BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

UNDER	the Resource Management Act 1991
IN THE MATTER	of submissions on Stage 3 of the Proposed District Plan
BETWEEN	**LESLEY AND JEREMY BURDON** **DINGLEBURN HOLDINGS LIMITED** **HUTTON NOLAN FAMILY TRUST** **BEECH COTTAGE TRUSTEES LIMITED** **RICHARD AND SARAH BURDON** **ALPHA BURN STATION LIMITED** **ORANGE LAKES (NZ) LIMITED** **GRAEME HAROLD RODWELL** **QUARTZ COMMERCIAL GROUP LIMITED** **LAKE HAEWA HOLDINGS LIMITED** **HAWEA COMMUNITY ASSOCIATION INCORPORATED** Submitters

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LEGAL SUBMISSIONS ON BEHALF OF SUBMITTERS

Dated: 10 July 2020

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MAY IT PLEASE THE PANEL:

Introduction

[1] These legal submissions are on behalf of the following submitters and further submitters to Chapter 39 (Wahi Tupuna) of Stage 3 of the Queenstown Lakes District Council (**Council**) Proposed District Plan (**PDP**):

(a) Lesley and Jeremy Burdon (#3312);

(b) Dingleburn Holdings Limited (#3443);

(c) Hutton Nolan Family Trust (#3334);

(d) Beech Cottage Trustees Limited (#3326);

(e) Richard and Sarah Burdon (#3401);

(f) Alpha Burn Station Limited (#3341);

(g) Orange Lakes (NZ) Limited (#3400);

(h) Graeme Harold Rodwell (#3293);

(i) Quartz Commercial Group Limited (#3328);

(j) Lake Hawea Holdings Limited; and

(k) Hawea Community Association Incorporated (#3287).

(**the Submitters**)

Submissions and Relief Sought

[2] The basis for the Submitters' opposition to the Wahi Tupuna chapter, the identification of their properties as being within Wahi Tupuna areas, and the additional restrictions imposed based on this identification, include the following:

(a) The provisions would place unjustified restrictions on land use and infringe on property rights;

(b) The provisions could cause significant delays and costs to landowners in terms of having applications for resource consents processed and the possibility of applications being subject to public notification and even being declined when this would not occur if the land was not subject to such notation;

(c) The provisions are contrary to the purpose of the Resource Management Act 1991 (**Act**); and

(d) There has been no consultation with owners of land identified as Wahi Tupuna areas.

[3] The Submitters seek deletion of the Wahi Tupuna chapter or removal of the Wahi Tupuna mapping from their properties, or alternatively, amendments to the provisions so as to reduce the burden to landowners resulting from the restrictions imposed by the provisions.

Evidence

[4] Expert planning evidence of Hayley Mahon has been filed on behalf of a number of the Submitters which recommends amendments to the Wahi Tupuna Objectives, Policies and Rules. Ms Mahon's evidence recommends:

(a) Changes to the Objectives and Policies to reduce uncertainty for landowners as to when they may have to consult with Manawhenua when undertaking activities on their land;

(b) Removal of the Wahi Tupuna overlay from urban areas; and

(c) Amendments to the restrictions on farm buildings and earthworks so as to exclude properties below 500masl

[5] Notwithstanding the primary relief sought by the Submitters being the deletion of the Wahi Tupuna chapter or the removal of the Wahi Tupuna mapping notation from their properties, the Submitters adopt Ms Mahon's evidence and support her recommended amendments to the provisions.

Evidential Basis for Mapping of Wahi Tupuna Areas

[6] It is submitted there has been an inadequate evidential basis provided by both the Council and Manawhenua for the inclusion of properties within Wahi Tupuna areas.

[7] It is clear the Council in notifying the mapping of Wahi Tupuna areas relied solely and entirely on the recommendations of Manawhenua and adopted these recommendations without question.

[8] Ms Picard in her section 42A Report confirmed "identification of areas of value sits with Manawhenua" and "the Council is not in a position to justify their extent".[1]

[9] Whilst Manawhenua might be in a position to determine what areas of land contain cultural values and significance for Maori, this does not mean the evidence they have presented should simply be accepted on its face, which it appears is exactly what the Council has done. The normal rules of evidence must still apply, and "information should be distinguished" from assertion".[2]

[10] The Submitters agree with the legal submissions presented on behalf of Ken Muir Gibbston Valley Station and others which point out the evidence of Manawhenua "must be tested in the usual way".[3] This is particularly the case given the potentially significant consequences to other parties (affected landowners) as a result of this evidence being otherwise accepted and adopted.

[11] It is submitted the evidence is not able to be tested nor understood by those most affected by the proposed provisions, being the Submitters themselves.

[12] There was no consultation with, or information given to affected landowners before or at the time of notification explaining the reasons or

1 Section 42A Report at 4.5.
2 *Westfield (New Zealand) Limited v North Shore City Council* [2005] NZSC 17 at [146].
3 Legal submissions on behalf of Ken Muir (#3211), Gibbston Valley Station (#3350) and others, 8 July 2020, at 27.

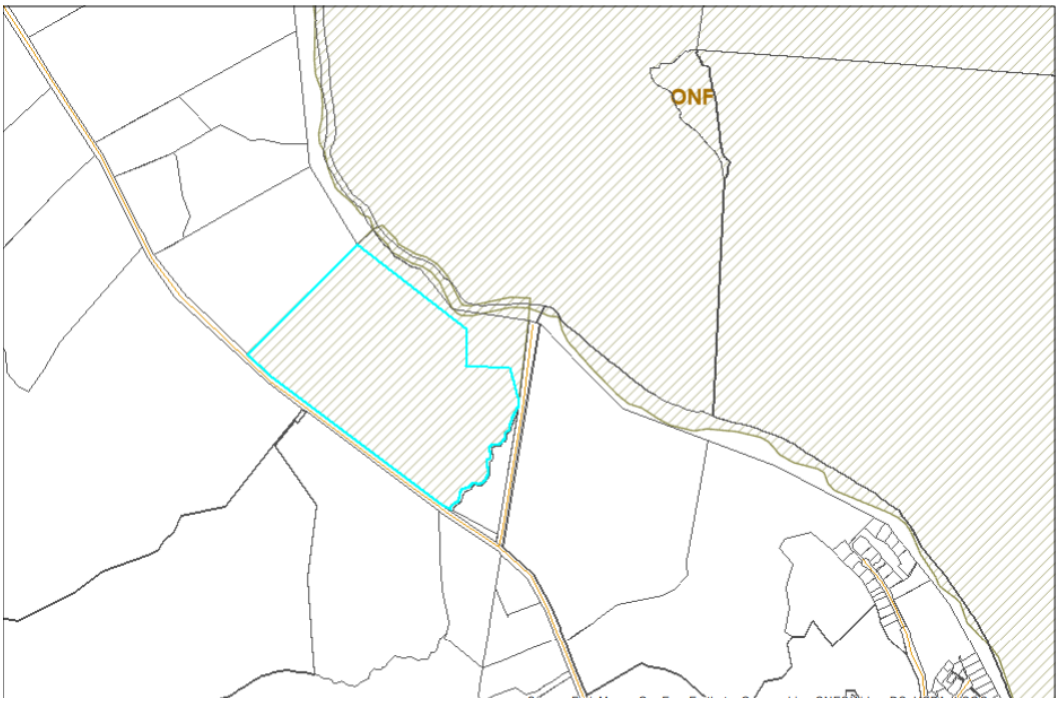
basis for the Wahi Tupuna mapping on their sites or what particular values were being sought to be protected.

[13] Indeed, following notification many of the Submitters sought such explanation from Council and representatives of Manawhenua, but none was forthcoming.

[14] Consequently, there is significant uncertainty for landowners as to how any application for resource consent for activities within these areas will be assessed, what effects such activities will be deemed to have on values for a particular site, and how such effects can be appropriately avoided, remedied or mitigated.

[15] Whilst subsequent evidence of Manawhenua has attempted to provide further explanation the Submitters are still unclear as to the reasons for the identification and mapping of their properties and are not able to clearly understand the basis for such.

[16] This uncertainty is particularly glaring for some of the Submitters' properties. Beech Cottage Trustees Limited's property west of Wanaka, for example, has been singled out as the only parcel of land in the vicinity on the Wanaka lakefront to be subject to a Wahi Tupuna notation:



[17] The mapping of this property is at odds with the evidence for Manawhenua that mapping is not based on cadastral boundaries.[4]

[18] The Submitters are also unsure of and have concerns as to whether the mapping of their properties will have a cumulative effect of enabling and justifying further restrictions to be imposed in the future.

[19] Some of the Submitters' properties have been through the Tenure Review process whereby Manawhenua had and took the opportunity to ascertain whether the land contained any such values as those they now seek to protect. In some cases where such values were identified specific provisions were made for such.

[20] Landowners should be able to assume that if anything of interest had been identified it would have been provided for.

[21] As expressed in the legal submissions for Remarkables Park Limited and Queenstown Park Limited, "where Manawhenua are the sole repository of evidence, it is incumbent on them to provide such evidence in a transparent and comprehensive manner such that it may be assessed and understood by affected landowners".[5]

[22] Those submissions cite examples where Courts have determined that mere assertions without evidence that land holds cultural values may not be enough, and more probative evidence may be required.[6]

[23] The evidence in support of the Wahi Tupuna mapping is neither transparent nor comprehensive and has not met the necessary test for justifying the restrictions it seeks to impose. Accordingly, it is submitted there is insufficient evidence for retaining the mapping as notified.

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4 Michael Bathgate evidence, 29 May 2020, at 45.

5 Legal submissions on behalf of Remarkables Park Limited and Queenstown Park Limited, 3 July 2020, at 3.2.

6 At 2.9.

Lack of Section 32 Analysis

[24] It is submitted the Council has failed to properly undertake a sufficient analysis of the costs and benefits of the proposed Wahi Tupuna provisions under s 32 of the Act.

[25] An evaluation of proposed provisions under s 32 must pursuant to s 32(2):

(a) Identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions;

(b) If practicable, quantify the benefits and costs; and

(c) Assess the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.

[26] The position advanced for the Council is that because the costs and benefits to Manawhenua cannot be quantified, the costs and benefits to landowners do not need to be quantified.[7]

[27] It is submitted this is not the purpose or intent of s 32 and is an inadequate justification for a failure to properly assess the costs and benefits of the provisions. The costs to landowners, particularly economic costs, can and should be quantified, or at the very least attempts at quantification should be made. The fact quantification cannot be made in respect of one affected group does not allow the Council to ignore such a quantification in respect of another group.

[28] By neglecting to undertake a cost-benefit assessment and quantify what could be significant costs to landowners, the Council has failed to adhere to its duties under s 32.

[29] It is submitted the Council has also failed to undertake a sufficient evaluation of alternatives, as is also required under s 32.

7 Based on answers by Ms Picard to questions from the Panel.

[30] Further, by deferring to the evidence of Manawhenua in terms of the mapping of Wahi Tupuna sites and not testing this evidence in notifying the maps and provisions, the Council has sought to delegate its responsibilities and obligations to a third party. This is inappropriate and once again a failure to adhere to its duties as a local authority.

[31] Given the Council has not identified the cost to landowners of the Wahi Tupuna provisions, it is submitted that the proper determination for the Panel to reach is such provisions are inappropriate and either delete the same or amend sufficiently to ensure such costs can be identified and are shown to be at an acceptable level.

Part 2 of the Act and Higher Order Planning Provisions

[32] It is acknowledged "the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" is a matter of national importance under s 6(e) of the Act.

[33] It is also acknowledged the Otago Regional Policy Statement (**RPS**) provides that Wahi Tupuna areas are to be mapped and protected, and that the PDP must give effect to the RPS.

[34] Likewise, the Strategic Directions of the PDP provide that Tangata Whenua status and values require recognition in the District Plan.

[35] However, the fact the PDP must give effect to these matters does not mean it must do so at any costs. The importance of Wahi Tupuna under Part 2 of the Act must be balanced against other Part 2 matters, such as:

(a) The purpose of the Act, being the promotion of the sustainable management of natural and physical resources, and the enabling of people and communities to provide for their social, economic, and cultural well-being (s 5);

(b) The efficient use and development of natural and physical resources (s 7(b);

(c) The maintenance and enhancement of amenity values (7(c)); and

(d) Any finite characteristic of natural and physical resources (s 7(g)).

[36] Similarly, provisions in the RPS relating to Wahi Tupuna matters need to be measured against provisions providing for people to be able to use and enjoy Otago's natural and built environment.[8]

[37] Chapter 3 of the PDP has as a Strategic Objective that the District's residents and communities are able to provide for their social, cultural, and economic wellbeing and their health and safety.

[38] When there is conflict between important Part 2 matters and higher order planning provisions, a cost benefit analysis must be undertaken before a proposal is implemented which gives effect to one matter at the expense of another. No such analysis has been undertaken in this case.

Requirement to Consult Contrary to s 36 of the Act

[39] Whilst not an express requirement, it is clear there will be a default obligation on applicants for resource consents in areas subject to a Wahi Tupuna notation to consult with Manawhenua in order to satisfy Council (who will by their own admission have no other way of knowing) the adverse effects of an activity on Wahi Tupuna values will be appropriately avoided, remedied or mitigated.

[40] It is clear based on discussions with Manawhenua representatives that applicants for consents will be required to meet the cost of Manawhenua in regard to such consultation. If applicants do not consult with and obtain Affected Party Approvals from Manawhenua this could mean such applications will be limited or publicly notified.

[41] It is submitted the obligation to consult is contrary to s 36A of the Act, which expressly provides that neither an applicant for consent nor a local authority has a duty to consult with any person in relation to an application.

[42] The Submitters agree with the submissions and evidence on behalf of Veint and others that provisions which effectively mandate consultation are unlawful and, in any event, unnecessary as a Council has the right

8 Partially Operative Otago Regional Policy Statement, Chapter 5.

to commission a report on relevant applications as it relates to Wahi Tupuna matters and Manawhenua values.[9]

Conclusion

[43] It is submitted:

(a) An insufficient evidential basis has been established to justify the Wahi Tupuna maps and associated provisions;

(b) There has been an inadequate analysis under s 32 of the Act of the proposed maps and provisions; and

(c) The proposed maps and provisions whilst giving effect to matters under Part 2 of the Act, the RPS and Chapter 3 of the PDP are also contrary to other provisions under Part 2, the RPS and Chapter 3.

[44] Accordingly, it is submitted the Wahi Tupuna Chapter as notified should be deleted or amended such that these matters have been addressed.

[45] In the alternative, it is submitted the restrictions imposed as a result of the Wahi Tupuna provisions should be amended so as to reduce the uncertainty, financial burden, and potential for delay for affected landowners.

Dated: 10 July 2020

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G M Todd / B B Gresson
Counsel for the Submitters

[9] Legal Submissions on behalf of Veint and others, 3 July 2020 at 56.