

Before Queenstown Lakes District Council

In the matter of the Resource Management Act 1991

And **The Queenstown Lakes District Proposed District Plan –
Stage 14 Wakatipu Basin**

**Legal Submissions for Darby Planning LP, Lake Hayes Limited, Lake Hayes
Cellar Limited, Glencoe Station Limited**

Submitters #2376; #2377; #2378; #2379;

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**anderson
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May it please the Panel

Introduction

- 1 These legal submissions are presented on behalf of Darby Planning LP, Lake Hayes Limited, Lake Hayes Cellar Limited, and Glencoe Station Limited **(Submitters)**.
- 2 By way of general introduction / overview of the relief sought in respect of each of those submissions, I note the following:
 - (a) The Darby Planning LP **(DPL)** submission provides a general umbrella or overview submission in respect of Stage 2 of the District Plan review **(DPR)**. This submission represents a range of property interests within the Wakatipu Basin, including those related to residential development and commercial/hospitality and recreational activities. The primary intent of this umbrella submission is to draw attention to fundamental issues with the WBLUS as a foundation for notified Stage 2 Wakatipu Basin provisions, and a disconnect between those provisions, the higher order provisions of Stage 1 PDP, and the RPS.
 - (b) The Lake Hayes Limited submission pertains to land located at 270 Arrowtown Lake Hayes Road, located on the south-eastern corner of Arrowtown Lakes Hayes Road and Hogans Gully Road. Its land has been identified within the Rural Lifestyle Zone under Stage 1 PDP, and Precinct Zone under Stage 2. As for the DPL submission discussed above, Lake Hayes Limited **(LHL)** generally opposes the WBLUS and its application of resulting Stage 2 provisions relating to the Wakatipu Basin. It is specifically concerned to see that existing rights such as those relating to subdivision, building within building platforms, tree protection rules and height limits are not fundamentally and arbitrarily removed through the PDP.
 - (c) The LHL Land was granted consent in 2010 (RM090703) for the subdivision of three existing titles into eleven lots and the creation of 9 new residential building platforms. This consent was most recently extended by EX090703, such that the consent will now lapse on 12 February 2021. As discussed in the extension decision, progress and effort has been made towards the implementation of this consent on the Site. RM090703 was granted as a controlled activity for subdivision within the then Rural Lifestyle Zone under the partially Operative District Plan. It is important to consider that this is the type of development anticipated in the Operative Plan for controlled activity rural living use, and this was appropriately recognised and provided for through the controlled activity and land use regime. The decision in particular recognised this through the following extracts:

The site is zoned Rural Lifestyle and residential development consistent with the zoning is anticipated subject to the exercise of control to ensure that such development is sympathetic to the character and anticipated amenities of the site. The lot sizes proposed by the subdivision and location of the building platforms with regard to boundary setbacks are consistent with the Partially Operative District Plan.

The creation of the proposed lots and building platforms will not result in any effects to people and built form. The landscape architects report identifies that the presence of mature trees on the site mitigate potential adverse landscape effects associated with the subdivision and will assist in absorbing built form. This in turn will mitigate against potential loss in rural character and amenity¹

...

It is also recognised that inappropriate development can result in cumulative degradation to a site and surrounds. Policies have been identified which seek to avoid cumulative degradation by ensuring that subdivision density does not increase to a point where there may be adverse effects on landscape values or over domestication of the landscape. The proposal is consistent with the densities anticipated in the Partially Operative District Plan and the residential building platforms are deemed to be sited in locations that are deemed appropriate.²

- (d) The Lake Hayes Cellar Limited submission relates to land located at 10 Arrowtown Lake Hayes Road (**the LHC land**) at the intersection with State Highway 6, which contains the established Amisfield Bistro and Cellar Door and a related area of vineyards to the north. The LHC Land is zoned WBRAZ under Stage 2 of the PDP. LHC seeks in the first instance that the WBRAZ zoning be removed and replaced with a Stage 1 Rural Residential zone / commercial overlay, as sought in the LHC Stage 1 submission. Or in the alternative, that chapter 24 is amended to provide for a Lake Hayes Cellar Precinct over this land. The purpose of both options is to recognise and provide for the nature of the established activities on the LHC land, but also to provide a wider base of support in the PDP to enable the site and the resources it represents to be used more efficiently and diversified into a range of related other activities that are complementary to the existing activities and amenities of the site. Specifics of the amendments sought are included in Appendix 3 to Mr Ferguson's evidence.

¹ RM090703 at page 9.

² RM090703 at page 10.

- (e) Resource consent RM970591 authorised the construction of the existing winery building and the use of this building as a winery complex including retail sales. Resource consent RM020982 and associated Consent Order granted consent for the winery complex to operate as a restaurant and to host private functions. The operation is authorised to operate 7 days per week between the hours of 8am – 8pm. The Lake Hayes area is recognised for its scenic qualities. It is also an environment that has a diverse range of activities and characteristics that contribute to the amenity values of the area. This includes the State Highway that contributes a high level of traffic noise, residential, horticultural, commercial and visitor accommodation activities. In addition the area contains existing function facilities at the Stoneridge Lodge and the Lake Hayes Pavilion both which can operate late into the evening. All of this results in the attraction of a large number of people into (as well as through) the Lake Hayes area.
 - (f) It is important to acknowledge that Amisfield Bistro itself has become an iconic part of the Queenstown Lakes District's tourism and hospitality. Amisfield Bistro is internationally recognised as providing the highest quality dining experience and has received several awards. In short, Amisfield Bistro is well known as a responsible operator that creates wider social and economic benefits within the Queenstown tourist market, and benefits from additional employment opportunities for those engaged in the operation.
 - (g) The Glencoe Station Limited submission raises concerns with the mapping of the WBRAZ as this zone is defined by all of the non-ONF/L land within the Wakatipu Basin which has yet to be determined through the stage 1 PDP decisions. The concern being with the way in which boundaries for the Zone have been established and the assessment methodology for establishing the Landscape Character Units.
- 3 These legal submissions address the following matters relevant to rezoning of the Property and the wider Site:
- (a) Legal decision making framework;
 - (b) Section 7(c) maintenance and enhancement of amenity values;
 - (c) Concern with the Wakatipu Basin Land Use Study (**WBLUS**) and zoning approach in Stage 2;
 - (d) General provisions for the Wakatipu Basin Lifestyle Precinct (**Precinct**) and Wakatipu Basin Rural Amenity Zone (**WBRAZ**);
 - (e) Lake Hayes Cellar precinct;

- (f) Traffic issues;
- (g) Disconnect between WBRAZ and the Proposed Regional Policy Statement (RPS).

- 4 This hearing topic is one of the most fundamental to the District Plan Review hearing process overall, as it relates to the iconic Wakatipu Basin landscape and its treatment for the next 10 years at least through the District Plan. The Commission will be well aware of the significant and extensive breadth of Environment Court and higher court cases which have been tested in this District and in particular in the Wakatipu Basin on this very topic. This includes the series of foundational WESI cases which lead to the currently operative regime, a regime which Mr Goldsmith, Mr Brown, and other experts in the DPR have considered as being largely appropriate to roll over into this new plan review, save for minor amendments.
- 5 In my submission, the iconic nature of this section 7 landscape is not necessarily attributed to just pure 'landscape' values, but is a question of amenity, being an inherently subjective and value-laden enquiry in this 'romantic' landscape. One cannot ignore the significant nature of consented and existing rural living development, which indeed makes up part of its unique and special character in this inquiry. It is the establishment of those very activities which lead to wider District benefits, and which there is no justification to ignore, and definitely not to remove, through this Review:

[93] The outstanding natural landscapes of the district are Romantic landscapes - the mountains and lakes. Each landscape in the second category of visual amenity landscapes wears a cloak of human activity much more obviously - these are pastoral" or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the district's downlands, flats and terraces. The extra quality they possess that brings them into the category of 'visual amenity landscape' is their prominence because they are:

- adjacent to outstanding natural features or landscapes; or
- on ridges or hills; or
- because they are adjacent to important scenic roads; or
- a combination of the above

These aspects mean they require particular regard under section 7. The third category is all other landscapes. Of course such landscapes may

[94] have other qualities that make their protection a matter to which regard is to be had" or even a matter of national importance".

[95] It must always be borne in mind that all landscapes form a continuum physically and ecologically in the many ways they are perceived...³

Legal issues

- 6 The Submitters presented significant and comprehensive legal submissions in respect of the legal issues in this DPR in Topics 01B (strategic direction) Topic 02 (Rural), and Topic 04 (Subdivision). The Submitters remain concerned that the Council's staged approach to the DPR, the splitting of hearings by text and mapping, and recently the Wakatipu Variation, have resulted in an inefficient and costly process for submitters and ratepayers.
- 7 Counsel does therefore not intend to substantially repeat legal submissions relevant to the DPR decision making framework which have already been tabled in previous hearings, save for reiterating some key legal points for context:
 - (a) When preparing or changing a district plan the Council must have regard to the matters listed in section 74 which include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts;
 - (b) Given the unsettled nature of higher order provisions of the PDP and RPS in this instance, the Commission must look beyond those documents and apply Part 2 of the Act in order to determine whether a proposed zoning or specific provision is most appropriate in accordance with section 32;
 - (c) There is no presumption as to the most appropriate zone, rule, policy or objective for decision makers when embarking on a section 32 analysis.⁴
 - (d) A section 32 analysis seeks to provide for the optimum planning solution ultimately within the scope of submissions.⁵ Such an analysis should be an effects-based decision, rather than based upon a desired outcome or directive planning purpose⁶ and should take into account the existing consented and developed environment on the ground rather than providing

³ *Wakatipu Environmental Society v Queenstown lakes District Council* [2000] NZRMA 59, at [93] – [95].

⁴ *Eldamos Investments Limited v Gisborne District Council* W47/05, affirmed by the High Court in *Gisborne District Council v Eldamos Investments Ltd*, CIV-2005-548-1241, Harrison J, High Court, Gisborne, 26/10/2005. See also *Sloan and Ors v Christchurch City Council* C3/2008; *Briggs v Christchurch City Council* C45/08, and *Land Equity Group v Napier City Council* W25/08.

⁵ *Eldamos* paragraph [129]

⁶ *Cerebos Greggs Ltd v Dunedin City Council*, Environment Court, Judge Smith, C169/2001, at [21].

a zone which makes that existing environment and development incongruous within the proposed DPR zone.⁷

- (e) In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*⁸ namely where the purpose of the Act and the objectives of the Plan can be met by a **less restrictive** regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by being **enabling** so that people can provide for their well-being while addressing the effects of their activities.⁹

8 I submit in particular the case of *Cerbos* is of relevance to the Lake Hayes Cellar submission, where the existing and highly modified and developed site has not been reflected in any way in the proposed 80ha non-complying residential and a non-complying commercial regime under the WBRAZ. This will result in an inefficient planning regime in the future whereby existing and previously lawfully established and anticipated activities will suddenly become entirely contradictory and inconsistent with the planning framework within which they sit. This is problematic for existing activities and activities which can be appropriately expanded and enhanced to continue to provide for sustainable use and development of land resources and meet the growing and diverse needs of the District's visitors. As discussed in *Cerebos* and relevant to the LHC outcome sought, it is not satisfactory to simply rely on existing use rights where development is of such a large nature, as is the Amisfield site. Locking up that site in its status quo and not enabling future adaption to changing needs and opportunities on the site is not an efficient use of existing resources, and is not justified on an effects basis.

9 In the case of the DPL and Lake Hayes' submissions pertaining to general provisions of Stage 2, and in particular where rights are being removed from the Operative District Plan (**ODP**) regime, the last case cited of *Forest and Bird* is particularly relevant to the submission point that a less restrictive rule framework

⁷ *Milford Centre v Auckland Council* [2014] NZEnvC 23 at para 120; *Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712; *Cerebos*.

⁸ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

⁹ *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council*, [2017] NZEnvC 051, at [59].

is appropriate where this gives effect to the objectives and policies of the PDP¹⁰ and this is consistent with the enabling purpose of the RMA. I submit that recent case is directly relevant to your considerations in particular on rules, policies, and objectives notified under Chapter 24 for both the Precinct and the WBRAZ which provide unnecessary and onerous controls on land use in a Zone / precinct which should otherwise be intended to give certainty as to future use to landowners. I further add to this submission that there must be a very strong and clear policy need to remove existing established rights under the DPR.

10 Ms Pfluger's Topic 02 evidence in particular addressed Dr Read's landscape reports tabled in the same hearing, and Mr Baxter's evidence from Topic 01B. In particular Ms Pfluger considered that Dr Read's analyses provided in general terms the key landscape characteristics of the Wakatipu Basin related to its landform, geology, current land use, and its location surrounded by mountain ranges. She found however that more specific characteristics are notable within discrete parts of the Basin but there are also general high level shared characteristics which include:

- (a) The formative processes of the glacial carved basin;
- (b) Open valley floors within limited natural vegetation patterns;
- (c) Varied settlement pattern and the use of local materials in buildings;
- (d) Higher areas of rural living densities and new development occurring;
- (e) The roading network and visual containment of the Basin.¹¹

11 Ms Pfluger goes on to state

While the Wakatipu Basin Study prepared by Dr Read provides some useful generic character descriptions, I consider that the settled nature of the rural landscape and occurrence of many existing nodes of developments within the Wakatipu Basin, need to be acknowledged within the context of the more natural mountain landscape. Mr Baxter states (para 10) "*The glaring omission from Dr Read's list of key characteristics is the extensive existence of houses and the rural living characteristics associated with these houses.*" I agree with his view on this aspect of Dr Read's landscape character descriptions. In my view, there are areas within the basin that can absorb further well-sited and designed development, which should be acknowledged as part of the landscape assessment. While there

¹⁰ In my submission, as discussed in topics 01B and 02, this reference point to objectives in section 32 are those as sought by the Submitter (or appellant in the case of higher order provisions under Stage 1 and under appeal).

¹¹ Evidence in Chieve, Ms Pfluger, Topic 02, at 4.08-4.09.

are sensitive parts of the landscape that warrant protection, I consider that there is great variability in its change absorption capability given the varied terrain and range of existing development.

Overall I consider that the Wakatipu Basin exhibits a varied landscape character containing a range of land uses and distinctive land use patterns. These man-made patterns that overlay the natural landforms should, in my opinion, influence the consideration of the landscape qualities that inform the zones and rules as an actual reflection of the modifications occurring within the basin surrounded by a more natural mountainous landscape. This means that within the district plan locations of zones and determination of appropriate activities, including the scale and density of potential development within these zones, should take the existing landscape characteristics into account.¹²

- 12 Ms Pfluger's findings as to varied landscape character across the Basin, and that zoning should take into account existing development and landscape characteristics supports the Submitters position and my legal submissions that zoning should reflect and take into account the existing environment.

Section 7(c) maintenance and enhancement of amenity values

- 13 It is acknowledged that the WBRAZ and the Precinct in Stage 2 have been applied to all land in the Basin which is not identified ONL / ONF, and therefore it forms part of a section 7 landscape.
- 14 Section 7 landscapes are those in the Operative Plan referred to as the Arcadian pastoral landscapes. The significant pattern of existing rural living development in the Wakatipu Basin is a product (in part) of almost two decades of the Operative Plan which recognised an existing "Arcadian" character and enabled development which reflected and enhanced that recognised Arcadian character.
- 15 The Act defines 'amenity values' as;

"those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".¹³
- 16 The above definition of amenity embraces a wide range of elements and experiences, and recognises that the appreciation of amenity may change depending on the audience;

¹² Ibid, at 4.10-4.11.

¹³ Section 2, RMA.

"We do not understand the words "pleasantness, aesthetic coherence and cultural and recreational attributes" to be some form of combined absolute value which members of the public appreciate to a greater or lesser extent. In our view the definition is embracing a wide range of elements and experiences. Appreciation of amenity may change, depending on the audience".¹⁴

- 17 This District has undergone significant consideration before the Environment Court in relation to section 7 amenity landscapes. The Environment Court in the 2000 WESI case helpfully considered the above distinction (emphasis added):

An important point in respect of section 7 landscapes is that the Act does not necessarily protect the status quo. There is no automatic preference for introduced grasses over pine forest. Nor should it be assumed (on landscape grounds) that existing rural uses are preferable in sustainable management terms to subdivision for lifestyle blocks which could include restoration" of indigenous bush, grasses or wetlands, especially if predator controls are introduced. Just to show how careful one has to be not to be inflexible about these issues **we raise the question whether it is possible that a degree of subdivision into lifestyle blocks might significantly increase the overall naturalness of a landscape... Logically there is a limit: the law of diminishing returns where too much subdivision leads to overdomestication of the landscape.**¹⁵

- 18 In my submission, the words 'maintain and enhance' in section 7 do not equate to protection or preservation of the status quo of the natural environment. Use and development of the land resource are allowed unless protection is required. The landscape evidence presented by submitters in this hearing and in Stage 1 hearings demonstrates that 'amenity' of the environment is not just derived from naturalness but from human interactions and perceptions of that environment.
- 19 The Court in *Yaldhurst Quarries*¹⁶ discussed rural character and amenity in respect of a resource consent application to establish a gravel quarry as a discretionary activity in the Waimakariri Zone. The Court considered that 'change *per se* does not mean that there is an adverse effect on rural character or an effect on amenity values':

[115] "Amenity values" are those natural and physical qualities and characteristics of an area that contribute to peoples' appreciation of its pleasantness, aesthetic coherence, cultural and recreational attributes.

¹⁴ *Phantom Outdoor Advertising Ltd v Christchurch City Council* (NZEnvC C90/2001, 7 June 2001) at [18]

¹⁵ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 at [91]

¹⁶ *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2017] NZEnvC 165.

[116] Amenity values are not solely concerned with visual amenity, although in this proceeding visual amenity is an important consideration. We are also concerned here with the effect on amenity of any change in background levels of noise, dust, vibration and the increase in volume of heavy goods vehicles. That there will be further change in the environment if the land use consent were confirmed is certain. That said, change per se does not mean that there is an adverse effect on rural character or an effect on amenity values. To test the proposition that the scale and intensity of effects will be adverse, experts need first to establish the baseline environment against which the effects are evaluated.

[117] With that in mind, our approach when assessing "values" evidence, is to:

(a) identify the values of people and communities. Based on the topics above this will include the attributes and characteristics of the existing landscape, soundscape and air quality that are valued by them. [We expect the experts will explain how they ascertained the values of people and communities];

(b) ascertain whether the District Plan identifies any valued attributes or characteristics for the relevant zone, landscape or more broadly the receiving environment. These elements may also be identified from other documentation such as a Conservation Management Strategy;

(c) determine whether the amenity values are reasonably held. In that regard we expect the experts to objectively test the basis of the values that are derived from the environment. This is necessary because the residents' views on their existing amenity is subjective and influenced by personal feelings or opinions, including the strength of their attachment to this place;

(d) assess whether the proposal gives rise to adverse effect on the relevant attribute or characteristic;

(e) if it does, then to consider whether, in this case, rural character is maintained and second, whether there are any consequential effects on the existing amenity values; and

(f) finally, to assess those effects in light of the outcomes for the relevant resources and values under the District Plans.

For further guidance see *Schofield v Auckland Council* and *Port Gore Marine Farms v Marlborough District Council*.¹⁷

(citations omitted)

¹⁷ *Yaldhurst Quarries Joint Action Group v Christchurch City Council*, at [115] – [117].

20 Evidence tabled in Topic 01, 02¹⁸ and in this hearing discusses different and subjective perceptions of amenity values. This is important when assessing objectives and policies to provide for those section 7 landscapes, which derive amenity not from outstanding naturalness, and not just from natural amenity, but also from a wide range of elements and experiences depending on the audience. It follows that rural living and its associated impact on the landscape is not necessarily an adverse effect and therefore an automatic contradiction to the requirement to maintain and enhance amenity values.

21 The subjective nature of amenity values was also discussed in *Schofield v Auckland Council*, where the Court considered:

The topic of amenity can be emotionally charged, as this case has revealed. People tend to feel very strongly about the amenity they perceive they enjoy. Whilst s 7(c) of the RMA requires us to have particular regard to the maintenance and enhancement of amenity values, assessing amenity values can be difficult. The Plan itself provides some guidance, but at its most fundamental level the assessment of amenity value is a partly subjective one, which in our view must be able to be objectively scrutinised. In other words, the starting point for a discussion about amenity values will be articulated by those who enjoy them. This will often include people describing what an area means to them by expressing the activities they undertake there, and the emotions they experience undertaking that activity. Often these factors form part of the attachment people feel to an area or a place, but it can be difficult for people to separate the expression of emotional attachment associated from the activity enjoyed in the space, from the space itself. Accordingly, whilst the assessment of amenity values must, in our view, start with an understanding of the subjective, it must be able to be tested objectively¹⁹.

22 In this case the situation is less clear for this Panel to guide their determination of amenity values given that the objectives and policies of the Plan are under inquiry and the very subject of this decision making. In this respect I submit that the collective evidence and submissions from the public to the notified PDP on the subject of the Basin and further rural living opportunities evidences a significant perception of this community as to the benefits of rural living and this being an integral part of the basin's 'amenity.

23 In terms of the RPS guidance as to treatment of section 7 amenity landscapes, I refer to the section of these submissions discussing recently lodged Consent Orders, in particular policy 3.2.4 which sets a threshold to 'maintain or enhance' highly valued landscapes by 'avoiding significant adverse effects on those values

¹⁸ Evidence in Chief from Mr Baxter, Mr Skelton, and Mr Stalker, Ms Pfluger in Topics 01B and 02.

¹⁹ *Schofield v Auckland Council* [2012] NZEnvC 68, at [51].

that contribute to the high value of the natural landscape'. I submit that is a very different standard to the higher threshold of protection of section 7 landscapes in proposed Chapter 24.

Concern regarding the Wakatipu Basin Land Use Study (WBLUS) and zoning approach in Stage 2

- 24 As discussed in the Submitters' submissions and in Mr Ferguson's evidence, the general concerns arising from the WBLUS and resulting Stage 2 zonings stems from the following issues:
- (a) The WBLUS has not been entirely adopted by the Council in its stage 2 approach to Chapter 24 resulting in a pick and mix approach from Council to direct its future planning objectives rather than taking an effects-based approach to planning;
 - (b) The Stage 2 provisions do not reflect the outcomes and recommendations of the WBLUS in all instances and will not achieve the desired protection of some specific areas in the Basin, or the desired certainty for further rural living development in others;
 - (c) The staged approach to the DPR and the Variation has resulted in inconsistencies and inefficiencies between higher order provisions and Chapter 24, resulting in a disconnect between these parts of the Plan and potential duplication / inconsistencies;
 - (d) The Variation is flawed in that it results in an area of stage 2 zoning bounded by draft ONF / ONL boundaries, which are yet to be determined. Should those boundaries be relocated based upon upcoming submissions and evidence there may be further anomalies in the application and extent of the Stage 2 zoning.
- 25 While those general concerns remain, the Submitters acknowledge that inevitability of the Variation continuing, and different planning regime ultimately applying to the Wakatipu Basin than other rural zones in the District. Therefore the remainder of these submissions, and the detailed of Mr Ferguson's evidence, provide specific suggestions in respect of the Stage 2 provisions in order to of greatest assistance to this Panel's inquiry.

General provisions for the Wakatipu Basin Lifestyle Precinct (Precinct) and Wakatipu Basin Rural Amenity Zone (WBRAZ)

- 26 As discussed in detail in Mr Ferguson's evidence, a number of amendments are sought to the general rules, policies, and objectives of Chapter 24 to:

- (a) Modify the wording of the policies to provide a more focused set of provisions, which better reflect s7 of the Act, particularly in terms of what the key focus of this Variation should be, namely how particular regard should be had to the maintenance and enhancement of the amenity values of the Basin.
 - (b) Remove the policies, rules and assessment matters relating to the retention of all existing vegetation greater than 4m
 - (c) Introduce a new policy to recognise established residential building platforms and enable building within them
 - (d) Increase the maximum height of building from 6m to 8m
 - (e) Amend the road boundary setback within the Lifestyle Precinct from 75m to 20m
- 27 The submissions by Lake Hayes Ltd et al seek to also enable subdivision within the Lifestyle Precinct. The approach to subdivision generally in Stage 1 of the PDP has opted for restricted discretionary activity status as the default within both the rural living and urban areas. Mr Ferguson and Counsel presented significant evidence and legal submissions in respect of Topic 04 on these matters, and I refer the Commission to that information rather than repeat it here.
- 28 My primary submission is that the only justification for moving from a controlled activity regime (subdivision and buildings in building platforms) in rural living areas under the PDP to a restricted discretionary regime under the PDP, can be to retain the ability to turn down or refuse consent application. That is a significant departure from the ODP regime and one which is of concern to many landowners who will lose certainty and land values as a consequence. This is further evidenced by the amount of appeals on this point on stage 1.
- 29 As submitted in Topic 04, and supported by the Forest and Bird case cited above, a less restrictive regime of a controlled activity subdivision in the Precinct and rural living zones can achieve the objectives of those zones. My earlier submissions particularly discussed this detail with respect to the Council's ability to control potentially adverse effects with a wide range of controls, including over matters such as control on bulk and location.
- 30 Where subdivision meets anticipated density and minimum / average allotment size rules in the Precinct there should be no justification to refuse this, given that those areas have been zoned for further rural living and development.

- 31 I further submit that the Panel cannot rely on the justification that a controlled activity subdivision right in the Precinct would be contrary to rural living zones under stage 1 because:
- (a) The Basin is distinctly different in character to other areas and should not be comparatively assessed in such a broad brush way;
 - (b) Restricted discretionary status for rural living subdivision has been appealed under Stage 1.
- 32 The opening of these submissions provided detail on the current consent existing over the LHL Land, RM090703, which is a pertinent example of the type of activity which is anticipated under the operative plan and was approved entirely as a controlled activity. As discussed in that decision, the development proposed was 'consistent with the zoning and anticipated subject to the exercise of control to ensure that such development is sympathetic to the character and anticipated amenities of the site'. The decision also acknowledged that part 8 of the Plan recognised and provided for rural living development and anticipated the development proposed which complied with the Rural Lifestyle density requirements.
- 33 I submit this is a pertinent example of the exact type of development / site which will lose fundamental rights and certainty under the Stage 2 proposed regime. If the purpose of the Precinct Zone is to provide for further rural living activities, and recognise the positive benefits of the same, and it provides for densities which are considered to deliver appropriate amenity outcomes in particular areas, then there is no reason and no justification to remove a controlled activity right to achieve those objectives.
- 34 As discussed in the opening of these submissions, the *Forest and Bird* case is also particularly relevant to where ODP rights are being removed without justification. The Submitters strongly oppose the removal of a controlled activity building right on established building platforms on this basis. It is also questioned whether the Council's section 32 analysis initially proposing this amendment could have taken into account economic costs and benefits when the number of building platforms across the Basin to be removed would have to be multiplied by the significant [property and development right attached to each platform. Counsel acknowledges the changed approach in Mr Barr's s42a report since notification and supports this amendment along with the reasoning set out in Mr Ferguson's evidence.
- 35 In respect of the proposed Precinct setback of 75m, it is submitted this has been applied broad brush and completely arbitrarily to all land within the Precinct. There are a number of consented building platforms and existing houses within rural living zones which would become contrary to this rule, the subsequent

development of those or alteration might therefore breach a restricted discretionary activity standard. There appears to be no logical landscape basis for this significant setback, and in many instances it will result in an inefficient use of land, which as already discussed in these submissions, is in an area of rural living zoned entirely to achieve a further rural living purpose. It may well be that certain areas of the Precinct are more susceptible to degradation from built form introduced within 75m of the road, however there are clear instances where this will also not be contrary to the purpose of the Zone / precinct. I submit given the relatively few number of roads within the Basin, it would not be a difficult exercise for Council to consider with more detail where exactly this increased setback rule should apply and where it need not.

- 36 With respect to the new rules pertaining to removal of exotic vegetation, the associated policies for the restricted discretionary rule are particularly uncertain to apply and would result in difficulties, uncertainties, and inconsistencies in the future in the Council's administration of its District Plan. It is difficult to understand how one exotic tree in the Precinct could be fundamental to the Precinct amenity character and therefore its retention would be required. Although not technically *ultra vires* the Act, I submit the intention and outcome of this rule is entirely inconsistent with the parliamentary intent of removing the right to blanket protect trees in urban areas under section 75. Furthermore, in a number of cases, exotic trees are required to be removed under consent orders, covenants and consent notices as a result of the ODP (and Stage 1 decisions now on the PDP) providing a policy approach opposed to shelter belt planting and the blocking of views which are open in the landscape. This would result in an internal inconsistency in the Plan where for example, exotic trees and shelter belt planting historically established could not be removed without consent to further enhance open views. If a rule is required to protect specific amenity trees, I submit this would be more efficiently administered on a case by case basis through landscape plans and consent conditions at the time of proposed subdivision.
- 37 Further amendments are sought as discussed in Mr Ferguson's evidence relevant to Chapters 3 and 6 of the PDP in order to:
- (a) recognise that the Wakatipu Basin has landscape qualities that are distinct from the rural landscape classification;
 - (b) that the character and amenity values of the Wakatipu Basin are mapped and landscape guidelines are formulated;
 - (c) that areas of rural living are provided through the Wakatipu Basin Lifestyle Precinct; and
 - (d) that subdivision, use or development within the Wakatipu Basin responds to its identified characteristics and values.

38 I rely on Mr Ferguson's evidence as to the appropriate amendments required to higher order chapters of the PDP to effectively integrate the variation into the Plan. I further refer to submissions tabled in Topic 02 from Counsel for the Submitters and Mr Goldsmith, relevant to the appropriateness of reflecting the positive benefits of rural living and development in the Basin, which appears to have been overlooked in notified Chapter 24. As discussed in those earlier hearing topics, post the Supreme Court's determination in King Salmon, it is important that planning instruments under the RMA provide for complete coverage of RMA issues otherwise they are likely in the future to be rendered void by want of completeness. Not providing sufficiently and recognising the established and ongoing rural residential nature of the Basin and its associated socio-economic benefits ignores a large and important aspect of Part 2 of the RMA relating to providing for people and their communities and their ongoing social, cultural, and economic wellbeing.

Lake Hayes Cellar precinct;

- 39 Mr Ferguson's evidence provides a detailed set of rules, policies, and objectives for a LHC Precinct within Appendix 3 of his Topic 14 evidence. Mr Ferguson in turn relies on the supporting landscape evidence from Ms Pfluger, as tabled in Topics 01 and 02 of the DPR hearings. Ms Pfluger's key findings are:
- (a) Currently the winery is within the Rural Zone and the neighbouring properties (across Arrowtown Lake Hayes Road) fall within the Low Density Residential Zone.
 - (b) that the control of the bulk, location and external appearance of the buildings, as well as landscaping are important considerations to ensure that future development is in character with the existing structures and landscaping on site.
 - (c) This would also ensure that the rural amenity experienced from outside the site can be maintained
- 40 The LHC land is clearly developed to a significant extent and in no longer exhibits truly rural characteristics and amenity values, it is certainly not in any way consistent with the proposed zoning under Stage 2 of the 80ha WBRAZ regime. The Site sits within notified Landscape Classification Unit (LCU) 13 which is expansive, covering a significant and diverse land area along the east of Lake Hayes and including the Morven Ferry Hill developed residential area. The wording of LCU 13 is tough. It would be difficult for further development to occur in this LCU without significant and detailed landscape assessments to show that it is not contrary to the described 'low' absorption capacity of the LCU, which makes little sense in the context of a developed site like Amisfield.

- 41 As discussed already in these submissions, the principle purpose of the LHC submission is to seek to recognise the nature of developed and existing activities on the site and appropriately provide for their continuation and expansion / consolidation into the future. The proposed WBRAZ zoning does not reflect the nature of development on the Site in anyway, nor on significant parts of the remainder of LCU 13.
- 42 Based on the nature and scale of the proposed activity and the addition of further controls over building, including application of the standards relating to building development, the proposal will not detract from the overall character of the landscape. A further aspect of the Site and the proposed Lake Hayes Precinct is that it is well delineated by road boundaries along two sides that contain the extent of further development potential and avoid sprawling development along roads.
- 43 I rely on Mr Ferguson's conclusions under section 32, that the proposed zoning is a more appropriate outcome to achieve the objectives of the PDP, and his findings that:

Whilst the Lake Hayes Cellar Precinct is indeed a spot zoning, that is not a bad planning outcome if the planning framework aligns with the nature and scale of activity within that zone. Amisfield is somewhat unique in terms of the nature of the activity and its location within a rural setting (outside of the Gibbston Character one). The Lake Hayes Cellar is well supported by a range of strategic objectives and policies, as detailed above. Arguably none of those provisions support zoning over resource consent, but the benefit of a zoning outcome is that it can provide a more coherent framework for the management of the land without the uncertainty of the resource consent process.

In addition, the proposed new policies and changes to the rules are practical in ensuring that the commercial overlay approach is clear and able to be appropriately interpreted²⁰

Zoning and resource consents

- 44 Mr Langman's rebuttal evidence considers that in this instance, the proposal 'would result in a micro-level zoning for a very specific commercial activity in association with objectives, policies and rules in for the management of activities within a single 1.68ha site.' And which could otherwise be provided for through a clear consenting pathway.

²⁰ Mr Ferguson, T14 evidence in chief, at 180 - 181

- 45 I refer to and rely on Mr Ferguson's opinion as expressed in para 180 quoted above, that a spot zone for this type of site, which has very specific and unique planning outcomes, is not necessarily a bad planning framework, and that in this case this proposal is supported by higher order provisions of the planning framework.
- 46 In my submission it is more appropriate to recognise the existing development and future planning of the Site by way of a zone overlay rather than relying on existing use rights or future resource consent proposals because:
- (a) The zoning proposed will achieve a more efficient and effective land use outcome for this site as discussed in Mr Ferguson's planning evidence;
 - (b) The Submitter's proposed zoning better reflects the reality of the land as already developed than the Council's notified zoning;
 - (c) A revised zoning does not necessarily undermine plan integrity where this is justified for a significant and unique site, as in this case;
 - (d) A zone will provide enduring assurance to the landowner and to the Amisfield product which is a significant tourism attraction and economic benefit to the District. The community and neighborhood also has greater certainty as to the future use of the Site under a specific zone;
 - (e) Flexibility in future development, long term certainty, and efficiency in using the site can only be afforded through a zone rather than a resource consent. This ensures a more efficient land use regime and greater value in the land asset, which in turn is reflected in the level of future investment and economic benefits from tourism to the community.

Traffic

- 47 Mr Smith's position for the Council is to refuse all Wakatipu Basin rezoning requests on the basis of a concern of cumulative adverse traffic effects on the road network.
- 48 Mr Smith's evidence in chief considers that the Shotover Bridge will be operating at capacity at around year 2035 with the notified zoning under Stage 1 and Stage 2 of the PDP. In response, it is submitted that:
- (a) There is evidence to show that within 17 years the Shotover Bridge will be required to be upgraded based on the status quo. It is submitted that the Submitter's rezoning, whether considered cumulatively with other rezoning proposals or not, should not be singled out as inappropriate as otherwise development throughout the Wakatipu Basin and Arrowtown would need to be halted, even to maintain the status quo. This is clearly a wider and

inevitable issue that the Council needs to address, and which will be assisted by knowing clearly what zonings are in place sooner rather than later for funding/business case purposes.

- (b) There is no justification to rely on a 17 year panning period for capacity of the Bridge to be reached and decline rezoning proposals in this District Plan Review, where the Plan should technically only be in place for ten years²¹.
- (c) The RPS infrastructure provisions are not directive in terms of requiring infrastructure provision to be available and developed at the time of zoning.
- (d) The issue of cumulative effects of rezonings in the Basin should not concern the Commission, given that the evidence shows upgrades will be required to the Shotover Bridge in any event, and it is preferable to know zoning now and in advance of such upgrade requirements so as to plan for this in an integrated way.
- (e) The Council's reliance on traffic evidence to refuse rezoning submissions is somewhat concerning given there is no clear infrastructure plan from Council throughout the DPR process. It is apparent the Council has taken a principally landscape-based approach to rezoning and then retrofitted its infrastructure (traffic) evidence around that. The removal of the Stage 1 rural living zoning over many sites in the Basin and the new Precinct zoning over other areas in the Basin not identified in Stage 1 for rural living further highlights this (lack of) strategy.

Disconnect between RPS and Wakatipu Zones

49 I submit the following consent orders are of particular relevance to this case and will be discussed in further detail by Counsel:

- (a) Chapter 1 – resource management in Otago is integrated
 - (i) This is an entirely new chapter of the RPS seeking to specifically recognise the enabling aspects of Part 2 without qualification of protective provisions. The chapter recognises that Otago's resources are used sustainably to promote economic social, and cultural wellbeing for its people and communities. And seeks to provide for the economic wellbeing of Otago's people and communities by

²¹ NZTA Research Report 422. Section 5.5: Where no validated and comprehensive regional transportation forecasts are available, then the assessment year should not be more than 10 years ahead, given the uncertainty of predicted development and the construction of transport infrastructure after this time.

enabling the resilient and sustainable use and development of natural and physical resources.

- (b) Chapter 4 – urban Growth and Development
 - (i) Chapter 4 provides for urban growth and development, rather than restricting it, ensuring it occurs in a strategic and coordinated way. As discussed above, Chapter 4 requires coordinating the design and development of infrastructure with land use change in growth and redevelopment planning, rather than requiring growth to only occur in areas with sufficient capacity (at the time of zone planning).
- (c) Chapter 3 natural resources (draft consent order lodged with Court but not yet approved by the Court)
 - (i) Seeks to 'maintain or enhance' highly valued landscapes by 'avoiding significant adverse effects on those values that contribute to the high value of the natural landscape' (Pol 3.2.6). And seeks to 'minimise the subdivision of productive rural and into smaller lots that may result in a loss of its productive capacity or productive efficiency' (pol 5.3.1).

50 The above provisions of the RPS are of direct relevance to this case and provide no basis for opposing the rezoning of this (already somewhat developed) section 7 landscape for commercial purposes (in the case of LHC). Furthermore, the provisions of Chapter 3 and chapter 6 relevant to natural resources and rural activities provide very little support for the way in which Chapter 24 seeks to protect landscape and restrict development of a section 7 landscape, particularly given it is acknowledged in the WBLUS that character is predominantly hobby farming or lifestyle rather than productive.

Dated this 20th day of July 2018



Maree Baker-Galloway/Rosie Hill
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