

**Before the Panel of Hearing Commissioners
For the Queenstown Lakes Proposed District Plan**

In the Matter of

the Resource Management Act
1991

And

In the Matter of

the Queenstown Lakes Proposed
District Plan – Stage 2

And

In the Matter of

Hearing Stream 14 – Wakatipu
Basin

**Legal Submissions on behalf of
Burgess Duke Trust (Submitter 2591)
and Ashford Trust (Submitter 2535)**

Dated: 16 July 2018

Introduction

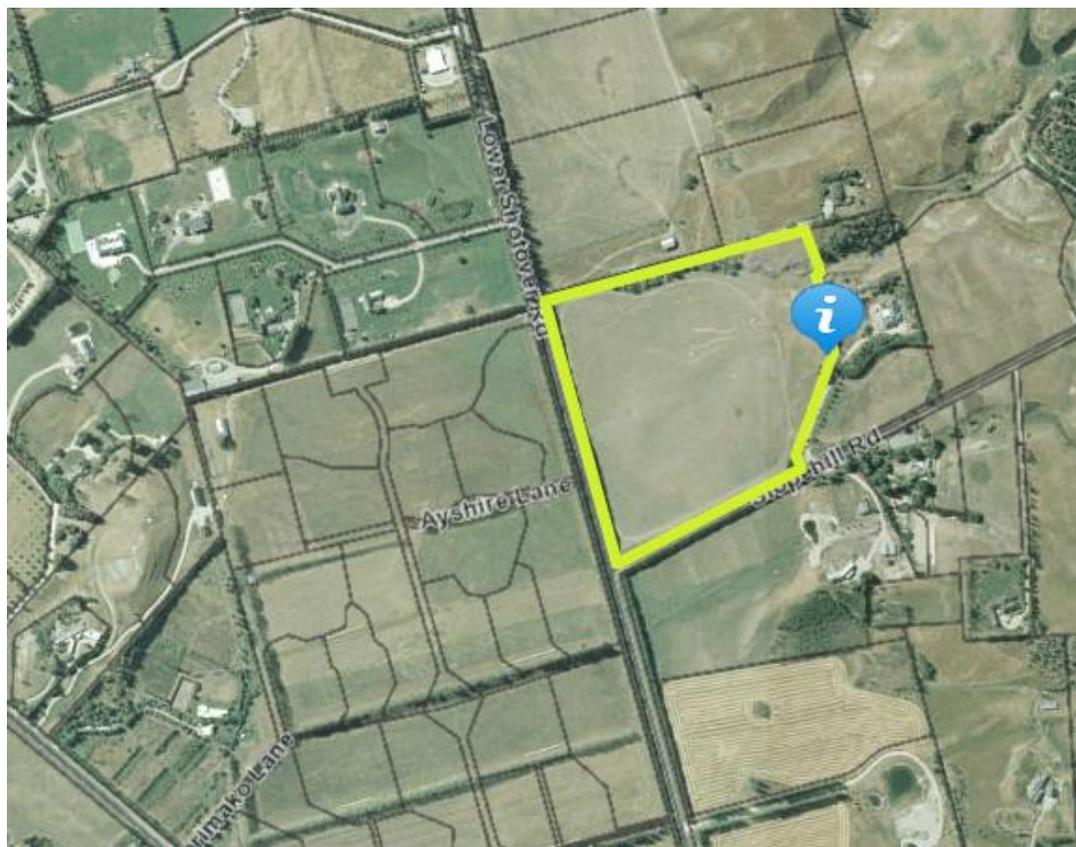
1. These opening legal submissions are presented on behalf of the trustees of the Burgess Duke Trust (**Burgess**) and Ashford Trust (**Harris**).
2. Both trusts own land in the Wakatipu Basin adjacent to the Hawthorn Triangle:
 - (a) The Burgess Duke Trust is a family trust owning land on the corner of Slopehill and Lower Shotover Road for the benefit of Mike and Cordelia Burgess (**Burgess Land**).
 - (b) The Ashford Trust is also a family trust owning land at 214 Lower Shotover Road for the benefit of Erika and Mark Harris (**Harris Land**).
3. The key point of contention between Ms Gilbert for the Council and the submitters is the location of the boundary of the Hawthorn Landscape Character Unit (**LCU**) and the Slope Hill LCU.
4. The Environment Court previously described the relevant land in the following way: “...we doubt if Virgil could have stood in this landscape and written *Et in Arcadia ego*.¹”
5. Both the Burgess and Harris Land was included in the Rural Lifestyle in the 2015 notified version of the PDP. Both my clients supported that proposed rezoning.
6. Despite that, the 2017 version of the PDP proposes Rural Amenity Zoning. Our case is that this proposal lacks an appropriate landscape based evidential basis, is inconsistent with s32 and ultimately doesn't represent sustainable management.
7. Both Burgess and Harris seek the Lifestyle Precinct boundary be moved to include their properties (consistent with the location of “the line” in 2015). In my submission Lifestyle Precinct most appropriately gives effect to the evidence of Mr Skelton (for Burgess and Harris) and Dr Read (for the Council – Stage 1).

¹ *Hawthorn Estates Limited v QLDC* C83/2004

8. Neither client wants to see inappropriate intensification of the land. Indeed that would impact the rural amenity they have moved to the area to enjoy.

The Properties

Burgess Duke Trust (Burgess)



9. Cordelia and Mike have lived in Queenstown for 17 years and purchased their first home in Dalefield on Dalefield Road in 2003 situated on 1 ha.
10. In 2014 they purchased their 8ha Slopehill Road property where they built a home in 2016 and live there with their 3 daughters.
11. The Burgess Land is situated on the corner of Slopehill and Lower Shotover Rd. The property is predominantly a flat site with some slight elevated gradients. The property is well screened from all surrounding roads with established hedge and tree plantings.
12. The Burgess' purchased the property in the knowledge that the area was moving towards a rural life style feel rather than a rural general feel.

Ashford Trust (Harris)



13. Erika and Mark have lived in Queenstown for 16 years and purchased 214 Lower Shotover Road in 2014 after moving from Hobart Street in central Queenstown. They live on Lower Shotover Road with their three young children and a dog. The Harris' run 30 sheep on the property.
14. The Harris property is flat to undulating and is private and screened by mature trees on each boundary – it cannot be seen from Lower Shotover Road.
15. The Harris family are attracted to the property for its location in relation to all Queenstown amenities, sun, views, privacy and space. The rural aspect of the property allows the Harris kids the room to move and enjoy an outdoor lifestyle and the proximity to the family neighbourhood being develop at Hawthorn Estate.
16. The Harris' wish to future proof the ability to appropriately and modestly subdivide the property and ensure the value of the property is maintained for future generations.

Relief Sought

17. In my submission the line between the two LCU in the immediate area of the Burgess and Harris Land lacks a credible and justifiable evidential basis.
18. Burgess and Harris seek that this line be moved to the geomorphological boundary proposed by Mr Skelton.
19. They seek that their land be rezoned Lifestyle Precinct as shown in Mr Skelton's Attachment I with a 50m (minimum) setback applying to both sides of the LCU boundary.²
20. This is graphically demonstrated at Attachment A to Mr Skelton's evidence.

Law

Overview

21. The Council's various opening legal submissions have already thoroughly set out the relevant statutory considerations to your decision making.
22. I will only briefly outline the law as it is particularly relevant to your assessment of the Burgess and Harris submissions.
23. When preparing or changing a district plan the Council must have regard to the matters listed in section 74 which include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts.
24. Under section 75, the plan must give effect to any national policy statement, any New Zealand coastal policy statement and any regional policy statement and must give effect to a water conservation order or a regional plan (for any matter specified in subsection 30(1)).
25. Under section 75(1), district plan policies must implement objectives, while any rules must implement the policies. Section 76 requires rules to achieve the objectives and policies of a plan.

² EIC, paragraph 36

Section 32

26. In my submission the section 32 analysis in relation to the Burgess and Harris Land is not robust and contains gaps.
27. The section 32 assessment hangs from the inclusion of the land within the Slope Hill LCU based on an arbitrary road boundary.
28. In my submission there is not a robust evidential basis to:
 - (a) protect ONL values³ from rural residential activity enabled on the Burgess and Harris Land; and
 - (b) suggest that the Burgess and Harris Land does not have the capacity to absorb development enabled by the Lifestyle Precinct.
29. This is contrary to the assessment of the landscape characteristics of the area containing the Burgess and Harris Land by; the Environment Court (relying on the evidence of Mr Miskell), Dr Read (in relation to Stage 1 PDP) and Mr Skelton (in his evidence on Stage 2).
30. The costs of the notified Amenity Zoning on landowners such as Harris and Burgess, where there is potential for further residential development to be acceptable (as is described in Council's own evidence) has not been adequately assessed.
31. In fact, the impact on them has not been assessed in a section 32 sense at all – with the focus being entirely on a conservative blanket restriction on rural residential living in such areas. Our review of the evidence has not identified any section 32 assessment of the costs of an 80 hectare minimum lot size on submitters such as Harris and Burgess that own land considered by Council suitable for rural residential activity in the 2015 notified version. As I describe later in my submissions, this is contrary to the RPS and Part 2 of the Act.
32. Determining the location of intensification in the basin needs to be based on more than just the conclusions of one landscape assessment. Section 32 requires consideration of wider costs, benefits and risks. In doing so, the views of what members of the community subject to the proposed

³ Mr Farrell, EIC, paragraph 3(h)

rezoning need to be considered as that informs and guides appropriateness in a section 32 sense.

33. Ultimately I submit that the lodestar of the Act has been lost through the Mr Langham's recommendation. This is particularly so in relation to the Harris and Burgess Land where every landscape witness agrees that to some extent at least, the landscape justifications for protection are not as strong as elsewhere.
34. The requirements of sustainable management have been lost. Sustainable management means the enablement of people and communities to provide for their social, economic and cultural well managing effects on the environment. To promote this, as the Act dictates, requires an understanding of what people want from their communities and their environment which inevitably necessitates the obtaining and consideration of views of members of the community.
35. The environmental, economic and social cost of the Amenity Zone applying to the Burgess and Harris Land is greater than Councils' experts have assessed it. Mr Langham's summary statement concludes that where:

...based on certain characteristics of the land, there will be examples in the Amenity Zone where some more intensive activities might be able to occur, but not the level anticipated by the Precinct Zone. It is my view that that role can be provided by resource consent process.
36. This statement by Mr Langham is inconsistent with the Objectives and Policies framework in Chapter 24 supported by Mr Barr. Protecting, enhancing and maintaining landscape character⁴ as Objective 24.2.1 does not enable more intensive activities – in my submission it will prevent (at the liberal end) any residential activity that has more than an inconsequential or negligible impact on *any* landscape quality. Arguably it would also mean any impact on landscape character needs to be “not allowed”.⁵
37. As such, in my submission the section 32 assessment is flawed in assuming that in such a situation activity will be enabled, let alone provided for.

⁴ Objective 24.2.1

⁵ *Environmental Defence Society Inc v King Salmon* [2014] NZSC 38

Landscape Character Unit – Hawthorn Triangle not Slope Hill

Summary

38. The point of contention turns on the location of the Hawthorn Slope Hill LCU boundary.
39. In Dr Read’s 2014 Land Use Study for the Council, part of the land was included in a LCU called “Hawthorn Triangle Margins”. This LCU was located between the Hawthorn Triangle LCU and the much larger North Slope Hill LCU.⁶
40. The 2017 Land Use Study appears to have merged this character unit with the Slope Hill LCU making the boundary a road rather than a geomorphological one.
41. Mr Skelton prefers the boundary of the LCU being a geomorphological one more appropriately providing for the values described in the Hawthorn Triangle LCU.⁷

Methodology

42. Despite their position at Stage 1, the Council now proposes the boundary between the Precinct and Amenity Zone to be a road boundary rather than a geomorphological one.
43. This is contrary to recognised best practice to give preference to geophysical boundary types such as topography and vegetation patterns.⁸ It is also contrary to Mr Langham for the Council’s position that geomorphological boundaries form an important function to prevent creep of development and where possible have been used to define LCU boundaries.⁹
44. In her evidence in chief, Ms Gilbert was critical of reliance on the existence of existing patterns of rural residential development to inform the extent of future zonings as it “ignores other critical aspects of landscape character (such as landform and vegetation patterns, and visibility etc).¹⁰

⁶ See Appendix I to the March 2017 Land Use Study

⁷ Mr Skelton, EIC, paragraph 22

⁸ Mr Skelton, EIC, paragraph 9

⁹ Mr Langham, EIC, paragraph 5.14

¹⁰ EIC, paragraph 36.9

45. Despite that, she has rejected the geomorphological line supported by Dr Read in 2015 and now proposed by Mr Skelton which includes a 50 metre setback from the LCU unit to reinforce its defensibility as an edge and proposed the use of a road as the LCU boundary.

Mr Skelton's boundary

46. Consistent with the Council's own methodology and best practice, Mr Skelton has used geomorphological boundaries to define the Hawthorn Triangle LCU and included this boundary in his evidence.¹¹ Mr Skelton has outlined his opinion on why this boundary is the most appropriate which in summary is due to:¹²
- (a) The flatter portion of the land between Slope Hill Foothills Ridge and Lower Shotover Road largely being part of the same geological make up;
 - (b) The legible geomorphological boundary;
 - (c) The lining of both sides of most of Lower Shotover Road with Hawthorn hedges;
 - (d) The landscape character effects of development rendering a rural living character throughout all of the Lower Shotover Road corridor;
and
 - (e) The land between Slope Hill Foothills Ridge and Lower Shotover Road having a very limited visual connection with the more elevated plateau characterising the Slope Hill Foothills.

Ms Gilbert's boundary

47. In response to this difference of opinion on the boundary of the LCU, Ms Gilbert states in relation to the Burgess and Harris submissions:

My discussion of the WEL [Wakatipu Equities Limited] submission at Section 8 addresses why I do not consider that the land on the eastern side of Lower Shotover Road should be included in LCU 9 Hawthorn Triangle.

¹¹ Attachment C

¹² EIC, paragraph 16

48. This broad brush comparison between the WEL land and the Harris and Burgess Land encapsulates my concerns regarding the section 32 analysis undertaken and the subsequent zoning proposed for the Harris and Burgess Land.
49. The landscape characteristics of the Harris and Burgess Land are different to the wider Slope Hill LCU that has been applied to it. Ms Gilbert has not appropriately given the Harris and Burgess land the fine grained assessment required instead concluding:

In my opinion, adopting such an approach would likely result in a somewhat unwieldy and overly complex landscape character delineation strategy that is likely to distract from the legibility of larger landscape patterns, which I consider should guide a landscaping planning exercise of the scale undertaken in the Basin.¹³

50. This is despite her conclusion that:

I acknowledge that the lower-lying nature of much of the land encompassed by Mr Skelton's amended Precinct, together with the exclusion of the hill slopes at the very southern end of Lower Shotover Road, means that rural residential development throughout much of the modified Precinct is unlikely to be of importance in views from the surrounding landscape to Slope Hill ONF.¹⁴....however I consider this is not the case at the southern end of Mr Skelton's amended Precinct where elevated land abuts the Slope Hill ONF.

And that:

It is possible that in some specific locations, additional rural residential development may be acceptable within this area.¹⁵

51. Ms Gilbert's position therefore lacks consistency specificity resulting in a proposed restrictive zoning that is not based on justifiable landscape evidence.

¹³ Rebuttal Evidence, Ms Gilbert, 27 June 2018

¹⁴ Ibid, paragraph 13.21 and 13.23

¹⁵ Ms Gilbert, EIC, paragraph 36.8

52. Ms Gilbert has taken what she describes as a “cautious approach” (see paragraph 36.8 of her EIC) in applying the Amenity Zone to the wider lower Slope Hill Road area.
53. Mr Langham has applied this cautious approach to the subsequent Amenity Zone support for the Burgess Land. Mr Langman does not appear to have considered the submission of the Ashford Trust in his rebuttal but presumably he would apply the same approach to that land.

The Environment Court’s ruling

54. In the Environment Court decision for the Hawthorn Triangle resource consent adjacent to the Burgess and Harris Land Judge Jackson considered lengthy landscape evidence on the category of landscape in the area. Importantly in relation to the “lower flanks” of Slope Hill which logically includes the Burgess and Harris Land the Court noted:

Mr D J Miskell, another very experience landscape architect called by the applicant, referred to the triangle in his primary evidence. He said that while once it may have had a rural pastoral Arcadian landscape as a result of agricultural uses, it was now a “lifestyle” landscape which no longer possessed the simple, poetically rural attributes associated with “arcadia”. The developments on the lower flanks of Slope Hill are also highly visible and detract significantly from any Arcadian qualities of the wider setting. We doubt if Virgil could have stood in this landscape and written Et in Arcadia ego.¹⁶

55. The same division of the Court also discussed the boundary of that assessment concluding:

*We found that development will not intrude into the grand vistas beyond. While we have not needed to define the boundary between the ORL and the adjoining VAL, we consider that the site occupies a fairly central position on the ORL **which includes the lower slopes east of Lower Shotover Road** and the development land west of Domain Road.¹⁷ (my emphasis added)*

¹⁶ *Hawthorn Estates Limited v QLDC C83/2004*

¹⁷ At paragraph 81

56. In relation to the proposal in front of the Court (which proposed density much greater than the Lifestyle Zone), the Court concluded:

*We found that there would be an effect on the naturalness of the landscapes as a result of the proposal but that would be largely imperceptible.*¹⁸

57. Although the Court was obviously making those comments in the context of the application before it, in my submission their assessment of the landscape character of the “lower flanks of Slope Hill” (to borrow their words) is compelling and worthy of significant weight by the Panel.
58. This is especially so in light of the relatively consistent evidence of Dr Read (for the Council) and Mr Skelton.

Applying the Law

59. There is robust landscape evidence supporting inclusion of the land within the Hawthorn LCU and therefore, in a section 32 sense, signalling appropriateness of the Lifestyle Precinct. In my submission you should prefer this, not the Stage 2 notified version in accordance with the following four Environment Court rulings:
- (a) As a decision maker you need to not start with any particular presumption as to the appropriate zone, rule, policy or objective.¹⁹
 - (b) Your task is to seek to obtain the optimum planning solution within the scope of the matters before you based on an evaluation of the totality of the evidence given at the hearing, without imposing a burden of proof on any party.²⁰
 - (c) Essentially it is the ‘noes’ in the plan which must be justified, not the ‘ayes’.²¹ Section 32 is there primarily to ensure that any restrictions on the complete freedom to develop are justified rather than the converse.

¹⁸ At paragraph 82

¹⁹ *Eldamos Investments Limited v Gisborne District Council* W47/05, affirmed by the High Court in *Gisborne District Council v Eldamos Investments Ltd*, CIV-2005-548-1241, Harrison J, High Court, Gisborne, 26/10/2005. See also *Sloan and Ors v Christchurch City Council* C3/2008; *Briggs v Christchurch City Council* C45/08, and *Land Equity Group v Napier City Council* W25/08.

²⁰ *Eldamos* paragraph [129];

²¹ *Hodge v CCC* C1A/96, at page 22.

(d) Consistent with the decision above, where the purpose of the Act and the objectives of the relevant Plan can be met by a less restrictive regime (in this case Lifestyle Precinct), then that regime should be adopted. This approach reflects the requirement to examine the efficiency of the provisions and also promotes the Act by enabling people to provide for their wellbeing.²²

60. In my submission there is insufficient evidence from Ms Gilbert and Mr Langham justifying the inclusion of the Harris and Burgess Land within the Amenity Zone. The inconsistencies in Mr Langham's evidence seem to demonstrate a retrospective justification of the appropriateness of the Slope Hill LCU for the Harris and Burgess Land.
61. To the contrary Mr Skelton has applied the Council's own methodology and determined a geomorphological landscape boundary supported by compelling analysis.

Other considerations

Infrastructure and traffic

62. No site specific infrastructure or traffic issues have been raised by Council's experts in relation to the relief sought.
63. I do not consider that district wide traffic network considerations are an appropriate section 32 basis to decline the relief sought on the Harris and Burgess Land.

Otago Regional Policy Statement

64. Policy 9.5.5 of the Operative RPS provides for the maintenance and (where practicable) enhancement of the quality of life for people and communities through promoting the identification and provision of a level of amenity which is acceptable to the community.
65. Notably the definition of Amenity Values in the Act refers to "people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

²² *Royal Forest and Bird Protection Society of New Zealand Incorporated v Whakatane District Council* [2017] ZNEnc 51 at [59]

66. Enabling rural residential living opportunities through the Lifestyle Precinct where that can be achieved while appropriately managing landscape effects gives effect to this Policy in the OPS.
67. The fact that both the Burgess and Harris families moved to this area for the rural residential characteristics it displayed in itself shows a level of amenity associated with measured rural residential development that is acceptable to the local community.
68. Mr Farrell's evidence provides an assessment of the relief sought on the Harris and Burgess Land against the relevant Proposed RPS provisions.

PDP Strategic Directions

69. The enabling nature of the Lifestyle Precinct in a location like the Harris and Burgess Land that the evidence shows can absorb change is consistent with Objective 3.2.5 and 3.2.6.
70. Regardless, as it is now under appeal I consider Chapter 3 can be given limited weight in this context. However I do not consider the submissions of Harris or Burgess turn on the provisions of the Strategic Directions Chapter.

Part 2

71. Ms Gilbert has concerns about development creep up the Slope Hill ONF hillside²³. This concern can be addressed through the relief proposed including the subdivision and development restraint beyond the 400m contour line as proposed by Mr Farrell. It is not appropriate to conservatively include the land within the LCU when there are other "tools" in the planning tool box to manage effects on the ONF.
72. Mr Skelton has considered this concern and undertaken assessments from several public places with view points to the Burgess and Harris Land. He considers that the Land was "barely visible and not a legible part of distant views of Slope Hill".²⁴ He considers that any additional development on the site would result in legible adverse effects on the visual coherence of

²³ Rebuttal Evidence, paragraph 13.28

²⁴ Mr Skelton, EIC, paragraph 24

the Slope Hill ONF.²⁵ Mr Skelton has attached images demonstrating this to his evidence.

73. With the controls proposed, the Lifestyle Precinct will not have an adverse effect on outstanding natural landscapes and will protect outstanding natural values.²⁶
74. Mr Farrell concludes that the relief sought will facilitate a more efficient use of the Burgess and Harris Land than rezoning it.²⁷
75. The evidence provides robust justification that enabling the Lifestyle Precinct is the most appropriate outcome and achieves sustainable management.
76. It will enable the Harris and Burgess families to provide for their economic, social and cultural wellbeing while appropriately avoiding, remedying and mitigating adverse effects on the environment, most notably the surrounding landscape.



Joshua MG Leckie
Counsel for Burgess Duke Trust and Ashford Trust

²⁵ Ibid, paragraph 24

²⁶ Mr Farrell, EIC, paragraph 3(f)

²⁷ Mr Farrell, EIC, paragraph 3(e)