

Before Queenstown Lakes District Council

In the matter of The Resource Management Act 1991

And The Queenstown Lakes District proposed District Plan Topic 09
Resort Zones

SUPPLEMENTARY LEGAL SUBMISSIONS

20 February 2017

Solicitors

Anderson Lloyd
M A Baker-Galloway | R E Hill
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348
DX Box ZP95010 Queenstown
p + 64 3 450 0700 | f + 64 3 450 0799
maree.baker-galloway@al.nz | rosie.hill@al.nz

**anderson
lloyd.**

SUPPLEMENTARY SUBMISSIONS

Introduction

- 1 The following legal submissions outline particular matters raised in the course of the hearing in respect of the Jack's Point Zone ("JPZ") that are relevant to the Commissioners' determination.

Scope

- 2 Questions about specific jurisdiction for changes to provisions, arising either from the relief sought by the Jacks Point submitters, or from propositions put by the Commissioners, arose in respect of the following matters:
 - (a) Changing the activity status for visitor accommodation in the R(HD) and (SH) areas from restricted discretionary to discretionary.
 - (b) In respect of the Village:
 - (i) The consolidation of the Village and Education/Health activity areas into one comprehensive activity area;
 - (ii) The changing of permitted size for single tenancy retail activities in the Village from 200m² to 300m²;
 - (iii) Changing the activity status for Village activities to more stringent than controlled;
- 3 Without restating the original legal submissions, it is submitted that scope for pursuing particular relief should be considered on a zone-wide basis, and without the constraints of 'legal nicety' so long as relief sought is fairly and reasonably raised in the collective of submissions, those options are open to the Panel to consider.
- 4 In support of this submission, on Monday 13 February 2017 the High Court issued a decision on preliminary questions of law on scope, in respect of the Proposed Auckland Unitary Plan. While the decisions were pursuant to the Local Government (Auckland Transitional Provisions) Act 2010, the Court upheld and applied case law developed under the Resource Management Act¹. In particular the below extracts are a convenient and helpful summary of the High Court ruling in respect of scope and the RMA, as it applies to the Queenstown District Plan Review ("DPR"):

[114] The IHP's integrated approach to scope noted at [96](a)(iv), (f) and (g) accords with this scheme and more broadly with the orthodox top down and integrated approach to resource management planning demanded by the RMA,

¹ *Albany North and others v Auckland Council* CIV-2016-404-2336. 13 February 2017

particularly in the context of a combined plan process. Submissions on the higher order objectives and policies inevitably bear on the direction of lower order objectives and policies and methods, including zoning rules given the statutory directions at ss 66-75 of the RMA. Given that all parts of the combined plan are being developed contemporaneously, it would have been wrong for the IHP to promulgate objectives, policies and rules without regard to all topically relevant submissions, including submissions dealing only with the higher order matters. Provided the lower order recommendation is a reasonably foreseen logical consequence of the higher order submission, taking such an integrated approach to scope was lawful.

Orthodoxy

[115] The reasonably foreseen logical consequence test also largely conforms to the orthodox “reasonably and fairly raised” test laid down by the High Court in *Countdown* and subsequently applied by the authorities specifically dealing with the issue of whether a Council decision was authorised by the scope of submissions. This orthodoxy was canvassed in some detail in the IHP overview report, which I largely adopt. A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The “workable” approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

[116] As Wylie J noted in *General Distributors Limited v Waipa District Council* the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise “the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness”.

...

[118] For completeness, I do not consider the language or scheme of Part 4 envisages a departure from the *Countdown* orthodoxy. The only material point of difference is that Part 4 is more streamlined, but as noted, the policy of public participation remains strongly evident and there is nothing in the legislation to suggest that the longstanding careful approach to scope should not apply.

...

Summary

[135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a reasonably foreseen logical consequence test which accords with the longstanding *Countdown* “reasonably and fairly raised” orthodoxy and adequately responds to the natural justice concerns raised by William Young J in *Clearwater* and Kós J in *Motor Machinists*.

- 5 The following submissions in response to questions raised are therefore made, on the matter of scope:

Changing the activity status for visitor accommodation in the R(HD) and (SH) areas from restricted discretionary to discretionary.

- 6 Scope for this is clearly established by the numerous submissions that sought reversion to the ODP by way of relief. The operative site standard 12.2.5.1.a, makes it clear that only "residential activity" is contemplated as a permitted activity for residential areas, and therefore anything other than that is a discretionary activity pursuant to 12.2.3.4.iv under the operative plan as it is a breach of the site standard. Maintenance of this operative position as sought by the various resident submitters, and as supported by JPROA on behalf of the residents, will help ensure the success of the village, by assisting it to remain the hub of "village" activities (as recommended by Messers Thomson and Copeland) and ensure that any effect of dispersal of village activities is assessed under the discretionary framework.

Consolidation of V and E, and classification of all as V

- 7 Scope for the consolidation of the Village and Education areas into a 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.
- 8 Zone-wide there can be no dispute that there is scope for a consolidated village for mixed use of retail, commercial, community (including education) residential and visitor accommodation. Compared to the operative position (sought by some submitters) it is a reduction in area for those village activities. Compared to the notified position taking into account the EIC as well (which included accommodation as well as the education and commercial aspects), it is also a reduction in the scale of those activities. Zone wide there can be no argument that when taking the appropriate multi layered approach, and applying the reasonably foresable logical consequence test, there is scope for the consolidated Village, with the removal of the EIC.
- 9 When it comes to a more fine grained site specific assessment of the effects of changing the Education activity area to an extension of the Village activity area, the focus is on the nature and scale of the effects of the change.
- 10 In respect of the factual changes to E as notified, I note as follows:
- (a) Education and Day Care facilities (including buildings) are controlled, the definitions of these activities are broad and also include commercial, social, cultural, recreational, healthcare, administrative activities (although ancillary to the primary activity);
 - (b) The above regime is to be replaced by controlled activity status in the consolidated village, on the condition that it is subject to a comprehensive

development plan as part of the suite of conditions. This now includes reservation of at least 2ha of land for a school and acceptance of imposed maximum commercial caps.

- 11 In respect of commercial activities, the broad definitions of education and day care facilities anticipate a commercial element occurring in this area already.
- 12 It is acknowledged that there are no submissions which particularly submit on the E activity area (geographically defined) in the PDP other than that of the Submitters seeking to extend activity status to include healthcare. Nonetheless, the submissions outlined below all seek general relief which reasonably anticipates commercial and residential development occurring in the E activity area as notified, in combination with an expanded consolidated village.
 - (a) A number of pro forma submissions seek removing controlled activity consent requirements for 'construction on a residential property'. The reasoning for this is due to faith in the covenant process which binds residential titles. It is submitted that reference to 'residential property' is different from a residential activity area, and this is to be read as broadly applying to all areas in the zone capable of residential development. On the basis that this seeks permitted activity status for residential development, this supports the anticipation that residential activity could be permitted in the E activity area, and in particular because this land is subject to the Primary covenant, from which the design control process is derived.
 - (b) Furthermore, the relief proposed by the Submitters is actually more restrictive than that anticipated by these submissions, given such activity will be captured by the controlled CPD rule, and otherwise permitted.
 - (c) The same group of pro forma submissions also seek relief that 'within the proposed framework we agree that changes should be made in order to allow the village area to develop in a manner that is commercially viable in order to support the community it services at an appropriate scale and design'. Again, this submission point is not in particular reference to a confined geographical area, but more of an outcome sought, and which is complementary to the relief from the submitters to provide an integrated V and E activity area to optimize the success and viability of the village.
 - (d) The Jacks Point original submission (762) sought expansion of the structure plan E area activities to include healthcare, and in addition made the statement:

Jacks Point seeks to make any similar, alternative and/or consequential relief that may be necessary or appropriate to address the matters raised in this submission or the specific relief requested in this submission.

- (e) The above submission points should be carefully interpreted as providing 'room to move' between the specific relief requested and the general matters raised in the submission. One such general matter being amending the structure plan as necessary to refine activity areas in a manner which reflects use of activities, topography and landscape values. It is submitted, that this is the exact exercise which has been undertaken by the submitters in consultation with, and endeavouring to allay concerns of, both resident submitters and the Council's experts.
- (f) Submission 601 (Williams) seeks that the ODP structure plan be reinstated, or in the alternative 'alterations are made to the proposed provisions to ensure the design, amenity, character, open space, and landscape qualities that exist within Jacks Point are provided for by the ODP are provided in Chapter 41'. This alternative relief to amend the structure plan to protect specific values is specifically given effect to through the Submitters' refined proposal. In particular, a reduction in the overall site coverage, the requirement for comprehensive development, and volunteered caps to significantly limit commercial and retail development capacity, all achieve a higher level of protection (as in the ODP) for landscape and amenity.
- (g) This is further supported by the evidence of Ms Pfluger that if the E activity area is consolidated with the Village activity area and provisions, the overall effect of the built form will be different, but not adverse.
- (h) The Williams' submission also seeks to remove resource consent requirements for residential dwellings. The submission point is drafted broadly and without specific limitation to just residential activity areas:

The rules relating to residential dwellings within Jacks Point do not require dwellings to obtain resource consent for design review purposes.

- (i) As with the pro forma submissions referred to above, this submission raises attention to the possibility of all residential development being permitted, where covered by covenant controls prescribing the design review process.

13 The final point to consider in the round, on the matter of scope, is the impact of the now proposed controlled activity framework with the comprehensive development plan for the whole village activity area. This framework is within

scope of the Operative District Plan generally, and Mr Darby provided the existing consents illustrating the level of detail and rigour that goes into that process. The proposed matters of control now include the layout of open space, roading and access patterns, streetscape design and building design controls.. These measure of control when applied to the whole consolidated village activity area provide **more** control over final product than rule 41.4.2 as notified for education and day care facilities (even in combination with slightly reduced height limits and site coverage standards).

- 14 However, if the Commissioners consider that on the merits or on the basis of scope, site coverage and height for the E area as notified should be retained (45% and 10m), then the Jacks Point entities submit that this could be addressed by still consolidating the Village classification over the V and E areas as notified, but instead providing for two Comprehensive Development Plans – one that complied with the Village provisions of 60% site coverage and 12m height, and the other over the E area with 45% site coverage and 10m height. The spread of activities throughout those two areas however should not be restricted as that would run contrary to the ability to create the optimum mixed use centre to serve the community.
- 15 In conclusion, when all the relevant layers are looked at, there is scope for consolidation of the Village, Education and EIC activity areas into one consolidated Village. And not only is there scope, but on the merits, the expert evidence supports the conclusion that this planning regime for the Village gives it the best chance of success.

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

- 16 Jacks Point have proposed a minor change to the rules in respect of retail activities in the Village, in order to avoid unnecessary consenting processes for otherwise minor breaches of the limit on the GFA for retail activities in the village. The effects in general are primarily beneficial by enabling a slightly more flexible framework to allow retail services to support the communities' needs and no person can be said to be surprised or adversely affected by the change. The introduction of the CDP process will control the overall layout of the village and integration with surrounding areas, so there can be no adverse effects from the minor change to retail footprint in that regard.

Controlled activity status for the village

- 17 The Commissioners queried whether the controlled activity status for the Village activities was appropriate. On the merits it is submitted that the framework of requiring an outline development plan under the operative regime for all activity areas in the zone has proven its effectiveness in ensuring high quality

outcomes. With appropriate amendments, this framework can be continued in manner that is *vires* to ensure continuation of the quality outcomes produced by that detailed design approach. In order to provide the Jacks Point submitters certainty, the first CDP should be controlled and activities carried out consistent with that CDP permitted. Mr Ferguson has refined the matters of control/discretion and included additional rules to address the Commissioners' points regarding subsequent applications that are inconsistent with the CDP, proposing that such subsequent applications to the extent they are inconsistent with the first consent and CDP, are restricted discretionary (**attached**).

- 18 In terms of scope, we have found no submission that sought a more stringent status than controlled for the village, or that generally submitted in opposition to the village and education activity areas on their merits. There is no scope to raise the activity status for the consolidated village above controlled.

Relevance of detail of non objection instruments, JPROA process and PC 44

- 19 In reliance on the Chair's statement on the afternoon of 17 February, that the detail and status of the various non-object instruments (covenants, deed and particularly the JPROA constitution of which all residents are parties) is not relevant to the decision to be made, we have not addressed the materially inaccurate statements made throughout the hearing. However should it be determined at a later point that details in respect of these instruments is relevant, the opportunity should be given to relevant parties to provide information to the Panel to ensure relevant information is able to be evaluated before a determination is made.
- 20 It is assumed that the same principle applies to the relevance of assertions in respect of processes followed regarding the JPROA submission. However, if the Commissioners determine that assertions of breaches in processes is relevant, then the JPROA reserve leave to respond to those assertions, to ensure the principles of natural justice are complied with.
- 21 In respect of PC 44 to correct statements made during the hearing, it is noted that the two outstanding appeals remain the subject of without prejudice discussions.

Amendments to plan provisions arising from the hearing.

- 22 The appended chapters 27 and 41 contain highlighted changes drafted by Mr Ferguson, as follows:

Chapter 27

- 23 The rules relating to subdivision within Activity Areas R(HD) Fb and G restructured and expanded to provide for:
- (a) Amended matters of discretion to include effects on the “distinctive rocky outcrops”
 - (b) The requirement to create a building platform with new Rule 27.7.13 The requirement to provide for a landscape and ecological management strategy, provision for at least 1.6ha of native revegetation designed to be comprehensively applied across the activity area; and coordinated with vehicle access and the building platforms.
 - (c) The new standard proposed in relation to the landscape and ecological management strategy is in response to the recommendations contained within the Joint Witness Statement from Dr M Read and Ms Y Pfluger dated 14/2/17.
- 24 New rule 27.7.13.7 is proposed, at the suggestion of Commissioner Nugent, to require subdivision of any land within the OSG to contain one Homesite

Chapter 41

Open Space Golf

- 25 The drafting of rule 41.4.12.7 has been amended, to address the issues raised by the Chair. On this point it is also noted that Mr Brabant queried where the driving range would be moved to (due to displacement by the proposed E activity area). In this regard the definition of what activities can take place in the OSG land, as notified and as still promoted, ensure that driving range activities and additional golf course activities, are permitted in the wider activity area.

ONL Policy

- 26 The chair requested drafting of a new policy specific to how ONLs are treated in the zone, taking into account Chapter 6 of the DPR. Mr Ferguson has included a new policy 41.2.1.16, with corresponding consequential changes to rules. The resulting package is intended to protect the ONL values while allowing for appropriate development as follows:
- (a) The classification of landscape character and ability to absorb change refers back to and relies upon the Coneburn Area Resource Study, as appended to Mr Darby's Evidence in Chief and referred to by Mr Te Paa and Ms Pfluger. Not only is this study comprehensive and appropriate for the characterization of the landscapes and their ability to absorb change,

but when it comes to Housesites 57 and 58, it provides the detailed evidential basis justifying the proposed restricted discretionary activity status for the two sites. That detailed foundation provided by the CARS is unprecedented in its level of detail, assessment and characterization of the land in the zone. The CARS in combination with the matters of discretion in respect of which Council can impose conditions, or decline consent, ensure that the values of the ONL are protected, and that appropriate development is provided for. There is no presumption that a restricted discretionary activity will be granted consent, therefore as long as the matters of discretion cover matters relevant to the ONL status and landscape character, both section 6 (b) and chapter 6 of the DPR have been addressed appropriately.

- (b) As part of the integrated "package" of provisions offered, is the non-complying status for buildings (other than buildings associated with farm and **outdoor recreation** activities) in the Peninsula Hill Landscape Protection Area. This is a more stringent than the default position in the notified district plan for ONLs.
- (c) Mr Ferguson also recommends changes to rule 41.4.3.3 in respect of HS57 and 58 addition additional matters of discretion in respect of vehicle access and light spill.
- (d) In respect of the ONL it is also noted that while some of the Tablelands Homesites may be in the general vicinity of the ONL line, a point which the landscape experts will clarify by Friday 24th, those same experts have all agreed that the proposed 20 Homesites, when assessed on a site basis, are appropriate with the planning framework proposed of controlled activity status, in terms of landscape effects.
- (e) If the Commissioners determine that the package outlined above is not appropriate, then the blanket imposition of discretionary status (excluding farm and outdoor recreation buildings) over the ONL area is the default position – however it is submitted that provides less protection and less certainty than the regime proposed by Jacks Point.

Miscellaneous drafting changes

27 Numerous drafting changes to the provisions in tables 1 and 2 were discussed by the commissioners. Corresponding changes have been made by Mr Ferguson to the following provisions:

- (a) 41.4.4 (State Highway Mitigation)
- (b) New 41.4.8.2, 3, 4 and 5 (re CDP as per paragraph 17 above).

- (c) 41.4.11 (Structure Plan - Activities)
- (d) 41.4.11.8 (OSL and **outdoor** recreation)
- (e) 41.4.12.11 (OSF)
- (f) 41.4.12.12 (OSR)
- (g) 41.4.13 (Forestry)
- (h) 41.5.4.1 (earthworks)
- (i) 41.5.2 (vegetation)
- (j) 41.5.12.2.j (temporary activities)
- (k) 41.5.16.1 (outside storage)

28 In respect of the height of farm and recreation buildings in the open space areas, questions were raised in respect of this by submitters and the commissioners. In response to these concerns Mr Ferguson proposes that the height standard for farm buildings be brought down to 8m generally, and 4m in the Peninsula Hill Landscape Protection Area. And for clarification, the height standard that is intended to apply to buildings associated with the permitted outdoor recreation activities is 4m. Changes to both site standard 41.4.11.8 defining the Open Space Landscape activity area as being specific to **outdoor** recreation, as well as 41.5.13.2 in respect of heights, have been made.

Open space versus built area

29 Some submitters addressed the panel on the fact the 2003 Stakeholder Deed requires that each of the three distinct areas of the zone, owned by the 3 original landowners, restrict buildings to a certain percentage of land. In case this is considered relevant, for clarification:

- (a) The ODP sets site coverage (being land covered by buildings for the purpose of the zone standard) at 2.5% for Homestead Bay, and 5% for the Henley Downs and Jacks Point land. This reflects the 2003 agreement between the 3 owners that each would restrict site coverage to a set percentage for their land.
- (b) In respect of the land still owned and controlled by the Jacks Point group entities this remains the case for the proposed Structure Plan; the 26.8ha Village (at 60% site coverage), the 22 new Homesites and R (HD)SH-3 will still allow for compliance with the 5% figure for land covered by buildings.

Lots 36 and 34

30 Mr Schrantz incorrectly asserted that there are covenants over the land identified as lots 34 and 36 on Mr Darby's attached ownership plan, preventing the future subdivision that would be required to enable the proposed Homesites. The titles for Lot 36 DP 381477 and lot 34 DP 381477 have been checked. There is no restrictive covenant preventing subdivision. There is a consent notice registered on each title limiting but not preventing further subdivision. If amendment of the consent notice is required there is a process for doing so pursuant to section 221 of the RMA.²

Conclusion

31 The nature of a district plan hearing is such that there is limited opportunity to respond to matters that could have material impacts on the rights and legitimate expectations of landowners, in respect of completion of the development of the Jacks Point land. Due to the nature of the process, incorrect assertions from other parties have gone unanswered. Should it become apparent to the panel that such assertions may be relevant, Jacks Point or any other similarly affected party should be given a fair opportunity to respond, in order to ensure the process is fair and the requirements of natural justice met.

Dated 20 February 2017



Maree Baker-Galloway

Counsel for Jacks Point group entities and
Jacks Point Residents and Owners
Association

² Section 221 (3A)