

Before the Queenstown Lakes District Council

Under the Resource Management Act 1991

In the matter of **Stage 3B of the proposed Queenstown Lakes District Plan  
- Stream 18 – Arcadia Rural Visitor Zone**

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**Legal Submissions on behalf of the successor to Lloyd Veint**

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lloyd.**

## May it please the Panel

### Introduction

- 1 These submissions are made on behalf of the successor to the submission by Lloyd Veint. The submission concerns the zoning of land at Diamond Lake known as the Arcadia Rural Visitor Zone (**RVZ**).
- 2 Mr Veint's submission and Carey Vivian's evidence set out the history of the Arcadia RVZ in detail. In summary, the Arcadia RVZ was established through the previous district plan review process of the now Operative District Plan (**ODP**) in 1998, subject to council approval of a structure plan for the area (as a controlled activity). In 2011 RM110010 was granted for a Structure Plan and design guidelines; development in accordance with the Structure Plan and design guidelines was a controlled activity. In 2014 consent RM130799 was granted for a 12 lot subdivision and identification of 11 residential building platforms.
- 3 The consented Structure Plan, design guidelines and subdivision plan have not been incorporated into the Proposed District Plan (**PDP**) planning maps and Chapter 46. Proposed Chapter 46 introduces more stringent controls on development within the RVZ, the residential and commercial development approved by the Arcadia Structure Plan will require non-complying consent under the PDP.
- 4 Mr Veint's submission seeks to retain the development rights afforded by the Structure Plan and subdivision consent by inserting the Structure Plan into Chapter 46, along with accompanying bespoke planning provisions to appropriately manage potential effects on the values of the Outstanding Natural Landscape (**ONL**).
- 5 The successor to Mr Veint's submission has agreed to purchase the site for a value based on the consented structure plan, consent for subdivision and an operative zoning permitting residential activity, amongst other things. The new landowner is actively involved in the rejuvenation of the Queenstown film industry and has advised that the approved Structure Plan and consented subdivision are integral to that vision<sup>1</sup>. Arcadia Station is a well known filming location, and it is common knowledge that this industry and related activities give rise to positive social, cultural and economic effects that benefit local and national economies.

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<sup>1</sup> Mr Veint lodged a late submission in respect of temporary filming activities in the RVZ Arcadia. That submission will be heard at a later date.

- 6 In summary, the submitter is opposed to the loss of development rights that were not only previously consented, but which were determined by the council to be appropriate from an effects perspective.

### **Status of RM110010 and RM130799**

- 7 RM110010 was granted on 11 May 2011. The consent was required to be 'given effect to' by 11 May 2016<sup>2</sup>.
- 8 Condition 3 of RM110010 required that a covenant be registered on the title requiring future development to be undertaken in accordance with the Structure Plan and design guidelines. The covenant has not yet been registered. The council has suggested that because condition 3 has not been met RM110010 has not been given effect to.
- 9 This is not the case, as RM110010 has been given effect to through the granting of RM130799, which is a consent for subdivision in accordance with the Structure Plan approved by RM110010.
- 10 *Friends of Nelson Haven*<sup>3</sup> provides a summary of key principles on how "given effect to" is to be interpreted, namely that:<sup>4</sup>
- (a) The statutory test requires a factual enquiry. It is not an evaluation of whether a consent *should* or *should not* lapse.<sup>5</sup>
  - (b) "Given effect to" does not necessarily require that the consented development has to be fully completed or is operational. The question is one of degree and is dependent on the factual context. The High Court decision in *Goldfinch* indicates that the answers to the following questions may help determine whether consent has been "given effect to":<sup>6</sup>
    - (i) what is the nature of the activity authorised by the consent?
    - (ii) why has it not been completed?
    - (iii) why has it been discontinued?

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<sup>2</sup> In accordance with s 125(1)(a) RMA.

<sup>3</sup> *Friends of Nelson Haven and Tasman Bay Inc v Marlborough District Council* [2018] NZEnvC 61

<sup>4</sup> As above at [17].

<sup>5</sup> *Auckland Council v 184 Maraeti Road Ltd* [2015] NZHC 2254, at [29].

<sup>6</sup> *Goldfinch v Auckland City Council* [1997] NZRMA 117 at pages 14-15.

- (iv) was discontinuance voluntary and justified?
- (c) The fact that there have been no physical works undertaken pursuant to the consent does not necessarily mean consent has not been given effect to. Rather, the factual matrix has to be considered, and the purpose and substance of the resource consent in issue are central to that matrix.<sup>7</sup> In both the Environment Court and High Court decisions on *Biodiversity Defence Society* it was found that mining consents had been given effect to as a result of a number of actions, including significant expenditure, preparation of management plans and annual plans, modelling, detailed design and scheduling, and some physical works (including the construction of access roads). The High Court stated:<sup>8</sup>

[61] Reflecting on both the mischief underlying the reason for s 125 and the purpose of s 125, there is nothing which suggests that there is a material distinction between preparation of management plans, letting of contracts, and undertaking preliminary works, as distinct from commencing the activities which are at the heart of the suite of consents. In very complex projects of large scale there is always a significant lead in to the construction or commencement of the activity.

- 11 It is submitted that in light of these legal principles, RM110010 was given effect to on 10 February 2014 when RM130799 was granted.
- 12 Considering the first question posed in *Goldfinch*, the nature of the activity approved by consent was a Structure Plan. There were no rules in the ODP RVZ to guide the implementation of the Structure Plan, or to suggest that activities in accordance with the Structure Plan could occur without consent. The logical next step to implementing the consent was to apply for subdivision consent in accordance with the Structure Plan.
- 13 As discussed by the Courts in *Biodiversity Defence Society*, giving effect to a consent does not require physical works. While physical works have not begun in accordance with the Structure Plan, extensive work has been undertaken towards implementing both consents, including the development of the subdivision proposal and the work required to obtain s223 certification.

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<sup>7</sup> *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZEnvC 195 at [56],[62]-[63], [66]-[73], [110], [114]-[121]. *Biodiversity Defence Society Inc v Solid Energy New Zealand Ltd* [2013] NZHC 3283 at [1]-[4], [49]-[89].

<sup>8</sup> As above at [61].

- 14 Consent was granted for RM130799 on 10 February 2014. The consent was given effect to when s 223 certification was issued on 21 December 2018<sup>9</sup>. S 224(c) certification must be obtained by 21 December 2021<sup>10</sup>. In the letter attached as **Appendix A** the project manager has confirmed subdivision works will be undertaken in 2021 and he is satisfied the 21 December 2021 deadline can be met.
- 15 The submitter proposes to register the covenant required by condition 3 of RM110010 on the new titles when 224(c) certification is obtained. It is submitted that this is the most efficient and logical approach to achieve compliance with condition 3.

### **Relevant legislation and planning provisions**

#### *Resource Management Act 1991*

- 16 The relevant sections of Part 2 of the Resource Management Act 1991 (**RMA**) are set out below:

- (a) S 6 RMA matters of national importance:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

(f) the protection of historic heritage from inappropriate subdivision, use, and development

- (b) S 7 RMA other matters:

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(b) the efficient use and development of natural and physical resources;

(c) The maintenance and enhancement of amenity values;

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<sup>9</sup> S 125(2) RMA.

<sup>10</sup> S 125(2) RMA.

(f) the maintenance and enhancement of the quality of the environment.

- 17 Sections 72 – 77 are relevant to the content of and changes to district plans. Of particular relevance is:
- (a) S 74 RMA which requires the council to prepare and change its district plan having regard to any proposed regional policy statement.
  - (b) S 75(3) RMA which requires that a district plan must give effect to any regional policy statement.

*Proposed District Plan Chapter 3 and 6*

- 18 The Environment Court's interim decision<sup>11</sup> on Topic 2 of the PDP is relevant to the assessment of the proposal against the objectives and policies of the strategic chapters of the PDP.
- 19 The Topic 2 decision identified 'Carve Out' or 'Exception Zones', being ODP zones and sub-zones to which a set of 'Carve Out' provisions of Chapters 3 and 6 would not apply. The Court explained the concept as follows:

[30] As noted, Carve Out essentially refers to a regime of specified exceptions to that overall regime for ss6(b) and ss 7(c) RMA. Carve Out is premised on a theory that those provisions have already been accounted for in the ODP zones and sub-zones to which Carve Out would apply. We discuss the various zones and sub-zones to which Carve Out would apply later in this decision.

[31] The issues, whilst complex, are essentially about ensuring that the intentions for the relevant excepted zones or sub-zones are properly and effectively expressed in Chs 3 and 6. That is, it is accepted by all relevant parties that the ODP should have such a regime of exceptions to the relevant Ch 3 and 6 provisions.

- 20 The relevant Chapter 3 provisions to the Carve Out regime as drafted by the Environment Court are:

*3.1B.5 In 3.1B.6 and SO 3.2.5.1A and 3.2.5.2A, 'Exception Zone' means any of the following:*

- a. The Ski Area Sub-Zone;*
- b. The following Special Zones;*
  - i. Ch 41 Jacks Point;*

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<sup>11</sup> *Upper Clutha Environmental Society Inc. v Queenstown Lakes District Council* [2019] NZEnvC 205.

- ii. *Ch 42 Waterfall Park;*
- iii. *Ch 43 Millbrook; and*
- iv. *Gibbston Character Zone;*
- c. *The Rural Residential Zone; and*
- d. *The Rural Lifestyle Zone –*

*In each case to the extent that the Zone (or sub-zone) is depicted on the planning maps as at [xxx date to come related to determination of related appeals.]*

3.1B.6 *The following Strategic Objectives and Strategic Policies do not apply to applications for any subdivision, use or development within any of the Exception Zones: ....[SO and SP to come].*

3.2.5.1A *In each Exception Zone located within Outstanding Natural Features and Outstanding Natural Landscapes, any application for subdivision, use and development is provided for:*

- a. *to the extent anticipated by that Exception Zone; and*
- b. *on the basis that any additional subdivision, use and development not provided for by that Exception Zone protects landscape values.*

- 21 Chapter 6 policies 6.3.1.2, 6.3.1.3, 6.3.1.4 and 6.3.1.5 exempt the Ski Area Sub Zones, Gibbston Character Zone, Wakatipu Basin Rural Amenity Zone and Open Space and Recreation Zone from the application of the ONL, ONF and RCL categories and the Chapter 6 policies which relate to those categories.
- 22 The RVZ is not listed as an Exception Zone in policy 3.1B.5 because the PDP RVZ was not part of Stage 1 of the district plan review. It is understood that it is the council's intention to include the RVZ as an Exception Zone.
- 23 The Court's identification of Exception Zones and drafting of the Carve Out provisions is not final. The Court has directed the council to file a complete list of Special Zones and Strategic Objectives and Policies to be referenced in policy 3.1B.6.<sup>12</sup> The parties to the Topic 2 decision then have an opportunity to respond to the council's position, which will then be followed by expert conferencing of landscape and planning witnesses and closing

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<sup>12</sup> As above n 11, at [525(g)].

submissions from counsel, before the Court makes its final decision on the Carve Out provisions / Exception Zones.

- 24 Given the Environment Court's decision is an interim decision, counsel simply intends to bring the Carve Out / Exception Zone regime to the Panel's attention to note as part of its overall consideration of the proposal.

## **Landscape**

- 25 The council's fundamental opposition to incorporating the Structure Plan and proposed bespoke provisions into the PDP is that it will result in inappropriate landscape effects. Ms Grace relies on the evidence of Ms Mellsop "that development enabled by the structure plan and proposed bespoke plan provisions would exceed the capacity of the area to absorb development without compromising its landscape values" and that development could lead to adverse landscape and visual amenity effects on the values of the ONL.<sup>13</sup>
- 26 The submitter considers the council's position is unreasonable and indefensible in light of the fact assessments completed by Council officers, including Ms Mellsop, resulted in a decision on RM110010 that found the landscape effects of development, in accordance with the Structure Plan and design guidelines, would be no more than minor.
- 27 Ms Mellsop considers that her 2011 assessment in the context of the ODP is not comparable to her 2020 assessment in the context of the PDP. She states:<sup>14</sup>

"I note that my assessment of the proposed structure plan in 2011 was undertaken in the statutory context of the ODP Rural Visitor Zone, a relatively enabling zone in which many activities, including structure plans, are controlled activities. There are no site coverage standards and buildings of up to 12 metres in height are provided for as controlled activities. In addition, there are no assessment matters for controlled activity structure plans and therefore no guidance as to the appropriate landscape outcomes of a structure plan or how such a plan might achieve the objective and policies for the zone."

- 28 This argument is not accepted. The landscape assessment completed by Ms Mellsop for RM110010 was a thorough and detailed assessment that went well beyond what was arguably required by the ODP RVZ provisions.

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<sup>13</sup> Rebuttal evidence of Helen Mellsop, dated 12 June 2020, at [3.4] – [3.5].

<sup>14</sup> Rebuttal evidence of Helen Mellsop at [3.3].



29 Ms Mellsop provided an initial landscape assessment on 28 January 2011 which considered the Structure Plan that is now sought to be included in the PDP. The assessment included:

- (a) An assessment of the surrounding landscape and classification of the landscape as ONL:

Classification of the landscape surrounding and including the site is not required for assessment of a controlled activity application in the Rural Visitor Zone. **However in this particular situation it is relevant to consider the landscape context of the site.** It is located in a remote, predominantly unmodified landscape, surrounded by dramatic mountain ranges, indigenous forest and shrubland, and a remnant glacial lake. Mt Aspiring national Park adjoins the eastern site boundary and extends to the north adjoining the Dart River. **In my opinion, the significant aesthetic and natural values of the area mean it is appropriately classified as an outstanding natural landscape.**<sup>15</sup>

- (b) An assessment of the relevant zone purpose and relevant zone and district wide objectives and policies governing activities within the Arcadia RVZ, as related to landscape:<sup>16</sup>

There are no criteria specified for assessing any structure plan. In undertaking this landscape assessment, I have therefore considered the purpose of the zone, the zone objectives and policies and the district-wide objectives and policies, where these are relevant to landscape matters.

- (c) The relevant objectives and policies assessed:

- (i) the district wide objective that subdivision, use and development be undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values;<sup>17</sup>
- (ii) the policies relating to outstanding natural landscapes district wide;<sup>18</sup> and

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<sup>15</sup> Landscape assessment by Ms Mellsop, dated 28 January 2011, at [6].

<sup>16</sup> At [7].

<sup>17</sup> At [23].

<sup>18</sup> At [23].

- (iii) the policies to "ensure development, existing and new, has regard to the landscape values which surround all the rural visitor areas" and to "ensure expansion of activities occur at a scale, or at a rate consistent with maintain the surrounding rural resources and amenities."<sup>19</sup>
  - (d) The natural character and amenity values of the surrounding area;<sup>20</sup>
  - (e) The effects of the proposed development on the landscape values of the site and wider surrounds. Ms Mellsop identified the areas of the site that are more sensitive from a landscape perspective and made recommendations to ensure future development would not significantly detract from the natural character of the landscape and heritage landscape values.
- 30 Following feedback from Ms Mellsop to the council and a formal response to a Request for Further Information by the applicant, Ms Mellsop produced an addendum to her landscape assessment on 31 March 2011 which detailed that in her opinion:
  - (a) The structure plan complies with the requirements laid out in Section 12.4.3.2(i) of the ODP;<sup>21</sup>
  - (b) The maximum densities proposed could be absorbed within RES1 activity area without significant adverse effects on the landscape values of the surrounding area;<sup>22</sup>
  - (c) The level of visible development proposed could be absorbed without significant adverse landscape effects, so long as dwellings were appropriately designed and landscaped;<sup>23</sup> and
  - (d) A greater setback of built development from the lakeshore is important in maintaining the landscape values of the area.<sup>24</sup>
- 31 Based on Ms Mellsop's assessment, the landscape assessment provided by the applicant, and the planning assessment, the decision found:

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<sup>19</sup> At [9].

<sup>20</sup> At [11].

<sup>21</sup> Landscape Assessment Addendum, by Helen Mellsop, dated 31 March 2011, at [2].

<sup>22</sup> Landscape Assessment Addendum at [2].

<sup>23</sup> Landscape Assessment Addendum at [3].

<sup>24</sup> Landscape Assessment Addendum at [6].

- (a) Overall, the location of the proposed activity areas will ensure development is managed and appropriately contained to protect surrounding scenic resources.<sup>25</sup>
  - (b) Effects in regard to landscape planting will be less than minor.<sup>26</sup>
  - (c) The proposed setbacks for development from the lakeside are greater than required by the ODP, and design controls have been offered to ensure development does not compromise the openness of the lake and to retain an acceptable level of rural amenity;<sup>27</sup>
  - (d) On the balance the Structure Plan results in positive effects;<sup>28</sup>
  - (e) The adverse effects on landscape are considered to be no more than minor.<sup>29</sup>
- 32 The council has no justifiable grounds to argue that from a landscape perspective the proposal is no longer appropriate, given that:
- (a) the proposed Structure Plan and design guidelines were considered to have a no more than minor effect on landscape in decision RM110010; and
  - (b) the same Structure Plan with more restrictive design controls is now proposed on the same land not subject to any change in landscape values since RM110010 was decided.
- 33 Ms Mellsop's argument that her 2011 landscape assessment is not relevant as it was carried out in the context of the ODP RVZ is hard to justify. As noted above the landscape assessment went beyond what may have been required by the ODP, and heavily focused on the potential effects of the proposed development on the landscape values of the site and surrounding environment. The proposed development and the landscape values remain unchanged, so it is illogical that a second landscape assessment by the same landscape expert could result in a significantly different conclusion.
- 34 The consented Structure Plan and design guidelines were the result of a lengthy collaborative process between the applicant and council, involving

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<sup>25</sup> Decision RM110010 at page 5.

<sup>26</sup> Decision at page 6.

<sup>27</sup> Decision at page 7.

<sup>28</sup> Decision at page 7.

<sup>29</sup> Decision at page 7.

amendments to the proposal by the applicant in response to feedback from Ms Mellsope and an urban design panel. All of the consultants involved in this process acknowledged the special characteristics of the site and surrounding landscape, and carefully worked to craft a development concept that is appropriate for the impressive landscape setting. The Urban Design Panel Report (**UDP Report**) dated 12 August 2010 was prepared within the scope of the New Zealand Urban Design Protocol as applied to the Queenstown Lakes District and states:

The site embodies all of the characteristics that one associates with the adjective "iconic". Surrounded by towering mountains, flanked by forested hillsides and fronting the lake, one would be hard pressed to find another site within the District that combines such splendid pristine isolation with unconstrained development rights<sup>30</sup>.

- 35 The UDP Report went on to identify one of the issues as "How to introduce development without compromising the outstanding visual amenity and sense of raw isolation of the site and its setting"<sup>31</sup> and, in respect of concept development the report noted that "Creating an inspirational concept is fundamental to this project's eventual success."<sup>32</sup>
- 36 What is clear from all of this information is, despite the lack of assessment criteria in the ODP RVZ provisions and more permissive rules, every effort was made by the applicant, consultants and council to ensure the proposed Structure Plan was thoroughly assessed and considered with a view to protecting the outstanding landscape setting.
- 37 As detailed in Mr Vivian's evidence<sup>33</sup> further detailed landscape assessments were carried out by the applicant's consultants and council before the subdivision consent was approved (RM130799).
- 38 The submitter's position is that it does not need to provide landscape evidence in support of its submission on Stage 3, because detailed landscape evidence from the applicant and the council produced for RM110010 and RM130799 is already available to council, and there is no reason the council cannot and should not continue to rely on that information.

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<sup>30</sup> Urban Design Report – Paradise Veint page 1.

<sup>31</sup> As above, page 2.

<sup>32</sup> As above, page 3.

<sup>33</sup> Evidence of Carey Vivian dated 28 may 2020, pages 10 and 11.

## Controlled activity status

- 39 The council has raised the concern that controlled activity status for buildings in the RES1A and RES1B activity areas does not give the council sufficient discretion to manage potential adverse effects, and the option to decline applications for inappropriate activities.
- 40 Controlled activities are determined in accordance with section 104A RMA. Council must grant consent unless it has insufficient information to determine whether the activity is a controlled activity (or if section 106 applies), and may impose conditions under s108 (or s220 for a subdivision) in respect of matters to which it has reserved itself control in the plan. Council's ability to apply conditions on a controlled activity consent is limited by section 87A (conditions may only be applied in respect of matters to which Council has reserved control in its plan); and through common law principles developed on section 108.
- 41 The Courts do not distinguish between different activity statuses when applying the common law principles under s108. Consent conditions must comply with the *Newbury* tests, and cannot fundamentally alter the activity so as to effectively nullify the consent<sup>34</sup>.
- 42 However, it is submitted that there is adequate flexibility in the application of ss 104A and 108 for council to require conditions of consent for controlled activities which sufficiently manage the potential or actual adverse effects of the activity.
- 43 For example, in *Director General v Marlborough District Council* the council held it was lawful to impose a condition which, if it is not satisfied, would mean that the activities authorised by the consent cannot commence.<sup>35</sup> In *Director General* a survey was required to be undertaken and then approved before consent could be carried out. An example applicable to the current case could be a condition that requires development to be in accordance with the design guidelines consented by RM110010.
- 44 While consent conditions cannot fundamentally change the nature of an activity, it is accepted that consent conditions can limit the scale and intensity of an activity in accordance with the matters of discretion. This concept was discussed by the Environment Court in *Aqua King* citing *McLaren v Marlborough District Council*:

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<sup>34</sup> *Dudin v Whangarei District Council* Environment Court Auckland, 30/03/2007, A022/07 at [60]

<sup>35</sup> *Director General v Marlborough District Council* [2004] 3 NZLR 127 (HC) at [23].

The case of *McLaren v Marlborough District Council* Decision No. W22/97 was also referred to, which states that a resource consent cannot go beyond the scope of the application (in that example, the location of the farm could not be altered from that notified in the application). **However, the proposal may be limited or reduced.** In this case, the issue remains whether altering the structures used is merely a limitation on the consent or a fundamental change to what was originally proposed.<sup>36</sup>

[emphasis added]

- 45 In *Dudin v Whangarei District Council* the court held that a controlled activity consent condition to reconfigure a proposed subdivision layout was lawful. The Court reconfigured the subdivision through consent conditions but retained the number of lots which were applied for. The Judge in *Dudin* considered that reconfiguration of the subdivision proposal was not 'tantamount to a refusal of consent for that which had been applied for'.<sup>37</sup>
- 46 In *Mygind v Thames Coromandel District Council* the Court considered relevant provisions of the plan which were associated with a controlled activity rule and could be used where applicable to impose a condition, but could not be read as providing a discretion to refuse consent:

Equally, almost all of these provisions can be read as allowing a consent authority to **impose consent conditions for a controlled activity to properly control the particular effect identified.** For example, in respect of the hazard issue, although the activity is controlled, **there may be certain sites proposed by an applicant which could not be included because they represented significant hazard.** In this regard, the two areas of subsidence, for example, between Lots 66 & 67 are in that category and have properly been excluded from development as a result<sup>38</sup>.

[emphasis added]

- 47 It is submitted that in the context of Arcadia, where development in the RES1A and 1B activities areas is proposed to occur in accordance with the consented Structure Plan and (amended) design guidelines, the matters of control in respect of Rule 46.4.6 provide sufficient control to council to ensure that effects on landscape are appropriately addressed. While the council cannot decline consent for buildings it can exercise its control over, most relevantly, building design, landscaping, and planting, and require that proposals be amended in relation to these matters to ensure they do not have significant adverse effects on landscape character and visual amenity values.

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<sup>36</sup> *Aqua King Ltd v Marlborough District Council* (1998) 4 ELRNZ 385 at [25] referring to *McLaren v Marlborough District Council* Decision No. W 022/97.

<sup>37</sup> *Dudin v Whangarei District Council* Environment Court Auckland, 30/03/2007, A022/07 at [60].

<sup>38</sup> *Mygind v Thames-Coromandel District Council* [2010] NZEnvC 34 at [32] - [33].

48 The controlled activity rule for buildings also works in conjunction with the Structure Plan which has identified the RES1A and 1B areas as being appropriate for residential development, and the proposed standards for height, coverage, setbacks, colours and materials, roading and fencing. It is submitted that where there are sufficient design controls and development standards worked into the plan, as is the case here, the council has sufficient control with controlled activity status to ensure enabled development is appropriate.

### **Residential use**

49 Another criticism by council of the proposed Structure Plan approach is that the council considers residential activity is no longer appropriate in the RVZ.

50 In its s 32 evaluation report the council determined residential activity should no longer be enabled in the RVZ, and recommended that residential activities be non-complying (as opposed to permitted in the PDP) and strongly worded objectives and policies be inserted into Chapter 46 directing avoidance of residential activities within the RVZ.

51 The s 32 report does not provide any evidence or justifiable planning position for this decision.

52 All existing RVZ include some level of residential activity. There is no evidence to suggest that residential activities are incompatible with visitor accommodation and commercial recreation activities, or that they undermine the purpose of the RVZ to provide for these activities. In the Cardrona RVZ for example, residential activities exist alongside visitor accommodation and commercial activities and are compatible with each other.

53 Arguably, residential development is important in RVZs to provide a resident base for economic activity, to provide employment, and to create a local sense of place that visitors can appreciate.

54 In the Arcadia RVZ the consented Structure Plan does not only contemplate residential activities; residential activities are enabled alongside visitor accommodation and commercial activities. There is no justifiable reason that the Structure Plan should be opposed on the basis that it enables residential activity when it also enables visitor accommodation activities, and there is no evidence the two activities are incompatible.

## S 32 Evaluation

- 55 It is submitted there is no adequate s 32 justification to support departure from the ODP RVZ provisions for the Arcadia RVZ.
- 56 The s 32 evaluation report states:<sup>39</sup>
- The enabling provisions of the operative zoning (controlled activity status, no building coverage limit, generous maximum height) combined with the large extent of the zone areas and the identification of most of the RVSZ areas as being within wider ONLs, means there is a high risk if not absolute certainty that the operative regime is not protecting outstanding landscapes from inappropriate subdivision, use and development as required by section 6 of the Act. The RVSZ does not achieve the strategic direction of the PDP (i.e. Strategic Objective 3.2.5).*
- 57 The s 32 evaluation does not provide any evidence to support this position. This is particularly true for the Arcadia RVZ, which has not been developed since the ODP provisions came into force and as such it cannot be argued that the ODP regime is not protecting the values of the ONL at Arcadia.
- 58 Should there be a valid concern that the ODP RVZ provisions are inappropriate to protect the values of ONLs generally, it is submitted the Arcadia RVZ is an exception, given the consented Structure Plan actually constrains the nature and scale of development that can be established, in a manner which was agreed in the council's previous consent decisions would protect the values of the ONL.
- 59 S 32 RMA requires decision makers to consider whether the proposed provisions are the most appropriate way to achieve the objectives [of the proposed plan] by identifying other reasonably practicable options for achieving the objectives.<sup>40</sup> An adequate assessment of alternatives does not require an assessment of every option, however it is considered good practice to undertake an evaluation of a sufficient selection of alternatives, including distinctive alternatives where they exist<sup>41</sup>.
- 60 In its s 32 evaluation report the council discusses the Structure Plan and subdivision consent and notes that the consents have not been implemented, but does not consider incorporating the Structure Plan into the PDP. It is submitted that incorporating the Structure Plan into the PDP,

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<sup>39</sup> S 32 evaluation for the Rural Visitor Zone at [8.8].

<sup>40</sup> S 32(1)(b)(i) RMA.

<sup>41</sup> Ministry for the Environment, 2013, A guide to s 32 of the RMA 1991; *Incorporating changes as a result of the Resource Management Amendment Act 2013, Interim Guidance*, Wellington, p33.



with amendments to the design guidelines as required, was a reasonably practicable alternative that the council should have considered.

61 S 32 also requires an assessment of the efficiency and effectiveness of the proposed provisions in achieving the proposed objectives.<sup>42</sup> Such an assessment must:<sup>43</sup>

(a) identify and assess the benefits and costs of the environmental, economic, social and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:

(i) economic growth that are anticipated to be provided or reduced; and

(ii) employment that are anticipated to be provided or reduced; and

(b) if practicable, quantify the benefits and cost.

62 It is submitted that incorporation of the Structure Plan into the PDP presents unique opportunities for economic growth and employment which will benefit the local Glenorchy and Queenstown economies. The Structure Plan provides for a combination of residential, visitor accommodation, and commercial activities. The benefits of commercial activities to the Glenorchy area are self-evident. Commercial activities such as filming and film industry related activities are contemplated at Arcadia which have a known economic benefit for the Queenstown area and the national economy.

63 The PDP should encourage diversity of activities, so long as potential adverse effects can be appropriately managed. There is an economic risk in limiting types of activities more than required to appropriately address potential adverse effects. Diversity assists with adaptability and the COVID-19 environment has confirmed that adaptability will be the key to Queenstown and the District's future wellbeing. The Structure Plan provides this diversity, and has been through a thorough assessment of effects to ensure potential effects will be appropriately managed. The strategic objectives and policies of the PDP support diversity, but as drafted this direction does not flow through into Chapter 46.

64 The s 32 evaluation does not include quantified costs and benefits. It is submitted it would have been practical to quantify the economic benefit to

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<sup>42</sup> S 32(1)(b)(ii) RMA.

<sup>43</sup> S 32(2)(a) & (b) RMA.

the local economic of enabling the Structure Plan development, and the costs to the landowner incurred through unimplemented consents and the further consenting requirements to obtain non-complying consent under the PDP for residential and commercial activities in accordance with the Structure Plan.

## **S 85 RMA Reasonable Use**

65 It is submitted that the PDP provisions for the Arcadia RVZ do not allow for reasonable use of the submitter's land in accordance with s 85 RMA.

66 This argument is advanced on the basis that development of the Arcadia RVZ has progressed in accordance with the consented Structure Plan to the extent that requiring an alternative development pathway, under the council proposed RVZ provisions, would render the land incapable of reasonable use and places an unfair and unreasonable burden on persons with interest in the land.

67 If council does not rectify this situation by amending its proposed RVZ provisions it runs the risk of a s 85 argument being pursued on appeal to the Environment Court.

68 S 85 RMA states, relevantly:

(2) Notwithstanding subsection (1), any person having an interest in land to which any provision or proposed provision of a plan or proposed plan applies, and who considers that the provision or proposed provision would render that interest in land **incapable of reasonable use**, may challenge that provision or proposed provision on those grounds—

(a) in a submission made under Schedule 1 in respect of a proposed plan or change to a plan; or ...

(3A) The Environment Court, if it is satisfied that the grounds set out in subsection (3B) are met, may,—

(a) in the case of a plan or proposed plan (other than a regional coastal plan or proposed regional coastal plan), direct the local authority to do whichever of the following the local authority considers appropriate:

(i) modify, delete, or replace the provision in the plan or proposed plan in the manner directed by the court: ...

(3B) The grounds are that the provision or proposed provision of a plan or proposed plan—

(a) makes any land incapable of **reasonable use**; and

(b) places an **unfair and unreasonable burden** on any person who has an interest in the land.

(6) In this section,—

**reasonable use**, in relation to land, includes the use or potential use of the land for any activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant

**[emphasis added]**

69 In *Steven*<sup>44</sup> the Environment Court set out relevant factors for an assessment of the two limbs of the s 85(3B) test as follows<sup>45</sup>:

[34] Summarising our views and adding other, obvious factors, we hold that the two tests in section 85(3) and the second in particular must be considered in a context somewhere between Mr Hearn's extremes. Whether there is an unfair and unreasonable burden cannot be considered in the abstract but in the context of the Act and in particular with (differentially weighted) reference to:

(1) the natural and physical resources in the case;

(2) that no reasonable use can be made of the land (that is whether the first test in s 85(3) is satisfied);

(3) Part II of the Act (the purpose and principles) because these underpin everything else in the Act;

(4) Part III of the Act and the inference from s 9 that real property rights prima facie meet the purpose and principles of the Act – Part III and s 9 are expressly referred to in s 85(3) so there can be no doubt of their relevance;

(5) the relevant provisions of the proposed plan (in this case the heritage section and discretionary rules) because the listing of the property has to be looked at in the context of that plan;

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<sup>44</sup> *Steven v Christchurch City Council* [1998] NZRMA 289. In this case the Court considered an application under s 85 that a heritage listing for a derelict building rendered the property incapable of reasonable use. Demolition of the building was a discretionary activity. The Court determined that the heritage listing made the land incapable of reasonable use because there were no alternative uses for the property. The heritage listing was determined to be an unfair and unreasonable burden in the landowner because it was not economic to restore the property and so the landowner was required to pay consenting costs for the demolition.

<sup>45</sup> As above n 44, at [34].

(6) the rebuttable presumption that the proposed plan is effective and efficient – otherwise the work on the (proposed) plan is wasted;

(7) the personal circumstances of the applicant, looked at objectively because in assessing a burden one has to look at who is carrying it.

We have to exclude from our considerations Part IV of the Act, and s 32 in particular (except to the extent identified in (6) above which allows the assumed results of a s 32 analysis to be considered).

70 In relation to the first test the Court stated:<sup>46</sup>

[36] The test is simply whether the plan or proposed plan in question renders the land incapable of any reasonable use.

71 In relation to the second question as to whether the proposed plan provision place an unfair and unreasonable burden on any person with an interest in the land, the Court commented that an assessment must be made in the context of Part 2 RMA:<sup>47</sup>

[17] ...The question of what is an "unfair and unreasonable burden" cannot be looked at in a vacuum, and should not be determined solely by common law tests of fairness and reasonableness. Without reference to Part II, there can be no justification for the heritage listing the applicant complains of.

[18] Our view that the fairness and reasonableness of the listing must be examined in the context of the purpose of the Act is supported by section 5(1) of the Acts Interpretation Act 1924 which enjoins us to give section 85(3) of the RMA "...such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act...". The fact that Part II is not referred to expressly in section 85(3) does not mean that it should not be considered. There are other places in the Act, for example decision-making under section 105, which do not specifically advert to Part II, but which the Court has held must be informed by the purpose of the Act:

[citations omitted]

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<sup>46</sup> As above n 44, at [36].

<sup>47</sup> As above n 44, at [40].

72 Also relevant to this case, in *Hastings*<sup>48</sup> the Environment Court considered that a s 85 assessment must take into consideration the council's obligations under ss 6 and 7 RMA. The Court considered that in light of a balanced Part 2 assessment, a zoning providing lesser protection of landscape values may be more appropriate than a zoning providing greater protection in order to also enable economic use of the land, so long as an appropriate level of protection is still afforded:

[168] In this case, the conflict between enabling economic use of the land and precluding all economic use to protect the undoubted natural values of the land is not quite as stark as that. Leaving aside the prospect of protection by the proposed designation for nature reserve, and eventual public acquisition, even Business 6 zoning would not allow unrestrained development of the remainder of the northern piece after excluding the marginal strips, the railway link easement, the other infrastructure elements, and the building line restriction. **Although they would not be as fully effective to protect the features of natural value as Open Space 1 zoning, the coastal management area control and the earthworks control have the potential to provide considerable protection.** In the unlikely event of activity to remove valuable indigenous vegetation in advance of a resource consent application (the risk mentioned by Ms Dorofaeff) a combination of sections 17 and 320 would provide a backstop. **By contrast, there is no corresponding moderation in Open Space 1 zoning to allow for any development to enable economic use, even development that does not have any significant adverse effect on the environment.**

[emphasis added]

73 It is submitted that on the facts, failure to incorporate the Structure Plan and design guidelines into the PDP renders the land incapable of any reasonable use. In the unique circumstances of this case, development has substantially progressed down the Structure Plan route to the point where it would not be reasonable or efficient to require the landowner to essentially restart their development.

74 In light of *Hastings*, it is also relevant that the Structure Plan was considered to give effect to ss 6 and 7 of the RMA. The Structure Plan sufficiently limits development to an extent previously determined as appropriate from a

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<sup>48</sup> *Hastings v Auckland City Council* A068/01. This case considered an appeal against a proposed plan regarding the zoning of land and various overlays and designations. The appellant sought a rezoning from Open Space to Business, and the deletion of a coastal management area. The relief was sought under s292 RMA but the Court considered s 85 as part of its overall assessment. The court held that the zoning of the land rendered the land incapable of reasonable use, but that the coastal management overlay did not render the land incapable of reasonable use.

landscape effects perspective, and as such a more restrictive zoning to protect ss 6 and 7 landscape values is not required.

- 75 It is accepted that case law suggests provisions do not render land incapable of reasonable use if there is still a consenting pathway available, i.e. the activity sought to be undertaken is a discretionary activity<sup>49</sup>.
- 76 However, it is submitted that a non-complying consenting pathway is distinguishable from a discretionary consenting pathway and does not provide for reasonable use of land. While consent can be obtained for a non-complying activity (as opposed to a prohibited activity for which consent cannot be obtained), an application must meet the s 104D RMA 'gateway test' in order for a decision maker to grant consent. Either the adverse effects of the activity must be minor, or the activity must not be contrary to the objectives and policies of the relevant plan(s). There is also the presumption written into the PDP that activities with non-complying status are activities that are not anticipated by the PDP.<sup>50</sup> As such there is a significantly higher threshold for non-complying activities than discretionary activities.
- 77 The available consenting pathway is also relevant to the determination of whether the proposed provisions place an unfair and unreasonable burden on the landowner. In *Steven* the Court considered this second limb of the s 85(3B) test in light of s 7(b) RMA, the efficient use and development of natural and physical resources. The Court determined that plan provisions which require the landowner to obtain consent may constitute an unfair and unreasonable burden<sup>51</sup>.
- 78 This finding is particularly relevant in the circumstances of Mr Veint's land, where he has incurred significant costs in obtaining consent for the Structure Plan and subdivision. Requiring the new landowner to reapply for consent at a higher activity threshold would place an unfair and unreasonable burden upon them.
- 79 Furthermore, alternative consenting pathways in accordance with the PDP RVZ will not be available once the covenant is registered on the land requiring compliance with the consented Structure Plan (registration is anticipated when titles are applied for under the subdivision consent).

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<sup>49</sup> Hastings at [50]. However, there are examples where provisions have met the s 85(3B) test regardless of a discretionary consenting pathway being available, for example see *Steven* at [44].

<sup>50</sup> PDP Chapter 1, section 1.6.9.

<sup>51</sup> *Steven* at [52].

- 80 In taking into account only the first limb of the s 85(3B) test and choosing to not consider whether the provisions place an unfair and unreasonable burden on the landowner, the council has not considered the time and cost implications to the landowner in progressing development in accordance with the Structure plan, which would be nullified if development could not proceed down that route.
- 81 Enabling development in accordance with the Structure Plan and subdivision consent will better enable economic use of the land, as the subdivision consent is already in the process of being implemented, and the Structure Plan provides for a range of land uses which will diversify economic return.

### **Bespoke provisions and zoning**

- 82 Ms Grace's rebuttal evidence has provided commentary on the provisions proposed by Mr Vivian, in case the Panel decides to grant the relief sought. Mr Vivian will respond to that commentary in his summary statement presented at the hearing.
- 83 The submitter considers that should the Structure Plan and proposed bespoke provisions be incorporated into the PDP RVZ, the RVZ is an appropriate zoning for Arcadia.
- 84 However, the submitter is willing to consider a bespoke zone which enables the consented development if the Panel considers a bespoke zone to be the more appropriate outcome. If this is the case, Mr Vivian is able to draft provisions for a bespoke zone for the Panel and council's review.

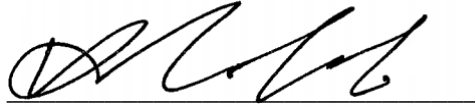
### **Further submission by Fish and Game**

- 85 Fish and Game submitted in opposition to the proposal on grounds that development in the Arcadia RVZ might have an impact on recreational amenity, in particular angling activities at Diamond Lake. The further submission goes on to raise planning and landscape issues already traversed in these submissions.
- 86 Fish and Game has not provided any evidence in support of its further submission, and did not clarify in its submission how the proposed development at Arcadia RVZ would affect angling activities.
- 87 Both Ms Grace and Mr Vivian have addressed Fish and Game's further submission in their evidence and consider the further submission should not be accepted.

**Evidence to be presented by submitter:**

88 Planning evidence from Carey Vivian.

Dated this 24<sup>th</sup> day of July 2020

A handwritten signature in black ink, appearing to read 'V. Robb', is written over a horizontal line.

Vanessa Robb  
Counsel for the successor to Lloyd Veint



## Appendix A



Vanessa Robb  
Anderson Lloyd  
Level 2  
13 Camp Street  
Queenstown, 9300

7 July 2020

Dear Vanessa,

RE: ARCADIA STATION SUBDIVISION RM130799

I write in relation to the 12 lot subdivision at Arcadia Station, Paradise, Glenorchy. I confirm that I have recently been engaged by The Station at Waitiri Ltd to act as Engineer to the Contract and to project manage the implementation of resource consent RM130799. This includes the construction of the roading and the installation of the necessary infrastructure in accordance with the consent conditions. Engagement of design consultants will commence in the near future to prepare the detailed designs to be submitted to Council for stormwater management, the potable water system, and roading. The 223 was issued on 21 Dec 2018, this leaves until 21 Dec 2021 year to get 224c approval. Design and Councils certification of these designs will be complete by the end of this year and the subdivision construction undertaken during 2021. I am satisfied there is sufficient time to be able to achieve 224c within the necessary timeframe and I look forward to completing this work to a high quality standard.

Yours Sincerely,

A handwritten signature in black ink that reads "Steve Hewland". The signature is written in a cursive style with a large, stylized initial "S" and "H".

Steve Hewland  
Owner/Director