

**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 4 -  
Subdivision chapter

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

**Hearing Stream 4 – Subdivision**

**26 August 2016**

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## 1. INTRODUCTION

- 1.1 The purpose of these legal submissions is to assist the Panel regarding legal issues that have arisen during the course of the hearing on the Subdivision chapter and to provide the Council's position on specific issues.
- 1.2 They also seek to address some matters raised by submitters through their written evidence filed prior to, and presented at the hearing, including submitters' legal submissions, where the Council considers that further analysis is required.
- 1.3 Otherwise, these submissions do not respond to every legal issue raised by submitters during the course of the hearings. The absence of a specific response in these submissions should not be regarded as acceptance of the points made by counsel for various submitters.
- 1.4 Filed alongside this right of reply is Mr Nigel Bryce's planning reply.
- 1.5 Having considered matters raised and evidence produced during the course of the hearing, Mr Bryce's reply and associated revised chapter represent the Council's position.

## 2. SUBDIVISION CHAPTER – SCOPE AND TREATMENT OF STAGE 2 ZONES AND ZONES EXCLUDED FROM THE REVIEW

- 2.1 The notified subdivision chapter includes the following text:

*27.3.3 Zones exempt from the Proposed District Plan and subdivision chapter*

*27.3.3.1 The following zones are not part of the Proposed District Plan: stage 1 (at the date of notification: 26 August 2015) and the subdivision chapter shall not apply to the following:*

- a Frankton Flats A Zone*
- b Frankton Flats B Zone*
- c Remarkables Park Zone*
- d Mount Cardrona Station Zone*

- e *Three Parks Zone*
- f *Kingston Village Special Zone*
- g *Open Space Zone*

*27.3.3.2 In addition, all the Special Zones within Chapter 12 of the operative District Plan, except as identified below, are excluded from the proposed District Plan subdivision chapter:*

- a *Jacks Point*
- b *Waterfall Park*
- c *Millbrook*

**2.2** For the purposes of the subdivision chapter, this means that it applies, through notification in Stage 1, to all zones except for the specific exclusions above in 27.3.3.1. Through 27.3.3.2, the subdivision chapter in Stage 1 does not apply to those Special Zones not listed. Those zones are:

- (a) Rural Visitor Zone;
- (b) Penrith Park Zone;
- (c) Bendemeer Special Zone;
- (d) Hydro Generation Zone;
- (e) Quail Rise Zone;
- (f) Meadow Park Zone;
- (g) Ballantyne Road Mixed Use Zone;
- (h) Shotover Country Special Zone;
- (i) Arrowtown South Special Zone; and
- (j) Northlake Special Zone.

**2.3** While all of these Stage 2 actions are subject to confirmation by the Council's elected members, the subdivision chapter would need to be re-notified in Stage 2, for the zones that are listed above in paragraph 2.2. Consideration of location specific objectives and policies, and any provisions such as minimum lot sizes would also be necessary and, if they are considered appropriate, would be notified as appropriate in Stage 2 (for these zones only). It is likely that the Council would re-notify its final position on the Subdivision chapter objectives and provisions that are filed alongside this reply, in Stage 2.

- 2.4** As the two clauses that define what land the subdivision chapter applies to in Stage 1, do not exclude the Industrial<sup>1</sup> and Township<sup>2</sup> zones, it is submitted that the Stage 1 chapter must also apply to them. In Mr Bryce's s 42A report, the minimum lot sizes for these zones were struck out with the reasoning being that they were Stage 2 zones. However, as the Panel raised during the course of the hearing, there are no submissions seeking the deletion of these specific standards, and as the two clauses do not say that the chapter does not apply to those zones, the Council accepts that the relevant minimum lot standards must be reinstated. They may however be considered for renotification in Stage 2.
- 2.5** The subdivision chapter does not apply to the geographic area covered by PC50 to the ODP, and accordingly the ODP subdivision chapter will continue to apply to that land. Even after any appeals on the subdivision chapter are resolved, the subdivision chapter in the ODP will continue to apply to PC50, Remarkables Park Zone, Frankton Flats (B) Zone, Mount Cardona Station Zone, Three Parks Zone, Shotover Country Special Zone, Arrowtown South Special Zone, and Northlake Special Zone.

### **Remarkables Park**

- 2.6** As noted above, clause 27.3.3.1 of the notified chapter states that the chapter does not apply to the Remarkables Park Zone and the ODP subdivision chapter will continue to apply. However, other district-wide chapters of the PDP do apply to the zone, for example the Strategic Directions, Urban Development, Landscape, and Historic Heritage chapters.
- 2.7** At the time of filing these closing submissions, QLDC is in discussions with Remarkables Park Limited about whether the zone chapter will be notified in Stage 2 of the PDP, or whether the zone will be excluded entirely from the review.

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1 Industrial A and B zones.

2 (Makarora, Kingston, Glenorchy, Lake Hawea, Luggate, Kinloch and Albert Town) Township Zones. The chapter also does not specifically exclude the Riverside Stage 6 zones from the ODP, the current intention being to notify this area in Stage 2 as a combination of Township and Open Space.

### 3. ZONES / CHAPTERS EXCLUDED FROM NOTIFICATION IN PDP

3.1 During the Council's opening, the Panel sought more information as to what zones / chapters will be excluded from notification in either Stage 1 or 2. Such decisions are made by elected members, and as a consequence what is stated in closing is the current position based on discussions with and recommendations of Council officers.

3.2 Subject to that qualification, the current intention is that the following ODP district-wide or zone chapters will not be notified in Stage 2 of the PDP:

*District-wide*

- (a) Earthworks;
- (b) Signs;

*Zone*

- (c) The geographic area covered by PC50;
- (d) Remarkables Park Zone (unless otherwise agreed by the landowner to be included in Stage 2);
- (e) Frankton Flats (B) zone;
- (f) Mount Cardona Station Zone;
- (g) Three Parks Zone;
- (h) Shotover Country Special Zone;
- (i) Arrowtown South Special Zone; and
- (j) Northlake Special Zone.

3.3 If they are not notified in Stage 2, all of these non-reviewed ODP provisions would remain part of the ODP. As previously submitted, there are four options for resolving any integration issues between the PDP provisions (once they are deemed to be operative) and the non-reviewed provisions which they would "join" which remain in the ODP. Which one will be most appropriate will depend on the extent of the integration issue. The options are:

- (a) amendment of proposed plan under clause 16(2) of Schedule 1 of the RMA, to alter any information where such an alteration is of minor effect, or to correct any minor errors;

- (b) variation of proposed plan, prior to the approval of the PDP, under clause 16A of Schedule 1 of the RMA;
- (c) correction of the ODP to correct any minor errors under clause 20A of Schedule 1 of the RMA; and
- (d) initiate a plan change once the PDP become operative.

**3.4** To further assist the Panel, at **Appendix 1** is an extract from the Council's Legal Submissions that formed part of the Council's Right of Reply dated 7 April 2016 for Strategic Direction hearing, which addresses the integration between Stages 1 and 2, and excluded chapters.

**3.5** For the sake of completeness, it is respectfully submitted that integration issues are matters for the Council, and there is no scope for the Panel to amend the ODP provisions through decisions on Stage 1 of the PDP.

#### **4. RELATIONSHIP WITH CHAPTER 15 OF OPERATIVE DISTRICT PLAN**

**4.1** Rule 15.2.20 of the ODP<sup>3</sup> makes earthworks associated with a subdivision a controlled activity (except for the Special Zones other than the Rural Visitor Zone and any of the SASZs). For ease of reference Rule 15.2.20 provides:

##### **15.2.20 Earthworks**

###### **15.2.20.1 Controlled Subdivision Activity – Earthworks**

*Earthworks associated with any subdivision of land in any zone except for any of the Special Zones that are listed in Section 12 of the District Plan other than the Rural Visitor Zone and any of the Ski Area Sub-Zones are a **Controlled Activity** with the Council reserving control in respect to the matters listed in Rule 22.3.2.2(a)(i)-(ix) in Section 22.*

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3 Decided by Plan Change 49.

### **15.2.20.2 Assessment Matters for Resource Consent**

*In considering whether or not to impose conditions in respect of Earthworks associated with any subdivision the Council may consider the Resource Consents – Assessment Matters 22.4i-viii in Section 22.*

**4.2** During the hearing Mr Bryce was asked whether earthworks should form part of the Council's discretion under the RDA rule framework. Mr Bryce has confirmed his position in his reply, that if earthworks were to be added as a matter of discretion, this would effectively replace Rule 15.2.20.

**4.3** Furthermore, notified Rule 27.3.2.1 of the PDP [redrafted Rule 27.4.2.1] deals with earthworks associated with subdivision, and states that earthworks undertaken for the development of land associated with any subdivision shall not require a separate resource consent but will be considered as part of any subdivision activity. It is submitted to be helpful for plan administration and for plan users, however it is potentially frustrated by the fact that it does not refer to Rule 15.2.20. The Council considers that it would be appropriate for the reference, as included in Mr Bryce's revised chapter, to be added to ensure the chapters ultimately align, once they are both located together in the operative plan.

## **5. DEFAULT ACTIVITY STATUS FOR SUBDIVISION**

**5.1** A number of submitters continue to seek controlled activity status for subdivision within the district. In particular, Darby and others<sup>4</sup> submit that subdivision should have a default controlled activity status. However, as noted by the Panel in the hearing, no evidence has been presented by submitters that demonstrates that every recent subdivision has achieved 'good subdivision' outcomes under the ODP's controlled activity status such that this could confidently be considered to be the most appropriate activity status in the PDP.

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<sup>4</sup> Darby Planning LP (#608), Soho Ski Area Ltd (#610), Treble Cone Investments Ltd (#613), Lake Hayes LTd (#763), Jacks Point 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 (#762), and Glendhu Bay Trustees Ltd (#583).



- 5.2** The Council continues to support its position that a restricted discretionary activity status is the most effective response to address the resource management issues raised by subdivision activities across the district.<sup>5</sup>
- 5.3** Through the Additional Information dated 29 July 2016 which was submitted by Mr Bryce on behalf of the Council, the data that was originally referred to in the section 32 evaluation for Chapter 27, Mr Bryce's s42A report and the Council's opening legal submissions has been reworked. In particular, this has been done by providing the same data sorted by consent type granted by zone.<sup>6</sup> Mr Bryce has included the updated data at Appendix D of his reply evidence, which is filed alongside these legal submissions.
- 5.4** We will address section 106 RMA matters in further detail later in these submissions but note that, provided there is greater clarity in terms of the matters of discretion (for example, with regard to roading matters), restricted discretionary activity status remains appropriate as the default for subdivision.

## **6. STRUCTURE PLAN**

### **Policy Regarding Future Detail**

- 6.1** Darby and others support the controlled activity status for subdivision where there is a structural plan or a development plan (assuming such a plan was the subject of a private plan change). However the Panel has highlighted that there is no support in definitions (i.e. no definition of either a structural plan or a development plan), nor policy support in either the Subdivision chapter or the zone chapters where those structural/development plans would logically sit.
- 6.2** In the hearing, the Panel raised the need for policy framework and definitions to support structure plans within the subdivision chapter. Ms Baker-Galloway also raised this in her synopsis of legal submissions dated 1 August 2016, where it was submitted that

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5 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 4.2.

6 See the Additional Information – Response of Nigel Roland Bryce dated 29 July 2016, at Appendix 1.

providing a definition of 'structure plan' would provide more certainty.<sup>7</sup> Those submissions also suggested that the Chapter 27 provisions could more clearly direct what a 'structure plan' is and "*what it must include or may include in order to be relied upon to receive the benefit of the controlled subdivision activity status*".<sup>8</sup>

**6.3** Mr Bryce has considered whether there is scope in the Chapter 27 submissions to grant this relief, and notes that no specific relief sought the introduction of a policy framework and definition to support the application of structure plans.<sup>9</sup> Consequently, Mr Bryce considers this would need to be advanced by a variation to the PDP and has not recommended any specific changes to Chapter 27 to respond to this matter.<sup>10</sup>

**6.4** For clarity, Mr Bryce would support the introduction of a policy framework and definition to support the application of structure plans if there was scope.<sup>11</sup>

**6.5** It is accepted that such a policy would have merit if there was scope but it is submitted that there would be some risks in a policy going so far as to specify a controlled activity status for subdivision in accordance with a structure or development plan. This is particularly the case when the specifics of relevant rules or other provisions relating to individual structure plans can be addressed in due course by plan changes.

### **Soho and Treble Cone**

**6.6** Soho and Treble Cone advanced through legal submissions a controlled activity status for subdivision within Ski Area Sub Zones (**SASZs**) in the Rural Zone.<sup>12</sup> At the hearing, the Panel questioned whether the submitters had scope to advance a controlled activity rule framework within the SASZs, and instead suggested they may be better to follow the 'structure plan' approach.

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7 At paragraph 4.5.

8 At paragraph 4.5.

9 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 9.3.

10 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 9.4.

11 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 9.4.

12 Synopsis of Legal Submissions dated 1 August 2016, at section 3.

6.7 The legal principles relating to scope are addressed in section 13 below, and are relied on in addressing the present issues.

6.8 It is noted that both Soho and Treble Cone's submissions seek to amend Rule 27.4.1 as follows:<sup>13</sup>

*All subdivision activities are ~~discretionary~~ controlled activities, except as otherwise stated:*

*Council's control is limited to:*

- *Lot sizes, averages and dimensions*
- *Subdivision design*
- *Property access*
- *Esplanade provision*
- *Natural hazards*
- *Fire fighting water supply*
- *Water supply*
- *Stormwater disposal*
- *Sewage treatment and disposal*
- *Energy supply and telecommunications*
- *Open space and recreation*
- *Easements*
- *The nature, scale and adequacy of environmental protection measures associated with earthworks*

Or

Insert new Rule 27.4.4, as follows:

*The following shall be Controlled activities:*

*a. Subdivision within the SASZ.*

*Council's control is limited to:*

- *Lot sizes, averages and dimensions*
- *Subdivision design*
- *Property access*
- *Esplanade provision*
- *Natural hazards*
- *Fire fighting water supply*
- *Water supply*
- *Stormwater disposal*
- *Sewage treatment and disposal*
- *Energy supply and telecommunications*
- *Open space and recreation*
- *Easements*
- *The nature, scale and adequacy of environmental protection measures associated with earthworks*

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13 Treble Cone Investments Limited (#613) at pages 12 to 13, and Soho Ski Area Limited and Blackmans Creek No.1 LP (#610) at pages 12 to 13.

- 6.9** It is submitted that there is little doubt that relief sought provides scope for a controlled activity rule framework within the SASZs, as it was specifically requested through the submissions.
- 6.10** In addition, Mr Christopher Ferguson filed supplementary evidence dated 15 August 2016 on behalf of Soho and Treble Cone, to report back on how the land use provisions proposed within the SASZs in Chapter 21 Rural could integrate with Chapter 27 Subdivision; and/or whether and how a structure plan might work to achieve that.
- 6.11** In that evidence, Mr Ferguson recommended amendments to Rule 21.5.32 as it relates to Visitor Accommodation in the SASZs to require a Landscape and Ecological Management Plan to support new visitor accommodation within the SASZs in Chapter 21. Mr Ferguson considers that this would then provide sufficient scope for a Landscape and Ecological Management Plan to be integrated into an amended Rule 27.7.1 and for a controlled activity status to be provided for subdivision activities in SASZs.
- 6.12** Mr Bryce notes that this approach is the same relief that Mr Ferguson sought to Chapter 21, which Mr Barr recommended be rejected in the Rural Hearing. It is respectfully submitted that the position presented by Mr Ferguson in the context of the present hearing does not provide any compelling reason for Mr Barr's recommendation to be revisited.
- 6.13** Further, Mr Bryce also notes that the Landscape and Ecological Management Plan Approach advanced by Mr Ferguson has a limited application in that it is only applicable to visitor accommodation activities. Mr Bryce considers that a true structure plan approach would be applied to a wider range of land use activities in order to benefit from a controlled activity subdivision status. As a consequence, he does not support the relief sought within Mr Ferguson's supplementary planning response. Accordingly, the Council does not support the relief sought.

## **7. UNIT TITLE SUBDIVISION RULE**

- 7.1** At the hearing the Panel indicated that a Unit Title subdivision rule may go some way to responding to the relief sought by Soho and Treble Cone. Mr Bryce supports this approach providing it does not enable the subdivision of building platforms.<sup>14</sup>
- 7.2** The Council notes there is no specific submission that seeks a Unit Title subdivision rule, however this issue is dealt with in section 13 below.

## **8. LOT SIZE MATTER OF DISCRETION**

- 8.1** Mr Goldsmith on behalf of a number of submitters<sup>15</sup> queried whether the restricted discretionary activity status for subdivision was significantly different from the notified fully discretionary status.<sup>16</sup> In particular, his legal submissions identified this as an issue because the proposed restricted discretionary status and rule retains the Council's discretion over lot size.<sup>17</sup>
- 8.2** Mr Bryce queries whether relying on 'property access and roading' as a matter of discretion, in the absence of clearly identifying lot size as a matter of discretion, is sufficient to avoid situations like the Larchmont decision<sup>18</sup> being extensively litigated.<sup>19</sup> The Larchmont decision was raised by the Panel in the hearing as an example of when Council retaining discretion over 'lot sizes' would have been helpful.
- 8.3** Furthermore, Mr Bryce considers that retaining Council discretion over 'lot sizes and dimensions' provides more certainty from a plan administration perspective.<sup>20</sup>

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14 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 2.14.

15 G W Stalker Family Trust Mike Henry Mark Tylden Wayne French Dave Finlin Sam Strain (#535/534), Ashford Trust (#1256), Bill and Jan Walker Family Trust (#532/1259/1267), Byron Ballan (#530), Crosshill Farms Limited (#531), Robert and Elvena Heywood (#523/1273), Roger and Coral Wilkinson (#1292), Slopehill Joint Venture (#537/1295), Wakatipu Equities (#515/1298), Ayrburn Farm Estate Limited (#430), and F S Mee Developments Limited (#525).

16 Legal Submissions dated 22 July 2016, at paragraph 5.2.

17 Legal Submissions dated 22 July 2016, at paragraph 5.2.

18 RM130588

19 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 4.4.

20 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 4.4.

8.4 Accordingly, it is submitted that the evidence before the Panel supports the clear identification of lot size as an appropriate matter of discretion (where Council's discretion is restricted to internal roading design and provision, and access and service easements for future subdivision on adjoining land).

## 9. SECTION 106

9.1 Mr Goldsmith also submitted that a restricted discretionary activity status for subdivision is not justifiable considering the Council's powers under s106 of the RMA to decline a consent application if there is no sufficient provision for legal and physical access to each allotment of a subdivision.<sup>21</sup> Ms Baker-Galloway raised similar concerns in her legal submissions.<sup>22</sup> The Council does not however consider that reliance on section 106 of the RMA to decline subdivisions applications is either a complete nor appropriate answer to those concerns.

9.2 Rather, it is submitted that it is more appropriate from both an administration and plan user perspective for the plan to be clear about what matters are relevant to subdivision proposals, rather than relying on a statutory discretion to decline inappropriate proposals.

9.3 Section 106 of the RMA provides:

- (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*

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21 Legal Submissions of Mr Goldsmith at paragraph 5.9(a).

22 Legal Submissions dated 1 August 2016 for Darby Planning LP and Co, at paragraph 6.14.

- (c) sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision.  
[emphasis added]

9.4 Given the history of section 106(1)(c) in particular,<sup>23</sup> it is submitted that it would be highly questionable for the discretion to be relied upon to decline subdivision consent based on concerns about a matter such as road or driveway width, when such matters could (and arguably should) be clearly articulated in the PDP. It is doubtful that the provision was intended to be used for circumstances where there is concern about the detail or proposed legal or physical access, rather than such access being provided at all.

9.5 The Council wishes to provide transparency, certainty and clarity in the PDP, and this has also been sought by a number of submitters.<sup>24</sup> It is considered that use of the power under section 106 should not be used to prop up or cover an ambiguity in the PDP. Instead, the Council's preferred approach is to clearly articulate within the PDP itself that minimum lot sizes or matters such as appropriately sized and engineered access ways are relevant to the Council's consideration of subdivision applications. The Council considers that to do otherwise would reduce confidence in the PDP.

## 10. INCORPORATION BY REFERENCE

10.1 In the Council's opening legal submissions dated 22 July 2016 the incorporation by reference of the QLDC Land Development and Subdivision Code of Practice (**Code of Practice**) and the QLDC Subdivision Design Guidelines (**Subdivision Guidelines**) was discussed.<sup>25</sup> Through Mr Bryce's section 42A report it was recommended that the Code of Practice be removed from notified

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23 Section 106(1)(c) reflects a similar provision in s321 of the Local Government Act 1974 which required a subdivider to provide every allotment that did not have frontage to a road or private road with frontage to a road or private road in order to give vehicular access to that allotment. A council could however approve access to any allotment on foot only, where it considered that vehicular access was unnecessary or, because of topographical features, was impracticable.

24 For example, Submitter 370 (Paterson Pitts Group) seeks clear guidance material for Council planning officers processing applications, to ensure consistency, and transparency in how the discretionary activity classes are designed to be administered and are to be generally understood by the community.

25 Opening Representations / Legal Submissions for Queenstown Lakes District Council - Hearing Stream 4 - Subdivision dated 22 July 2016, at section 6.

Policy 27.2.1.1 but still be used to provide for suitable guidance on the need to adopt best practice for subdivision infrastructure.<sup>26</sup>

**10.2** Consequently, the Code of Practice is now referred to in redrafted 27.1 Purpose statement and Rules 27.5.6 and 27.5.7 Assessment Matters. It is submitted that this allows for the Code of Practice to be amended without use of a plan change, as it is not a document that *must* be complied with but instead is a matter that is simply to be taken into account.

## **11. SECTION 32**

**11.1** In the hearing the Panel queried whether there was a need for quantitative analysis on the notified Chapter 27. Section 32 of the RMA requires an evaluation report to examine the extent to which the objectives of the proposal being evaluated are the most appropriate way to achieve the purpose of the RMA. Part of this examination includes assessing the efficiency and effectiveness of the provision in achieving the objectives. That assessment must identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, and only *if practicable, quantify the benefits and costs*.

**11.2** The RMA defines 'benefits and costs' as *of any kind, whether monetary or non-monetary*. It is therefore submitted that it will not always be appropriate to quantify the benefits and costs of a proposal and that it is only one part of the overall assessment. In this instance, a quantitative analysis has not been practicable.

**11.3** The consequence of this for the Panel is that if there is little quantitative analysis, it will need to make a qualitative judgment based on the evidence before it.

**11.4** In regard to the section 32AA report, it is submitted that the Panel's recommendation needs to justify the outcome even if this is to revert to the ODP approach. Submitters are also still required to bring

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26 Section 42A Report for Chapter 27, Nigel Bryce, at paragraphs 18.19 to 18.20.



evidence of this nature to support their positions,<sup>27</sup> even if their position is that the ODP framework should remain. Simply because the ODP has been around for some time, does not remove the need for a s32AA assessment, as the s32AA needs to be compared to the *notified version*.

## 12. DEFINITIONS

### 'Site' definition

12.1 The Panel has requested that the Council further consider the definition of 'site' as per clauses b) and c) below, and express a view about whether there is a need for this to be addressed with a more substantive rule in Chapter 17. The definition states:

*In addition to the above.*

- a) *A site includes the airspace above the land.*
- b) *If any site is crossed by a zone boundary under this Plan, the site is deemed to be divided into two or more sites by that zone boundary.*
- c) *Where a site is situated partly within the District and partly in an adjoining District, then the part situated in the District shall be deemed to be one site.*

12.2 The Council considers that this matter requires additional thought and is more appropriately deferred until the Definition hearing stream, for any consequential amendments to be subsequently made to Chapter 27 (if any).

## 13. SCOPE ISSUES

13.1 The evidence of a number of submitters on the Subdivision chapter has brought about the need to address issues of scope. The legal principles relating to scope have been addressed in depth in the Council's various submissions on Hearing Streams 1A and 1B<sup>28</sup> Hearing Stream 2<sup>29</sup> and these submissions are not repeated here.

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27 See Council's right of reply legal submissions, Streams 01A and 01B, dated 7 April 2016 at paragraphs 10.1 – 10.2

28 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7; Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2.

29 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

The relevant principles are however summarised below for the convenience of the Panel.

### Legal principles

**13.2** The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:

- (a) a submission must first, be *on* the proposed plan;<sup>30</sup> and
- (b) a decision maker is limited to making changes within the *scope of the submissions made on the proposed plan*.<sup>31</sup>

**13.3** The two limb approach endorsed in the case of *Palmerston North City Council v Motor Machinists Ltd*,<sup>32</sup> subject to some limitations, is relevant to the Panel's consideration of whether a submission is *on* the plan change.<sup>33</sup> The two limbs to be considered are:

- (a) whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and
- (b) whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

**13.4** The principles that pertain to whether certain relief is within the scope of a submitter's submission can be summarised as follows:

- (a) the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;<sup>34</sup>

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30 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7.  
31 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

32 [2014] NZRMA 519.

33 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at paragraph 7.3-7.12.

34 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.

- (b) another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought in a submission; the scope to change a plan is not limited by the words of the submission;<sup>35</sup>
- (c) ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter;<sup>36</sup> and
- (d) scope is an issue to be considered by the Panel both individually and collectively. There is no doubt that the Panel is able to rely on "collective scope". As to whether submitters are also able to avail themselves of the concept is less clear. To the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief, it is submitted that the submitter could not advance relief.<sup>37</sup>

### Upper Clutha Environmental Society

**13.5** The Upper Clutha Environmental Society (**UCES**) asserted that there was scope within its submission for it to seek that residential subdivision (and/or development) should be non-complying within Outstanding Natural Landscapes (**ONL**) and Outstanding Natural Features (**ONF**). The Council disagrees with the UCES on this point, as what the submission challenges is the content and analysis of the section 32 report. The relief pursued by UCES is re-notification with an extended submission period, rather than any specific amendments to the activity status for subdivision within chapter 27. The second paragraph from the extract from UCES' submission (directly below), refers to re-notification of the Landscape chapter, rather than chapter 27.

*The Society seeks that the S.32 Landscape Evaluation Report be rewritten containing discussion of the costs and benefits associated with the option of residential subdivision and development become non-complying versus the option of it*

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35 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.

36 *Ibid*, at 574.

37 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

*being discretionary, as required by S.32 of the Act and especially S.32(2).*

*The S.32 Landscape Evaluation Report, once rewritten, should then be publicly notified. The Society seeks that the 40 working day submission period should apply to the rural part of the Proposed District Plan from the date of renotification of the rewritten S.32 Landscape Evaluation Report.*

- 13.6** Mr Barr recommended that the Society's submission to re-notify the s32 report be rejected in his evidence in Hearing Stream 2, and Mr Bryce has made the same recommendation in this hearing.<sup>38</sup> Furthermore, Mr Bryce does not consider that UCES' submission provides scope as all the submissions ask for is the s32 to be rewritten and the chapter re-notified. Non-complying activity status was not the relief asked for.
- 13.7** When considering the legal principles outlined earlier, it is submitted that amendment to the activity status of subdivision in the manner sought was not a reasonably foreseeable consequence of their submissions and relief which sought the re-writing of the section 32 report (which is not of course part of a proposed plan in any event). Other submitters could not have identified that non-complying status was a likely or even possible consequence of the relief and, as such, could be prejudiced by the outcome now sought by UCES.

#### **Unit Title subdivision rule**

- 13.8** Mr Bryce has recommended a new Policy 27.2.8.3 be inserted into Chapter 27 to enable unit title subdivision of multi-unit developments in urban areas.<sup>39</sup> He notes that there is no direct relief seeking a standalone policy.
- 13.9** It is submitted that while there is no direct relief, Chapter 27 covers all types of subdivision. The creation of unit titles, cross leases and strata titles are expressly included within the definition of "subdivision" in section 218(1) of the RMA and therefore are sub-sets of the

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38 Section 42A Report for Chapter 21, Craig Barr, dated 7 April 2016 at paragraph 11.24.  
39 Reply of Mr Nigel Roland Bryce dated 26 August 2016, at paragraph 2.4.

broader defined term. The insertion of new Policy 27.2.8.3 is considered to simply be a clarification to appropriately acknowledge those types of subdivision, rather than a new or materially different policy or regulatory approach. It is therefore respectfully submitted that the inclusion of the new policy would be neutral.

**DATED** this 26<sup>th</sup> day of August 2016



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J G A Winchester / C J McCallum  
Counsel for Queenstown Lakes  
District Council

## APPENDIX 1

### Extract from Legal Submissions on behalf of Queenstown Lakes District Council as part of Council's Right of Reply dated 7 April 2016 for Strategic Direction hearing

#### Integration between Stages 1 and 2, and excluded chapters

- 10.7 The Panel asked the Council to provide some further information in its reply, on the intended integration between Stage 1 and Stage 2 chapters, and chapters/topics excluded from the Review.
- 10.8 As decisions are made on submissions on Stage 1 PDP provisions under clause 10 of Schedule 1, the deeming effect of section 86F of the RMA will come into play.<sup>40</sup> While section 86F is a deeming provision, it will have the effect of treating PDP rules as operative. Indeed, if there are no submissions in opposition to PDP rules, section 86F(a) provides that those rules are already to be treated as operative. Otherwise, if there are no appeals on rules after decisions on submissions are released, those rules will also be treated as operative by virtue of section 86F(b). Finally, rules that have been appealed will not be treated as operative until appeals are withdrawn or determined.
- 10.9 The deeming effect of that is illustrated below, noting that all rules will have legal effect once decisions on submissions are made:

PDP rules where no submissions in opposition	PDP rules not appealed	PDP rules appealed
Deemed operative under section 86F(a)	Deemed operative after closing date of appeals under section 86F(b)	In legal effect, but not operative until appeals withdrawn or determined

- 10.10 For rules and associated provisions in the first two categories of the table above, what will in effect occur is that those PDP provisions will become part of

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40 Section 87F states that: *A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—*

- (a) *no submissions in opposition have been made or appeals have been lodged; or*  
(b) *all submissions in opposition and appeals have been determined; or*  
(c) *all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.*

the ODP, by effectively replacing the previous corresponding rules and associated provisions of the ODP that were subject to Stage 1 of the Review.<sup>41</sup>

10.11 Section 86F of course expressly applies only to *rules*, rather than other plan provisions such as objectives and policies. Therefore as a matter of law, the unchallenged PDP provisions which are associated with deemed operative rules will not also be deemed to be operative by section 86F. However, to the extent that those provisions are not subject to appeal, they would have overriding weight compared to the corresponding provisions of the ODP, which would be operative and in legal effect only on a nominal basis.<sup>42</sup>

10.12 Therefore, over time as the appeal process moves on, the "size" of the PDP will progressively shrink as rules and associated provisions move back into the ODP by "joining" the non-reviewed provisions that were excluded from Stage 1 of the Review. The same process will apply to Stage 2 of the Review. Those provisions that are excluded from the Review will simply stay in the ODP.

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41 In order to formally ensure that the reviewed provisions of the PDP replace the corresponding (Category B) provisions of the operative plan, final approval of the PDP provisions under clause 17 of Schedule 1 of the RMA is required.

42 It is only at the point when the PDP or discrete parts of the PDP are formally made operative under clause 17 of Schedule 1 that corresponding ODP provisions would be extinguished as a matter of law.