

**BEFORE THE QUEENSTOWN LAKES
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

SYNOPSIS LEGAL SUBMISSIONS FOR:

Skyline Enterprises Limited (#574)
Totally Tourism Limited (#571)
Barnhill Corporate Trustee Limited & DE, ME Bunn & LA Green (#626)
Alexander Kenneth and Robert Barry Robins & Robins Farm Limited (#594)
Slopehill Joint Venture (#537)

Hearing Stream 1 (Chapter 3- Strategic Direction, chapter 4- Urban
Development, Chapter 6- Landscapes)
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1. Introduction

1.1 These submissions address Chapter 3 and 6 provisions of the Proposed District Plan ("**PDP**") and the relief sought within submissions from the following entities (each having more site specific interests):

- (a) Skyline Enterprises Limited (#574)
- (b) Totally Tourism Limited (#571)
- (c) Barnhill Corporate Trustee Limited & DE, ME Bunn & LA Green (#626)
- (d) Alexander Kenneth and Robert Barry Robins & Robins Farm Limited (#594)
- (e) Slopehill Joint Venture (#537)

1.2 I am aware that the statutory framework for preparation and consideration of a proposed district plan and applicable legal principles have been well traversed in legal submission during the course of this hearing stream. Accordingly, I have not repeated the framework and principles in these submissions.

2. Summary

2.1 I am also aware that many submissions have been received and heard by the Panel on the same or similar issues to those which are raised in these submissions. Accordingly, it is my intention to provide a summary of those key issues insofar as they relate to the clients represented in these submissions, and to bring to the attention of the Panel some additional matters:

- (a) The proposed planning regime is overly and unjustifiably restrictive, particularly within the landscapes categories, and given the manner in which use of absolute and unqualified provisions are likely to be interpreted in light of the Supreme Court decision in *Environmental Defence Society Inc v The NZ King Salmon Company Ltd*¹.

¹ *Environmental Defence Society Inc v The NZ King Salmon Company Ltd* [2014] NZSC 38

- (b) Amendments to the proposed planning regime are necessary to achieve the purpose and principles of the Act, including amendments to the provisions so as to achieve the most efficient and effective use of resources². Section 7(b) is relevant in assessing the efficiency of plan provisions under the Act as considered by the Environment Court in *Marlborough Ridge Ltd v Marlborough District Council*.³
- (c) The proposed planning regime provides an unbalanced and unjustified approach to rural activities occurring in the Rural Zone. Some amendments have been made since notification to remedy that approach however further amendments are required to show that regard has been had to all of the factors residing in section 7 of the Act.

3. **'King Salmon' and the provisions requiring protection of ONFLs**

- 3.1 I am aware that many submitters have already put to the Panel considerations relevant post the Supreme Court's determinations in *King Salmon*.
- 3.2 Chapters 3 and 6 provide for a higher level of protection for Outstanding Natural Features and Landscapes ("**ONFLs**"). A key matter brought to the attention of the Panel is that provisions within these chapters have not been adequately justified in Council's section 32 analysis in accordance with the sustainable management purpose of the Act.
- 3.3 The Supreme Court in *King Salmon* specifically stated that section 6 does not give "primacy" to preservation or protection however;

*"...provision must be made for preservation and protection as part of the concept of sustainable management"*⁴.

And that sections 6(a) and (b);

"...make it clear that those implementing the RMA must take steps to implement that protective element of sustainable management".

² When considering *Under s35(2A) local authorities are required to prepare a report at least every five years on the results of their monitoring under s35(2)(b) for policy and plan efficiency and effectiveness*

³ *Marlborough Ridge Ltd v Marlborough District Council*. [1998] NZRMA 73 (ENVC)

⁴ *King Salmon*, above n 3, at para 149

- 3.4 It therefore follows that in the determination of planning provisions, whilst there is a requirement to recognise and provide for the protection of ONFLs from inappropriate subdivision, use, and development; that is one subset of the overarching purpose of sustainable management, which by its nature is enabling.
- 3.5 Importantly, those sections in Part 2 of the Act that provide for sustainable management have remained unchanged since 2005, and are not proposed to be changed in light of the *King Salmon* judgment⁵.
- 3.6 These avoidance type policies within the strategic directions and landscapes chapters at present, such as Objective 3.2.5.1, policy 6.3.1.3, and policy suite 6.3.2 will make any future development proposals or amendments to existing development within ONFLs near impossible; even where the effects of such development may be able to be appropriately managed.
- 3.7 Many tourism operations within the District, such as that of Skyline Enterprises rely heavily on the District's ONFLs as a core part of their attraction. The Skyline Gondola and restaurant provide increased public access and economic benefits to the community. In my submission, those benefits could not be achieved under the proposed protective regime within ONFLs. The Skyline operations in themselves give character and importance to those features and landscapes, and do not necessarily detract from their 'naturalness'. The District Plan should provide an enabling framework so that appropriate development opportunities can be considered on a case by case basis in light of the effects of each particular development.
- 3.8 Moreover, a landscape is not restricted to the purely visual, but may comprise and encompass the ways in which individuals and communities perceive the natural and physical resources. The "WESI"⁶ line of cases in this District (which the Panel has already considered in the course of this hearing) significantly assisted in establishing the criteria for identification of ONFLs. Those cases, together with later case law, have resulted in a significant body of jurisprudence for determining what landscapes fall within section 6(b) of the Act.

⁵ See for example, policy documents in support of the Resource Legislation Amendment Bill 2015 which do not provide for an amendment to Part 2 other than to recognise the occurrence of natural hazards

⁶ *Wakatipu Environmental Society Inc v Queenstown Lakes DC* [2000] NZRMA 59

3.9 Once those classifications have been made, then appropriate provisions should be implemented in a planning instrument to recognise and provide for those features/ landscapes.

3.10 That ordering is vital, and was discussed by the High Court in the recent *Man o War* litigation in which the High Court states that

*"Thus, the identification of ONLs drives the policies"*⁷

3.11 It is submitted that that ordering as not been complied within this PDP Review. The restrictive provisions relating to ONFLs do not appear to be justified with reference to those factors which are being protected.

4. **Recognising tourism in the strategic direction chapter**

4.1 The strategic direction chapter of the PDP sets the framework for what issues are of importance and are to be recognised and provided for through the provisions. In instances of conflict between provisions, the higher order chapter is of vital importance as the purpose and context of the plan will be used to colour the interpretation of any conflicting lower order provisions⁸. Thus it is important that Chapter 3 provides an overall picture of the District's economic resources.

4.2 To that end, the addition of the provisions to recognise the socioeconomic benefits of tourism for the District within Chapter 3 are supported. However, further amendments to those provisions would also assist in meeting the purpose of the Act.

4.3 The requirement of section 32(1)(b)(i) to consider whether there are other reasonably practicable options for achieving the objective has not been complied with; for example the status quo of the Operative Plan ("**ODP**") has not been analysed as a viable alternative.

4.4 Dr Marion Read in her *"Wakatipu Basin Residential Subdivision and Development: Landscape Character Assessment"* dated June 2014 states on page 7 that;

⁷ *Man o War Station Ltd v Auckland Council* [2015] NZHC 767 at para 59

⁸ *Powell v Dunedin City Council* [2005] NZRMA 174, at para 35, "regard must be had to the immediate context And, where any obscurity or ambiguity arises, I may be necessary to refer to the other sections of the plan and the objectives and policies of the plan itself".

"It is the case that the District Plan seems to have been effective in managing the spread of residential development... It appears that this is a result of the performance standard which requires development in these landscapes to be reasonably difficult to see".

4.5 That report from Dr Read specifically identifies areas within the Wakatipu basin which are capable of absorbing the effects of further development (including rural living) and identifies specific areas which are not capable of that outcome and should be afforded a higher level of protection. Dr Read's recommendation is not reflected in the current rural provisions which require a blanket approach to be taken across the Wakatipu Basin, and across the entire District.

4.6 In that same assessment, at page 17, Dr Read states; (emphasis added)

*"It is my opinion that **if there is a desire to slow the subdivision and residential development of the Wakatipu Basin and to protect the local character of the landscape** then it is necessary to amend the definition of Visual Amenity Landscapes to remove references to 'arcadia'".*

4.7 That statement suggests an element of predetermination of the PDP regime, which contrary to proper plan development, should provide for a specific assessment of characteristics of the District. That assessment then informs the establishment of provisions to recognise and provide for those characteristics appropriately.

4.8 Similarly, Council section 42A reports do not appear to have considered the effectiveness of the operative regime as a platform for determining whether the proposed changes are justified (in accordance with section 32). There are however general criticisms of the ODP on page 6 of the Section 42A report (chapter 6) which includes the following; (emphasis added)

*"The ODP has one principal landscape objective and 43 policies grouped into 17 themes. These are phrased in a similar '**effects based**' manner to the landscape assessment criteria and do not offer effective specificity and value over and above the assessment criteria, many of which are structured and phrased as policies in themselves".*

- 4.9 That suggestion undermines the premise of the Act which is inherently and intentionally 'effects-based'.
- 4.10 Under the ODP it is evident that in the ONFLs there is a strong presumption toward protecting existing landscape values, whilst acknowledging that there will be some locations in the ONFLs where development is appropriate. In the VAL there is an acknowledgement that development will be appropriate in many locations provided the character is maintained and cumulative effects well managed. There is considerably less emphasis on landscape matters in the ORL, with the emphasis being more about rural amenity and well-designed solutions. This regime recognises and provides for the particular characteristics of the District.
- 4.11 The PDP provisions do not differentiate between the particular characteristics of the District. These characteristics should be recognised and provided for (which in some cases will be achieved through protection). The 42A report statement (referred to in paragraph 4.8 above) and the other general statements contained on page 6 do not address specific ways in which the operative regime has not achieved its desired outcome, other than to say it has resulted in rural living opportunities;
- "A deficiency with the ODP 'visual amenity landscape' landscape provisions is that they anticipate the maintenance, if not the creation of, a specific type of landscape, with the ODP rules using the words being 'arcadian' or 'pastoral in the poetic sense'."*
- 4.12 I am not aware of any assessment by Council that supports the proposition that a deficiency of the ODP regime is that an Arcadian or "pastoral in the poetic sense" landscape has evolved and been maintained over the last ten years.
- 4.13 A fundamental difference in Chapter 4 (District Wide Issues) of the ODP and Chapter 3 of the PDP is that the ODP recognises the landscapes of the District including the opportunities that those different landscapes provide for those who use them:

"4.1.1 Natural Environment

The natural environment of the District consists of a variety of systems including rivers, lakes, downland basins, wetlands, bush remnants,

uplands, mountains and shorelines. This combination plays a significant role in the quality of life in the District **by providing recreation, economic, residential, conservation and servicing opportunities**".

Objective 2 - Environmental Effects

Recreational activities and facilities undertaken in a way which avoids, remedies or mitigates significant adverse effects on the environment or on the recreation opportunities available within the District.

2.1 To avoid, remedy or mitigate the adverse effects of commercial recreational activities on the natural character, peace and tranquillity of the District.

2.2 To ensure the scale and location of buildings, noise and lighting associated with recreational activities are consistent with the level of amenity anticipated in the surrounding environment.

2.3 To ensure the adverse effects of the development of buildings and other structures, earthworks and plantings in areas of open space or recreation on the District's outstanding natural features and landscapes or significant natural conservation values are avoided, remedied or mitigated.

2.4 To avoid, remedy or mitigate any adverse effects commercial recreation may have on the range of recreational activities available in the District and the quality of the experience of people partaking of these opportunities.

2.5 To ensure the development and use of open space and recreational facilities does not detract from a safe and efficient system for the movement of people and goods or the amenity of adjoining roads.

2.6 To maintain and enhance open space and recreational areas so as to avoid, remedy or mitigate any adverse effects on the visual amenity of the surrounding environment, including its natural, scenic and heritage values.

2.7 To avoid, remedy or mitigate the adverse effects of commercial recreation activities on the District's indigenous vegetation

- 4.14 Although some of those provisions relate to open space areas, these provisions from the ODP illustrates a more balanced regime which seeks

to be enabling while providing for appropriate (and justified) protective measures.

4.15 Section 7(c) of the Act requires that particular regard be had to "the maintenance and enhancement of amenity values". Of course there are many other factors which exist within section 7 which must also be balanced. However this submission seeks to focus on the enquiry under subsection (c).

4.16 The section 42a report and the section 32 reports appear to have conflated the consideration of amenity values under section 7(c) with the protection of natural character of ONFLs from inappropriate development within section 6(b). See for example;

"The District's landscapes are particularly valued, and an integrated approach to urban growth management with a focus on urban intensification can help reduce the risks to amenity values (s 7c RMA) and landscape values (s 6b) posed by dispersal of urban growth"⁹.

4.17 Whilst amenity values can be those derived from natural resources such as landscapes there is a substantial amount of case law which discusses the amenity values to be derived from recreational opportunities. The Court has also considered the appropriateness of preferring one recreational use over another; *NZ Jet Boat association v Queenstown Lakes District Council C 109/2003* considered the right of private recreational jetboaters versus non motorized recreational users of the Hawea River. The outcome of that case ended in a compromise between recreational users, but the point is that there is no apparent authority for comparing recreational uses to find an overall net recreation benefit.

4.18 At a high level one could draw an analogy between the amenity values afforded by farming activities (expressed at numerous stages in the PDP), and those amenity values afforded by recreational use (which are to some extent recognized in the PDP).

4.19 It is also relevant to note the definition of amenity values within the Act is much broader than natural or visual amenity values;

⁹ S 42A report Chapter 3, Appendix 3 (referring to section 32 reports) page 14

"Section 2; Amenity Values - those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

- 4.20 The Environment Court in *Phantom Outdoor Advertising Ltd v Christchurch City Council*¹⁰ considered that the definition of amenity values embraces a wide range of elements and experiences, and recognises that the appreciation of amenity may change depending on the audience.
- 4.21 Not only is the amenity values derived from tourism (or commercial recreation) important under section 7(c), they are also important in economic terms under section 7(b), which is discussed further below. Amendments sought to provide for a more balanced recognition of tourism activities in the PDP are set out in the Evidence of Mr Tim Williams.
- 5. Diversification of the Rural Zone provisions**
- 5.1 The section 42A Officers' Report clearly acknowledges the multitude of submitters' concerns over the need to recognise rural land within the district for its diverse values, and beyond those provided by productive agricultural practices¹¹.
- 5.2 Those submissions, from submitters across the District, illustrate that the District is much more complex than just an agricultural sector. Recognition of broader activities which exist within the rural area and within landscape classifications including ONFLs is vital for the effective and efficient use of resources. At a strategic level, Chapters 3 and 6 should provide for the recognition of the positive benefits which are derived from tourism and other economic activities which do not have unacceptable adverse effects on the quality of landscapes.
- 5.3 The failure of the section 32 report to justify the proposed outcome is clear, particularly in light of the shortcomings of the section 32 analysis with respect to Part 2 of the RMA. As stated above, the Environment Court in *Marlborough Ridge Ltd v Marlborough District Council* provides

¹⁰ *Phantom Outdoor Advertising Ltd v Christchurch City Council* (NZEvc C90/2001, 7 June 2001)

¹¹ Section 42A Report, Chapters 3 & 4; para 12.108

authority for the way in which section 7(b) RMA is taken into account in decision making under section 32(1)(c);

- 5.4 The only reference in the s42A Report to the enabling concepts embodied in s7(b), and the related benefits, is;

"The purpose of the Rural Zone is to provide for farming activities and manage the effects of other activities seeking to utilise the rural land resource (ie: skiing, commercial recreation activities, mining, forestry and industrial activities)"¹²

- 5.5 The PDP at present is internally inconsistent in its proposed strategic and landscape provisions which provide for a preference of farming activities. As discussed above, various higher order policies provide for the (absolute) avoidance of adverse effects in ONFLs. Putting aside whether such a provision has been adequately justified in light of the particular ONFLs which are sought to be protected, those provisions are also inconsistent with provisions such as 3.2.5.5.1 and 6.3.4.2 which recognise and provide for farming activities in rural areas (including ONFLs).

- 5.6 Firstly, an assumption as to what farming practices are is required as this is not specifically addressed in Dr Read's evidence, or extensively in the section 32 reports. Secondly, if the avoidance provisions discussed above remain as they are now and in light of the interpretation of such provisions in *King Salmon*. It is feasible that any development (which could include farming associated activities such as tracks, exotic shelter belts, fencing, farm buildings, etc.) will no longer be allowed, as such development must be avoided;

Policy 6.3.4.1- Avoid subdivision and development that would degrade the important qualities of the landscape character and amenity, particularly where there is no or little capacity to absorb change.

- 5.7 That internal inconsistency within the PDP is problematic, and supports the view that justification for the preference of farming activity within the rural sector is not evident.
- 5.8 The use of the term 'finite capacity' is not supported in policy 6.3.2.1;

¹² s32 Evaluation Report – Landscape, Part 6 on page 22, second paragraph

Acknowledge that subdivision and development in the rural zones, specifically residential development, has a finite capacity if the District's landscape quality, character and amenity values are to be sustained.

- 5.9 This policy does not provide a useful assessment for decision makers to assess applications against as it anticipates an environmental outcome rather than policy criteria. Furthermore, it suggests that the rural zones of the District will reach a finite capacity within the lifetime which this proposed plan is expected to survive and which should seek to provide for that timeframe.
- 5.10 In assessing the reasonably foreseeable needs of future generations under section 5(2)(a) the Environment Court has suggested that *"two generations... was a minimum period to consider"*¹³

6. Conclusion

- 6.1 The regime does not recognise the fundamental need for development to accommodate inevitable growth (both in the tourism and living sectors) or that certain development will contribute to people and communities' appreciation of the District.
- 6.2 The assumption to be gained from the PDP is that Council is trying to protect rural areas from any development (other than productive rural activity) when in fact that is not what the PDP should be striving to achieve, at all.
- 6.3 Overall the PDP does not strike an appropriate balance between the protection, use and development of all resources. Accordingly, it is not the most appropriate regime to achieve the purpose of the Act.

V J Robb

18 March 2016

¹³ *Christchurch Regional Council v Christchurch City Council* EnvC Christchurch C217/2001, 6 December 2001 at 18