Before Queenstown Lakes District Council

In the matter of	the Resource Management Act 1991
And	**The Queenstown Lakes District Proposed District Plan – Stage 14 Wakatipu Basin**

Legal Submissions for Lake Hayes Investments Limited (Submitter 2291); Crosby Developments (2526); Crosby Developments (2527); L McFadgen (2296); Slopehill Joint Venture (2475);

Dated 23 July 2018

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May it please the Panel

Introduction

1 These legal submissions are presented on behalf of those named on the front page to these Submissions (Submitters). These Submissions generally address two aspects for the Submitters, namely:

(a) The appropriate zoning for land to the east of Lake Hayes (Lake Hayes East)[1]; and

(b) General rural living issues from Stage 2 of the Proposed District Plan (**PDP**)[2].

2 By way of general introduction / overview of the relief sought in respect of each of

3 These legal submissions address the following matters relevant to rezoning of the Property and the wider Site:

(a) Legal decision making framework;

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

(c) The Council's economic case;

(d) Lake Hayes East zoning

(i) The Submitters' case for rezoning

(ii) Comments on the Council's case for WBRAZ

(e) Traffic issues;

(f) Disconnect between WBRAZ and the Proposed Regional Policy Statement (**RPS**).

Legal issues

4 Counsel does not intend to substantially repeat legal submissions relevant to the DPR decision making framework which have already been tabled in previous hearings. In summary the salient legal points in this framework are:

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[1] Relevant to Lake Hayes Investments Limited

[2] Relevant to Crosby Developments, Len McFadgen, Slopehill Joint Venture

(a) When preparing or changing a district plan the Council must have regard to the matters listed in section 74 which include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts;

(b) Given the unsettled nature of higher order provisions of the PDP and RPS in this instance, the Commission must look beyond those documents and apply Part 2 of the Act in order to determine whether a proposed zoning or specific provision is most appropriate in accordance with section 32;

(c) There is no presumption as to the most appropriate zone, rule, policy or objective for decision makers when embarking on a section 32 analysis.[3]

(d) A section 32 analysis seeks to provide for the optimum planning solution ultimately within the scope of submissions.[4] Such an analysis should be an effects-based decision, rather than based upon a desired outcome or directive planning purpose[5] and should take into account the existing consented and developed environment on the ground rather than providing a zone which makes that existing environment and development incongruous within the proposed DPR zone.[6]

(e) In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*[7] namely where the purpose of the Act and the objectives of the Plan can be met by a **less restrictive** regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by being **enabling** so that people can provide for their well-being while addressing the effects of their activities.[8]

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

[4] *Eldamos* paragraph [129]

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

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

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

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

5 I submit in particular the case of *Cerebos* is of relevance to the Lake Hayes east submission group, where the existing and rural lifestyle / rural residential Landscape Unit 13 (LCU 13) has not been reflected in any way in the proposed 80ha non-complying regime under the WBRAZ. This will result in an inefficient planning outcome in the future whereby existing and previously lawfully established and anticipated activities will suddenly become entirely contradictory and inconsistent with the planning framework within which they sit. This is problematic for existing activities and activities which can be appropriately expanded and enhanced to continue to provide for sustainable use and development of land resources.

6 In the case of the other rural living submissions pertaining to general provisions of Stage 2, and in particular where rights are being removed from the Operative District Plan (**ODP**) regime, the last case cited above, *Forest and Bird,* is particularly relevant to the submission point that a less restrictive rule framework is appropriate where this gives effect to the objectives and policies of the PDP[9] and this is consistent with the enabling purpose of the RMA. I submit that recent case is directly relevant to your considerations in particular on rules, policies, and objectives notified under Chapter 24 for both the Precinct and the WBRAZ which provide unnecessary and onerous controls on land use in a Zone / precinct which should otherwise be intended to give certainty as to future use to landowners. I further add to this submission that there must be a very strong and clear policy need to remove existing established rights under the DPR.

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

7 As detailed in this Submitters' submissions, a number of amendments are sought to the general rules, policies, and objectives of Chapter 24 to:

(a) Modify the wording of the policies to provide a more focused set of provisions, which better reflect s7 of the Act, particularly in terms of what the key focus of this Variation should be, namely how particular regard should be had to the maintenance and enhancement of the amenity values of the Basin.

(b) Remove the policies, rules and assessment matters relating to the retention of all existing vegetation greater than 4m

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

(c) Recognise established residential building platforms and enable building within them

(d) Recognise and provide for existing rights to subdivide and build within compliant rural residential sites

(e) Increase the maximum height of building from 6m to 8m

(f) Amend the road boundary setback within the Lifestyle Precinct from 75m to 20m

8 The submissions also seek to enable subdivision within the Lifestyle Precinct subject to compliant densities as a controlled activity. The approach to subdivision generally in Stage 1 of the PDP has opted for restricted discretionary activity status as the default within both the rural living and urban areas. Counsel presented significant legal submissions in respect of Topic 04 on these matters, and I refer the Commission to that information rather than repeat it here.

9 My primary submission is that the only justification for moving from a controlled activity regime (subdivision and buildings in building platforms) in rural living areas under the PDP to a restricted discretionary regime under the PDP, can be to retain the ability to turn down or refuse consent applications. That is a significant departure from the ODP regime and one which is of concern to many landowners who will lose certainty and land values as a consequence. This is further evidenced by the amount of appeals on this point on stage 1.

10 As submitted in Topic 04, and supported by the *Forest and Bird* case cited above, a less restrictive regime of a controlled activity subdivision in the Precinct and rural living zones can achieve the objectives of those zones. My earlier submissions particularly discussed this detail with respect to the Council's ability to control potentially adverse effects with a wide range of controls, including over matters such as control on bulk and location.

11 Where subdivision meets anticipated density and minimum / average allotment size rules in the Precinct there should be no justification to refuse this, given that those areas have been zoned for further rural living and development.

12 I further submit that the Panel cannot rely on the justification that a controlled activity subdivision right in the Precinct would be contrary to rural living zones under stage 1 because:

(a) The Basin is distinctly different in character to other areas and should not be comparatively assessed in such a broad brush way;

(b) Restricted discretionary status for rural living subdivision has been appealed under Stage 1.

13 As discussed in the opening of these submissions, the *Forest and Bird* case is also particularly relevant to where ODP rights are being removed without justification. The Submitters strongly oppose the removal of a controlled activity building right on established building platforms on this basis and the controlled activity right to build within a compliant rural residential sized allotment. It is also questioned whether the Council's section 32 analysis initially proposing this amendment could have taken into account economic costs and benefits when the number of building platforms across the Basin / rural residential sites to be removed would have to be multiplied by the significant property and development right attached to each platform. Counsel acknowledges the changed approach in Mr Barr's s42a report since notification and supports this amendment along with the reasoning set out in Mr Brown's evidence.

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

15 With respect to the new rules pertaining to removal of exotic vegetation, the associated policies for the restricted discretionary rule are particularly uncertain to apply and would result in difficulties, uncertainties, and inconsistencies in the future in the Council's administration of its District Plan. It is difficult to understand how one exotic tree in the Precinct could be fundamental to the Precinct amenity character and therefore its retention would be required. Although not technically *ultra vires* the Act, I submit the intention and outcome of this rule is entirely inconsistent with the parliamentary intent of removing the right to blanket protect trees in urban areas under section 76. Furthermore, in a number of cases, exotic trees are required to be removed under consent orders, covenants and consent notices as a result of the ODP (and Stage 1 decisions now on the PDP) providing a policy approach opposed to shelter belt planting and the blocking of views which are open in the landscape. This would result in an internal inconsistency in the Plan where for example, exotic trees and shelter belt planting historically established could not be removed without consent to further enhance open views.

If a rule is required to protect specific amenity trees, I submit this would be more efficiently administered on a case by case basis through landscape plans and consent conditions at the time of proposed subdivision.

Council's economic case

16 I refer to extensive rural living submissions presented in Topic 02 relevant to the appropriateness of reflecting the positive benefits of rural living and development in the Basin, which appears to have been overlooked in notified Chapter 24. As discussed in those earlier hearing topics, post the Supreme Court's determination in *King Salmon*, it is important that planning instruments under the RMA provide for complete coverage of RMA issues otherwise they are likely in the future to be rendered void by want of completeness. Not providing for the established and ongoing rural residential nature of the Basin and its associated socio-economic benefits ignores a large and important aspect of Part 2 of the RMA relating to providing for people and their communities and their ongoing social, cultural, and economic wellbeing.

17 Having established the law relating to the existing environment (including *Cerebos*), it must be considered what the Panel's obligations are in respect of making decisions on a planning instrument which must be forward looking for two generations.[10]

18 In accordance with section 5(2) of the Act, decision makers are required to assess the 'reasonably foreseeable needs of future generations'. The PDP, in accordance with section 79 of the Act, will be in place for at least a decade (up to twice that possibly, as is the case with the Operative Plan).

19 In summary it is submitted that:

(a) There is clear evidence of a demand for further rural living in the Basin. This is a relevant matter to consider in terms of providing for future generations in accordance with section 5(2)(c) of the Act.

(b) There is a desire for landowners to realise the economic benefits of developing their lifestyle land for rural living as evidenced by the breadth of submissions lodged to the PDP.

20 s32(2)(a)(i) and (ii) requires that the opportunities for economic growth and employment that are anticipated to be provided or reduced are assessed. This recognises that Part 2 of the Act includes economic wellbeing of individuals as well as the wider community, and the use and development of natural and

[10] Referring in support to cases relied upon in legal submissions of Ms Baker Galloway for Darby Planning Limited Partnership and others, dated 18 March 2016

physical resources invariably involves economic activity. The reference to "*economic growth*" in subsection (i) must include the economic growth resulting from the increase in realisable land value which benefits a subdividing landowner, and the reference to "*employment*" in subsection (ii) must include specific employment opportunities which arise from rural living, both short term in terms of house construction and long term in terms of ongoing property maintenance.

21 The Council has declined to present economic evidence in respect of the Stage 2 Variation to the Basin planning regime, despite it representing a significant departure from the ODP approach, and to a lesser extent, the originally notified Stage 1 approach.

22 Legal submissions for rural living submitters discussed this aspect in Topic 02 rural hearings, noting:

(a) There is no challenge to various generic statements in Council evidence to the effect that the landscapes in the district, particularly the Outstanding Natural Landscapes (currently in the PDP comprising 96.7% of the district), are very important to the economic wellbeing of the district;

(b) There was no specific evidence that the existing character of the section 7 landscape components of the Wakatipu Basin (excluding ONLs and ONFs) is important to the economic wellbeing of the district;

(c) There was no specific evidence to the effect that providing for additional rural living opportunities within the RLC components of the Wakatipu Basin would adversely affect the economic wellbeing of the district.

23 The Council's economic evidence in Stage 1 Rural Topic 02 presented the following case:

(a) The key focus of Mr Osborne's evidence is on the economic contributions of tourism to the District, and the economic contributions derived from ONFLs.

(b) Mr Osborne omits any reference to rural living, rural lifestyle, or rural residential activities. Notably, Mr Osborne does not comment on whether additional rural living within the Wakatipu Basin would have an adverse effect on tourism for the District, or on the economic wellbeing of the District;

24 Despite having now had the opportunity to present economic evidence in relation to the specific issue subject to these submissions, the Council has elected not to provide such evidence in respect of the Wakatipu Basin hearings in Stage 2. Mr Osborne's evidence further discussed (generally) that agricultural land use is an

important tool in the management of natural landscape. (Paras 5.9 and 8.7). This predates the Basin Study and subsequent Basin Variation which acknowledges the predominant land use of the Basin is not working agricultural land.

25 This evidence is not a qualitative cost benefit analysis under section 32, and the Council has declined to provide this information in Stage 2. I submit there is a clear section 32 case made out that, as suggested in the submissions, the benefits of rural living and development should be specifically recognised and provided for within Chapter 24. There is certainly no clear case to the contrary which justifies the removal of existing rights.

Lake Hayes East rezoning

The Submitter's case

26 The Submitters rely on the evidence of Mr Espie and Mr Brown with respect to the appropriate zoning and development regime applicable to the eastern slopes of Lake Hayes, within LCU 13.

27 Mr Espie considers that the lower slopes of land east of Lake Hayes, as indicated in his Appendix 1 evidences a significant character of rural living development, and would be appropriately zoned to 4000m^2 minimum allotment sizes, with an LCU absorption capacity description of 'high'.

28 These areas, largely coinciding with legacy rural residential / rural lifestyle ODP zoned land are described by Mr Espie as exhibiting relatively 'dense and visible' rural living development.

29 Mr Espie concludes that:

> The rural living area that would result from this would be contained within logical boundaries, would only slightly exacerbate the effects of existing elements and patterns in the landscape, would not spread into undeveloped areas and would not sully the character of the Wakatipu Basin as a whole.[11]

30 Mr Brown relies on Mr Espie's landscape findings, and supports the recognition of a separation of two sub-precincts or minimum allotment sizes in different areas of the Precinct to reflect the legacy zoning and rights:

> Given the spectrum of character and amenity within the WBLP, the “one size fits all” approach, with a minimum and average area, is not appropriate for all of the WBLP, in my view. Some areas are able to absorb smaller sites, some not, and in some areas an average may be appropriate. This reflects also in some areas the legacy

[11] Evidence of Mr Espie, T14, at 5.1.

> zonings of Rural Residential and Rural Lifestyle and the different patterns which have evolved under these…[12]

31 Mr Brown considers that the legacy rural living zoning if this area has led to a distinctive rural living development pattern such that the site is no longer predominantly rural in nature, and that maintaining the site as Precinct is most appropriate. He concludes:

> …landowners have made significant capital investment in their properties. The change of zoning to the WBRAZ has the potential to undermine that investment particularly those who have not exercised the entitlements afforded by the existing zonings, including subdivision or where a building platform does not yet exist[13].

Comments on the Council's case

32 Ms Gilbert for the Council considers that smaller allotment sizes of 4000m^2 and the sloping topography of Lake Hayes East reduces the potential for effective mitigation planting and landscaping and there is a risk that planting will be modified to increase private views, therefore undermining visual mitigation.[14]

(a) This position appears to overlook the significant control that Council has retained in respect of its ability to impose controls on landscaping and planting mitigation requirements. In reality, all rural living developments are required to submit for approval a landscaping plan either at the time of building development or at the time of subdivision.

(b) It must be assumed that such plans will impose requisite mitigation from Council's perspective to be signed off and that these will be complied with as a condition of consent.

33 Ms Gilbert also opposes Mr Espie's revised Precinct due to an opinion that 'filling in the gaps' of rural residential development will not provide for a defensible edge, but rather allow for development creep in the context of a relatively evenly sloping hillside where there are no identifiable edges.

(a) This position overlooks Mr Espie's envisaged outcome that this will create a legible and strong edge to the rural living areas, with the rural areas outside reading as 'distinct and different'.

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[12] Evidence of Mr Brown, T14, at 4(f)(i).

[13] Ibid, at 8.3.

[14] Rebuttal Evidence of Ms Gilbert, T14, at 14.16 – 14.17.

(b) In this context a distinct edge can be enhanced by the focusing of rural living to provide a demarcation based upon density of development rather than a (lack of) natural landscape or topographical features.

34 Ms Gilbert's evidence suggests that filing in the gaps of existing rural residential land is not an appropriate outcome, however does not explicitly state this to be a cumulative adverse effect, or that this landscape has reached a threshold of over domestication. Conversely, Mr Barr's rebuttal suggests that filling in the gaps is appropriate from a planning perspective, in that such development would be assessed (favourably) in its context of an 'established node of development'.[15]

35 Mr Langman's rebuttal evidence disagrees with Mr Brown's conclusion that the Lake Hayes East site has been modified to the extent that it is no longer rural (and therefore maintenance of the Site as Precinct / rural living would be more appropriate). This position is not however based upon Council's landscape evidence as to the extensively developed nature of the Site, whereas Mr Brown's conclusion is directly based upon this finding from Mr Espie's landscape assessment. I therefore rely on Mr Brown's conclusion and the appropriate planning framework to apply as this has an expert evidential foundation as to the nature of the existing developed environment[16].

36 Mr Langman also states that Mr Espie concludes the rezoning approach 'would not maintain rural character and amenity'[17] however this is not Mr Espie's conclusion at all.

37 Mr Langman agrees with Mr Espie that further intensification within Mr Espie's proposed Precinct area would create a 'legible and strong edge to the rural living area' which is Ms Gilbert's fundamental concern with the revised zoning.[18]

Traffic

38 Mr Smith's position for the Council is to refuse all Wakatipu Basin rezoning requests on the basis of a concern of cumulative adverse traffic effects on the road network.

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[15] Rebuttal Evidence of Mr Barr, T14, at 8.16.

[16] Mr Langman at para 20.9 of his rebuttal, states that Ms Gilbert refers to 'rural character and amenity values' being retained in this area in her rebuttal evidence, however Counsel's review of that evidence does not evidence that this finding has been made.

[17] Ibid, at 20.14

[18] Rebuttal evidence of Mr Langman, T14, at 20.13.

39 Mr Smith's evidence in chief considers that the Shotover Bridge will be operating at capacity at around year 2035 with the notified zoning under Stage 1 and Stage 2 of the PDP. In response, it is submitted that:

(a) There is evidence to show that within 17 years the Shotover Bridge will be required to be upgraded based on the status quo. It is submitted that the Submitter's rezoning, whether considered cumulatively with other rezoning proposals or not, should not be singled out as inappropriate as otherwise development throughout the Wakatipu Basin and Arrowtown would need to be halted, even to maintain the status quo. This is clearly a wider and inevitable issue that the Council needs to address, and which will be assisted by knowing clearly what zonings are in place sooner rather than later for funding/business case purposes.

(b) There is no justification to rely on a 17 year panning period for capacity of the Bridge to be reached and decline rezoning proposals in this District Plan Review, where the Plan should technically only be in place for ten years[19].

(c) The RPS infrastructure provisions are not directive in terms of requiring infrastructure provision to be available and developed at the time of zoning.

(d) The issue of cumulative effects of rezonings in the Basin should not concern the Commission, given that the evidence shows upgrades will be required to the Shotover Bridge in any event, and it is preferable to know zoning now and in advance of such upgrade requirements so as to plan for this in an integrated way.

(e) The Council's reliance on traffic evidence to refuse rezoning submissions is somewhat concerning given there is no clear infrastructure plan from Council throughout the DPR process. It is apparent the Council has taken a principally landscape-based approach to rezoning and then retrofitted its infrastructure (traffic) evidence around that. The removal of the Stage 1 rural living zoning over many sites in the Basin and the new Precinct zoning over other areas in the Basin not identified in Stage 1 for rural living further highlights this (lack of) strategy.

Disconnect between RPS and Wakatipu Zones

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

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

(a) Chapter 1 – resource management in Otago is integrated

(i) This is an entirely new chapter of the RPS seeking to specifically recognise the enabling aspects of Part 2 without qualification of protective provisions. The chapter recognises that Otago's resources are used sustainably to promote economic social, and cultural wellbeing for its people and communities. And seeks to provide for the economic wellbeing of Otago's people and communities by enabling the resilient and sustainable use and development of natural and physical resources.

(b) Chapter 3 natural resources (draft consent order lodged with Court but not yet approved by the Court)

(i) Seeks to 'maintain or enhance' highly valued landscapes by 'avoiding significant adverse effects on those values that contribute to the high value of the natural landscape' (Pol 3.2.6). And seeks to 'minimise the subdivision of productive rural and into smaller lots that may result in a loss of its productive capacity or productive efficiency' (pol 5.3.1).

41 The above provisions of the RPS are of direct relevance to this case and provide no basis for opposing the rezoning of this (already somewhat developed) section 7 landscape for rural living purposes. Furthermore, the provisions of Chapter 3 and chapter 6 relevant to natural resources and rural activities provide very little support for the way in which Chapter 24 seeks to protect landscape and restrict development of a section 7 landscape.

Dated this 23rd day of July 2018

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