

Before the Queenstown Lakes District
Council

In the matter of the Resource Management Act 1991

And

In the matter of the Queenstown Lakes District Proposed District Plan – Hearing
Stream 08

And

In the matter of Chapter 12, Queenstown Town Centre Zone

**Legal Submissions for John Thompson and MacFarlane Investments Limited
(Further Submission 1274)**

Dated 25 November 2016

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Introduction

- 1 These submissions are presented on behalf of Further Submitter 1274 John Thompson and MacFarlane Investments Limited (**John Thompson**).
- 2 John Thompson owns approx. 3,900sqm of land within the Isle Street East (ISE) sub zone bounded by Man Street on its northern boundary and Brecon Street on its eastern boundary located on the opposite (northern) side of Man Street from the Sofitel Hotel. That land is potentially affected, by the matters addressed in these submissions and the supporting evidence. However John Thompson's primary concern is a broader one of appropriate urban design outcomes in this area. The ultimate urban design decided upon by the Panel will have direct consequences for the development of the land within the ISE sub zone.
- 3 John Thompson has accumulated this property over a period of 30 years and was previously involved in the planning debates which established the current operative height limits on the Sofitel Hotel site and the (current) Queenstown Town Centre Transition Zone. At the time those height limits were set they established an appropriate relationship between height limits in this general area, taking into account the particular characteristics and topography of the parcels of land involved. John Thompson acknowledges that those previously established height limits will change, notwithstanding that the Sofitel height is fixed in time. What he seeks to ensure is that, overall, appropriate height relationships are maintained and good urban design outcomes are achieved.
- 4 John Thompson has no concerns about the general approach of the Council's urban design expert Tim Church. Accordingly John Thompson is not calling separate urban design evidence. The primary purpose of these submissions, and the supporting evidence, is to draw the attention of the Panel and Tim Church to factual matters which appear to have been overlooked by the s42A Report and which could potentially lead to undesirable urban design outcomes. John Thompson then proposes an alternative matrix of height controls which he suggests would result in more desirable outcomes.
- 5 John Thompson's concerns are primarily limited to the northern half of the block bounded by Man Street, Hay Street, Shotover Street and Brecon Street (**Man Street Block**), namely the 'Language School' site as defined in the evidence of John Edmonds and the 'Carpark' site containing the Man Street carparking building. John Thompson has no concerns about, and does not address, those properties within the Man Street Block which adjoin Shotover Street.
- 6 John Thompson has no particular view about those properties adjoining Man Street and Hay Street west of the Carpark (**Well Smart Block**), which is a somewhat complex site because of topography. Whether the 'flat plane'

approach to height limits advocated by John Thompson for the Language School and the Carpark should be extended to the Well Smart Block, or whether a rolling height plane related to original ground level should apply to the Well Smart Block, is a matter which John Thompson draws to the attention of the Panel but leaves the Panel to determine.

- 7 These submissions, and the supporting evidence, focus primarily on the 'Language School' site, as defined by John Edmonds in his evidence, being Area P1 adjoining the corner of Man and Brecon Streets as shown on the plan in Rule 12.5.10.4. There is no intention to disadvantage the owner of that land; rather the proposed amendments enhance development of the site. These submissions, and the supporting evidence, are presented on the basis that a change from a sloping height limit based upon original ground level to a flat plane masl height limit will not have a net adverse effect in terms of development rights because a loss of height at the top will be balanced by acquisition of equivalent (and more useable) development space lower down.
- 8 It is acknowledged that the currently proposed sloping height limit based upon original ground level applicable to the Language School site is 12m 'as of right' with a 2m restricted discretionary activity bonus up to 14m. These submissions, and the supporting evidence, assume that such a combination of rules anticipates that the 2m bonus will be applied for and there is a reasonable expectation it would be granted. Therefore the 14m height limit is used for the purpose of these submissions and the supporting evidence, without reference to the lower 12m height limit. All relevant figures can be adjusted, if necessary, to reflect the lower 12m height limit.

Jurisdiction

- 9 Counsel adopts, and will not repeat, submissions previously made to the Panel that scope and jurisdiction are determined by the combination of all relevant submissions lodged to the Proposed District Plan (**PDP**), and that evidence can be led by any submitter provided it falls within that overall scope and jurisdiction.
- 10 John Thompson relies upon the following submissions lodged to the PDP as providing jurisdiction for the height limit outcomes proposed by him:
 - (a) Original Submission 417 by John Boyle which requests that the maximum building heights enabled in the Man Street Block be no greater than those enabled in the Operative District Plan (**ODP**);
 - (b) Original Submission 398 by Man Street Properties Limited (**MSPL**) which requests a complex mixture of height limits within the Man Street Block based upon 'flat plane' RL or masl levels rather than height limits based upon height above original ground level.

Scope Issues

- 11 Counsel respectfully submits that the process by which Council has identified jurisdiction to increase height limits within the Man Street Block is questionable and may present a *vires* issue.
- 12 The leading case on determining collective scope is established in the recent High Court case, *Simons Hill Station Ltd v Royal Forest and Bird*, where Gendall J held:

What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority¹

- 13 In order to be 'put on notice' of the issues sought to be raised in a submission, a submission must sufficiently identify issues with due particularity, including the relief sought.
- 14 The Environment Court considered this matter in *Romily Properties Ltd v Auckland City Council*, which coincidentally was an appeal on the validity of proposed changes to height control provisions of the proposed Auckland City District Plan. Judge Sheppard analysed the submissions at issue being relied upon to assert scope for proposed changes to the notified plan rules and commented:²

The amendment to the rule that was sought in the submission on the plan, and the amendment that was sought in the reference originally lodged, were both stated in general terms. The submission did not "give precise details" of the amendment sought, as directed by the prescribed form... In that respect, these proceedings represent poor practice, which should not be followed. The appellant should have set out in the original submission the wording of the amendment to the rule that it wanted.

The importance of submissions and references stating with particularity the amendments sought is evident from the scheme of the Act. People who may wish to oppose a submission or appeal, or to propose some modification to the relief sought, have only the original documents from which to learn what is the scope of the possible amendments that might be made to the proposed instrument. It is the relief sought by the original submission which defines the

¹ *Simons Hill Station Ltd v Royal Forest and Bird Protection Society of New Zealand Inc* [2014] NZHC 1362 at [30]

² *Romily Properties Ltd v Auckland City Council* A095/96 (Environment Court, Auckland November 1996) At Page 6

extent of the authority of the council, or the Environment Court on appeal, to amend the proposed instrument. If amendments are considered that are beyond the scope of the relief sought in the original submission, that could unfairly affect the interests of people who have not taken part in the proceedings, not realising that their interests could be affected. See the Planning Tribunal's decision in Leith v Auckland City Council [1995] NZRMA 400, 411.

15 In comparison to the *Romily* case, where the submission in question had at least identified the relevant rule for amendment and provided suggested relief, the Council's section 42A report on Chapter 12 justifying Man Street Block height increases relies on the submission of Mr Cowie to provide scope to recommend amended height limits higher than those publicly notified or specifically requested by any submitter.

16 Mr Cowie's submission (#0020) is attached to these submissions marked "A". The first point to note is that it is in the form of an email which generally seeks:

- Significantly higher property heights throughout the district
- Amendments to the Building Code
- Pedestrianisation of the centre of Queenstown
- A ban on all polluting vehicles in Queenstown
- A free bus service
- That the airport be relocated

almost all of which is beyond the scope of the District Plan Review. It is a generic expression of a range of concerns with very little particularity.

17 As far as a specific request for relief relating to height is concerned, the only statement that can be pointed to is a request to "*create a nice urban feel (see the best European lake cities, eg: Bellagio etc) up to 4/5 story high houses with some narrow streets [to] give a greater ambience that is missing from Queenstown*".

18 Council effectively relies on that submission for jurisdiction to recommend an increased height on part of the Man Street Block. If that is correct in terms of jurisdiction, then it must follow that the submission could provide jurisdiction to increase height limits anywhere in the district by an unspecified amount. Counsel queries whether that conclusion meets the relevant tests in the case law referred to above. Whilst it is acknowledged that some tolerance should be allowed for imprecise expressions in submissions prepared without professional help, it is questionable whether Mr Cowie's submission could be relied upon as fairly and

reasonably putting submitters 'on notice' of this potential change to increase height.

- 19 I submit that the critical issue here is the extent to which other potentially affected parties would have been adequately put on notice of potential height increases. For the purpose of providing legal advice to John Thompson, Counsel commissioned a review of submissions lodged to the PDP, and the Summary of Submissions documents prepared by Council. That review did not identify that Submission #0020 by Mr Cowie, resulting in advice to John Thompson that no submission had been lodged seeking an increase to the publicly notified height limits within the Man Street Block (other than as detailed in some aspects of the MSPL submission).
- 20 The s42A Report recommends a 3m height limit increase on part of the Man Street Block in reliance on Mr Cowie's submission. 3m is quite significant. There are properties north of Man Street that could be potentially affected by that height increase. There must be a question as to whether any potential submitter, particularly a lay submitter, could reasonably have been expected to find the Cowie submission and be put on notice that height limits on the Man Street Block could increase by an indeterminate amount.
- 21 Similarly to Mr Cowie's submission, the submission by NZIA (#0238) is relied upon for the general (and qualified) proposition that height increases are supported in lieu of lowering view shafts in other parts.³ Counsel cannot ascertain this alleged relief from that submission.
- 22 Another issue relating to jurisdiction potentially arises in the evidence of Tim Williams (at paragraphs 35 and 36 of his Statement of Evidence) lodged for MSPL which sets out a case for removal of the publicly notified view shafts applicable to the Carpark site. On that issue Counsel:
- (a) notes that Submission 398 lodged by MSPL supported the view shafts;
 - (b) queries what submission provides jurisdiction to remove the view shafts;
 - (c) Notes that the submission re removal of the viewshafts could have been considered as containing some merit had there been a concession offered to lower height at the sensitive Eastern boundary of the podium closest to the town centre.

³ Section 42A report, Chapter 12 at 10.82

s42A Report Deficiencies

- 23 Historic difficulties with establishing height above original ground level (prior to any development) within many parts of the district generally, and in relation to the Man Street Block and the Sofitel Hotel site in particular, are well known and well documented. Those difficulties are referred to in the evidence of John Edmonds⁴ and the evidence of Tim Williams for MSPL⁵.
- 24 Given that complex planning history, those known difficulties, and the opportunity presented by the PDP to properly address those issues, it is disappointing that the opportunity has not been taken, either in the PDP as notified or in the amended height regime now proposed by the s42A Report. This is evidenced in a number of respects (referring only to the latest version rules now being proposed by the Council officers).
- 25 There is lack of attention to detail in the drafting. By way of example, Rule 12.5.10.3 refers to a height "*... 4m above RL312.0 masl (412.0m Otago Datum)*", Rule 12.5.10.4.a refers to a height "*...11m above 327.1 masl*" and Rule 12.5.10.5.c refers to a height "*... RL332.20 masl (being 432.20 Otago Datum)*". Queries about the consistency of that drafting include:
- (a) Why refer to a height "*11m above 327.1 masl*" instead of just saying "*338.1 masl*"?
 - (b) Why do some height limits refer to "*RL*" whereas others do not?
 - (c) Why do some height limits refer to an equivalent Otago Datum height whereas others do not?
- 26 This confused and inconsistent approach extends to the recommended maximum height limits applicable to the northern half of the Man Street Block. The middle section (Areas C, A, D and B on the plan in Rule 12.5.10.4) are recommended to be based upon flat plane masl levels whereas the western end and the eastern end (both marked P1 on the map in Rule 12.5.10.4) are recommended to be based upon a maximum height above original ground level. Past difficulties with that latter approach are well known and are detailed in the evidence of John Edmonds⁶, including uncertainty about the original ground level (because original development took place so long ago) and the likely planning outcome involving landowners trying to push through a sloping height plane which, in part, illogically prevents appropriate development.

⁴ Evidence of John Edmonds dated 18 November 2016, at paragraph 11 on page 3

⁵ Evidence of Timothy Williams dated 18 November 2016, at paragraph 16 on page 5

⁶ Evidence of John Edmonds dated 18 November 2016, paragraphs 9 – 11 on page 3

- 27 The s42A Report contains no analysis which compares the merits and demerits of the two different approaches and justifies the retention of the historic approach within the two P1 areas instead of changing to a flat plane approach which, in these particular circumstances, would create greater certainty for the landowners and more logical and sensible development outcomes.
- 28 John Thompson queries the accuracy of the 'Model Views' contained in Appendix A1 Graphic Supplement Amendment attached to the Memorandum of Counsel for the QLDC dated 18 November 2016. In particular:
- (a) Referring to the dark blue indicative building in Precinct P6, that dark blue building does not correctly reflect the Sofitel Hotel which actually exists and is part of the existing environment;
 - (b) The evidence of John Edmonds⁷ points out that the maximum height limit applicable to the upper part of the Language School is about 8m higher than the Sofitel Hotel. While it is difficult to tell exactly because the 'Model Views' produced for the Council do not contain cross sections and do not detail specific heights, the indicative dark brown building on the Language School site in Precinct P1 does not appear to be 8m higher than the Sofitel Hotel.
- 29 I submit for John Thompson that the points identified in the previous paragraph have the following consequences:
- (a) The s42A Report, and Tim Church's evidence in particular, do not appear to appreciate that the recommended height regime could result in a building on the Language School site, at the top of the pedestrian stairs on Brecon Street, extending up to 8m above the Sofitel Hotel. Accordingly the urban design consequences of such a building, in terms of the relationship between that building and the Sofitel Hotel in the context of the important pedestrian thoroughfare going up the Brecon Street stairs, is not assessed;
 - (b) The consequential potential height profile of buildings along Man Street identified in the evidence of John Edmonds⁸ being a 332.2 masl Sofitel Hotel, rising to 341 masl Language School site building, dropping to a 338.1 masl building on the Carpark, and then rising again on the Well Smart Block, is not assessed.

⁷ Evidence of John Edmonds dated 18 November 2016, at paragraph 13 referring to the Height Plans in Appendix 1

⁸ Evidence of John Edmonds dated 18 November 2016, at paragraph 12

Evidence Lodged for MSPL

- 30 There are considerable similarities between the approach recommended by John Edmonds and the approach recommended by Tim Williams for MSPL. The primary similarity is that both planners recommend adopting a 'flat plane' masl height limit to both the Language School and the Carpark. However there are three significant differences between the two recommended height regimes.
- 31 The first difference relates to the differential stepped heights on the eastern and western parts of the Carpark site. John Edmonds recommends 338 masl applicable to the western Carpark building stepping down to 336 masl for the eastern Carpark building (and stepping down again 334 masl for the Language School and 332 masl for the Sofitel Hotel). Tim Williams recommends 341 masl applicable to the western Carpark building stepping down to 338 masl for the eastern Carpark building. That issue turns firstly on the jurisdictional point addressed in paragraph 18 above, and secondly on which is the more appropriate urban design outcome. Those are matters for the Panel to determine.
- 32 The second difference relates to the retention, or not, of the view shafts (with no compensation offered for obtaining additional height and bulk). That issue relates to the jurisdictional point addressed in paragraph 22 above and is also a matter for the Panel to determine.
- 33 The third difference has two separate parts:
- (a) John Edmonds recommends a 334 masl height applying to 10 Man Street plus the two adjoining titles which bound Brecon Street, which is all of Area P1 on the plan in Rule 12.5.10.4, so that height plane extends southwards as far as the adjoining Carpark to the west. By comparison, Tim Williams recommends 338 masl applicable just to 10 Man Street, which is only 1/3 of Area P1 on the plan in Rule 12.5.10.4.
 - (b) John Edmonds recommends a 334 masl height limit applicable to his (larger) Language School site whereas Tim Williams recommends a 338 masl height limit applicable to his (smaller) Language School site.
- 34 I submit that John Edmonds' recommended approach should be preferred in relation to the first point detailed in the previous paragraph, for the following reasons:
- (a) It is difficult to see how anybody could design a practical and useful building on the smaller flat plane masl height limit Language School site recommended by Tim Williams, with that building then having to drop significantly down to a lower building based upon a rolling height plane;

- (b) In the context of the adjoining carpark, it is logical that whatever masl height plane is applied to the Language School site should extend southwards to the same extent as the adjoining Carpark;
- (c) In the context of the existing Sofitel Hotel directly across Brecon Street, which rises sheer from Brecon Street up to the 332.2 masl height for a considerable distance along Brecon Street, there is a degree of logic in an equivalent building on the Language School site extending about the same distance to the south.

35 I submit that John Edmonds' recommendation in relation to the second point described in paragraph 34 above should also be preferred, for the following reasons:

- (a) Tim Williams' evidence contains no assessment of the 6m differential in height between his proposed Language Site building built to 338 masl and the 332 masl Sofitel on the other side of the Brecon Street steps. John Edmonds' proposed 2m stepdown from the Language School site to the Sofitel Hotel is a preferable urban design outcome in terms of the potential adverse effects of a taller building on the Language School site identified in his evidence⁹.
- (b) The previous point is particularly significant given the reduced area which Tim Williams recommends should be subject to a 338 masl height limit. The potential outcome would be a relatively thin tower which I submit would be anomalous in the urban fabric of this part of the Queenstown Town Centre.

Dated this 25th day of November 2016



Warwick Goldsmith
Counsel for John Thompson and
MacFarlane Investments Limited

⁹ Evidence of John Edmonds dated 18 November 2016, at paragraph 12(c) on page 4