

**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 19 - Stage 3b
Proposed District Plan

**REPLY LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES
DISTRICT COUNCIL**

STAGE 3B / HEARING STREAM 19 - WALTER PEAK REZONING

5 JULY 2021

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1. INTRODUCTION

1.1 These reply submissions respond to several legal issues that arose during the course of Hearing Stream 19 (Walter Peak rezoning appeal). They also address certain matters raised in:

- (a) the supplementary legal submissions¹ filed on behalf of Wayfare Group Limited (**Wayfare**) on 25 June 2021; and
- (b) the Panel's Minute 47, issued on 28 June 2021 (**Minute**).

1.2 The Council's reply consists of these submissions, and evidence filed by:

- (a) Helen Mellsop – Landscape; and
- (b) Elias Matthee – Planning.

2. OUTLINE OF LEGAL SUBMISSIONS

2.1 The following matters are addressed in these submission:

- (a) The relevant provisions of Chapters 3, 4, and 6 of the Proposed District Plan (**PDP**) to the Walter Peak rezoning;
- (b) The relevance of the Proposed Otago Regional Policy Statement (**pRPS**) to the Walter Peak rezoning;
- (c) Walter Peak Station – within the Outstanding Natural Landscape (**ONL**);
- (d) The effectiveness of the proposed Tourism Zone provisions;
- (e) Council position on potential interim guidance from the Panel.

2.2 The following documents are attached to these legal submissions:

- (a) **Appendix A:** Jacks Point Resort Zone Joint Witness Statements (Planning and Landscape) and Environment Court Decision [2021] NZEnvC 34.

¹ Opening legal submissions dated 18 June 2021 and supplementary legal submissions dated 25 June 2021.

3. RELEVANT PROVISIONS OF CHAPTERS 3, 4 AND 6

- 3.1 During the course of the Hearing, the Panel sought clarification from Council as to which Chapter 3 and 6 provisions apply to the rezoning of Walter Peak.
- 3.2 Attached at Appendix B to Mr Matthee's reply evidence is a table that sets out the relevant provisions, with a short explanation as required.

4. THE PROPOSED REGIONAL POLICY STATEMENT

- 4.1 Following the Hearing, the Panel issued a Minute which requested, at paragraph [3], that Council confirm which new, or amended provisions of the recently notified proposed Otago Regional Policy Statement (**pRPS**) are relevant for the proposed zoning of Walter Peak.
- 4.2 At this stage, the pRPS is a matter to be had regard to,² with the Operative Regional Policy Statement 2019 (**ORPS**) the operative document for the purpose of section 75(3)(c) of the RMA that must be given effect to.³
- 4.3 Given the nascent state of the pRPS, with the public submission period currently open, it is submitted that little weight should be afforded to it as part of this process. Despite that, Council's reply evidence has considered the impact of the provisions of the pRPS, and the extent to which the direction departs from the OPRS.
- 4.4 In order to assist the Panel, Council has reviewed the provisions of the pRPS and provides the following summary:

² RMA, section 74(2)(a).

³ RMA, section 75(3)(c); the Court of Appeal in *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38, [2014] 1 NZLR 593 (**King Salmon**) found that: "Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it, at [77], and that where policies are expressed in clearly directive terms, a decision-maker may have no option but to implement them, at [129].

- (a) The landscape related provisions, specifically those relating to ONLs, are essentially the same as per the ORPS. Council has not identified any reason why the Chapter 3 and 6 PDP provisions should not be applied in the manner outlined with the Panel to date.
- (b) The more significant changes in the pRPS are with the natural hazard provisions. The pRPS has, through its natural hazard risk chapter, set out a specific methodology for the assessment of risk, and has defined what is an acceptable, tolerable and significant risk. In conjunction with this, the pRPS contains a directive policy framework based on the varying degrees of risk, with the overall objective being that risk does not exceed tolerable levels.

4.5 Having reflected on the changes to the natural hazard provisions, it is submitted that Council's recommended natural hazard provisions (which were supported by Wayfare during the hearing) remain appropriate, as they specifically respond to the identified risk to people and buildings (through the use of overlays that respond to the degree of natural hazard risk). Mr Matthee's reply evidence recommends the inclusion of an additional policy, which provides direction for the consideration of natural hazard matters through the resource consenting process, and picks up the matter of 'tolerable' level of risk from the pRPS. The policy and rule framework now recommended by Council's experts is submitted to provide for consent applications to take account of the risk management framework in the pRPS, as it evolves through the Schedule 1 process.

4.6 Council's proposed provisions, which were developed with assistance from Mr Bond, were informed by an assessment of the hazard risk on the site. As noted in Mr Matthee's reply, while that assessment did not follow the specific methodology outlined in the pRPS (which has only recently been proposed), it did follow the Australian Geomechanics Society methodology, which is a recognised methodology for assessing risk from debris flow in New Zealand.

5. WALTER PEAK STATION – LOCATED WITHIN THE ONL

- 5.1 There is no disagreement between the experts that Walter Peak Station forms part of the ONL. In addition, Ms Mellsop's evidence is that the biophysical, perceptual and associative attributes found at the Walter Peak site contribute to the values of the wider Northern Eyre Mountains ONL.⁴ There is no dispute on this point either.
- 5.2 The Wayfare supplementary submissions refer to the decision in *Wakatipu Environmental Society v QLDC*,⁵ and observe – relative to the Walter Peak station – that there was no fine grained analysis supporting the ONL classification, and that the enabling legacy zone was part of the ONL.⁶
- 5.3 Council's response is that:
- (a) While, rightly or wrongly, the Operative District Plan (**ODP**) identified land as ONL without fine-grained analysis in all cases, the ODP maps have now been replaced with new PDP maps that depict the boundaries of the ONL across the District.
 - (b) The updated PDP boundaries have been tested in certain cases through the Stage 1 hearings and on appeal. No changes have been sought by Wayfare to the ONL classification of Walter Peak station.
 - (c) The fact that an enabling zone framework has applied to Walter Peak station for some time is not fundamentally determinative of whether the development enabled by that zone remains appropriate. Landscape character and sensitivity is not static, and neither is the policy framework in which the appropriateness (or not) of activities within ONLs is regulated.

4 Evidence in Chief of Helen Mellsop, dated 4 March 2021, at 5.10.

5 *Wakatipu Environmental Society v Queenstown Lakes District Council* C180/99.

6 Wayfare supplementary legal submissions dated 25 June 2021, at 10.

5.4 The Wayfare supplementary submissions refer to the Supreme Court's decision in *King Salmon*⁷, and note that:

... a protection against inappropriate development is not necessarily a protection against any development. Rather it allows for the possibility that there might be some forms of 'appropriate development'.

5.5 Council does not disagree. The recommended Rural Visitor Zone (RVZ) enables development in certain areas, to a point that is considered *appropriate* given the ONL classification, and provides for development elsewhere, subject to policy tests that are designed to achieve the required *appropriateness*. The notified RVZ was informed by an assessment of landscape sensitivity, as Ms Mellsop's evidence addresses. In addition, Ms Mellsop, in paragraphs 4.4 and 4.11 of her rebuttal evidence, has accepted that the Homestead area and some pockets of the Eastern Paddocks could absorb further development, provided there are stringent controls in place that ensure any development is appropriate.⁸

5.6 The Wayfare supplementary submissions seek to create a connotative distinction between the words "protect" and "avoid",⁹ but it is submitted that it is the context in which those words are used that is important. There may be some cases where the direction to 'protect' could warrant avoidance, an example being where the relevant proposal is so incompatible with the protection of certain landscape values that it would be inappropriate. That, however, is informed by context, and cannot be considered in the abstract.¹⁰

5.7 It is submitted that the direction provided by Chapter 3 is consistent and clear, for development to be appropriate within an ONL, it must *protect* the landscape values of the ONL (SO 3.2.5.1 and 3.3.30¹¹). In the face of this clear direction, the Council team was concerned

7 *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38.

8 Rebuttal Evidence of Helen Mellsop dated 11 June 2021 at paragraph 4.11.

9 Wayfare supplementary legal submissions, at 17.

10 Which is the basis for the submission made in paragraph 19 of the Wayfare supplementary legal submissions.

11 As confirmed by the Environment Court in its Interim Decision 2.7 [2021] NZEnvC 60.

to hear during the hearing that certain members of the Wayfare team had not 'applied' this policy direction to the proposed Tourism Zone.

5.8 Finally, in relation to ONL related issues, it is submitted that there is no obvious nuance to 3.1B.6 / 3.3.30 which means that the policy direction can be watered down to situations where rezoning is sought from Rural Zone to an Exception Zone only.¹² The language used in the Exception Zone framework provisions applies uniformly, and is not specific to any underlying zoning (ie. it would be possible to seek to rezone any Rural Residential Zone land to a new Exception Zone).

6. THE EFFECTIVENESS OF THE PROPOSED TOURISM ZONE PROVISIONS: CONTROLLED ACTIVITY STATUS

6.1 The Wayfare supplementary submissions respond to certain queries raised by the Panel regarding the ability to relocate proposed buildings to different sites, or within a wider site, through the exercise of control under a controlled activity status / rule.

6.2 At paragraph 30 of those submissions, counsel for Wayfare refers to the *Mygind* decision, reproducing an excerpt that noted the relevance of a specific rule (Rule 702.1) which “requires **that the building site** should be free of inundation, erosion, subsidence, slippage or other potential hazard” (emphasis added).

6.3 Based on the wording of that rule, Council accepts that there would be discretion to relocate a building from a 'site' in circumstances where it would fail to satisfy the requirements of Rule 702.1.

6.4 That wording is distinguishable however from the new policy proposed by Wayfare, and the matter of control at Rule X.4.12(a). For example, there is no reference to 'site' at all. Instead, the control is reserved to “... compatibility of the building... *location* with landscape, cultural and heritage and visual amenity values”.

¹² Wayfare supplementary legal submissions, at 18.

- 6.5 Counsel for the Council understood the Panel's concerns to arise from the lack of any standards or policy guidance as to how built development and subdivision¹³ would be regulated for Walter Peak station. Council's concern, which was raised in opening submission with the Panel, was that this lack of guidance could manifest itself in the subdivision of the Walter Peak station could down to a number of smaller "sites" (each held in one certificate of title). If controlled activity consent was then sought in relation to a specific site, then would the matters of control provide for the relocation of buildings to other sites, if the landscape effects were considered inappropriate?
- 6.6 Council's view is that the proposed matter of control (and policy amendment) would not provide for relocation outside any site. While Wayfare's supplementary submissions, at 34, conclude that Council has a wide discretion to alter building location within a Site, there is no reference to "site" in the proposed matter of control as there was in *Mygind*, which is a significant distinction.
- 6.7 As discussed with the Panel, Council remains concerned about the effectiveness of the proposed controlled activity rule. Given the Council's expert evidence in relation to landscape sensitivity and the lack of any fine-grained assessment of the location of built form (as part of the Tourism Zone), before it can be in a position to agree to any controlled activity framework, Council would need comfort that buildings will be located where there is capacity to absorb development. Failing that, Council would need to reserve the ability to refuse inappropriately located buildings, in order to achieve the strategic directions of the PDP. For completeness, Council notes that the proposed RVZ provisions provides for such refusal, in areas of elevated sensitivity.
- 6.8 The same approach applies for other sensitive landscapes and environments within the District. Council's position is that it is clearly more efficient, and effective, to include provisions that provide guidance on the built outcome intended, and plans that

¹³ During the hearing, the Chair asked Ms Baker-Galloway what the consequence would be if a consent application was accompanied by a map which sought to limit the spatial extent of the site, and the proposed building location.

identify where buildings can be appropriately located. If there is no such guidance, and a reliance on matters of control to achieve good outcomes, there is a risk of significant adverse effects and a failure to protect the landscape values of the ONL, and a perpetuation of appeals relating to conditions (where applicants are dissatisfied with Council's decisions).

Comparison with the Jacks Point Zone

- 6.9 As observed during the Hearing, Council considers the Jack Point Zone to be a useful comparison to Walter Peak. While Jacks Point involves a different landscape and location, and a mix of ONL and section 7(c) amenity landscape (being the Tablelands area), the common feature is that both are visible from the lakeshore, and both seek to provide for development.
- 6.10 Through the Topic 22 appeals on the Jacks Point Zone, the relevant parties (and Environment Court) agreed that a single homesite could be located within the Peninsula Hill ONL, subject to a specific policy and restricted discretionary activity status. Council's landscape expert was prepared to agree to this additional homesite on the basis that its location has been specifically assessed, development would be able to protect the landscape values of the ONL, and that a restricted discretionary status provided an appropriate means of assessing potential effects arising from built form, infrastructure, servicing and earthworks.¹⁴ The Environment Court endorsed this set of provisions.¹⁵
- 6.11 Agreement was also reached between Council and Jacks Point in relation to additional homesites in the Tablelands, two of which were subject to a restricted discretionary status that reserved discretion to "the external appearance of buildings with respect to the effect on visual amenity and landscape values of the area".¹⁶

¹⁴ PDP, Rule 41.4.4.18.

¹⁵ *Coneburn Preserve Holdings Limited & Ors v Queenstown Lakes District Council* [2021] EnvC 34, at [38].

¹⁶ PDP, Rule 41.4.4.19.

In addition, a specific policy was included to further guide the application of the rule.¹⁷

6.12 What can be drawn from both of these examples is that, despite the location of these homesites having been specifically assessed by Council's landscape experts, it can still be appropriate to reserve discretion to refuse consent, as a result of the sensitivity of the landscape.

6.13 Council has attached, at **Appendix A** to these reply submissions, the relevant Joint Witness Statements filed in relation to these matters, and the Court's decision which endorsed the new Chapter 41 provisions.

7. COUNCIL POSITION ON POTENTIAL INTERIM GUIDANCE FROM THE PANEL

7.1 During the Hearing, and subsequently in its Minute, the Panel sought advice from Council as to whether it would be agreeable to an approach which provided for the issuing of interim guidance (or an interim decision) from the Panel. The intention behind any interim guidance would be to provide for an iterative process between the parties, with a view to resolving a possible new set of bespoke zone provisions for the Walter Peak site.

7.2 As foreshadowed by the Panel, any such approach would inevitably require an application to the Minister under clause 10A of Schedule 1 to the RMA, for an extension of time.

7.3 Council has considered the Panel's invitation and makes the following observations:

- (a) Firstly, it has previously (and continues to) acknowledge the significant impact that COVID-19 disruptions have had on Wayfare and its operations (as well as other Tourism operators in this District).

¹⁷ Joint Witness Statement (Planning) dated 28 August 2020; PDP, Policy 41.2.1.32.

- (b) Council agreed to a deferral of this hearing in early 2020, in order to provide further time for the Wayfare team to fully prepare its case for bespoke zone provisions for the Walter Peak site. This deferral was confirmed by Panel in a Minute dated 20 May 2020.
- (c) Subsequent to that Minute, Council agreed a further shorter extension for the Wayfare team, but did so again on the basis that its decision would be made within the statutory period. While there is the potential to seek an extension from the Minister, Council must take account of its other ongoing processes and resourcing constraints, and cannot be expected to agree to all such requests on the basis of COVID-19 impacts.
- (d) While there would potentially be benefit in the parties receiving interim guidance, or an interim decision, from the Panel, the respective positions of the parties does not appear to be such that an agreed solution can be easily found.
- (e) As accepted by Wayfare in opening (and now supplementary) legal submissions, there is a significant amount of background work for Wayfare to complete, before there can be meaningful engagement on the merits and drafting of any new zone provisions, and agreement on the vision for the Walter Peak site. Council had hoped that this background work would have been completed by now, given the 12-month deferral of this hearing.
- (f) Clause 10A requires specificity around the duration of any extension sought. At this stage there has been no conversation about duration, however Council is concerned that if the preparation of a detailed structure plan and supporting master-planning is as “significant” and “resource-heavy”¹⁸ as Wayfare suggests, then the extension sought will need to be lengthy, and not in keeping with the intent of Clause 10A.
- (g) As the Panel will be aware, there was (and remains) significant disagreement between the expert witnesses

18 Wayfare supplementary legal submissions dated 25 June 2021, at 4.

and parties as to landscape capacity, and the regulatory approach to activities occurring on the site. It is likely that there would need to be significant concessions by Wayfare before any common ground could be reached, including a departure from its current reliance on the legacy ODP zoning as indicating what level of activity is appropriate.

7.4 Council makes these observations to assist the Panel, as at this point it remains neutral in relation to the issuing of interim guidance, or making an application under clause 10A. For the reasons set out below, Council's final position on any application under clause 10A will be linked to both the substance of any interim guidance (if the Panel chooses to go down that path), and Wayfare's response to the same. It is only at that point that Council will be able to properly consider the merits of continuing to engage with Wayfare in relation to its bespoke zoning proposal, and the resourcing consequences of that for Council.

7.5 If the Panel is minded to consider an interim guidance type approach, it is submitted that any guidance should be accompanied with specific directions to Wayfare, including that Wayfare must, within a timeframe directed by the Panel:

- (a) Confirm to the Panel and Council that it considers an appropriate zone framework can be developed for Walter Peak station that is in keeping with the Panel's interim guidance. This confirmation must include a substantive (albeit high level) response to the guidance, including relevant explanation where required;
- (b) Confirm that it will develop any new zone framework in a manner that will achieve the strategic directions in Chapter 3 and 6 of the PDP;
- (c) Commit to developing an effective zone and rule framework that responds to landscape sensitivity and characteristics across the site;
- (d) Confirm a date (with the Panel to confirm that it is appropriate) by which it can provide to Council: a draft

Structure Plan, supporting landscape assessment, completed master planning for the site, updated proposed provisions and an outline of the vision for Walter Peak station.

7.6 It is respectfully considered that directions to Wayfare along the lines of the above will be necessary to provide a platform for any ongoing discussions between the parties. This is particularly so in light of the present discord between the parties on certain substantive matters.

7.7 Finally, if after the issue of any guidance from the Panel, it appears to Wayfare that the modifications to its proposed Tourism Zone would be too significant, or that the Panel's guidance is simply not acceptable to it, it is respectfully sought that Wayfare advise the Panel and Council of this as soon as possible, and seek that the Panel continue to issue its recommendations in the normal course.

7.8 Counsel can be available at short notice to discuss this matter.

DATED this 5th day of July 2021



M G Wakefield
Counsel for Queenstown Lakes District Council

APPENDIX A
Jacks Point Resort Zone Joint Witness Statements (Planning and Landscape)
and Environment Court Decision [2021] NZEnvC 34