BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan Hearing Stream 02

AND

IN THE MATTER of Chapter 21 and Chapter 22 provisions relating to provision for rural living opportunities in the Wakatipu Basin

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LEGAL SUBMISSIONS
on behalf of the Submitters listed in paragraph 1.1
20 May 2016

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1. Introduction

1.1 The legal submissions are presented on behalf of the following submitters in respect of the Proposed District Plan ("**PDP**") Chapters 21, (Rural) and 22 (Rural Residential and Rural Lifestyle):

(a) Allenby Farms Limited - 502/1254;

(b) Ashford Trust - 1256;

(c) Ayrburn Farm Estate Limited – 430;

(d) Bill & Jan Walker Family Trust - 532/1259;

(e) Byron Ballan - 530;

(f) Crosshill Farms Limited - 531;

(g) G W Stalker Family Trust, Mike Henry, Mark Tylden, Wayne French, Dave Finlin, Sam Strain - 535/1262/534;

(h) Hansen Family Partnership - 751/1270;

(i) Robert and Elvena Heywood - 523/ 1273;

(j) Roger and Carol Wilkinson - 1292;

(k) Slopehill Joint Venture - 537/ 1295;

(l) Wakatipu Equities - 515/1298.

Note: The expert evidence of Mr Strain, Mr Stalker, Mr Reid, Mr Skelton, Mr Baxter, Mr Farrell and Mr Brown is presented on behalf of the above listed submitters.

2. District Plan Review Process

Hearing Panels - due process

2.1 Counsel wishes to raise with the Hearings Panel ("**Panel**") the fact that the hearing process to date for the PDP has raised a number of practical and procedural concerns for the submitters represented in these submissions.

2.2 The Panel issued two Minutes concerning procedural matters prior to the commencement of hearings on the PDP in lieu of holding a procedural hearing at the outset[1]. The Panel's Minute dated 25 January 2016 refers at page 1 to the appointment of a Panel of 17 Hearing Commissioners to hear the submissions and further submissions on the PDP. The Minute states that:

> *"It is proposed that, generally, the Hearing Commissioners will sit as Panels of three, comprising the Chair, an elected representative, and a professional commissioner. For some hearings this number may be increased, and in other instances may be decreased, depending upon the nature of the topic".*

2.3 Page 2 of the Minute then goes on to state the principles of the hearings process, and that:

> *"The Hearings Panel will conduct an efficient process which minimises time and costs to all parties participating in the hearings. The Hearings Panel will provide all submitters with an adequate opportunity to be heard, while, at the same time, avoiding unnecessary repetition and presentation of irrelevant material…"*

2.4 Counsel's concern is that the change in membership of Hearing Commissioners for interrelated Hearing Streams means that some Commissioners are sitting and hearing issues which have been partly addressed at prior hearings without their being present. This raises three significant issues:

(a) A potential disconnection between the Council delegation and the manner in which that delegation is being implemented;

(b) Potential substantive unfairness;

(c) Additional and unnecessary costs to submitters and to the Council.

Hearing Panel - delegation

2.5 The Council has delegated its functions under Schedule 1 to hear submissions and evidence and make recommendations under s34 of the Act to the whole of the Hearings Panel in respect of the whole of the PDP (Stage 1).[2] Council does not appear to have delegated authority to

[1] Minutes of Hearings Panel dated 25 January 2016 and 05 February 2016.
[2] QLDC Report for Agenda Item: 5 dated 17 December 2015

separate Commissioners or separate groups of Commissioners to hear and make recommendations on constituent parts of the PDP.

2.6 The legal submissions of Counsel for Council dated 04 March 2016 set out that the Council's obligations under the RMA are also related to broader powers and obligations under the Local Government Act 2002 and that the Panel's power to make recommendations sits within a framework under the RMA.[3] Those submissions omit an analysis of the legal and statutory obligations on decision makers with delegated authority.[4]

2.7 Although section 34 of the Act establishes very broad powers of delegation to the Council, those must be read in light of the Schedule 1 plan making process, and the broader requirements of public decision making by Council.

Other approaches to Schedule 1 decision making

2.8 Counsel acknowledges that some other territorial authorities have taken the approach of splitting a hearing under Schedule 1 on a planning instrument into sub parts for administrative efficiency. The fundamental difference here is the inconsistency of panel membership and recommendations to be made in respect of interrelated hearing topics.

2.9 The Dunedin City Council second generation plan which has recently been notified for example has established a panel of seven commissioners to hear and make recommendations on submissions on the entirety of the plan review. All seven members will be present for all hearing topics, save for designations and hazards chapters, which only two members will sit on.

2.10 For those two topics there is an established decision making process as to how to make a combined recommendation to Council.[5] Of particular

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[3] Para 3.2 legal submissions on behalf of Queenstown Lakes District Council dated 04 March 2016

[4] Ibid, pars 4.1-4.10

[5] The DCC Hearings Panel delegation dated 21 September 2015 states at para 12 that: *"To complete hearing of submissions and evidence as efficiently as possible, it is expected that the Hearings Panel will sit (where appropriate) as a series of smaller panels where topics concern matters of a technical nature. To enable consistent decision making across all subject areas, the smaller panels will report their findings to the panel as a whole. The full panel will then consider those findings and reach a decision on what will be recommended to Council as a decision on the relevant submissions. It is expected that this process will avoid any inconsistencies arising in the decisions issued."*

relevance is the fact that the matters to be dealt with by a smaller Panel of only two members are limited to matters of a technical nature.

2.11 Two other examples known to Counsel are the Auckland Unitary Plan hearings and the current Christchurch District Plan hearings. In both cases there are instances of smaller Panels sitting to hear and consider identified topics, although in the case of Auckland at least the smaller Panels generally comprise a subset of the full Panel which has heard and considered the higher order matters. However both the Auckland Unitary Plan process and the Christchurch District Plan process are occurring under the authority of legislation separate from and different from the RMA. That may or may not have implications for hearings by Panels consisted of only some of the appointed Commissioners. It is therefore possible that those two examples do not provide any guidance relevant to a standard Schedule 1 RMA District Plan Review hearing process. Counsel has not researched that issue for the purpose of these submissions.

2.12 Accordingly Counsel raises the question as to whether the current process of differently constituted Panels hearing separate parts of interrelated matters is legally permissible in terms of the specific delegation from the Council. Counsel does not intend to take this issue any further (in terms of a legal challenge) because Counsel's concerns are more about the potential substantive unfairness referred to in the following section of these submissions. However Counsel raises the issue in case the Panel may wish to check and ensure that the process being adopted is legally permissible.

Potential Substantive Unfairness

2.13 These submissions are presented on behalf of a number of separate submitters who have lodged separate submissions seeking certain outcomes. In a number of cases a submission proposes a rezoning. Parts of each submission relate to the Hearing Stream 01 Chapters 1, 3 and 6 Strategic Direction and Landscape issues, other parts relate to Chapter 21 and/or Chapter 22, and parts relate to a rezoning request. The fact that the Panel has decided to deal with those issues at different times does not derogate from the fact that each 'submission' must be 'heard' and 'considered' by a Panel.

2.14 Evidence presented in relation to each 'part' of the 'hearing' (due to the Panel's process) is relevant to all of the other 'parts' of the 'hearing'. Counsel is concerned that a Commissioner sitting during Hearing Stream 02 cannot fully appreciate the case being presented for a submitter, and therefore cannot give fair and appropriate consideration to that case, without being fully appraised of all evidence, questions and answers and all other matters raised during Hearing Stream 01. The same issue may arise during the rezoning hearings.

2.15 This issue is compounded by the evidence lodged for Council for Hearing Stream 02, particularly the evidence of Philip Osborne and Dr Marion Read. Philip Osborne's economic evidence records, at paragraph 1.5, that he was engaged in March 2016. Therefore his evidence has clearly been commissioned for the purpose of responding to submissions made during Hearing Stream 01 about the lack of economic evidence supporting the Council case presented during Hearing Stream 01, particularly in relation to the required s32(2) assessment. Dr Read's landscape evidence for Hearing Stream 02 is clearly a response to submissions made during Hearing Stream 01 relating to determination of ONLs. Accordingly Council is presenting evidence during Hearing Stream 02 which is directly relevant to, and must be considered in respect of, Hearing Stream 01 Chapters 1, 3 and 6.

2.16 It follows from the previous point that Council evidence presented for Hearing Stream 02 will need to be considered by the Commissioners who sat on Hearing Stream 01. The same must equally apply to submissions and evidence presented on behalf of submitters during Hearing Stream 02 where relevant to Hearing Stream 01 issues.

2.17 None of the above necessarily causes a problem provided these issues are appropriately addressed by the Panel. It appears to Counsel (and Counsel specifically tables this submission for consideration by the Panel) that the concerns detailed above relating to the Council delegation and substantive unfairness can only be adequately and properly addressed if all Commissioners who will be part of the decision-making process, in relation to all aspects of the submissions lodged by the submitters for whom these legal submissions are being made, read all of the evidence presented in all Hearing Streams relevant to those submissions and listen to all of the transcripts relating to all of those

Hearing Streams. This submission extends to the Hearing Stream which will deal with the relevant rezoning requests, because those are relevant to each rezoning submission along with Hearing Streams 01 and 02.

Additional and unnecessary costs

2.18 The first concern is that this process is already costing Submitters more than might reasonably be expected. The issue is not having to present submissions and evidence at multiple hearings in relation to one submission, because that is probably unavoidable. The issue is having to re-present and reference evidence and submissions previously presented at a consequential hearing before a differently constituted Panel, some of whom have not heard the submissions and evidence previously presented.

2.19 The second concern is that, if the approach identified in paragraph 2.17 above is indeed the approach intended for Stage 1 of the PDP, this will result in significant additional costs to the public purse than would normally be required in a Schedule 1 partial plan review process. Requiring all 17 Commissioners to have read and heard the evidence and submissions presented in the course of the entire 'hearing' in order to make informed recommendations on the PDP as a whole will be more costly than is necessary for a partial district plan review.

2.20 Counsel submits that it would be appropriate for the Panel to issue a Minute clarifying how the Panel is addressing the issue raised above.

Basis of Hearing Stream 02 Presentation

2.21 In addition to the assumption detailed in paragraph 2.17 above, the following factors have influenced the basis upon which these submissions are presented:

(a) The fact that Council is presenting evidence during Hearing Stream 02 which responds to submissions and evidence presented during Hearing Stream 01 and which is relevant to Hearing Stream 01;

(b) The extent to which the Council has (or has not) responded in its Hearing Stream 02 evidence to the submissions and evidence presented during Hearing Stream 01;

(c) The case presented for each submitter is a single case (covering Hearing Stream 01, Hearing Stream 02 and (in some cases) the eventual rezoning Hearing Stream(s)). All aspects of each case are related and they must be heard and considered as a whole.

2.22 Accordingly the Panel is referred to the prior legal submissions lodged on behalf of the submitters represented in Hearing Stream 01.[6] Those submissions, and the transcript recording questions and answers relating to those submissions, are adopted and are relied upon in these submissions due to the significant overlap in the content of Hearings Streams 01 and 02. As a summary reminder the following excerpts from those submissions are repeated below:

> *"2.1 The focus of these submissions is on provision for rural living in the Wakatipu Basin. Nothing in these submissions relates to ONLs or ONFs, or to RLC outside the Wakatipu Basin. The phrase "planning regime" as used in these submissions means those Chapter 3 and Chapter 6 planning provisions which relate to existing, consented or potential future rural living opportunities in the Wakatipu Basin (whether located in RL/RR or RLC).*
>
> *2. Summary*
>
> *2.1 Summary of the points addressed in these submissions:*
>
> *(a) The starting point;*
>
> *(b) The Planning Regime is minimal, to a deficient extent;*
>
> *(c) The Planning Regime is overly, and unjustifiably, restrictive;*
>
> *(d) The Planning Regime does not reflect the variety of RLC landscape characters;*
>
> *(e) The Planning Regime does not properly reflect Environment Court case law;*

[6] Submissions of W P Goldsmith (UGB and ONL Issues) lodged 01 March 2016; Submissions of W P Goldsmith (ONF/ ONL/ Wanaka UGB Issues) lodged 01 March 2016; Submissions of W P Goldsmith (RLC Issues) lodged 01 March 2016; and Submissions of W P Goldsmith and R E Hill (supplementary ONFL Issues) dated 15 March 2016).

> *(f) The Planning Regime is unbalanced, and does not implement Section 7 RMA;*
>
> *(g) The Planning Regime does not properly reflect Council's own technical s32 research;*
>
> *(h) The Planning Regime cannot survive an appropriate s32 examination;*
>
> *(i) Amendments to the planning regime are necessary to achieve the purpose and principles of the Act."*[7]
>
> *……*

2.23 Likewise the evidence presented during Hearing Stream 01, along with the transcript detailing questions and answers during Hearing Stream 01, is adopted and relied upon for Hearing Stream 02.

2.24 The 'Planning Regime' referred to in the above quoted excerpt paragraph 2.1, in terms of what has been presented on behalf of the submitters, comprises both the Hearing Stream 01 aspects previously addressed and the Hearing Stream 02 aspects addressed in these submissions and related evidence to be presented.

2.25 The Panel is referred to the detailed amendments to Chapters 1, 3 and 6 proposed on behalf of the submitters, and supported by evidence presented for the submitters, during Hearing Stream 01. While that Hearing Stream 01 presentation has resulted in some amendments to Council's proposed Chapters 21 and 22, many of the significant amendments proposed during Hearing Stream 01 have not been accepted, which results in Council's proposed Chapters 21 and 22 being significantly different to what is proposed for the submitters.

2.26 Effectively the divergence (between what was proposed for the submitters during Hearing Steam 01 and what has been accepted by the Council staff in considering Hearing Stream 02) results in two separate sets of provisions heading down different paths. The case for the submitters presented during this Hearing Stream 02 is based upon the case presented during Hearing Stream 01. This is clear in the planning evidence to be presented for the submitters in Hearing Stream 02 by Mr

[7] Legal submissions of W P Goldsmith 'RLC Issues' at paras 1.5-2.1

Farrell and Mr Brown who both address Chapters 21 and 22 in their evidence on the basis of their earlier Hearing Steam 01 evidence.

2.27 Counsel records the point made in Hearing Stream 01 submissions that Mr Farrell and Mr Brown have been separately briefed for different clients with some similar issues. There has been some consultation between them, but not in all respects. Their recommended Hearing Stream 02 amendments are similar in substance but differ in detail. That is a result of two professional planners approaching issues in slightly different ways. The Panel is being presented with two slightly different options (in terms of wording) to achieve a similar outcome.

2.28 For the avoidance of doubt therefore, these submissions are made in reliance on the higher order provisions as recommended by Mr Farrell and/or Mr Brown in their evidence presented during Hearing Stream 01. Amendments now proposed to the provisions of Chapters 21 and 22 are sought to give effect to Mr Farrell's and/or Mr Brown's version of the higher order chapters and not to give effect to the Council's latest version higher order chapters (as presented in the Hearing Stream 01 s42A Reports). That of course does not necessarily mean that the Hearing Stream 02 amendments proposed for the submitters, or a variant thereof, might not also give effect to the Council's Hearing Stream 01 provisions (or a variant thereof). This point emphasises the extent to which Hearing Streams 01 and 02 are interrelated.

3. Scope of Issues

3.1 The Panel is referred to the submissions of Ms Baker-Galloway on behalf of Darby Planning Limited and others in respect of Hearing Stream 01 dated 18 March 2016 which discuss the issue of scope at paras 1.2 – 1.5.

3.2 Council's Right of Reply in respect of Hearing Stream 01 traverses further the issue of scope in respect of the PDP. Counsel for Council states that;

> *"To be clear, it is not suggested that there is a legal constraint on submitters presenting evidence or commenting on matters raised by other submitters, although the weight that could be attributed to such evidence would be questionable if it did not relate to the relief*

specified in their submission or a matter addressed in a further submission."

…

"There is no dispute that the concept of "collective scope" applies to the Hearings Panel in terms of defining the boundaries of relief that it might recommend. There is however no authority for the proposition that an individual submitter can avail itself of that concept at their discretion to provide legal standing, irrespective of what relief they might have specified in their original submission or whether or not they have made a further submission."[8]

3.3 It is submitted in response to the above submissions that those statements are contradictory and that they conflate two separate legal concepts of 'scope' and 'standing'.

3.4 'Standing' is a principle of law about appearance in a proceeding, not about principles of admissible evidence or scope of evidence. Standing is the term for the ability of a party to demonstrate, to the relevant decision maker, sufficient connection to the law or action challenged to support that party's participation in the case. Standing is not at issue here given that all submitters being represented have made valid submissions or further submissions in respect of Stage 1 of the PDP and in particular in respect of topics covered in Hearing Stream 02 of the PDP.

3.5 Council's legal submissions also state that the High Court case of *Simons Hill Station Limited*[9] on collective scope is not applicable to the Schedule 1 plan making process as that case was on a resource consent, and because Schedule 1 is a code in terms of standing.[10]

3.6 Whilst the point of law on appeal in *Simons Hill Station* was in the context of a resource consent appeal under s 120, the High Court's findings on the interpretation of s 120 necessarily looked at the scope of the originating submission put before the local authority;

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[8] Paras 2.4 and 2.10, right of reply legal submissions for QLDC dated 07 April 2016
[9] *Simons Hill Station Limited v Royal Forest and Bird protection Society of New Zealand Inc* [2014] NZHC 1362
[10] Para 2.6, legal submissions for QLDC dated 07 April 2016

> *"What is important is that the applicant is put on notice, by the submissions **in their entirety**, of the issues sought to be raised, so that they can be confronted by that consenting authority."*[11]
>
> (emphasis added)

3.7 In coming to that conclusion, the High Court relied explicitly on Environment Court's determinations of scope in the context of plan changes, namely the *Environmental Defense Society* case which was also relied upon by Ms Baker-Galloway in Hearing Stream 01;

> *"Similarly, in a more recent case dealing with a similar issue, Environmental Defence Society Incorporated v Otorohanga District Council it was stated:*
>
> *[12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions".*[12]

3.8 It cannot be said that Schedule 1 provides a code for scope (assuming that Counsel for Council intended to refer to this as scope rather than 'standing'). Clause 8 provides a process for submitters to become involved in the plan change proceedings (therefore to establish standing). It does not provide any assistance to the Commissioners on the determination of admissible evidence, or the weight to be given to that evidence.

3.9 The principles of admissible evidence are that it must be probative, and relevant[13]. Evidence that both meets the relevance test and has probative value in the context of the case will be admitted. Evidence presented in the course of hearings on the PDP which supports any submission put to the Panel is clearly relevant and probative to the Panel's duty to enquire and make recommendations on the provisions. The reality of the Council's legal submissions would for example mean that a well-resourced submitter could not present expert evidence in

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[11] Ibid, at Para [30]
[12] Ibid, at para 28, referring to *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70 para [12]
[13] Ss 7 and 8 Evidence Act 2006

respect of a matter contained in another person's submission which might be highly relevant and of assistance to the Panel. That cannot be the outcome envisaged by Parliament, and is not the outcome supported by case law.

3.10 Counsel therefore disagrees with the contention for Council (quoted in paragraph 3.2 above) that the weight to be attributed to any evidence depends upon whether that evidence relates to relief specified in a particular submission. Evidence is either relevant or it is not, and it is either admissible or it is not. Provided evidence is relevant and admissible, the weight to be given that evidence does not relate to some theoretical extent to which the evidence directly or indirectly relates to a specific relief specified in a submission.

3.11 Finally, a contextual reading of the whole of Schedule 1 makes clear the distinction between a hearing to be held on submissions on a planning instrument under clause 8B and appeals to be brought under clause 14. Clause 8B provides that a local authority must hold a hearing into submissions; it does not specify which submitters may be heard or upon what matters. By contrast, clause 14 expressly provides that a person may only bring an appeal where they referred to the provision being appealed in their submission on the plan.

3.12 Accordingly it is submitted that the submissions and evidence presented for the submitters are within scope if they (or any part of them) meet any of the following tests:

(a) The relevant relief is specifically requested in a submission or further submission;

(b) The relevant relief is a consequential or alternative relief which is appropriate to address matters raised in a submission (where the submission includes a request for consequential or alternative relief, which is generally the case in the submissions lodged for the submitters listed in paragraph 1.1);

(c) The relevant relief is within the scope of all submissions lodged in respect of the relevant DPR provisions. On this point it is noted that there is significant breadth across the range of reliefs requested in the numerous submissions lodged to the DPR. To highlight two examples:

(i) Submission #145 lodged by the Upper Clutha Environmental Society Incorporated generally requests reinstatement of the ODP provisions in relation to Chapter 21. The range between the ODP provisions and the relevant replacement DPR provisions is significant.

(ii) Submissions 345 (John McQuilkin) and 456 (Hogans Gully Farm Ltd) request that the DPR Chapter 21 assessment matters for the Rural Landscape Classification be replaced with the ODP 'Other Rural Landscape' assessment matters. There is a significant range of potential outcomes between those two extremes.

4. The Existing Environment

4.1 The leading case on the existing environment remains the Court of Appeal's decision in *Queenstown Lakes District Council v Hawthorn Estate Limited.*[14]

4.2 There the Court found that the environment embraces the future state of the environment as it might be modified by the utilisation of rights to carry out a permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it is likely that those resource consents will be implemented.[15]

4.3 Relevant to these proceedings is the fact that the Environment Court decision in *Hawthorn Estate Limited* held that it was highly likely that houses would be built on the residential building platforms in the Wakatipu Basin subject to that appeal.[16] No evidence has been presented in these proceedings which would challenge that finding or would suggest that that finding would not apply to any approved residential building platform in the Wakatipu Basin. If anything that finding is supported by the evidence of Douglas Reid presented for the submitters, and by the maps identifying buildings and building platforms in the Wakatipu Basin attached to the Memorandum of Counsel for the

[14] *Queenstown Lakes District Council v Hawthorn Estate Limited* [2006] NZRMA 424
[15] Ibid at pars [83] and [84]
[16] Ibid, at para [90]

Council dated 29 April 2016, which in combination support the proposition that the supply of unbuilt residential building platforms in the Wakatipu Basin is steadily diminishing.

4.4 The Court in *Hawthorn* examined the definition of "environment" and referred to section 5 of the Act. Looking at the purpose of the Act, namely the promotion of sustainable management, the Court held that *"the idea of management plainly connotes action that is on-going, and will continue into the future,"* and went further to state that each component of section 5(2) is directed to the present and future state of affairs, a conclusion that is reinforced by sections 6 and 7.

4.5 The approach in *Hawthorn* has been applied by the Environment Court to a proposed plan change in *Milford Centre v Auckland Council*[17] and by the High Court in *Shotover Park v Queenstown District Council.*[18] In *Shotover Park*, Justice Fogarty confirmed that where some of the land the subject of a plan change is already the subject of resource consents likely to be implemented, the planning authority has to write a plan which accommodates the presence of that activity.

> *"The purpose of a territorial authority's plan is to "establish and implement objectives, policies and methods to achieve integrated management... of the land and associated natural and physical resources of the district. Where some of that land is already the subject of resource consents likely to be implemented, and the plan has not yet been made for that locality, it is natural enough that the territorial authority has to write a plan which accommodates the presence of that activity."*[19] (underlining added)

4.6 His Honour also considered that in deciding a plan for the future, there is nothing in the RMA intended to constrain forward-looking thinking and that the *"likely to be implemented"* test is intended to be a real-world analysis.[20]

> *"[117] In any event, if I am wrong on that point, the likely to be implemented test in [84] was intended to be a real world analysis,*

[17] *Milford Centre v Auckland Council* [2014] NZEnvC 23 *at para 120*
[18] *Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712
[19] Ibid at para [112]
[20] Ibid at para 117 referring to Hawthorn at para 42

as is confirmed by [42] of the Hawthorn decision which ends with the word "artificial":

[42] Although there is no express reference in the definition to the future, in a sense that is not surprising. Most of the words used would, in their ordinary usage, connote the future. It would be strange, for example, to construe "ecosystems" in a way which focused on the state of an ecosystem at any one point in time. Apart from any other consideration, it would be difficult to attempt such a definition. In the natural course of events ecosystems and their constituent parts are in a constant state of change. Equally, it is unlikely that the legislature intended that the inquiry should be limited to a fixed point in time when considering the economic conditions which affect people and communities, a matter referred to in para (d) of the definition. The nature of the concepts involved would make that approach artificial".

4.7 Mr Barr states the following in his right of reply evidence for Hearing Stream 01B dated 07 April 2016;

"In this regard I do not go so far as Mr Brown where he recommends in Part 6.4 of his evidence to add:

> *The landscape character of the Wakatipu Basin has been affected by existing development, and will continue to be affected by consented development, to the extent that it displays a predominantly rural living character with some remaining pastoral areas, interspersed with undeveloped roche moutonees.*

I consider that this statement reads as though 'the horse has bolted' in terms of subdivision and development, and the resource management response is to accept this. I consider that this statement would confuse plan users when contemplating and applying, in particular, the cumulative effects objectives and policies (6.3.2). In addition, Appendix 5 of my s42A report acknowledges and illustrates the high level of approved subdivision and development in the Wakatipu Basin".[21]

[21] Para 5.3 Right of Reply Evidence of Craig Barr dated 07 April 2016, referring to evidence in chief of Jeff Brown, para 6.4, dated 29 February 2016

4.8 Mr Barr's statement quoted above takes an inappropriate inference from Mr Brown's evidence. All Mr Brown was proposing is that the District Plan should refer to and reflect the starting point of the existing character of the Wakatipu Basin. The significant pattern of existing rural living development in the Wakatipu Basin is a product (in part) of almost two decades of the Operative Plan which recognised an existing "Arcadian" character and enabled development which reflected and enhanced that recognised Arcadian character.

4.9 It is submitted that the starting point for the assessment of effects relevant to consideration of the PDP must be the existing environment, which encompasses all of the identified buildings and building platforms in the Wakatipu Basin as evidenced on the maps attached to the Memorandum of Counsel for Council dated 29 April 2016. The existing unimplemented building platforms and the buildings in the Basin are defining characteristics of the existing environment, and represent the reality of the situation "on the ground".

5. The Future Environment

5.1 Having established the law relating to the existing environment, it must now be considered what the Panel's obligations are in respect of making decisions on a planning instrument which must be forward looking for two generations.[22]

5.2 In accordance with section 5(2) of the Act, decision makers are required to assess the 'reasonably foreseeable needs of future generations'. The PDP, in accordance with section 79 of the Act, will be in place for at least a decade (up to twice that possibly, as is the case with the Operative Plan).

5.3 It is submitted in summary that:

(a) The evidence demonstrates a clear demand for rural living development in the Wakatipu Basin, such that this should be recognised under section 5(2)(a) when providing for the foreseeable needs of future generations, subject to appropriate environmental constraints.

[22] Referring in support to cases relied upon in legal submissions of Ms Baker Galloway for Darby Planning Limited and others, dated 18 march 2016

(b) There is clear evidence that demonstrates landowner desire to realise the economic potential of their rural land through appropriate rural living development.

(c) The purpose of section 5 of the Act is enabling, subject to appropriate mitigation of environmental effects.[23] No evidence has been put before the Commissioners that providing for a degree of additional rural living opportunities in the Wakatipu Basin will not meet an established environmental bottom line.

5.4 The remaining task for the Panel is to determine, on the evidence, what are the dis-benefits associated with providing for rural living opportunities, and what are the benefits? If the benefits outweigh the dis-benefits, then what justification is there for the PDP to not include provisions which give effect to the existing and appropriate future environment of the Wakatipu Basin? This leads into the section 32 assessment which is further discussed in the following section.

6. Section 7 and Section 32

6.1 These submissions now consider the particular matters relevant to assessing the appropriateness of providing rural living related provisions within Chapter 21. This Panel (in the collective sense) has already been addressed on the matters for consideration under Part 2 and section 32 of the Act.[24]

6.2 Those Part 2 aspects are summarised, for the assistance of the Commissioners, as follows:

(a) Apart from their formal requirements[25] as to what a district plan must (and may) contain, those sections impose three sets of positive substantive obligations on a territorial authority when preparing or changing a plan. These are first to ensure the district plan or change accords with the authority's functions under section 31, including management of the effects of development, use and protection of natural and physical resources in an integrated way;

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[23] *Day v Manawatu-Wanganui Regional Council* [2012] NZEnvC 182 at 5-12
[24] Referring to legal submission of Ms Baker Galloway dated 18 March 2016, para 5.2 and legal submissions of Rebecca Wolt for Trojan Helmet Limited dated 07 March 2016
[25] Sections 75(1) and (2) RMA

second to give the proper consideration[26] to Part 2 of the RMA and the list of statutory documents in section 74 and section 75; and third to evaluate the proposed plan or change under section 32 of the RMA.

(b) A partial Plan Review (as opposed to a plan change) is not subject to *'fitting in with'* an operative district plan.[27]

(c) The PDP must *give effect to* the Operative Otago Regional Policy Statement[28] and must have regard to the proposed Otago Regional Policy Statement.[29]

(d) Section 5 is to be read as an integrated whole. The wellbeing of people and communities is to be enabled at the same time as the matters in section 5(2) are achieved.[30]

(e) In achieving the purpose and principles contained in Part 2 of the Act, section 32 evaluations must be carried out in respect of the PDP provisions. S32 also requires economic considerations including considering reasonably practicable options to achieve efficiency and effectiveness of the proposed provisions through identifying the benefits and costs of the environmental, economic, social and cultural effects, including opportunities for economic growth and employment.[31]

6.3 Case law developed under the RMA has long grappled with the inherent conflict between protection of the natural environment and benefits to be derived from development and use of resources. The seminal case of *NZ Rail v Marlborough District Council* traversed this issue at length Greig J stated (emphasis added);

" That economic considerations are involved is clear enough. They arise directly out of the purpose of promotion of sustainable management. Economic well-being is a factor in the definition of sustainable management in s5 (2). Economic considerations are

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[26] This ranges from "according" with Part 2, through "giving effect to" or making provisions "not inconsistent with", to "having (particular) regard to".
[27] *Appealing Wanaka Incorporated v Queenstown Lakes District Council* [2015] NZEnvC 139 at [37]
[28] Section 75(3)(c) RMA
[29] Section 74(2)(a)(i) RMA
[30] *Environmental Defence Society Inc v New Zealand King Salmon Company Limited* [2014] NZSC 38 at [24(c)]
[31] Section 32(2) RMA

also involved in the consideration of the efficient use and development of natural resources in s 7 (b). They would also be likely considerations in regard to actual and potential effects of allowing an activity under s 104 (1). ***But in any of these considerations it is the broad aspects of economics*** *rather than the narrower consideration of financial viability which involves the consideration of the profitability or otherwise of a venture and the means by which it is to be accomplished".*[32]

6.4 In *Marlborough Ridge Ltd v Marlborough District Council* the Environment Court commented on economics and the RMA as follows;

"We start with a few remarks about the role of economics in the RMA.

There is a distinct thread in the RMA which takes an 'economic' approach to sustainable management of natural and physical resources. This approach derives from:

- *section 5(2) - the references to 'enabling' and 'economic wellbeing';*
- *section 7(b) - reference to 'efficient use';*
- *sections 9, 13(2), 14(2) and 15(2) where the default option is that activities are allowed as of right unless a rule in a plan states otherwise; (and contrast these with)*
- *sections 11, 12, 13(1), 14(1) and 15(1) with their 'default' requirements in which activities are unlawful unless a rule in a plan or a resource consent states otherwise)*
- *section 32(1)(b) - benefits and costs;*
- *section 32(1)(c)(ii) - effectiveness and efficiency."*[33]

6.5 In the present case of considering the PDP, the required balancing exercise is straightforward in approach (if not necessarily easy in implementation. In the Rural zone and in the Rural Living zones section 6 matters are not the main issue outside of ONL, ONF and SNA areas[34].

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[32] *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC), at [88]
[33] *Marlborough Ridge Ltd v Marlborough District Council* [1998] NZRMA 73 at [4.3]
[34] Outstanding Natural landscapes, Outstanding Natural Features, and Significant Natural Areas

The balance of the Rural zone outside of those s6 areas is predominantly subject to 7 considerations, in particular ss 7(b), 7(c), and 7(f). In providing for the purpose of s5 to achieve an overall sustainable management regime (in the sense of a broad judgment approach) the Panel must consider these s7 principles.

Section 7(b) efficient use and development of resources

6.6 'Efficiency' or 'effectiveness' is not defined in the RMA. Efficiency in the context of section 7 has commonly been considered by the Court's as an economic consideration. Economic considerations under the RMA are considered at a macroeconomic level, rather than considering financial wellbeing of individuals. The consideration of whether rural living development provides for macroeconomic benefits was put to Counsel in Hearing Stream 01 by Commissioner Robinson, referring to Judge Jackson's decision in *Maniototo Environmental Society Inc v Central Otago District Council*[35] (colloquially known as the *'Project Hayes'* case).

6.7 In *Project Hayes*, Judge Jackson confirmed that the economic efficiencies of the proposal being considered should be assessed in terms of benefit to the community or public rather than private benefit. Counsel for the submitters confirmed, in response to Cr Robinson's proposition, that rural living development does provide community-wide economic benefits such as significant, employment benefits. Evidence to be presented in this Hearing Steam 02 advances and supports that submission.

6.8 The evidence to be presented also supports what might seem a self-evident submission that making provision for rural living opportunities in the Wakatipu Basin will enable the more effective and efficient use of the land resource. The obvious comparison is with farming activities, and the evidence to be presented directly addresses (by way of example) the extent to which traditional farming activities are still being carried out in the Basin, the extent to which that is being supplanted by rural living activities, and the extent to which that enables better and more efficient use of the land for the benefit of a wider range of people.

[35] *Maniototo Environmental Society Inc v Central Otago District Council* C103/09 (EnvC Christchurch 28 October 2009)

Section 7(c) maintenance and enhancement of amenity values

6.9 The Act defines 'amenity values' as;

> "*those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".*[36]

6.10 The above definition of amenity embraces a wide range of elements and experiences, and recognises that the appreciation of amenity may change depending on the audience;

> *"We do not understand the words "pleasantness, aesthetic coherence and cultural and recreational attributes" to be some form of combined absolute value which members of the public appreciate to a greater or lesser extent. In our view the definition is embracing a wide range of elements and experiences. Appreciation of amenity may change, depending on the audience".*[37]

6.11 This District has undergone significant consideration before the Environment Court in relation to section 7 amenity landscapes. The Environment Court in the 2000 *WESI* case helpfully considered the above distinction (emphasis added);

> *"An important point in respect of section 7 landscapes is that the Act does not necessarily protect the status quo. There is no automatic preference for introduced grasses over pine forest. Nor should it be assumed (on landscape grounds) that existing rural uses are preferable in sustainable management terms to subdivision for lifestyle blocks which could include restoration" of indigenous bush, grasses or wetlands, especially if predator controls are introduced. Just to show how careful one has to be not to be inflexible about these issues* ***we raise the question whether it is possible that a degree of subdivision into lifestyle blocks might significantly increase the overall naturalness of a landscape****… **Logically there is a limit: the***

[36] Section 2 RMA
[37] *Phantom Outdoor Advertising Ltd v Christchurch City Council* (NZEnvC C90/2001, 7 June 2001) at [18]

law of diminishing returns where too much subdivision leads to overdomestication of the landscape".[38] [emphasis added]

6.12 The above question put by the Court is directly relevant to matters being considered by this Panel. The consideration of 'overdomestication' must be assessed against the existing environment of the Wakatipu Basin and for (at least) the life of this plan. It is false to assess it against an unrealistic historic connection, or to other landscapes within the District.

6.13 Evidence to be led directly addresses this issue of amenity values, including one personal viewpoint expressed by Mr Stalker, a professional landscape assessment provided by Mr Baxter in relation to the Wakatipu Basin generally, and a further professional landscape assessment by Mr Skelton in relation to an increase in density within the Rural Lifestyle zone.

6.14 This is important when assessing objectives and policies to provide for those section 7 landscapes, which derive amenity not from outstanding naturalness, and not just from natural amenity, but also from a wide range of elements and experiences depending on the audience.

Section 7(f) maintenance and enhancement of the quality of the environment

6.15 The general requirement to maintain and enhance the quality of the environment complements the environmental obligations contained within the definition of sustainable management (sections 5(2)(a), (b) and (c)).

6.16 The words 'maintain and enhance' do not equate to protection or preservation of the status quo of the natural environment. Use and development of the land resource are allowed unless protection is required. The landscape evidence to be presented demonstrates that 'quality' of the environment is not just derived from naturalness but from human interactions and perceptions of that environment.

6.17 The overall broad judgment to be exercised under section 5 will inevitably require an evaluation of the environmental *quality,* otherwise and evaluation would be limited to whether or not particular site-specific uses or developments will have an adverse effect on the environment in

[38] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 at [91]

terms of section 5(2)(c), and judgments concerning section 5(2)(a) and (b) will not be as well-informed by section 6 provisions.

Section 32

6.18 In 2013 the legislature introduced new requirements into s32 of the Act which added additional requirements for decision makers to consider when making policy evaluations. Those amendments included additions to section 32 to provide for the quantification of costs and benefits and the need to assess economic costs and benefits.

> "*32(1) An evaluation report required under this Act must—*
>
> …
>
> *(b) examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by—*
>
> *(i) identifying other reasonably practicable options for achieving the objectives; and*
>
> ***(ii) assessing the efficiency and effectiveness of the provisions in achieving the objectives; and***
>
> *(iii) summarising the reasons for deciding on the provisions; and*
>
> …
>
> *(2) An assessment under subsection (1)(b)(ii) must—*
>
> ***(a) identify and assess the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—***
>
> ***(i) economic growth that are anticipated to be provided or reduced; and***
>
> ***(ii) employment that are anticipated to be provided or reduced; and***

(b) if practicable, quantify the benefits and costs referred to in paragraph (a); and

…"

6.19 A Council must now identify other reasonably practicable options to and assess the efficiency and effectiveness of the proposed provisions through identifying the benefits and costs of the environmental, economic, social and cultural effects, including opportunities for economic growth and employment.

6.20 The addition of section 32(2) post-dates Environment Court case law which accepted the relevance of economic considerations in the RMA. In part that amendment added further weight and clarification to what were already valid and important considerations. In part that amendment arguably broadened the focus of economic considerations by specifically including benefits to individuals which the Courts had previously discounted to some degree.

6.21 The reference to "*economic growth*" in subsection (i) must include the economic growth resulting from the increase in realisable land value which benefits a subdividing landowner, and the reference to "*employment*" in subsection (ii) must include specific employment opportunities which arise from rural living, both short term in terms of house construction and long term in terms of ongoing property maintenance.

6.22 s32(2)(a)(i) and (ii) requires that the opportunities for economic growth and employment that are anticipated to be provided or reduced are assessed. This recognises that Part 2 of the Act includes economic well-being of individuals as well as the wider community, and the use and development of natural and physical resources invariably involves economic activity.

6.23 A cost, or negative effect, can be described as what society has to incur to obtain a desired benefit. A benefit, or positive effect, can be described as a consequence of an action (eg, a plan change) that enhances well-being within the context of the RMA. The evidence for the rural living submitters assesses the costs and benefits to be derived from rural living opportunities, including the potential provisions for employment and economic growth.

7. The Council's Case

7.1 The fundamental factual issue which arises from the legal issues addressed above and which is addressed in these submissions, the related evidence, and related Hearing Stream 01 submissions and evidence, is the extent to which the Wakatipu Basin can accommodate additional rural living development (by way of rezoning and/or resource consent) and consequentially the extent to which Chapters 21 and 22 of the DPR should recognise and provide for existing and future rural living development in the Wakatipu Basin.

7.2 These submissions now address the Council's case on that issue and the case for the submitters on that issue. This section of these submissions discusses the Council's case, in the following order:

(a) Council's landscape evidence.

(b) Council's economic evidence.

(c) Council's planning evidence.

(d) Council's legal submissions based upon that evidence.

7.3 As previously stated, these submissions and the related evidence build upon the Hearing Stream 01 submissions and evidence. Counsel will seek to minimise repetition, although the interrelated nature of Hearing Streams 01 and 02 means some cross referencing is necessary.

Council's Landscape Evidence

7.4 Council has presented new landscape evidence from Dr Read in Hearing Stream 02, in addition to her landscape evidence prepared for Hearing Stream 01, primarily in rebuttal of submissions and evidence presented at Hearing Stream 01. The significance of this point is firstly that the Council has taken the opportunity to introduce rebuttal/supplementary evidence in relation to Hearing Stream 01, and secondly that Council has elected not to introduce rebuttal/supplementary landscape evidence in relation to the fundamental issue identified in paragraph 7.1 above.

7.5 On this point the Panel is reminded that submissions presented in Hearing Stream 01 referenced Dr Read's original Wakatipu Basin

Landscape Report[39] and submitted firstly that that Report provided a good starting point for assessment of absorption capacity in different parts of the Wakatipu Basin and secondly that that Report could be a useful starting point for specific landscape policies in Chapter 21 to address the issue of absorption capacity in different parts of the Wakatipu Basin.

7.6 Despite now presenting additional landscape evidence in Hearing Stream 02, the Council has elected not to adopt that suggested approach. That has broader implications for the planning provisions which are addressed further below. However it also has specific significance because the Panel is now in the position of determining appropriate Chapter 21 objectives and policies based (in part, as it is not the only consideration) upon the expert landscape evidence which has been presented.

7.7 The Panel is reminded that Mr Baxter's Hearing Stream 01 evidence criticised Dr Read's June 2014 Report on the basis that Dr Read, when analysing the character of the Wakatipu Basin, significantly failed to take into account the extent of existing and consented residential development. On that basis Mr Baxter's evidence stated the following:

> *"I disagree with Dr Read's factual analysis of the landscape character of the Wakatipu Basin. In my opinion large parts of Wakatipu Basin actually have an established rural living character, one that has been guided and controlled through a lengthy planning process based on the retention of appropriate visual amenity values".*

And concluded:

> *"The rural living character I have described above varies throughout the Wakatipu Basin in terms of location, density, and the extent to which it has affected local landscape character. As a consequence there are some areas of the Basin which should be rezoned as rural residential rural lifestyle, some areas where I believe rural living development should be avoided, and other areas which can accommodate the limits to a greater or lesser*

[39] Dr Read's June 2014 Report "*Wakatipu Basin Residential Subdivision and Development Landscape Classification Character Assessment*"

extent, potentially including urban development. I have not been briefed to address this level of detail as I understand that will be dealt with during later hearings".[40]

7.8 The second paragraph quoted above was put to Dr Read in the course of Hearing Stream 02 by Commissioner Robinson. Cr Robinson asked Dr Read to comment on Mr Baxter's critique of her June 2014 Report[41] and his contention that Dr Read had omitted rural living as a key aspect of the character of the Wakatipu Basin. Dr Read replied questioning whether Mr Baxter had read her entire June 2014 Report . She referred directly to Mr Baxter's concluding paragraph (second paragraph quoted above). Dr Read stated that Mr Baxter's conclusion was *'almost identical'* to hers, and that there was *'no contradiction'* between their evidence. Cr Robinson responded to say that made life easy [for the Panel].[42]

7.9 There has been no other landscape evidence lodged in respect of Hearing Stream 02 which either rebuts Mr Baxter's evidence about the character of the Wakatipu Basin and its ability to absorb further development, or provides an alternative assessment:

(a) The evidence of Di Lucas for the Upper Clutha Environmental Society, dated 21 April 2016 assesses (at paras 53-57) in general terms the amenity values of non–ONL rural landscapes, but not the Wakatipu Basin Rural Landscape Classification area.

(b) The evidence of Julia McMinn for the Ministry of Education, dated 21 April 2016 states (at paras 14-15) that 'rural activities include people and families that are supported by existing education and other community activities' (in support of the submission to include objectives recognising education facilities in the rural zone).

(c) The evidence of Nikki Smetham for Queenstown Park Limited, dated 21 April 2016, specifically addresses the character of the rural landscape of the Wakatipu Basin, confirming the wide variety of land uses occurring including commercial tourism recreation and rural residential and rural lifestyle (para 5.3). Ms Smethan refers

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[40] Evidence of Paddy Baxter, Hearing Stream 02, at paras 7 and 14

[41] Dr Read's June 2014 report "*Wakatipu Basin Residential Subdivision and Development Landscape Classification Character Assessment*"

[42] Hearing Stream 01B transcript, dated 07/03/2016, at approximately 1 hour 27 minutes onwards.

to Mr Baxter's evidence for Hearing Stream 01, does not disagree with any of that evidence, and specifically agrees with aspects of that evidence.[43]

Note: For completeness it is noted that Mr Julian Haworth (representing UCESI) expressed an opinion on this issue.[44] However Mr Haworth is not a landscape expert, his evidence is based upon the expert landscape evidence of Di Lucas, and that expert evidence does not provide an evidentiary foundation for Julian Haworth's statement.

7.10 Accordingly it is submitted that:

(a) There is no evidentiary challenge to the factual contention that the Wakatipu Basin exhibits, to a considerable degree, a rural living character;

(b) The landscape experts are in agreement that there are areas of the Wakatipu Basin which can accommodate additional rural living development (both inside and outside areas zoned Rural Lifestyle);

(c) The Council's proposed Chapter 21 objectives and policies fail to reflect (a) above and fail to provide for (b) above;

(d) There is no landscape evidentiary basis to justify the failures referred to in (c) above.

Council's Economic Evidence

7.11 The Panel is reminded of the following aspects of the submissions and evidence presented for the submitters during Hearing Stream 01:

(a) There is no challenge to various generic statements in Council evidence to the effect that the landscapes in the district, particularly the Outstanding Natural Landscapes (currently in the DPR comprising 96.7% of the district), are very important to the economic wellbeing of the district;

(b) There was no specific evidence that the existing character of the RLC components of the Wakatipu Basin (excluding ONLs and ONFs) is important to the economic wellbeing of the district;

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[43] Evidence of Nicky Smethan for Queenstown Park Limited, dated 21 April 2016, at paras 5.12 – 5.14 on pages 17 - 19

[44] Evidence of Julian Haworth Hearing Stream 02, para 48

(c) There was no specific evidence to the effect that providing for additional rural living opportunities within the RLC components of the Wakatipu Basin would adversely affect the economic wellbeing of the district.

7.12 The Council has now presented (for Hearing Stream 02) economic evidence by Philip Osborne. That evidence clearly responds to criticism made during Hearing Stream 01 that the Council's case lacked an economic evidentiary foundation, in relation to the district as a whole and specifically in relation to identified issues such as rural living in the Wakatipu Basin. Philip Osborne's evidence is significant to the fundamental issue being addressed in these submissions for the following reasons:

(a) The key focus of Mr Osborne's evidence is on the economic contributions of tourism to the District, and the economic contributions derived from ONFLS[45].

(b) Mr Osborne omits any reference to rural living, rural lifestyle, or rural residential activities. Notably, Mr Osborne does not comment on whether additional rural living within the Wakatipu Basin would have an adverse effect on tourism for the District, or on the economic wellbeing of the District;

(c) Despite having now had the opportunity to present economic evidence in relation to the specific issue subject to these submissions, the Council has elected not to provide such evidence.

7.13 Mr Osborne's evidence does include the following statements:

> *"**5.9** Agricultural land use is an important tool in the management of the natural landscape as its productive form is generally both in keeping with the landscape, and in fact forms an integral component of it. As Dr Read states in her Evidence for the Strategic hearing, "Agricultural land uses create the character of the landscape" (at paragraph 6.7)"*
>
> …

[45] Refer Executive Summary of evidence of Mr Osborne dated 06 April 2016

> ***"8.7** It is my economic opinion that the value of this natural landscape is of such vital economic importance to the District's community that it is prudent to adopt a precautionary approach and manage the development of other activities in the Rural and Gibbston Character zones".*[46]

7.14 In respect of the statements quoted above, it is submitted that:

(a) The statement about agricultural land use is a generic statement applicable to the entire Rural zone. The extent to which that "agricultural land use" is relevant to the Wakatipu Basin is debatable and is not established in evidence for the Council;

(b) The reference to the "*value of this natural landscape…*" is also a generic statement applicable to the entire Rural zone, and again the extent to which it applies to the Wakatipu Basin is debatable;

(c) Mr Osborne's evidence for this Hearing Stream primarily considers the ONFLs of the District rather than the balance of the Rural zone and the rural living zones. This is made clear in Mr Osborne's Conclusion[47] where he states:

> "*The competitive advantage exhibited by the Queenstown market is based on its outstanding natural landscape and to a less degree the agglomeration of visitor related activities…*"

7.15 Of even more significance is Mr Osborne's statement in his paragraph 5 as follows:

> "*1.5 I was engaged by the Queenstown Lakes District Council (**QLDC**) in March 2016 to provide evidence in relation to economic matters for the Rural Proposal of the Proposed District Plan (**PDP**), in particular the Rural Zone Chapter 21 and the Indigenous Vegetation and Biodiversity Chapter 33. I have not had any prior involvement in preparation of the PDP, and this evidence is not a full quantitative or qualitative cost and benefit analysis in terms of section 32 of the RMA. That was not possible in the time available.*"

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[46] Evidence of Philip Osborne dated 06 April 2016, para 5.9 and 8.7.
[47] Ibid paragraph 8.4 on page 12

7.16 Accordingly the Council's own economic evidence records that it is not a full quantitative or qualitative cost and benefit analysis under section 32. Mr Barr does not provide any economic assessment which addresses s32 requirements, particularly in relation to s32(2). Despite now having taken a second opportunity to address this issue, the Council's evidence fundamentally fails to do so.

7.17 Accordingly it is submitted that the failures by the Council to recognise and provide for existing and future rural living opportunities in Chapters 21 and 22 has no economic evidentiary basis.

Council's Planning Evidence

7.18 The Panel is reminded of the following aspects of the submissions and evidence presented for the submitters during Hearing Stream 01:

(a) The existing character of the Wakatipu Basin, combined with its location and the obvious demand for additional rural living opportunities in the Basin, support the proposition that the Wakatipu Basin should be treated differently from other parts of the Rural Zone in general and from other RLC components of the Rural Zone in particular;

(b) (a) above justifies specific provisions relating to rural living opportunities in the Wakatipu Basin to be included in the higher order chapters dealt with during Hearing Stream 01;

(c) (b) above justifies [looking forward to Hearing Stream 02] specific provision being made in Chapters 21 and 22 to address the issue of existing and future rural living development in the Wakatipu Basin;

(d) Because of (a), (b) and (c) above this is one of the most significant issues facing this Panel.

7.19 There can be no justification for the Council's approach that the 'Arcadian' landscape, explicitly referenced in the Operative Plan and consequentially developed throughout the Wakatipu Basin, can now be reinterpreted on the basis of a historical connection to farming which is no longer the reality of the area. Messrs Strain and Stalker provide useful examples of the recent history of farming activities and rural living subdivision within the Wakatipu Basin.

7.20 To omit objectives and policies from the Rural Chapter 21 which do not provide for the current state of the environment, and to provide assessment matters which appear to attempt to reverse the pattern of previous development history, is inconsistent with the High Court case law cited above[48] requiring planning provisions to recognise and provide for the existing environment (in the *Hawthorn* sense).

7.21 Despite the above matters, Mr Barr extraordinarily fails to identify this issue as even being an issue relevant to consideration of appropriate Chapter 21 objectives and policies. Even more extraordinarily, Mr Barr fails to provide an explanation for omitting to refer to this issue at all in the s42A Report.

7.22 Mr Barr does state at his para 8.16 that:

> *"I also wish to emphasise that if farming remains a viable activity in the Rural Zone there is less likely to be pressure to convert Rural Zoned land to other land uses or activities, such as residential subdivision or development".*[49]

7.23 Mr Barr then accepts at his para 8.17 that very few farmers derive income entirely from farming, particular in the Wakatipu Basin, and he records that the PDP Chapter 21 provides for a range of non-farming activities *'in particular tourism and other commercial activities…'* (Para 8.17-8.18).

7.24 If anything the two statements quoted above emphasise Mr Barr's failure to address the issue of rural living in the Wakatipu Basin. Mr Barr does confirm at para 13.49:

> *"As set out in Mr Osborne's evidence, it is important to the economic, social and cultural wellbeing of the district that a range of activities are provided for in the Rural Zone and I consider it equally important that the resources that make the Rural Zone a desirable place to locate are appropriately managed".*

7.25 It is difficult to tell whether the above statement is intended to encompass rural living, but the failure of Mr Barr to otherwise address rural living at all, and the general tenor of his evidence, suggests that that statement is limited to farming and commercial tourism activities.

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[48] *Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712
[49] S42A report Rural chapter 21, dated 07 April 2016, para 8.16.

7.26 The second significant failure of Mr Barr's evidence is the failure to even consider, let alone address, the s32(2) statutory obligation to properly assess the full range of costs and benefits relevant to the issue of rural living in the Wakatipu Basin. Mr Barr makes passing reference to landscape disbenefits, without in any way attempting to quantify them. He completely fails to identify, let alone assess, economic and social benefits which arise from existing rural living and which would arise from additional rural living opportunities in the Wakatipu Basin. It is submitted that this fundamental failure very significantly undermines the s 42A Report recommendations on this issue.

7.27 Accordingly it is submitted that:

(a) There is no planning evidence which justifies the failure to provide, in Chapter 21, objectives and policies which reflect and enable existing and future rural living opportunities in the Wakatipu Basin;

(b) It is appropriate that that failure be addressed.

Legal Submissions for the Council

7.28 Mr Winchester's synopsis of submissions dated 21 April 2016, and opening representations dated 02 May 2016, similarly omit any reference whatsoever to the issue of rural living in relation to Chapter 21 issues.

7.29 In the course of these hearings on the PDP, one can assume to rely on legal counsel to summarise and present on the salient points of agreement and disagreement between experts. Mr Winchester has taken the opportunity in the above submissions to reiterate Council's position in disputed Hearing Stream 01 issues such as scope and ONFLs, but has made no further comment on the landscape issues within the Wakatipu Basin raised within Hearing Stream 01, nor any comment on the rural living issues addressed during Hearing Stream 02.

7.30 Mr Winchester states in defence of the 'other activities' provided for within Chapter 21 that;

> *"There is submitted to be no compelling evidence which has been produced by QPL to demonstrate that the Council's approach is*

flawed or that QPLs approach will be more appropriate".[50]

7.31 By contrast, there is no such statement responding to the landscape and planning evidence presented on behalf of the submitters represented in these submissions.

7.32 Of particular significance is Mr Winchester's paragraph 3.10 which reads:

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

The above statement confirms the extent of economic evidence which has informed the Council's s32 assessment, to the extent that any such assessment has been carried out. The inadequacy of that economic evidence has been commented on above.

7.33 In summary, the Council's case simply fails to address the fundamental issue addressed in these submissions. The issue will not go away just because the Council does not wish to address it. The issue must be addressed. There is nothing in the legal submissions for the Council which undermines the following submissions for the submitters:

(a) Landscape experts are in agreement that the Wakatipu Basin can accommodate additional rural living development (within and outside the Rural Lifestyle zone);

(b) There has been no evidence presented by Council to rebut the evidence considering the economic and planning considerations presented on behalf of the submitters;

(c) A substantial case has been made that Chapter 21 should include key objectives and policies which reflect the existing rural living character of the Wakatipu Basin and which provide for additional rural living opportunities where those opportunities can be appropriately absorbed.

8. The Submitters' Case

8.1 These submissions now address the amendments sought by the submitters. It may seem surprising, given the matters raised in these

[50] Mr Winchester opening representations dated 01 May 201, para 4.9

submissions, that the amendments sought to the Chapter 21 rural provisions and assessment matters are relatively minor. However the proposed amendments reflect the following important considerations:

8.2 The Council has elected not to adopt the suggestion made during Hearing Stream 01 that Dr Read's June 2014 Report provided a good starting point for a planning regime which could identify (through policies) parts of the Wakatipu Basin which should be protected from further development and other parts of the Basin where further development could be absorbed. The Council has elected to provide no policy guidance on this issue and instead to rely on non-specific (as to area) assessment matters to enable 'case by case' decisions to be made as to whether any particular development can appropriately be consented. That approach by Council significantly limits the options for the submitters who cannot be expected to do the Council's job and provide a full and detailed landscape assessment of the Wakatipu Basin in order to provide the basis for area specific policies.

8.3 As a consequence of the previous point, the only option reasonably open to the submitters is to propose a generic objective and related policies for the Wakatipu Basin and to suggest amendments to the 'case by case' RLC assessment matters.

8.4 The objective and policy amendments proposed by Mr Farrell and Mr Brown therefore directly address the fundamental case being presented for the submitters while, at the same time, remedying the Council failures identified in the above submissions;

8.5 The RLC assessment matters generally appear to anticipate and provide for future applications for rural living opportunities in the Wakatipu Basin. An examination of Dr Read's evidence for this hearing on the RLC assessment matters evidences[51] an assumption on her part that such rural living opportunities will arise and may be consentable (which in turn reflects her original Report referred to above.[52] However Chapter 21 contains virtually no objective and policy support for what the RLC assessment matters appear to anticipate.

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[51] For example refer Marion Read's evidence dated 6 April 2016, paragraph 6.21 on page 20 and paragraph 6.26 on page 21

[52] Dr Read's June 2014 Report "*Wakatipu Basin Residential Subdivision and Development Landscape Classification Character Assessment*"

8.6 Two specific legal points are made in relation to the RLC assessment matters in Rule 21.7.2, with specific reference to Rule 21.7.2.7:

(a) Subclause (a) of that assessment matter refers to "*valued quality*". It is submitted that that reference should be deleted because it is simply too subjective and it invites debate about who is doing the valuing. This is particularly the case in the absence of policy direction in Chapter 21, in relation to rural living opportunities, as addressed above.

(b) The reference to "*openness*" should be deleted for the reasons addressed in detail during Hearing Stream 01, with particular reference to past Environment Court rulings that openness is a characteristic limited to ONLs and ONFs.

Evidence for the Submitters

8.7 The evidence for the Submitters is focussed directly on the fundamental issue which is the subject of these submissions.

8.8 The purpose of Mr Stalker's evidence is to provide the Panel with one 'on the ground' example of what has happened, and is continuing to happen, to historic agricultural farming activities in the Wakatipu Basin. Mr Strain's evidence provides a similar example in respect of what was the farm which adjoined Mr Stalker's family's farm. Those examples could be replicated right across the Wakatipu Basin. It is noted that the Council has made no attempt to provide any factual analysis or assessment in relation to historic and/or existing farming activities in the Wakatipu Basin.

8.9 Mr Stalker's evidence also provides one personal view of the consequences of rural living development at the Basin, from his point of view as a member of a long term farming family which has been resident in the Basin for a considerable number of years.

8.10 Mr Strain's evidence separately provides the Panel with information about the Arrow Irrigation Scheme. This is an example of a significant infrastructural asset which has benefitted, and will continue to benefit, from existing and future rural living development in the Basin.

8.11 Mr Reid's evidence provides an analysis of the current values of rural living lots and rural living houses in the Wakatipu Basin, and the demand for those lifestyle products. Mr Reid's evidence confirms the steady

increase in market values over time for rural living opportunities. This evidence informs the required s32(2) assessment in particular.

8.12 Mr Baxter's evidence considers the current landscape character of the Wakatipu Basin and projected landscape effects of providing for further rural living opportunities.

8.13 Mr Skelton's evidence addresses the specific issue of increased density within areas zoned Rural Lifestyle, with particular reference to the effect of increasing density of existing RL zoned areas.

8.14 Mr Farrell and Mr Brown consider the Council's proposed Chapter 21 provisions and propose amendments. Each planner's evidence differs slightly in terms of amended provisions, however the intent and effect of those amendments both address the matters raised in these submissions.

9. Density of the Rural Lifestyle Zone

9.1 This part of these submissions addresses the relief sought by submitters in para 1.1 to reduce the current density of one dwelling per 2ha in the Rural lifestyle Zone to 1 dwelling per 1ha.

Council's Landscape Evidence

9.2 The landscape evidence of Dr Read for the Council begins by asserting that the purpose of Chapter 22 is to provide rural living opportunities and that the density standards ensure the *'open space, natural and rural qualities of the district's distinctive landscapes are not reduced'.*[53]

9.3 Dr Read relies upon the wording of the policy without in any way examining the appropriateness of the wording of the policy. Minimum residential density standards normally relate to the minimal size necessary to maintain the desired residential amenities within a particular lot. There is no evidentiary basis for the contention that the purpose of the 2ha Rural Lifestyle or 4,000m2 Rural Residential minimum density standards is to preserve open space, natural or rural qualities.

9.4 The term "*open space*" is a defined term in the District Plan. That definition reads:

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[53] Para 10.2 Evidence of Dr M Read dated 07 April 2016

"*means any land or space which is not substantially occupied by buildings and which provides benefits to the general public as an area of visual, cultural, educational or recreational amenity values.*"

9.5 Dr Read provides no analysis which establishes that existing rural living development within the Rural Lifestyle zones makes any meaningful contribution to 'open space' as thus defined. Any such contention would obviously be debatable given the extent to which Rural Lifestyle lot owners tend to landscape their properties, with particular reference to boundary planting.

9.6 It is noted that the italicised quote in paragraph 9.2 above is taken directly from Policy 22.2.1.2 as notified in the PDP. Dr Read's following assessment of the landscape character provided by the 2ha density is predicated on the above policy. With respect, this approach is not helpful to the Panel. Such landscape evidence should be to assess whether the provisions give effect to the character established on an evidential basis, rather than the other way around.

9.7 At para 10.3 -10.4 Dr Read then goes on to state;

"It is my general observation that 2ha enables the keeping of animals and other productive land uses which are characteristic of the broader rural landscape and which cannot be sustained on smaller lots".

9.8 In respect of the paragraph quoted above it is submitted that:

(a) There is no landscape evidentiary basis for a contention that the Rural Lifestyle zone should be "*characteristic of the broader rural landscape*";

(b) There is no evidentiary basis that 2ha enables the keeping of animals and other productive land uses in an economic sense;

(c) It could equally be asserted that people who own a 2ha lot keep animals in order to keep the grass down because otherwise they end up having too much grass to mow;

(d) This statement does not provide appropriate justification for a 2ha density on landscape grounds.

9.9 In her paragraph 10.4 Dr Read goes on to say that "*… people wishing to have a few horses, raise a few sheep or alpacas or grow a few*

olives will have to move, again, to the Rural Landscape zone. I consider the effects of this on the landscape, particularly in the Wakatipu Basin, would be adverse."

9.10 In relation to that statement it is submitted that:

(a) There is no evidentiary basis for the contention that somebody would be able to subdivide in the Rural Landscape zone just because they wanted to have a few horses or a few sheep or grow a few olives;

(b) There will always be pressure for subdivision in the Rural Landscape zone. Any such proposed development will be assessed on its merits under the relevant provisions of the District Plan. There is no basis to suggest that a reduction in density from 2ha to 1ha in the Rural Lifestyle zone will have any effect on that situation.

9.11 Dr Read's evidence does not contain any assessment of the landscape effects of a 1ha density within those parts of the Wakatipu Basin proposed to be zoned Rural Lifestyle (other than within the Hawthorn 'triangle') It is therefore unclear on what basis Dr Read is making her assessment as to the suitability of density in the Rural Lifestyle.

Council's Economic Evidence

9.12 The evidence of Philip Osborne for hearing Stream 02 completely omits an analysis of the proposed increase in density in the Rural Lifestyle zone. That statement is not intended to criticise Mr Osborne, because it appears that his brief did not extend to include the Rural Lifestyle zone. However this is a significant lacuna in the Council's case, due to the obvious economic benefits which would flow from increasing the density of the Rural Lifestyle zone

Council's Planning Evidence

9.13 Mr Barr's section 42A report for Chapter 22 considers the submissions presented on the density requirements and finds that the Rural Lifestyle zone:

"…does not result in the most efficient use of the land resource both in terms of the potential removal of land from being utilised for primary production and use of the soil resource, nor is this type of

development very efficient in terms of housing supply and efficient energy usage, including transportation. However, it is a housing choice that is available".[54]

9.14 Mr Barr then goes on to state that the location of many of the RLZ areas would not support an increased density, and refers for support to Dr Read's section 10;

"I refer to and rely on Dr Read in section 10 of her evidence that also states that the 2ha is the minimum size that ensures a sense of spaciousness and the maintenance of other aspects of rural amenity."[55]

9.15 Putting to one side the issue of how much weight should be placed upon Dr Read's landscape evidence, given the points made above, the primary point here is that Mr Barr's assessment is based entirely upon landscape considerations. It does not take into account other relevant considerations.

9.16 In particular Mr Barr does not make any attempt to carry out a proper s32(2) analysis. There is no consideration whatsoever of the economic and social benefits which would accrue to existing landowners (who may subdivide) and future landowners (who would enjoy the benefit of subdivided lots). This failure is even more significant in light of Mr Barr's acknowledgment above that the RL Zone does not result in the most efficient use of the land resource by. This fundamental failure to provide adequate s32(2) assessment fatally undermines Mr Barr's assessment.

Council's Legal Submissions

9.17 Mr Winchester's synopsis of legal submissions for Hearing Stream 02 does not mention the proposed reduction in density.

9.18 In his paragraph 5.4 on page 12[56] Mr Winchester states that:

"*It is appropriate that the capacity of land within Rural Lifestyle zones to accommodate a higher density of development is assessed on a case by case basis…*"

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[54] Section 42A Report, Chapter 22 para 8.3
[55] Ibid, at para 8.5
[56] Mr Winchester's Opening Representations for Hearing Stream 02 dated 2 May 2016

The problem with that statement is that non-compliance with the minimum residential density rules triggers non-complying activity status which definitely does not invite or anticipate consideration on a 'case by case basis'.

The Case for increased density in the Rural Lifestyle zone

9.19 The evidence of Mr Skelton considers the landscape effects of a reduced average density within the Rural Lifestyle zone. This evidence considers the perceived effects of an increase in density as compared to the actual effects based on landscape evidence. Mr Skelton confirms that the proposed change would not have adverse consequences from external viewpoints, and that there would be positive landscape benefits derived from appropriate development to a greater density.

9.20 Mr Skelton's evidence also addresses the issue of a minimum distance between houses, for the purpose of protecting existing residential amenities, as a possible basis for a limited notification rule.

9.21 The economic benefits to be potentially derived from a 1ha density subdivision regime in the rural lifestyle zone as compared to a 2ha density significantly outweigh the benefits to be derived from 'low intensity pastoral' activity in this zone.

9.22 These considerations must be taken into account in terms of section 7 matters and weighed against other principles of the Act in determining an overall broad judgment as to how to achieve the purpose within section 5. Council has not provided an evidentiary foundation which justifies retention of the 2ha average from the Operative Plan. There is also no justification in terms of section 32 as to the efficient and effective use of the land resource subject to the avoidance of inappropriate adverse effects on the environment.

10. **500m2 House Size Limitation**

10.1 In paragraph 5.8 of her evidence Dr Marion Read maintains that the "*context*" for the debate (about the proposed 500m2 house size consent trigger) is the average floor area of a house in New Zealand at 149m2 and the average floor area of houses built in New Zealand since 2010 at 205m2. With respect, the correct context should relate to the size of houses being built on residential building platforms in

the Rural and Rural Lifestyle zones in the Queenstown Lakes District in general and the Wakatipu Basin in particular. The Council holds relevant data in its building consent records but has elected not to present that data.

10.2 In her paragraph 5.10 Dr Read refers to the landscape assessment undertaken when residential building platforms are approved. Her assessment assumes that the relevant landscape assessment is currently the same in the Rural General zone and the Rural Lifestyle zone. That is incorrect. Dr Read's analysis in her paragraph 5.10 is correct in relation to Rural General properties where the assessment of proposed building platforms almost always results in strict design controls, frequently including height controls.

10.3 However the situation is fundamentally different in the Rural Lifestyle zone. Subdivision within the Rural Lifestyle zone requires the creation of a residential building platform for each lot created. The only Council control on the consequential house is through a controlled activity rule which limits the Council's discretion to location and external appearance of a building and which does not extend to height or area.

10.4 Accordingly Dr Read's contention that the proposed permitted activity 500m2 consent trigger limit is a "*liberalisation*" compared to the current regime is factually incorrect in relation to the Rural Lifestyle zone.

20 May 2016

W P Goldsmith/R E Hill

Counsel for the Submitters listed in paragraph 1.1