

Before the Queenstown Lakes District Council

Under the Resource Management Act 1991

and

In the matter of the Queenstown Lakes Proposed District Plan Stage 3 Stream
18 – Proposed Morven Ferry Rural Visitor Zone

**Supplementary legal submissions on behalf of Barnhill Corporate Trustee
Limited and DE, ME Bunn & LA Green on scope to rezone land**

21 August 2020

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**anderson
lloyd.**

May it please the Panel

Introduction

- 1 These legal submissions are made on behalf of Barnhill Corporate Trustee Limited and DE, ME Bunn and LA Green (**Barnhill**), submitter 31035.
- 2 They are made in accordance with Minute 32 of the Hearings Panel in regards to the legal submissions of Mr Nolan QC regarding the Panel's jurisdiction to recommend rezoning of land in Stage 3 which was zoned in an earlier stage of the Proposed District Plan (**PDP**).
- 3 They do not comment on the fact specific points raised by Mr Nolan in relation to Scope Resources Limited's interests in the Cardrona Cattle Company Limited submission, rather they clarify the reasons that Barnhill's own submission is within scope.

Scope – Whether submissions 'on' the proposed plan change

Legal principles

- 4 The law on whether a submission is 'on' a proposed plan change is set out in *Clearwater*¹ and *Motor Machinists*².
- 5 William Young J in *Clearwater* sets out the two limbed test to be applied:³
 - (a) A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
 - (b) If the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation.
- 6 Kós J in *Motor Machinists* expands on this two limbed test:
 - (a) As to the first limb, what is required is a direct connection between the submission and the degree of notified change proposed to the

¹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/03, 14 March 2003.

² *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

³ *Clearwater* at [66].

plan⁴ i.e. the submission must reasonably fall within the ambit of the plan change⁵.

- (b) As to the second limb, the question is whether there is a real risk that persons potentially directly affected by the changes proposed in the submission have been denied an effective response to those changes.

The first limb – Whether the submission is addressed to the extent to which the variation changes the pre-existing status quo.

- 7 Mr Nolan submits that the council's approach to considering the rezoning of land not notified as Stage 3 land as part of its Stage 3 review is inconsistent with the first limb of the *Motor Machinists* test.
- 8 With respect, Mr Nolan's argument for Scope Resources is fact specific in the context of the CCCL submission, and should not be applied to other fact specific scenarios. His argument is that CCCL did not submit on the zoning of its land when it was considered in Stage 1 of the District Plan Review (**DPR**), meaning that that zoning is operative in accordance with s 86F of the RMA and the Panel is *functus officio*.
- 9 This is not the case for Barnhill's land, as the PDP zoning decided in Stage 2 remains unresolved. The zoning of Barnhill's land was first considered in the notified version of Stage 1 and then included in the Stage 2 Wakatipu Basin Variation. Barnhill submitted on both stages and lodged an appeal on the Stage 2 decision. That appeal remains unresolved, therefore the Stage 2 zoning is not operative.
- 10 The first limb of the test is satisfied for the Barnhill submission because both its Stage 1 and 2 submissions and its Stage 2 appeal raised the issue of a Morven Ferry Rural Visitor Zone (a Stage 3 Zone), the same relief (albeit reduced in scale) which has subsequently been carried through into its Stage 3 submission.
- 11 The council has maintained throughout the DPR process that the correct time to make submissions seeking a particular zoning for land is when the zone in question is being reviewed, not when the land itself is being reviewed. Therefore it can be said that the Barnhill submission addresses

⁴ *Motor Machinists* at [80].

⁵ *Motor Machinists* at [81].

the extent to which the plan change amends the pre-existing status quo under the Operative District Plan (**ODP**).

- 12 The issue for Barnhill and other submitters is the nature in which the council is conducting its DPR. The council is undertaking a series of plan changes of its ODP in accordance with s 79(1)-(3) of the RMA. While a separate Schedule 1 process, Stage 3 is not practically an isolated variation or plan change, rather it follows on from Stages 1 and 2 and shares overarching higher order provisions. While the council has purported to be identifying specific areas of land subject to each subsequent stage of the DPR, in reality it is identifying chapters and provisions of the ODP to review in each stage.
- 13 The council's position throughout the DPR has been that if a submitter wishes to seek a specific zoning for its land it must do so in the stage that that zoning is considered, not at the stage when the zoning of the submitter's land as per the ODP is considered. The trouble with conducting the DPR in this way is that the council must ensure submitters have the opportunity to submit at that later stage of the DPR when the relevant zoning is considered, despite their land being originally considered at an earlier stage. This is why Barnhill has been involved in every stage of the DPR, and again submits in Stage 3, to ensure this right is retained.
- 14 Irrespective of the fact specific circumstances, we do not agree with Mr Nolan that the Stage 3 Hearings Panel is barred from making decisions on the zoning of land considered in an earlier stage of the DPR, even if that zoning is now operative. Each stage of the DPR is a complete Schedule 1 process. There is nothing to prevent the council from notifying variations or subsequent plan changes to zoning and provisions included in Stage 1 and 2 of the PDP, and considering submitter relief on these zonings and provisions, if submissions are within scope.

Second limb – Whether real opportunity for participation by those potentially affected

- 15 The essence of the second limb, as discussed by the High Court in both *Clearwater* and *Motor Machinists*, is that where a submission seeks a change to the proposed plan that was not reasonably contemplated in the notified plan, potentially affected persons may not be live to the fact that the change is sought and may miss the opportunity to be heard on the submission.
- 16 Kós J in *Motor Machinists* considered the Schedule 1 Clause 7 and 8 requirements for the council to notify a summary of decisions requested and allow for further submissions do not sufficiently safeguard the

participatory rights of potentially affected parties in such circumstances. i.e. there is a risk that where potentially affected persons do not otherwise have notice of the relief sought by the submitter, the Clause 7 and 8 requirements will not be sufficient to ensure that notice is given.

- 17 Mr Nolan's submissions on this point are again specific to the CCCL submission and should not be applied to other submissions. The situation for Barnhill is quite different to that of CCCL; Barnhill's land was notified in Stage 1 and again in Stage 2 of the DPR, so any potentially affected persons had notice from the notified PDP and s 32 reports of those stages that the zoning of Barnhill's land was under review. Barnhill submitted in both stages seeking a rezoning of part of its land to a Morven Ferry Rural Visitor Zone, so potentially affected person had the opportunity to make a further submission in response. Being on notice that Barnhill had an interest in pursuing a Rural Visitor Zone, these persons would have known to look for a submission from Barnhill in Stage 3. As an indication of interest in the Barnhill land, there were four s 274 notices lodged on Barnhill's Stage 2 appeal, none of which related to the Rural Visitor Zone component of Barnhill's relief.
- 18 It is submitted that in Barnhill's situation the key consideration of fairness is ensuring Barnhill has the opportunity to pursue its relief in Stage 3. Barnhill's understanding throughout the DPR process has been that the ODP Rural Visitor Zone required a full review and that the council and the Panel considered it was not appropriate for a submitter to seek rezoning to Rural Visitor Zone until this review was undertaken. Barnhill understood that the council would undertake this review in Stage 3 of the DPR, and that Barnhill would have the opportunity to submit seeking a Rural Visitor Zoning at this point. Council has been consistent in this position throughout the DPR process.

Dated this 21st day of August 2020

A handwritten signature in black ink, appearing to be 'V. Robb', written over a horizontal line.

Vanessa Robb

Counsel for Barnhill Corporate Trustee Ltd and DE, ME Bunn & LA Green