

**BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER** of the Proposed District Plan Review,  
Stream 4 Hearing: Chapter 27  
Subdivision

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**SUPPLEMENTARY LEGAL SUBMISSIONS FOR:**

Darby Planning LP (#608)  
Soho Ski Area Ltd (#610)  
Treble Cone Investments Ltd (#613)  
Lake Hayes Ltd (#763)  
Lakes Hayes Cellar Ltd (#767)  
Mt Christina Ltd (#764)

Jacks Point Residential No.2 Ltd, Jacks Point Village Holdings Ltd, Jacks Point  
Developments Limited, Jacks Point Land Limited, Jacks Point Land No. 2 Limited,  
Jacks Point Management Limited, Henley Downs Land Holdings Ltd, Henley Downs  
Farms Holdings Ltd, Coneburn Preserve Holdings Limited, Willow Pond Farm Limited  
(#762)

Glendhu Bay Trustees Ltd (#583)  
Hansen Family Partnership (#751)

**15 August 2016**

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**ANDERSON LLOYD**  
LAWYERS  
QUEENSTOWN

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## MAY IT PLEASE THE PANEL

### 1. Introduction

1.1 These supplementary legal submissions are presented in support of the submitters named on the front cover page ("**Submitters**") in respect of questions raised by the Hearings Panel ("**Panel**") during the Hearing on chapter 27 of the Queenstown Lakes Proposed District Plan ("**PDP**").

1.2 The following matters are addressed in these supplementary submissions:

- (a) Illustration of proposed integration between subdivision and landuse provisions for Ski Area Subzones ("**SASZs**") supporting a controlled activity ("**CA**") status for subdivision; and
- (b) Additional legal analysis on section 106 RMA.

1.3 The following supplementary evidence and supporting documents are attached to these submissions:

- (a) Supplementary Evidence in Chief of Chris Ferguson dated 15 August 2016
- (b) *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25
- (c) Additional cases requested by the Panel on materials incorporated by reference: *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 285 (see [96] – [100]), and *Horticulture New Zealand v Manawatu-Wanganui Regional Council* [2013] NZHC 2492 (see [109] – [114]).

### 2. Controlled activity status in SASZs

2.1 By way of background, the Submitters requested relief that controlled activity status be imposed in zones identified at stage 1 of the PDP where there are suitable standards for design, lot sizes, and spatial outcomes reserved for Council's control.<sup>1</sup> The zones in which the submitters have interests and in respect of which have requested this relief are:

- (a) the rural residential and rural lifestyle zones,
- (b) the Jacks Point Resort Zone,
- (c) the SASZs (which are within the Rural Zone) and

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<sup>1</sup> Legal Submissions of Counsel for the Submitters dated 01 August 2016, para 5.2

- (d) the proposed rezoning of Glendhu Bay.<sup>2</sup>
- 2.2 Soho Ski Area Ltd (#610) and Treble Cone Investments Ltd (#613) submitted a controlled activity status was appropriate for SASZs in the Rural Zone (Chapter 21) given the unique nature of development anticipated in those Zones and their differentiation from the Rural Zone.<sup>3</sup>
- 2.3 The Panel queried the SASZ specific relief and invited the Submitters to address the panel further on the appropriateness of the CA subdivision framework for the SASZs.
- 2.4 The attached supplementary evidence from Chris Ferguson provides amended drafting which links the CA status in SASZs to the specific intended development constraints for those Sub Zones. The integration between the subdivision and landuse rules is proposed through two routes:
- (a) Firstly, subdivision qualifies for controlled status if it is in accordance with a Landscape and Ecological Management Plan required by the restricted discretionary rule for Visitor Accommodation; and
  - (b) Secondly, subdivision qualifies for controlled status if it is for any Ski Area Activity.
  - (c) Each of the proposed SASZ specific subdivision rules have specific SASZ matters of control listed that reflect the matters of control proposed for the land use rules, in addition to the standard matters of control for subdivision.
  - (d) If subdivision is not in accordance with a Landscape and Ecological Management Plan, or not for a Ski Area Activity, the activity status of the subdivision will default to discretionary. Linking the CA subdivision rule with the SASZ land use rules provides security and an additional layer of control to ensure that subdivision under the CA framework is appropriately constrained, and effects associated with it assessed together with the assessment of Ski Area Activities as they are consented.

### 3. **Scope for changes in SASZs**

- 3.1 The recommended amendments provided by Chris Ferguson are within the scope of Soho and TC's submissions. They are consistent with the land use rules sought for Ski Area

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<sup>2</sup> However all matters to do with the re-zoning proposal for Glendhu Bay Trustees Limited #583, including subdivision provisions, are deferred to the hearing considering the re-zoning request, in accordance with the section 42A report, and memorandum of counsel for QLDC, 21 July 2016, paragraph 5.3.

<sup>3</sup> Legal Submissions of Counsel for the Submitters dated 01 August 2016, section 3

Activities in the Rural Zone Chapter 21, and continue to advance the controlled activity status as sought in the submissions for Chapter 27.

#### 4. Section 106 RMA 'Sufficient Access'

4.1 Counsel submitted previously that common issues of concern to Council including 'roading widths and access issues' could be addressed by decline of consent under section 106 RMA<sup>4</sup>.

4.2 The Panel queried whether section 106 gave the ability to decline consent based upon sufficient width of roads/access. There is no doubt that section 106 provides the ability to decline consent for a controlled activity. It is understood that the Panel's question relates to the extent to which section 106 (1) (c) can be applied i.e., how broad are the powers to impose conditions or decline based on this section.

4.3 Counsel has not found any case law on section 106 which specifically considered the scenario of declining consent based upon insufficient widths of roads for access to a subdivision. The only case found of some assistance is *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25, addressed below.

4.4 Section 106 RMA provides (emphasis added):

**"106 Consent authority may refuse subdivision consent in certain circumstances**

(1) **[[A]]** consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that—

(a) the land in respect of which a consent is sought, or any structure on the land, is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source; or

(b) any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source; or

**(c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.**

(2) Conditions under subsection (1) must be—

(a) for the purposes of avoiding, remedying, or mitigating the effects referred to in subsection (1); and

(b) of a type that could be imposed under section 108".

4.5 Section 106 acts as a code, without being subject to a broader sustainable management purpose:

*"unlike s104, the application of s106 is not expressed as being subject to Part 2. The implication which we draw from that is that in the circumstances where application of s106 is appropriate, a consent authority may decline to grant a subdivision consent or impose conditions on such a consent, having regard solely to the narrow issues identified in s 106 rather than the wider range of issues which must be considered under Part 2<sup>5</sup>.*

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<sup>4</sup> Legal Submissions of Counsel for the Submitters dated 01 August 2016, para 6.4

<sup>5</sup> *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25 at [120]

- 4.6 The Environment Court interpreted the provisions of section 106(1)(c) relatively broadly, emphasising the discretionary nature of decision making under the section and the degree of fact finding associated with 'sufficiency':

*"As with the exercise of any discretion, a consent authority (or the Court) must not act capriciously but must take into account the full range of relevant factors when exercising its discretion in any given case."*<sup>6</sup>

...

*"Insofar as s106(1)(c) is concerned, we consider that the determinative issue is whether or not sufficient provision has been made for legal and physical access to the subdivided lots. The word sufficient is not defined in RMA. Dictionary definitions include:*

- *Enough to meet a need or purpose; adequate*
- *Enough, adequate*
- *Sufficing, adequate, enough*


*Mr Quickfall agreed that the term sufficient requires that there be practical physical access"*<sup>7</sup>.

[footnotes omitted]

...

*"We consider that s106(1)(c) requires consent authorities to undertake a broadly based enquiry into the adequacy of both legal and physical access to lots created by subdivisions."*<sup>8</sup>

- 4.7 The above extracts from *Carter Holt Harvey* provide a broad interpretation of the section 106 discretion. The facts of the case which lead to a finding of insufficient access were much more extreme than simply the insufficient widths of roads however. Despite this, it is submitted that a 'broadly based inquiry' into the adequacy of physical access suggests that a range of factors could be considered relevant to the imposition of conditions or decline of consent, for example safety, accessibility, and future hazards which might impinge upon the physical access to each allotment. Should road width be fundamental to ensuring sufficient provision of access in the circumstances, it is a matter within the Council's jurisdiction to consider pursuant to section 106 (1) (c), and appropriately constrained by section 106 (2) when imposing conditions.



Maree Baker-Galloway

Counsel for the Submitters

15 August 2016

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<sup>6</sup> *Carter Holt Harvey*, at [121]

<sup>7</sup> *Carter Holt Harvey*, at [129]

<sup>8</sup> *Carter Holt Harvey*, at [130]