

**BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of Hearing Stream 2 –
Rural, Rural Residential,
Rural Lifestyle, Gibbston
Character, Indigenous
Vegetation and
Biodiversity, and Wilding
Exotic Trees chapters

**OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR
QUEENSTOWN LAKES DISTRICT COUNCIL**

HEARING STREAM 2 – RURAL

2 May 2016

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of submissions made on the Rural chapters in the Proposed District Plan (**PDP**). The provisions that are the subject of Hearing Stream 2 consist of the following chapters:

- (a) Chapter 21: Rural;
- (b) Chapter 22: Rural Residential and Rural Lifestyle;
- (c) Chapter 23: Gibbston Character;
- (d) Chapter 33: Indigenous Vegetation and Biodiversity; and
- (e) Chapter 34: Wilding Exotic Trees.

2. OUTLINE OF LEGAL SUBMISSIONS

2.1 These submissions should be read together with the synopsis of Council's legal submissions that were filed on 21 April 2016. At the time of filing the Council's synopsis, evidence from submitters and legal submissions in support had not been filed (although it is understood that only two submitters filed a synopsis of legal submissions on 21 April 2016,¹ in response to the Panel's Direction). Therefore, for the assistance of the Panel, these submissions address key legal issues that have been raised in legal submissions for submitters, and also identify issues arising from submitters' evidence. They are not a comprehensive response to all evidence that has been filed, which will be covered in the Council's right of reply if necessary.

2.2 Despite the fact that there are numerous issues raised in evidence for submitters that are contested and/or not accepted by the Council, because there is no direction for rebuttal evidence, the summaries of the Council's evidence have responded, at a very general level, to some of the key issues raised in submitters' evidence. More detailed supplementary evidence can be provided by the Council's witnesses during the course of the hearing, should the Panel consider that it would be useful.

¹ On behalf of Jeremy Bell Investments Limited (#782) and Queenstown Park Limited / Queenstown Wharves GP Limited (#806).

2.3 Council refers to and adopts the opening legal submissions presented at the Strategic Direction hearing, in terms of Council's functions and statutory obligations (section 3), relevant legal considerations (section 4), and whether various submissions are "on" Stage 1 of the PDP (section 7).² Those submissions are not repeated here.

3. HIGHER ORDER FRAMEWORK / ECONOMIC EVIDENCE

3.1 Two statements of evidence from economics witnesses have been filed on behalf of submitters. The witnesses are Mr Michael Copeland for various submitters,³ and Professor Tim Hazledine for Queenstown Park Limited (**QPL**). The Council's economic expert, Mr Osborne, has identified a number of issues with those statements and will be prepared to answer questions from the Panel.

3.2 In order to foreshadow some of those issues, it is submitted that both statements are based on an incorrect factual premise which undermines the value of the evidence presented. Both statements incorrectly suggest that the Council is, through its Rural provisions, seeking to prop up an ailing primary production/farming sector and protect its viability, to the detriment of other stronger economic contributors to the local economy.

3.3 That of course is quite incorrect, as has already been addressed in some detail in the Council's evidence and legal submissions for the Strategic chapters. The correct position is that the Council is consciously seeking to recognise and provide for farming activity and rural land management practices within rural areas, given the substantial influence that it has on character and in shaping the very natural resources upon which the bulk of the District's economy relies.

3.4 To suggest therefore that the Council is "discouraging" tourism activity or other non-farming uses from utilising the rural land resource is wrong. This is evidenced by the Council's clear recognition that non-farming

² Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B – Strategic Chapters in Part B of the Proposed District Plan, dated 4 March 2016.

³ Darby Planning LP (#608), Soho Ski Area Ltd (#610), Treble Cone Investments (#613), Lake Hayes Ltd (#763), Lake Hayes Cellar Ltd (#767), Mount Christina Ltd (#764).

uses are likely to seek to locate in the rural zones, but that their actual and potential effects will need to be managed.

3.5 Indeed, proposed revised Objective 21.2.9 of the Rural chapter states that "*a range of activities are undertaken on the basis that they do not degrade landscape values, rural amenity, or impinge on farming and established activities*". With respect, that position is perfectly clear and appears to have been overlooked by Mr Copeland and Professor Hazledine. Furthermore, it is submitted that such an objective is hardly unorthodox or surprising for management of the rural land resource and could in fact be regarded as relatively permissive.

3.6 The evidence of Mr Copeland and Professor Hazledine also appears to have been written in somewhat of a vacuum, in that neither witness appears to have turned their mind to the Strategic chapters and the Council's high-level strategic approach. Based on the Council's intended plan structure and drafting approach, the Rural and other more specific "topic-based" provisions will need to be aligned with and achieve those higher-order strategic provisions.

3.7 It is submitted that the evidence of Professor Hazledine:

- (a) is based on an incorrect characterisation of the Council's position and policy approach;⁴
- (b) does not recognise that the Council's position acknowledges the likelihood that diversification into non-rural land uses (or even non-traditional farming practices) will occur, and that there will be a continuing demand for such uses given the economics of farming in the District – it is not turning a blind eye to the issue;
- (c) lacks a reasonable basis to suggest that what attracts tourists to the District and drives the local economy is the local hospitality and services,⁵ rather than the natural environment; and

⁴ See section 5 of Professor Hazledine's evidence in particular. The Council's evidence has been very clear that it does not regard farming *per se* as a major economic contributor to the District, but rather as the predominant land management practice which maintains the District's character and appeal.

⁵ See Professor Hazledine's evidence at 8.3 – 8.6 for example.

(d) does not identify why or how the Council's proposed policy approach will not enable the outcomes that he suggests are desirable.⁶

3.8 The evidence does not support the suggestion that a more permissive approach is justified or more appropriate in terms of section 32 of the Resource Management Act 1991 (**RMA**).

3.9 Mr Copeland's evidence suffers from some of the same issues and it is submitted that this evidence:

(a) wrongly characterises the Council's position as seeking to protect the viability of farming and viticulture and suppressing tourism;⁷

(b) does not appear to acknowledge that the Council's approach in Ski Area Sub-Zones in particular is already highly permissive;⁸

(c) provides a benefit summary based on assertions rather than analysis;⁹

(d) has had no regard to the Council's strategic approach regarding the location of urban development within the District;

(e) does not have any regard for the significant capacity and benefits of locating housing primarily within urban areas;

(f) does not recognise that the Council has identified the significant value and importance of tourism in its Strategic chapters; and

(g) disregards the risk of inappropriate development in highly-valued landscapes.

3.10 The Council therefore continues to rely on the evidence of Mr Osborne in terms of economic considerations.

4. RURAL - CHAPTER 21

4.1 The Rural chapter develops detailed policies that relate to the relevant Goals and Strategic Direction objectives outlined in Chapter 3 of the PDP. The policies seek to ensure that growth can be accommodated in

⁶ See paragraphs 8.7 and 8.14 – 8.15 of Professor Hazledine evidence.

⁷ See paragraph 8.11 of Mr Copeland's evidence.

⁸ See section 6 of Mr Copeland evidence.

⁹ See paragraph 6.3 of Mr Copeland's evidence for example.

a sustainable way that does not have significant impacts on the natural values that draw people to the area, and drive the local economy.

- 4.2 The Rural chapter also expands on Strategic Goal 5 and the Landscape chapter, by providing the landscape assessment matters for ONFs/ONLs (matters of national importance), and the Rural Landscape Classification.
- 4.3 In a similar theme to the hearing on the Strategic and Landscape chapters, QPL seeks the inclusion of a specific objective and policies in Chapter 21 that recognise and provide for non-farming activities in the Rural Zone, and that Rule 21.4.5 be amended to provide for a wider range of commercial activities. QPL does not oppose the recognition and encouragement of farming, but opposes the "implicit relegation or discouragement of non-farming activities that is at the very least implicit in the Council's objectives and policies."¹⁰
- 4.4 This position has already been partially addressed with regard to the evidence of Professor Hazledine for QPL. QPL's assertion and characterisation of the Council's policy position, whether it is implicit or explicit, does not have a sound foundation.
- 4.5 QPL has summarised Council's "flawed" policy position as being advanced on two grounds:
- (a) farming will maintain landscape and rural character; and
 - (b) the existing landscape and rural character is the single most important factor in maintaining Queenstown's competitive advantage as a tourist destination.
- 4.6 QPL's legal submissions refer to the *Staufenberg Family Trust* case¹¹ and use that as an example of how applying a "singularly definable character" to a zone can result in perverse outcomes.¹² The legal submissions suggest that the policy framework of Chapter 21 should be amended so that it enables an assessment of the landscape and rural character, rather than "assume farming will always or is most likely to

¹⁰ QPL/QWL, legal submissions, 21 April 2016, at paragraph 2.3. QPL's interest is to enable the establishment of a gondola from Remarkables Park to the Remarkables Ski Area, which is "*an example of a tourist, recreation or commercial activity that should not be foreclosed or discouraged in the Rural Zone*".

¹¹ *Staufenberg Family Trust No. 2 v Queenstown Lakes District Council* [2013] NZEnvC 100.

¹² QPL/QWL, legal submissions, 21 April 2016, at section 3.

deliver the best outcome".¹³ It is noted that the quoted passages from Judge Jackson are part of the Court's minority judgment in that case and do not necessarily reflect the view of the majority.

- 4.7 The *Staufenberg Family Trust* case states that the drafting of the ODP ultimately provides three options as to the categories of landscapes in the District: outstanding natural landscapes; visual amenity landscapes; other rural landscapes.¹⁴ The decision also recognises:

*In other words, a small area of a VAL may have very low visual amenity values indeed (because of its proximity to existing development and because it possesses low natural values) but it still needs to be categorised as part of a VAL because there is no other pigeonhole to put it into as a landscape.*¹⁵

- 4.8 It is submitted that this case is distinguishable from the issue raised by QPL because the relevant matter in the *Staufenberg Family Trust* case was the application of landscape categories which result in black and white outcomes (ie. the land must be "pigeonholed" into a specific landscape category). The Chapter 21 provisions provide for farming but also recognise and provide for other activities in specific circumstances, where it is appropriate.

- 4.9 There is submitted to be no compelling evidence which has been produced by QPL to demonstrate that the Council's approach is flawed or that QPL's approach will be more appropriate. To the extent that the submission is founded on a concern that the Remarkables gondola concept will be discouraged by the Council's proposed policy approach, it stands to reason that there are many other factors than the Council's approach to the Rural zones that would have an influence on that project. A discretionary activity status would be the appropriate means to assess those factors.¹⁶

¹³ QPL/QWL, legal submissions, 21 April 2016, at paragraph 3.2.

¹⁴ *Staufenberg Family Trust No. 2 v Queenstown Lakes District Council* [2013] NZEnvC 100, at [51].

¹⁵ *Staufenberg Family Trust No. 2 v Queenstown Lakes District Council* [2013] NZEnvC 100, at [54].

¹⁶ Passenger Lift Systems, heli-skiing and non-commercial skiing are exempt from non-complying activity status through Rule 21.5.19, and instead under Rule 21.4.10 are fully discretionary. The rule would benefit from clarification, but to confirm that the activities are not non-complying.

Informal airports

4.10 Totally Tourism Ltd, NZ Ski Ltd, and Skyline Enterprises Ltd are of the view that the Department of Conservation (**DoC**) exemption recommended by Mr Barr to Rule 21.5.25 in Table 6 (regarding informal airport operations as setbacks from legal roads) is unnecessary.¹⁷ Mr Dent's reasoning is that section 4(3) of the RMA sufficiently covers the situation.

4.11 It is however submitted that section 4(3)(b) is the key matter for consideration:

(3) *Section 9(3) does not apply to any work or activity of the Crown within the boundaries of any area of land held or managed under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act (other than land held for administrative purposes) that—*

(a) *is consistent with a conservation management strategy, conservation management plan, or management plan established under the Conservation Act 1987 or any other Act specified in Schedule 1 of that Act; and*

(b) *does not have a significant adverse effect beyond the boundary of the area of land.*

4.12 The Revised Chapter sets out at 21.5.25 the standards for informal airports on Public Conservation and Crown Pastoral Land. There is an inconsistency between the s42A Report and the Revised Chapter as to whether the 500m setback from boundaries applies to DoC. The intent is that the 500m setback from boundaries *should* apply to DoC¹⁸ however the current Revised Chapter as drafted does not reflect that.¹⁹

4.13 Setting that aside, while DoC qualifies as being exempt under section 4(3) of the RMA, the qualifier at 4(3)(b) provides the basis for the setback to apply to DoC, as their activities could have a significant adverse effect on the neighbouring land.

¹⁷ Evidence of Mr Sean Dent (for Totally Tourism Ltd (#571), NZ Ski Ltd (#572), and Skyline Enterprises Ltd (#574)) at paragraph 24.

¹⁸ As per paragraph 16.34 of the section 42A Report for chapter 21 Rural.

¹⁹ As Rule 21.5.25.4 only refers back to 21.5.25.1 and 21.5.25.2 (and not 21.5.25.3 under which the Department of Conservation is referred to). The appropriate correction will be made to the Revised Chapter to be attached to the Council's right of reply.

- 4.14 Finally, it is noted that the evidence of Mr Day for Skydive Queenstown appears to re-litigate findings made by the Environment Court in the Skydive direct referral case²⁰ regarding the noise effects of that operation. While the Panel is not bound by the Court's findings in that case, it is submitted that it should have regard to them in considering the evidence on this issue and the relief sought by Skydive.
- 4.15 Further, the Council has had the opportunity to consider the memorandum filed by Skydive Queenstown and Totally Tourism Limited on 27 April 2016. The rule now supported by Skydive Queenstown through the amended relief set out in that memorandum, is quite different to that supported by Mr Dent through his evidence for Totally Tourism. The exemption for many commercial recreation activities broadens the rule to a number of areas beyond that just occupied by Skydive Queenstown, and making flights unlimited but managed via controlled activity status is departing from what Mr Dent says in his evidence at paragraph 41; that 14 flights per week is near the maximum threshold of amenity.

Activities on the surface of water

- 4.16 Mr Farrell's planning evidence²¹ is that the District's water resource (to the extent that it is used for activities on the surface) is not well managed and requires a stand-alone chapter within the PDP. What Mr Farrell has not addressed in any real detail for this chapter is the interface issues between other zones and the landward margins of water. Mr Farrell's logic for changing Objective 21.2.1 to better reflect the sustainable management purpose of the RMA rather than "protecting" is also submitted to be unnecessary – "protection" is already incorporated in section 5(2) as an element of sustainable management, whereas the words sought by Mr Farrell, "avoid, remedy or mitigate" are the qualifiers under section 5(2)(c). Mr Barr can also address the Panel on the Council's administration of certain Regional Plan / Regional Council functions, which is not acknowledged by Mr Farrell in his evidence.

²⁰

Re Skydive Queenstown Ltd [2014] NZEnvC 108.

²¹

For Stalker Family Trust (#535) Cook Adam Trustees limited/C & M Burgess (#669) Slopehill Properties limited (#854) D & M Columb (#624) Real Journeys Limited (#621/1341) Te Anau Developments Limited (#607/1342) Cardrona Alpine Resort Limited (615) Queenstown Water Taxis Ltd (#658) Ngai Tahu Tourism Limited (#716).

Education and community facilities

- 4.17 Ms Julie McMinn's evidence on behalf of the Ministry of Education²² is that there should be increased flexibility for the establishment of education and community facilities in the Rural zone through direct references in objectives, policies and rules. Ms McMinn has not however recommended any specific changes to the provisions that would give effect to what is sought, or the types of activities the Ministry is seeking to allow (beyond those covered under designations for education purposes). The Ministry's submission does not provide this information either.
- 4.18 In addition, Ms McMinn's evidence does not refer to or acknowledge the Strategic chapters of the PDP and how the relief sought would align with those provisions.
- 4.19 Ms McMinn recognises that the Ministry "relies on the designation requirements of Part 8 of the RMA to establish school sites"²³ yet goes on to state that policy support is required to enable education and community activities (no specific detail is provided, as to why the policy support is required when the designations are existing). Ms McMinn explains that the Ministry has made a submission on the proposed Otago Regional Policy Statement (**pRPS**) and that, to ensure consistency with that submission, the objectives, policies and rules of the Rural Zone should be amended. We note that, as recognised by Ms McMinn, the decision on the pRPS is pending, therefore to update the PDP provisions on the basis of the Ministry's submission on the pRPS would be premature.
- 4.20 Regardless of the outcome of the pRPS submission, a further (and more important) consideration is the existence of the designation process. It is submitted that the designation process provides sufficiently for the establishment of schools. The examples in Ms McMinn's evidence of Hawea Primary and Remarkables Primary are both designated for "education purposes". The designations include very specific conditions on some matters (for example minimum car parking, colours of building,

²²

Submitter #524.

²³

Ms McMinn's evidence at paragraph 17.

storage of goods, setbacks etc) but there appear to be no restrictions on operating hours of the schools nor the ability to hold community events.

Wanaka Airport

4.21 Queenstown Airport Corporation (**QAC**) seeks to apply a prohibited status to certain activities within a proposed runway end protection area (**REPA**). The REPA rules would prohibit a range of activities including the "*release of any substance which would impair visibility or otherwise interfere with the operation of aircraft including the creation of smoke, dust and steam*". The consequences of these activities are discharges to air. Discharges to air are within the jurisdiction of the Otago Regional Council.

4.22 In addition, there is submitted to be an element of unfairness on affected landowners through imposing a prohibited activity status through a submission, and QAC have not provided sufficient evidence to justify the need for prohibiting the activities and listed effects (ie bird strike). There is also the potential that large parts of the requested rule are negated through existing uses associated with permitted farming activities, such as cultivating land. It is noted that this rule is not included in the revised chapter provided with Ms O'Sullivan's evidence but appears to be supported through paragraph 5.28 of her evidence.²⁴

5. RURAL RESIDENTIAL AND RURAL LIFESTYLE – CHAPTER 22

5.1 A number of submitters have pursued relief which would reduce the proposed average density of one household per two hectares to one per hectare in the Rural Lifestyle zone.

5.2 Mr Barr's evidence identifies a number of issues with this suggested relief. Most importantly however, it is submitted that the evidence in

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The prohibited status rule requested by QAC is (see Appendix A of Ms O'Sullivan's evidence, page 7):

Within the Runway End Protection Areas, as indicated on the District Plan Maps,

a. Buildings except those required for aviation purposes;

b. Activities which generate or have the potential to generate any of the following effects:

i. mass assembly of people

ii. release of any substance which would impair visibility or otherwise interfere with the operation of aircraft including the creation of smoke, dust and steam

iii. storage of hazardous substances iv. production of direct light beams or reflective glare which could interfere with the vision of a pilot

v. production of radio or electrical interference which could affect aircraft communications or navigational equipment

vi. attraction of birds.

support of this relief largely fails to acknowledge or have regard to the Strategic chapters of the PDP and the proposed policy approach to housing and urban/commercial development. Nor does the evidence generally acknowledge that the Council has provided a conservative analysis of the capacity of the land within Urban Growth Boundaries to accommodate additional households.

5.3 The fact that historical development in some of those areas has tended towards a lower density than what is being proposed does not undermine the Council's position as to the appropriate permitted density. A lower permitted density would simply serve to lower the bar and reduce the distinction between these identified rural areas and urban areas. They are not intended to be small townships.

5.4 It is appropriate that the capacity of land within Rural Lifestyle zones to accommodate a higher density of development is assessed on a case by case basis. It is also appropriate that the Council has the ability to decline consent, through a restricted discretionary activity status, where permitted standards are breached.

6. GIBBSTON CHARACTER ZONE – CHAPTER 23

6.1 The submitter evidence filed has confirmed that the Council and submitters' areas of disagreement are limited for this zone. In particular, it is worth mentioning the NZ Transport Agency's evidence confirming that it largely agrees to the changes recommended for this chapter, with the only outstanding matter being reverse sensitivity for new dwellings located outside the environmental buffer area.²⁵

6.2 Transpower New Zealand has also confirmed it is largely in agreement with the revised chapter, except that Ms Craw considers that "inappropriate" should be reinstated and "other" deleted in Objective 12.2.1.²⁶ Mr Brown's evidence seeks some residual changes to the chapter.²⁷

²⁵ Also a matter for Chapter 21 (21.5.2).
²⁶ Paragraph 45 and 46 of Ms Craw's evidence.
²⁷ Section 4 of Mr Brown's evidence for various submitters.

7. INDIGENOUS VEGETATION AND BIODIVERSITY – CHAPTER 33

7.1 Following review of submitters' evidence, the identification of SNAs on the planning maps where they are accurately mapped and possess the qualities of SNAs appears to generally be supported.²⁸ There does not appear to be any substantial challenge to the criteria for assessing the SNAs.

General exemptions to Clearance of Indigenous Vegetation rules

7.2 Several submitters seek exceptions to the discretionary activity status for clearance of indigenous vegetation within certain areas.²⁹ In his s42A Report Mr Barr rejected this relief as he considered allowing it would result in the Council not fulfilling its functions under section 31 of the RMA. Section 31 provides, relevantly:

(1) *Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*

...

(b) *the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of-*

...

(iii) *the maintenance of indigenous biological diversity: ...*

7.3 NZ Ski Ltd disagrees with the Council's position on this. It does not consider its requested relief is a request for the Council to "*renege on its statutory obligations for the maintenance of indigenous biological diversity*".³⁰ Instead, it is proposing that the Council "*considers, recognises and accepts the assessments of these values that are undertaken by DOC in the Concessions process*".³¹

²⁸ For example, QPL legal submissions, paragraph 7.1. Synopsis of Submissions for Jeremy Bell Investments Limited, paragraph 7.

²⁹ Submissions #621-1341 (Real Journeys Ltd) and #607-1342 (Te Anau Developments Ltd) seek the exception in the Ski Area Sub-Zone; Submissions #571 (Totally Tourism Ltd), #572 (NZSki Ltd) and #574 (Skyline Enterprises Ltd) seek the exception in the Ski Area Sub-Zone located within Public Conservation Land; Submissions #615 (Cardrona Alpine Resort Ltd) seeks the exception in the Cardrona Alpine Resort (being land above 1,070m), and Submissions #610 (Soho Ski Area Ltd) and #613 (Treble Cone Investments Ltd) seek the exception on land managed under the Conservation Act in accordance with Conservation Management Strategy or Concession; under the Land Act, in accordance with a Recreation Permit; or the Reserve Act in accordance with a Reserve Management Strategy.

³⁰ Evidence of Sean Dent for Submission #572 (NZ Ski Ltd) at paragraph 140.

³¹ Evidence of Sean Dent for Submission #572 (NZ Ski Ltd) at paragraph 141.

- 7.4 In a similar vein, Soho Ski Area Ltd's evidence is that it is a duplication of process and therefore inefficient for the PDP to subject land to further rules and potential consent processes when such matters have already been considered under the Conservation Act 1987, or the Land Act 1948.³²
- 7.5 The Council's position is that an exception could be supported on land that is a Conservation Area³³, managed by DoC and has the relevant approval, although noting that this could compromise the ability to perform its functions under section 31 of the RMA, and its duties under section 6 of the RMA. This view is primarily based on the e-mail from DoC, attached to Mr Dent's evidence, confirming that DoC will be withdrawing their further submission that opposes the exemption for clearance of indigenous vegetation within DoC Conservation Areas.³⁴

Jeremy Bell Investments Ltd - Legal Submissions

- 7.6 Counsel for Jeremy Bell Investments Ltd (**JB**) raise, amongst others, the following issues in their synopsis of legal submissions:
- (a) the provisions that relate to land outside of SNAs or below 1071m do not achieve the purpose of the RMA;
 - (b) the Chapter 21 and Chapter 33 provisions do not give effect to the National Policy Statement for Freshwater Management (**NPS**), nor the operative Otago Regional Policy Statement (**RPS**);
 - (c) the Chapter 33 provisions (in particular the definition of 'clearance of vegetation', Rules 33.3.3 and 33.5) are inconsistent with the Regional Plan: Water for Otago; and
 - (d) the Chapter 33 provisions do not achieve the objectives and policies of the Strategic Directions chapter and preclude the objectives of the rural zone being achieved (that promote farming as the predominant land use in the Rural Zone).

³² Evidence of Christopher Ferguson for Submissions #610 (Soho Ski Area Ltd) and #613 (Treble Cone Investments Ltd) at paragraph 136.

³³ As defined in the Conservation Act 1987, and as explained the evidence of Sean Dent #572 (NZ Ski Ltd) at paragraph 106.

³⁴ Counsel is not aware of the further submission being formally withdrawn at the time of filing these opening submissions.

7.7 Matters (a) and (d) above are evidential issues, while (b) and (c) involved mixed issues of evidence and law, which we address below.

National Policy Statement for Freshwater Management

7.8 The NPS is of primary relevance to regional councils in terms of their water management functions. Nevertheless, it is accepted that the district plan must give effect to it under section 75(3). It is submitted to be drawing a long bow to suggest that there is an unqualified obligation for the Council, in its land use management functions, to actively provide for spray irrigation systems, in order to give effect to the generally expressed objective to "improve and maximise the efficient use and allocation of water" in the NPS.³⁵

7.9 The NPS does not act as any form of legal barrier to the inclusion of "irrigation" within the definition of clearance of vegetation. The evidence of Mr Davis is that, as a matter of fact, irrigation results in clearance of sensitive vegetation. As it is a land management practice, it is submitted it is within the Council's powers to regulate in this instance, bearing in mind its duties under section 6 of the RMA.

Royal Forest and Bird Society of New Zealand v Dougal Innes

7.10 JB submits that Rule 33.3.3 is *uncertain, inconsistent and create ambiguity as to the application of the Rules at 33.5*.³⁶ They further submit that the issues identified in *Royal Forest and Bird Society of New Zealand v Dougal Innes*³⁷ have not been resolved by the PDP. The Council does not accept these suggestions. The former Site Standard 5.3.5.1.x was a difficult rule to understand and could be interpreted in various different ways, as the Court found in the *Innes* case.³⁸ That did not however make the rule *ultra vires* in that case.

7.11 Mr Barr has specifically considered the points raised in Mr Cubitt's evidence which suggests that Rule 33.3.3 is uncertain, and maintains his view that the rule is capable of being objectively applied through a

³⁵ Paragraphs 27 – 28 of Mr Cubitt's evidence.

³⁶ Synopsis of Opening Legal Submissions on behalf of Jeremy Bell Investments Ltd dated 22 April 2016, at paragraph 17.

³⁷ [2014] NZEnvC 72

³⁸ At paragraphs 35-38.

quantitative assessment. It is noted that no specific drafting suggestions have been provided to address the concerns expressed in evidence.

- 7.12 Considering the *Innes* case, it was clear that the combination of rules and definitions required significant value judgments to be made about the interpretation and application of the relevant site standard, which led to widely differing opinions from different experts. The Council has sought to remove and reduce the degree of subjectivity that troubled the Court in *Innes*. If the Panel holds concerns as to the clarity of the rules, then both counsel and experts would be willing to engage in discussions with the submitters to seek to resolve that.

Queenstown Park Limited

- 7.13 QPL has confirmed its support for the provisions that relate to biodiversity offsetting as an appropriate mechanism to manage residual effects (although it considers that the effects of clearance should also be balanced against the benefits associated with the activity for which clearance is being undertaken).³⁹
- 7.14 Consistent with their relief on Chapter 21, QPL seek that Chapter 33 be amended to acknowledge that identified non-farming activities (including recreation and/or tourist activities) can be appropriate in and around SNAs, in particular to "achieve a better balance" by promoting incentives to protect, maintain, or enhance indigenous biodiversity through the enablement of some form of development right as a means to compensate a landowner for, or offset the effect of, the restrictions imposed on the use of their land through the identification of an SNA.⁴⁰
- 7.15 As we have addressed earlier in these submissions, the Council considers that it has provided a balance between farming and non-farming activities in rural areas. Based on the evidence of Mr Davis, it has concluded that the impact of farming activities on SNAs is generally well-known and low.
- 7.16 It does not however have the same level of confidence that other activities, such as those suggested by QPL, have a similarly well-

³⁹ QPL opening submissions, paragraph 4.25.

⁴⁰ QPL opening submissions, paragraph 4.13.

understood or low impact on SNAs in every instance, certainly not to the extent that they justify specific policy recognition and/or enablement. The suitability of non-farming activities should be assessed on a case by case basis in terms of their impacts on the values of SNAs.

7.17 In terms of the request for new policies recognising opportunities for proposals that can demonstrate a significant indigenous biodiversity gain, Mr Barr has recommended changes to provisions that more accurately reflect concepts such as biodiversity offsetting but has not gone further. It is accepted that the cases cited by counsel for QPL⁴¹ indicate that the requested approach is available and has been adopted as a matter of policy by some councils, but they do not require that it should be adopted in this instance for this District.

7.18 It is submitted that there is nothing in the Council's proposed policies which would preclude such an approach being advanced by an applicant in individual circumstances, but the circumstances which might apply to one development proposal will not necessarily apply to others, such that policy recognition of increased development opportunities or incentives for biodiversity gains is appropriate across the entire zone. The Court in *RFBPS* recognised⁴² that a palette of measures could and should be used to protect SNAs, so it is not necessarily appropriate to give specific policy recognition to only one of the available measures.

Department of Conservation

7.19 DoC supports the mapping and criteria for SNAs, but considers that the mapping is incomplete and that changes are required to provide protection for additional areas identified through development proposals.⁴³

7.20 If the Panel was inclined to adopt the approach suggested by DoC of effectively using the PDP criteria when assessing the need for protection of sites as part of development proposals, then it is submitted that considerable further drafting work to the specific relief sought in DoC's

⁴¹ The *RFBPS* and *Green* cases referred to at paragraphs 4.14 – 4.20 of QPL submissions.

⁴² *Royal Forest and Bird Protection Society of New Zealand Incorporated v New Plymouth District Council* [2015] NZEnvC 219 at [86].

⁴³ See paragraphs 24-27 of Mr Brian Rance's evidence.

submission to give effect to this concept is required, in order for the concept to be effective.

8. WILDING EXOTIC TREES – CHAPTER 34

8.1 The Council's synopsis of submissions listed "whether wilding tree spread affects water yield" as an outstanding matter, but no submitter evidence has been filed on that point.

8.2 In relation to the second issue, being Council's support of discretionary activity status for the planting of Radiata pine through the s42A report:

- (a) Mr David Cooper on behalf of Federated Farmers supports new policies 34.2.1.2 and 34.2.1.3, and the discretionary activity status of planting Radiata pine;⁴⁴
- (b) Mr Brian Rance, an ecologist for DoC, supports the prohibited activity rule from an ecologist' perspective, and appears to agree with the Council's position that it is not practicable or manageable to administer a rule allowing the planting of sterile cultivars, as it would be difficult to prove that the cultivars they seek to plant are sterile⁴⁵. He does not comment on the change to discretionary activity status for the planting of Radiata pine only;⁴⁶ and
- (c) Ms Fiona Black for Real Journeys and Te Anau Developments Limited (this is understood to be company evidence) opposes the move from prohibited to discretionary activity status.⁴⁷ Ms Black's evidence and the examples given at Walter Peak, do not take into account that by allowing the planting of Radiata pine as a fully discretionary activity, the Council has the ability to manage compliance, and enforcement if appropriate.

8.3 Regarding Ms Black's comment about Policy 10.5.3 of the operative RPS, this policy directs that adverse effects of plant pests on Otago's communities and natural physical resources are reduced and where practicable eliminated through (relevantly) developing strategies to

⁴⁴ Evidence of Mr David Cooper for Submitter #600-1132 (Federated Farmers) at paragraph 71.

⁴⁵ Mr Barr, section 42A Report, Chapter 34 Wilding Exotic Trees paragraph 9.3. The request for this new rule came through Arcadian Triangle and David Broomfield's submissions. Both statements of evidence filed on behalf of these submitters is silent on the issue.

⁴⁶ Evidence of Mr Brian Rance for Submitter #373-1080 (Director-General of Conservation) at paragraph 38.

⁴⁷ Submitters #621/#1341 and #607/1342. Statement of evidence at paragraph 5.1.

effectively *manage* Otago's plant pests, and adopting the most practicable method of pest control while safeguarding the environment. The legal test is that the PDP must give effect to the RPS (not that it must not "undermine" it). The relevant policy is about existing plant pests, not about the *planting* of new plant pests.

9. WITNESSES

9.1 The Council will call the following evidence:

- (a) Mr Craig Barr, Planner, who is the author of all five section 42A reports, which address:
 - (i) the objectives and policies of the chapters and the resource management issues that the chapters respond to; and
 - (ii) submissions on each chapter;
- (b) Dr Stephen Chiles, on acoustic matters related to informal airports (relevant to the Rural chapter only);
- (c) Dr Marion Read, on landscape matters relevant to the Rural, Rural Residential, Rural Lifestyle, and Gibbston Character chapters;
- (d) Mr Glenn Davis, an ecologist who gives evidence on the Indigenous Vegetation and Biodiversity, and Wilding Exotic Trees chapters; and
- (e) Mr Philip Osborne, an economist who provides evidence in relation to economic matters for the Rural and Indigenous Vegetation and Biodiversity chapters.

DATED this 2nd day of May 2016



J G A Winchester/S J Scott
Counsel for Queenstown Lakes District Council