

**BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of Hearing Stream 9 -
Resort Zones

**LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT
COUNCIL AS PART OF COUNCIL'S RIGHT OF REPLY**

**CHAPTERS 41 JACKS POINT ZONE, 42 WATERFALL PARK ZONE,
43 MILLBROOK RESORT ZONE**

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1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen during the course of the hearing on Chapters 41 Jacks Point Zone, 42 Waterfall Park Zone and 43 Millbrook Resort Zone, and to provide the Council's position on specific issues.

1.2 Filed alongside this right of reply is the planning reply of:

- (a) Ms Vicki Jones for Chapter 41 Jacks Point Zone;
- (b) Ms Vicki Jones for Chapter 42 Waterfall Park Zone; and
- (c) Ms Ruth Evans for Chapter 43 Millbrook Resort Zone.

1.3 Having considered matters raised and evidence produced during the course of the hearing, Ms Jones' and Ms Evans' replies and associated revised chapters represent the Council's position.

2. AMENDED STRUCTURE PLANS FOR JACKS POINT AND MILLBROOK

2.1 Amended structure plans have been provided for both Jacks Point and Millbrook Resort, and these represent the Council's position following the hearing of submissions and evidence. They are included within the recommended chapters attached to the planning right of replies.

2.2 An amended structure plan has been provided for Jacks Point (within Ms Jones' reply), which can be printed to scale at A4 and A2. The Panel asked that grid references and additional 'topographical features' to allow plan users to more easily orient themselves be added to the Jacks Point structure plan. This has been provided in Appendix 4 of Ms Jones' reply, but for the reasons set out by Ms Jones at paragraphs 1.7-1.8, it is the Council's position that this version should not form part of Chapter 41, and that the Structure Plan should only show those elements that rules and policies apply to.

2.3 It has not been possible to provide an updated Structure Plan for Millbrook Resort in the time available. A version of the Council's

recommended final position with the changes marked up by hand is included in Ms Evan's reply. Council will file an updated structure plan that reflects the changes marked up by hand, as soon as possible.

2.4 During the course of the hearing, the Panel queried whether it would assist plan usability to include within the key of the structure plans, a reference to relevant rules that apply to the respective activity areas. Council's position on this is that it would be too much information to be contained on the Structure Plan, and is unnecessary given the purpose statement of the chapter explains each activity area. Such an approach also creates risks, as the likes of relevant subdivision rules would not be referred to, and probably should, and then one must consider other relevant district-wide chapters. Overall, it is considered to be too complex, and a better approach is that the relevance of the structure plan is better explained in the Introduction/purpose statement of the chapter, and in the case of the Jacks Point Zone, a note be added on the Structure Plan which refers to reply Rule 41.5.1. That rule further details what activity can occur within each activity area.

3. SPECIFIC MATTERS RELATING TO JACKS POINT ZONE, CHAPTER 41

Separation of Jacks Point Zone into three separate Structure Plans and sets of rules

3.1 Evidence and submissions presented to the Panel have also pursued the separation of the Jacks Point, Hanley Downs and Homestead Bay portions of the Jacks Point Zone into three separate structure plans and presumably, three separate chapters or sets of objectives/policies/rules. No version of this redrafted chapter has been provided to the Panel by these submitters either through their submissions or expert evidence, and therefore the Panel has not through the course of the hearing, nor as it deliberates, had a chapter in this separated format before it, to consider on the merits. It is therefore submitted that very little weight can be given to these requests for the chapter to be disseminated into three parts.

3.2 In the absence of such a chapter, it is presumed that the ODP chapter is the 'disseminated' chapter preferred by these submitters. The Panel has before it, expert evidence from Ms Jones that a single chapter better achieves the purpose of the RMA and that although there may be some differences in character between the three parts of the Jacks Point zone, it is most appropriate to retain all three parts within a single zone and structure plan.¹ There is also support for the retention of a single zone and single chapter approach in the expert planning evidence of Mr Christopher Ferguson.² The expert planning evidence of Mr Daniel Wells, in assessing the suitability of the notified Structure Plan, did not identify any concerns around the single zone and single structure plan approach.³ Jardine (715) has confirmed that it is 'comfortable' with the Council's approach.⁴ The Council's expert witnesses on urban design, landscape and economics did not raise any concerns about the use and /or effects of a single zone and structure plan.

Location of ONL within Jacks Point Zone boundaries

3.3 As confirmed by counsel during the Council's opening, the landscape assessment matters⁵ (located in Reply Chapter 21.7) apply only in the Rural Zone, and not within that part of the Jacks Point Zone located within the ONL line. This is because the Outstanding Natural Landscapes (**ONLs**)/ Outstanding Natural Features (**ONFs**) are primarily located within the District's Rural Zone, hence the assessment matters are located in the Rural Zone chapter.

3.4 Where an ONF or ONL is located within a zone other than the Rural Zone, the Council's position is that there must be objectives or provisions within the text for that zone that manage section 6 matters to the extent contemplated by the PDP. For example, there is not the same level of protection of landscapes in some of the Rural

1 Section 42A Report on Chapter 41 Jacks Point dated 17 January 2017, at paragraphs 11.4-11.11.

2 Evidence of Mr Ferguson dated 3 February at paragraph 3.5, where he states that the single structure plan unifying the three previous structure plans is particularly important to achieve an integrated community and to satisfy the strategic directions objectives of the PDP. The supplementary evidence of Mr Ferguson dated 20 February 2017, which includes a recommended revised chapter, continues to pursue the single zone approach.

3 Evidence of Mr Wells dated 3 February 2017, at paragraphs 43-48. The evidence presented by Mr Wells at the hearing on 17 February 2017 continues to pursue the single zone approach.

4 Memorandum of Counsel for Jardine Family Trust and Remarkables Station Limited in relation to transfer of submission points, dated 8 February 2017 at paragraph 3.

5 These assessment matters are to be applied with regard to applications in or on ONLS and ONFs (Rule 21.7.7).

Residential Zones and Rural Lifestyle Zones that are otherwise within the wider ONL, because the PDP contemplates a different development potential in these areas.

- 3.5** Council's position is that the Jacks Point Zone must give an equivalent level of protection to the ONL located within it, as is provided in the district plan to other ONLs and addressed in detail during the course of the Rural Hearing Stream. Ms Jones has specifically recommended⁶ replicating the framework for farm buildings in the ONL of the Rural Zone, within the Jacks Point Zone, classifying the ONL as PHLPA, and amending Objective 41.2.1 to provide greater direction to the ONLs in order to meet section 6(b) of the RMA.⁷ Through Ms Jones' recommendations, the level of protection is greater for the OSG area within the ONL (compared to the Rural Zone), but the protection in the OSL is the same, as it adjoins rural zoned land. It is further noted that under Dr Read's expert view of the location of the ONL (and the Council's position on the appropriate Homesites), only one Homesite (36) is located within an ONL and that is not new as it has been carried over from the ODP.
- 3.6** The landscape objectives and policies located in Chapter 6 will also be relevant to any non-complying or fully discretionary activity consent application, and to any restricted discretionary or controlled activity consent application where the same landscape matters are adequately covered in a matter of discretion or control.
- 3.7** At the Panel's request, the ONL line (based on Dr Read's expert position) is also shown on the Jacks Point structure plan. Council's position is that the ONL line should be shown on the final structure plan.
- 3.8** During the course of the hearing, a joint statement between Dr Read (Council's landscape architect expert) and Ms Pfluger (for Jacks Point/Jacks Point Residents & Owners Association (**JPROA**)) was handed up by Ms Baker-Galloway, recording that the two had agreed that the location of the notified ONL line in the area along the northern

6 Ms Jones' right of reply, paragraph 4.2(a), 4.3(e).

7 Permitted activity status subject to meeting strict criteria, and restricted discretionary status thereafter.

line of what is R(HD)-FA and RL on the Council's reply version of the Structure Plan, required a slight amendment.

- 3.9** The Panel then requested Dr Read and Ms Pfluger to undertake further site visits in order to endeavour to reach agreement on where the ONL line should be located, from the western edge of the new RL Activity Area down to the western boundary of the zone. Dr Read has advised that no agreement was reached with Ms Pfluger, but that Dr Read has recommended a slight amendment to the ONL line. It is this line that is shown on the Council's reply version of the Structure Plan. This is of relevance, as her recommended amendment means that Homesites 37, 38, 39 and 40 are no longer intersected by the line and/or located within the ONL. Homesite 36 remains within the ONL the only Homesite to be in that location, in the Council's reply position (and is sufficiently protected through the framework as a controlled activity with landscape being a matter of control,⁸ and other relevant objectives/policies relating to landscape then become relevant and this includes the Chapter 6 policies). As covered below, Jacks Point are still pursuing two further Homesites located within notified FP2.

Scope to amend the ONL

- 3.10** No submissions specifically seek an amendment to the location of the ONL line in this location, and at the time of filing these legal submissions, identifying whether scope is provided through more general submissions was still being explored.
- 3.11** Council's position is that moving a notified ONL line, is not a non-substantive change. As the location of the ONL line is also a matter that falls within the realm of the rezoning hearings, Council considers it most appropriate that the matter of amending the location of the ONL at Jacks Point, be revisited, at least from a legal perspective.
- 3.12** It is noted that for the purposes of this reply, the location of the ONL line shown on the Jacks Point structure plan reflects the agreed position of Dr Read and Ms Pfluger (for the northern line of R(HD)-FA

⁸ Under Rule 41.4.3.2, residential buildings in a Homesite are controlled activities, with matters of control including the matters in rule 41.4.3.1 and also the matters in rule 41.4.3.2. The matters include "The external appearance of buildings with respect to the effect on visual and landscape values of the area" and "Associated earthworks and landscaping."

and RL), and of Dr Read for the remainder of the line down to Lake Wakatipu.

Location of Jacks Point within Urban Growth Boundaries (UGBs)

3.13 During the course of the hearing, the Panel asked Council to consider whether it was appropriate for the UGBs to be located around the outside of the Jacks Point Zone, more particularly around the outside of the ONL.

3.14 Council continues to support the notified approach for the following reasons:

- (a) there are wider considerations for deciding on the location of the UGBs, than just landscape. The rationale for UGBs is not for any overriding single purpose. They serve a range of valid resource management purposes (land use, urban design, and infrastructure are also important);⁹
- (b) from a planning perspective, putting the UGB around a special zone can be entirely appropriate if considered and applied together with a robust structure plan and associated rules that protect the ONL;
- (c) Policies 4.2.2.3-4.2.2.5 and 4.2.3.7 anticipate this approach, in particular the words in bold font in Policy 4.2.2.4:¹⁰

4.2.2.3 Within Urban Growth Boundaries, land is allocated into various zones which are reflective of the appropriate land use.

*4.2.2.4 **Not all land within Urban Growth Boundaries will be suitable for urban development or intensification, such as (but not limited to) land with ecological, heritage or landscape significance; or land subject to natural hazards.***¹¹
The form and location of urban development shall

⁹ Section 42A Report of Mr Matthew Paetz (Chapter 3 Strategic Direction and Chapter 4 Urban Development), Hearing Streams 1A and 1B, dated 19 February 2015 at paragraphs 12.48 and 12.62-12.65. See also Legal Submissions on behalf of Queenstown Lakes District Council as part of Council's Right of Reply (Hearing Streams 1A and 1B) dated 7 April 2016 at paragraphs 7.1-7.6.

¹⁰ Appendix 2 to Reply of Mr Matthew Paetz, Hearing Streams 1A and 1B, dated 7 April 2016.

¹¹ The word "hazard" appears to be missing from Mr Paetz' reply version.

take into account features or constraints to protect public health and safety.

4.2.2.5 Urban Growth Boundaries may need to be reviewed and amended over time to address changing community needs.

4.2.3.7 The edges of Urban Growth Boundaries are managed to provide a sensitive transition to rural areas, with the transition addressed within Urban Growth Boundaries.

(d) the approach does not create the potential for future development within the ONL that is inconsistent with section 6(b) of the RMA, because the recommended revised provisions provide sufficient protection.

3.15 During the hearing Dr Read offered her opinion that it was inappropriate for the UGB to be located around an ONL. However and as already mentioned, Dr Read also confirmed her view that the response needs to be that the Jacks Point provisions are at least as restrictive as the Rural Zone provisions.

3.16 The Council submits that the recommended revised provisions attached to Ms Jones' reply (and also set out above) have been carefully considered so as to provide protection for ONL areas within the UGB, and this is supported by Dr Read's expert opinion.

3.17 Related to this query is the fact that only one of the agreed Homesites is located within an ONL (as determined by Dr Read following conferencing during and after the hearing and as shown in the reply version of the Structure Plan), and more generally a question from the Panel as to whether in fact rather than being "urban" in nature, the Homesites function more like large lot, rural residential development.

3.18 As noted by Mr Paetz in Hearing Stream 1A and 1B, the Jacks Point Zone contains large areas of open space and is also characterised by large areas of housing within that open space.¹² In that regard, the Jacks Point Zone has a different character from more traditional

¹² Right of Reply of Mr Matthew Paetz, Chapters 3 and 4 (Hearing Streams 1A and 1B) dated 7 April 2016 at paragraph 6.18.

urban zones. The Jacks Point Zone is also different in that its physical location makes it a stand-alone zone, as opposed to more traditional zoning where houses on large lots would often be within a rural residential zone that acted as a transition or buffer along the spectrum between residential and rural zones. Instead, the entire Jacks Point Zone is envisaged as containing both large areas of open space and large areas of housing (including a diversity of lots such as those containing Homesites). In short, a more strategic, master planning type approach, is being advanced.

3.19 Despite these differences from traditional zoning, the Jacks Point Zone as a whole will have significant urban characteristics that make it appropriate for inclusion within the UGB.

3.20 In summary, the recommended revised provisions are considered to achieve an appropriate balance between protecting the ONL within the Jacks Point Zone as required by section 6(b), and achieving the intended scale of development.

Restructure of Chapter 41

3.21 Following a request of the Panel Ms Jones has considered whether it is feasible to restructure/reorder the rules and standards within the chapter, so that all rules relating to an activity area are grouped together. This would include grouping all residential activity area rules together, etc. This has not been possible in the time available, and Ms Jones in her s42A report did not identify it as an issue of concern when she was considering the approach of a single Jacks Point zone.¹³ However, as noted, Ms Jones has indicated in her reply evidence that it can be undertaken if the Panel wish to pursue it.

Urban Design

3.22 During the hearing, the Panel queried how and whether it should take notice of the Jacks Point Stakeholders Deed in its decision-making. The Deed states it sits outside the Variation 16 process undertaken by the Council under the RMA, and also states that the Council

13 Section 42A Report on Chapter 41 Jacks Point dated 17 January 2017, at paragraphs 11.4-11.11.

agreed to the Deed without predetermining its decision on the Variation.

3.23 The Deed is one of a group of non-statutory mechanisms, including covenants and bylaws, relating to land in the Jacks Point Zone. One of the ultimate outcomes of that group of non-statutory mechanisms is to impose design controls via guidelines. For a number of submitters seeking relief by way of reversion to the ODP provisions, that relief includes that Council should retain some control over the design guidelines. At least one submitter at the hearing (Mr Brabant) has raised concerns about whether the Deed is being complied with, although this Panel does not have jurisdiction to make such a determination.

3.24 The Panel can therefore have regard to the existence of the Deed and other non-statutory mechanisms, because those mechanisms are relevant to the reasoning and relief sought by a number of submitters who wish the PDP to contain provisions ensuring at least some of the same outcomes as the non-statutory mechanisms.

3.25 However, Ms Jones's view in her reply evidence is that while design guidelines may be effective at achieving a particular design aesthetic, the revised Jacks Point chapter provides additional standards and controls to ensure appropriate development, even in the unlikely event that the guidelines were in some way "watered down". Ms Jones states that the existence of the non-statutory process is not determinative of her recommendation to not reference or require the preparation of the design guidelines in respect of most development in the recommended Jacks Point chapter.¹⁴

Scope concerns

3.26 Ms Baker-Galloway made oral submissions during the course of the hearing that a tightening in activity status within the Village to Controlled activity status along with a CDP, "in the round"¹⁵ create scope to expand the Village plan provisions out over the Education area. Supplementary legal submissions have subsequently been

¹⁴ At paragraph 2.15.

¹⁵ Oral submissions presented at hearing on 15 February 2017.

lodged, clarifying this submission. These submissions (at paragraph 5) take the Panel to a very recent High Court decision relating to preliminary questions of law on scope in respect of the proposed Auckland Unitary Plan, *Albany North Landowners v Auckland Council (Albany)*¹⁶ and then address a number of scope concerns that were raised during the course of the hearing by both the Council and the Panel.

3.27 In the Council's view, *Albany* does not overturn or significantly alter the *Countdown*¹⁷ test on scope. Rather, *Albany* refines and reframes it as "the reasonably foreseen logical consequence test",¹⁸ and holds that an "integrated approach to scope" is lawful. That is, a submission on a higher order objective or policy will also be relevant to any lower order objectives, policies and methods, even if the submission did not specifically mention the lower order provision. *Albany* clearly states that the "reasonably foreseen logical consequence" test largely conforms to the orthodox "reasonably and fairly raised" test in *Countdown*.¹⁹

3.28 The question of whether a submitter may rely on other submissions for scope ("collective scope") was not at issue in *Albany* as the key question was whether the Panel had correctly identified out of scope submissions. In the Council's view, the legal position on collective scope therefore remains unchanged to that set out in the Council's Right of Reply for the Business hearing, in section 4. For efficiency reasons those submissions are referred to and adopted here. To the extent that a submitter has not sought relief in their submission (applying the *Albany* framing of the test), then such relief will be out of scope of that submission. For the avoidance of doubt, it is not suggested that there a legal constraint on submitters presenting evidence or commenting on matters raised by other submitters, although the weight that could be attributed to such evidence may be at issue if it did not relate to the relief specified in their submission or a matter addressed in a further submission.

16 [2016] NZHC 138.

17 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 (HC) at 166. See also Council's Opening Legal Submissions on Hearing Stream 5 (District Wide) dated 9 September 2016 at paragraph 5.8.

18 At paragraph [98].

19 At paragraph [114].

Changing the activity status for Visitor Accommodation in the R(HD) and (SH) areas from restricted discretionary to discretionary

- 3.29** In her supplementary legal submissions, Ms Baker-Galloway stated there is scope to change visitor accommodation from restricted discretionary to discretionary in the R(HD) and R(SH) areas, relying on the submissions that sought reversion to the ODP.
- 3.30** In the ODP, approximately 15ha of proposed R(HD)-E was classified as Hanley Downs Village (**V(HD)**). Under 12.2.5.1(i)(b) visitor accommodation was permitted in V(HD) and discretionary outside the village (12.2.3.4(iv)). In the PDP, notified Rule 41.4.7.2 made visitor accommodation a restricted discretionary activity in R(HD)-E and R(SH)(HD). The Council therefore submits that for the 13.88ha of land previously classified as V(HD) and now included in R(HD)-E, the scope for visitor accommodation lies between permitted and restricted discretionary, and does not extend to full discretionary as pursued by Jacks Point.
- 3.31** Accordingly Ms Jones has recommended full discretionary status for visitor accommodation in all R(HD) and R(SH) areas, except in R(HD)-E where it is recommended that the restricted discretionary status of the notified version be retained but be subject to a CPD in reply Rule 41.4.7.5. For the land that was not classified as V(HD) in the ODP, the Council agrees there is scope to make visitor accommodation a discretionary activity and Ms Jones has recommended this.

Consolidation of the Village and Education areas into one village, and classification of all as Village

- 3.32** Ms Baker-Galloway submits that the scope to consolidate the Village and Education areas into one global village area, needs to be looked at both in the context of the zone as a whole, as well as on a site specific basis.
- 3.33** Starting at the site specific level, no submissions sought that the Education area be rezoned Village. Nor did any submissions seek

that the activities anticipated in the Education area, include the likes of the activities anticipated in the Village, or the commercial, retail, and accommodation activities provided for in the notified EIC, which in Ms Baker-Galloway's submission should now be catered for in the expanded Village area.²⁰ The notified Village is far more permissive in terms of activities permitted than the notified EIC (where retail etc needs to be associated with technological based activity), so this is certainly not a 'like for like' comparison. This appears to be acknowledged in the opening sentence of paragraph 12 of her supplementary submissions.

- 3.34** Instead, all that is anticipated in the notified Education area are Educational and Day Care Facilities (rules 41.4.2 and 41.4.9.4). The original submission of Jacks Point Residential No.2 (762) sought only the addition of healthcare to this list of activities for the notified E area. It is submitted that this specific submission point by Jacks Point is important, as it focuses the attention of someone interested on the process, of the specific relief being pursued by Jacks Point, for that particular area.
- 3.35** It is submitted that other submitters, having read the submissions seeking the addition of healthcare to the notified Education area, would not have reasonably foreseen that a consequence of that relief would include extending the Village activity area out over the notified Education Area and/or allowing activities other than Education, Day-care Facilities and healthcare. Other submitters have therefore not had the opportunity to make further submissions on whether the notified Education area should be amended in this way, raising questions of procedural fairness.
- 3.36** Turning then to Ms Baker-Galloway's submission that scope needs to be looked at in the context of the wider zone as a whole, the Council submits that of importance is the structure of the notified chapter 41 and the structure plan within. The notified structure plan contained a number of separately delineated Activity Areas, each with their own specific rules, all sitting under a single overarching zone objective. In

²⁰ As submitted in Ms Baker-Galloway's written submissions at paragraph 30.

effect, the Activity Areas function as de facto zones within the chapter.

- 3.37** Nothing in the chapter indicates that the Activity Areas were only indicative "amoeba" areas or that they were expected to be significantly extended and/or moved during the decision-making process. Rather, submitters could reasonably have been expected to proceed on the basis that the separate Activity Areas were a key aspect of the chapter structure, and would be retained unless submissions specifically sought to extend, move or delete them. Put another way, in the Council's view it is not a reasonably foreseeable logical consequence of a body of submissions on separate Activity Areas with distinct characters, that relief would be granted by essentially rolling some of them into one basket.
- 3.38** Following *Albany* it must be considered whether the relief would be a "reasonably foreseen logical consequence" of the submission or other submissions on the zone. The question of procedural fairness is still entirely relevant, and this extends to the public as well as to the submitter.²¹ The test approved in *Albany* was expressed as being "an acceptable method for achieving fairness to potentially affected persons."²²
- 3.39** Therefore the Council submits there is no scope for the amendments sought. In order to establish scope for expanding the Village area in the manner sought by Jacks Point Ltd, that expansion must be a "reasonably foreseen logical consequence" of the relief sought in submissions. The application of the scope test must achieve fairness to potentially affected persons. The Council does not consider that test is met.
- 3.40** Putting the matter of scope to one side, the Council's position through expert evidence and on the merits is, that the extension is not appropriate.

²¹ *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556 (HC) at 574-575.

²² At paragraph [117].

Change of permitted size for single tenancy retail activities in the Village from 200m² to 300m²

3.41 JPL's supplementary submissions do not argue that there is scope within submissions to make this change. Instead, the submission (at paragraph 16) is that the change from 200m² to 300m² is a "minor change". Council refers to and adopts the legal submissions previously provided to the Panel on the Council's ability to recommend such minor, non-substantive changes, and confirm that there is no legal or procedural barrier preventing the Panel from recommending them when the change is of neutral (regulatory) effect. The Council can then subsequently make such changes under clause 16(2).²³

3.42 However, a 33% increase in the permitted size for a single tenancy retail activity from 200m² to 300m² is, not a minor change. There does not appear to be any evidence before the Panel as to the impacts of such a change, presumably because Mr Copeland did not address the higher size in his evidence. Council also submits that there is no expert evidence before the Panel supporting the position that such a change is "minor", or in other words to not have neutral (regulatory) effect. We return to the matter of caps, below.

Individual and aggregate commercial activity caps

3.43 Mr Copeland's written evidence appears to support a 200m² single tenancy retail activities cap. Through legal counsel, Jacks Point Ltd changed its position seeking instead a 300m² single tenancy retail cap. JPL's economic expert Mr Copeland has not provided any further supplementary evidence on the merits of this change, and it was understood from his appearance that he had no input into the change, as when he appeared at the hearing on Friday 17 January he gave evidence that he had not had any input into the 300m² cap but understood it was wanted to enable a larger convenience store. The change is simply noted in his evidence summary as being "now proposed",²⁴ without further explanation.

²³ See Legal Submissions for QLDC as part of Council's right of reply, District Wide (Hearing Stream 05), dated 22 September 2016, at paragraphs 5.1-5.3.

²⁴ At paragraph 6(c) of his evidence summary dated 17 February 2017.

3.44 Council's position, following the hearing of submissions and evidence and taking into account the limitations given scope of submissions and Mr Heath's expert opinion following receipt of JPL's supplementary submissions, is as follows:

- (a) a 200m² maximum net floor area for any individual commercial activity (if there was scope, the Council would support this at 300m², consistent with the Local Shopping Centre Zone);
- (b) an aggregate cap of 2.12ha on the total gross area of land that can be developed for commercial activities, including space for carparking, within the Jacks Point Village and of 2.1ha in the Homestead Bay Village; and
- (c) for the purposes of the individual and aggregate commercial activity caps, an exclusion to the Chapter 2 definition of "commercial activity"²⁵ so that it excludes markets, showrooms, professional, commercial and administrative offices, service stations, and motor vehicle sales. Pursuant to the definition of commercial activity, the activity and therefore the cap, includes the car parking associated with the commercial activity.

3.45 Jacks Point continues to seek a 26.80 ha Village area. Mr Copeland's evidence is that, with the exception of the net floor area cap on individual tenancies, market demand should otherwise determine the total areas of the various activities within the Village.²⁶ Mr Copeland stated at the hearing that the caps recommended by Mr Heath were unnecessarily restrictive.²⁷

3.46 The Council maintains, relying on Mr Heath's evidence, that there is no economic basis to increase the Jacks Point village to 26.80 ha, nor does his evidence demonstrate a need to endorse a "let the market decide" approach over a 26.80 ha area (an area larger than the

²⁵ Commercial Activity, means the use of land and buildings for the display, offering, provision, sale or hire of goods, equipment or services, and includes shops, postal services, markets, showrooms, restaurants, takeaway food bars, professional, commercial and administrative offices, service stations, motor vehicle sales, the sale of liquor and associated parking areas. Excludes recreational, community and service activities, home occupations, visitor accommodation, registered holiday homes and registered homestays.

²⁶ At paragraph 40 of his evidence dated 3 February 2017. See also his Summary of Evidence dated 17 February 2017, at paragraph 13.

²⁷ Summary of Evidence dated 17 February 2017, at paragraph 12.

Queenstown Town Centre). Mr Heath's expert evidence (following consideration of Mr Copeland's evidence and informal discussions with Mr Copeland) is that there is considerable uncertainty around whether the envisaged land uses in the Village would eventuate, and that caps are appropriate in light of the large geographic extent of the notified Village area.²⁸ That remains the Council's position and has underpinned the recommendations in Ms Jones's revised chapter 41.

Visibility from public places beyond the zone

3.47 At the hearing, the Panel queried whether there was scope for Ms Jones to recommend replacing "visibility from State Highway and Lake Wakatipu" and "when viewed from the State Highway" in policies 41.2.1.1 and 41.2.1.3, with the broader phrase "public places beyond the Jacks Point Zone". Having considered this and had regard to ODP policies 3.1 and 3.4, it is accepted that the ODP only anticipates the views from the State Highway and from the lake, and therefore Ms Jones has recommended reverting to the notified wording.

Unlawful discretion

3.48 The Panel queried whether recommended Rule 41.5.6.3 gives unlawful discretion to a third party to determine the activity status. The Council submits that there is no unlawful discretion.

3.49 Rule 41.5.6.3 prevents any increase in the scale of use until an amended intersection design has been updated, completed and available for use. However, the rule also contains an exception; the scale of use can increase without an amended intersection design, if the New Zealand Transport Agency has approved a Traffic Management Plan.

3.50 Rule 41.5.6.3 is not framed so that the activity status depends on compliance with the Traffic Management Plan. Put another way, the rule does not leave the question of compliance open. Rather, it is the prior existence (or non-existence) of an approved Traffic

²⁸ At paragraphs 7 and 10-13 of Mr Heath's summary of evidence dated 13 February 2017.

Management Plan that determines whether the activity is captured by the rule. The New Zealand Transport Agency is not determining whether the activity is permitted.

Vires of rules

- 3.51** Ms Jones has considered and decided against recommending a rule of the type proposed by Mr Ferguson, which would have triggered a resource consent if a covenant was not registered on titles requiring buildings within Homesites to adhere to design guidelines. The Panel had queried the *vires* of such a rule at the hearing.
- 3.52** Instead Ms Jones has recommended adding a new rule 27.7.11.5, the overall effect of which will be to require registration of the Preserve Design Guidelines on each lot in the event of a subdivision of the Open Space Golf Activity Area. There are examples of such rules already in chapter 27²⁹ (considered in Hearing Stream 4), where the rules state that they are to be given effect to by consent notice registered against the title of the lot created, to the benefit of the lot holder and the Council.
- 3.53** Ms Jones has also recommended adding five new rules (41.4.7.1, 41.4.7.2, 41.4.7.3, 41.4.7.5 and 41.4.7.6). Under Rule 41.4.7.1, buildings and activities within the Village Activity Area would be a controlled activity provided the application is accompanied by a Comprehensive Development Plan (**CDP**) or is in accordance with an approved CDP. If there is no CDP the building would be a restricted discretionary activity under Rule 41.4.7.2. Where a land use consent (including approval of a CDP) has already been granted for the subject land under Rule 41.4.7.1 and a subsequent application is made for the use and development of that land and an amended CDP, then this would be a restricted discretionary activity under Rule 41.4.7.3. The purpose of this latter rule is to allow Council to manage applications for multiple or successive CDPs. New rule 41.4.7.5 operates in a similar way for the R(HD)-E Activity Area.

²⁹ Rules 27.7.8 and 27.7.9 of revised Chapter 27, attached as Appendix 1 to the reply evidence of Mr Nigel Bryce dated 26 August 2016.

- 3.54** The Council submits that these CDP rules are *intra vires*, because the status of an activity is not being determined under the CDP itself. Rather, the existence (or lack thereof) of a CDP as part of a prior consent determines whether an activity is captured by Rules 41.4.7.2-41.4.7.3. The CDP is the trigger for those rules but it is the rules themselves which determine activity status. In considering the *vires* of the CDP rule, the Council has had regard to *Appealing Wanaka Incorporated v Queenstown Lakes District Council*³⁰ which provides an example of how this type of rule can be drafted to avoid *vires* issues, and has also had regard to *Re Auckland Council*³¹ which upholds the key point that the status of activities must be determined through the RMA and planning documents.
- 3.55** It is also submitted that the matters of control and discretion are sufficiently detailed to ensure that there is certainty as to the level of detail that is required in a CDP.
- 3.56** Ms Jones has given thought to whether Rule 41.4.7.1 (under which buildings within the Village Activity Area would be a controlled activity provided the application is accompanied by a CDP or is in accordance with an approved CDP) should instead be restricted discretionary. However, because Outline Development Plans were controlled activities in the ODP it is submitted that there is no scope to make Rule 41.4.7.1 more restrictive.
- 3.57** In terms of scope, the Panel asked if the Outline Development Plan rules in the ODP give scope, given that they appear to be *ultra vires*. Council's submission is that the rules must be observed and complied with, until the point that the Environment Court set them aside. No application has been made to the Environment Court in relation to these particular rules, and therefore they remain in the ODP and provide the necessary scope for Ms Jones's recommended CDP rules. Similar rules requiring the provision of a Comprehensive Development Plan in conjunction with those activities that require a RD activity in the R(HD)-E area have also been recommended for

³⁰ *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 196.

³¹ *Re Auckland Council* [2016] NZEnvC 56 and *Re Auckland Council* [2016] NZEnvC 65.

that area and the same reasoning as outlined above apply equally in respect of that rule (41.4.7.5).

4. SPECIFIC MATTERS RELATING TO WATERFALL PARK ZONE, CHAPTER 42

Subdivision Activities

4.1 Ms Vicki Jones recommended at the hearing and in her reply evidence for Waterfall Park that Chapter 27 Subdivision should be amended as follows (purple changes):

	Zone specific standards	Activity Status
27.7.12	Any subdivision of the Millbrook Resort Zone <u>or Waterfall Park Zone</u> that is inconsistent with the <u>respective Millb-Brook Resort Zone Structure Plan specified in part 43.7 or the Waterfall Park Zone Structure Plan in Part 42.7.</u>	<u>D</u>

4.2 The reasons for this recommended amendment, was that there was no rule in the subdivision chapter that provided an activity status for subdivision in the Waterfall Park Zone, that was inconsistent with the Structure Plan in Chapter 42.7.

4.3 The Panel asked what the notified activity status was for subdivision within Waterfall Park, and whether there was scope to recommend the new rule, or whether it was a non-substantive change.

4.4 This change is respectfully submitted to be non-substantive because:

- (a) notified Rule 27.4.1 stated that all subdivision activities are discretionary unless otherwise stated;
- (b) the notified Rule 27.4.3 provided that subdivision undertaken in accordance with a structure plan or spatial layout plan that is identified in the District Plan shall be a restricted discretionary activity;³²

32 This was amended to controlled through the Subdivision hearing.

- (c) with the restructure of the Subdivision Chapter through its respective hearing, rules were drafted for those chapters that included a Structure Plan;
- (d) although the notified chapter did not include a 'non-compliance' rule for subdivision in Waterfall Park (and Millbrook Zone), the non-compliance status would have fallen to fully discretionary in any event, through notified Rule 27.4.1; and
- (e) therefore, a specific rule for the Waterfall Park Structure Plan should be included, and in effect there is no change in the activity status for subdivision that is inconsistent with a structure plan.

Regulation of fire

- 4.5 Notified Rule 42.5.7 provides that indoor solid fuel fires are non-complying except for feature open fireplaces in the clubhouse and other communal buildings including bars and restaurants. The rule is titled "Atmospheric Emissions".
- 4.6 Section 30(f) of the RMA provides that regional councils have *control of discharges of contaminants into or onto land, air, or water and discharges of water into water*. It follows that this rule should be deleted as it is a clear function of a regional council to control the discharge of contaminants into air, which includes emissions from fires.
- 4.7 This is also the case in the Millbrook Resort Zone Chapter, specifically notified Rule 43.5.12. The Council recommends that this rule be deleted as well.

5. SPECIFIC MATTERS RELATING TO MILLBROOK RESORT ZONE, CHAPTER 43

- 5.1 The Council has met and reached what is understood to be an agreed position with Millbrook Country Club Limited (**MCCL**) and X-Ray Trust regarding Chapter 43. This position is set out in

Appendix A to Ms Evan's Reply Evidence filed alongside these legal submissions. The key points to note are:

- (a) deletion of all references to 'design guidelines';
- (b) deletion all references to air quality in objectives, policies and rules as control of discharges to air is a function of the regional council;
- (c) inclusion of landscaping requirements for all overlay areas in the Millbrook Zone;
- (d) allowance of utilities buildings as a permitted activity in the Landscape Protection (Malaghan) Activity Area;
- (e) R14 amended to require a 6.5m height limit; and
- (f) discretionary activity status for non-compliance with the Structure Plan.

Rules relating to building heights

5.2 As noted in Ms Evans' reply evidence, it has come to the Council's attention on the morning of filing the Council's right of reply that there is uncertainty around the simulations attached to Mr Andrew Craig's evidence filed before the hearing. The Council had understood that the simulations were modelled using the amended height limit of 6.5m as included in MCCL's 2 December version, but it now appears that they may represent a 5.5m height limit.

5.3 Ms Evans' recommendations set out in her evidence and her Appendix 1 are based on the simulations including:

- (a) the R14 height limit of 6.5m (not 5.5m); and
- (b) the height restriction overlay being included for R15.

5.4 Council is waiting for that confirmation at the time of filing its right of reply. If it evolves that the simulations do not reflect the position agreed between MCCL and Council and set out directly above, then Council records that it will need to reconsider its position. Council suggests that if MCCL confirm that the simulations are incorrect, that it is given an opportunity to file correct simulations. The Council would then be able to assess and provide updated recommendations,

if necessary. It is therefore respectfully submitted that the Panel seek MCCL to confirm the basis of its simulations so that the Council can provide an updated recommendation if required.

Planning maps

- 5.5** The Panel asked for an explanation of the process that was followed to correct an error in planning map 10 at notification. The issue was that the Millbrook Resort Zone boundary on notified Planning Map 10 did not include Dalglish Farm (it was shown as Rural General), but the Farm's inclusion within the Millbrook Resort Zone was clearly contemplated as the Structure Plan located within Chapter 43 did cover the Dalglish Farm. In addition, a number of provisions that managed land use within specific activity areas located on Dalglish Farm, were also included in the chapter.
- 5.6** This error was identified at notification, and subsequently the Council uploaded a corrected planning map to its website (Planning Map 10a). There was no public notice or Council report accompanying the report, and up until January 2017 when the Council undertook a number of clause 16A minor corrections to the PDP, both of these versions of planning map 10 remained on the website. It is understood that at the time of making clause 16A corrections to the planning maps in January 2017, the Council used Planning Map 10A as the base and included a new grey hashed diagonal line over the Millbrook Zone to show that it was a PDP zone, and subsequently removed Planning Map 10 from QLDC's website.
- 5.7** It follows that some of the submissions lodged on the chapter refer to the notified planning map, and others refer to the corrected planning map.
- 5.8** It is submitter to be immaterial that a formal process was not followed, and importantly that there would be no prejudice to any interested parties because:
- (a) while the notified planning map was not accurate, the Millbrook Structure Plan was included in the notified version

- of Chapter 43 and accurately shows the correct scope and extent of the proposed zone;
- (b) given that position, it would not be reasonable for a submitter to say that they only relied on the planning map when the discrepancy between the map and the detailed structure plan would be evident if they looked (particularly given that one would expect a person with a strong interest in Millbrook to look at the specific chapter as well);
 - (c) in addition, the Dalgleish Farm land that is incorrectly excluded from the Millbrook Resort Zone on the notified planning maps is within the scope of the proposed plan in any event (i.e. it is not expressly excluded, unlike other areas of land);
 - (d) Millbrook specifically identified the discrepancy in a submission and sought that it be corrected – any interested person could of course lodge a further submission in opposition to that relief, and a number of submitters did;
 - (e) similarly, similar submitters lodged submissions on the basis that the Dalgleish Farm would be zoned Millbrook Resort Zone, and therefore they have standing on the matter of whether that zoning is appropriate or not; and
 - (f) in all of the circumstances, we do not consider that any person could reasonably say that they could not possibly have anticipated the mapping relief being sought.

Restricted Discretionary or Discretionary Rule

5.9 As set out at paragraph 14.7 of Ms Evans' s42A, the first two standards in Rule 43.5.1 have a restricted discretionary status but no matters of discretion. Her recommendation was that the activity status should therefore be changed to discretionary, and it is submitted that this is the appropriate outcome.

5.10 Section 2 of the RMA defines a "restricted discretionary activity" as an activity described in section 87A(3), which provides:

If an activity is described in ...a plan, or a proposed plan as a restricted discretionary activity, a resource consent is required for the activity and-

- (a) *the consent authority's power to decline a consent, or to grant a consent and to impose conditions on the consent, is restricted to the matters over which discretion is restricted (whether in its plan or proposed plan...)...*
- (b) *if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.*

5.11 Section 2 of the RMA defines a "discretionary activity" as an activity described in section 87A(4), which provides:

If an activity is described in ...a plan, or a proposed plan as a discretionary activity, a resource consent is required for the activity and-

- (a) *the consent authority may decline the consent or grant the consent with or without conditions; and*
- (b) *if granted, the activity must comply with the requirements, conditions, and permissions, if any, specified in the Act, regulations, plan, or proposed plan.*

5.12 It is respectfully submitted that as Rule 43.5.1 does not meet the description of a restricted discretionary activity under section 87A(3), but it does meet the description of a discretionary activity under section 87A(4), the appropriate status is fully discretionary. This is supported by commentary that a discretionary activity is wholly discretionary unless specifically restricted in the plan.³³

Structure Plan

5.13 It is noted that the Structure Plan in Appendix 1 to Ms Ruth Evan's Reply Evidence, filed alongside these submissions, has not been updated due to time constraints. The Council will provide an updated Structure Plan as soon as possible next week.

³³ Salmon Environmental Law, RM104B.01.

Regulation of fire

5.14 This is addressed above at paragraphs 4.5 to 4.7 as a similar rule was also notified in the Waterfall Park chapter.

DATED this 24th day of February 2017



S J Scott
Counsel for Queenstown Lakes District
Council