QUEENSTOWN LAKES DISTRICT COUNCIL

Hearing of Submissions on the Proposed District Plan

Report 16.14

Report and Recommendations of Independent Commissioners
Regarding Upper Clutha Planning Maps
Mount Iron

Commissioners
Trevor Robinson (Chair)
Jenny Hudson
Calum MacLeod
Ian Munro

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ALLENBY FARMS LIMITED (502) ("Allenby")

Further Submitter: FS 1041.1 Quentin Smith

1. INTRODUCTION

1.1. Overall Recommendation

1. We recommend the Allenby submission be accepted in part.

1.2. Summary of Reasons for Recommendation

2. Our key conclusion is that the proposed Rural Lifestyle residential development would not protect the Mount Iron ONF, principally because of previous development unsympathetic to the values of the ONF, and that the positive effects sought to be relied upon, even if within our jurisdiction, do not overcome that fundamental problem.

3. We have likewise found the case not made out for uplifting the BRA on State Highway 84, the subject of submission.

4. We recommend Allenby's submission seeking amendment to the Urban Growth Boundary be accepted in part and in Report 16.1, we recommended acceptance in part of aspects of Allenby's submission discussed in that report.

2. PRELIMINARY MATTERS

2.1. Subject of Submission[1]

5. This submission relates to Lot 104, DP 412843 (Computer Freehold Register 471461), a 90.12 hectare site located at Hidden Hills Drive[2].

2.2. Outline of Relief Sought

6. Relevant aspects of the submission not already addressed in Report 16.1 sought:
   a. Extension of the Large Lot Residential Zone adjoining the site to the north, as shown on Planning Map 18, to cover 19.6 hectares of the site currently zoned Rural, with site specific rules and restrictions within this extension to the Large Lot Residential Zone to form a Sub-Zone of its own.
   b. Reduction of SNA Area E18C, as shown on Planning Map 18, to exclude 16 hectares of land located within the proposed Large Lot Residential Sub-Zone.
   c. Amendment to the south-western boundary of SNA Area E18C from that shown on Planning Maps 18 and 21 to add 16 hectares of the property to the identified SNA.
   d. Amendment to the UGB from that shown on Planning Maps 18, 20 and 21 so that it would follow Riverbank Road to the corner of Riverbank Road and State Highways 84 and 6, and then extend north east along State Highway 6 until it joins the notified UGB east of Mount Iron.
   e. Addition of a BRA over 6.9 hectares of the site, to overlay land currently shown as zoned Rural on Planning Maps 18, 20 and 21 on the western side of Mount Iron.

[1] Aspects of this submission related to the location of the boundaries of the Mount Iron ONF and the Clutha Corridor ONF where it crosses Hikuwai Conservation Reserve (and consequential changes to the UGB) have been addressed in Report 16.1

[2] The submission is internally contradictory as to whether it relates to part only of the property, and if so, which part or parts and indeed, whether it extends beyond the legal boundary of the property. Because the scope of the submission was an issue before us, we deal with that question as a discrete aspect of our Report.

f. Deletion of the existing BRA over part of the site adjoining State Highway 84, as shown on Planning Maps 18 and 21.

7. The further submission from Mr Smith was limited to opposition to deletion of the existing BRA (i.e. the last bullet point above).

8. By the conclusion of the case presented for the submitter, the relief sought, as above, was amended in the following respects:
   a. The application to rezone 19.7 hectares was maintained, but the zone sought was amended to a Rural Lifestyle Sub-Zone, with bespoke provisions. The suggested zone provisions included a Structure Plan, a copy of which is attached as Appendix 1 to this Report. That Structure Plan and the related Sub-Zone provisions included identification of 51 hectares of the site, together with a further 24.1 hectares of an adjacent property (Little Mount Iron) as Protection Areas the subject of a covenant precluding further development and requirements, among other things, for ongoing animal and plant pest control, revegetation of an identified area, and formation and maintenance of recreational trails for the use of the public. The Structure Plan also shows 15 proposed building platforms[3] and a 'centroid' used as the basis to constrain variations to their shape.
   b. The area sought to be removed from SNA E18C was reduced by 3.1 hectares, meaning that two areas of 9.8 hectares and 2.5 hectares respectively currently forming part of the SNA shown on Planning Map 18 were identified as being the subject of the submission. These areas, along with the area proposed to be added to the SNA (increased from the area shown in the appendices to the submission by 2.3 ha on its northern side, and approximately 1.1ha on its eastern side) are shown on the plan contained in Appendix 2. The original SNA plan, as attached to the submission, is attached at Appendix 3 for comparison.
   c. The request for a new BRA to be noted on the Plan was formally withdrawn[4].

2.3. Description of the Site and Environs

9. The site is the residue of a 750 acre (303.5 hectare) farm located partially on Mount Iron and partially on the flat lands to the west and north west of Mount Iron. Areas of farm have been progressively subdivided and sold off since 1971, most recently as part of the Northlake development the subject of Plan Change 45. Those developments have meant that the site is now reduced to the higher parts of Mount Iron, together with an area the subject of a BRA in the notified plan separating State Highway 84 from the residential development on the former Allenby farmland land to the north.

10. Mount Iron is a very distinctive roche moutonee, described to us by Ms Mellsop as a land form created by the passage of glazier ice over bedrock with a smooth and eroded 'upstream' side and a steep, rough and craggy 'downstream' side. In this case, the upstream side is that on the north and west faces of the mountain. The downstream side is readily recognisable with the cliffs that form the backdrop to Albert Town on the eastern side of the mountain, and those on its southern side.

11. There are two recognisable peaks to Mount Iron. The principal peak at Mount Iron is 548 masl (compared to the lake level at approximately 277 masl). A secondary peak known as Little Mount Iron is located to the north-east of the principal peak. Little Mount Iron has a highest point of 507 masl. The main peak is located on Department of Conservation land and provides

[3] Three of those platforms define areas around existing houses.

[4] The proposed Structure Plan attached as Appendix 1 continued to show the new BRA on the western side of Mt Iron, albeit reduced in size to 4.8ha. We presume this was an error.

a scenic outlook over Wanaka township and the lake behind it to the north and west, across the Hawea Flats to the Grandview Range, down the Clutha River valley to the east, and down the Cardrona Valley to the south. That vista is enjoyed by visitors and residents of the area alike. We heard evidence that the Department of Conservation has counted an excess of 140,000 people a year accessing the track up the mountain[5]. Mount Iron is visible across a wide area of the Upper Clutha Basin. Its western slopes form both a highly visible and memorable backdrop to the township of Wanaka.

12. While the term 'iconic' is over-used in discussions about the landscapes of the District, Mount Iron is undoubtedly an iconic element of the landscape of the Wanaka area. Unsurprisingly, Mount Iron is identified on Planning Maps 18 and 21 of the PDP as an ONF, although, as discussed in our Report 16.1, the ONF defined on the planning maps does not include the lower slopes of the mountain on its northern side, now occupied by residential development and zoned Large Lot Residential.

13. The ONF defined on the planning maps is divided into three separate properties[6]. The property the subject of the submission occupies most of the defined ONF. The adjacent Department of Conservation property[7] occupies some 52.4 hectares, including the principal peak of the mountain. The area of Little Mount Iron is held on a separate title[8] comprising 27.21 hectares and we heard evidence that it is now owned by Allenby.

14. There are extensive areas of regenerating native vegetation on both Mount Iron and Little Mount Iron, principally, but not solely, in kanuka. On the site, some 47.9 hectares of land are defined as an SNA with the notation E18C. Accordingly, the SNA occupies slightly in excess of half of the site.

15. The existing BRA shown on Planning Maps 18 and 21 occupies another 8.6 hectares of the site. The area is grassed up to a low ridge running parallel to State Highway 84. Houses located on Mount Iron Drive and Rob Roy Lane sit on or just over the ridgeline and are readily visible from the State Highway below for approximately half the length of the BRA (from the Anderson Road end).

16. There are several walking tracks to the principal peak of Mount Iron. While it is possible to reach the peak from the Albert Town side, entirely within Department of Conservation land, tracks across the submitter's site provide the principal routes to the peak from a Department of Conservation carpark located on State Highway 84 and from an access point on Hidden Hills Drive. While the principal tracks across the site are the subject of easements either in favour of the Crown or of Council, we heard evidence that members of the public frequently utilise informal tracks across the site to which there is no legal right of access. To date that has occurred with the acquiescence of the landowner. As above, there is no legal right of public access to the peak of Little Mount Iron.

2.4. The Submitter's Case in Support of the Relief Sought

17. The submitter presented a comprehensive case supporting the relief sought. By way of overview, its counsel (Mr Goldsmith) presented that relief as an option for the future management of an important land resource, suggesting that it would:

[5] 2015/16 figures

[6] A small section (Lot 1, DP22244) that forms an enclave within the site is owned by the Council and occupied by a Council water storage reservoir

[7] Lot 2, DP21892, Section 40 Block IV and Section 58, Block IV

[8] Lot 4, DP471320

"Provide for a holistic management and development regime for all of this land which will ensure that significant ecological and recreation community values are protected and enhanced for the benefit of future generations, while providing a sensitive development outcome to ensure those positive benefits can be realised."

18. This was compared to the status quo which in counsel's submission, would provide an inadequate land management regime "*without adequate protection of this land and ecological resource which will not secure the future certainty of public use and enjoyment and will seriously endanger existing ecological values".*

19. Mr Goldsmith drew our attention in particular to:
    a. The unsuitability of the land for farming;
    b. The significant ecological values of the land, and in his submission, the failure to adequately protect and enhance those values through the present zoning regime;
    c. The extensive use of the submitter's land by the public as a recreational resource, without any legal rights to do so;
    d. His submission that any farming of the land in accordance with the objectives of the Rural Zone would not protect the "*significant public access, ecological, recreation and amenity values of* [the] *land";*
    e. The intrinsic connection between the proposed rural lifestyle development and the positive ecological and recreational benefits he had identified through provision of an initial economic return for the submitter, and an ongoing obligation on land owners to contribute legally and financially to the proposed management regime;
    f. His submission that the proposed Rural Lifestyle development would be an appropriate outcome for the land in terms of landscape, amenity, infrastructural and geotechnical capability and servicing.

20. When we received the submitter's pre-circulated evidence, it appeared obvious to us that there were jurisdictional hurdles that the submitter would have to surmount, given the extent of the changes from the relief contained in the submission initially lodged, as above. We asked that counsel for the submitter address us specifically on these issues, which he did. Mr Goldsmith identified seven elements of the proposal that might possibly give rise to a scope issue and addressed each in turn. Summarising the essence of the submitter's case on each point:
    a. Change from Large Lot Residential to Rural Lifestyle Zone – there is no change to the area of land the subject of rezoning, the proposed development is of a significantly lower density than might have been assumed from a Large Lot Residential zoning as originally sought, the number of houses proposed is unchanged and a Rural Lifestyle Zone with bespoke provisions better reflects what the submission originally requested;
    b. Proposed amendments to different parts of the PDP from those the subject of the submission – Mr Goldsmith emphasised the absence of any change to the general Rural Lifestyle Zone provisions (i.e. objectives and policies) while including a site-specific suite of provisions at rule level. Although this response rather missed the point (which related to the addition of changes to Chapter 27), Mr Goldsmith addressed that in his supplementary submissions, arguing that the Chapter 27 changes were consequential in nature and did not prejudice any other party because they were location-specific;
    c. The amended SNA provisions – Mr Goldsmith submitted that no issue could be taken with the reduced area excluded from SNA E18C. He accepted that the additional area of 2.3 hectares on the western side of the SNA proposed to be added to it was outside the relief sought, but argued that the change was made for the same reasons as in respect of that relief, can reasonably be said to address a "*minor mapping anomaly",* and cannot

adversely affect any other party. When we drew Mr Goldsmith's attention to another smaller area (of approximately 1.1 hectares) on the southern side of the notified SNA between it and the site boundary that had not been identified in the submission and which had been added in the revised SNA Plan, he said that area was in the same category;

d. The proposed Mount Iron Protection Area – Mr Goldsmith submitted that this amendment was fairly and reasonably raised within the submission because the latter sought the most effective and efficient use of the submitter's land, the land was identified in the submission, the protection area falls "*entirely within the 'alternate SNA'* requested in the submission with the minor exception of the 2.3 hectare area already addressed and the submission requested provisions relating to ongoing management of the SNA and protection of significant ecological values and habitats;
e. Rules relating to land outside the zone – being the proposed Mount Iron Protection Area and the Little Mount Iron Protection Area – Mr Goldsmith submitted that there is no legal impediment to its inclusion because all of the land is under the control of the submitter, no changes are proposed to any Zone Plan provisions, no other party is adversely affected any application to subdivide the land would necessarily have to include both the rezoned Rural Lifestyle Zoned land and the Rural Zoned balance of the property. Mr Goldsmith argued that what was proposed was purely a land ownership issue which has no bearing on environmental or other controls applying to the land;
f. Public access – Mr Goldsmith accepted that this may be a valid concern, but argued that this is a positive element of the proposal that if set out explicitly in the submission would have been very unlikely to attract opposition, and the lack of any disadvantage to any potential submitter. Alternatively, Mr Goldsmith suggested as a potential basis for jurisdiction, third party submissions by John Wellington[9], Upper Clutha Tracks Trust[10] and Queenstown Trails Trust[11], all of whom sought greater provision in the PDP for facilitating public access across the district and, more general submissions such as Queenstown Park Limited[12] and Darby Planning Limited[13] making reference to the need for diversification of the Rural Zone for matters beyond farming, and seeking to include more policy support for matters such as recreation. As a further alternative, Mr Goldsmith submitted that the future provision of public access could be assured by the land owner entering into a formal easement agreement, a copy of which was provided to us, conferring rights on the public. We discussed with Mr Goldsmith the terms of that easement, with the result that he tabled with us a revised executed agreement to grant an easement with his supplementary submissions. We will return to discuss the terms of that easement below;
g. Inclusion of Little Mount Iron – insofar as provision of public trails and public access is proposed, this is addressed under the previous point. As regards ecological and recreational management provisions, Mr Goldsmith accepted that the submission did not refer to the Little Mount Iron property (as counsel noted, this was unsurprising given that the submitter did not own the property at that point) and that it is difficult to read references to SNA values as applicable given that the SNAs on Little Mount Iron have a different appellation. However, he submitted that the submissions of Royal Forest & Bird Protection Society[14] might provide jurisdiction through the protection sought for biodiversity values in areas outside currently identified SNAs. Alternatively, he referred us to the submissions of Wakatipu Reforestation Trust[15] seeking a policy provision

[9] Submission 640
[10] Submission 625
[11] Submission 671
[12] Submission 806
[13] Submission 608
[14] Submission 706
[15] Submission 281

encouraging the planting of native plants. In the alternative, Mr Goldsmith drew our attention to existing consent condition requirements related to construction on an approved dwelling within a building platform that has been established on the Little Mount Iron property and which requires implementation of an ecological management plan prepared by Dr Lloyd.

21. Mr Goldsmith raised a legal point of his own regarding the Council case, arguing that the approach of counsel for the Council in reserving the Council's position on issues of scope, created natural justice issues because it meant that the submitter would not have the opportunity to respond to the Council's position. Mr Goldsmith requested on behalf of the submitter the opportunity to respond in writing following receipt of the Council's right of reply.

22. Turning to the merits, Mr Goldsmith put the case of the submitter firmly on the basis of Part 2 of the Act. He supported and adopted the submissions that we had had from counsel from the Council that it was both permissible and appropriate that the Hearing Panel has regard to Part 2.

23. Mr Goldsmith frankly acknowledged the tension that the proposal created as regards consistency with the PDP arising from the proposal to enable 12 new houses to be located on the Mount Iron ONF with inevitable adverse visual effects but, in his submission the Proposed Sub-Zone and related provisions would result in better ecological outcomes and accordingly, greater consistency with provisions of the PDP related to ecological outcomes. He also emphasised that the proposed zone would better achieve objectives and policies relating to public access and recreational values.

24. As regards landscape effects, Mr Goldsmith advanced submissions emphasising the reference in section 6(b) of the Act to **inappropriate** subdivision, use and development and to the fact that the factors for identification of ONFs and ONLs are not limited to visual aspects, but also include ecological and cultural aspects that are brought into play by the proposed enhancement to recreational and public access values.

25. As regards section 6(c) of the Act, Mr Goldsmith's submissions emphasised that the proposal was to provide positive environmental enhancement rather than merely a passive or protective regime only. He relied on Dr Lloyd's evidence as to the superior ecological outcomes from the regime proposed. Counsel also highlighted the evidence of Mr Cleugh regarding the extent of work that it had been necessary to date to control wilding conifers, without which, they would have taken over the mountain.

26. As part of presentation of the Council's case, we had queried whether in the view of counsel for the Council, an 'environmental compensation' approach such as that proposed by the submitter was available in a plan setting. Mr Goldsmith submitted to us that the concept of environmental compensation is subsumed within Part 2 of the Act. He acknowledged that he was not proposing a 'no net loss' type approach that has been found to be appropriate in the case of biodiversity offsetting, but suggested rather that this was a case of clearance of a small area of kanuka with limited ecological values in exchange for one off eradication of pest plant and animal species within the substantial protection area, ongoing pest, plant and animal species management, a requirement to undertake regenerative planting in the defined revegetation area and permanent protection of native vegetation within the proposed zone, outside the defined building platforms and accessways.

27. Mr Goldsmith returned to this issue at our invitation in his supplementary submissions, arguing:
    a. The Supreme Court's decision in *King Salmon*[16] has not overruled the previously understood approaches to a broad judgment in the application of Part 2 of the Act. Rather, the Supreme Court confirmed that planning instruments might set a higher threshold than the starting presumption of the wording within Part 2, emphasising the statement in the Supreme Court's judgment[17] that Section 6 does not give primacy to preservation or protection;
    b. In the alternative, section 6(b) incorporates a value-based assessment of competing matters by reason of its reference to inappropriate subdivision, use, and development, overlaid with the Supreme Court's confirmation that what is inappropriate is determined by that which is sought to be protected. In the context of the Mount Iron ONF, that requires analysis of the values of the feature which justify its section 6(b) status, which were argued to include recreational attributes, visual amenity and ecological significance;
    c. Mr Goldsmith also relied on the recommendation of Council staff that policy support be included for environmental compensation in Chapter 21 and the definition of environmental compensation recommended by Council staff in relation to Chapter 33, which refers to open space, recreational and heritage values.

28. The evidential case for the submitter comprised evidence from:
    a. Mr Lynden Cleugh, Managing Director of the submitter, whose evidence provided:
        i. Historical evidence regarding development of Allenby Farm and conditions on Mount Iron over time. Mr Cleugh advised in particular that the regenerating kanuka that provide much of the ecological values on the mountain have largely grown since the 1960s, and that before then, it was largely free of either kanuka or the manuka that he understood previously covered the mountain.
        ii. Mr Cleugh put the submitter's development proposal in the context of a broader concept of a future public park incorporating the balance of Mount Iron outside the proposed Rural Lifestyle Zone and the Little Mount Iron property that the submitter had recently purchased;
        iii. Mr Cleugh emphasised the lack of documentation explaining when and why the existing BRA was imposed, and argued that it is being overtaken by events with the entry to Wanaka moving towards Albert Town. He also drew attention to the BRA as being an anomaly constraining Allenby from applying for a consent for a house and/or farm buildings on the land in a way which is not the case for other entrances to the town.
    b. Dr Kelvin Lloyd provided expert ecological evidence including on the following principal points:
        i. His detailed fieldwork on the Mount Iron site indicated that the highest ecological values occur in habitats other than the kanuka woodland present at the northern part of the notified SNA;
        ii. The alternate SNA proposed (that is to say including the additional area proposed and excluding the revised area proposed to be excluded from the notified SNA E18C) would include all ecologically significant values and would achieve significantly greater protection of ecological values than the notified SNA;
        iii. Dr Lloyd emphasised the value of the proposed active management of the alternate SNA as enhancing its ecological values, compared to the essentially passive management of SNAs required under the PDP;

[16] *Environmental Defence Society v New Zealand King Salmon Company* [2014] NZSC 38
[17] At [149]

iv. The Proposed Rural Lifestyle Zone provisions would provide stronger protection for indigenous vegetation outside the defined building platforms and accessways than the PDP would provide;
v. Kanuka woodland is not representative of the original vegetation in the lower northern part of the site (but is representative of the upper part of the site);
vi. The purchase of Little Mount Iron provided excellent potential for indigenous forest restoration.
vii. In addition, Dr Lloyd joined issue with the evidence of Mr Davis on a number of points. He stated his opinion that the area proposed to be removed from the defined SNA is not ecologically significant. Dr Lloyd also emphasised the potential for wilding conifers to threaten the persistence of significant ecological values on the site if not actively controlled.
viii. Responding to the evidence of Ms Mellsop, Dr Lloyd agreed that the recommended species proposed to be planted within the defined building platforms (for fire resistance purposes) would be different from the dark brown colour of the predominant kanuka, but he believed that the planting of ecologically appropriate indigenous tree species other than kanuka would provide a superior outcome.

c. Mr Paddy Baxter presented expert landscape evidence. Principal points from this evidence were:
    i. The proposed house sites are located in distinct groups and there is no single public viewpoint where all dwellings may be seen;
    ii. From any given viewpoint, a maximum of 3-4 dwellings will be potentially visible, albeit recessively coloured, with the bulk of the dwellings at similar elevations to existing residential housing from public views;
    iii. The most affected viewpoint is from the west (Andersons Ridge).
    iv. The majority of lots will have only a sliver of roof potentially visible.
d. Dr Shayne Galloway presented expert recreational amenity evidence. Principal points from his evidence were:
    i. Mount Iron and Little Mount Iron form a central geographic feature within Wanaka township with recreation amenities that receive high use from local residents and visitors to the area;
    ii. Development of the additional house sites proposed would have no effect on current or future recreation amenity;
    iii. Formalisation of additional tracks on Mount Iron and Little Mount Iron as proposed would significantly enhance recreational amenity values;
    iv. With the growth of tourism and residential and commercial development within eastern Wanaka, the use of and desire for access to Mount Iron and Little Mount Iron will increase proportionately;
    v. The conflict between recreational activities that currently occurs (e.g. mountain bikers and walkers) is best managed by a recreational resource management plan that would also address management of environmental impacts of recreation and health and safety issues;
e. Mr Peter Joyce provided expert engineering commentary on questions that had arisen during the hearing to the effect that:
    i. The water supply will meet Fire Service requirements;
    ii. Roading had been designed to meet New Zealand standards;
    iii. The design width (including berm) would be adequate for fire trucks and would provide for the ability to pass parked cars;
    iv. There had been no change to the earthworks proposed, but in Mr Joyce's view, the cuts and fills that have been shown could be improved upon.

f. Mr Duncan White provided planning evidence presenting the various iterations of zone provisions proposed by the submitter. In his supplementary evidence, Mr White significantly expanded on the summary section 32 analysis contained in his evidence in chief, providing a much more detailed analysis of the proposed zone provisions against the requirements of section 32. We discussed with Mr White whether the objectives and policies of the Proposed Sub-Zone needed to make reference to the character of Mount Iron as an ONF. Mr White was of the view that the provisions were already sufficiently strong not to need such reference, but we note that in the final version of the proposed zone, reference to the ONF had been inserted, reflecting Mr White's view that equally there was no reason not to make reference to it.

2.5. Council's Case

29. The case for the Council on this submission evolved over time, as the nature of the relief sought shifted. On the legal issues raised by Mr Goldsmith, the Council's position was:

a. The Council's evidence addressed the merits of the submitter's case and the submitter had had every opportunity to understand and respond to that evidence;
b. As regards the scope issues addressed in Mr Goldsmith's submissions:
    i. While density is not the only issue, the Rural Lifestyle Zone is generally more restrictive in terms of activities than the Large Lot Residential Zone and accordingly, there was scope for the change in zoning from that originally sought;
    ii. The issue of public access was not fairly and reasonably raised in the submission, and the third party submissions relied upon likewise did not provide scope. Counsel for the Council also considered that insofar as the submitter sought to include the area known as Little Mount Iron within the relief sought, this was beyond the scope of the submission and the relief sought not authorised by the other submissions relied upon;
    iii. Counsel, however, agreed that there was scope to add the two additional areas identified to the SNA on Mount Iron;
    iv. Likewise, counsel for the Council agreed that there were no scope issues in making consequential changes to Chapters 22 and 27, to include objectives and policies referring to the proposed sub-zone.
c. As regards the question of whether the 'environmental compensation' approach advocated for the submitter is available, counsel for the Council submitted:
    i. Strategic Chapters 3 and 6 are not unqualified so as to create an 'environmental bottom line';
    ii. Nor do Sections 6(b) or 6(c) create environmental bottom lines in themselves;
    iii. Positive effects or environmental compensation, however categorised, are relevant to the decision on what zone is the most appropriate;
    iv. There is likely to be a point where the effects of a proposal are so adverse that the effects on the values that resulted in the identification of the Section 6(b) or 6(c) landscape in the first place are too great to be accepted, particularly where the positive effects are not directly related to the adverse effects. Specifically, counsel submitted that while positive outcomes and the balance between negative outcomes and positive outcomes is relevant, "*it cannot be used to justify what would otherwise be a failure to follow the direction in Section 6(b) and 6(c) of the RMA*"[18].
d. In relation to the alternate SNA, Counsel's submissions were that if we conclude that the alternate SNA is significant so as to trigger Section 6(c), we must identify it as an SNA.

30. The Council evidence of direct relevance to the matters in contention on the submission was provided by Ms Mellsop, Mr Davis and Mr Barr. Summarising the evidence of each in turn, Ms Mellsop made the following principal points in her rebuttal evidence:

[18] Supplementary Legal Submissions for Council in Reply at 3.8

a. A number of the proposed design controls and covenants Mr Baxter discussed had not been translated into the rules and development standards Mr White had proposed (this was addressed in the subsequent iteration of those provisions);
b. Mr Baxter's analysis focuses on aesthetic values in the amenity of views, but had not assessed the extent of potential effects on bio-physical characteristics of the ONF, on its natural character, or on experiential or associative values;
c. She noted concerns Mr Davis had expressed about the difficulty of establishing the species proposed and the failure to provide for rabbit control to ensure successful establishment of revegetation;
d. The proposed cuts and fills of up to 2.5 and 2 metres respectively would modify the natural landform to a moderate extent.
e. Exotic tree and shrub planting within the proposed building platforms could detract from the natural character of the feature and the integrity of vegetative patterns (this was proposed to be addressed in the revised provisions by a proposed requirement to limit exotic planting to shrubs no more than one metre in height);
f. She considered Mount Iron to be highly sensitive to adverse cumulative effects of additional built development and domestication and that the proposed rural living development would adversely affect the integrity of the landform, the natural processes of indigenous regeneration and the scenic and wild values of the feature to a significant extent;
g. Overall, she was of the opinion that the proposed structure plan would result in a high level of adverse effects, including cumulative adverse effects, on the landscape character, quality and values of Mount Iron;
h. She disagreed with Mr Baxter's opinion that the proposed development would not be visually prominent and would be absorbed within the surrounding cloak of kanuka. In her opinion, all proposed new dwellings were likely to be visible from at least one public road or public place in the vicinity. She noted difficulty in making an accurate assessment of the level of visibility due to the absence of profile poles;
i. The native plant species proposed for revegetation would contrast with the dark khaki of the surrounding kanuka forest and, together with potential exotic vegetation, would likely result in distinct islands of contrasting vegetation on the mountain slopes, exacerbating the domesticating effect of dwellings, roads and residential activities. It would not be an issue if the vegetation covered the hillside. The problem was the artificial appearance.
j. As regards the existing BRA, Ms Mellsop recommended that the relief sought be granted in part, removing the BRA west of a line drawn south from the eastern boundary of 20 Rob Roy Lane. In her view, that would leave an unimpeded view of Mount Iron for eastbound observers and the adverse effect on the approach to Wanaka was not significant.

31. Mr Davis made the following principal points, responding to the evidence of Dr Lloyd:
a. Contrary to Dr Lloyd's surmise, Mr Davis had undertaken a personal site visit, as well as relying on the observations of his colleagues;
b. He agreed with Dr Lloyd that the Threatened Environment Classification (TEC) should not be the sole basis for identification of SNAs, but stated that he had not used in that manner; rather, he had used this classification to guide the process of identifying the SNA, which was then assessed via site visits and existing scientific research;
c. The comparison that Dr Lloyd had drawn based on the extent of indigenous cover in the specific land environment of which Mount Iron forms part within a 5 kilometer radius was in his view arbitrary;

d. Kanuka form part of the pre-settlement native woodlands along with matagouri, small-leafed coprosma and olearia species and kowhai, based on both literature and modelling. Accordingly, Mr Davis's view, it met the criteria for 'representativeness'.
e. Mr Davis drew our attention to the fact that native vegetation had been cleared from the area on the site illegally and that the Environment Court has made enforcement orders requiring replanting within proposed building platform 10 and along the proposed access to platforms 10 and 11. He noted that the landowner was specifically enjoined from harming, disturbing or damaging the areas of replanting;
f. Mr Davis considered that there are indigenous invertebrate and lizard values within the SNA at the location of building platform 10;
g. Mr Davis agreed with Dr Lloyd that the area Dr Lloyd had identified to the south of the current SNA (his 'alternate SNA') also has ecologically significant values, and he supported adjustment to the southern boundary of the SNA to include those values. Mr Davis noted that he specifically opposed the inclusion of building platforms 10, 11 and 12 within the SNA (we note that those building platforms are three of the four sites on the eastern section of the proposed sub-zone) but could support the inclusion of building platforms 3 to 9, 13 and 15 within the SNA subject to conditions that he specified[19].

32. When we heard from Mr Davis, we asked him about the relative merits of the two areas in contention, being the existing 'discard' area the submitter sought to exclude from the SNA and the proposed alternate SNA. Mr Davis advised us that if it was a matter of choice on the basis of which area would provide the greater ecological values, he would pick the alternate area. He also advised that in his opinion it was possible to maintain the kanuka against the spread of invasive species and that consent conditions might manage that spread, so long as no invasive plants are actually being planted. He drew our attention specifically to the problem of rabbits forming an insuperable obstacle to more wide-ranging re-establishment of original vegetation species.

33. As regards the appearance of indigenous vegetation and Ms Mellsop's concern about 'islands' among the kanuka, he said it would depend what species are used. A preponderance of small leaf plants was ecologically preferable because that was the natural pattern, but they would never withstand the predators. Reliance on broadleaf species, which would be more flexible, would make a difference in appearance.

34. He clarified that he particularly opposed sites 10-12 because those sites are in the middle of the kanuka, whereas the other sites are already quite open and therefore their development would involve much less loss of indigenous vegetation.

35. Mr Barr opposed the relief sought. In his reply evidence, responding to the final iteration of that relief, he made the following principal points:
a. He considered that Mr Baxter had overstated the effectiveness of the potential for mitigation to address adverse visual effects of the proposed residential development and had taken the best case scenario that might result from the zone provisions proffered;
b. Mr Barr compared the Rural Zone provisions that are currently applying to the land and expressed the view that the principal activity and any future activities would be subject to a substantially more stringent framework of assessment under the latter;
c. Mr Barr accepted that the provisions of the PDP do not require active planting of indigenous vegetation or reduction of pests as would be required by the proposed

[19] Building Platforms 1, 2 and 14 are located at the western end of the proposed sub-zone, and appear to sit outside the notified SNA. We note also that Building Platforms 7, 9 and 14 have been drawn by the submitter around houses that already exist

provisions, but relative to the alternative of not clearing the indigenous vegetation within the notified SNA and abiding by the enforcement order of the Court to replace and regenerate the illegally cleared kanuka, he did not consider the end result to be beneficial;

d. He considered that the provisions of Chapter 33 of the PDP would provide adequate protection of the proposed Protection Area, including the area proposed to be added to the SNA;
e. Mr Barr considered that the claimed benefits of the Little Mount Iron property being included in the proposal were overstated, because pest control in terms of wilding exotic trees and indigenous vegetation regeneration is already required as compensation associated with the approval of a building platform on the property[20]. He described inclusion of the property as potentially "*double dipping"* by the submitter;
f. Mr Barr accepted that the proposed recreational benefits are a positive component of the proposed rezoning but, in his view, should not come at the cost of landscape and ecological degradation of the ONF.

36. Earlier, in his rebuttal evidence, Mr Barr had addressed the submission in relation to the existing BRA. While noting Ms Mellsop's contrary view, he considered from a planning perspective that the entire BRA should be retained because the whole area contributes to the openness and overall view both towards Mount Iron and as part of the entrance to Wanaka[21]. He drew our attention to notified Policy 4.2.8.2 seeking a sensitive transition to rural land at the edge of the Wanaka UGB. Mr Barr also considered that the BRA proposed to be added by the submitter was not necessary given the status of the land as within the Mount Iron ONF.

37. In his reply evidence, Mr Barr responded specifically to our query regarding the implications of a significant entrance to the Three Parks Development approximately opposite the Department of Conservation carpark leading to the Mount Iron walkway. He did not think it reduced the need for an effective BRA on the submitter's land, given its location to the east, and also noted that the nature of the accessway was being negotiated by Council, NZTA and the Three Parks developer, which would determine whether it was to be a T intersection or a roundabout.

38. Mr Barr also recommended rejection of that aspect of the submission seeking relocation of the Wanaka UGB. While Chapter 4 contemplates that not all land within the UGB is anticipated to be developed for urban development, he noted that such land is generally zoned specifically for landscape protection or is zoned Rural and either overlaid by a BRA or owned by the Council and designated as a reserve. Mr Barr also directed our attention to the overlap of this submission with submissions seeking rezoning of the land that would be within the UGB if we were to recommend acceptance of this aspect of the Allenby submission.

39. Mr Barr's view was that the current location of the UGB is appropriate because it does not include Rural zoned land that in his words, *"is readily contemplated to be developed in any way"*[22].

[20] Mr Barr supplied us with a copy of the resource consent granted to the previous owners (RM 130177) which requires that the balance of the 28.5ha property outside the permitted curtilage area of the house defined on the consent plans be managed as ecological restoration or pastoral grazing land. The resource consents conditions require, among other things, registration on the title of a covenant against further subdivision or buildings.

[21] Barr Rebuttal at 5.42

[22] Barr, s42A Report 2 at 5.25

2.6. Discussion of Planning Framework

40. Both Mr White and Mr Barr provided us with input on the planning background to the issues as above. They necessarily had to work off the latest version available to them of the PDP (that recommended in the staff reply on each chapter). In our Report 16, we summarised the key background provisions in the PDP, as recommended by the Hearing Panel, that is to say, a further iteration along from that considered in the planning evidence.

41. Focussing on the most relevant provisions, given that most of the site is within an ONF, the question as to whether the proposal protects that landscape and visual amenity values and the natural character of that ONF from more than minor effects in terms of recommended Objective 3.2.5.1 is obviously a key consideration. Likewise the corresponding provisions of recommended Policy 3.3.30.

42. Policy 6.3.12 also needs to be noted given its emphasis on subdivision and development on ONFs needing to be an exceptional case "*where the landscape or feature can absorb the change and where the buildings and structures and associated roading and boundary changes will be reasonably difficult to see from beyond the boundary of the site."*

43. In relation to the SNA issues, the focus of recommended Objective 3.2.4.1 on sustaining and enhancing ecosystems and maintaining indigenous biodiversity needs to be noted, as does policy 3.3.17 related to identification of significant indigenous vegetation and significant habitats of indigenous fauna, along with the related policy 3.3.18 to protect SNAs from significant adverse effects and to ensure enhanced biodiversity outcomes where other adverse effects cannot be avoided or remedied.

44. We also note recommended Policy 32.2.2.2, indicating that permissible clearance of indigenous vegetation in an SNA is an exceptional event that can only be undertaken in a way that retains the indigenous biodiversity values of the SNA.

45. Recommended Policy 32.2.3.2. is also of relevance, seeking to encourage opportunities to remedy adverse effects through the retention, rehabilitation or protection of "*the same indigenous vegetation community"* elsewhere in the site. Last but not least, we note the provision in Recommended Policy 32.2.1.6 for biodiversity offsets for residual adverse effects on significant areas of indigenous vegetation or indigenous fauna.

46. In relation to public access and recreation issues, the focus in recommended Objective 3.2.4.5 on maintaining and enhancing public access to the natural environment is clearly relevant as is Policy 3.3.28 given that this is an opportunity to provide public access where it is not currently lawfully available. In relation to the proposed use of a Rural Lifestyle Sub-Zone, recommended Policy 6.3.20 would on the face of the matter provide encouragement for that mechanism, but we note that that policy applies in Rural Character Landscapes, which this is not. However, the acknowledgement in Chapter 22.1 that many areas zoned Rural Lifestyle are located within sensitive parts of the district's distinctive landscapes is relevant, as are the objectives noted in Report 16 related to maintaining and enhancing landscape quality, character and amenity values and enabling rural living opportunities in areas that can absorb development.

47. As regards the discrete issue of the existing BRA, the policy Mr Barr referred to us regarding transition between urban and rural areas is recommended to be deleted, but recommended Policy 4.2.2.12 requires that any transition to rural areas is contained within the UGB. Policy 6.3.26 is also relevant, directing avoidance of adverse effects on visual amenity from

subdivision, use and development that forms the foreground for an ONF when viewed from public roads.

48. Having identified these as the relevant higher order planning provisions in the PDP that form the reference point for our Section 32 analysis, we need to note that as already recorded, counsel for the submitter put his submissions to us in terms of Part 2 of the Act. Accordingly, before placing reliance on the objectives of the PDP, we need to be satisfied also that the end result is consistent with Part 2 of the Act.

3. ISSUES

49. As will be apparent from our summary of the submissions and evidence, there are a number of issues that we need to consider:

a. Do the rules of natural justice require that Allenby has the ability to comment further on the Council's Reply?
b. Are all elements of the relief sought by the submitter within our jurisdiction to recommend?
c. Is an environmental compensation approach involving provision of positive benefits in exchange for adverse effects of a proposed rezoning open to us to consider as a matter of law?
d. In the case of the public access provisions proffered by the submitter, does the executed easement provide an acceptable alternative, such that those benefits should be taken into account even if not within scope?
e. Is the area proposed to be deleted from SNA 18C 'significant'?
f. Are we bound by the conditions placed on the submission seeking expansion of the SNA to include additional parts of the site?
g. If we find that the notified SNA sought to be deleted is 'significant', is it permissible to swap that area of SNA for a different area on the basis of evidence that the ecological outcome is superior?
h. What is the nature and scale of the adverse effects enabled by the provisions of the proposed sub-zone related to additional rural lifestyle development?
i. Assuming an environmental compensation approach is open to us, are the positive benefits created by the proposed sub-zone provisions sufficient that we should recommend acceptance of the sub-zone and associated provisions notwithstanding those adverse effects?
j. Is it appropriate to relocate the UGB as sought in the submission?
k. Should the existing BRA over the site be retained?

4. DISCUSSION OF ISSUES

4.1. Natural Justice Issues

50. Mr Goldsmith did not press this point when he appeared before us. He said specifically that he did not wish to address it further.

51. With respect to him, we think that there was a rather substantial jump in logic, moving from the reservation of the position on the part of counsel for the Council in relation to scope issues in her opening submissions to the suggestion that that implied that the Council would not take any position on the merits of the submitters case in reply.

52. The Council's position on the merits of the submission, as it was then framed, was clear from the evidence that was contained in the Section 42A Report.

53. At each subsequent stage, the Council's evidence responded to the submitter's case as it then stood. We consider that the submitter has already pushed the envelope by the scale of the supplementary submissions and evidence that was filed following its appearance before us given our limited request for further input and we do not think that the rules of natural justice or fairness require that we provide it with any further opportunity to comment on the merits.

54. As regards the specific issue of scope, this issue was created by the submitter when it circulated evidence supporting relief that was materially different to that contained in its submission. It will have been apparent to Mr Goldsmith, (who is a very experienced practitioner under the Act) that this change of approach would need at some stage to be referenced back to the original submission. Notwithstanding that, while providing us with a helpful, but brief explanation of the amended relief by way of submissions lodged at the same time as the submitter's evidence, Mr Goldsmith chose to "*keep his powder dry"* on those scope issues.

55. We do not think he can complain that counsel for the Council did likewise, particularly given our request that Mr Goldsmith address the issue in detail when he appeared.

56. The end result is that Mr Goldsmith has supplied us with a detailed analysis of scope issues as they relate to all relevant aspects of the relief sought. Counsel for the Council has responded in reply, largely accepting Mr Goldsmith's submissions. To the extent that she has not accepted those submissions and has argued that aspects of the submitter's relief are not within scope, that is for reasons that Mr Goldsmith anticipated in his detailed submissions on the point (and endeavoured to address). Certainly, we did not identify anything as being raised by counsel for the Council on scope issues that we felt called for a further response from Mr Goldsmith. Put in terms of the classic statement of principle, we think he has had a "*fair crack of the whip"* on the point[23].

57. Accordingly, we decline Mr Goldsmith's formal request for an opportunity to respond to the Council's reply.

4.2. Scope Issues

58. The detailed way in which Mr Goldsmith addressed scope issues in his evidence, and the constructive way in which counsel for the Council responded enables us to focus on the issues in contention.

59. We record, however that we accept Mr Goldsmith's submissions that the following aspects of the relief sought by the submitter are within the scope of the submission as lodged and accordingly, we have jurisdiction to consider them on the merits:
    a. The change from a requested Large Lot Residential Zone to a Rural Lifestyle Zone;
    b. Consequential changes resulting from a submitter pursuing a Rural Lifestyle zoning to the provisions of the Chapters 22 and 27;
    c. Reduction of the area sought to be excluded from SNA E18C.

60. In each case, we agree with the reasoning set out in Mr Goldsmith's submissions.

[23] Refer *North Taranaki Environment Protection Association v Governor-General* [1982] 1 NZLR 312, 317 per Cooke J.

61. Turning to the balance of the scope issues, we accept in general terms that those issues have to be determined on the basis summarised at paragraph 14 of Mr Goldsmith's Part 2 submissions, namely that:
    a. An amendment is beyond scope if it goes beyond what is fairly and reasonably raised in submissions;
    b. That issue must be approached in a realistic and workable fashion rather than from the perspective of legal nicety;
    c. An amendment is admissible if it falls fairly between the Plan provisions as notified and the amendments requested in the collective of original submissions;
    d. Amendments may be made that are consequential on matters fairly and reasonably raised in submissions.

62. The first point that we need to address is what area, exactly, the submission covers.

63. Allenby's submission made the following statement:

    "The land which is the subject of this submission is the northern part of the Allenby Farms property, including Mount Iron and Hidden Hills. The property is located at Hidden Hills Drive, Wanaka, 9305, legal description: Lot 104, DP 412843, being approximately 90 hectares total area. The particular parts of that land which are subject to this submission are identified on the plans attached in Appendices 1-5."

64. Turning to those appendices, Appendix 1 showed 16 hectares sought to be excluded from SNA E18C, the balance of the notified area E18C (being some 32 hectares), and the area of 16 hectares sought to be added to the SNA. Appendix 2 showed the notified UGB and the amended UGB sought by the submitter. Appendix 3 showed an area on the south and west side of the ONF that the submitter sought to exclude from it, and areas on the northern and eastern margins of Mount Iron beyond the boundaries of the site that the submitter sought be included within the ONF. Appendix 4 showed the existing BRA on the northern side of State Highway 84 and the Proposed BRA on the western margin of Mount Iron, being an area of 6.9 hectares. Lastly, Appendix 5 showed the proposed Large Lot Residential area on the northern side of the site which entirely overlapped and extended beyond the 16 hectare SNA 'discard' area referred to above.

65. In summary, the detailed plans indicate relief is sought in respect of parts of the site beyond the northern area of the site that is expressly referred to, and indeed, beyond the site.

66. When we asked him about the wording of the submission, Mr Goldsmith agreed that there was a mismatch between the first sentence quoted above and the balance. He submitted that it was a legal nicety, because aspects of the submission clearly sought relief outside the northern area[24].

67. We agree that the text of the submission, to the extent that it suggests the submission is limited just to the northern part of the site, must give way to the maps that clearly indicate a broader focus. Applying the realistic and workable approach required of us, any interested parties would have looked at the maps attached to the submission and identified from them both the nature of the relief sought and the areas in respect of which that relief was sought.

[24] Quite apart from the mapped areas, the submission sought to alter the boundary of the Clutha River ONF where it extends southward to include the Hikuwai Conservation Area

68. We do not think, however, that it follows that the entire site was the subject of all of the relief sought. That would not be the message one would derive from looking at the attached plans. Rather, we think that different areas were relevant for different purposes. Specifically:
    a. The relief sought in respect of SNA's was confined to two 16 hectare areas, one on the northern part of the site sought be to excluded, and one on the south-western side of the site sought to be included. The submission sought that the balance of the notified SNA remain as is;
    b. The relief sought in respect of the UGB was to include all of the land shown within the amended UGB line. That included all of the Allenby Property, together with, among other things, the Little Mount Iron property, the Department of Conservation Reserve making up the balance of Mount Iron, and the properties on the south side of State Highway 54 the subject of our Report 16.2 (at Section 14)[25];
    c. The relief sought in respect of the ONF was to exclude the land on its western and southern fringes shown on the Plan attached as Appendix 3 to the submission, and to include the land also shown on that plan beyond the site. The balance of the ONF was not the subject of submission[26];
    d. As regards BRAs, the relief sought related to the existing BRA area, and to the proposed area of 6.9 hectares sought to be added as a BRA. Subsequently, however, that latter submission was withdrawn;
    e. As regards rezoning, any rezoning is limited to the area shown on the plan in Appendix 5, being the 19.6 hectares at the northern part of the site.

69. Against that background, the first additional element that we need to consider are the two areas, 2.3 hectares to the west of the notified SNA and approximately 1.1 hectares to the south of notified SNA, that the submitter had not sought be added to the notified SNA in its submission.

70. Mr Goldsmith argued that addition of these areas would be a consequential amendment addressing a minor mapping anomaly. He emphasised the reasoning in the submission for suggesting an additional area be identified as part of the SNA and argued that as the land belongs to the submitter, no other party can be adversely affected, and it cannot reasonably be said that any potential submitter would be disadvantaged. Potentially most contentiously, Mr Goldsmith submitted that the submission clearly related to the whole of the 90 hectare property and clearly sought to retain and enhance the ecological values of that land.

71. The reply submissions of counsel for the Council indicated agreement with addition of the two areas to the SNA[27].

72. We are concerned as to whether this is in fact correct.

73. We do not think addition of the two areas in question to the notified SNA are consequential on the relief sought by the submitter. That relief is quite specific as to the areas involved – and they are identified in the map set out in Appendix 1 to this submission.

74. Nor do we have clear evidence that the areas were excluded from the area mapped in Appendix 1 in error. While the Report annexed to Dr Lloyd's evidence identified the western area as being within the additional 'alternate' SNA area and as having ecological values

[25] It also sought to include the Hikuwai Conservation Area within the UGB, as discussed in our Report 16.1.
[26] As above, there was a separate submission relating to the ONF notation over the Hikuwai Conservation Area, addressed in our Report 16.1
[27] Refer Supplementary Legal Submissions in Reply for Council at 3.1-3.2

consistent with that, that report had been updated and revised. The earlier version of his report attached to the submission did not include it. Dr Lloyd's revisions appear to have followed from the further work he has undertaken on site (i.e. reflecting greater knowledge and understanding of the ecological values of the site) rather than suggesting his initial report was in error in failing to correctly record his then views. In addition, his report did not appear to support addition of the southern area. Our interpretation is that the most that could be said is that Dr Lloyd's investigations would now support inclusion of the western area within the proposed SNA.

75. Moreover, even if it is an error, it appears to have been an error by the submitter rather than by Council. We had no evidence that the latter was the case. Rather to the contrary, Mr Davis accepted that Dr Lloyd and his team had identified ecological values in the area of the site the submitter sought to add to the SNA that he was unaware of. This was not a minor mapping slip.

76. The other reasons Mr Goldsmith provided us with relate more to the potential that one or both areas might be added to the SNA pursuant to clause 16(2) of the First Schedule. That clause permits out of scope changes "*where such alteration is of minor effect, or may correct any minor errors".* We do not think this was in fact an 'error' for the reasons just discussed. Nor do we consider that adding an SNA notation to 2.3 hectares of land (or 1.1 hectare for that matter) might be described as a 'minor' change, even in the context of a 90 hectare site or a 38 hectare notified SNA. Viewed objectively, they are both reasonably substantial areas of land.

77. Nor do we think that the fact that the landowner is relaxed about the additional protection provided to these areas of land is decisive. As the Environment Court noted in *Power v Whakatane District Council*[28]*,* major changes might be made to plans with an owner's consent, especially if they are in favour of the owner, through that route. Rather, the test is whether the amendment affects (prejudicially or beneficially) the rights of some members of the public, or whether it is neutral. That might, in turn, be tested by reference to whether there was any realistic prospect that a third party, if given the chance, might wish to make a submission on the point.

78. The *Power* decision related to placement of an ONL line on Council land and a neighbouring landowner argued successfully that they were indirectly affected (and prejudiced) by the change.

79. The effect of the SNA notation is to ascribe greater protection to indigenous flora and fauna within the identified area. On the face of the matter, if the landowner and the Council agree, that might be seen to be a good thing. However, in this case, Mount Iron has recreational uses that potentially conflict with a high degree of preservation of ecological values and the material provided to us suggests that there are existing (for the western SNA area) and proposed (for the southern area) trails through those areas.

80. Given the evidence we heard of both the extent and importance of recreational access to the mountain, we are uncomfortable about recommending the additional SNA areas on a clause 16(2) basis. In relation to the southern area, there is the additional consideration that Dr Lloyd's evidence does not appear to support its inclusion, and so it would fail for that reason also.

[28] W7/2008

81. Many of the same issues arise in respect of the proposed 'Protection Area'. This was against a background where counsel had already referred us to the Environment Court's decision in *Infinity Group v QLDC*[29] which included an *obiter* comment implying that public facilities proposed to be provided as part of a subdivision development might be taken into account as positive environmental outcomes resulting from a variation or plan change.

82. Putting aside the extension of the protection area to include the Little Mount Iron property, which raises additional issues, Mr Goldsmith based his argument that the additional provisions were within scope on the basis that the submission identifies the land in question and seeks that the PDP be amended "*to enable the most effective and efficient use of its land*". Mr Goldsmith also relies on aspects of the submission requesting amendment to the boundaries of the SNA, and provisions relating to ongoing permanent management of the SNA.

83. Counsel for the Council did not specifically address the jurisdiction to entertain this aspect of the submitter's final relief in her reply submissions.

84. As above, while the submission identifies areas outside the proposed rezoning area, it did so for specific purposes. As we read it, those purposes did not extend to an enhanced management regime for ecological values.

85. Paragraph 9 of the submission, which Mr Goldsmith relied on, sought only to alter the boundaries of the SNA. It does not seek relief as to the management of the SNA.

86. Paragraphs 21 and Appendix 6 of the submission that Mr Goldsmith relied on, would clearly extend to cover enhanced ecological management provisions, but those provisions were specifically related to the area proposed to be rezoned, that is to say the 19.6 hectares at the northern end of the site. We do not think that they provide jurisdiction to extend the ambit of the ecological protection measures to the balance of the site.

87. Lastly, we think that the very general reference in paragraph 6 of the submission quoted above is altogether too non-specific to provide jurisdiction for the range of provisions now suggested.

88. Nor do we consider that the Protection Area can be justified as a consequential matter arising out of the proposed rezoning, as Mr Goldsmith contended. While, as he observes, a subdivision consent would be required to implement any rezoning, we consider it is drawing a very long bow to say that any rules governing the balance of the land that might be considered expedient to enable the subdivision to proceed are thereby within scope. We think the position is different regarding potential restrictions on use of the land, as opposed to positive requirements. The submitter suggested, for instance, a 'no build' covenant as part of the Protection Area provisions. Restricting the ability to build on the property is not a separate land use activity in the way positive requirements (e.g. in relation to control of wilding conifers) are.

89. Mr Goldsmith considered separately whether zone provisions governing part of the site might relate to the balance of the site. We agree that in theory, they might, but we think that the more important point is that that is not what the Allenby submission sought, and we regard that as the critical factor. As above, the provisions for active management and protection of significant ecological values and habitats related to the area of the sub-zone, and not to other parts of the site.

[29] See 010/2005

90. In summary, insofar as the submitter now seeks relief related to the broader Protection Area, we think that that is largely beyond the scope of the submission. That has implications for the overall proposal the submitter put to us because considerable weight was placed on the benefits of the active protection the submitter was proposing across the entire Protection Area.

91. We also acknowledge the considerable effort the submitter's team went to, to develop the proposal in this regard. Partly for that reason, but also to guard against the potential that the view we have come to might be found to be unduly legalistic, we will consider the merits of the proposal, both with and without the Protection Area provisions.

92. At the outset of this part of our report, we put aside the proposal that the Protection Area might be extended to include the Little Mount Iron property. Mr Goldsmith acknowledged that it was not possible to read the Allenby submission in a way that could reasonably be seen to refer to the Little Mount Iron property. As noted above, he referred us to other submissions that might possibly provide scope. However, we agree with the submissions of counsel for the Council that in each case, the relevant submitters did not seek relief that could reasonably be read to enable the enhanced management regime that the submitter is proposing for at Little Mount Iron.

93. In summary, we do not consider that there is jurisdiction to recommend relief in respect of Little Mount Iron. However, for the reasons set out above, we will consider the merits of the overall proposal the submitter suggests on the contrary assumption, to determine what if any difference it makes.

94. Lastly, as regards the proposed public access provisions, Mr Goldsmith commenced his submissions by seeking to put public access across the Allenby property in context, emphasising the extent to which it occurs on an informal/illegal basis already, and the obvious desirability of public access being regularised, if not enhanced. We think those are all fair points, supported by the evidence called for the submitter, and not seriously disputed by the Council. However, while they might provide context, they do not create scope for amendments to the PDP. For that, we have to look to the submissions, primarily of Allenby, but also potentially of other parties.

95. On issues of scope, Mr Goldsmith relied on the same provisions in the Allenby submission as those discussed above in relation to the proposed Protection Area. For essentially the same reasons, we regard those provisions as either constrained as to the area to which they apply (to the proposed rezoning area) or too generally expressed to be of assistance.

96. As regards the third party submissions Mr Goldsmith sought to rely on, we agree with the submissions of counsel for the Council[30] that those submissions do not seek new objectives or policies encouraging public access or the creation of structure plans providing for new trails. We do not think any of those submissions could reasonably be read to provide a jurisdictional basis for the provisions the submitter now seeks.

97. That is not necessarily the end of the matter. We will discuss the efficacy of the agreement to grant easements the submitter provided to us shortly. However, we conclude that we do not have scope to recommend relief by way of the provision for public access that the submitter suggested.

[30] Supplementary submissions for Council in Reply at 3.15

4.3. Environmental Compensation

98. One of the points that struck the Hearing Panel when we first reviewed the pre-circulated evidence for Allenby was that it sought to apply an 'environmental compensation' approach to the management of adverse effects on an ONF. While there are a number of cases that have examined the concept of environmental compensation, and the related concepts of offsetting and mitigation, in a resource consent setting[31], we thought that its application to a District Plan was a novel approach. We also wondered whether, even to the extent that parallels might be drawn with the previous authorities on environmental compensation, those authorities could still be relied upon after the decision of the Supreme Court in *EDS v New Zealand King Salmon* referred to earlier. Similar issues arose in respect of other submissions seeking rezoning within ONLs[32]. While clear distinctions could be drawn between each situation, we invited counsel appearing for the submitter in each case to provide us with any additional assistance they could on the point of principle. All counsel took up that invitation and we have had regard to the points made in relation to those other submissions, as well as to the supplementary submissions of Mr Goldsmith, in the discussion that follows.

99. Mr Goldsmith's submissions were that, in summary:
    a. Recourse to Part 2 of the Act is appropriate if not necessary;
    b. Part 2 includes an overall broad judgment approach;
    c. The *King Salmon* decision has limited the situation when that broad judgement approach can be applied, but not removed it entirely;
    d. *King Salmon* is authority for the proposition that Section 5 does not set an environmental bottom line per se, but rather leaves it open for planning instruments to set a higher threshold, in particular giving primary to preservation or protection in particular cases.
    e. Mr Goldsmith submitted in the alternative that the approach he advocated could also be supported through the application of Section 6(b) of the Act. We will return to Mr Goldsmith's alternative point below.

100. As already noted, Mr Goldsmith also drew our attention to provisions in the PDP which appeared to provide support for an environmental compensation approach.

101. Turning to the submissions for GBT, they largely parallelled those of Mr Goldsmith, while being more directed at the ability to consider positive effects.

102. As we will discuss in greater detail in our report on the GBT submission, it is both appropriate and necessary that we consider positive effects[33], but the more difficult question surrounds the ability of positive effects to 'compensate' for adverse effects on those aspects of the natural environment whose protection section 6 directs us to recognise and provide for.

103. The submissions of counsel for Mr Beresford reflect the focus in that case on a proposal for a Large Lot Residential development on part of the property that on a factual landscape assessment contains ONL values, and on the Court of Appeal's decision in *Man O'War Station Limited v Auckland Council*[34]. The Beresford submissions also introduced the additional element of the principles of the Treaty being relevant that we consider in detail in our Report 16.15.

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[31] E.g. *Royal Forest and Bird Protection Society Inc v Buller District Council* [2013] NZHC 1346

[32] E.g. GBT (Submission 583) and Michael Beresford (Submission 149)

[33] Quite apart from anything else, section 32 requires an assessment of costs and benefits of the different alternatives before us.

[34] [2017] NZCA24

104. We have already summarised the submissions that we received from counsel for the Council on this point[35].

105. In the Mount Iron context, the issue was whether positive benefits in terms of active protection of ecological values and enhancement of recreational values (through provision of legal rights of access formalising use of tracks across the site) might be taken into account in the rezoning decision.

106. We have no difficulty agreeing that the concept of an overall broad judgment has survived *King Salmon*, at least to some extent.

107. By the same token, we do not think that *King Salmon* can be limited to the situation where directive provisions of the NZCPS apply. As we think Mr Goldsmith acknowledged, the majority decision of the Supreme Court indicates that a plan may determine that protection of particular areas or particular resources is appropriate. Similarly, while, as Mr Goldsmith notes, the Supreme Court observed that the provisions of Section 6 do not give primacy to preservation or protection, it also said that provision must be made for preservation of protection as part of the concept of sustainable management and therefore (we infer) as one of the elements of the PDP.

108. This has been reinforced by the Court of Appeal in *Man O'War Station Limited v Auckland* Council[36] which emphasised that Section 6(b) "*clearly intends that such landscapes* [i.e. ONLs and ONFs] *be protected"*[37]. This was in relation to ONLs outside the coastal environment and therefore outside the ambit of the NZCPS.

109. The concept of 'environmental bottom lines' is a loaded one. The Supreme Court in the *King Salmon* decision talked about the directive provisions of the NZCPS it was considering as providing something in the nature of an environmental bottom line[38] reflecting the qualitative nature of policy provisions compared, for instance, to the precision of a numerical limit[39].

110. This was to distinguish them from being mere considerations, however weighty, which is how the majority of the Court characterised the approach of the Board of Inquiry decision under appeal.

111. Consideration of these issues also needs to take account of the guidance provided by the Supreme Court as to what "*inappropriate subdivision, use and development"* means in the context of Section 6(b) of the Act. Because that must now be taken as referring back to what it is that has to be protected, decisions like *Genesis Power Limited v Franklin District Council*[40] and *Meridian Energy Limited v Wellington City Council*[41] must now, we think, be regarded as highly suspect insofar as they appear to have utilised the overall broad judgment approach and a broad interpretation of what factors might make a particular development 'appropriate' to circumvent significant adverse effects on the natural character of the coastal environment and/or on ONLs.

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[35] Refer Section 1.7 above
[36] 2017 NZCA24
[37] At [61]
[38] Refer [2014] NZSC38 at [132]
[39] Such as, for instance, as is provided for in the National Policy Statement for Freshwater Management 2014
[40] A148/2005
[41] W031/2007

112. For ourselves, we think that the simpler and clearer approach is to apply the guidance of the Court of Appeal and ask ourselves whether the end result, should we recommend a submission be accepted, will or will not protect the relevant ONF or ONL. Recommended Objective 3.2.5.1 is relevant to that question, but cannot be determinative given that it is ultimately Section 6(b) that we have to ensure is being recognised and provided for.

113. It follows that we think that environmental compensation and/or positive effects associated with a rezoning proposal may be relevant to our consideration of particular submissions, but there has to be a nexus between the compensation/positive effects and the ONL and ONF that enables us to conclude that the landscape or feature in question is still being protected.

114. It follows in turn that we agree with the submission of counsel for the Council that while the balancing of negative outcomes against positive outcomes is relevant, it cannot be used to justify what would otherwise be a failure to follow the direction in section 6(b) (or section 6(c) of the Act[42]).

4.4. Relevance of Easement Agreement for Provision of Public Access

115. As already noted, when the submitter presented its case to us, Mr Goldsmith tabled an agreement to grant an easement purporting to confer both the right of way over identified trails and a "*right to roam*" over the defined Protection Area. Although the parties to the easement were the submitter and individuals associated with the submitter, the draft agreement was expressed to provide rights for the Council to enforce the agreement under the Contracts (Privity) Act 1982. The agreement stated that it could not be cancelled without the Council's written consent.

116. The agreement was stated to be conditional upon:

> "a. *AFLs* [standing for Allenby Farms Limited] *Proposed Mt Iron Park Rural Lifestyle Zone being confirmed and inserted into the District Plan as a consequence of District Plan review hearings held during 2015-2017; and*
>
> *b. Subdivision consent being obtained and being implemented (in full or in part) under the provisions of that zone."*

117. Although the form of agreement attached to Mr Goldsmith's submissions was unexecuted, he tabled an executed copy when he appeared before us.

118. In his submissions, Mr Goldsmith referred us to the *Infinity* case already noted above. As he observed, the Court there declined to place weight on a proposed stakeholders deed for two reasons, firstly that the deed had not been entered into and secondly that, as a private contract, there was nothing to prevent the parties to the deed from resiling from or cancelling the deed. The Court went on to say:

> *"Where a private promoter of a variation or plan change wishes that intended public facilities be taken into account as positive environmental outcomes, the better practice is for the obligation to provide them being imposed by rules or other implementation in the plan."*[43]

[42] Supplementary Legal Submissions for Council in Reply at [3.8]
[43] *Infinity Group v QLDC* C010/2005 at [104]

119. Mr Goldsmith emphasised to us that the Court has described it in terms of what was "*the better practice",* rather than holding such private agreements to be irrelevant to the decision before it. He submitted that by providing an executed document, the first concern of the Court had been addressed and that the involvement as a party enjoying benefits under the contract for the purposes of the Contracts (Privity) Act resolves the second concern.

120. Discussing it with Mr Goldsmith, we had an immediate concern that the conditions quoted above might mean that if our recommendation and/the Council's decision was anything other than the zone provisions sought by the submitter be inserted into the PDP, the agreement might be of no value. Mr Goldsmith said that that was not the intention, but rather the objective was to tie the Easement Agreement to the initial subdivision pursuant to any zone provisions that might be inserted into the Plan, thereby effectively leaving it to the landowner to decide whether the easement should apply by its decision whether or not to proceed with the subdivision.

121. Addressing the application of the *Infinity* case, we also discussed with Mr Goldsmith whether his suggested solution answered the concern of the Environment Court, given that the Council was still a party to the agreement, albeit through the mechanism of the Contracts (Privity) Act, and could decide to provide its consent. We suggested that he might think about making the agreement in favour of the public at large to overcome the point.

122. Mr Goldsmith tabled a revised executed Agreement to Grant an Easement with his supplementary submissions seeking to address these points. A copy of the amended Agreement to Grant Easement is attached at Appendix 4 to this Report.

123. Key amendments to the Agreement were:
    a. The Easement Agreement makes provision at Clause 1.2 for use of the rights it confers by bicycle owners, at the servient tenement's discretion. This reflects a discussion we had with Mr Goldsmith who said that both the landowner and the Department of Conservation preferred no bicycles on the mountain because of potential damage and safety issues, but he did not see it as a 'die in the ditch' matter.
    b. It provides at clause 1.9 that if the Council accepts that role, the registered easements might be created in favour of the Council;
    c. The conditions have been revised to address the point discussed above and to reinforce the role of the Easement Agreement as operating in tandem with any additional houses constructed on the property;
    d. The privity clause has been expanded so that the Agreement is expressed to be in favour of the Council, the Upper Clutha Tracks Trust and the general public. Mr Goldsmith admitted frankly that he was unsure as to the legality of the latter, which we had suggested as an option to overcome the apparent inconsistency with the *Infinity case*, but had added the Upper Clutha Tracks Trust for good measure. Counsel for the Council likewise expressed concern that the Agreement might be void for uncertainty, because of the difficulty in identifying who comprises the 'general public'. Counsel suggested that an easement in gross to the Council preserving rights of public access might be a more straightforward option.

124. The efficacy of the Agreement for Grant of Easement that we have been provided now needs to be assessed with reference to the Contract and Commercial Law Act 2017 which has absorbed the provisions of what was the Contract's (Privity) Act 1982 without substantive change. Section 12(1) of the 2017 Act states that it applies to promises contained in a contract that purports to confer a benefit on a person "*designated by name, description, or reference*

to a class, who is not a party to the deed or contract". It seems to us that the general public is a class of people, albeit a very large class, and that on the face of the matter, the promise should be enforceable. Certainly, we are not aware of any authority to the contrary and counsel for the Council did not identify any to us. Having said that, we are aware that in other fields of law, there are issues with obligations expressed to be in favour of a very large number of people. Thus, in the common law governing trusts, the determination of a trust could be referenced to the lives of a class of people but the class must not be so numerous as to make it impossible to ascertain the survivor[44]. However, that is in the context of a general presumption against trusts and other dispositions of property operating in perpetuity. There is no similar rule in respect of contracts that take immediate effect, but last a long time.

125. Potentially more problematic is the ability the parties to the agreement have under Section 14(1)(a) of the Contract and Commercial Law Act 2017 to cancel it without reference to the third party beneficiaries, but from our reading of the Act, the preconditions for application of that section would enable the Council to prevent it being cancelled. At a more practical level, if the Council is concerned about the enforceability of the easement agreement, it is drafted in a way to enable the Council to step into the shoes of the servient tenement in the easement as registered i.e. the option that Ms Scott suggested.

126. We agree with Mr Goldsmith's submission that the *Infinity* decision does not preclude reliance on an agreement such as this. While we would respectfully concur with the observation of the Court that the better practice is to have relevant provisions visible on the face of the PDP, that implies that a private agreement may suffice, depending on the circumstances.

127. In summary, while the inter-relationship between the proffered Agreement and other aspects of the Allenby relief is not without complexity, we think that it confers rights that we ought properly to take into account given that in our view, our initial concerns about the way in which the conditions in the agreement were framed has been overcome.

128. We should note, however, that the additional benefit conferred in respect of potential access to the mountain by cyclists (almost by definition, mountain bikers) is in our view of dubious benefit given the conditionality with which the benefit is conferred.

129. We will therefore proceed on the basis that notwithstanding our view that the proposed sub-zone provisions related to public access are out of scope, the Easement Agreement creates positive effects that we ought to consider.

4.5. Significance of SNA E18C

130. The submitter seeks to alter the boundary of SNA E18C to delete a total of 12.3 hectares from it. As above, this is a reduction in the area sought be to deleted from the SNA compared to the submission as originally lodged.

131. Also, as discussed above, this relief is in the context of a proposal to add the somewhat larger area that both Dr Lloyd and Mr Davis agree has superior ecological values to the proposed 'discard' area.

132. The purpose of identifying SNAs on the planning maps is to identify areas of significant indigenous vegetation and significant habitats of indigenous fauna in terms of recommended Policy 3.3.17 and thereby to assist achievement of recommended Objective 3.2.4.1 of the PDP.

[44] A rule prompting the use of so called '*Queen Victoria*' clauses – tying the termination of a trust on the death of the last remaining survivor of Queen Victoria alive at a particular point in time

More generally, identification of SNAs on the planning maps forms part of the PDP's response to the instruction in Section 6(c) to recognise and provide for the protection of such areas and habitats as a matter of national importance. The key question, therefore, is whether as a matter of fact the areas sought to be deleted qualify as 'significant'. Our consideration of this matter is informed by the expert evidence of Dr Lloyd for the submitter, and Mr Davis for the Council summarised above.

133. The pre-circulated evidence in chief of Dr Lloyd did not seek to answer this question. Rather, Dr Lloyd's conclusions were expressed in terms of whether the alternate SNA that would result from acceptance of the submitter's proposal "*would achieve significantly greater protection of* ecological *values than the notified Mt Iron SNA C"*[45]. It was a relativistic assessment of ecological merit. The balance of Dr Lloyd's evidence in chief reflected that focus.

134. It was only in the summary of his evidence that Dr Lloyd presented that he expressly advanced the opinion that the kanuka woodland in the 'discard area' is not ecologically significant[46].

135. In that summary, Dr Lloyd acknowledged that while not significant, the kanuka woodland does have ecological value. He gave the example of one of its values is as a habitat for indigenous forest birds and invertebrates.

136. The fact that these opinions only emerged in Dr Lloyd's summary rather than being central elements of his evidence in chief raises questions in our mind as to how much weight we should give them. The impression we had that this was something of an afterthought in Dr Lloyd's analysis was rather reinforced when we discussed with him the reasons why he held this view. He told us that, in his opinion, an SNA must have all of the aspects of significance that one would expect for the site – larger more complex habitats, turf vegetation, kanuka woodland on the upper slopes, coprosma on the southern slopes. Later in our discussion with him, he said that that was his primary filter, but other areas might be added if practical to do so.

137. At paragraph 52 of Dr Lloyd's evidence in chief, he stated that the kanuka woodland on the lower northern sides "*does not need to be included within Mt Iron SNA C, apart from where it is an integral component of the gully that should remain within the SNA".* We note in passing that the gully Dr Lloyd refers to is the area that has been reinserted into the SNA in the submitter's revised relief. When we queried that particular passage in his evidence in chief, Dr Lloyd confirmed that the inference we had drawn from it was correct, and that it is optional where you draw the line at the edge of an SNA. He also agreed that it might be considered somewhat similar to the process that we have discussed in our Report 16.1 of identifying boundaries to ONLs when the line between an ONL and surrounding non-outstanding landscapes is 'fuzzy', at least to an extent.

138. Our discussion with Dr Lloyd suggested to us that while his emphasis on an SNA having all relevant values might be the primary filter, as he put it, it does not assist identification of the boundaries of an SNA. In some cases, those boundaries will be obvious, such as where an area of indigenous vegetation adjoins exotic pasture land or urban development. In other areas, such as this, the boundary might not be quite so obvious. There, as Dr Lloyd agreed, we have a choice. It seems to us, applying the admittedly imperfect analogy with fixing ONL boundaries, that a factor in making that choice might be whether the area in question

[45] Lloyd Evidence in Chief at paragraph 20
[46] Lloyd Summary of Evidence at paragraph 20

contributes to the ecological values of the balance of the SNA. Dr Lloyd's evidence suggested to us that the 'discard' area does make an important contribution to those ecological values.

139. One reason for Mr Davis forming the view that the 'discard' area is significant is that in his view, it satisfies the tests of representativeness (one of the accepted criteria of ecological significance). He based that view on vegetation modelling indicating that kanuka was one of the main species present within the pre-settlement vegetation of Mt Iron. Dr Lloyd emphasised the uncertainty of such models and expressed the opinion that the most likely natural, and thus representative vegetation on deeper soils on the lower slopes of Mt Iron would have been dry hardwood forest.

140. Dr Lloyd noted Mr Cleugh's evidence that there was very little kanuka cover on the steeper northern slopes when Allenby purchased the property, whereas there has subsequently been significant regeneration. However, that suggests there was some kanuka previously, and Mr Cleugh told us that some form of blight had killed most of the manuka on Mt Iron in the 1950s and 1960s, prior to his arrival there. While obviously not an expert opinion, Mr Cleugh presumed there must have been mixed manuka/kanuka originally on the site because the kanuka regenerated naturally[47].

141. Ultimately, the difference in expert opinion may be more apparent than real because Dr Lloyd did not suggest there was likely to have been no kanuka on this part of Mt Iron. For his part, Mr Davis did not suggest that kanuka was the only species historically present on the mountain (or this part of the mountain in particular). He likewise accepted that the current environment lacks the ecological diversity of the original woodland community[48].

142. We were also concerned that Dr Lloyd may have inappropriately constrained his consideration as to whether the ecology of the 'discard' area is representative because he observed to us that he had always maintained that the quality of what is left [on a site] is important to representativeness. We observed to Mr Goldsmith that Dr Lloyd's approach might be seen to be inconsistent with the High Court's decision in *West Coast Regional Council v Friends of Shearer Swamp Inc*[49]. While Mr Goldsmith addressed this issue in his supplementary submissions, we fear that he misunderstood the concern that we had expressed, because he sought to argue that Dr Lloyd's overall assessment of the site had been undertaken consistently with the approach mandated by the Environment Court in the *Shearer Swamp* litigation, and approved by the High Court.

143. Counsel for the Council put her finger on the point in her submissions in reply, noting that the Environment Court had determined that the purpose of the criteria employed by the expert witnesses for the Regional Council and for Solid Energy was to capture the best representative examples, in that case, of wetlands. As she noted[50], this approach was rejected by the Environment Court, which held that there was no basis to focus on the best examples.

144. Counsel for the Council recorded that position as not being challenged in the High Court. We think that that rather understates the position. Our reading of the High Court decision is that the approach the Court had confirmed was challenged and approved by the High Court[51].

[47] Cleugh Summary Evidence at 3
[48] Davis Rebuttal Evidence at 3.9-3-10
[49] [2012] NZRMA 45
[50] Supplementary Submissions in Reply for Council at 3.14
[51] See for instance the High Court's summary of the argument for the appellant at [64]-[65]

145. The upshot is that we were left with a concern that Dr Lloyd may have inadvertently constrained his inquiry in a way that is inconsistent with the *Shearer Swamp* decisions.

146. The final point we should address is the relevance, or otherwise, of the illegal clearance of kanuka within the area the subject of submission and the District Court's findings in its subsequent sentencing decision[52].

147. Mr Goldsmith made it clear that the submitter had assessed the ecological values of the site as if the legal clearance had not occurred. Although counsel for the Council queried this approach, we agree that this was appropriate. The alternative would have been to take the site as it currently exists, which would have meant that the submitter would take advantage of its previous illegal action[53]. Relevantly, however, the District Court found that the cleared indigenous vegetation was both extensive and ecologically significant[54].

148. While the Court did not need to consider the ecological significance of the indigenous vegetation that remained on the site in the vicinity, it is difficult to conceive that it would have reached a different opinion in respect of that vegetation.

149. When we discussed that finding with Mr Goldsmith, he submitted to us that the District Court had not had the same degree of inquiry as we did. The District Court had before it an agreed Statement of Facts, a copy of which was provided to us. While that Summary is not particularly illuminating, it is apparent from the Court sentencing notes that the Court had available to it the reports of both Ms Teele (Mr Davis's colleague) and Dr Lloyd. We consider that we should not lightly put the Court's conclusion aside.

150. Our own review of the evidence suggests to us that at least in the area the subject of submission (the northern extent of SNA E18C), the boundary of the SNA is appropriately drawn. The findings of the District Court, as above, reinforce that view in our minds.

151. We note we have given brief consideration to some intermediate position. The aerial photographs attached to the Allenby submission show areas of exotic grassland within the notified SNA that could potentially be excluded from it. However, we heard no evidence that would support compartmentalisation of the notified SNA in this way and we think it would be unsafe to assume that exotic grassland surrounded by indigenous kanuka is devoid of ecological value given that the report attached to Dr Lloyd's evidence identified a record of McCann's skink being found in one of the grassland areas in question. Accordingly, we take that possibility no further.

4.6. Conditions on Submission Seeking Expansion of SNA

152. As we have endeavoured to make clear, the submitter presented its submission on the boundaries of SNA E18C as a package involving, on the one hand deletion of the 'discard' area from the SNA, and on the other, expansion of the SNA to cover additional areas at its south-western margin.

153. Dr Lloyd and Mr Davis agreed that the ecological values of the additional area that had been identified at this submission at Appendix 1 (Appendix 3 to this Report) justified its inclusion

[52] *QLDC v Allenby Farms Limited* [2017] NZDC 3251 - noting that the defendant had entered a plea of guilty
[53] Compare *Glenfield Ratepayers and Residents Association v North Shore* CC A138/2002 at 65 holding the existing environment is represented by existing **lawful** activities
[54] At paragraph [51]

within the SNA. The submissions of counsel for the Council[55] were that if we conclude on the evidence that the alternative SNA area is significant, we must recommend identification of it as an SNA.

154. The submitter sought specifically to avoid the possibility that we might recommend retention of the existing SNA boundary at the northern end of the site, and addition of the alternative SNA area. The submission contained the following statement:

"This submission specifically does not seek partial grant of relief. The SNA Extension and SNA Reduction are proposed to work in tandem. The ecological significance of this area is best served by this particular boundary adjustment. This submission specifically provides that, if the SNA Reduction is not approved, the SNA Extension is withdrawn."

155. The question we have to consider is whether that statement precludes our recommending rejection of the submission seeking reduction of the SNA, but accepting its extension. It seems to us that it does.

156. The starting point is to observe that the approach taken by the submitter in this case, suggesting amendments to the Plan on a conditional basis, is not one that the Hearing Panel has ever seen before. Neither Mr Goldsmith nor Ms Scott, appearing for the Council, referred us to any authority that would assist us, and we are not aware of any authority that would govern the position.

157. We have therefore considered the point from first principles. Our ability to recommend that any area be identified as an SNA on the planning maps, where that is not currently the case, depends on that relief being sought in a valid submission. We have already discussed the more general submissions that have been filed on this point and accepted the submission of counsel for the Council that they do not provide us with jurisdiction to identify new SNAs on the planning maps[56]. Accordingly, given the amendment to the SNA boundary would not satisfy the tests in clause 16(2) of the First Schedule[57], the only basis on which we might make such a recommendation is the Allenby submission.

158. If the Allenby submission seeks relief on a conditional basis, we do not think we can accept the relief and ignore the conditions.

159. While the condition is expressed in the part of the submission headed "*reason*", it is clearly intended to clarify and limit the relief sought. We do not think the additional statement that if the SNA reduction is not approved, the submission seeking the SNA Extension is withdrawn was necessary to achieve that end result, but clearly, it reinforces the position in our minds. If the submission is withdrawn, it cannot be relied upon to provide jurisdiction to amend the Plan.

160. Nor, we observe, can a submission be resurrected, once formally withdrawn[58].

[55] Supplementary Legal Submissions in Reply for Council at 3.11

[56] Refer Section 3.5 above

[57] We think it is clear that the failure to identify the area mapped in Appendix 1 to the submission is part of SNA E18C is neither a minor error nor, were it to be recommended over the landowner's objection, would it have minor effect

[58] We say 'formally' to exclude unintended errors in communications, rather than indicating a need for any great formality.

161. Before we leave the point, there is one further aspect that we should address. The condition enabling us to entertain extension of the SNA is approval of the "*SNA Reduction"*. The reduction in question is clearly the reduction to exclude the 16ha identified in Appendix 1 to the submission. (Appendix 3 to this Report).

162. When the submitter appeared however, its ecological evidence (from Dr Lloyd) and legal submissions sought that a more limited area of the SNA as notified (some 12.3ha) be "*reduced"*, reflecting Dr Lloyd's assessment of the ecological merits of the gully he discussed in his evidence[59].

163. We have considered whether, as a result, even if we were to recommend reduction of the SNA in the manner the submitter sought at the hearing, the precondition for our having scope to entertain the corresponding extension of the SNA might not have been triggered, and the submission seeking that extension withdrawn. We have decided that that would be an unduly legalistic reading of the Allenby submission.

164. The intention is that the reduction sought operate "*in tandem"*, but we do not think to the extent that the submitter is not free to proffer a reduced SNA Reduction in exchange for the same SNA Extension.

165. We have approached the matter, however, on the basis though that if we should deem it appropriate to recommend retention of all or part of the SNA 'discard' area we should regard the SNA extension as "*off the table"*, unless the difference between our recommended position and that put to us by the submitter is de minimis.

4.7. Swapping SNAs

166. As above, part of the submitter's case hinges on the ability to 'swap' an area currently identified as an SNA with an alternate area that Dr Lloyd identifies as qualifying as an SNA on the basis that the ecological values of the latter are superior to the former.

167. We have concluded the area sought to be excluded from the notified SNA is 'significant' so as to quality it as legitimately forming part of the SNA as defined. Counsel for the Council submits to us[60] that that is the end of the matter.

168. In summary, we agree with that submission. As counsel for the Council points out, the Court of Appeal have made it clear that in the application of Section 6(b) of the Act, the decision as to whether a particular feature or landscape is an ONF or ONL (as applicable) is a technical decision on the evidence[61].

169. In particular, the Court of Appeal has told us that the question of what restrictions apply to land that is identified as an ONL, and what criteria might be applied when assessing whether or not consent should be granted to carry on an activity within the ONL arise once the ONL has been identified[62].

170. We agree with counsel for the Council that the same logic must apply to identification of areas of significant indigenous vegetation or significant habitats of indigenous fauna (i.e. SNAs).

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[59] Refer Section 3.5 of this Report
[60] Supplementary Legal Submissions in Reply for Council at 3.12
[61] *Man O'War Station Limited v Auckland Council* [2017] NZCA 24
[62] At [62]

171. Even if this did not follow inextricably from the logic of the Court of Appeal's decision, it is reasonably clear from the *Shearer Swamp* cases already discussed that this is what is required, that is to say identification of SNAs is an ecological issue, not a planning question[63].

172. This is in our minds reinforced by the fact that unlike section 6(b) of the Act, section 6(c) does not make reference to inappropriate subdivision, use and development – the sole focus on section 6(c) of the Act is on recognition and provision for the protection of identified areas.

173. We have not overlooked recommended Policy 3.3.18, and the related provisions of Chapter 32 noted above, but we think that that policy only comes into play once we are satisfied that adverse effects on an SNA cannot reasonably be avoided or remedied.

174. Were this not the case, then we think the recommended Policy would be inconsistent with Part 2 of the Act, as clarified for us by the Court of Appeal in the *Man O'War* decision. Moreover, Mr Goldsmith did not seek to rest his case on the biodiversity offsetting principles given policy recognition in Chapter 32. His case was put expressly on the basis of Part 2 of the Act.

175. In summary, we agree with the submissions for the Council on this point. That conclusion leads logically to the next issue, regarding the effects of what is proposed.

4.8. Nature and Scale of the Adverse Effects from Proposed Rural Lifestyle Development

176. The competing evidence on this point is principally that of Mr Davis and Ms Mellsop, for Council, and Mr Baxter and Dr Lloyd for the submitter. We have summarised their evidence above.

177. The proposed rural lifestyle development would occur in an ONF. Consideration of the effects of the proposed rural lifestyle development on the northern side of the ONF needs to factor in the residential development that has already occurred on Mt Iron. As best we could ascertain it, within the defined ONF, there are three existing homes[64] on the property the subject of the submission and one authorised building platform on the neighbouring Little Mt Iron property that has not yet been built on (but which should assume will be built on for the reasons Mr Goldsmith discussed with us, and which we address further below). However, there are a number of houses constructed on the slopes of Mt Iron to the north of Allenby property, but beyond the boundary of the ONF. As discussed in our Report 16.1, Mr Goldsmith submitted to us that a 'real world' assessment of the effects of further development on the outstanding natural feature that is Mt Iron would include consideration of the adverse effects of those additional houses. As stated in our Report 16.1, we agree with that submission. Indeed, we think this is a situation where the PDP fails to properly implement Part 2 of the Act. We have recommended in Report 16.1 that that be rectified. However, for present purposes, this is clearly a situation where Part 2 of the Act should guide our consideration of the Allenby submission.

178. The reason this is important is because it is not just that there are existing houses on Mt Iron, but that those houses have not been designed or located in a manner calculated to ensure that the adverse effects on Mt Iron are less than minor – or at least, if that was the intention, it has not been successful. Mr Baxter told us that in his view, not one of the houses in the Hidden Hills subdivision would pass a non-complying activity test, because of their colour and

[63] That was the interpretation of the effect of those divisions recently in *Royal Forest and Bird Society Inc v Christchurch City Council* [2017] NZHC 865.
[64] Plus the Council's water storage reservoir

height. We agree. The impression we formed during our site visit was that the label given to the Hidden Hills subdivision is particularly inapt.

179. Mr Baxter told us that the design controls he had recommended to Allenby would ensure that the development would be considerably more recessive than Hidden Hills.

180. They would need to be. Our concern is that the Hidden Hills development has used up all of the absorptive capacity of that part of Mt Iron (and then some).

181. As already noted, Ms Mellsop observed that it was difficult to determine the likely visual effect of additional residential dwellings on the property without profile poles. Whether seeking to respond to that concern or merely to assist the Hearing Panel, by the time of our site visit, the submitter had installed profile poles on each house site. The profile poles were useful because they conveyed the impression to us that house sites 10 and 11 at least would sit high on the hillside above the existing residential development. We have to be careful, however, not to place too much weight on the impression created by the profile poles of the visibility of homes on those site, because Mr Baxter told us that the profile poles for those sites were 5.5 metres, whereas the proposed maximum height of the buildings was 3.8 metres. We had no reference point enabling us to determine how much of the proposed houses would appear over the vegetation, particularly bearing in mind that the existing kanuka would be cleared.

182. Before considering the balance of the proposed new house sites, we should also note the implications of Mr Davis's evidence that house sites 10, 11 and 12 are located in the area where the kanuka is most dense and will accordingly require the greatest level of clearance of kanuka if the proposed development is to proceed. We also have to consider the implications of the fact that the Environment Court has ordered replanting of kanuka within the bounds of proposed building platform 10 and directed that once replanted, the landowner cannot do anything to those plants.

183. Mr Goldsmith submitted to us that this is the submitter's problem, and if it is necessary to make application to the Court to amend those orders, that is an issue the landowner will have to address with the Court.

184. We appreciate that this is something of a 'chicken and egg' problem for the submitter, but we are concerned that were we to recommend acceptance of the submitter's development proposals, we could be seen as undermining the intent of the Environment Court's orders. We also observe that to the extent that this is a problem for the submitter, it is a problem of the submitter's own making.

185. Mr Davis did not have the same concern about site 13. As Mr Baxter notes however, this site, along with the adjacent site 12, has the additional factor of being visible from the existing walking trail up from Hidden Hills Drive. Road access to both sites would also add an additional level of domestication in this area of the ONF. Given the numbers of people utilising the walking trails (in this area, lawfully), this is a relevant consideration telling against both sites.

186. Ms Mellsop also expressed concern about the implications of the proposed replanting around new houses constructed on the hillside and whether the resulting islands of different indigenous species (it is not desirable to replant kanuka because of its flammability) would make the proposed sites more obvious. Having initially submitted to us that Ms Mellsop was not qualified to comment on ecological matters, Mr Goldsmith accepted we think that she could comment on the appearance of the proposed replanting. For his part, Dr Lloyd accepted

that the greener foliage of the recommended species would be different from the darker brown colour of the kanuka, but thought that the planting of ecologically indigenous tree species other than kanuka would provide a superior outcome. In his view, the gradual spread of a range of indigenous trees would offset the contrasting island effect over time. As above, Mr Davis likewise thought that there was potential for the replanting to be visibly different, depending on what species ultimately are chosen.

187. Mr Baxter took a different view, suggesting that indigenous planting around the houses of Hidden Hills could not readily be detected. We found them a mixture. Some of the Hidden Hills homes are nestled in the kanuka, and provide no indication how what is now proposed would look. Indigenous planting in other areas is certainly noticeable. No doubt, there are others that we did not note (rather demonstrating Mr Baxter's point, in part at least).

188. We find that there is at least potential for the proposed replanting to be visibly obtrusive, notwithstanding its ecological merit.

189. We also need to factor in that this effect will operate in combination with the adverse effect of the houses themselves on the natural values of the ONF.

190. More generally, we think that there is a good argument that identification of Proposed Building Platforms 10, 11 and 12 is inconsistent with our conclusion that the area is part of an SNA. In any event, given the cumulative effects of further development overlaid on the existing residential development on this part of Mt Iron, we find that making provision for those building platforms, 10-13 inclusive, and the roading and associated development that would follow from their identification, would not recognise and provide for the protection of the Mt Iron ONF. Such further development would, in our view, be inappropriate.

191. That conclusion does not, however, mean that we should exclude consideration of the rezoning proposal in respect of the balance of the proposed building platforms, being the eight new platforms, and the three platforms proposed to be identified around the existing houses on the hillside.

192. Mr Baxter's analysis of the development from different viewpoints suggests that these sites sit in a different visual catchment to those further to the east and should be considered separately.

193. Turning then to the more western groupings of house sites, as Mr Baxter noted, these have largely been identified to take advantage of small clearings in indigenous kanuka. Accordingly, Mr Davis did not have the same intrinsic objection to their identification. The corollary, however, is that the house sites appear to be more visible, particularly from the west. Mr Baxter told us that the sites are located within localised undulations within the wider land form, with the kanuka that surrounds these building platforms providing partial screening.

194. We had the same difficulty getting a clear understanding of the visibility of the proposed house sites, due to the profile poles being (in this case one metre) higher than the proposed maximum house heights. However, it certainly appeared to us from the extent of the profile poles we could see from public viewing points that significant areas of some houses would be readily visible (subject to colour and other techniques to reduce their obtrusiveness).

195. Mr Baxter emphasised to us that the proposed house sites are at a similar elevation to existing houses forming part of the Hidden Hills development. We accept the point, but the

topography of Mt Iron means that the western sites do not read as being in the same visual catchment as Hidden Hills. Rather, they would appear to step up the hill, above the existing residential development on the lower part of the mountain.

196. There are two ways one can look at that fact. It might be seen as a natural progression of the existing development. On the other hand, it might be categorised as exacerbating the cumulative effects of the development that has already occurred on the lower slopes of the mountain. In the context of an ONF, we think the latter is the more appropriate characterisation.

197. Mr Baxter was of the opinion that the effects of the accompanying roading would be minimised by the design process adopted, including use of existing access roads. The latter are, however, little more than farm tracks on this side of the mountain, so we also need to factor in the increased domestication inherent in formed roadways.

198. We regard the question of these house sites and the accompanying development as being rather more finally balanced than those to the east where the effects on the visual aspects of the mountain's landscape qualities are combined with a greater level of adverse ecological effects.

199. To assess the implications of enabling rural lifestyle development on this part of the mountain properly, we have to consider the likely effectiveness of the proposed constraints on development that Mr Baxter emphasised in his evidence. Although considerable thought was clearly given to those requirements, the fact that previous developments have apparently been found to meet the requirements on developments affecting ONFs does not engender confidence.

200. Mr Barr drew attention to the detail of the proposed zone provisions and suggested that they were "extraordinary *and excessive in terms of District Plan drafting"*[65]. Mr Goldsmith criticised this view suggesting that Mr Barr had failed to appreciate the extent of the vision being pursued by the submitter; in particular, he had failed to appreciate the extent that this was far more than a development of 12 new residential units. It was an integrated proposal to enhance key attributes of the Mt Iron outstanding natural feature and to provide net benefits to the community.

201. We think that Mr Goldsmith rather seized upon Mr Barr's opening comments as a means to emphasise the breadth of the submitter's proposal. Like Mr Barr, we think there is much to commend in the proposal. It is well considered, and the submitter's team have responded constructively to our queries about aspects of it, inserting desirable improvements such as the proposed 'no-build' covenant over the Protection Area. However, and also like Mr Barr, we are left more than a little uneasy regarding the extent of the proposed regulation and whether it will be effective in practice. In his rebuttal evidence, Mr Barr made the telling observation[66] that where the resource is of such sensitivity that the proponents are requesting onerous conditions such as those that are being proffered "*then perhaps it must be realised that the proposed development, or development enabled by the requested zone, is likely to exceed the limits of the resource".*

202. We think the sensitivity of the site to cumulative effects is a key consideration. We do not find Ms Mellsop's description of it being "highly sensitive" to those effects over-stated.

[65] Barr Rebuttal Evidence at 12.19
[66] At 12.36

203. Mr Goldsmith did not shrink from the fact that there would be adverse effects. We queried whether the suggested policy wording reference (in the attachment to Mr White's evidence) to minimising adverse effects was appropriate for an ONF, and whether the extent of permissible adverse effects needed to be qualified. Mr Goldsmith responded that avoidance was not possible, and that acceptance of the proposal entailed acceptance of a level of effects. Neither the PDP nor section 6(b) of the Act require complete avoidance of all the adverse effects. More concerning though, Mr Goldsmith advised (and subsequently confirmed in his supplementary submissions) that it was not possible to quantify what the level of adverse effects will be in the plan provisions that would govern the proposed development.

204. In the end result, while we consider Ms Mellsop's conclusion (that the proposed structure plan will result in a high level of adverse effects[67]) perhaps a little overstated as regards the western area of the proposed sub-zone, we have concluded that the proposed developments on that side of the site also fail to protect the Mt Iron ONF.

205. The matter is, however, sufficiently balanced as to require further consideration under the next heading.

4.9. Effect of Taking Account of Positive Benefits

206. We have concluded above that positive benefits might be relevant to our recommendation on the proposed rezoning. We also need to consider the alternative argument of Mr Goldsmith that the nature of those benefits in relation to the particular attributes of Mt Iron means that the proposed development is not inappropriate in its context.

207. We start on the basis of our finding that we can and should take into account the benefits conferred by the executed Agreement to Grant Easement. That then requires analysis of the nature and extent of those benefits. Without labouring the point, Mr Goldsmith made it clear that the general public makes use of the Allenby property to a far greater extent than is permitted by the legal easement rights across the property held by the Crown (i.e. Department of Conservation) and Council. Mr Cleugh described the position as being one where:

> *"The reality is that Mt Iron is now treated by the general public as if it were a public park or recreation reserve."*[68]

208. In support of that observation, Mr Cleugh noted that he might see up to 100 people wandering over the Allenby property in any given day. Those people include, he said, mountain bikers, walkers, rock climbers and other outdoor enthusiasts.

209. The submitter did not pitch its case on the basis that if its rezoning proposal were not achieved, it would take steps to prevent public access to its land other than as authorised by registered easements. But clearly, it would be well within its rights to do so.

210. We have therefore approached consideration of the issue on the basis that we should consider the "*existing environment"* as excluding the informal access to the Allenby property that the public currently enjoys. That then requires consideration of the extent to which the rights that would be conferring by the Easement Agreement provide real benefits to the community. Dr Galloway gave evidence for the submitter on the value of Mt Iron as a recreational resource to the community. It is clear that the benefits are considerable. Dr Galloway's evidence was

[67] Mellsop Rebuttal Evidence at 3.28
[68] Cleugh Evidence in Chief at 25

somewhat less specific on the scale of the incremental benefits of access to the Allenby Property other than by utilisation of the registered easements. When we queried that point, Dr Galloway referred us back to the Department of Conservation's quantification of numbers utilising its tracks on the mountain. We infer that precisely because access to the Allenby property is unregulated, its benefits are unquantified, and possibly unquantifiable.

211. In summary, while we accept in principle that a greater degree of public access to the Allenby property than is provided by the registered easements would be desirable, and would provide additional benefits by way of recreational amenity, we have no basis on which to quantify the extent of that benefit. We also record the point previously made that because discretion is retained in the Easement Agreement over potential access by mountain bikers, we cannot assume that mountain bike access to the mountain would occur. Even if it occurred, Dr Galloway's evidence was that the conflict between mountain bikers and walkers (and the accompanying health and safety issues) means that it would not necessarily be beneficial. Certainly, it would need to be carefully managed

212. Turning to ecological values, Mr Barr drew our attention to the restrictions in the PDP on clearance of indigenous vegetation outside an SNA. His view was that while the status quo would not provide the active ecological management contained within the Allenby proposal, the extent of the benefits it provided were over stated compared to the loss of significant vegetation in the northern part of the site. While the rules governing clearance of indigenous vegetation have been recommended to be amended, Dr Lloyd's evidence of the values of the 'alternate' area suggest that any significant clearance would still require a resource consent (as a discretionary activity) by reason of its height, if nothing else.

213. We also have to take into account our finding as above that insofar as those active ecological management benefits were proposed outside the proposed zoned area, they are beyond the scope of the submission.

214. Mr Barr also drew to our attention the extent of ecological management required in conjunction with development of the existing approved building platform on Little Mount Iron. Mr Goldsmith suggested to us that for the purposes of the "*existing environment"* we could safely assume that that consent requirement will be triggered because the building platform will be built on[69]. We accept Mr Goldsmith's point and therefore agree with Mr Barr's reasoning that the ecological benefits of including Little Mt Iron within the overall proposal even if there were scope (which we have held not to be the case) are somewhat limited.

215. If we are wrong, and there was scope to impose the positive obligations related to pest control (including in particular control of wilding conifers), the position is more finally balanced, at least from a section 6(c) perspective. The position is less obvious than when considered from a pure landscape perspective, in relation to section 6(b). While ecological values are relevant to the experience people have of Mt Iron, that experience is not necessarily eroded if species establish that are not indigenous or representative. There are, for instance, many ONLs in the District with large areas of pine forest cover. Likewise, while both residents and visitors derive much recreational amenity from access to the mountain, we wonder whether the principal experiential value (aside from the exercise) is enjoyment of the views of the surrounding countryside en route, rather than the experience of walking through areas of indigenous kanuka. Mr Baxter did not analyse these broader values of Mt Iron from a landscape perspective in any detail so as to provide us with assistance on the point.

[69] Applying the well-known test in *Queenstown Lakes District Council v Hawthorn Estate Limited* CA45/05

216. Mr Goldsmith emphasised in his submissions to us the lack of effect the proposed rural lifestyle development would have on views of the mountain from the areas where it is most visible and most appreciated. He makes a valid point. The topography of the mountain means that views of the proposed development are restricted to particular sectors of the compass and that, for instance, the most dramatic views – of the 'upstream' side of the roche moutonnee - would not be affected.

217. On the other hand, one of the reasons for identifying an ONF is so that the feature as a whole is protected. We have found that this would not occur if the proposal were approved. In addition, while the proposal involves suggested benefits to the ecological and recreational attributes of the mountain, it would have adverse effects on natural character, landscape and visual amenity values that in our view are significant (contrary to recommended Objective 3.2.5.1).

218. In summary, even if the entire package of positive benefits were within the scope (which we have found not to be the case) and therefore able to be bought to account, we do not find the proposal overall to be either the most appropriate way to achieve the objectives of the PDP or consistent with Part 2 of the Act.

4.10. Amending the UGB Line

219. Mr Goldsmith did not present submissions on this aspect of the Allenby submission. In effect, it was overtaken by the shift in relief, to seek a Rural Lifestyle Sub-Zone, rather than an (urban) Large Lot Residential Zone.

220. Mr Barr addressed the issue in some detail in his Section 42A Report. He pointed out to us the overlap with other submissions that are addressed in our accompanying reports. While he accepted the underlying point in the Allenby submission that Chapter 4 of the PDP contemplates that not all land within the UGB is anticipated to be developed for urban development, he observed that it was undesirable that Rural zoned land be located within the UGB unless the subject of a BRA or designation, making it clear that it is not intended to be developed. We agree with that view, particularly given the absence of any policy framework that would support what is essentially a deferred zone, a point we will discuss in greater detail in Report 16.15, related to the submission of Mr Beresford[70].

221. Otherwise, the end result is to imply land is suitable for development and invite ad hoc applications for resource consent, notwithstanding its Rural Zoning.

222. We consider that there are two areas within the broader area that is the subject of the Allenby request to include within the UGB that merit further consideration. The first is the subject of Report 16.2 where we have recommended that the UGB be moved to take in an area we have recommended be rezoned Large Lot Residential A[71].

223. The second is on the western margins of the Allenby property. Mr Goldsmith pointed out to us that the UGB diverts into the area (visible at the top of Planning Map 21), zoned Low Density Residential. Planning Map 18 is at too low a scale to see the area clearly, but there also appears to be an area east of Planning Map 20 where Low Density Residential zoned land is outside the UGB. Given the clear policy focus on avoiding urban development outside UGBs where they are defined[72], this is anomalous and should be corrected. We have no jurisdiction to

[70] Submission 149
[71] See Report 16.2 at Section 14
[72] See for example recommended Policy 3.3.14

recommend that the zone boundary be shifted to align with the UGB, but the Allenby submission provides jurisdiction to shift the UGB in the opposite direction, so it aligns with the zone boundary. We recommend that occur. If accepted, this would highlight a further discrepancy, given that the ONF boundary is within the UGB boundary as well, but as noted in our Report 16.1, that is already the case in part, and we have recommended that the Council review that aspect of the PDP.

4.11. Existing BRA

224. Mr Goldsmith described this as a discrete issue unrelated to the broader case he advanced on behalf of the submitter. In summary, his argument was that it was incumbent on the Council to justify the BRA restriction, which appears to have been rolled over without any explanation or thought, in particular without a Section 32 evaluation.

225. Both Mr Cleugh and Mr White gave evidence of an inability to identify any historic documentation explaining when and why the BRA was first imposed.

226. Paragraph 16 of Mr Cleugh's Evidence in Chief, however, states:
"Sections were setback from the State Highway and Anderson Road to preserve the entrance to Wanaka and exotic trees were planted to enhance the State Highway entrance."

227. Mr Cleugh confirmed in response to our query that this was referring to the existing BRA.

228. Mr Cleugh's evidence separately identified the subdivision that included Mt Iron Drive and Rob Roy Lane as having occurred over the period 1985-2007.

229. It seems reasonably clear to us, therefore, why the BRA was imposed. The issue is whether that restriction is still justified (in Section 32 terms).

230. As already noted, Ms Mellsop was of the view that approximately half of the BRA might be uplifted, but that the balance was supportable by reason of its role as forming part of the view of Mt Iron for eastward travellers.

231. Mr Goldsmith drew to our attention that Dr Marion Read had given expert landscape evidence for Council supporting that view in the context of the Stream 2 hearing (related to the Rural Chapters of the PDP).

232. Mr Barr did not support Ms Mellsop's recommendation. While he acknowledged Ms Mellsop's comments regarding the reduced sensitivity east of the identified line at 20 Rob Roy Place, he considered that the whole area contributes to openness in the overall view towards Mt Iron and part of the entrance to Wanaka. We concur with Mr Barr's view. We asked Ms Mellsop if she had considered the role of the BRA in protecting the foreground of the view of the peaks to the north of the lake as one approaches the roundabout at Anderson Road from the east. She had not.

233. Those peaks are part of the ONL defined on the northern side of the lake.

234. Although, as above, the exact planning provisions Mr Barr referred us to have been overtaken by the Hearing Panel's recommendations (retention of the BRA would for instance be consistent with recommended policy 4.2.2.12, but is not required by that policy), this appears to fit neatly within recommended Policy 6.3.26 directing that adverse effects on visual amenity from subdivision, use and development that are highly visible from public places or form the

foreground for an ONL or an ONF when viewed from public roads be avoided. This particular area of land is both highly visible from a public place [i.e. the State Highway] and forms the foreground when travelling in both directions for an ONL, to the west, and the Mt Iron ONF, to the east.

235. As regards Mr Goldsmith's complaint that this particular entrance to Wanaka is treated differently to other entrances, we note the recommendation in Report 16.2 that a BRA be applied to protect the entrance to Wanaka on Cardrona Valley Road.

236. As regards his suggestion that the proposed entrance to Three Parks off State Highway 84 would fundamentally alter the appearance of the entrance to Wanaka, we did not find the evidence particularly persuasive. Mr Barr accepted that the Three Parks entrance would alter the entrance to Wanaka, but noted that the form the entrance took was still the subject of negotiation and that Three Parks Structure Plan provided setbacks from the highway to provide a buffer from it. The balance of the area opposite the BRA is the Wanaka golf course.

237. We asked Mr Baxter whether he had an opinion on the issue. While he advised he was working on the Three Parks entrance proposal, he did not suggest to us that the nature of the arrival in Wanaka from a visual perspective would be radically changed. He observed that it would not be like arriving in Queenstown (which we took to be a positive factor).

238. We also note that the location of the UGB running along the eastern side of the BRA increases the latter's significance as a control on development of the land. Were it to be uplifted, it would send a clear signal that urban development of the land is contemplated by the PDP. We do not consider that signal desirable given the inter-relationship between views of the various outstanding landscapes and features in the area.

239. Mr Cleugh summarised his perception of what the PDP proposes as being that the majority of the Allenby land will be sterilised by ONF plus SNA status and the small balance will be sterilised by BRA status. He accepted the former, but did not believe that the BRA status was reasonable. We can understand Mr Cleugh's perspective. Mr Goldsmith sought to rely on it for a different purpose, arguing in support of rezoning, that the Allenby property was not a viable farm.

240. We think, however, that this situation is a product of the submitter's own actions, progressively subdividing off and selling parts of its land over a period of several decades, leaving a residue of limited usefulness for its original purpose. The BRA appears to have been a quid pro quo for approval of the neighbouring subdivision. We do not consider it unreasonable that it be maintained.

241. In summary, we consider that there is a case under Section 32 to retain the BRA, and that this particular planning notation is the most appropriate way to achieve the objectives of the PDP.

5. SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

242. For the reasons set out above, we have concluded that the rules of natural justice or fairness do not require that the submitter be given a further opportunity to comment on the Council's case.

243. As regards matters bearing on the proposed rezoning of land in the northern end of the site Rural Lifestyle, with consequential amendments to other chapters of the PDP, we have concluded:

a. Not all of the benefits sought to be relied upon by the submitter are within our jurisdiction to recommend. Specifically, to the extent that the submitter now proposes a regime of active management of an ecological area extending beyond the proposed sub-zone, including onto the neighbouring Little Mt Iron property, we find that to be beyond our jurisdiction to recommend. We also find that we do not have jurisdiction to recommend extension of SNA E18C to parts of the site not identified in the Allenby submission. While we also find the submitter's proposals regarding public access to be outside our jurisdiction, the executed easement agreement tabled by the submitter provides an alternative route to the same end.

b. We find that the provision of positive benefits is relevant to our recommendation in relation to rezoning, but where, as here, outstanding natural features and/or significant areas of indigenous vegetation and significant habitats of indigenous fauna are involved, such benefits cannot overcome the failure to recognise and provide for the protection of the ONF or SNA (as applicable). There needs to be a nexus between the proposed benefits and protection of the ONF or SNA.

c. We have found that the area defined by notified SNA E18C to be significant such that it is properly identified as an SNA.

d. We have found that the consequence of our conclusion, as above, that the area in the northern part of the site properly forms part of the notified SNA, it is not permissible to provide as a planning outcome for the substitution of a different area, notwithstanding that the ecological end result is superior.

    i. We have found that we are bound by the conditions placed by the submitter on addition of land to form part of SNA E18C so that notwithstanding the ecological evidence supporting that result, we do not have jurisdiction to recommend its addition if (as is the case) we do not recommend the rezoning sought.

    ii. We have found that the proposed Rural Lifestyle Sub-Zone would not protect the Mount Iron ONF, principally because of the sensitivity of the feature to further development as a result of previous unsympathetic development, and that conclusion is not overcome by consideration of the positive benefits forming part of the proposal. This is the case even if we factor in those aspects that we have found to be outside our jurisdiction to recommend.

    iii. We have therefore concluded that the proposed rezoning is not the most appropriate way to give effect to the objectives of the PDP, and we recommend it not be accepted.

244. That should not be the end of the matter. Allenby has drawn attention to a number of unsatisfactory aspects of the status quo. The informal access the public enjoys to Allenby's private land, in particular, is something that the Council needs to address if it considers that private access to be of value to the community (as we do). Mr Cleugh's vision was that ultimately, the Allenby property would be part of a public park encompassing the entire mountain. That would be a highly desirable outcome if it could be achieved, but at the very least, we recommend Council negotiate additional easement rights in favour of the public, preferably paralleling those that the submitter has indicated it would be prepared to confer as recompense for the proposed rural lifestyle rezoning, whose rejection we have recommended.

245. By the same token, having concluded that the 'alternate SNA' is not within our jurisdiction to recommend if, as is the case, we are not also recommending acceptance of the submitter's rezoning proposal, the ecological evidence is clear that it qualifies as such. Accordingly, we recommend that Council consider notifying a variation to include the alternate SNA area

ultimately recommended by Dr Lloyd, that is to say, including the 2.3 hectares he identified as part of his evidence.

246. We consider, however, that it is unreasonable to expect the landowner to actively manage large areas of SNA to maintain and enhance its ecological values. Again, we recommend Council consider what steps it might take to assist the landowner in this regard.

247. We recommend the Allenby submission in relation to UGB boundaries be accepted in part:
   a. Where it overlaps with the submissions considered in Report 16.1 and to the extent recommended in that Report; and
   b. To align the UGB with the boundary of the Low Density Residential Zone and the Rural Zone at the northern end of Planning Map 21 and following that boundary across Planning Map 18.

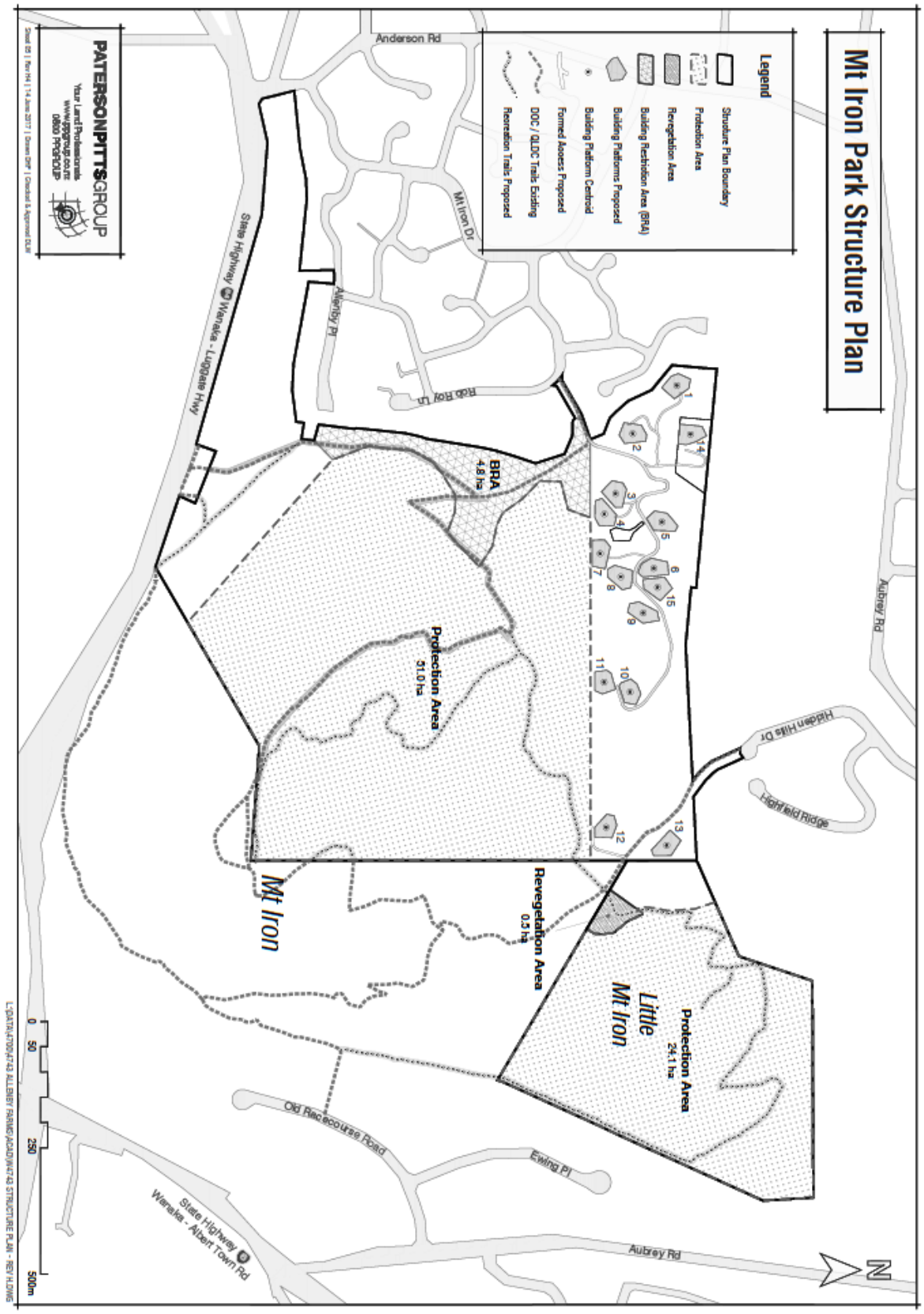
248. We recommend rejection of Allenby's submission seeking that the existing BRA on State Highway 84 be uplifted.

For the Hearing Panel

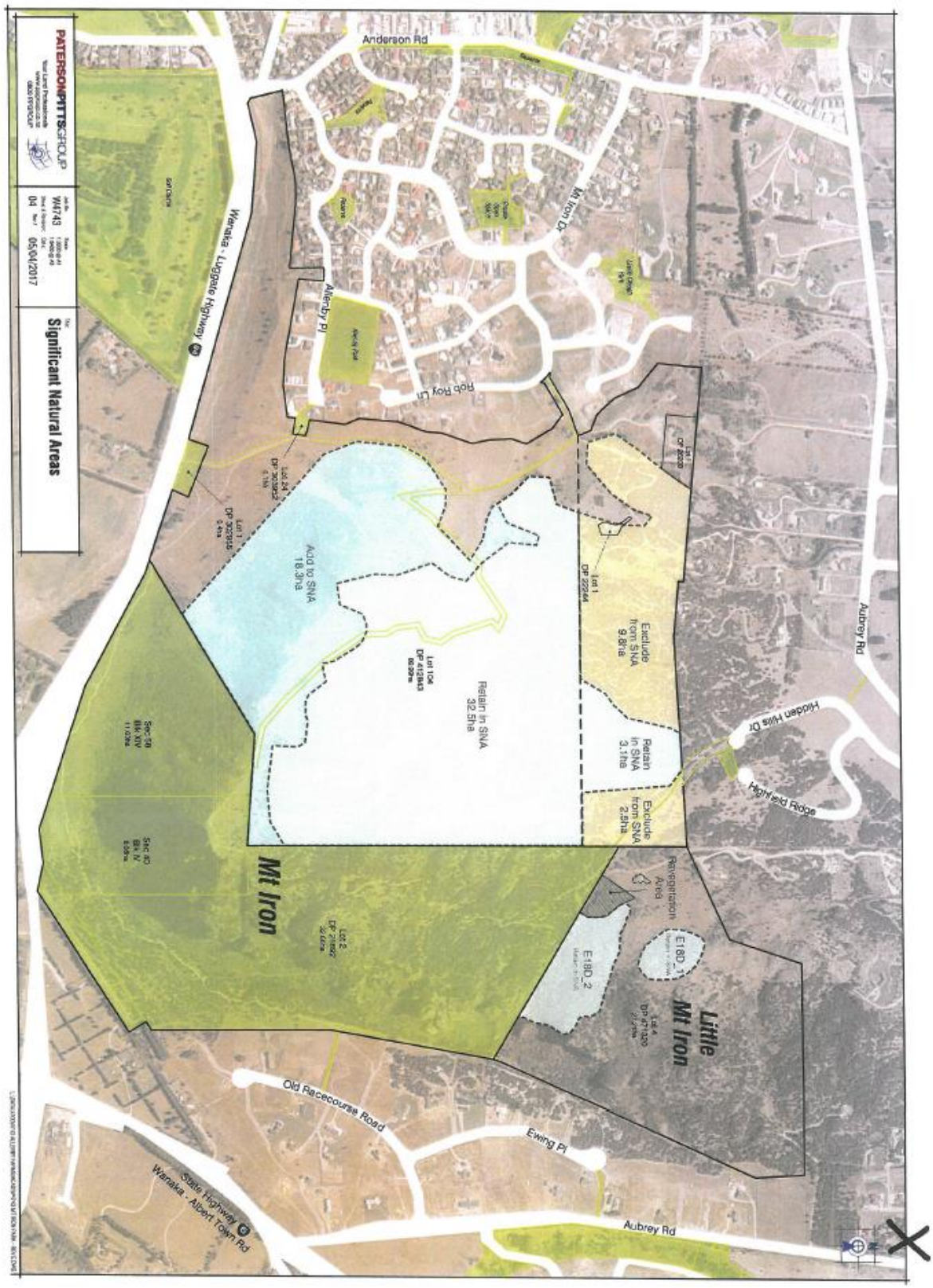
Trevor Robinson, Chair
Date: 27 March 2018

Attachments
Appendix 1 – Revised Allenby Structure Plan
Appendix 2 – Revised Allenby Relief with respect to SNA E18C
Appendix 3 – SNA Relief set out in Allenby Submission
Appendix 4 – Revised Agreement to Grant Easement

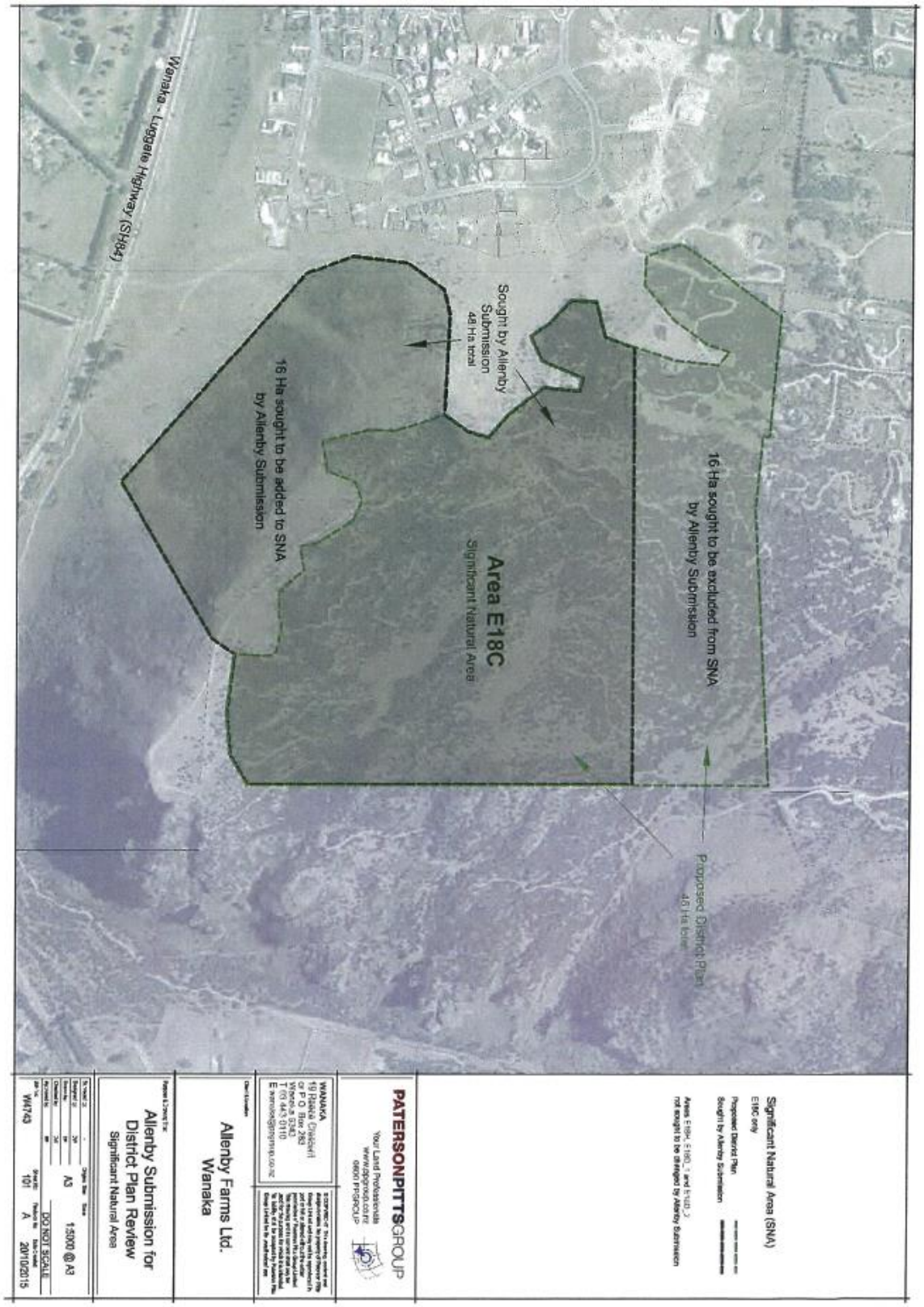
Appendix 1 – Revised Allenby Structure Plan



Appendix 2 – Revised Allenby Relief with respect to SNA E18C



Appendix 3 – SNA Relief set out in Allenby Submission



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Agreement to Grant Easement

Allenby Farms Limited

Jeffrey Lawrence Cleugh, Lynden Andrew Cleugh & Zita Mary Cleugh as trustees of The Lynden & Zita Cleugh Family Trust

anderson lloyd.

Parties 8677

(1) Allenby Farms Limited (**AFL**)

(2) Jeffery Lawrence Cleugh, Lynden Andrew Cleugh and Zita Mary Cleugh as trustees of The Lynden & Zita Cleugh Family Trust (**Cleughs**)

Agreement

1. Easement

1.1 AFL shall grant the following easements in favour of the Cleughs on the terms and conditions detailed in this clause 1, subject to the satisfaction or waiver of the conditions set out in clause 2:

(a) a right of way easement (the **Right of Way**) over the following trails (**Trails**) shown on the plan attached at Schedule 1 (**Structure Plan**):

(i) Alpha;

(ii) Charlie;

(iii) Delta

(iv) Echo;

(v) Foxtrot;

(vi) Golf; and

(b) a right to roam easement (the **Right to Roam**) over the "Protection Areas" shown on the plan attached at Schedule 2 (the **Protection Areas**),

in each case, for the purpose of a walking trail, and shall exclude use by bicycles (subject to clause 1.2), horses or motorbikes or other motorised transport (other than vehicles required for maintenance purposes which are permitted) (the Right of Way and the Right to Roam each an **Easement** and together, the **Easements**).

1.2 The exclusion of use by non-motorised bicycles will not necessarily be comprehensive or permanent. The Easements shall include a right for the owner of the servient tenement to allow use of any or all of the Trails, or of any other part of the Protection Areas where new trail(s) may be constructed or enabled for cycling purposes, from time to time on such terms and conditions as are determined by the owner of the servient tenement. This right shall include the right for the owner of the servient tenement to restrict or terminate any such bicycle use at the discretion of that owner.

1.3 With respect to the Right to Roam, AFL shall retain the right, from time to time, to restrict access to specific parts of the Protection Areas for the purposes of:

(a) managing health and safety;

(b) protecting flora, fauna and landform;

(c) general maintenance.

1.4 The Easements shall:

(a) be in favour of land owned by the Cleughs legally described as Lot 1 DP 26209 contained in Computer Freehold Register OT18B/176 and any additional land that may be amalgamated with that land into the same title;

(b) run through that land owned by AFL legally described as Lot 104 DP 412843 contained in Computer Freehold Register 471461 (excluding that part of that land contained within the Mt Iron Park Rural Lifestyle Zone shown on the Structure Plan) and Lot 4 DP 471320 contained in Computer Freehold Register 7505103 (**AFL Land**);

(c) allow the public at large (as deemed invitees of the Cleughs) to use the Easements; and

(d) require AFL to repair and maintain the Trails to standard "Walking Tracks" under SNZ HB 8630:2004 notwithstanding that the public will be users.

1.5 AFL shall meet all costs in respect of the survey and registration of the Easements.

1.6 Following this Agreement becoming unconditional, AFL will procure its solicitors to prepare the Easement instruments for registration, with such instruments to be provided to the Cleughs for their approval (such approval not to be withheld provided the terms of the instruments are as set out in, and anticipated by, this Agreement).

1.7 The term (**Term**) of this Agreement shall run from the date of this Agreement until the earlier of the:

(a) date that this Agreement is terminated (either by way of lack of satisfaction of conditions or otherwise); or

(b) date that the Easements are registered.

1.8 The Easements shall otherwise be on the standard terms and conditions applicable to public walkway easements (pursuant to the Land Transfer Regulations 2002 and otherwise) as approved by the solicitors acting for AFL (acting reasonably).

1.9 The parties acknowledge the possibility that the Easements anticipated to be created under this Agreement may be created in favour of the Queenstown Lakes District Council (**Council**) (by way of easement(s) in gross) as a consequence of a future subdivision of the servient tenement, subject to agreement by the Council to accept the benefit of such easement(s) in gross. If that occurs the Easements shall otherwise be on standard terms and conditions applicable to public walkway easements as approved by the solicitors acting for the Council (acting reasonably).

2. Condition

2.1 This Agreement is subject to and conditional upon:

(a) A Mt Iron Park Rural Lifestyle Zone being confirmed and inserted into the District Plan as a consequence of District Plan Review hearings held during 2015 - 2017; and

(b) Subdivision consent being obtained and being implemented (in full or in part) under the provisions of that zone.

2.2 The conditions in clause 2.1 shall be complied with if:

(a) Any form of Rural Lifestyle (or similar) zoning is confirmed in the District Plan Review in respect of all or part of the servient tenement; and

(b) Any subdivision consent is obtained and implemented (in full or in part) which will enable the construction of any house(s) on or near any building platform(s) or any equivalent area identified as suitable for construction of a house, regardless of whether or not the subdivision consent application is fully in compliance with the rules of the relevant zone.

For the avoidance of doubt, the purpose and intent of this Agreement is that no right or opportunity to erect a house or houses on any part of the servient tenement, arising as a consequence of the District Plan Review, can be implemented unless the Easements are created.

2.3 These conditions are inserted for the benefit of AFL and may be waived at any time by notice in writing by AFL.

3. Privity

3.1 This Part 3 creates rights under the Contracts (Privity) Act 1982 in favour of (severally) the Council, the Upper Clutha Tracks Trust, and the general public (**Beneficiaries**).

3.2 For the purposes of the Contracts (Privity) Act 1982, each of the Beneficiaries is entitled to enforce against AFL and the Cleughs each provision of this Agreement. However, the consent of the Beneficiaries does not need to be obtained for any amendment made to this Agreement which does not undermine the fundamental public right to:

(a) use the Trails under the Right of Way; and

(b) roam under the Right to Roam,

as broadly set out in this Agreement.

3.3 This Agreement cannot be cancelled without the written consent of each of the Beneficiaries.

4. Miscellaneous

4.1 The terms and conditions of this Agreement shall not merge upon the registration of the Easements except where stated in this Agreement.

4.2 In the event that any part of this Agreement or the Easements become void, invalid or unenforceable at any time, that will not affect the validity of the rest of this Agreement or the Easements.

4.3 Each party will, from time to time sign, execute, and procure all such further documents, and shall undertake all such acts, matters and things as shall be required to effect the provisions of this Agreement.

4.4 Any dispute arising between the parties to this Agreement which touches the construction, meaning or effect of this Agreement or the rights or liabilities of the parties to this Agreement shall unless otherwise specifically agreed in writing between the parties be resolved pursuant to the dispute resolution procedure for easements contained in Schedule 4 of the Land Transfer Regulations 2002.

4.5 The Cleughs agree that, notwithstanding any rights pursuant to the Land Transfer Act 1952, the Cleughs may not register a caveat against the title to the AFL Land.

4.6 AFL will obtain the consent to the registration of the Easements of any chargeholders, mortgagees and encumbrance holders of any type which have or may acquire an interest in the AFL Land (at its cost).

5. Transfer of rights and obligations

5.1 At any time during the Term, each of the parties will notify any other third party (**Third Party**) acquiring or intending to acquire an interest in any part its land (including any potential mortgagee) of the terms and conditions of this Agreement.

5.2 Neither party will dispose of the whole or any part of its interest in its land (including granting any mortgage or other encumbrance) during the Term except with the prior written consent of the other party which will not be withheld where the Third Party acquiring the interest or estate enters into a Deed of Covenant (prepared by the transferring party's solicitors at the transferring party's cost) where the Third Party undertakes and agrees that it:

(a) will be bound by and comply with the term of this Agreement;

(b) will not assign or transfer or in any way dispose of the whole or part of its estate or interest in the relevant land without first obtaining a like Deed of Covenant from any part acquiring the estate or interest; and

(c) is not entitled to any payment from the other party in respect of this Agreement or the Easements.

6. Notices

6.1 A notice to be given under this Agreement shall be in writing and delivered to the addresses listed below or to such other address as either party may notify to the other in writing, and in any event shall be sufficiently given or served if actually received by the party.

For AFL

Name: Allenby Farms Limited

Address: C/- Anderson Lloyd, Te Ahi House, Level 2, 13 Camp Street, Queenstown 9300

For the Cleughs

Name: Jeffrey Lawrence Cleugh, Lynden Andrew Cleugh and Zita Mary Cleugh

Address: C/- Anderson Lloyd, Te Ahi House, Level 2, 13 Camp Street, Queenstown 9300

7. Limitation of liability

7.1 The liability of Jeffrey Lawrence Cleugh under this Agreement shall be limited to the assets that he holds in his capacity as independent trustee of The Lynden & Zita Cleugh Family Trust from time to time so that he shall not be personally liable hereunder.

8. Counterparts

8.1 This agreement may be executed in counterparts (which may include electronic copies) which, read together, will constitute one agreement.

Attestations

Signed on behalf of **Allenby Farms Limited** by its Managing Director in the presence of:

Lynden Andrew Cleugh

Signature of witness

Mathew Sidney Andrews

Name of witness

Real Estate

Occupation

23 Kirimoho Crescent Wanaka

Address

Signed by **Jeffrey Lawrence Cleugh** as trustee of The Lynden & Zita Cleugh Family Trust in the presence of:

Jeffrey Lawrence Cleugh

Signature of witness

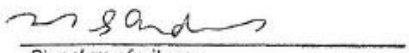
Name of witness

Occupation

Address

Signed by **Lynden Andrew Cleugh** as trustee of The Lynden & Zita Cleugh Family Trust in the presence of:

Lynden Andrew Cleugh



Signature of witness

Matthew Sidney Andrews

Name of witness

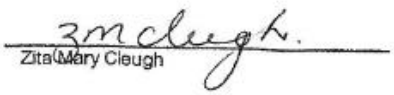
Real Estate

Occupation

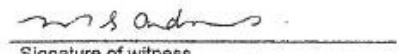
23 Kirimoko Crescent Wanaka

Address

Signed by **Zita Mary Cleugh** as trustee of The Lynden & Zita Cleugh Family Trust in the presence of:



Zita Mary Cleugh



Signature of witness

Matthew Sidney Andrews

Name of witness

Real Estate

Occupation

23 Kirimoko Crescent Wanaka

Address

Attestations

Signed on behalf of **Allenby Farms Limited** by its Managing Director in the presence of:

Lynden Andrew Cleugh

Signature of witness

Name of witness

Occupation

Address

Signed by **Jeffrey Lawrence Cleugh** as trustee of The Lynden & Zita Cleugh Family Trust in the presence of:

Jeffrey Lawrence Cleugh

Signature of witness

Name of witness

Occupation **Esther Gilbert** ~~**Personal Assistant**~~ **Dunedin**

Address