level at the date of public notification of this Plan; except for land for which subdivision consent has been obtained after the notification of this Plan, for which ground level shall mean the actual finished ground level when all works associated with the subdivision of the land were completed; and excludes any excavation or fill associated with building activity. Ground slope shall mean the slope of the ground measured across the above ground level(s). |
|---------------------|---|

### 1.3 The issues

There are a number of issues with the current definition of ground level. The most obvious is the ambiguous wording of the definition allowing it to be interpreted in two different ways. Other issues identified include the fact that the definition refers to the notification date of the Plan as the date from which ground level is measured and confusion as to what the subdivision exception means and allows for.

The wording of the definition is unclear with most confusion stemming around the exception and exclusion contained within the definition. To expand on this it is useful to examine the current definition in three parts as follows

*Means the actual ground level at the date of public notification of this Plan;* [Primary definition]

*except for land for which subdivision consent has been obtained after the notification of this Plan, for which ground level shall mean the actual finished ground level when all works associated with the subdivision of the land were completed;* [Exception]

*and excludes any excavation or fill associated with building activity.* [Exclusion]

It is clear the exception relates to the primary definition however uncertainty arises in whether the exclusion relates to the primary definition or is limited to the exception. The effect of this is that in certain circumstances it is arguable for a site to have a ground level that is higher than intended or expected.

The Council's interpretation has historically been that the exclusion relates only to the exception. However, this has been confused in the past with different Council Officers reading the definition in different ways and also with the Commissioners interpretation in the Grand Lakes Development case in July 2002 where it was determined that the exclusion related to the primary definition.

The reference of actual ground level to the notification date of the District plan (10 October 1995) leads to several issues. The problems are that the Council or local surveyors have no complete record of the ground levels of the District at that date and therefore surveyors cannot always certify a ground level as being at that particular date. The permitted earthworks allowed under the Plan add to the difficulties and the further from 1995 we get, the harder it is to accurately determine ground level.

Further uncertainty arises with the exception to the definition being unclear in that it does not define what subdivision should be used for the determination of ground level if more than one subdivision has been carried out on a particular site. Nor does it state at what stage subdivision works are considered to be complete. In addition there is no limit to the amount of earthworks that can be carried out as part of the subdivision whether approved by Council or not.

These issues are expanded upon in section 4 of this report.

#### **1.4 The purpose of the Plan Change**

The purpose of the Plan Change is to provide a definition of ground level that is clear, easy to understand, and which removes the ambiguity associated with the current definition.

## 2.0 THE CONTEXT AND NECESSITY OF THE PLAN CHANGE

Section 32 of the Resource Management Act (the Act) stipulates that, in achieving the purpose of the Act, the local authority must consider alternatives and assess the benefits and costs of adopting any objective, policy, rule, or other method before adopting a plan change. Under section 32(3) the evaluation must examine:

- (a) *the extent to which each objective is the most appropriate way to achieve the purpose of this Act: and*
- (b) *whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.*

A report summarising the section 32 evaluation and giving reasons for the evaluation must be available for public inspection at the same time as public notification.

### 2.1 The Resource Management Act (1991)

Section 74 of the Act requires that proposed Plan Changes be in accordance with the Council's functions under Section 31, the provisions of Part II, its duty under Section 32 and any regulations. In addition regard must be given to the Regional Policy Statement for Otago.

Section 31 of the Act sets out the functions of territorial authorities. This Plan Change relates specifically to Council's functions under 31(a), which reads:

- (a) *The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:*

The purpose of the Act is to promote the sustainable management of natural and physical resources. Sections 5 and 7 have particular relevance to this proposed Plan Change:

Section 5 of the Act states that:

*In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while—*

...

- (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment.*

Section 7 of the Act states:

*In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—*

...

- (c) *The maintenance and enhancement of amenity values.*

...

(f) *Maintenance and enhancement of the quality of the environment:*

It is considered that the proposed Plan Change would assist in achieving the purpose of the Act. The clarification of the ground level definition will provide more certainty in interpretation and in determining compliance with height rules contained within the various sections of the Plan and resource consents. In doing so it will allow people to provide for their wellbeing while supporting the existing mechanisms in place to avoid potential adverse effects on the environment.

The clarification of the ground level definition will not change any existing rules but will strengthen the intent of the definition. Therefore the existing rules relating to building height along with the proposed Plan Change will allow people to undertake development that does not result in the erosion of amenity values or the quality of the environment.

## 2.2 Regional Policy Statement for Otago

Section 75 of the Act requires the Plan not to be inconsistent with the Regional Policy Statement (RPS) or any Regional Plan. Part 9 *'Built Environment'* of the RPS considers issues such as the quality and amenity of the built environment.

This Plan Change is consistent with the RPS as it aims to ensure certainty in the interpretation of what ground level actually is, and in doing so ensures that development does not adversely affect the quality of the built environment (including amenity values) and the use and enjoyment of natural and physical resources.

## 2.3 Partially Operative District Plan (2003)

While this Plan Change is solely concerned with altering a definition there are numerous rules and standards that could be affected by the change. These mostly deal with building height in various zones but also include recession plane rules, setback rules and several other definitions including height (in relation to buildings). For reference the definition of height is below:

|               |  |
|---------------|--|
| <b>HEIGHT</b> | <p>In relation to a building means the vertical distance between ground level at any point and the highest part of the building immediately above that point. For the purpose of calculating height in all zones, account shall be taken of parapets, but not of:</p> <ul style="list-style-type: none"><li>- aerials and/or antennas, mounting fixtures, mast caps, lightning rods or similar appendages for the purpose of telecommunications but not including dish antennae which are attached to a mast or building, provided that the maximum height normally permitted by the rules is not exceeded by more than 2.5m; and</li><li>- chimneys or finials (not exceeding 1.1m in any direction); provided that the maximum height normally permitted by the rules is not exceeded by more than 1.5m.</li></ul> |
|---------------|--|

It is through this connection of ground level to height that the definition gains considerable importance. However, as the change to the definition of ground level is for clarification purposes and the way ground level is measured has not changed there will not be any effects on these provisions except to assist in creating more certainty for the users of these provisions.

### **3.0 CONSULTATION PROCESS**

#### **3.1 Direct consultation**

With a definition such as ground level it is probable that all residents and in particular landowners of the District will be affected by any change. Developers, architects, lawyers, surveyors and planners etc, (i.e. the users of the definition), are considered to be interested persons and a useful resource to consult due to the technical nature of such a change.

In-house discussions with CivicCorp consents planners, engineers and monitoring staff have taken place with respect to the implications of maintaining or amending the current definition.

In addition to the above discussions, local surveyors, architects, planning consultants and lawyers were invited to a workshop to discuss the definition, identify issues, work through several potential options and recommend some alternative definitions. Several surveyors and lawyers attended the workshop, which was run on 27 January 2005. Throughout this process several issues were identified and potential options were discussed and professionally critiqued.

A follow up e-mail was distributed to all invited to the meeting and the planners at CivicCorp summarising the main points of the meeting and providing several alternative options drafted for further comment. No replies were received.

Council Lawyers, Macalister Todd Philips Bodkins, have reviewed the definition and their comments on the wording of the definition have been incorporated into the definition.

#### **3.2 Statutory Bodies**

Letters were sent to the following informing them of the proposal and asking for comments:

Otago Regional Council  
Ministry for the Environment  
Department of Conservation  
Kai Tahu Ki Otago  
Ngai Tahu

No comments were received.

#### **3.3 Agendas, reports and minutes**

All information presented to the Strategy Committee has been in the public domain. The agendas, reports and minutes have been made available through the QLDC website.

## **4.0 ISSUES**

### **4.1 General issues**

From the past history, discussions and consultation described above it is possible to determine that there are several issues with the definition of Ground Level. Perhaps the most obvious of these is the poor wording of the definition and the ambiguity that this causes. Other issues identified are as follows:

- The fact that the definition refers to 10 October 1995.
- Limited record of ground level at 1995.
- The permitted earthworks under the Plan add to the uncertainty of determining ground level.
- The above three issues mean that surveyors cannot always determine ground level at 1995.
- The requirement for survey certificates as part of developments adds to the cost of the development and is an additional monitoring issue.
- Ambiguity as to which subdivision determines ground level if there has been more than one on the same site.
- Ambiguity as to at what stage subdivision is considered complete.
- Confusion as to whether subdivision includes unit titles and boundary adjustments when determining ground level.
- Confusion as to what level of earthworks are acceptable as part of a subdivision consent. Currently earthworks carried out on subdivisions require engineering approval if they exceed permitted earthworks under the Plan.
- The Hinsen Environment Court decision interpretation is unfair for some properties in that it does not provide an exception for earthworks associated with building activity carried out prior to 1995.
- Problem cases are often ones where there are other compliance issues as well, i.e. no resource consent or non-compliance with survey conditions.

While the above list sets out numerous issues, they all stem back to four main points as below:

1. Ambiguous wording of the current definition
2. Referencing the definition to 1995
3. Fairness of the current interpretation of the definition
4. Compliance

### **4.2 Ambiguous Wording**

The wording of the definition is poor and unclear with most confusion stemming around the exception and exclusion as explained in section 1.3 of this report. Further uncertainty arises with no supporting definition of 'building activity'. The exception to the definition has also been identified as being unclear in that it does not define what subdivision activity should be used for the determination of ground level if more than one subdivision has been carried out on a particular site, nor does it state at what stage works within a subdivision are considered to be complete. The Hinsen decision has clarified the role of the exclusion within the definition by determining that it relates only to the subdivision exception.

The interpretation determined by the Court does appear to be the most logical interpretation to draw. Applying the exclusion to the exception provides a limit to the earthworks that can be considered as part of the subdivision. Another reason is that if the exclusion were applied to the primary definition it would mean that ground level would have to be

determined back in time to before any buildings in the District were erected. This would result in more guesswork and research than what is currently expected with the 1995 date.

In researching other District Plans it was found that the exception of subdivisions from the definition of ground level is common. However, most of these definitions state that ground level is the finished ground level of either any subdivision, or the latest subdivision. The QLDC Plan does neither, and therefore arguments can be made for any option. In speaking with CivicCorp engineers it is considered that the completion date of a subdivision is at the time of the Section 224(c) certification as this is when all conditions of the consent are signed off.

#### **4.3 1995 Reference Point**

The tying of actual ground level to the notification date of the District Plan (10 October 1995) leads to several issues. The problems are:

- That the Council or surveyors have no complete record of the ground levels of the District at that date.
- That surveyors cannot always certify a ground level as being at 10 October 1995.
- The permitted earthworks allowed under the Plan add to the difficulties, and
- The further from 1995 we get, the harder it is to accurately determine ground level.

While there is no complete record of ground levels at 10 October 1995 it is recognised that to determine the ground levels at that date, some research, best guess and interpolation may be required. This is accepted by the Council compliance officers and also by the Court as demonstrated in the Hinsen case, where the nearest survey in terms of time was some three and a half to four years later (July 1999). This survey was used as the basis for ground level.

It has been raised by surveyors and architects that the permitted earthworks under the District Plan add to the uncertainty of ground level. In residential areas for example it is permitted to carry out earthworks of up to 100m<sup>3</sup> per year. Over time this can create significant changes to the level of a property.

Another issue raised here is that it is not a requirement to submit a contour plan at the completion of a subdivision. This is a consent processing issue and conditions can be imposed to require such plans. It is considered appropriate to require surveyed contour plans for finished ground levels of completed subdivisions. It is already a requirement (section 2, PODP) that levels on the site boundaries and around buildings be submitted on resource consent application site plans and that contours be submitted if the site is over 1000m<sup>2</sup> and has a grade more of than 1 in 10. CivicCorp also requires that certification be supplied from an architect or surveyor that the ground levels shown are those as at 10 October 1995 if the proposed development is within 0.5m<sup>2</sup> of the height limit.

While there are some compelling reasons to update the 1995 reference point there are still others as to why it should be retained. One of these is that the reference point is well known by the community and has been through a thorough consultation and submission process already. To change this date may open the definition up to further appeals, which as indicated by previous experiences can take some time (years) to resolve.

To consider why people may appeal any such change it is useful to consider two neighbours; one who lives on their site and the other with an empty section. Say the person with the empty section dumps fill on their site over time. The person who lives on their site is secure in the knowledge that the future height of any building on the neighbouring site is still

calculated from the level prior to the fill being put there. However, if this date is suddenly changed or removed then height may be calculated from the ground level on top of the fill. This scenario could also occur with any landscaping, earthworks or retaining walls.

The second reason is that changing the reference point date may not achieve a great deal. It will not provide full survey records of the District, nor will it stop earthworks from occurring and as with the current date, the further into the future we get the harder it will become for surveyors to determine actual ground level at the selected date. In effect changing the date just defers the problem for the short term.

#### **4.4 Fairness of Current Interpretation**

Now that the definition has been clarified the question arises as to whether this interpretation is fair and what the community wants? An example was suggested in the surveyor workshop:

Take a pre 1995 dwelling that has an excavated basement garage in the middle of a sloping site, with original ground level around the perimeter. It would seem unfair that any new dwelling would be required to be limited to 7 metres above the garage floor. If a new dwelling that had a larger footprint were to be constructed on this site it would require a sunken portion over the area of the original garage.

While the above example is a possibility, along with numerous buildings within the CBD that have basements, this was the way the definition was interpreted prior to the Grand Lakes Development decision. The community had opportunity to comment when it was proposed with two organisations (Wakatipu Trust Ltd and Remarkables Park Ltd) doing so. It could be considered that to avoid making a definition overly complicated it would be appropriate to assess these cases through the resource consent process at the time of redevelopment. If the effects are less than minor then a consent should be a relatively simple exercise.

#### **4.5 Compliance**

It has been noted that where problems occur in relation to height it is often where someone has not taken practicable steps to comply with either a resource consent or the District Plan. As examples, in the Hinsen case the owners of a non-complying dwelling failed to apply for resource consent prior to redeveloping their property even though the requirement was stated in their PIM and building consent. Had resource consent been applied for it is likely that a survey condition would have been imposed. This would have ensured that the site was surveyed prior to work taking place and the building foundations laid in the right location and final building height was that applied for. More importantly, the effects of the proposed development would have been assessed prior to the work actually taking place.

A current example is a site on MacDonnell Road, Arrowtown, where construction has started on additions to an existing dwelling. These additions were identified by a neighbour as exceeding the height plane and raised their concerns firstly with the neighbours and then with CivicCorp. A survey was carried out that shows the dwelling to be through the maximum height limit. It appears that in this case an out of town architect did not examine the height rules in the Plan and calculated permitted height based on an average over the site rather than the rolling method that should have been used.

In addition, recently a case was raised between neighbours where it was alleged that one neighbour had changed his building during construction so that it now exceeded the height limits for the zone and that enabled by the resource consent. In this particular case there had been more than one subdivision carried out on the land and it was disputed as to what subdivision should be used to determine ground level along with what stage a subdivision

could be regarded as being completed. In the end the differences in levels between the subdivisions disputed were minimal and instead the effects of the new dwelling on the neighbour were assessed.

Other cases exist where the survey condition in granted resource consents has not been complied with and as such building foundations have been set at the wrong level or location. Non-compliance is not revealed unless a neighbour notices or when the survey certificates are required retrospectively.

Changing the definition of Ground Level will not prevent any of the above from taking place. It could however provide more clarity in the disputes after the issues are raised and perhaps result in less cost through Court hearings and mediation.

## 5.0 ASSESSMENT OF THE OPTIONS FOR ADDRESSING THE ISSUES

There are a variety of options that can be utilised to address the above problems ranging from minor changes to clarify the definition, formally allowing for interpolation in certain cases, or changing the way ground level is measured. All of these options raise their own issues, which are discussed below.

### 5.1 Take no action

This approach means removing the definition of ground level from the Plan and to provide no replacement. This option has no perceivable benefits however there would be numerous disadvantages in that widespread confusion would prevail when determining the permitted heights of buildings. This could lead to the current ground level, the natural ground level, an averaged ground level or any other ground level being used as the starting point for the measurement of height. Therefore this option is considered to be ineffective in achieving the purpose of the Act or the various policies of the Plan. It is recommended that this option be discarded.

### 5.2 Status quo

This approach involves retaining the existing definition of ground level. The direct advantage of this is that no plan change need occur therefore possibly providing a direct financial saving to the Council and community. The disadvantages of this option are that the community still has to deal with the issues explained above into the future. This may involve expense with Court action being necessary from time to time. This option is considered to be ineffective, as it has been demonstrated that there are loopholes within the definition that can be exploited which may provide a ground level that was not anticipated by affected people. Therefore it is recommended that this option be discarded.

### 5.3 Amendments to definition for clarity.

This would involve making some changes to the current definition to provide more clarity in what it actually means. This would be in line with the Hinsen decision and proposed wording may be as below:

|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | Means the actual ground level at 10 October 1995 except for: <ul style="list-style-type: none"><li>• Land for which subdivision consent has been obtained after 10 October 1995, for which ground level shall mean the actual finished ground level when all works associated with the subdivision of the land were completed. Works associated with a subdivision excludes earthworks associated with building activity.</li></ul> Ground slope shall mean the slope of the ground measured across the above ground level(s). |
|---------------------|--|

This can be taken further to clarify the subdivision exception and to provide further information to specify what subdivision determines ground level, when a subdivision is considered to be complete and the type of earthworks excluded. To add to the clarity of the definition the sub-definition of 'ground slope' has been removed and included in the Plan as its own definition.

|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | <p>Means the actual ground level at 10 October 1995 except for:</p> <ul style="list-style-type: none"> <li>• Land in respect of which a subdivision resource consent creating additional lot(s) has been granted after 10 October 1995. In such cases ground level shall mean the actual finished ground level resulting from completion of all Subdivision Works authorised by that subdivision resource consent.</li> </ul> <p>For the purpose of this definition:</p> <ul style="list-style-type: none"> <li>• Subdivision Works means all works associated with the subdivision but does not include earthworks that are not Approved Earthworks.</li> <li>• Approved Earthworks means earthworks associated with a subdivision that has both resource consent and engineering approval.</li> <li>• Subdivision Works are deemed to be completed at the time of section 224(c) certification for the subdivision.</li> <li>• Where there has been more than one subdivision resource consent granted in respect of a particular piece of land since 10 October 1995, it is the most recent subdivision that determines the ground level.</li> </ul> <p><i>(Refer to interpretative diagrams in Appendix 4)</i></p> |
|---------------------|--|

|                     |   |
|---------------------|---|
| <b>GROUND SLOPE</b> | <p>Means the slope of the ground measured across the ground level(s) as defined in this Plan.</p> |
|---------------------|---|

This definition contains several parts. The first is the primary definition, which is that ground level is defined as that at 10 October 1995. The second is the exception to this definition. The exception is clear in that it only applies to subdivisions that have resource consent granted after 10 October 1995 and where all subdivision works have been completed. It also specifies that only subdivisions that create additional lots are excluded, which has the effect of excluding boundary adjustments from the exception. It also specifies that only subdivision works authorised by the subdivision resource consent can result in a new ground level.

The next four parts are statements that provide meaning to the terms used within the definition and provide further clarification as to when a subdivision is considered to be complete and what subdivision can be used to determine ground level if more than one has taken place on the same piece of land. These provisions are limited to the ground level definition and do not apply to other definitions in the Plan.

The first of these statements gives meaning to the words ‘Subdivision Works’. This meaning is required to prevent future argument or dispute as to what such works mean. This is important as the ground level can only be altered from the 1995 level when ‘Subdivision Works’ are completed. In this case ‘Subdivision Works’ means all works associated with the subdivision including ‘Approved Earthworks’. It does not include any earthworks that are not approved.

The second statement defines ‘Approved Earthworks’. This is necessary to provide meaning and limitation to such earthworks. ‘Approved Earthworks’ are earthworks that have both a resource consent and engineering approval.

The third statement specifies that ‘Subdivision Works’ are deemed to be completed at the time of Section 224(c) certification. This means that the ground level on affected land will be the level at the date the 224(c) certificate is issued.

The final statement specifies that if there have been a number of subdivisions on the subject land, ground level will be determined by the most recently competed eligible subdivision, i.e. the most recent subdivision that creates additional lots – not a boundary adjustment. This is important as in the current definition this point has been disputed in that it was not clear as to what subdivision determined the ground level. It could have led to situations where there could be several ground levels on one piece of land.

It is important to note that the exclusion relating to earthworks associated with building activity has not been included in this definition. This means that any earthworks associated with building activities, such as the formation of building platforms, will create a new ground level if applied for and approved at the time of subdivision resource consent. This is considered appropriate as the effects of such earthworks can be assessed during the processing of the resource consent under the following provisions:

#### **15.2.7.1 Controlled Subdivision Activities - Subdivision Design**

*Except where specified as Discretionary or Non-Complying Subdivision Activities in Rules 15.2.3.3 and 15.2.3.4, any subdivision of land in any zone, which complies with all of the Site and Zone Subdivision Standards, is a Controlled Subdivision Activity, with the Council reserving control in respect of the following matters:*

...

- *The location of building platforms;*

...

- *The effect of potential development within the subdivision on views from surrounding properties;*

...

- *The scale and nature of earthworks and the disposal of excess material.*

#### **15.2.7.3 Assessment Matters for Resource Consents**

*In considering whether or not to grant consent or impose conditions in respect to subdivision design, the Council shall have regard to, but not be limited by, the following assessment matters:*

- (i) *The relationship and size of the lots in terms of their solar advantage including the alignment and layout of the lot, the location of building platform, relationship to adjoining lots.*

...

- (v) *The degree to which any likely development of the lots, taking into account the earthworks proposed for the subdivision, will adversely affect the opportunities for views from properties in the vicinity, or will result in domination of surrounding properties by buildings on the lot(s).*

- (vi) *The effects of the scale and nature of the earthworks proposed for the subdivision, the methods proposed for the disposal of excess soil or vegetation, and the need for any conditions to avoid or mitigate any adverse effects, including effects at the disposal site.*

- (vii) *The effect of subdivision on any places of heritage value including existing buildings, archaeological sites and any areas of cultural significance.*

...

Also supporting the above assessment matters, in particular, as they relate to discretionary subdivision activities, are the following Rules:

**15.2.2.8 Application of Assessment Matters**

...

(iv) *In the case of Controlled Subdivision Activities, the assessment matters shall only apply in respect to conditions that may be imposed on a consent.*

...

(vi) *Where a subdivision is a Discretionary Subdivision Activity because it does not comply with one or more of the relevant Site Subdivision standards, but is also specified as a Controlled Subdivision Activity in respect of other matter(s), the Council shall also apply the relevant assessment matters for the Controlled Subdivision Activity when considering the imposition of conditions on any consent to the Discretionary Subdivision Activity.*

Subdivisions are often controlled activities which cannot be declined even if the effects of the change in ground level from building platforms on neighbouring properties are more than minor. However, Council does have the ability to impose conditions on these developments that may prescribe a ground level or limit the height of future buildings on that platform.

Any earthworks carried out after 224(c) certification will require land-use resource consent if exceeding the permitted amounts allowed in the Plan. Such earthworks will not have any effect on the ground level set at 224(c). There may be a small number of cases where a developer decides to move a platform, create additional platforms or carry out further earthworks to that consented to, but prior to the 224(c) certification. Unless a variation is applied for these additional earthworks, so that they may be assessed, the ground level at this point/area will remain that at 10 October 1995, as the additional earthworks are not 'Approved Earthworks'. To some extent this has not changed from the current regime as such earthworks may be considered to be 'associated with building activity' and would therefore be excluded from altering ground level.

Problems with amending the definition as described above are that we are left with a definition that may not be considered fair in all cases and we are still referencing back to 1995. However, as discussed above the resource consent process can effectively deal with those proposals that do not meet the height rules. This will have a financial cost to those people in terms of resource consent fees.

The benefits of this option are that it provides a clear meaning of the words 'ground level' as utilised within the Plan. The new definition would have the same intent as the current definition and therefore most of the community is familiar with its meaning. Clarifying the definition will make it easier for people from outside the District to understand and reduce errors in its interpretation.

The 1995 date provides a line in the sand to which we refer all ground levels. The benefit of this is that it provides certainty to the community as to what developments can and cannot take place on neighbouring sites as of right. Some difficulties are encountered in determining ground level at this date in some instances. However, it is considered that the professional judgement of suitably qualified surveyors is acceptable.

Another benefit of this option is that it is less likely to attract serious opposition in the form of appeals as it is clarifying what we already have therefore leading to less cost to Council and community.

It is considered that this option would be effective in assisting to achieve the purpose of the Act with minimal cost to the community. Therefore this option is recommended.

#### 5.4 Utilise interpolation methods

This option was discussed in depth at the surveyor's workshop. The proposal would be for a definition as follows:

|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | Means the actual ground level at 10 October 1995 except for: <ol style="list-style-type: none"><li>1. Land for which subdivision consent, that creates new lots, has been obtained after 10 October 1995. In such cases ground level shall mean the actual finished ground level, as indicated on the final contour plan submitted at the time of s.224(c) certification, of the most recent subdivision completed on that land.</li><li>2. For the purposes of determining height of structures on sites where previous excavations or fill have been undertaken to such an extent that a suitably qualified surveyor cannot determine the actual ground level at 10 October 1995 then ground level may be determined by the following method:<br/>Ground level shall be established by the interpolation of original ground levels around the site boundary, or the edge of building platforms approved by resource consent in rural situations.</li></ol> |
|---------------------|--|

It was noted that the surveyors preferred this option. However this proposal has raised the potential for sites to be deliberately filled in or disturbed so that an interpolated ground level is used. It provides an 'out' from determining ground level at 1995 and the compliance staff consider that in time a surveyor's interpolation of sites may become common practice therefore providing no certainty for the community.

Costs of this option include possible uncertainty, possible legal fees through challenged resource consent decisions, and possible appeal costs to the decision to use the new definition. Benefits are that it provides an easy way for surveyors to determine ground level if need be.

It is considered that the costs of this option outweigh the benefits. The option loses effectiveness in achieving the purpose of the Act in that it would be possible for actions to be taken to prevent ground level being determined at 1995 meaning that a new level would have to be interpolated. This could lead to situations where amenity values are eroded and the quality of the environment is compromised. Therefore it is recommended that this be discarded.

#### 5.5 Total review of method for determining ground level

There are several options available under this heading, including using average ground levels, natural ground levels, and using actual ground levels at the time a development is proposed. Each of these has benefits and disadvantages.

In general there is a risk that if the method of determining ground level is changed in a comprehensive manner then there will likely be a number of submitters and possible appeals to the final decision. Through the process of mediation and negotiation the final definition may be no better than what we currently have. There is also the added risk that in implementing an entirely new system that it is misinterpreted, it is not tested, i.e. in the Court, and there is a possibility that new and unforeseen effects result.

- Average ground levels

An average slope of the site is taken as ground level. Requiring the average to be calculated on say 1-metre intervals can tighten this method. Readily identifiable deficiencies with this option are that it is likely to result in increased earthworks, especially at the higher end of sloping sites and also it will allow for buildings to be of considerable height on the lower slopes. This would lead to dwellings higher on a hill overlooking lower dwellings affecting privacy and sunlight for the lower dwelling.

Advantages may be that it is relatively simple to measure and it does away with the minor peaks and depressions that are inherently on most sites.

- Natural ground levels.

This option references ground level back to the natural ground level that existed prior to any earthworks, building or other activities. This can provide a sense of security for homeowners, as they know that any earthworks carried out on sites do not affect the possible heights of buildings constructed at a later date. However, there are problems with determining the natural ground level on many sites and this could lead to more problems than the 1995 reference point due to the lack of information kept in past records.

It is likely that this option would not solve any of the current problems associated with the current definition except the interpretation issue.

- Actual ground level at time development is proposed.

This means that ground level is the current ground level at the time a development is proposed. This type of definition is used by the Wellington City Council and does have some very good points. The main one being that because it uses the current ground level as much as possible it does away with researching historical records and guesswork to determine the ground level. It is also a level that people can see. The definition can be refined further to provide exceptions for cases where a basement or garage of an existing development is set into the ground. Earthworks that result in fill on a site are taken into account through the use of recession planes on all sites.

To utilise recession planes on all sites in the Queenstown-Lakes District means that the Plan Change would require an expansion of this project to encompass the height and recession plane rules and definitions. These rules are a suite of provisions related to each other and changing one in any major way will most likely result in necessary changes to the others.

The costs of doing this would be in the extra assessments required to produce a suite of rules that are interrelated and research into the finer details. The problem of recession planes on steep sites (especially south facing) also needs addressing. As above there is the risk of appeals and testing of the definition through the Courts.

Overall it is considered that the widening of this Plan Change to involve a total review of the method of determining ground level is unnecessary. The extra costs of completing the required assessments, review of related rules and associated appeals would likely outweigh the benefits that could be achieved over and above a clarification of the current definition. Therefore this option should be discarded.

## 6.0 CONCLUSION

From the discussion above it is considered that the best option available to the Council is to carry out amendments to the current definition of ground level and implement some processing changes, i.e. request contour plans for subdivisions and more enforcement of survey conditions.

It is proposed that the new definition would be as follows:

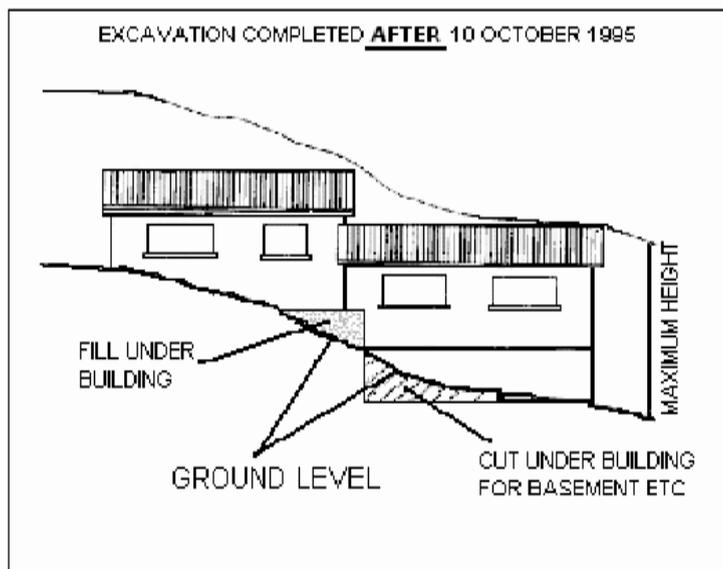
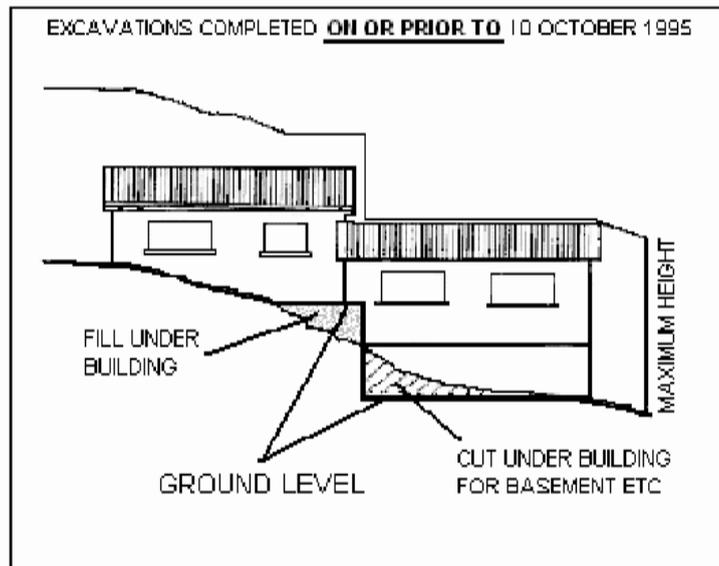
|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | <p>Means the actual ground level at 10 October 1995 except for:</p> <ul style="list-style-type: none"> <li>• Land in respect of which a subdivision resource consent creating additional lot(s) has been granted after 10 October 1995. In such cases ground level shall mean the actual finished ground level resulting from completion of all Subdivision Works authorised by that subdivision resource consent.</li> </ul> <p>For the purpose of this definition:</p> <ul style="list-style-type: none"> <li>• Subdivision Works means all works associated with the subdivision but does not include earthworks that are not Approved Earthworks.</li> <li>• Approved Earthworks means earthworks associated with a subdivision that has both resource consent and engineering approval.</li> <li>• Subdivision Works are deemed to be completed at the time of section 224(c) certification for the subdivision.</li> <li>• Where there has been more than one subdivision resource consent granted in respect of a particular piece of land since 10 October 1995, it is the most recent subdivision that determines the ground level.</li> </ul> <p><i>(Refer to interpretative diagrams in Appendix 4)</i></p> |
|---------------------|--|

|                     |  |
|---------------------|--|
| <b>GROUND SLOPE</b> | Means the slope of the ground measured across the ground level(s) as defined in this Plan. |
|---------------------|--|

This definition clarifies that ground level is the ground level as at 10 October 1995. The only exception to this is for land where an approved subdivision that creates additional lots has been completed since that date. It provides clear direction as to when a subdivision is deemed to be complete and clarifies that it is the most recent subdivision on the land that is to be used to determine the ground level. In addition it clarifies the meaning of the different terms used within the definition, such as Subdivision Works and Approved Earthworks.

To add to the clarification, the ground slope part of the definition has been removed and provided for separately. In addition two interpretative diagrams have been included into Appendix 4 of the Plan to assist users of the definition in their interpretation of the differences in measuring ground level before and after 10 October 1995. The diagrams included are below:

SECTION 32 REPORT FOR PROPOSED PLAN CHANGE 11 TO QUEENSTOWN-LAKES DISTRICT PARTIALLY OPERATIVE DISTRICT PLAN REGARDING THE DEFINITION OF GROUND LEVEL



## PLAN CHANGE

The Plan Change consists of exchanging the current definition of ground level with the proposed definition of ground level as below and including two diagrams into Appendix 4 of the Plan:

### Definitions.

Current definition of Ground Level:

|                     |   |
|---------------------|---|
| <b>GROUND LEVEL</b> | Means the actual ground level at the date of public notification of this Plan; except for land for which subdivision consent has been obtained after the notification of this Plan, for which ground level shall mean the actual finished ground level when all works associated with the subdivision of the land were completed; and excludes any excavation or fill associated with building activity. Ground slope shall mean the slope of the ground measured across the above ground level(s). |
|---------------------|---|

Proposed definition of Ground Level:

|                     |  |
|---------------------|--|
| <b>GROUND LEVEL</b> | <p>Means the actual ground level at 10 October 1995 except for:</p> <ul style="list-style-type: none"> <li>• Land in respect of which a subdivision resource consent creating additional lot(s) has been granted after 10 October 1995. In such cases ground level shall mean the actual finished ground level resulting from completion of all Subdivision Works authorised by that subdivision resource consent.</li> </ul> <p>For the purpose of this definition:</p> <ul style="list-style-type: none"> <li>• Subdivision Works means all works associated with the subdivision but does not include earthworks that are not Approved Earthworks.</li> <li>• Approved Earthworks means earthworks associated with a subdivision that has both resource consent and engineering approval.</li> <li>• Subdivision Works are deemed to be completed at the time of section 224(c) certification for the subdivision.</li> <li>• Where there has been more than one subdivision resource consent granted in respect of a particular piece of land since 10 October 1995, it is the most recent subdivision that determines the ground level.</li> </ul> <p><i>(Refer to interpretative diagrams in Appendix 4)</i></p> |
|---------------------|--|

|                     |  |
|---------------------|--|
| <b>GROUND SLOPE</b> | Means the slope of the ground measured across the ground level(s) as defined in this Plan. |
|---------------------|--|

**Appendix 4: Interpretative Diagrams.**

8. Ground Level

