BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Rezoning Hearing Stream 13 – (Queenstown mapping)

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

Hearing Stream 13 – Queenstown Mapping

6 October 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen during the course of Hearing Stream 13 (Queenstown), and to provide the Council's position on specific issues. The legal reply in relation to the submissions by Queenstown Park Limited (806), Skyline Enterprises Limited (556), Grant Hylton Hensman et al (361) and Gibbston Valley Station Ltd (827) will be filed on 11 October 2017 as Part Two, alongside the respective planning replies.

1.2 Filed alongside this right of reply are the planning replies of:

(a) Ms Kim Banks, Group 1A;
(b) Ms Ruth Evans, Group 1B;
(c) Ms Rosalind Devlin, Group 1C;
(d) Ms Vicki Jones, Group 1D; and
(e) Mr Robert Buxton, Group 2.

1.3 Having considered matters raised and supplementary evidence produced during the course of the hearing, these replies represent the Council's position. Attached to all of the planning replies is:

(a) a table that sets out the changes to the planning maps that are required as a consequence of accepting in full or part, relevant submissions; and
(b) a final accept/reject table, which reflects the final recommendations for that particular group of submissions.

1.4 In addition, the following expert witnesses for the Council have also provided reply evidence, which is filed alongside these legal submissions:

(a) Dr Marion Read (landscape);
(b) Mr Timothy Heath (commercial land requirements);

(c) Mr Philip Osborne (residential capacity and industrial/commercial office capacity);

(d) Mr Ulrich Glasner (infrastructure); and

(e) Ms Wendy Banks (transport).

1.5 These reply submissions first address higher level strategic matters that apply to all of the rezoning submissions, and then consider specific matters, where reply legal submissions are considered necessary. They also address two of the matters that the Panel requested the Council address in its Reply, in its minute of 15 September 2017. The other three matters are covered in the reply evidence of Ms Jones and Mr Buxton.

2. RESIDENTIAL AND BUSINESS LAND NEEDS

2.1 Various legal submissions have been presented by submitters that address the NPS, and development capacity in particular. No evidence from a qualified expert (other than planning) has been filed that challenges the Council's evidence that there is sufficient development capacity, thus it is submitted that this must be the starting point for the Panel's deliberations. Council agrees with and emphasises Ms Hill's submissions for Oasis in the Basin,[1] that Mr Geddes' planning evidence does not provide the necessary analytical process to support the challenges he makes of the Council's assessment, nor does he profess any particular expertise in carrying out the type of analytical assessment needed to challenge the Council's dwelling capacity evidence.

2.2 Council otherwise refers to and adopts its opening legal submissions, except to the extent that the following clarifies its position around the NPS 'margin'.

1 At paragraphs 14-16.

Policy C1

2.3 PC1 is:

> ***To factor in the proportion of feasible development capacity that may not be developed****, in addition to the requirement to ensure sufficient, feasible development capacity as outlined in policy PA1, local authorities shall also provide an additional margin of feasible development capacity* ***over and above projected demand*** *of at least:*
>
> - *20% in the short and medium term, and*
> - *15% in the long term.*

2.4 The Panel asked during the hearing whether the percentages should be added onto feasible development capacity or onto projected demand, as the Council's experts in evidence did take a different approach to housing capacity and business capacity (this difference is explained in Mr Osborne's Reply Evidence).

2.5 This question was asked because Mr Osborne in his EIC took a different approach to the 'over supply buffers' for residential capacity, as a result of his previous experience during the course of the proposed Auckland Unitary Plan (**pAUP**) hearings where he was advising Housing New Zealand. In Auckland, following an intensive series of evidence exchange and further mediations and Panel directions, the end result was that a discount to feasible capacity was applied in order to account for the higher than average levels of land speculation and other relevant matters. This reflected an estimated proportion of unimplemented development, and took into account a variety of differing motivations that will change in terms of what the market actually provides. Therefore, following this experience, Mr Osborne in his Queenstown evidence, applied what averages to be a 22% discount to feasible capacity (for the Wakatipu) in order to account for the higher than average levels of land speculation and banking. He referred to this as 'realisable' capacity.[2]

2 Dwelling Capacity Evidence of Mr Osborne, at paragraphs 6.10 to 6.15.

2.6 Although dealing with the same issue, the NPS requires a different approach. Council's position is that the 15% or 20% must be added to the projected demand, given that the words "over and above" in the policy directly precede "projected demand". MfE's Guide on Evidence and Monitoring, although not having legal status under the RMA, also clearly outlines and supports this approach. The "margin" referred to in PC1, is then the increase in feasible development capacity that would be required, if that capacity did not already exceed the increased projected demand. This approach was encapsulated in the primary evidence of Ms Banks,[3] Mr Osborne (for commercial office/industrial, but not residential)[4] and Mr Heath.[5/6]

2.7 The Council's position remains that there is no need to increase 'feasible development capacity' in the PDP in order to give effect to the NPS, as the feasible capacity (as estimated by the evidence presented to the Panel for this hearing stream) exceeds projected demand, inclusive of the PC1 buffers of 15% and 20% across each of the planning timeframes set out in PA1.

2.8 In summary, in Queenstown:

(a) in the medium term to 2028, feasible capacity of 20,494 exceeds projected demand of 4,711;

(b) in the long term to 2048, feasible capacity of 20,494 exceeds projected demand of 10,273.

2.9 In the Upper Clutha:

(a) in the medium term to 2028, feasible capacity of 10,994 exceeds projected demand of 2,376;

(b) in the long term to 2048, feasible capacity of 10,994 exceeds projected demand of 6,516.

3 Supplementary Statement of Evidence of Ms Kim Banks (Dwelling Capacity) dated 19 June 2017, at 8.5(b).
4 Second Statement of Evidence of Mr Philip Osborne (Dwelling Capacity) dated 19 June 2017, at 7.6.
5 Statement of Evidence of Mr Timothy Heath dated 24 May 2017, at 7.4 to 7.1 (there is a numbering issue in this statement), and Table 4.
6 In opening submissions Council states its position was that the additional margin was to be added to realisable capacity. This is incorrect and consequently Ms Scott advised at the hearing that this paragraph of opening submissions should be deleted.

2.10 Mr Osborne's Reply Evidence also demonstrates that even with a more conservative margin (through the application of PC2), feasible capacity still surpasses demand. Council's submission remains that it is giving effect to the relevant requirements of the NPS in this respect, and the figures are summarised and clarified for the avoidance of any doubt, in Mr Osborne's and Ms K Banks' replies.

2.11 The following table is extracted from Mr Osborne's reply evidence.

Queenstown	Zone Name	Enabled	Feasible	3 Year Short Term	10 Year Medium Term	30 Year Long Term
CAPACITY	Low Density Residential	9,500	5,700			
	Medium Density Zone	1,565	689			
	High Density Residential	2,395	1,090			
	Mixed Business Use	747	556			
	Rural Residential	267	164			
	Rural Lifestyle Zone	359	215			
	Local Shopping Centre	162	162			
	Queenstown Town centre	196	146			
	Arrowtown Town Centre	32	21			
	Township	293	157			
	R.G. Glenorchy					
	R.G. Wakatipu					
	Gibbston Character Zone					
	Ferry Hill RR Sub-Zone					
	Bobs Cove RR Sub-Zone					
	TC Queenstown (PC50)					
	SP Remarkables Park					
	Jacks Point					
	Quail Rise					
	SP Bendermeer					
	SP Millbrook					
	SP Waterfall Creek					
	SP Meadow Park					
	SP Shotover Country					
	Kingston Village					
	Arrowtown South					
	Arthurs Point					
	Frankton Flats B					
	Total Special Development Capa	11,643	11,594			
	TOTAL	27,159	20,494	20,494	20,494	20,494
DEMAND (2018 Base)						
	Rationale Dwelling Projections			1,085	3,126	8,133
	Latent Demand			800	800	800
	NPS Buffer			2,262	4,711	10,273
Differential / Surplus				**18,232**	**15,783**	**10,221**

Upper Clutha	Zone Name	Enabled	Feasible	3 Year Short Term	10 Year Medium Term	30 Year Long Term
CAPACITY	Low Density Residential	10,719	6,764			
	Medium Density Zone	1,090	381			
	High Density Residential	427	281			
	Special Purpose	2,068	2,068			
	Northlake	1,500	1,500			
	TOTAL	15,804	10,994	10,994	10,994	10,994
DEMAND (2018 Base)						
	Rationale Dwelling Projections			723	1,830	3,744
	Latent Demand			150	150	150
	NPS Buffer			1,048	2,376	4,478
Differential / Surplus				**9,946**	**8,618**	**6,516**

Middleton Family Trust (338) and Oasis in the Basin (FS1289 to Middleton)

2.12 Counsel for Oasis agreed with, and adopted Council's position as summarised in paragraphs 2.14-2.16 of opening submissions.[7] Oasis' position is essentially that the Middleton Family Trust has wrongly relied on the NPS as the pre-eminent consideration supporting the proposed rezoning.[8] Council agrees with this submission, and agrees with Ms Hill's submissions that the directives of the NPS need to be balanced against what may be competing directives under other RMA instruments or the RMA itself, for example the requirement to provide development capacity, and the requirement under Part 2 to protect and manage ONLs. Even if there was a feasible capacity deficit in the NPS sense, in the Council's view, a rezoning submission could still be turned down for other reasons, for example the change in zone would not protect an identified ONL from inappropriate subdivision, use and development. Council refers to its opening legal submissions in paragraph 2.14 in that respect.

2.13 In her written submissions, Ms Hill responds to Middleton's three propositions:

(a) that the land subject to the Middleton Submission is part of an 'urban environment' for the purposes of the NPS;
(b) that the evidence supports a case that the NPS requirements are triggered; and
(c) that in this case the NPS should trump all other considerations, including landscape considerations.

2.14 Council's position remains that the Middleton land is not located within the Queenstown 'urban environment' and therefore their legal submission is fundamentally flawed. However, even if the Middleton land was located within the urban environment, it is submitted that there is nothing in the NPS that provides a determinative 'lever' that

7 Dated 21 July 2017.
8 At [5] and [9].

could be used to *require* a local authority to rezone land for urban purposes. The NPS does not make it mandatory for all land within an 'urban environment' to be zoned for residential purposes, which seems to be an underlying assumption in the Middleton submissions. If the Council is not meeting its obligations in terms of providing sufficient development capacity, it is then a question for the Council as to how it will do that.

2.15 In addition, the Responsive Planning policies in the NPS, state that "a response shall be initiated within 12 months" if for example, the evidence base or monitoring indicates that development capacity is not sufficient in any of the short, medium or long term. The NPS itself therefore allows the Council some leniency in responding to such a situation. However, if additional feasible capacity is required to give effect to PA1 (which, it is not), the Council accepts that it would be a logical starting point to consider land within an existing urban environment (whether that new capacity comes from going 'up' or 'out'), which is entirely consistent with Council's strategic approach in introducing Urban Growth Boundaries, into the PDP.

2.16 Point (b) has already been covered in detail in the Council's opening and evidence. On the contrary, as stated in the Council's opening legal submissions at paragraphs 2.14-2.16, the Council's evidence shows that additional zones and/or more permissive zones are not required in order to give effect to PA1 and PC1 of the NPS. Further, as submitted above, the NPS is not determinative as to whether a particular rezoning submission should be approved, particularly when the Council's evidence is that there is sufficient realisable development capacity in the Queenstown (and Upper Clutha) Ward. The reply of Ms K Banks highlights that instead, a sequential assessment and monitoring process is required to determine first if additional capacity is needed, and second, how it is to be provided.

2.17 In relation to (c) and the 'trump' argument, Council submits that the argument is irrelevant to this hearing because of (b), there is no conflict between the NPS and Part 2 because there is sufficient development capacity outside of those landscapes. In any event, point (c) is not accepted, is not supported by the RMA, nor any case

law authority. The NPS is one matter within a range of other matters required to be considered/implemented/given effect to by the PDP, as the statutory tests requires. The NPS does not override other nationally important matters. Council wishes to add, that if the NPS was to require, in this District, development within its s 6 landscapes, that may give rise to contradicting Court of Appeal authority in *Man o' War*, as to a 'top-down' approach to identification of ONLs/ONFs, before confirming what is the appropriate protection for those landscapes.

2.18 Council also agrees with Ms Hill's observations as to the future development strategy, which is to be completed by end of 2018. The unchallenged evidence before this Panel is that there is sufficient development capacity zoned in the district plan, under the Council's recommendations and evidence, for the short and medium terns. *If* a future process gives rise to the need for additional development capacity to be zoned, the question of where will be subject to that separate process and separate decision making.

Hansen Family Partnership (#751), FII Holdings (#847), Arnott and Fernlea Trust (#399), Jandel Trust (#717) and Universal Developments (#177)

2.19 The position advanced through legal submissions for these submitters is that the Council's position in relation to *commercial* land does not give effect to the NPS, in particular PA1. The reason advanced is that the evidence states that there is *zoned* commercial land capacity to meet demand for the next 20 years, but not for the 20-30-year timeframe, and this later point does not give effect to PA1. This is based on an interpretation that even long term capacity must be zoned in the district plan.

2.20 This submission is not accepted, and Council's position can be summarised as:

(a) each of the short, medium and long-term descriptions in PA1 have different requirements, and this is submitted to be deliberate – that is the very purpose of having three different planning periods, and essentially creates a 'hierarchy' of

requirements and level of certainty/planning, depending on the planning timeframe;

(b) the 'zoned' requirement is a specific requirement for the short and medium terms, but not long term;

(c) short and medium term require a zoning, whereas the deliberate language for long term is that the development capacity must be "identified in relevant plans and strategies". Council submits that the NPS uses this language to reflect that some of the capacity that will provide for the next 30 years is identified in a district plan via a zoning (because short and medium term development capacity, which forms a portion of overall long term development capacity, must be zoned in a district plan), whereas the remainder of the development capacity (ie. the medium through to long term capacity) will be identified in strategies, if not already zoned. The term strategy is not defined in the NPS, but in the Council's submission would include the likes of the NPS future development strategy;

(d) although Mr Goldsmith's submission highlights a possible internal inconsistency/contradiction within the NPS as to what PA1 itself requires and the relevant definitions, it ignores the deliberate omission of reference to 'zoned', within PA1 'long-term development capacity'. In Council's submission, the specific must prevail over the general;

(e) the definition of *development capacity*, as relied on by Mr Goldsmith, uses the terminology "based on". The definition does not say that development capacity *must* comprise of district plan 'zoned' land. In the Council's submission, it provides flexibility as to how that development capacity is made up through a variety of methods; and

(f) the 30-year timeframe is so uncertain/speculative, that to zone for it now would also be speculative (and we refer to Mr Osborne's evidence on this matter in his reply evidence).

2.21 As is the case in other parts of the country, there are other mandatory actions that have to take place, the two most important in this instance being completion of the Housing and Business Capacity Assessment by the end of 2017, and the completion of the Future

Development Strategy by the end of 2018. The Industrial Zones are unlikely to be notified until the first quarter of 2019, after the FDS will be completed. It is submitted to be bad practice to 'jump the gun' in this Stage 1 process, and attempt to cut across that mandatory process, required by the very same policy statement.

2.22 No submitter has challenged that there is not enough zoned *commercial* land in the short to medium term. Beyond that ten-year date, it is submitted that the responsibility created by the NPS is for the Council, and there is a clear, mandatory work stream still to be worked through.

Land banking

2.23 The Panel observed on several occasions during the hearing that land banking is an issue in the District. This was acknowledged in Mr Osborne's evidence and in questions from the Panel during his appearance, although it is submitted to not affect the conclusions in Council's evidence that additional zones and/or more permissive zones are not required in order to give effect to the NPS.

2.24 A report for a Council meeting dated 23 June 2017 relating to Special Housing Areas[9] was raised by submitters and the Panel during the course of the hearing. In this report, Council acknowledges that the District does not have a shortage of zoned land, but does have a low uptake of land zoned for development, with 56% of feasible residential capacity being contained in three ownerships (at Kelvin Heights, Jacks Point/ Hanley Downs, and Remarkables Park). Ms K Banks has covered this query in her reply evidence, including that this is a factor to be reviewed in the housing and business assessment required under the NPS, it is a matter that could be taken into account through PC2, and that land banking cannot be 'solved' by a district plan.[10]

9 http://www.qldc.govt.nz/assets/Uploads/Council-Documents/Full-Council-Agendas/2017/17-August-2017/1.-Feedback-on-adding-Ladies-Mile-to-the-Lead-Policy-for-Special-Housing-Areas/1b.-Att-B.-23-June-agenda-item-excluding-appendices.pdf

10 Reply Evidence of Ms Kim Banks dated 6 October 2017, at paragraph 3.15.

2.25 The Council maintains its view that it is giving effect to PA1 and PC1 of the NPS, because feasible capacity exceeds projected demand along with the necessary margins. This does not necessarily result in uptake, but other NPS policies (PB3, PB6, PB7 and PC2) also operate to ensure that uptake is reviewed over time.

3. OUTSTANDING NATURAL LANDSCAPES

'Unzoned road reserve'

3.1 The Stage 1 planning maps include land within the 'road boundary'[11] that is coloured white on the planning maps. The Panel referred to this during the hearing as 'unzoned road' and in some instances, the 'unzoned road' is located within an ONL or ONF (by way of example, Mount Nicholas Beach Bay Rd is within an ONL on plan map 12a, as is Vista Terrace north of Wye Creek on plan map 13a).

3.2 The Panel asked the Council to clarify the relationship between section 6(b) landscapes and 'unzoned road' within Stage 1 zones – it is understood the question to ultimately be, are these ONLs sufficiently protected from inappropriate development?

3.3 This matter is also addressed to some extent, in the Rural Hearing Legal Right of Reply, in section 18. The Rural chapter expands on Strategic Goal 5 and the Landscape chapter, by providing the landscape assessment matters for ONFs/ONLs (matters of national importance) and the Rural Landscape Classification. These landscape assessment matters, designed to ensure ONLs are protected as required by section 6(b) of the RMA, apply only in the Rural Zone. Other zones where an ONL is located, for example at Jacks Point, include specific objectives and policies within the text for that zone that are submitted to 'protect' section 6 matters to the extent contemplated by the PDP.[12]

11 As per the Planning Map Legend and User Information.

12 As previously confirmed to the Panel presiding over the Resorts Zone hearing stream, the landscape objectives and policies located in Chapter 6 will also be relevant to any non-complying or fully discretionary activity consent application, and to any restricted discretionary or controlled activity consent application where the same landscape matters are adequately covered in a matter of discretion or control.

3.4 Rules that will apply to 'roads' as defined in the PDP are currently being prepared for notification in Stage 2 of the PDP. In addition, some district wide chapters/rules also apply to 'unzoned roads'. For example (noting that in the list below, the Panel has confirmed the approach that district wide chapters apply across all parts of the District covered by the PDP zones *notified to date*):[13]

(a) Chapter 26 (Historic Heritage) applies to roads where there is a protected feature and/ or the road is located within an overlay;

(b) Chapter 28 (Natural Hazards) applies to roads, in the event that a consent application triggers one or more rules applying to roads from another district wide chapter and also raises natural hazards issues in the vicinity of the roads. Consideration of the Chapter 28 policy framework would then be required in determining any such consent application. However, it is noted that Chapter 28 contains no specific rules;

(c) Chapter 30 (Energy and Utilities) has a policy relating to minimising effects on the road network (30.2.3.3); rules requiring setbacks from road boundaries (30.4.9, 30.4.19.3, 30.4.20.1, 30.4.21.3 and 30.4.23.2); and rules making the placement and upgrading of lines, poles and supporting structures a permitted activity within formed legal road (30.4.32 and 30.4.42). Chapter 30 also contains a rule (30.4.30.7) exempting earthworks in relation to the repair sealing and resealing of existing road from Rule 30.5.11 (which permits earthworks within the National Grid Yard provided the standards in that rule are met);

(d) Chapter 32 (Protected Trees) contains a clarification clause explaining that "public space" in the context of the rules in that chapter includes roads (32.3.2.6). This chapter also applies to roads where a protected tree is located within road or road reserve. It is noted that this includes trees in

13 As per the Panel Minute dated 12 June 2017 concerning Annotations on Maps. See also the Council's memorandum in response dated 30 June 2017, in particular paragraphs 4.1-4.2 and 5, and opening legal submissions in this hearing, in Section 9.

the road reserve in the Arrowtown Residential Historic Management Zone;

(e) Chapter 33 (Indigenous Vegetation and Biodiversity) contains a clarification clause explaining that the rules in that chapter apply to all zones in the District, including formed and unformed roads, whether zoned or not (33.3.2.3);

(f) Chapter 34 (Wilding Exotic Trees) contains a rule prohibiting the planting of identified species (34.4.1) and applies everywhere in the District. Although this chapter contains no clarification clause to state that it applies to formed and unformed roads (including road reserve), that is not considered to be necessary given the blanket prohibition on planting identified species; and

(g) Chapter 35 (Temporary Activities and Relocated Buildings) contains a rule requiring lighting to be directed away from roads (30.5.1).

3.5 There is one further factor, Council ownership, that Council also submits contributes to the protection of these ONLs from inappropriate development. The Council holds and manages road reserve for specific current and future purposes. In comparison, private roads are typically zoned and therefore this scenario does not arise.

3.6 Although Council may consider granting a license to occupy for private services such as telecommunications, water supply and wastewater pipes to be laid within road reserve, anyone seeking to undertake such activities, including for example establishing any structure/sign/fence, would need to seek a license to occupy from the Council.

3.7 This combination of factors is submitted to be sufficient to ensure that the ONL within the 'unzoned road' will be sufficiently protected even though the Chapter 21 landscape assessment matters technically do not apply. No person could undertake an activity such as the erection of a structure on these discrete areas of land, without the Council's permission.

Alleged incompleteness of ONLs/ONFs

3.8 The legal submissions for NZ Tungsten Mining (**NZTM**) suggest that there is an insufficient level of information in the PDP in relation to all ONLs/ONFs. It is understood that this submission is not just made in the context of NZTM's submission and the one ONF that it has submitted and called evidence on. It is submitted that this is the incorrect forum to be making such a legal submission (this would have been a matter for the Strategic Hearing Stream, however it is acknowledged it was the Rural Hearing Stream where Ms Baker Galloway first raised this issue, for this particular client only). Ultimately what NZTM want, is more text/a better descriptor of one particular ONF so that they can say what areas have less values/longstanding activities, and can therefore be mined.

3.9 The landscape assessment matters in Part 21.7 require an assessment of the landscape on a case by case basis, by applying the modified Pigeon Bay criteria (with the same wording as the schedule in the PRPS). The application of these will inform decision makers as to the values and descriptors of the landscape. Under the proposed Landscape and Rural chapters recommended through the Stage 1 hearings, Council's position is that one descriptor for each ONF or ONL unit in the proposed plan is not required, and it would be impractical to do so in this District where such a high proportion of the area is either an ONF or part of an ONL. Some other second generation plans might include detailed schedules of a landform/landscape feature, but QLDC has chosen to include assessment matters that consequentially require a detailed report from a landscape architect, when development is proposed on an ONF.

4. REGIONAL COUNCIL CONSENTS AND INFRASTRUCTURE

4.1 The Panel queried whether the Council should consider the need for Otago Regional Council consents and/or infrastructure, in the context of a request for rezoning in the district plan.

4.2 Section 75(3)(c) states that a district plan must give effect to any regional policy statement, and s 75(4)(b) states that a district plan (which includes zones) cannot be inconsistent with a regional plan. The regional planning documents for Otago are therefore relevant, in that decisions on the district plan must give effect to the RPS, and must not result in inconsistencies between objectives, policies and rules in any district plan zones, and the relevant regional policy framework and rules for the geographic area covered by that zone. Insofar as regional council infrastructure is covered in the regional planning documents, then it will also be relevant under s 75(3)(c) and (4)(b).

5. REQUESTS FOR OPERATIVE DISTRICT PLAN ZONES

5.1 Council's position on how the Panel should make recommendations on submissions seeking an operative zone (ie. not currently in the PDP and where not supported by sufficient evidence) has not changed since opening submissions. Council's position can generally be summarised as:

(a) neither the Council nor the Panel have jurisdiction to transfer a submission over to a later *stage* of the plan review, a recommendation and decision needs to be made alongside the rest of the Stage 1 submissions;

(b) there is insufficient evidence nor sections 32 and 32AA analysis before the Panel at this time to insert any ODP zones into the PDP via a submission;

(c) in a number of instances, Council's recommendations are that the rezoning submission has no merit and the notified zone is the most appropriate, and the submission should be rejected;

(d) despite there being a lack of evidence to justify the statutory tests which would allow the ODP zones to come across into

the PDP via a submission, Council planners have acknowledged that in *some* instances, there is merit in the general type of relief being pursued, and in those instances the Panel must reject the rezoning submission, but the Council welcomes the Panel including commentary in its recommendations to the effect that the land is revisited via a variation (or plan change depending on timing), when the relevant ODP zone is reviewed;

(e) for those particular submissions, in the meantime the notified zone (or a more 'appropriate' PDP zone type as recommended by the Council) be confirmed. Council acknowledges that this approach does not mean that a future variation/change to the zone type, is guaranteed for the submitter. However:

(i) in the case of those submissions seeking a rezoning from Rural to either Visitor Accommodation Sub Zone or Rural Visitor Zone, there is some certainty provided to the submitter in the meantime, in that the Council's Rural zone includes a fully discretionary activity rule for visitor accommodation provisions;

(ii) in addition, if the Panel includes a recommendation in its decision to revisit any of the land at issue, this will subsequently form part of the Council's decision. Although the Panel and that decision cannot bind the Council to initiate such a variation, it is a strong message to the public that the Council will follow that process forward into subsequent stages of the review; and

(iii) it is important to outline the approach that the Council proposes to take, to dealing with rezoning submissions in subsequent stages, as this will contribute to ensuring that submitters get an opportunity to reconsider these specific sites, without being 'cut out of the process' due to the staged approach to the review. We return to this shortly.

5.2 The Panel's Minute of 15 September asked Council to advise whether it should recommend a "placeholder zone" to provide some certainty to relevant submitters that the Council will review the zoning in a future stage. This question is given on the assumption that the Panel has come to the conclusion that some alternative to the notified zone is appropriate, but the option presented by the submitter, having considered it in accordance with sections 32 and 32AA, is not appropriate.

5.3 Council's position is that labelling a zone type a 'placeholder' zone will have no legal impact in terms of requiring the zone to be revisited. It therefore will have no regulatory impact, or resource management purpose. A district plan cannot require a council to enter into future planning processes to change a zone type, and therefore the purpose of labelling a zone, a 'placeholder' zone, is not justified, nor have any resource management purpose, nor 'regulatory bite'. Council's position remains that the Panel needs to make a specific recommendation on such rezoning submissions that seek an ODP zone type (ie. accept, accept in part, or reject).

Fairness/natural justice question

5.4 A number of submitters including Mr Brabant (for #699) and Ms McDonald (for #495) have raised fairness and natural justice issues, that could result from the staged review depending on what the Council decides to notify in subsequent stages. The result being that their clients' land may not be within scope of a later stage meaning they will be prevented from asking for either a VA Sub Zone, or one of the ODP zones that are still to be reviewed.

5.5 The uncertainty arises where the Council does not agree that there is any merit to the zone applying to an area of land not otherwise notified at the time, and does not notify the new zone or sub zone over, for example, Stage 1 land. Case law and Council's submissions on scope throughout Stage 1 supports an approach where, if land had already been decided on in Stage 1 or had not yet been notified, and if no new zone or sub zone was re-notified for that particular land, the zone provisions for that area of land were not within the scope of

the hearing, preventing a submitter from seeking relief that the RV zone, or for example the VA sub zone, be applied to their land.

5.6 Council intends on taking the following approach in later stages of the plan review, as the fairness issues raised by Mr Brabant and Ms McDonald are acknowledged. This approach results purely from the staged approach that has been taken through this plan review, and therefore is only applicable to the unique circumstances at hand:

VA Sub Zone

(a) any notified VA Sub Zone on the planning maps in Stage 2 will form part of the PDP Stage 2, and people will clearly have scope to submit 'on' the appropriateness or otherwise of those sub zones in those notified locations;

(b) where an underlying zoning is notified but no VA Sub Zone is notified on the planning maps in Stage 2, a submission can be made 'on' the underlying zone given the change to the pre-existing status quo. This submission could also request that the VA Sub Zone be added to that land, giving scope to seek a VA Sub Zone;

(c) where no VA Sub Zone is notified on the planning maps in Stage 2 and no underlying zone is notified, there is no change to the pre-existing status quo for that particular area of land and therefore no proposed plan for submitters to make a submission 'on' (the concern raised by Mr Brabant and Ms McDonald). However, as these people are prevented from seeking that the VA Sub Zone apply over their land simply because of the staged approach taken to the review, the Council will consider the merits of such submissions and will not oppose such submissions on the basis of there being no scope;

Rural Visitor Zone / Industrial Zones / Township Zones

(d) these are underlying zones in their own right, and therefore the approach will be slightly different;

(e) for all land currently zoned one of these zone types (excluding land that will remain in Volume B of the district plan) in the operative plan, whether the Council notifies

some form of Rural Visitor, Industrial or Township zone into the PDP, or some other zone type, the Council will still need to notify the land in one of the remaining stages of the DPR to complete its s79 obligations. When the land is notified, the pre-existing status quo is changed by the PDP and people will have an opportunity to submit on the appropriateness of the underlying zone at that point in time. There is no issue as to scope at this point in time; and

(f) the situation becomes more complex where, for example in Stage 2, someone wants a Stage 2 zone type, over land previously notified and decided on in Stage 1. Because the land has not been notified in Stage 2, there is no change to the pre-existing status quo and therefore no proposed plan for submitters to make a submission 'on'. Following the same logic as set out in (c) above, the Council will consider the merits of such submissions seeking a Stage 2 Rural Visitor, Industrial or Township zone (for any other such zone type) over Stage 1 land, and will not oppose such submissions on the basis of there being no scope.

6. VISITOR ACCOMMODATION

6.1 In its Minute dated 15 September 2017, the Panel asked for the Council's view on the status of those submissions that sought the extension of the VA Sub Zone over all or part of their land. In the Council's view, such submissions should be treated in the same way as those seeking an operative zone type not currently notified in Stage 1; they are valid submissions and there is scope for recommendations to be made. Council otherwise refers to and adopts Section 10 of its opening legal submissions, that apply to the scenario as described in the Panel's Minute.

7. QUEENSTOWN AIRPORT CORPORATION (QAC)

Does QAC's further submission implement PC35?

7.1 As outlined in opening submissions, QAC's further submission opposes various rezoning requests in both land within and beyond the PC35 outer control boundary (**OCB**). The Council's rezoning submission within the OCB that was originally supported by Ms K Banks has now been withdrawn, and therefore Council and QAC are aligned in terms of opposing rezoning requests within the OCB that would provide for ASAN. However, QAC also opposed rezoning requests that would enable new ASAN on land located beyond the OCB in areas that may be affected by "moderately high" levels of aircraft noise in the future.[14] In addition, QAC also seeks that Plan Change 35 (**PC35**) be implemented, and specifically submits that *QAC's further submission is wholly consistent with Plan Change 35*.[15]

7.2 Council respectfully disagrees with that assertion and submits that QAC's further submission does not fully implement PC35 due to its opposition to rezoning requests outside of the OCB. An integral part of PC35 are the aircraft growth forecasts, however QAC are now stating that those forecasts will be exceeded and a more stringent position is needed to be adopted beyond the OCB.[16] This goes beyond PC35 and is something that Council considers needs to be considered through a separate process, which Council understands is currently being undertaken. In effect what QAC are seeking is interim protection for land that may be within an expanded OCB in the future in order to not compromise that land or their position for that separate process. This is an option open to QAC, however Council considers that this approach is not simply implementing PC35 but is seeking further relief beyond PC35.

14 Legal Submissions for Queenstown Airport Corporation Limited (Submitter 433 and Further Submitter 1340) dated 26 July 2017, at paragraph 104.
15 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraph 69.
16 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraph 110.

Reverse sensitivity

7.3 Council agrees with QAC's legal submissions where it sets out what reverse sensitivity effects are and also that reverse sensitivity is an environmental effect relevant to territorial authorities' functions and duties under s 31 and 32, and Part 2 of the RMA generally.[17] QAC goes on to submit that some key physical resources, such as airports, cannot, in practical terms, internalise all adverse effects, and that the concept of reverse sensitivity is forward looking (as is the RMA).[18] Council does not disagree with most of these submissions.

7.4 However, Council does raise a concern with QAC's statement that:[19]

> *The focus of the* [reverse sensitivity] *concept is to ensure that actual effects (e.g. alteration or curtailment of lawfully established, existing activities) are avoided via appropriate land use planning decisions.*

7.5 Unless the objectives and policies of a plan provide a hard line response to reverse sensitivity effects (through for example the use of an 'avoid' statement) the focus of reverse sensitivity is not simply avoidance, but should also include mitigation and management. It is important to be able to consider methods to mitigate or manage new activities to reduce the risk of reverse sensitivity. Such methods are important in new urban environments, and a range of options may be appropriate, for example noise attenuation standards or non-object instruments.

Christchurch International Airport analogy

7.6 In paragraph 127 of QAC's legal submissions, and the analysis in the paragraphs preceding, Ms Wolt refers to the *Robinsons Bay Trust v Christchurch City Council* case[20] and the decision reached there that the OCB for Christchurch Airport was most appropriately located at a position based on the 50 dB L_{dn} contour. With the OCB contour in Queenstown being located at 55 dB L_{dn}, QAC relies on this

17 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraphs 33 to 35.
18 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraphs 36 to 47.
19 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraph 40.

Christchurch based case to support its position that rezoning areas outside the OCB that could be exposed to "moderately high" levels of airport noise in the future is inappropriate.[21]

7.7 The *Robinson* case concerns the previous Christchurch City Plan (pre-Earthquakes), and the regulatory environment has since changed, which we now explore to the extent necessary given Ms Wolt's reliance on the case. The Christchurch environment is unique and significantly different to that of Queenstown, and the same rule framework (the *Robinson* version or the post-earthquake version) should not necessarily be applied to Queenstown without modification or detailed analysis under section 32 of the RMA. In summary, the situation in Christchurch can be distinguished from the Queenstown environment for the following reasons:

(a) the provisions in the Canterbury Regional Policy Statement (**CRPS**) are more strongly worded in regards to contours and recognition of the 50 dBA contour. Chapter 6 in fact stipulates what contours must be used. Chapter 6 was inserted into the CRPS by the Minister of Canterbury Earthquake Recovery using his powers under the relevant legislation at the time, the Canterbury Earthquake Recovery Act 2011. The Otago Regional Policy Statement does not have anywhere near as directive provisions;

(b) the 50dBA contour is unique to Christchurch and is not used for any other airport in New Zealand. As noted in *Robinson*, New Zealand Noise Standard 6805:1992 does not recommend using the 50 dBA contour;[22]

(c) there is a lengthy history of litigation at Christchurch concerning reverse sensitivity and the position has been tested numerous times;

(d) Christchurch airport has no curfew, and a key issue in cases concerning that airport is trying to maintain that position, hence the strong planning framework discouraging any new ASANs. In contrast, Queenstown has only recently started

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20 *Robinsons Bay Trust v Christchurch City Council* EnvC Christchurch C60/2004, 13 May 2004.
21 Legal Submissions for Queenstown Airport Corporation dated 26 July 2017, at paragraphs 125 to 130.
22 Ibid, at [20](2).

after hours' flights and even then there is still a curfew for late night/early morning flights; and

(e) the two cities have completely different physical/factual settings. There is realistically nowhere else for Queenstown airport to be located and it is in very close proximity to established and zoned development. Inevitably there will be some "trade-offs" required. In clear contrast, Christchurch had a choice of a lot of available flat land and the airport was consciously located away from any development in the 1950s. Over the years, urban development has developed closer to the Christchurch airport. These factual, physical and operational differences do not appear to have been acknowledged by QAC in terms of what controls are the "most appropriate".

Consenting under ODP within OCB

7.8 QAC filed a memorandum dated 18 August 2017 responding to the Panel's advice at the hearing that resource consent had recently been granted on a non-notified basis authorising activities including ASAN at 1 Hansen Road. This land is partly located within the OCB for the Queenstown Airport.

7.9 In that memorandum QAC confirm that they have no issue with how the Council processed these consents. Council confirms its agreement with the summary in paragraph 7 of the memorandum, and in particular that the granting of consent does not present any inconsistencies with PC35.

8. 1B: QUEENSTOWN URBAN – FRANKTON AND SOUTH

Frankton Flats North

Scope for recommendation to High Density Residential (HDR)

8.1 As noted in opening legal submissions for the Council,[23] Ms Banks assessed the Frankton North area[24] at a strategic level and then assessed each submission individually. The notified zones across the wider area range from Rural to MDR. Some of the submissions sought residential zoning while others sought commercial/ industrial rezoning, and a number of submissions also focused on lack of infrastructure and transport connections. The OCB covers part of the area and therefore QAC opposes any ASAN within this specific area.

8.2 Ms K Banks assessed the overall scope as ranging from Industrial to Rural, with all levels of residential and commercial zoning in between.[25] Ms K Banks has reconsidered her recommendation for the land from the Hawthorne Drive Roundabout to Hansen Road and now recommends in her reply that some of this land be zoned Business Mixed Use Zone (**BMUZ**). However, she maintains her position that the remaining land to Ferry Hill Drive should be zoned HDRZ, as shown in Figure 1 of her reply.[26]

8.3 During the hearing, the Panel queried whether there was scope for all of Ms Banks' HDRZ recommendation. The Chair observed that the relief sought in submission 717 was rezoning to BMUZ or Industrial zone, or MDR with changes to the provisions, and queried whether this submission gave scope for rezoning to a higher residential density.

8.4 The relevant submission in terms of scope is that of the Jandel Trust's submission, which seeks *a mixed use zone that provides for residential and lighter industrial/commercial uses*[27] for its property (179 Frankton-Ladies Miles Highway) and the surrounding properties,

23 At [14.3]-[14.4].
24 Originally referred to in her evidence as "Hansen Road / Frankton-Ladies Mile".
25 Section 42A report (Group 1B) of Kim Banks dated 25 May 2017 at [4.3].
26 Also refer to the Rebuttal evidence of Kim Banks dated 7 July 2017 at [5.23] and Figure 6.
27 Submission of the Jandel Trust (717) at paragraph 8.

and which was notified as MDRZ. More specifically it considers the *most appropriate zone would be the Business Mixed Use zone or Industrial zone*.[28]

8.5 The scope of this submission is therefore any zone between the notified MDRZ and the Business Mixed Use zone (**BMUZ**). The following table is submitted to demonstrate that there is scope for this land to be rezoned to HDRZ as it sits between the MDRZ and BMUZ. A table of the three zones with relevant extracts from the notified chapters are set out below:

	MDRZ	**HDRZ**	**BMUZ**
Purpose	*…The zone will primarily accommodate residential land uses, but may also support limited non-residential activities where these enhance residential amenity or support an adjoining Town Centre, and do not impact on the primary role of the zone to provide housing supply…*[29]	*…Small scale commercial activity will be enabled, either to support larger residential developments, or to provide low impact local services…*[30]	*…The intention of this zone is to provide for complementary commercial, business, retail and residential uses that supplement the activities and services provided by town centres...*[31]
Activities not listed in the table	• Non-complying[32]	• Non-complying[33]	• Permitted[34]
Minimum lot area	• 250m^2 [35]	• 450m^2 [36]	• 200m^2 [37]
Building coverage	• 45%[38]	• 70% (flat sites)[39]	• 75%[40]
Height limit	• 8 metres[41]	• 3 storeys with max height of 12 metres; or 4 storeys with a	• Up to 12 metres (permitted); or 12m to 20m (restricted

28 Submission of the Jandel Trust (717) at paragraph 9.
29 8.1
30 9.1
31 16.1
32 8.4.1
33 9.4.1
34 16.4.1
35 27.5.1
36 27.5.1
37 27.5.1
38 8.5.4
39 9.5.4 – sloped sites have a site coverage 65%.
40 16.5.4
41 8.5.1.2 For all other locations except for Wanaka and Arrowtown. Non-compliance with this standard is a non-complying activity.

	MDRZ	HDRZ	BMUZ
		max height of 15 metres[42]	discretionary)[43]
Permitted activities	• Dwelling, Residential Unit, Residential Flat (1 per site in Arrowtown, or for all other locations 3 or less per site)[44]	• Dwelling, Residential Unit, Residential Flat (3 or less per site)[45] • Commercial activities (<100m^2 GFA, integrated within a residential development comprising at least 20 dwellings)[46]	• Default activity status
Restricted discretionary activities	• Dwelling, Residential Unit, Residential Flat (2 per site in Arrowtown, or for all other locations 4 or more per site)[47]	• Dwelling, Residential Unit, Residential Flat (4 or more per site)[48]	• Buildings[49] • Licensed Premised[50] • Visitor accommodation[51]
Discretionary activities	• Commercial Recreation[52] • Commercial activities (within Queenstown, Frankton or Wanaka with < 100m^2 GFA)[53]	• Commercial recreation[54]	
Non-complying activities	• Buildings within a Building Restriction Area[55] • Default activity status	• Commercial activities not otherwise defined[56] • Default activity status	• Industrial activities not otherwise provided for[57]

8.6 The purpose of the BMUZ is to provide a *complementary commercial, business, retail and residential uses*, which is a more intensive use of land than the HDRZ. In contrast the HDRZ's purpose refers to *small scale commercial activity* [that] *will be enabled, either to support larger residential developments*. The BMUZ allows more site

42 9.5.1.1 For Queenstown. Non-compliance with this standard is a non-complying activity.
43 16.5.7.1 - non-compliance with this standard is a non-complying activity.
44 8.4.10
45 9.4.3
46 9.4.6
47 8.4.11
48 9.4.4
49 16.4.2
50 16.4.3
51 16.4.4
52 8.4.8
53 8.4.1
54 9.4.14
55 8.4.4
56 9.4.7
57 16.4.7

coverage (75%) as well as higher buildings (up to 20m), when compared to the HDRZ (70% and up to 15m). In addition, while the HDRZ allows some commercial activity that activity has to be related to residential development and relatively small. Whereas in the BMUZ a commercial activity simply must meet all of the building standards.

8.7 The one exception is the minimum lot size, but this is submitted to not be determinative. Although the HDRZ (450m^2) does not neatly sit between the MDRZ at 250m^2 and BMUZ spectrum, at 200m^2, the reason for this is set out in the relevant s 42A Report in Hearing Stream 6, specifically the additional land area is necessary in the HDRZ so as to provide for landscaping, access, servicing and parking requirements where density and height limits are greater than the MDRZ.[58] Although a larger lot size generally means lower intensity, in this instance the reasoning for the larger lot size, and combined with other relevant standards such as the 70% building coverage, still means that the zone anticipates higher density development, which is part of the submitter's request through its rezoning request to BMUZ. In addition, minimum lot size is not always a strong factor in comparing the intensity of zones; for example, if you had a notified rural zone (no minimum lot size) and were seeking MDRZ (250m^2), a LDRZ clearly sits between the two in terms of intensity, but the LDRZ would have a higher minimum lot size at 450m^2.

8.8 The BMUZ permitted default status, as sought by the submitters, is also significantly more enabling in allowing any activities that comply with the standards and that are not listed elsewhere. This is submitted to be relevant to scope, as the HDRZ zone is less permissive, sitting closer to the MDRZ on the 'spectrum'.

8.9 Consequently, it is respectfully submitted that there is scope within the Jandel Trust's submission for Ms Banks' recommendation to HDRZ of this land.

58 Section 42A Report of Ms Kim Banks for Chapter 9 High Density Residential Zone dated 14 September 2016, at paragraph 14.2.

Section 85 of the RMA

8.10 At the hearing the Panel raised concerns that the recommended Rural zoning (as recommended in Ms K Banks' evidence and rebuttal) would result in inefficient use of the land and also whether a rural zoning would render the land incapable of 'reasonable use' as per s 85 of the RMA.

8.11 As Ms K Banks has reconsidered her recommendation and now recommends that some of the land be rezoned to BMUZ, this matter is not addressed in this legal reply.

Test for rezoning

8.12 The legal submissions for these submitters[59] draws the Panel's attention to the 'first principles approach' to zoning, and notes that the RMA is not about needs, but rather about effects. The submissions go on to say that in determining whether or not this rezoning will achieve the purpose of the Act, the potential effects of subsequent development that will be enabled by the rezoning should be considered. In addition, the submitter states that such effects can then be evaluated through an analysis of the benefits, costs and risks as per s 32 of the RMA.[60]

8.13 The Council has no disagreement with these submissions and they are generally consistent with the Council's submissions on what is the 'test', or question for the Panel. Council also does not disagree with Mr Goldsmith's summary at paragraphs 32 and 33 as to case law relating to trade competition and zoning considerations under s 74 of the RMA.

8.14 However, it is submitted that the submissions miscategorise the purpose and scope of Mr Osborne's evidence. The evidence presented by Mr Osborne in this hearing was to the effect that recommending a rezoning that is not needed in terms of demand (in

59 Legal Submissions for Hansen Family Partnership (751), FII Holdings (847), Peter and Margaret Arnott, Fernlea Trust (399), the Jandel Trust (717) and Universal Developments Limited (177) dated 11 August 2017.
60 At paragraph 16.

the context of the NPS requirements), could result in certain types of externalities. It is accepted that he did not undertake a specific analysis of effects and has simply discussed the types of externalities to be expected from under or over supply of land capacity.

8.15 In any event, it is submitted that the concerns raised in Mr Goldsmith's legal submissions are now generally irrelevant given Ms K Banks' revised recommendations, which include two areas of BMUZ (albeit with site-specific restrictions) and the HDRZ (also with site specific restrictions).

8.16 At the hearing the Panel raised concerns regarding the fairness/equity issues of giving all HDRZ zoning to two landowners. As explained earlier in these legal submissions and also in the reply evidence of Ms K Banks, the recommendation for this land is now to zone part BMUZ and part HDRZ (previously the recommendation was for only the HDRZ rezoning and the rest of the land was to remain Rural as notified). Consequently, any perceived fairness/equity issues are no longer a concern as all the submitters have received a "piece of the pie" in a sense, subject to the respective constraints that exist over the different parcels of land. This issue is not addressed in any further detail in these submissions.

Middleton Family Trust (338) and Oasis in the Basin Association (FS1289)

8.17 The relief sought by the Middleton Family Trust includes two rezonings in an area generally between Lake Johnson and Tucker Beach (a rezoning from Rural to LDR over an area immediately north of Lake Johnson (**LDR rezoning**) and a rezoning from Rural to Rural Residential (**RR**) over an area west and south of Tucker Beach (**RR rezoning**)), as well as changes to the UGB and the ONL. All of the RR rezoning, and part of the LDR rezoning is within the Wakatipu Basin Land Use Planning Study (**WBLUPS**).[61] On 17 May 2017 the submitter requested via memorandum that both rezoning submissions be transferred to the Wakatipu Basin hearing stream 14. In a Minute

61 See the Memorandum of counsel for the submitter dated 17 May 2017 requesting that all of the submission be transferred to the Wakatipu Basin hearing stream 14.

also dated 17 May 2017, the Panel refused the transfer request, stating that the major part of the request was the LDR rezoning, and that *"the overall intent of the submission relates to matters which are more properly considered as part of our consideration of the zoning of Queenstown."*

8.18 In legal submissions, Ms Macdonald requested that the RR rezoning be transferred into the Wakatipu Basin hearing stream. The reason is an alleged unfairness and lack of natural justice, and generally relying on the approach taken by Dr Read in her evidence. Dr Read in her evidence in chief stated that she had not considered the part of the submitter's land within the WBLUPS, however she did give an opinion on that land in her rebuttal, following landscape evidence that was filed by Oasis in the Basin Association (albeit only on that part of the site located within the ONL), and understanding that the Panel had directed for the RR rezoning to be considered in this hearing stream. Ms Macdonald states that the submitter relied on Dr Read's evidence in chief as indicating that the RR rezoning would not be considered in hearing stream 13, and accordingly did not file landscape evidence in support of the rezoning request.

8.19 With respect, the Council's position is that Dr Read's evidence does not override the Panel's 17 May 2017 minute and the direction contained within, as to whether the Panel will consider a rezoning submission in this hearing stream. Ms K Banks made a recommendation on the rezoning submission in her section 42A report, and although she did not specify landscape concerns, the submitter had full knowledge that there was a further submitter opposing the rezoning request, who would likely file landscape evidence, and therefore consideration of the merits of the rezoning submission was not limited to just the Council and the submitter. In addition, it is questionable as to whether the submitter would have called evidence in any event, as Dr Read opposed the LDR rezoning, and no landscape evidence was called by the submitter to rebut Dr Read's evidence and support that rezoning. Further, a number of submitters have, during the course of the hearing, applied to file late evidence, applications that have generally been granted by the Panel. The

submitter could have followed this same approach, following receipt of the Council's rebuttal evidence.

8.20 Overall, Council's position is that it is preferable for this submission to be heard in stream 13. The Panel has already refused a request to transfer it and the Council has accordingly prepared planning, transport and infrastructure evidence in relation to it (although it is acknowledged, landscape evidence only in rebuttal). In the Council's view it would be most efficient for this Panel to make a decision on this submission now. In addition, Ms K Banks in her Reply Evidence has amended her recommendation and although she is not recommending RR, is recommending a Rural Lifestyle zone for this land.

F S Mee Developments Co Limited (425 and 429)

8.21 An amended proposal was put forward by the submitter in legal submissions and evidence at the hearing, which included areas that were not part of the primary submission. It was noted by counsel for the submitter in legal submissions that this raised a jurisdictional issue and that the submitter requested leave to amend the primary submission.

8.22 Council agrees that there is a jurisdictional issue, considers that there is no process in the RMA allowing for a Council to "amend a submission", and is also of the view that the Council would need to re-notify an amended submission, and allow an opportunity for further submissions. Otherwise the submitter needs to demonstrate there is scope within the primary submission, as filed. This view is consistent with the Panel's Minute dated 20 September 2017, in which the Panel refused the submitter's application to amend the submission or lodge a late submission, and directed that the submission to be reported on and decided by the Council is that as lodged in October 2015. Council's final recommendations therefore relate to October 2015 version of the relief sought by this submitter.

Natural hazards

8.23 At the hearing, Ms K Banks reiterated[62] that she did not support five submissions[63] in Group 1B due to outstanding issues in relation to natural hazards. Ms K Banks considered the level of information provided by the submitters as insufficient to quantify the level of risk for the hazards previously identified on the land, and also insufficient to demonstrate that the intensity of the rezoning sought was achievable in light of the hazards. In her reply evidence, Ms K Banks has now recommended accepting one of these submissions (661) but maintains her recommendation to reject the other four submissions.

8.24 The Panel queried whether Ms K Banks' approach amounted to requiring the submitter to meet the *Colonial Vineyard* test in reverse,[64] by requiring evidence that the relevant Rural rules should be removed from the plan, allowing something more permissive.

8.25 When a submitter seeks a rezoning, the question which the Panel must decide on is what zoning is the most appropriate for that particular piece of land, or which zone type is 'better'. This has been covered in detail in opening submissions, see for example Section 2. Where natural hazards have been identified on the land and therefore the land is known to be subject to natural hazards, and the submitter seeks a rezoning that would enable intensified development of that land (accepting this is 'more permissive'), the submitter therefore needs to provide sufficient evidence to allow the Council to assess the potential effects of the zone being pursued and show that the risk from natural hazards can be adequately avoided, or managed. This approach is submitted to be no different to the provision of evidence by the Council, in relation to for example, landscape (a section 6 or 7 matter in many instances) and ecology (if an area is identified as significant indigenous vegetation, then it must be protected), or addressing any transport effects that may be created by the rezoning of land.

62 Summary of evidence of Kim Banks (Group 1B) dated 21 July 2017 at [15].
63 48 (Kerr Ritchie), 661 (LINZ), 533 (Winton Partners), 429 (F.S Mee Developments Co Limited) and 434 (B Grant).
64 See Appendix 1 to the Council's opening legal submissions for a list of the matters to be addressed in a plan review, as set out by the Environment Court in *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

8.26 This evidential requirement to underpin the rezoning sought does not amount to imposing a reverse *Colonial Vineyard* test. In the Council's view, as stated by Ms Banks, the four submitters have not provided sufficient information in relation to natural hazards to show that the rezoning sought is more appropriate, and therefore Ms Banks has recommended rejecting these rezonings.

9. 1C: QUEENSTOWN URBAN – CENTRAL, WEST AND ARTHURS POINT

Neville Mahon (628)

9.1 The Panel queried whether Ms Devlin had scope to recommend upzoning to HDR for the whole block containing the subject site, and noted that the evidence of Ms Leith for the submitter had addressed scope. Ms Leith considered that there may be scope in submission 628, and other generic submissions such as 328 and 391, to expand the HDR zoning over a wider area.

9.2 Ms Devlin has considered the evidence for the submitter and continues to maintain her view that there is no scope to rezone the wider area to HDR. Submission 628 seeks that only part of the Park Street area be rezoned HDR, and does not cover the entire Park Street area. While submission 628 does also seek whatever alternative relief would be better able to give effect to the submission, the submission itself is brief and do not in the Council's view, amount to rezoning a wider area than set out in the submission. In relation to the HDR rezoning, the submission states only that the sites are located in close proximity to the town centre, the Queenstown Gardens, and Lake Wakatipu and are ideal for HDR. The submission contains a clear diagram outlining the sites sought to be rezoned in red, and that diagram covers only part of the Park Street block. In the Council's view, the submission does not provide scope to rezone the wider area.

P J & G H Hensman and Southern Lakes Holdings (543)

9.3 The submitter's site was notified LDR with VA Sub Zone over the south west part of the site. The submitter supported the Sub Zone (albeit with concerns about the lack of any associated text provisions) and sought HDR zoning over the remainder (ie the northern part) of the site. There was no submission on the LDR zoning underlying the VA Sub Zone. As the Panel is aware, no VA Sub Zone provisions were notified for the LDR Zone, and that Sub Zone was shown on the planning maps for information purposes only. Proposed planning map 37 was therefore amended in December 2016 to remove the Sub Zone. Ms Devlin's recommendation in her rebuttal (to rezone to MDR) relates to the northern part of the site only.

9.4 The planning evidence for the submitter asserted that the removal of the VA Sub Zone meant the rezoning request extended over the entire site, and sought HDR (or alternatively MDR) for the entire site. There is clear scope for either HDR or MDR, over the northern part of the site.

9.5 Council's position remains that submission 543 does not give scope to change the zone type on the south west part of the site. However, that is submitted to no longer be material, as it has been identified that there is scope in submission (391) to rezone the south west part of the site to MDR. Submission (391) does not give scope to rezone to HDR, only to MDR. As a consequence, Ms Devlin's reply recommendation is to rezone the whole site to MDR.

9.6 As recorded in Section 7 of these submissions, when the VA Sub Zone is notified in a later stage of this plan review, the submitter will have an opportunity to submit on the VA Sub Zone, if it still wishes to pursue that overlay.

The ONL at Arthurs Point

9.7 Notified plan map 39a shows an ONL incorporating land at Arthurs Point notified as Rural, as well as LDR on both sides of the Shotover River. This same area of land is also zoned Low Density Residential

in the operative plan. There is also an operative Rural Visitor zone at Arthurs Point (within the ONL), but this land is not part of Stage 1 of the PDP. There is no ONL line on the planning maps around the outside of the LDR and operative Rural Visitor zones, which would identify that they do not form part of the ONL. The landscape assessment matters in Chapter 6, will therefore not be of any relevance to consent processing under the LDR provisions.

9.8 Dr Read confirmed in the first week of the hearing that, in the lead up to Stage 1 notification, she had not identified the LDR land as ONL, because historically the land was zoned LDR and under the ODP, the landscape assessment matters could not apply in any event. Therefore whether the urban zones are included in the ONL or not, there would be no regulatory change because the link through to the landscape assessment matters only applies in rural zone types. Dr Read in her reply evidence, has confirmed that she does still consider that the entire landscape in which the Arthurs Point LDR and Rural Visitor Zone are embedded in, is ONL.

9.9 Although the Gertrude Saddlery submission is on land in this area, it does not relate to either of the LDR or the (operative) Rural Visitor zone. Despite the questions to Dr Read from the Panel, there is no scope for the Panel to revisit the historical LDR zone in this hearing. The land has historically been zoned to provide development opportunities for low density residential development, and the Council has no intention of revisiting or removing development rights, from that area of land.

9.10 Consequentially, the Council has identified that there is scope in the submission of Universal Developments (#177), who sought that ONLs be removed from urban zones, to put the boundary of the ONL around the outside of the LDR zone (and the Rural Visitor Zone, when it comes into the PDP), and Ms K Banks' recommendations are to accept that submission point in relation to this area of land.

9.11 The Panel suggested using clause 16(2) of Schedule 1 of the RMA to fix the planning maps (which would be a change of minor effect, by

including an ONL boundary line around the outside of the notified LDR zone).

9.12 This option is also submitted to be available to the Council, as the identification of this LDR land (and also the adjacent operative Rural Visitor zone) as ONL has no regulatory effect in the PDP. Council therefore considers that it would be permissible for the Council to use clause 16(2) of Schedule 1 of the RMA to include an ONL boundary line around the outside of the notified LDR, and also around the outside of the operative Rural Visitor zone. Although the Council does not need the Panel to make a recommendation on this point, given the matter has been discussed at the hearing Council invites the Panel to include this change in its recommendations, in response to the Universal Developments' submission.

9.13 Under clause 16(2) of Schedule 1 of the RMA the Council can make an amendment to its PDP, without using Schedule 1, to alter any information, where such an alteration is of minor effect, or may correct any "*minor error*".

9.14 In the context before the Panel, the relevant part of clause 16(2) is the reference to an alteration of 'minor effect'. The Environment Court in *Re an application by Christchurch City Council*[65] determined that a change is of minor effect where:[66]

> *In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16. Although to put it in that abstract way may seem unhelpful, I rather think that like pink elephants the neutral changes will be easier to recognise than to describe.*

9.15 In light of the above case law it is respectfully submitted that the amendment to include an ONL boundary line around the outside of

65 *Re an application by Christchurch City Council* (1996) 2 ELRNZ 431.
66 At page 10.

the notified LDR is a neutral change because the landscape assessment matters are not triggered under the LDR zoning, and therefore the Council is able to use its powers under clause 16(2) to make this change.

Gertrude's Saddlery Limited (494) and Larchmont Developments Limited (527, FS1281) (together referred to as "**Gertrude's Saddlery**")

9.16 The Panel asked a number of questions of Ms W Banks and of Ms Devlin relating to access and transport safety issues. Ms W Banks has considered the evidence from the submitter and she continues to oppose the rezoning sought, due to concerns about safety as a result of poor visibility at the access road.

9.17 The Council acknowledges that there are resource consents approving vehicle access in this area, as described in the reply evidence of Ms Devlin. However, notwithstanding that these consents exist and have been given effect to,[67] Ms Devlin's view (relying on the evidence of Ms W Banks) is that the vehicle access is not adequate for the scale of the rezoning proposed (even with the consented upgrades) and therefore she recommends rejecting the rezoning.

10. 1D: QUEENSTOWN URBAN – JACKS POINT EXTENSION

Jardine Family Trust and Remarkables Station Limited (Jardine) (715)

NZone Resource Consent

10.1 The Panel queried what rules would apply to the NZone operation and whether the airport was consistent with the policy direction in the PDP. Ms Jones has addressed this in detail in her reply evidence and has set out the relevant provisions, which are not repeated here.

67 See *Goldfinch v Auckland City Council* HC Auckland 101/96 10 September 1996 at pages 14-15 regarding what is required to give effect to a consent.

Relevance of Part 2

10.2 Mr Page, counsel for Jardine, made a submission that there is an element of artificiality to the proposition that Part 2 remains relevant to the consideration of Stream 13 submissions, because the higher order provisions remain unsettled.[68] That submission appears to have been made on the assumption that the Council will release decisions on the Strategic (and possibly zone) chapters, prior to making decisions on this rezoning request. That assumption is incorrect – the Panel will make recommendations on, and the Council will make decisions on, all of Hearing Streams 1-13 (except for the Millbrook Zone), at the same time, which is likely to be in the first quarter of 2018.

10.3 Mr Page has also made a submission that the rezoning can be assessed simply against the higher order provisions of the PDP. As noted above and consistent with the Council's position in opening and the Upper Clutha hearing stream, the Council's view is that Part 2 remains relevant, as do other higher order planning documents.

Infrastructure and Noise

10.4 Mr Page submitted that all the land subject to the Jardine submission can be entirely self-served, without any assistance from the Council.[69]

10.5 The onus is on the submitter to provide evidence to show that the rezoning sought is the most appropriate for that particular piece of land, as discussed earlier in these submissions. Ms Jones has stated in her reply that she does not consider there is sufficient evidence to show that the wastewater from the full extent of residential development enabled by the rezoning can be appropriately disposed of, without adverse effects on the environment. This lack of evidence, together with the lack of any noise modelling, leads Ms Jones to maintain the position in her s42A report by recommending only a

68 Jardine opening submissions, at [9].

small additional expansion to the Open Space Residential Activity Area (**OSR**).

10.6 Ms Jones notes that the only qualified expert to present noise evidence in this hearing stream is Dr Stephen Chiles for the Council, and that he concludes no residential activity is appropriate within the 55dBL. Ms Jones therefore recommends a precautionary approach whereby Areas R(HB-SH)-A, R(HB-SH)-B, and R(HB)-D should be declined.

Jacks Point Residents and Owners Association (JPROA, FS1277 in opposition to 715)

10.7 JPROA[70] continues to oppose the rezoning proposed by Jardine on a number of grounds, including concerns around infrastructure and noise (which are also key reasons for Ms Jones' recommendation to reject the majority of the rezoning sought).

10.8 At the hearing, the Panel queried whether JPROA's further submission provided scope for JPROA to object to the airstrip land being included within the Jacks Point Zone and to residential development on the basis of amenity effects on the Jacks Point residential areas.

10.9 As noted, Ms Jones recommends that the airstrip should remain Rural, rather than being included within the Jacks Point Zone. However, the Council notes that the further submission is broadly framed and provides scope for JPROA's objections in respect of the airstrip and amenity effects (which in the case of the airstrip, would include noise effects). One of the reasons for the further submission is "maintaining the character and amenity values of the residential environment for its members", and in respect of submission 715, the further submission supports it subject to refinements to the Jacks

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69 Jardine opening submissions, at [12].

70 Although a strike out application has been made by submitter 361 in respect of FS1275 and 1277, the Memorandum of Counsel for JPROA dated 20 September 2017 confirms service of FS1275 on submitter 361, and seeks a waiver of directions and timeframes for service of FS1277 on submitter 361. At the date of filing these reply legal submissions, a decision on the strike out application had not been issued.

Point Zone structure plan and provisions to provide for protection of amenity values.

11. 2: RURAL

Noel Gutzewitz & J Boyd (328)

11.1 The Chair noted that Mr Buxton's rebuttal at paragraph 8.2 referred to the margins of the Kawarau River. Mr Buxton stated that the preservation of this feature and its margins from inappropriate use, subdivision and development is a s 6 matter that must be considered in determining whether the proposal can achieve the purpose of the RMA. The Chair noted that the Environment Court in *Save Wanaka Lakefront Reserve Incorporated v Queenstown Lakes District Council*[71] had recently considered the meaning of "margins".

11.2 *Save Wanaka* was an appeal against a grant of consent for a water sports facility adjacent to Lake Wanaka. The landscape experts agreed that the proposal would be within the margin of Lake Wanaka but disagreed as to how far the margin extended landward.

11.3 The Environment Court noted[72] that in *High Country Rosehip Orchards Ltd v Mackenzie District Council*[73] a broader approach had been taken to "margin" than in the earlier case of *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*[74] where the Court had held that the "margin" of a river or lake in s 6 is the uppermost limit of wave action. In *High Country Rosehip* the Court observed that given the protective purpose of s 6(a), "margins" in that section may have a wider meaning than in s 230 (concerning esplanade reserves), and further observed that margins are likely to be areas beyond the wave action of a lake or extending away from the banks of a river for at least 20-50 metres and sometimes more, depending on topography and other factors.

71 [2017] NZEnvC 88.
72 At [156].
73 [2011] NZEnvC 387.
74 EnvC Christchurch C012/98, 26 February 1998.

11.4 In *Save Wanaka* the Court observed[75] that *High Country Rosehip* may have wrongly assumed that s 6(a) only applies to developments within the lake or margin. The Court noted that s 6(a) and the relevant plan provisions were open to being applied to development on land beyond the margin, particularly for effects on perception of natural character. The Court held:[76]

> *We find that determining a lake's margin is primarily an exercise of practical contextual judgment. Namely, it requires identification of the physical edge of the lake through physical markers of that edge. Usually that can be done by simple observation. Ultimately, a lake's margin will be located where most people would observe it to be.*

11.5 Applying the findings in *Save Wanaka* to any of the proposed rezonings affecting the margins of the Kawarau River (including Queenstown Park's proposed sub zone,[77] it is submitted that "margins" may extend at least 20-50 metres from the river, and possibly more depending on topography. Further, both s 6(a) and the relevant PDP provisions could apply to development beyond the "margin" of the Kawarau River, particularly when natural character is at issue.

11.6 The expert conferencing undertaken in respect of a different submission (806) is relevant to the Chair's observation about "margins". The landscape experts agreed on the geographic extent of the Kawarau River margins in the vicinity of the proposed Queenstown Park Special Zone, but disagreed on the magnitude of potential cumulative adverse effects on the natural character of those margins.[78]

75 At [163].
76 At [164].
77 Mr Young's submissions for QPL on "margins", did not address this *Save Wanaka* decision.
78 See the Record of Conferencing dated 24 August 2017 at paragraph 4.4 and 5.6 (attached to the Memorandum of Counsel for Queenstown Park Limited, Remarkables Park Limited and Queenstown Lakes District Council dated 30 August 2017).

Loch Linnhe (447)

11.7 The Council's opening legal submissions[79] noted that through Mr Espie's evidence, Loch Linnhe had amended the area it sought to be either rezoned to a Farm Base Area (**FBA**) or a Rural Visitor zone. Mr Buxton's rebuttal evidence addressed the revised area on its merits, but it was noted in legal submissions that the amendment raised a jurisdictional issue because the revised area goes beyond the area of land identified in the maps attached to Loch Linnhe's original submission.

11.8 That earlier reference in our opening submissions is now superseded, as the submitter's evidence at the hearing sought rezoning of a smaller area of land.

11.9 Although Mr Buxton has recommended rejecting the rezoning sought for the amended areas, he considers there is scope for the revised relief sought at the hearing (shown in Figure 1 in his reply evidence) though not for the part of the relief that is outside the submission area.

Marc Scaife (811)

11.10 It was agreed during the course of the hearing, that it would be appropriate for the Hearing Stream 02 Panel to make a decision on this submission, as the submission point was considered in full, in that hearing.

DATED this 6th day of October 2017

S J Scott / H L Baillie
Counsel for the Queenstown Lakes
District Council

79 At [17.9]-[17.10].