BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	Of the Variation to the Proposed District Plan, Priority Area Landscape Schedules

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MEMORANDUM ON BEHALF OF

DR JOHN COSSENS

Date: 17th of January 2024

MAY IT PLEASE THE COMMISSION

DOES THE HEARINGS PANEL AND COUNCIL HAVE JURISDICTION AND APPELLATE AUTHORITY TO CURE PREVIOUS PROCEDURAL DEFECTS?`

1. The crux of this memorandum is a challenge to the jurisdiction and authority of the Hearing Panel, (and by extension, the Council), wherein the Panel considers that the schedule 1 process of these submission hearings provides a curative effect on previous and significant procedural errors, most notably in the consultation with residents and in the methodology used to develop the landscape schedules. As this memorandum will highlight, the ability to cure procedural effects lies only with appellate courts.

2. This memorandum seeks that the Panel hearing the submissions in relation to the Priority Area Landscape Schedules variation to the proposed QLDC district plan, allow for legal submissions and then having considered those submissions provide a determination on the jurisdictional matters of whether:

   a. schedule 1 processes such as a submission hearing, cure procedural defects?
   b. the Hearings Panel has authority to recommend changes to the Landscape Schedules which will 'cure' previous procedural defects and errors in the methodology employed by QLDC landscape consultants to develop the priority area landscape schedules?
   c. the QLDC have appellate authority to make changes to the priority landscape schedules to cure previous methodological defects?
   d. The Hearings Panel has sufficient, and reliable information before it to make recommendations on submissions and/or changes to the landscape schedules?

3. It is submitted that it is incumbent upon the panel to provide a determination on its jurisdiction and authority **before** it issues its recommendations report to Council. The

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reason being that issues of natural justice may arise if the panel considered and made recommendations on matters that were either out of its scope/jurisdiction, or within scope but upon which submitters had not had sufficient opportunity to comment and be heard.

4. In a previous minute[1], and during hearing discussions, it became apparent that the Hearings Panel seemed to be of the opinion that the process of the hearings and the Panel's future report to Council in which it may recommend changes to the landscape schedules, would provide a sufficiently curative effect on any procedural errors present in the schedule consultation and methodology. It is respectfully submitted that the Panel does not have authority in the same way as the Court in a de novo appeal hearing, nor does the schedule 1 hearings process have curative powers over procedural errors. The hearing panel has been given delegated authority by the QLDC to act on its behalf so to suggest that the schedule 1 process and panel recommendations provide some sort of curative powers over procedural errors would essentially be suggesting that the Council has jurisdiction over its own procedures, much like an appellate court. Respectfully, that would exceed the Council's powers and be a step too far and be akin to *marking one's own homework*.

TASK OF THE HEARINGS PANEL

5. The Council notification which was the catalyst to the present priority area landscape schedule hearings stated:

The Queenstown Lakes District Council hereby gives notice that, in accordance with clause 8B of the First Schedule to the Resource Management Act 1991, the Hearing Panel appointed to hear submissions on behalf of the Council on the Proposed District Plan will hear submissions and make recommendations on Variation to the Proposed District Plan: Priority Area Landscape Schedules, at ***11am on 16 October 2023****.*

[1] Queenstown Lakes District Council Proposed District Plan: Priority Area Landscape Schedules Minute of Commissioners 11 October 2023, [13] – 'Even if we were wrong with respect to our powers, it is plain that any alleged defect with respect to public consultation has been remedied by the Schedule 1 process following public notification of the proposed variation.'

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6. As set out in the Hearing Panel's introductory minute, the task and role of the independent panel seemed straight forward:

The Hearing Panel appointed by the Queenstown Lakes District Council (the Council) is required to make recommendations as to whether or not to accept or reject the submissions received on the Landscape Schedules Variation and any proposed amendments to its provisions. The Council is then required to decide whether to accept or reject the Hearing Panel's recommendations.[2]

7. The panel is only empowered to make a recommendation to the territorial authority in terms of the limits of its delegated authority under section 34A (1) of the Act.

34A Delegation of powers and functions to employees and other persons
(1) A local authority may delegate to an employee, or hearings commissioner appointed by the local authority (who may or may not be a member of the local authority), any functions, powers, or duties under this Act except the following:
(a) the approval of a proposed policy statement or plan under clause 17 of Schedule 1:
(b) this power of delegation.

8. Following the hearing panel's recommendations to the Council, the full Council is then required to make a decision on matters raised in submissions as set out in Clause 10, Schedule 1 RMA which states:

10 Decisions on provisions and matters raised in submissions

(1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.
(2) The decision—
(a) must include the reasons for accepting or rejecting the submissions and, for that purpose, may address the submissions by grouping them according to —

[2] minute-1-pa-landscape-schedules-4-aug-23, [2.1]

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(i) the provisions of the proposed statement or plan to which they relate; or

(ii) the matters to which they relate; and

(ab) must include a further evaluation of the proposed policy statement or plan undertaken in accordance with section 32AA; and (b) may include—

(i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and

(ii) any other matter relevant

(3) To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.

(4) The local authority must—

(aaa) have particular regard to the further evaluation undertaken in accordance with subclause (2)(ab) when making its decision; and

(a) give its decision no later than 2 years after notifying the proposed policy statement or plan under clause 5; and

(b) publicly notify the decision within the same time.

(5) On and from the date the decision is publicly notified, the proposed policy statement or plan is amended in accordance with the decision.

9. Thus the hearing panel can only make recommendations to the Council, and cannot, of itself make decisions on submissions which must be left for the full council.

10. The fact that the panel can only make recommendations which may or may not be accepted by the Council becomes relevant when considering whether the panel has jurisdiction to suggest changes to the landscape schedules with a view to curing previous procedural errors.

11. It is submitted that because the panel can only make recommendations to Council, it becomes obvious it does not have appellate authority to correct procedural errors. Nor for that matter does the full Council. Here are several reasons why procedural errors cannot be corrected by the panel or the Council based on submission hearings:

    a. The hearings are not an appellate court.

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b. The panel can only make 'recommendations' to Council which are not binding (for example, two panel recommendations in relation to the Chapter 24 Wakatipu basin landscape study were not taken up by the Council)[3]

c. The submission hearings are not 'de novo' which conspires against the legal principle that '*any procedural defects can be cured by the de novo hearing in the Environment Court'*[4].

d. There is no opportunity to cross-examine expert witnesses, nor for that matter, submitters, or Council staff report authors.

e. The Hearings Panel is not truly independent in the sense it was appointed by the Council and includes a Councillor (who presumably can vote on the recommendations put forward by the panel) which presents as a very different scenario to an appellate court presided over by a Judge.

12. In responding to an earlier memorandum[5] seeking the panel to consider the whether the landscape schedule methodology and in particular the consultation was fair, robust and reliable, Ms Taylor as Chairperson answering for the panel stated:

Even if we were wrong with respect to our powers, it is plain that any alleged defect with respect to public consultation has been remedied by the Schedule 1 process following public notification of the proposed variation. [6]

13. With respect, I submit that that understanding of the Schedule 1 process is wrong. As authority to support this argument, the panel referenced *Paraparaumu Airport Coalition Inc v Kapiti Coast District Council*. In *Paraparaumu* the Court was primarily asked to consider whether there were any grounds to consider how the plan change commission hearings were conducted. The Court rejected the appeal primarily on the basis that the Environment Court has neither supervisory powers over a consenting authority nor does it have

[3] report-18-1-chapter-24-wakatipu-basin, [108], February 2019
[4] Paraparaumu Airport Coalition Inc v Kapiti Coast District Council, W 077 /2008, [8]
[5] Memorandum to the hearing panel - Dr John Cossens 12 September 2023
[6] Queenstown Lakes District Council Proposed District Plan: Priority Area Landscape Schedules Minute of Commissioners 11 October 2023, [13]

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jurisdiction to remit the matter back to the Council because of *process concerns.* It did note however, that any appeal to the Environment Court or the High Court would cure any previous procedural errors.

14. However, there are two matters that clearly distinguish *Paraparaumu* from the current situation, the first being the appeal to the Environment Court was about alleged procedural errors within a commission hearing, and secondly, the very appeal of *Paraparaumu Airport Coalition Inc (*PACI) was in front of an Environment Court Judge and thus an appellant court proceeding. There is absolutely no mention within the *Paraparaumu* decision that previous Council procedural errors are cured simply by a Schedule 1 process. Judge Dwyer in fact referred to de novo Environment Court appeals (or other appellate courts) as the place where curative processes apply, not hearings into submissions.[7]

15. Given that these submission hearings were not de novo, were not held in an appellate court, there was no opportunity for cross examination, and the panel's recommendations are not binding, there is no jurisdiction for the panel to provide curative changes to the landscape schedules which would assuage procedural errors. As it stands, if the panel were to persist with the idea that the hearings process and the subsequent recommendations can purge the schedules of previous errors then any potential benefit of the public submission and hearing process would be lost because the panel was acting out of jurisdiction.

16. Conversely, I submit that the submission hearings are the very place that concerns about methodology should be able to be heard because of the very fact it is not an appellate court, curative powers do not apply and submitters are free to raise issue about critical things such as landscape schedule methodology and thus the opportunity exists for the panel to comment on and make recommendations to the Council about such matters. It does seem an absurdity that many submissions raised real and valid concerns about the consultation and landscape methodology employed, yet they are effectively disregarded because the panel considers them to be 'procedural errors' that can be cured by either the hearings process itself or in recommended changes to the schedules. If that were the case, the

[7] See *Paraparaumu* [5]

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Council could have asked residents in their landscape schedule survey about attitudes towards 'the man in the moon', but because that would be seen as a procedural error, it could be cured simply by the hearings process under schedule 1 RMA.

17. Counsel for the QLDC have made comments on the issue of consultation and methodology but their statements appear contradictory. On the one hand, counsel have said consultation is a procedural issue that can be raised with the hearing panel at the hearing, but in a later legal submission counsel submitted that the Hearings Panel does not have jurisdiction to make findings on procedural issues so what then would be the point of hearing procedural issue concerns:

To the extent that community consultation is a concern for Dr Cossens and other submitters, this is considered a procedural issue (rather than a merits / evidential issue), which can be raised with the Hearing Panel at the hearing.[8]

The Council is aware that submitters have raised concerns with the approach to consultation for this Variation. To the extent that consultation is a relevant matter in the lead up to notification, it is submitted that the Panel's task now is to make recommendations on the submissions that have been heard. Indeed, the Panel is not charged with making findings on procedural matters, those being beyond its jurisdiction.[9]

18. Given the mixed signals the Council has sent on the jurisdiction of the Hearings Panel, then it is reasonable to ask whether procedural fairness within the submission process has been followed and submitters have not been allowed a 'fair go' to speak to concerns over consultation and methodology. Certainly excluding 'methodology' from the expert conferencing meant that submitters were not made aware of landscape and planning expert opinion on methodology. Respectfully, it is submitted the schedule process alone cannot cure procedural errors, and that the panel must allow submissions and expert evidence on methodology to be heard.

[8] QLDC-onfl-pa-variation-memo-re-expert-witness-conferencing, 20 Sept 2023, [13.7]
[9] qldc-pa-schedules-reply-legal-submissions-15 Dec 2023, 5.1

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THE ADEQUACY OF INFORMATION BEFORE THE HEARINGS PANEL

19. However, it does appear that the concern over the consultation, methodology and procedural errors, has clouded what is submitted to be the real issue, namely, does the Hearings Panel have sufficient information to make recommendations to the Council on the landscape schedule submissions?

20. Concerns over inadequate information on which to formulate an opinion about submissions were at the heart of the recommendation by the Hearings Panel convened to consider submissions on Chapter 24 of the PDP – the Wakatipu Basin. The panel summarised its concerns as a background to their final report to the Council:

> *[100] As with the Operative District Plan, the Stage 1 Proposed District Plan did not specify a minimum density for subdivision and residential development within the general Rural Zone. Subject to specified exceptions, applications for subdivision and residential development were discretionary activities. Again paralleling the provisions in the Operative District Plan in this regard, provisions of the Stage 1 Proposed District Plan as notified sought to displace any inference that might have been taken from that activity classification, to the effect that subdivision and development was generally appropriate in the Rural Zone203.*
>
> *[101] During the course of its hearing of submissions on the chapters of the Proposed District Plan containing the rules implementing this general structure, the Stream 2 Hearing Panel formed the view that further work was required to evaluate the extent to which the Proposed District Plan (as notified), as it affected the floor of the Wakatipu Basin, was the most appropriate method to manage the natural and physical resources within that area. More specifically, in a Minute dated 1 July 2016, the Hearing Panel stated:*
>
> *"In the course of the hearing, based on the evidence from the Council and submitters, we came to the preliminary conclusion that continuation of the fully discretionary development regime of the Rural General Zone of the ODP, as*

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proposed by the PDP, was unlikely to achieve the Strategic Direction of the PDP in the Wakatipu Basin over the life of the PDP. We are concerned that, without careful assessment, further development within the Wakatipu Basin has the potential to cumulatively and irreversibly damage the character and amenity values which attracts residents and other activities to the area."

[102] The Hearing Panel recommended to the Council that a detailed study of the floor of the Wakatipu Basin was required, among other things, to:

"Determine whether, given the residual [sic] development already consented, there is any capacity for further development in the Wakatipu Basin floor and, if there is, where it should be located and what form it should take."[10]

21. The parallels between the reasoning and concerns of the hearing panel in calling for a Wakatipu landscape study and the information (or lack of it) available to the hearing panel in considering the priority area landscape schedules are significant. The Wakatipu panel was concerned as to whether chapter 24 in its current form met the strategic direction of the PDP and the requirement of the act (RMA), namely, to promote the sustainable management of natural and physical resources. It is respectfully submitted , that like the Wakatipu Hearings Panel , the current hearing panel also does not currently have sufficient information to make recommendations about the landscape schedules to the Council especially since there is no legal ability of the panel or Council through this submission hearing stage to make changes to the schedules that might correct major and fatal errors in methodology without them being out of scope.

[10] report-18-1-chapter-24-wakatipu-basin, Feb 2019, [100-102]

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WHAT INFORMATION CRITICAL TO ALLOWING THE HEARINGS PANEL TO MAKE INFORMED RECOMMENDATIONS ON THE LANDSCAPE SCHEDULES IS MISSING?

No areas offering capacity for rural living identified within the Upper Clutha basin.

22. Relevantly, the Wakatipu study sought to determine whether *'there is any capacity for further development in the Wakatipu Basin floor and, if there is, where it should be located and what form it should take?'* Despite it being so critical to the future sustainable development of the district, in particular, for the Upper Clutha Basin, that is something which cannot possibly be answered by the landscape schedules in their current form. Nowhere has there been a definitive identification of capacity for any future development. Instead, incredulously, across the floor of the upper Clutha basin (which is almost twice the size of the Wakatipu basin), the landscape experts have found no areas where there may be capacity for future rural living and across all rural character landscapes (RCL) in the Upper Clutha, rural living was classified as having 'very limited' capacity. Nor did the landscape experts identify any landscape character units within those RCL's. By comparison, capacity was clearly identified within 24 landscape character units on the Wakatipu basin floor, in an area half the size of the Upper Clutha valley floor.

What are residents/the community's most important landscape values and attributes in each priority area?

23. While community landscape values might be considered the single most important aspect of identifying values and attributes of a particular landscape, the landscape schedules have not identified what people consider to be the most important values to protect. There is no ranking or rating of individual values, so it is impossible to know which values to afford the greatest protection. This also becomes an issue for future resource consent applications where applicants and consultants do not know what the primary issues are. The arbitrary nature of previous consent applications under the ODP was highlighted during the PDP appeals where it was noted that under the discretionary regime, landscape evaluations could be very arbitrary because it was left to the individual expert to decide on the

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importance of a particular value or attribute. The concept of the landscape schedules was to try and reduce that inconsistency, but in their current form, they will not do that.

Resident and community values of priority areas have not been identified or expressed.

24. In very simple terms, not one single person, be they commissioner, landscape expert/planner, councillor, council staff, landowner or community member would be able to say what resident or community values are assigned to a particular priority area or landscape. And yet being able articulate what the community values is fundamental to a best practice landscape assessment as prescribed the NZ Institute of Landscape Architects. Not only is it fundamental to good landscape assessment and practice, but it is also fundamental to fair and reasonable consultation and at a deeper level, natural justice. There was comment made by the hearing panel that they felt oral submissions had provided them with a greater understanding of community landscape values[11]. With respect, I don't see how that could be the case. For example, of the 30 oral submissions at the Wanaka submission hearings, 8 were what could be termed residents or community members and none mentioned landscape values in either their oral or written submissions. So as it stands, the landscape schedules do not provide any answers to what the community landscape values are, what they consider most important, whether they think there might be capacity for further development or rural living and how cumulative effects (that is, impacts on community landscape values) might be measured in the future.

No summary statement of resident landscape values and attitudes of the PA they live in?

25. The authors of the schedules contend that they are high level, so where then is the high level summary of resident values for each PA one would have expected to go along with, or balance, the expert opinion? A related unanswered question is how would resident's like the area they live in to look like in the future? It is submitted there is nothing unreasonable in such a question and the answer would clearly assist the Hearings Panel.

[11] In discussion at the oral submission of Dr John Cossens, 7th November, 2023

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No assessment of viewer sensitivity

26. Across all the priority area landscape schedules there has been no assessment of viewer sensitivity and yet that is also well recognised as being a critical component of best practice landscape assessment. The value of an assessment of viewer sensitivity is that it provides a realistic understanding of what the 'real' effects of current and future development might be. For example, transient or commuter road users of SH6 approaching Wanaka travelling at 100 km/hr exhibit very different behaviours, attitudes and perceptions to landscape change than does someone who might be travelling for more recreational and scenic reasons. Likewise, the primary users of a minor rural road, such as resident, farmers and contractors would exhibit different behaviours and have different viewer sensitivities compared with visitors. It is well accepted that any worthwhile landscape assessment should provide detail on viewer sensitivity and yet the PA landscape schedules provide nothing in this regard.

No assessment of anticipated or predicted future change to landscapes and their values.

27. Making a landscape assessment is as much predictive as it is about assessing the current situation. But strangely and concerningly, there is almost no comment in the landscape schedules or from the consultants on what the PA landscapes might look in 5, 10 or 20 years, not only as a result of current consented but unbuilt dwellings, but also those that could be consented in the future. While the authors of the schedules may consider the schedules to be a snapshot in time[12], a landscape assessment without considering and then stating the anticipated future environment is of very limited use in a district where change is rapid and ongoing. Along with the idea of considering what future landscapes might look like, there has been no scenarios presented (best, neutral, worst case) of how the district's landscapes might look. For example, will the 'greening' of the landscape of the Wakatipu basin (i.e. more trees, irrigated land, less pasture, etc.) happen (or is happening) in the

[12] response to QLDC Final Legal submissions, 15 December 2023, [2.18b] *explain that the PA Schedules represent a point in time, and are not intended to provide a complete, or fixed, description of values or landscape capacity.*

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Upper Clutha, and how will that impact landscapes (for better and worse) and how will it impact views and the mitigation of rural living dwellings?

28. The principle of 'forward looking' was well articulated in the Wakatipu basin report which noted:

In our view, the two points made by counsel are linked. Clearly, the environment one sees on the ground is relevant to the Plan provisions that are put in place, <u>but the content of a plan is forward looking. It needs to reflect the environment sought to be achieved over the life of the Plan, not (or not just) the environment that already exists.</u>[13]

No cumulative effect measurement data or tools offered.

29. The Environment Court had been very interested in how landscape cumulative effects would be measured over time to account for any change in landscape values and sought policy to be included in the PDP to ensure this happened. Firstly, in their current form there is no data within the landscape schedules (other than expert opinion) which will allow cumulative effects to be measured, and secondly, no method has been outlined of how such information will be captured. So one of the most basic requirements of the Environment Court appeal decisions and the district plan chapters cannot be met.

The landscape schedules have not provided sufficient detail to reduce high transactional costs.

30. During the PDP appeals the Environment Court was cognisant of the very significant transactional costs associated with rural resource consent applications. It was anticipated that by providing more transparent and detailed priority area landscape schedule values would narrow the often large differences in opinion between applicants and the council or more often between opposing landscape experts. It is submitted that given the 'high level' the schedules have been developed at, then it is very unlikely transactional costs will reduce. Indeed, with the expectation from the authors and reviewers that the landscape

[13] report-18-1-chapter-24-wakatipu-basin, Feb 2019, [70]

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schedules are intended primarily for experts, it is likely consent costs will only increase. As Ms Evans highlighted in her summary statement:

In my view the PA Schedules are intended to be used to inform landscape assessments. As a result, they will be used by landscape architects to assist plan users and decision makers in relation to plan implementation, and where required, plan development. They will, however, also continue to be read and used by a wide range of plan users, including landowners and the community more generally, developers, decision makers, planners, lawyers, etc.[14]

The PA Schedules are necessarily technical in places because they address and record what can be a technical matter, being descriptions of landscape attributes, values and capacity. They are also intended to be used to inform landscape assessments, and I expect that they will be predominantly used by landscape architects and planners (who will have a familiarity with this topic, particularly in the Queenstown Lakes District).[15]

31. Ms Evans also noted a comment from Mr. Vivian:

I also note that Mr. Carey Vivian expressed a view on Day 4 of the hearing that it is very difficult for a lay person to obtain approval for any development in these areas (ONF/Ls and RCLs) without the assistance of an expert.[16]

32. So it seems highly unlikely there is any expectation from planners, landscape experts and the like that transactional costs will be reduced. I would note that Ms Evan's use of the Vivian comment is not entirely accurate. For the panels benefit in a recent application for rural subdivision resource consent, I undertook and presented all my own landscape and planning evidence, including presenting landscape values and attributes for the Cardrona-Mount Barker PA RCL, and was successful in gaining non-notified consent. So it can be done and the landscape schedules should not be a barrier to the layperson making their own consent application.

[14] Ruth Evans Final Response for QLDC dated 15 December 2023, 3.10.
[15] Ibid at 3.12
[16] Ibid at 3.17

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The landscape schedules have not met the strategic and policy requirements of chapters 3 and 6.

33. The now operative district plan requires a top down hierarchical approach whereby rules and assessment matters, including landscape schedule must be consistent with, and follow higher order chapters. It is submitted that the schedules currently are not consistent with policies in chapters 3 and 6. For example,

3.3.22 Provide for rural living opportunities in areas identified on the District Plan web mapping application as appropriate for rural living developments. (relevant to SO 3.2.1, 3.2.1.8, 3.2.5, 3.2.5.1 - 3.2.5.7)

No rural living opportunities have been identified within the Upper Clutha landscape schedules and shown on a map.

The lack of identification of rural living opportunities within the Upper Clutha does seem at odds to the chapter 24 landscape study when so many of the same opportunities were identified by Ms Gilbert within the Wakatipu basin, an area often cited as being overdeveloped and where tipping points had been reached.

Considering the extent to which the Environment Court's reasoning remains valid, we think it is fair to say that both the policy regime in Chapter 24 and the evidence of the Council (particularly that of Ms Gilbert) would support the view that there is scope to absorb some development within the Rural Amenity Zone. As was the case in 2000-2001, the issue is how the Rural Amenity Zone is best managed to identify those areas with further development potential and to exclude development in areas where that is inappropriate.[17]

3.3.23 Ensure that the effect of cumulative subdivision and development for the purposes of Rural Living does not compromise:

[17] report-18-1-chapter-24-wakatipu-basin, Feb 2019, [134]

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a. the protection of the landscape values of Outstanding Natural Features and Outstanding Natural Landscapes; and
b. the maintenance of the landscape character and maintenance or enhancement of the visual amenity values of Rural Character Landscapes. (relevant to SO 3.2.1, 3.2.1.7, 3.2.5, 3.2.5.1 - 3.2.5.7)

The assessment and measuring of cumulative effects within the landscape schedules is almost nonexistent and there is no capacity to measure change over time.

3.3.45 c. in each case apply a consistent rating scale for attributes, values and effects.

There is no rating scale for individual attributes, values and effects in the landscape schedules.

34. The Environment Court highlighted the importance of alignment between assessment matters and the policies and objectives of the proposed district plan when it said:

As for the remainder of Ch 21, we find force in UCESI's submission as to the need for further amendments beyond those recommended in the Plan Provisions J\VS in order to ensure proper alignment with Decision 2.2. <u>One dimension of that is to ensure that, as rules, the assessment matters help achieve related objectives and policies (RlvlA, s76). That includes the related strategic objectives and policies of Chs 3 and 6</u>. Furthermore, proper alignment is important for the overall integrity and coherence of the Plan and its effective administration.[18]

35. So, even with this cursory examination of Chapter three of the district plan, it shows that there are several policies that have not been met by the landscape schedules as they stand and there is a lack of alignment between the landscape schedules and the objectives and policies of Chapters 3 and 6. Overall, there is ample evidence to suggest that the Hearings Panel does not have sufficient information to make informed recommendations to the

[18] [2021] NZEnvC 60 Topic 2.7 – Opt [62]

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Council on the submissions made about the landscape schedules and that as a result, further information gathering is required.

THE COUNCIL'S POSITION ON SCOPE AND *MOTOR MACHINISTS*

36. Counsel for the QLDC have helpfully provided commentary on the issue of scope and the Panel's jurisdiction. Firstly, in regard scope, counsel made note of the fact that:

The Panel, as with the Council in its decision-making role (and Environment Court on appeal) can only operate within jurisdiction (scope). This is an important procedural fairness measure that must be carefully observed. [19](emphasis added)

37. In referring to *Motor Machinists v Limited v Palmerston North City Council,* QLDC counsel highlighted what the Court had held in relation to the importance of a submission being 'on' a plan change:

there must be no real risk that people directly affected by additional changes proposed in the submission have been denied an effective response to those additional changes on the plan change process; "To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources."[20]

38. Likewise, it is submitted that if the Hearings Panel are seeking to cure procedural errors raised in submissions, but have also said, those same submission on consultation and methodology are effectively out of scope and the appropriate avenue for them is by way of appeal to the Environment Court, I do not see how the Hearings Panel can make recommendations to cure those same errors? As QLDC counsel said in final legal submissions:

[19] QLDC Final Legal submissions, 15 December 2023 [3.3]

[20] *Motor Machinists v Limited v Palmerston North City Council* [2013] NZHC 1290 [82] cited in QLDC Final Legal submissions, 15 December 2023, [4.3]

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In effect, the concept of scope (and the tests set out above) operate to ensure that decision makers exercise appropriate restraint when making decisions.[21]

39. In regard consultation, QLDC counsel have said:

CONSULTATION

5.1 The Council is aware that submitters have raised concerns with the approach to consultation for this Variation. To the extent that consultation is a relevant matter in the lead up to notification, it is submitted that the Panel's task now is to make recommendations on the submissions that have been heard. Indeed, the Panel is not charged with making findings on procedural matters, those being beyond its jurisdiction.

5.2 For completeness, the Council notes that the Schedule 1 process provides full rights of participation for the public, which have been taken up by many through the making of submissions. In the event that submitters are dissatisfied with the eventual decisions made by the Council, these rights of participation extend to the ability to lodge appeals.[22]

40. The statement made by counsel does seem confused in the sense that on the one hand, they are saying the panel is tasked with making recommendations on the submissions heard, but when a number of submissions did raise concerns over consultation and methodology, they are somehow beyond scope.

41. It is submitted that counsel has confused procedure and methodology. It is well accepted they are not the same. Methodology is the 'how', the 'method' to be employed, whereas 'process' is the act of doing. For example, it is hard to bake a cake without a recipe. The mixing of the ingredients is the process, the recipe the method.

[21] Ibid at [4.5]
[22] Ibid at [5.1-5.2]

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42. Finally, counsel made the following observation:

3.3 The Panel, as with the Council in its decision-making role (and Environment Court on appeal) can only operate within jurisdiction (scope). This is an important procedural fairness measure that must be carefully observed.

3.4 While, in its list of issues, the Panel requested "expert evidence on scope", it is submitted that the determination of what is or is not in scope is not a matter for evidence. Instead, it is a matter of interpretation and legal submission, based on the approach adopted, and proposal notified, by the Council.[23]

43. Thus, as counsel stated above, what is or is not in scope is a matter of interpretation and legal submission. But I would add, what is in scope, must be determined by the hearing panel before it makes its recommendations to Council otherwise, people could well argue issues of procedural fairness. For example, on where issues of methodology have been raised in submissions they have not been fairly heard and certainly not considered in exert conferencing which is where, of all places, they should have been discussed.

44. The methodology for consultation and landscape assessment has been well laid out in Schedule 1 of the RMA, chapters 3,6 and 21 of the now operative district plan, and in various professional practice documents and in the case of consultation, other acts of government. As such, the 'methodology' adopted by a local authority is amenable to examination, whereas the act of 'doing', that is, 'the process' is limited in scope to further appeal. Therefore, it is submitted, the hearing panel is entirely within its legal rights to hear submissions on 'methodology' and make recommendations to Council, and indeed, is required to do so if it is to meets its section 32 obligations as stipulated by the panel in the Wakatipu chapter 24 report:

'Among other things, section 32 requires us to test plan provisions against the objectives of the PDP.'[24]

[23] Ibid at [3.3-3.4]
[24] report-18-1-chapter-24-wakatipu-basin, Feb 2019, [47]

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'Second, section 32 of the Act requires an evaluation of Plan provisions against the criteria in that section. As already noted in this report, case law indicates that where a Plan contains restrictions, the correct interpretation of section 32 requires adoption of the least restrictive alternative meeting the purpose of the Act and the objectives of the relevant Plan.'[25]

45. The Council's section 32 analysis highlights the connection between the landscape schedules, their methodology and the objectives and policy of the district plan when it states:

The purpose of this proposal is to implement the requirements of Chapter 3 of the PDP that direct landscape schedules be included in Chapter 21 of the PDP for certain landscapes that are identified as Priority Areas[26]

Including the schedules within Chapter 21 of the PDP will provide certainty in policy direction for landscape management within the PDP. Objective SO 3.2.5.2 directs that the landscape values of ONFL are protected, and Objective SO 3.2.5.5 directs that for RCLs, landscape character is maintained, and visual amenity values are maintained or enhanced.[27]

The schedules provide clarity on what is being sought to be protected, maintained, or enhanced within each Priority Areas landscape by identifying landscape values, landscape character, and visual amenity values. This provides more detail to support the policy framework. The schedules provide certainty that the landscape outcomes set by Chapter 3 of the PDP will be achieved.[28]

[25] Ibid at [439]
[26] QLDC Section 32 Evaluation - Variation to introduce into Chapter 21 schedules of landscape values for 29 Priority Area landscapes, June 2022, [3.1]

[27] Ibid at [3.8]
[28] Ibid at [3.9]

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The best practice landscape methodology used to prepare the schedules in not within scope of this proposal, as the methodology is prescribed in Chapter 3 of the PDP, including in Policies SP 3.3.38, SP 3.3.41, and SP 3.3.43.[29]

46. While being contradictory in taking a position the methodology is not within scope of the s32 analysis, the report identifies the methodology as being prescribed in the PDP chapters and as such required to be followed by the Council, open to submissions and therefore amenable to examination by the Hearings Panel. Put another way, because the landscape schedule development must follow the methodology prescribed in chapter 3, submissions are clearly within scope, if they choose to challenge the methodology used.

47. The s32 evaluation pointed out that the methodology to be used was prescribed by the Court and was to adopt best practice methodologies[30]. As such, because it is considered the methodology is within the scope of submissions and therefore the Hearings Panel does have jurisdiction to consider those submissions, then the Hearings Panel must consider whether best practice was applied to the landscape schedule methodology and consultation. To be clear, this memorandum does not seek an examination of the processes but whether the Council met best practice methodology.

[29] Ibid at [1.7]
[30] Ibid at [4.5] '*the policies require best practice landscape assessment methodology be used for the identification of landscape values, landscape character, and visual amenity values. This proposal has adopted best practice landscape assessment methodology through the guidance of Te Tangi a Te Manu (TTatM).'*

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SUMMARY

48. The memorandum seeks that the panel hearing submissions on the PA landscape schedules consider concerns over the panel's jurisdiction in relation to:

    a. The powers of RMA schedule 1 submission hearings to cure 'procedural errors'.
    b. The authority of the hearing panel to provide nonbinding recommendations to the Council that cure methodological flaws.
    c. The power of the hearing panel to meet s32 requirements and make recommendations to change the landscape schedules when there is a lack of relevant evidence and information to reliably guide those changes.

49. It is submitted the Hearings Panel <u>does not</u> have jurisdiction to recommend changes to cure methodology errors in the development of the landscape schedules because:

    a. It is not an appellate court.
    b. It is acting under limited delegated authority of a Council.
    c. The submission hearings are not 'de novo'.
    d. There has been no opportunity to cross examine witnesses.
    e. There is insufficient information to enable the panel to recommend changes.

50. This memorandum has examined the issues of scope and jurisdiction of the Hearings Panel and has concluded in line with QLDC counsel that for the above reasons the panel would be acting out of scope to recommend changes they consider would cure procedural errors when submitters have not been fully heard on submissions concerning methodology, this being particularly so within regard to expert conferencing where methodology was not put forward as a topic for discussion. If the panel were to recommend such changes would provide substantive grounds for submitters to complain of a lack of procedural fairness.

51. It has also been submitted that because the 'methodology' has been prescribed in the now operative district plan chapters, in particular as policy in chapter 3, then it is within scope to consider whether the consultation and landscape assessment methodology the Council

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adopted meets the requirements of the district plan policy. Both the Council's final legal response and the s32 analysis have recognized that the landscape schedule variation to the plan must be consistent with and meet the requirements of higher order chapters of the district plan and as such, fall within the preserve of the hearing panel's jurisdiction. For example, the provisions within chapter 3, direct that 'best practice landscape assessment methodologies' be used and also that individual landscape vales and attributes are rated. Given that submissions have questioned whether that has been the case, then the panel, because of jurisdictional principles, is honour bound to examine such concerns. However, at this stage, it is respectfully submitted, the panel does not have sufficient information concerning the methodology to make recommendations to Council. So, the panel must first seek expert opinion on the methodology, and also hear submissions specifically in regard to the consultation and landscape methodology.

52. In conclusion, based on the points made above, this memorandum respectfully seeks that the Hearings Panel calls for legal submissions on the matter of whether.

   a. a submission hearing process cures procedural defects?
   b. the Hearings Panel has authority to recommend changes to the Landscape Schedules which will 'cure' previous procedural defects and errors in the methodology employed by QLDC landscape consultants to develop the priority area landscape schedules?
   c. the QLDC have appellate authority to make changes to the priority landscape schedules to cure previous methodological defects?
   d. Concerns over consultation and landscape assessment methodology are within scope because methodological requirements are set out in higher order chapters and therefore whether those policies have been met needs to be considered by the panel.
   e. The Hearings Panel has sufficient, and reliable information before it to meet section 32 requirements and make informed recommendations on submissions and/or changes to the landscape schedules?

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53. As a final observation, it appears to me that the landscape schedules have evolved from a narrow band of expert opinion, which is in many ways similar to the 'overall judgment' approach that was rejected by the Supreme Court in *King Salmon*[31]. In a keynote address to the Local Government Environmental Compliance Conference, Sir Geoffrey Palmer QC said of *King Salmon*:

In that case Justice Grieg considered that the preservation of natural character was subordinate to section 5's primary purpose, which was to promote sustainable management. He described the protection of natural character as "not an end or an objective on its own" but an "accessory to the principal purpose" of sustainable management. <u>This lead to the application of an overall judgment test which seemed to take priority over the intention of the Act which was to provide environmental bottom lines</u> as clearly illustrated in parliamentary speeches by the Minister for the Environment at the time the Act was passed, the Honourable Simon Upton and earlier by me.[32]

54. It is submitted that in its current form, the landscape schedules rely to much on an overall judgment approach as a result of expert 'opinion' rather than developing schedules based on a more nuanced evidential and quantitative basis. As a result, this broad brush, or as the Council and its experts call it, 'high level' landscape assessment simply perpetuates what the Supreme Court rejected. As Sir Geoffrey Palmer concluded, '*What the decision makes plain is that ad hoc balancing tests are out and environmental bottom line tests are in*.'

55. The final word on this matter lies with Justice Ko in *Motor Machinists*, where the Judge stated:

The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.

[31] Environmental Defence Society v New Zealand King Salmon Co Ltd [2014]NZSC 38(SC).
[32] Sr Geoffrey Palmer, Keynote address to the Local Government Environmental Compliance Conference, 2015, [13-15]

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A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed. And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process. It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the Clearwater test.[33]

56. Respectfully, it is the concern of this submission that there is the real possibility that not only has the community been inadequately informed as a result of flawed consultation and methodology, if the panel attempts to cure procedural errors by recommending changes to the landscape schedules but does not have jurisdiction to do so, then those schedules could not only well morph into something very different from what residents originally submitted on but also be unlawful. In a similar vein to what Justice Ko highlighted in *Motor Machinists*, that side-wind would be inherently unfair.

Dated this 17th day of January 2024

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[33] *Motor Machinists v Limited v Palmerston North City Council* [2013] NZHC 1290

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