BEFORE COMMISSIONERS APPOINTED BY
QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER	of Resource Management Act 1991
AND	
IN THE MATTER	of submission of Jeremy Bell Investments Limited and Submission 782/784 and FS1030/1091

EVIDENCE OF PETER ALLAN CUBITT IN SUPPORT OF SUBMISSION BY JEREMY BELL INVESTMENTS LIMITED

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INTRODUCTION

1. My name is Peter Allan Cubitt. I hold a Bachelor of Arts and Law Degrees from the University of Otago. I am an affiliate member of the New Zealand Planning Institute and have been involved in resource management matters since 1989. During this time I have been involved in many aspects of planning and resource management throughout the South Island.

2. I am currently the principal of Cubitt Consulting Limited that practices as a planning and resource management consultant throughout the South Island, providing advice to a range of local authorities, corporate and private clients. I was heavily involved in the preparation of three District Plans prepared under the Resource Management Act 1991, being the Southland, Central Otago and the Clutha District Plans.

3. I personally act for the Clutha District Council. This involves both resource consent processing (subdivision and land use) and District Plan review work. Of relevance to this hearing is my work in relation to the recent Plan Changes 26 to 27 to the Clutha District Plan that deal with indigenous vegetation and biodiversity. I have also been involved in the review of numerous District and Regional Plans throughout the South Island for a large range of private clients.

4. I am also a Certified Hearings Commissioner having completed the RMA: Making Good Decisions programme. I have conducted numerous hearings on resource consent applications, designations and plan changes for the Dunedin City Council, the Southland District Council, the Timaru District Council, the Waitaki District Council and Environment Southland. I was also the Chair of Environment Southland's Regional Policy Statement Hearing Panel and I am currently the Chair of the Hurunui District Council Hearing Panel on the proposed Hurunui District Plan.

5. I have been engaged by Jeremy Bell Investments Limited ("JBIL**"**) to provide advice in relation to the Proposed Queenstown Lakes District Plan ("PDP"). I was not involved in preparing the JBIL submission or further submissions. In preparing this evidence I have reviewed the submissions and further

submissions made by JBIL and the section 42A report prepared by Mr Craig Barr for the Council in relation to Chapter 33 Indigenous Vegetation and Biodiversity.

CODE OF CONDUCT

6. Whilst I accept that this is not an Environment Court hearing, I have read and agree to comply with the Environment Court's Code of Conduct for Expert Witnesses contained in the Practice Note 2014. I confirm that the issues addressed in this brief of evidence are within my area of expertise. I have not omitted to consider material facts known to me that might alter or detract from the opinions that I express here. However due to time constraints around this hearing process, I have not had the opportunity to fully review the original submissions and further submissions made by submitters or the expert evidence presented by the Council.

SCOPE OF EVIDENCE

7. JBIL made a number of submissions on Chapters 2, 3, 21, 33 and 34 on a range of issues that affect their farming operation. My evidence only addresses the submissions that sought changes to the indigenous vegetation provisions throughout those chapters.

PLANNING ASSESSMENT

8. To order to assess the indigenous vegetation provisions of the PDP, it is first necessary to understand the statutory context. The Act contains two key provisions in relation to a District Councils functions in respect of indigenous flora and fauna :

- Section 31(1)(b)(iii) – *Every District council shall have the function of controlling any actual or potential effects of the use, development, or protection of land including for the purpose of the maintenance of indigenous biological diversity.*

- Section 6 – *In achieving the purpose of this Act all persons .... shall recognise and provide for the following matters of national importance ....(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna.*

9. Biological diversity is defined in s.2 of the Act as "the variability among living organisms and the ecological complexes of which they are part, including diversity within species, between species and of ecosystems*."*

10. While I am not an ecologist, it is my view that the Act is dealing with distinct matters in its treatment of significant indigenous flora/fauna and biological diversity. The latter is a much broader concept which deals with a broad ecological state. Section 6 (c) is aimed specifically at one part of the ecosystem that is to be given specific protection.

11. With respect to the broader concept of indigenous biodiversity, the use of the word "maintenance" should not be read down on the basis that it is just another way of describing "avoid, remedy or mitigate." It may contain elements of those requirements, but its use by the legislation means that it has a distinct meaning. The word is not defined in the Act and should therefore be given its ordinary dictionary meaning in this context of keeping a situation or a state of being at the same level. It is a factual test.

12. The question then becomes what should be kept at the same level? In my view it is the 'diversity' (i.e. variety or range), not the 'quantity', of the "living organisms and the ecological complexes" that is to be maintained. Hence not all indigenous biodiversity must be protected or treated in the same way as significant indigenous vegetation and habitats are under s6(c). Nor is the loss of indigenous biodiversity fatal to the goal of trying to maintain it. Trying to achieve this would simply be impractical and unrealistic, particularly when you consider the need to meet the overall sustainable management purpose of the Act. And it is a well understood that the RMA is not a 'no risk', 'no adverse effect' statute (and for this reason I am concerned at the proposed introduction of the phrase "no net loss" into Policy 33.2.1.8).

13. The PDP deals with Councils s6(c) duty by mapping and scheduling SNAs. This provides certainty for landowners and is considered by Mr Barr to be the most appropriate way to meet the purpose of the RMA (See his paragraph 6.31). I support this approach.

14. However it is the next tier of indigenous vegetation management (the maintenance of indigenous biodiversity) in the PDP where the issues arise and have led to the submission from JBIL. It is at this tier, as with amenity landscape provisions, where the conflict between indigenous vegetation management and productive land uses generally becomes more apparent as most people recognise and support the need for the identification and protection of SNA's.

15. At this level (i.e. outside of SNAs), the PDP enables the clearance of a small area of indigenous vegetation except if it involves clearance of a plant identified as threatened species. The thresholds are very low but particularly low when it comes to LENZ Level IV environments (no more than 500m^2 in a continuous 5 year period, less if the site is below 10 hectares) and threatened species (a single plant) exist on the site. They are also complicated by the level of judgment required under Rules 33.3.3.2 and 33.3.3.3 to determine whether the rules apply. These rules require a judgement call to be made about structure dominance, coverage and species diversity, which will be challenging in the Central Otago environment. This does not seem to have solved the ambiguity apparent in the Operative District Plan (ODP) definition; it has now just been relocated to a different provision within the PDP. Even if one can identify whether the rule has been triggered by the given % parameters, the question must be asked how such a small area of vegetation, within what is a productive working rural environment where, at the very least, the vegetation has been modified by the grazing and trampling of animals, can be considered significant?

16. Basing the consent threshold on these parameters is problematic in my view. Surely any indigenous vegetation threshold must relate to a sustainable community of plants, not single plants. Single or small groups of plants in isolation cannot be assumed to be significant. If there is a

community of rare and threatened species, then it should qualify for scheduling as an SNA.

17. The LENZ Threatened Land Environments are an environment classification that assumes that similar environmental conditions will give rise to similar species distribution. It does not actually represent the vegetation actually present in a particular environment. The evidence of Mr Espie discusses this in more detail. As I understand the LENZ classification it does not endeavour determine whether actual vegetation is significant or important in terms of maintaining indigenous biodiversity values. It is not possible to assess whether biodiversity (a 'representative range') is being appropriately maintained under the case by case assessment approach promoted by this rule.

18. This same issues arises when one is in the consent process and is required to assess the "nature and scale" of the adverse effects of indigenous vegetation clearance on indigenous biodiversity values under Policy 33.2.1.10. Unless the "nature and scale" of existing indigenous biodiversity values are known, how can an individual make such an assessment? Such an assessment must occur at District wide level so it is understood what biodiversity exists and what is already protected. It is quite probable that many of the environments that need to be maintained are already protected (outside the SNAs) by QEII covenants, scientific reserves and other conservation estate land.

19. Clearly any objective assessment by an individual of what this impact might be will be extremely difficult in these circumstances. When coupled with a policy framework that is highly protectionist (see Objective 33.2.1, Policy 33.2.11.9), it becomes difficult to see how consent for any vegetation clearance will be able to be obtained when that policy framework is applied in accordance with the direction set in King Salmon[1]. Policy 33.2.1.7 requires activities involved in clearance of indigenous vegetation to be undertaken in a manner to ensure biodiversity values are protected, maintained or enhanced. I am unsure how that can occur.

[1] *Environmental Defence Society Incorporated v. The New Zealand King Salmon Company Limited* [2014] NZSC 38

20. This protectionist approach is at odds with the Strategic Directions section of the PDP as it relates to rural land use and the provisions of Rural zone itself. The following Strategic Directions policy suite is particularly relevant:

> ***Objective 3.2.5.5*** *Recognise that agricultural land use is fundamental to the character of our landscapes.*
>
> ***Policies***
>
> ***3.2.5.5.1*** *Give preference to farming activity in rural areas except where it conflicts with significant nature conservation values.*
>
> ***3.2.5.5.2*** *Recognise that the retention of the character of rural areas is often dependent on the ongoing viability of farming and that evolving forms of agricultural land use which may change the landscape are anticipated.*

21. This policy suite recognises the importance of farming to the District and gives it preference over the retention of indigenous vegetation except where that vegetation is significant, which in this plan is the mapped SNAs. There is also recognition of the fact that agricultural land uses do need to change over time to stay viable and that this can change the landscape. Similar enabling policies are found in the Rural zone.

22. There is clearly tension between the indigenous vegetation provisions and the rural provisions that enable farming. This is compounded by the fact that much of the District's low lands are the most highly modified environments in the District and are where these changes will occur (particularly in respect to the expansion or improvement of pasture), yet are identified as LENZ land environments that have 20% or less remaining in indigenous cover. This is likely to be a pastoral environment that will be interspersed with low-growing indigenous vegetation such as cushion fields and tussock grasslands and possibly plants included within the Threatened Plant List. Furthermore it will not always be readily apparent to the lay person that such plants exist within in these environments, particularly if they are only a single threatened plant or a small, scattered group of such plants.

23. The Section 32 report (page 9) "… recognises[s] that the identification of these plant communities and applying practical ways to ascertain the presence of this vegetation can be complex. Particularly in the context of applying parameters to determine whether indigenous vegetation located

amidst other vegetation including exotic pasture grasses requires a resource consent to be removed." I agree with that but do not believe the PDP has solved that issue.

24. Given these complexities and the fact that we are dealing with production land upon which farming is to enabled, such low permitted activity thresholds are not warranted. The difficulty with the approach is further highlighted when we consider that the definition of 'clearance of vegetation' includes irrigation, which is defined as "the deliberate application of water where it would change the ecological conditions such that the resident indigenous plant(s) are killed by competitive exclusion…". The vires of this rule is questionable given the functions of District Councils do not run to the use of water (Regional Councils have the function of the controlling the taking, use, damming, and diversion of water – see s30(1)(e)). Even if they could control the use of water, the definition again involves a judgment call. What type of irrigation and at what levels will it be deemed to be 'clearance'? Who will make this judgement call? And how will this affect the renewal of water takes used for irrigation purposes?

25. Given the policy recognition of the importance of farming to the economy; the significant contribution it makes to the landscape characteristics of the District; and the fact that agricultural practice evolves over time to stay viable, I question the inclusion of irrigation in this definition at all. The definition of farming in the PDP *"means the use of land and buildings for the primary purpose of the production of vegetative matters and/or commercial livestock…"* It is well accepted that irrigation is part and parcel of the use of land to produce vegetative matters and/or commercial livestock. The viability of a farm often depends on it. The health of the soil often depends on it also. Objective 21.2.1 is that "the life supporting capacity of soils is sustained" and Policy 21.2.2.2 is to "Maintain the productive potential and soil resource of Rural Zoned land and encourage land management practices and activities that benefit soil and vegetation cover". Irrigation does this.

26. The protection of the life supporting capacity of soils is also a strong focus of the operative RPS ("ORPS") and the proposed RPS ("PRPS"). Objectives 5.4.1 and 5.4.2 and Policy 5.5.3 of the ORPS along with Policy 2.1.5 of the

PRPS directly address this issue. Policy 5.5.4 of the ORPS also promotes the diversification and use of Otago's land resource to achieve sustainable land use and management systems for future generations. In many locations, particularly Central Otago, irrigation is an important part of that.

27. In relation to the renewal of existing water takes for irrigation purposes, the Otago Regional Council ("ORC") is requiring farmers to use water more efficiently. This is a requirement of the National Policy Statement for Freshwater Management 2014 (see Objective B3 "To improve and maximise the efficient allocation and efficient use of water"). The policy statements and plans of the ORC are required to give effect to this and do so. (See Policy 6.5.3 of the ORPS; and Policy 6.40A of the Regional Plan: Water). The PDP must also give effect to National Policy Statements and while I acknowledge that freshwater management isn't a core responsibility of District Councils, I note that Policy 21.2.3.1 is to encourage, in conjunction with the ORC, the efficient use of water.

28. Border dyke irrigation (which is common in the district) is no longer considered efficient and farmers are now being required to replace such systems with spray irrigation systems. This greatly increases production but generally also requires an expansion in the area to be irrigated to justify the cost of the infrastructure. Provisions that hinder the efficient use of water in this context could be seen as being inconsistent with the NPS.

29. On the basis of my assessment above, I agree with JBIL's submissions in relation to the indigenous vegetation provisions of the PDP. Irrigation should be exempt from the clearance rules (as should all normal farming activities on land that is essentially pasture). The Threatened Plant List schedule and the LENZ classification should be removed from the PDP and Council should identify all areas (over and above the SNAs) that are important in terms of maintaining indigenous biodiversity.

30. The cost to Council of undertaking such a task is often identified as one of the reasons for not going down such a path. However the cost of the proposed approach to the landowner has not been adequately quantified and analysed in the section 32 report. The section 32 report also fails to

assess the effectiveness of the rules given the reasonably high potential for vegetation to be removed because land users do not know what they are dealing with. Particularly with respect to some of the obscure and cryptic species on the Threatened Species List. The benefit of maintaining indigenous biodiversity lies with the wider community so it is appropriate that they bear some of the cost of identifying the areas of vegetation to be protected. They would not bear the full cost under this approach, as the landowner still bears the cost of retaining such areas on their property, because it will not produce an economic return.

31. The policy framework should also be amended to reflect the different management regimes required for significant indigenous vegetation and for indigenous biodiversity in general. This would be consistent with the approach taken by the Council in respect to the management of landscapes (which similarly has section 6 and section 7 matters relevant).

32. More importantly it will ensure that the PDP gives effect to the operative RPS and the PRPS on biodiversity matters. The Regional Council has very similar functions in regard to indigenous biodiversity. (See s30(1)(ga) which requires the establishment, implementation, and review of objectives, policies, and methods for maintaining indigenous biological diversity). Objective 10.4.1 of the ORPS is "*To maintain and enhance the life-supporting capacity and diversity of Otago's biota*". This is not restricted to 'indigenous' biota. The explanation refers to productive potential of the region and states that *"In productive systems, economic stability and balance comes about through maximising production while minimising the effects of threats to productivity such as diseases and pests."* The objective specific to indigenous biota is Objective 10.4.3 which focuses on *significant indigenous vegetation and significant habitats of indigenous faun rather* than indigenous vegetation per se.

33. More importantly perhaps is that the PRPS does seem to incorporate the two tiered approach promoted here. Policy 2.1.6 provides for the management of ecosystems and indigenous biodiversity values. Its focus is generally on the maintenance or enhancement of these resources. Policy

2.2.2 addresses significant indigenous vegetation and has a strong protection focus.

34. Due to time constraints, I have not had the opportunity to draft a set of provisions that reflect my position on the matter. However I could provide this at some later stage should the Panel find it useful.

Dated this 20th day of April 2016

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Allan Cubitt