

Before Queenstown Lakes District Council

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In the matter of            The Resource Management Act 1991

And                            The Queenstown Lakes District proposed District Plan Topic 13  
Queenstown Mapping

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**Memorandum of Counsel re Submissions 'on' Stage 2 PDP**

Glenpanel Developments Limited (#2548)

Dated 01 May 2018

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## **MAY IT PLEASE THE PANEL**

### **Introduction**

- 1 This Memorandum of Counsel (**Memorandum**) is presented on behalf of Glenpanel Developments Limited (**Glenpanel**) in response to the Chair's Minute dated 16 April 2018.
- 2 This memorandum provides reasons as to why the Glenpanel Submission 2548 (Submission) should not be struck out under clause 41D of the Act, as the Submission is in fact considered to be 'on' the Variation.

### **Summary of issues**

- 3 The Submission sought, as summarised in Council's summary of decisions requested:

Rezone the land on the Stage 2 Planning Map 30 located adjacent to Lades Mile State Highway 6 from Rural (Stage 1) to a mix of Low, Medium and High Density Residential Zoning to provide for urban development. The consequential rules are requested to be located in the Chapter 24 Wakatipu Basin Zone. Consequential amendments would also be required to the Subdivision and district wide chapters.

- 4 The Submission provided a comprehensive framework for the rezoning of Ladies Mile land from Rural Zone to an urban zone, subject to a structure plan consenting framework and future development regime. This rezoning proposal is also consistent with the council's proposed inclusion of the land within its Special Housing Area Lead Policy.<sup>1</sup>

### **Reasons for opposition from Chair and responses**

- 5 In the Chair's Minute, the following reasons for considering no scope for the Submission are raised. This memorandum responds to each point in turn:
  - (a) The submission is neither incidental nor consequential, but rather proposes a new zoning regime where none has been proposed by Stage 2.
  - (i) The submission of rezoning is consequential to the inclusion of LCU 10 which provides for high absorption capacity of Ladies Mile. The inclusion of LCUs into chapter 24 are an intrinsic part of the framework for future subdivision and development in the Basin. The policy framework directs that development will occur according to the capacity of the LCU and its particular characteristics will be relevant

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considerations. Therefore where the LCU 10 recommends high capacity for development, a residential zoning is the logical way to achieve this.

- (ii) The Glenpanel relief is also a logical extension which fills in the gaps of the notified variation. It is not seeking to 'jump' expanded areas (as discussed below under Wellsmart Investments), this is relevant to considering those who may be directly affected by such appreciable changes. The zoning regime sought is not what is at issue, but rather whether the land in question forms part of the Variation.
- (b) S32 specifically excludes land along Ladies Mile
- (i) Section 32 analyses Ladies Mile in a way that considers it a feasible alternative, as required under s32(1). Case law as to the determination of scope addresses section 32 as one component of that analyses. Other related factors in this instance are significant, including the extensive public notice of inclusion of the land in HASHAA Lead Policy, inclusion of Ladies Mile within infrastructure contributing areas<sup>2</sup>, and the Basin Study which informed the Variation.
  - (ii) Case law analysing whether s32 gives 'notice' to potentially affected parties of an out of scope submission does not go into whether an area of land is expressly excluded, but rather the extent to which that land is addressed in the variation and considered as a valid alternative. It is submitted that the consideration of Ladies Mile in the s32 report actually supports scope for the Glenpanel Submission as readers of the Report could appreciate Ladies Mile rezoning was considered as a valid s32 alternative, and logically this might be also contested.
- (c) Schedule 24.8 (Ladies Mile LCU) does not provide the basis for the application of the zonings. This LCU applies to that part of Ladies Mile zoned BRAZ.
- (i) The LCU's provide further description of a particular area's landscape currently, opportunities for further development, and the ability to absorb change. That text in reality would have a bearing on the land development regime applicable to the land within any LCU.
  - (ii) It is clear that other submissions to the PDP consider the wording of the LCU to be important regarding future development; for example

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<sup>2</sup> Amendment 13 – draft 2018 Policy on Development and Financial Contributions

the submission from NZTA (2538) seeks that the Ladies Mile LCU be amended from reading a 'high' absorption capability for further development to 'low'. This clearly evidences that the reasonable submitter considers the inclusion of LCU 10 within the PDP Chapter 24 would have a consequence on planning outcomes.

- (iii) It is clearly not the case that LCU 10 just applies to that far eastern part of Ladies Mile which is zoned BRAZ, because that Zone by its nature is the most restrictive / for the most sensitive land for development, whereas LCU 10 envisages an urban type zoning for 'high development'. It is clear that this LCU description has been taken from the Basin Study, which proposed a mixed density residential zoning Ladies Mile precinct.

### The legal position

- 6 The leading authority on this is the High Court decision in *Clearwater Resort Limited and Canterbury Golf International Limited v Christchurch City Council*. There William Young J stated:

On my preferred approach:

1. A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
2. But if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly "on" the variation<sup>3</sup>.

- 7 His Honour continued<sup>4</sup>:

The first of the considerations . . . seems to me to be in conformity with the scheme of the Resource Management Act which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans. The second of the considerations is consistent with the judgment of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council*.<sup>5</sup> It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those

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<sup>3</sup> *Clearwater Resort Limited and Canterbury Golf International Limited v Christchurch City Council* HC, Christchurch AP34/02, 14 March 2003, William Young J, at [66].

<sup>4</sup> *Clearwater*, at [68] and [69].

<sup>5</sup> *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192.

likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.

- 8 Applying that two step test to the present case, the first consideration is the extent to which the Glenpanel submission seeks to change the 'status quo'. In this case it is submitted that the 'status quo' of Ladies Mile under the PDP process is not necessarily straight forward to determine, and this depends when you consider the status quo as applying. Ordinarily, this would simply be the operative plan position, which is being reviewed or varied through a Schedule 1 process. The 'status quo' in this instance however could be considered as either the operative Rural General Zoning, the Stage 1 proposed Rural General Zoning (but with different provisions), the concurrent Stage 1 submissions on Ladies Mile seeking Rural Residential and / or Wakatipu Basin Lifestyle Precinct,<sup>6</sup> inclusion of Ladies Mile within infrastructure contributing areas, or the separate and publicly notified inclusion of the land in an urban structure plan in the Council Lead SHA Policy.
- 9 All of these status quo scenarios are valid, given the time which has elapsed since notification of the PDP in 2015. Therefore, the Variation of the Wakatipu Basin land (which by its defined outer boundary includes Ladies Mile) is a change to the 'status quo' of the land development regime(s) currently in place / under consideration.
- 10 This is even more relevant given Stage 2 is part of a broader whole of plan review being progressed concurrently. High Court case law has stated that scope in a review is generally broader than a narrow variation.<sup>7</sup> Given the close implications of higher order provision amendments on the land development regime of Ladies Mile (such as through strategic direction, urban growth, and landscapes chapters), the breadth of what submissions should be considered to be on the plan change is significantly larger than narrowly looking at the Basin Variation in isolation.
- 11 As to the second limb of the test, it is submitted that there cannot be said to be any chance of submitters potentially affected being precluded from participation. The Glenpanel submission has been publicly notified and summarised the same was as all other Stage 2 submissions, giving it the same opportunities for further submission as any other rezoning proposal in the Basin would have.

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<sup>6</sup> Ladies Mile Consortium Stage 2 submission

<sup>7</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138.

- 12 By its nature, the Glenpanel submission has and will attract significant public attention, given the community is heavily involved in the urbanisation of Ladies Mile. This is evidenced in the numerous submissions that Counsel has seen lodged on Stage 2 from other submitters, either in support or opposition to urbanisation. A number of those submissions also reference the Wakatipu Basin Landscape Study (which preceded and informed the Variation), when supporting or opposing inclusion of Ladies Mile and Arrowtown South precincts.<sup>8</sup>
- 13 The large number of initial submissions lodged in respect of Ladies Mile evidences that the reasonable person assumed that Ladies Mile were considered to be 'on' the variation. This is also consistent with the High Court's determination in *Healthlink South v Christchurch International Airport*, where that the barrier for participation should not be unreasonably high and that the test for participation should be that of a reasonably informed reader or citizen, not someone with knowledge of planning matters well above the informed citizen and apparently approaching expertise.<sup>9</sup>
- 14 It is submitted, that the reasonable person reviewing the proposed Variation would consider Ladies Mile as on the variation given:
- (a) It is surrounded by land included in the Variation;
  - (b) Its current land development regime is unknown and has been well publicised through Council's website (in respect of Stage 1 and HASHAA); and
  - (c) The description of LCU 10 within chapter 24 as notified clearly identifies Ladies Mile as an area for development with 'high' absorption capability.
- 15 There has already been significant public participation in the Ladies Mile zoning, and Counsel anticipates there will be significant further submissions received on the Glenpanel submission. It cannot therefore be said that the Glenpanel submission is 'out of left field', and as stated in Clearwater, It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority.
- 16 Clearwater also anticipates that submissions on a variation which are incidental to, consequential upon, or (perhaps) directly connected to a plan change / variation will pass the scope test (in conjunction with the participatory second

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<sup>8</sup> See for example, submission from Bruce McLeod supporting inclusion of precincts (as referenced in the Landscape Study); Philip Blakely and Mary Wallace opposing Ladies Mile Precinct (as referenced in Landscape Study).

<sup>9</sup> *Healthlink South Ltd v Christchurch International Airport Ltd* [2000] NZRMA 375

limb)<sup>10</sup>. As submitted above, the inclusion of the text and description of Ladies Mile LCU 10 in Chapter 24 leads the ordinary reader to the conclusion that the described land would be developed in that way. Indeed this is evidenced in initial submissions lodged, such as that from NZTA seeking to amend the LCU. The rezoning request for that land which then matches the LCU description already in the plan is clearly consequential to or directly connected to what has already been notified in the text. It would be illogical to state that this text description has no consequence in planning terms when and LCU is so intrinsically connected to objectives and policies in Chapter 24 for development.

- 17 In a recent local case, Plan Change 50, His Honour Judge Jackson determined the scope of extensions sought to the notified Town Centre Zone through submissions. In coming to the conclusion that such extensions were in fact on the Plan Change, he considered extraneous and preparatory material to the Change itself, and explicit acknowledgement from the High Court that zoning extensions are not precluded<sup>11</sup>:

[23] A section 32 evaluation is usually prepared by the proposer of the plan change, so it has an interest in confining the plan change to the boundaries (and issues) it wants dealt with. Despite that it must comply with section 32(1) RMA. Indeed, if a section 32 evaluation fails to consider the consequences of some flexibility in the boundary location (because that flexibility might more appropriately achieve the relevant objectives) then that may be a failure in the section 32 evaluation. A sense of fair play suggests it should not lead to jurisdictional consequences for a submitter who claims to have located a better boundary.

[24] The Hearing Commissioners stated that the further extension land"... does not fall within the area of the district plan that is subject to the proposed plan change"<sup>27</sup> as if that by itself makes the submission out of scope. Indeed they later said as much<sup>28</sup>. I consider that is incorrect as a matter of law because in *Motor Machinists Kos J* expressly stated that zoning extensions by submission are "... not exclude[d] altogether"<sup>12</sup>.

[25] I hold that all the submissions meet the first test- primarily because the Section 32 Evaluation includes an Appendix "A" ("the McDermott report") that shows the four pieces of land which are the subjects of these appeals are included as part of a proposed and much larger QTCZ...

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<sup>10</sup> *Clearwater* at [65].

<sup>11</sup> *Wellsmart Investment Holdings Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214, at [23] - [25].

<sup>12</sup> *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [81]

- 18 The analogy in this instance with that of the "McDermott Report" in *Wellsmart*, is of course the Basin Land Use Study, which was authored in March 2017 and made publicly available shortly after. The Study also formed the basis for the Wakatipu Variation,<sup>13</sup> and included recommendations for urban zoning with a mixture of medium – high densities (the same relief now being sought in the Glenpanel submission).
- 19 Therefore, as was confirmed in *Wellsmart*, the possibility of the rezoning of Ladies Mile was clearly raised in the section 32 report and Wakatipu Basin Study.
- 20 Ultimately in *Wellsmart*, His Honour found that the notification of the submissions sought to extend Town Centre Zoning was not enough to allow effective participation of neighbouring landowners and occupiers. There are two distinct differences with that evidential finding and the present instance:
- (a) *Wellsmart* considered the difference of where land might be immediately adjacent to a plan change boundary (and therefore a credible consideration of s32 alternatives) as compared to where a submitter seeks a rezoning which is several intervening lots away from the plan change boundary. The Glenpanel submission is not that of the Appellants' submission in *Wellsmart*, being several blocks away, but rather it abuts the variation boundary and entirely fills in the gap. This has the consequence of increasing the likelihood of submitters being aware that this land could be the subject of rezoning.
  - (b) *Wellsmart*, and its reliance on Motor Machinists both talk about the second limb of the two stage test being relevant to those directly affected by the plan change and / or 'neighbours and occupiers'<sup>14</sup>. The mischief being that it would be unfair to appreciably amend a plan change without allowing those directly affected to have input. In this instance, all landowners in Ladies Mile have either been consulted in the preparation of the Glenpanel submission<sup>15</sup>, have provided their own submissions seeking similar relief<sup>16</sup>, or are otherwise aware of the Submission.
- 21 The Glenpanel Submission is clearly different from the extension sought in *Wellsmart*; the collective of the Basin Study, the section 32 report, the number of Ladies Mile Submitters, the confusion of the 'status quo', inclusion of LCU 10

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<sup>13</sup> Section 2.7 of the Wakatipu Basin Variation section 32 report states 'the Wakatipu Basin Variation arises from the Wakatipu Basin Land Use Planning Study, March 2017'.

<sup>14</sup> *Wellsmart* at [26] and [33].

<sup>15</sup> Counsel refers to the Ladies Mile consortium of landowners who are separately involved in pursuing submissions to the Variation and are aware of the Glenpanel Submission.

<sup>16</sup> Submissions 2246, 2251, 2253, 2541, 2542 all submitted seeking the inclusion of Ladies Mile LCU 10 into Chapter 24 and support for a residential or lifestyle zoning.

into the Variation, and separate HASHAA processes all establish that both limbs of the *Clearwater* test are met through the Glenpanel Submission.

#### **Practical effect – HASHAA**

- 22 Putting the legal position aside, it is submitted that the practical effect of this rezoning must be considered in its unique context. The planning and zoning regime for Ladies Mile has changed significantly since the PDP was notified in August 2015. In the intervening period, the development of the Queenstown Country Club SHA has significantly changed the receiving environment; the promulgation of the NPS on Urban Development has placed increase pressures on Queenstown Lakes District as a high growth area to provide long term growth projections in housing supply, and the inclusion of the remainder of Ladies Mile in the Council's Lead SHA Policy, are all factors which were not foreseen by submitters in August 2015.
- 23 Had those submitters had the foresight of these processes, their submissions to the PDP as originally notified may have been quite different. The Wakatipu Basin Variation will ensure that directly affected landowners are aware of and can submit on the Glenpanel submission, and are more aware of the likelihood of such a submission given extraneous planning processes to the Variation which are happening. This is exactly the type of 'unfairness' which scope considerations are intended to address.
- 24 The important matter of protecting affected persons from submissional sidewinds raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 20 year District-wide plan, via the submission process. Take for example a landowner affected by a rule in a proposed plan that will remove a pre-existing right to develop his or her property in a particular way. The RMA does not envisage, via s 32, that he or she would be precluded from seeking by way of submission a form of relief from the proposed restriction that was not specifically considered by the s 32 assessment and report. This is consistent with case law which considers that the section 32 report is not the only basis for determining scope.
- 25 In this instance, the unique and parallel planning processes involving Ladies Mile should also form part of this consideration. To those affected landowners, it seems more that the exclusion of their land through the Variation is in fact the 'submissional side wind' given these other planning processes and the Study's inclusion of the land.

**Other means for achieving this outcome**

- 26 Had Glenpanel had the foresight of the significant changes to Ladies Mile as addressed above, its submission to Stage 1 of the PDP perhaps would have sought an urban zoning. In accordance with the Chair's earlier rulings, that submissions seeking a different zoning regime which might not be a 'proposed zone' are valid, the Ladies Mile land could indeed be facing a residential rezoning through Stage 1, the same outcome now being sought in the Glenpanel Submission.
- 27 Alternatively, this land could have been captured by an amended stage 1 submission, to seek a residential zoning (just as the Ladies Mile Consortium sought and was granted leave to pursue Rural Residential zoning rather than Rural Lifestyle).
- 28 Landowners have the ability to develop their land or not under any range of legitimate planning processes available to them. It follows, that pursuing a rezoning of this land through the Variation is entirely logical, but to deny this opportunity would be prejudicial.



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