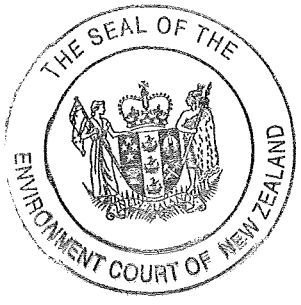
BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 214

IN THE MATTER	of the Resource Management Act 1991
AND	of appeals pursuant to clause 14 of the First Schedule of the Act
BETWEEN	WELL SMART INVESTMENT HOLDING (NZQN) LIMITED (formerly REID INVESTMENT TRUST)
	(ENV-2015-CHC-0070)
	QUEENSTOWN GOLD LTD
	(ENV-2015-CHC-0071)
	MAN STREET PROPERTIES LTD
	(ENV-2015-CHC-0072)
	KELSO INVESTMENTS LTD AND CHENG'S CAPITAL INVESTMENTS LTD
	(ENV-2015-CHC-0073)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson (Sitting alone under section 279 of the Act)
Hearing:	In Chambers at Christchurch
Submissions:	G M Todd for the appellants J C Campbell/B A Watts for the respondent (Final submissions received 3 December 2015)



Date of Decision: 11 December 2015

Date of Issue: 11 December 2015

PROCEDURAL DECISION

A: The Environment Court rules under section 279(1)(a), (f) and section 279(4) of the Resource Management Act 1991 that the following parts of these appeals are not on the subject of plan change 50:

- Well Smart Investment Holdings (NZQN) Ltd: the part seeking deletion of the Town Centre Transition Zone and rezoning as Town Centre Zone and/or changes to the rules affecting its land;
- Queenstown Gold Ltd: the part seeking rezoning of its land on Brecon Street as Queenstown Town Centre Zone;
- Man Street Properties Ltd: the parts seeking removal of the Transitional zoning, substitution of a Queenstown Town Centre Zoning and changes to the relevant rules affecting its land;
- Kelso Investments Ltd and Cheng's Capital Investments Ltd: the part seeking rezoning of their land in the northeast quadrant of the Shotover/Stanley Streets intersection to Queenstown Town Centre Zone;

— and should be struck out.

B: Leave is reserved for any party to apply for more precise orders if the wording in Order A is incomplete or ambiguous.

C: Costs are reserved. Any application should be made by 29 January 2016 and any reply by 18 February 2016.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

REASONS

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Introduction

The issues

[1] The questions to be decided in this procedural decision are whether the court has jurisdiction to hear parts of these four appeals. The Queenstown Lakes District Council says certain parts are not 'on' its plan change 50 and should be struck out.

PC50

[2] On 15 September 2014 the Council publicly notified Plan Change 50 ("PC50") to its operative district plan. The public notice delineated the plan change area ("the PC50 Area") which is shown on the attached proposed map 35 (annexed and marked "A") inside a black dashed line. The new Queenstown Town Centre Zone ("QTCZ") including the PC50 area is in pink on that plan.

[3] The stated purpose of the Plan Change is:

> To provide for an extension to the existing Queenstown Town Centre Zone through the rezoning of:

- The Council-owned Lakeview site;
- Some privately owned land adjoining the Lakeview site and bounded by Thompson and Glasgow Streets;
- 34 Brecon Street site;
- Two additional blocks bounded by Camp Street, Isle Street, Man Street, and Hay Street (the 'Isle Street blocks'); and
- The Lake Street/Beach Street/Hay Street/Man Street block (the 'Beach Street block').

It will be noted that one relatively unusual aspect of this plan change is that the Council has a direct financial interest in the outcome through the rezoning of its own land.

[4] The public notice explained that PC50 proposed to add one extra objective to the existing objectives[1] for the Queenstown Town Centre. It then described the (sub-) zonings proposed for the specified areas and stated that there would be accompanying changes to policies and rules.

[5] An evaluation under section 32 of the RMA was required[2] before notification. This evaluation was prepared by a firm called Mitchell Partnership and is dated 26 August 2014. Its analysis of other reasonably practicable options appears to be confined to alternative uses of the PC50 area. It did not directly address use of other land for achieving the objectives of the district plan. However, it is clear from Appendix A to the Section 32 Evaluation that the appellant's land was considered potentially suitable for rezoning to QTCZ early on. Curiously, at that stage the Council's Lakeview site was not included in the evaluation.

The challenged submissions

[6] The Trustees of the Reid Investment Trust ("Reid"), Man Street Properties Ltd ("MSPL"), Queenstown Gold Ltd ("QGL") and Kelso Investments Ltd and Cheng's Capital Investments Ltd ("Kelso/Cheng") own or owned various parcels of land next to or close by the PC50 area. Each made submissions on PC50. A copy of the Council's planning map 36 with the appellants' land identified by their counsel is annexed and marked "B". All the appellants' land falls outside the PC50 area (as shown on attachment "A").

1 Objectives (10.2.4)(1) to (4) [QLDP pp 10-15 to 10-17].
2 Clause 5(1)(a) Schedule 1, RMA.

[7] The Kelso/Cheng submission[3] sought — as part of the relief sought[4] — rezoning of their land[5] to QTCZ. The QGL submission[6] sought that its land on Brecon Street also be rezoned as QTCZ. I will call these two appeals the "further extension appeals"[7].

[8] The MSPL submission[8] sought removal of the Town Centre Transitional Zoning (shown on attachment "A" as the area inside the heavy black dashed line) on its land and changes to the rules to allow an increase in building height limits to (generally) 12 metres, maximum building coverage of 80%, and a maximum setback of 1.5m.

[9] The Reid Investment Trust, now Well Smart Investment Holdings (NZQN) Ltd ("Well Smart"), sought[9], as part of its relief, deletion of the Town Centre Transition Zone ("TCTZ"), para 10.2.2 (Values), and changes to rules in the TCTZ. I will call the MPSL and Well Smart (formerly Reid) appeals collectively "the amendment appeals".

[10] The Council's summary of submissions[10] referred to the submissions of each of the appellants in some detail. Any person with an interest greater than the public on any of those submissions then had the right[11] to lodge a further submission. I have not been informed whether any further submissions of relevance to these appeals were lodged other than by existing primary submitters and it is difficult to tell from the Hearing Commissioners' Decision and its Appendices.

[11] At the hearing before Commissioners appointed by the Council, the Council presented legal argument that there was no scope to accept parts of the submissions (on which these four appeals are based) because they were not submissions "on" PC50. The representatives of Reid, MSPL, Queenstown Gold and Kelso/Cheng argued the opposite.

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3 Under clause 6 of Schedule 1, RMA.
4 Kelso and Cheng submission dated 10 October 2014 at para 4.1.
5 And adjacent land along Gorge Road.
6 QGL submission dated 10 October 2014 para 2.11(1).
7 And name their land and submissions collectively in the same way.
8 MSPL submission dated 10 October 2014.
9 Reid (now Well Smart) submission dated 10 October 2014, Table 4.1.
10 Under clause 7 Schedule 1, RMA.
11 Clause 8 Schedule 1, RMA.

The first-instance report[12] sets out the legal authorities and concluded in the Council's favour on the jurisdictional issues.

[12] The appellants then lodged their appeals repeating the claims for relief as stated in their submissions. I should record that in addition to the relief which the Council has challenged, most of the appeals also sought (in effect) that PC50 be cancelled as alternative relief.

[13] The Council has requested that the issue of scope be determined as a preliminary issue. The Council submits that the parties to all the appeals will be greatly assisted by knowing, as early as possible, whether the relief sought is legally available. The question of scope is substantially a question of law alone, and the parties have confirmed that they are prepared for the issue to be determined on the papers. No submissions were lodged by any of the section 274 parties.

[14] I also record as part of the background facts to this decision that on 26 August 2015 the Council publicly notified the first stage of its proposed district plan ("the PDP"). The PDP proposes rezonings for these appellants' land that are generally consistent with the relief sought by their respective submissions and appeals. The PC50 Area is expressly excluded from the first stage of the PDP. The Council says that the proper proceeding in which to consider the substance of the submissions which are the subject of these appeals is the PDP, not appeals on PC50.

The law

The authorities on whether submissions are "on" a plan change

[15] Clause 6 of the First Schedule to the RMA provides that:

> Once a proposed policy statement or plan[13] is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority. (emphasis added)

12 Report and Recommendations dated 16 June 2015.
13 'Plan' includes a 'plan change': section 43 AAC (1)(a) RMA.

If a submission is not *on* the plan change, there is no jurisdiction for relief to be granted by the local authority (or, on appeal, this court).

[16] The leading authorities in the High Court on this jurisdictional question — *Clearwater Resort Ltd v Christchurch City Council*[14] ("*Clearwater*") and *Palmerston North City Council v Motor Machinists Ltd*[15] ("*Motor Machinists*") — indicate that there is a two-stage test:

(1) is the relief sought in the challenged submission incidental to, consequential upon or (perhaps) directly connected[16] to the plan change (or variation)?

(2) have potential submitters been given fair and adequate notice of what is proposed in the submission or has their right to participate been removed?

Neither of the higher authorities suggest other than that each case must be determined on its own facts, and there is no clear line: whether there is jurisdiction is a matter of fact and degree.

[17] Before I turn to those questions I should briefly consider the relevant changes to the RMA since the High Court authorities were decided in case they alter the correct approach to the issue.

The changes to section 32

[18] Aspects of the statutory scheme applied by the High Court in *Motor Machinists*[17] have now been replaced. In particular, Section 32 RMA as replaced[18] in 2013, now requires the evaluation report now required by the First Schedule[19] to (inter alia):

...

14 *Clearwater Resort Ltd v Christchurch City Council* High Court, Christchurch AP34/02 William Young J dated 14 March 2003.

15 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC).

16 Being merely "connected" to the submission is inadequate: *Clearwater* footnote 14 above, at [65].

17 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC).

18 By section 70 Resource Management Amendment Act 2013. The new section 32 came into force on 3 December 2013.

19 Clause 5(1), Schedule 1 to the RMA.

(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; …

Section 32(1) RMA now contains more detailed directions for assessing which provisions (including zone boundaries) are the most appropriate for achieving the relevant objectives. Those directions require the Section 32 Evaluation to[20] "identify … other reasonably practicable options for achieving the objectives".

[19] While none of the submissions specifically addressed these amendments to the RMA and how they might affect the *Clearwater* tests, I consider the amendments have merely reinforced and expressly stated the need for a comparative analysis which Kós J held in *Motor Machinists*[21] was inherent in section 32. He described a pre-2013 section 32 evaluation as "… a comparative evaluation of efficiency, effectiveness and appropriateness of options". Thus the 2013 changes have not substantially changed the law.

[20] The analysis of reasonably practicable alternatives for achieving the objectives may simply require the benefits and costs of a proposed rezoning to be compared with the benefits and costs of the operative zoning of the same area. But in many cases, depending on the objectives, it may also be necessary to compare the benefits and costs of using the plan change area to achieve the relevant objective versus the benefits and costs of another resource or area (which may or may not overlap with the first) to achieve the objectives.

[21] Ostensibly only the second task of the examination — assessing the efficiency and effectiveness of the provisions[22] — needs to be assessed and quantified under section 32(2): it refers to section 32(1)(b)(ii) but not to section 32(1)(b)(i). That seems

20 Section 32(1)(b)(i) RMA.

21 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [76].

22 Section 32(1)(b)(ii) RMA.

to be the position of the Hearing Commissioners who wrote[23] that "all that is required is that any other reasonably practicable options are identified". Against that, since assessing efficiency under section 32(1)(b)(ii) involves a comparison — it is not an absolute — the more plausible reading of the section is that the assessment under section 32(2) needs to compare the benefits and costs of the proposal with the benefits and costs of at least one of the other reasonably practicable options for achieving the objectives. I note that the recent New Zealand Treasury *Guide to Social Cost Benefit Analysis*[24] may help local authorities and others with this evaluation (despite the potentially confusing use of the word 'social' in the title).

[22] A new section 32(3) applies in the case of a plan change or a variation, or, it appears, to a submission seeking amendment of a plan change (see the definition of "proposal" in section 32(6)). Therefore a provision in a plan change (or submission) needs to be evaluated not only under, as one would expect, any objectives in the plan change (or submission) but also under the unchanged objectives of the operative district plan[25]:

> (b) … to the extent that those objectives —
>
> (i) are relevant to the objectives of the amending proposal; and
>
> (ii) would remain if the amending proposal were to take effect.

The relevant objectives in the district plan (or plan change or submission) are presumably any higher order or "equal"[26] objectives.

[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

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23 Hearing Commissioners' Decision para 9.1.11 [p 48].

24 *Guide to Social Cost Benefit Analysis* New Zealand Treasury, July 2015.

25 Section 32(3) RMA.

26 By equal, I mean others in a suite such as existing objectives 10.2.4 (1)-(4) of the QLDP for the Queenstown Town Centre.

suggests it should not lead to jurisdictional consequences for a submitter who claims to have located a better boundary.

(1) Is the relief sought within scope?

[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"[27] as if that by itself makes the submission out of scope. Indeed they later said as much[28]. I consider that is incorrect as a matter of law because in *Motor Machinists* Kós J expressly stated that zoning extensions by submission are "… not exclude[d] altogether"[29].

[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. The real issue for this decision is the second question: whether fair and reasonable notice has been given to other persons who might be affected so that they had an opportunity to participate?

(2) Have potential further submitters been denied an effective response?

Submitters on the extension sites

[26] The purpose of *Clearwater's* second limb is to prevent procedural unfairness to persons who would be more affected by a submission than by the notified plan change. Kós J explained the reason for this in *Motor Machinists*[30]:

> It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the *Clearwater* test.

The second limb prevents the interests of people and communities from being overridden "by a submissional sidewind"[31]. Kós J bore in mind the need to protect

27 Hearing Commissioners' Decision para 7.23.
28 Hearing Commissioners' Decision para 9.1.19.
29 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [81].
30 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [77].
31 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [82].

people from unforeseen "consequential" zoning extensions when he stated that they would only be permissible if no substantial further section 32 analysis was needed to inform affected persons[32].

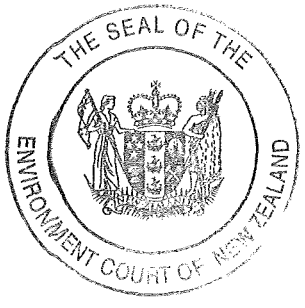
[27] Ms Campbell and Mr Watt submitted:

> It would be procedurally unfair to other persons, particularly the ... Appellants' neighbours, to allow the scope of PC50 to be enlarged by submissions. Such parties might have seen no need to lodge a submission on PC50 as they considered they were unaffected. The Council's s 32 analysis did not signal the possibility of changes to the zonings of the Extension Appellants' properties. Non-submitters would not have been served with a copy of the summary of submissions. Non-submitters would have no rights of appeal if they were dissatisfied with a decision accepting the Extension Appellants' submissions.

On one matter of fact that submission is wrong: in Appendix A to the Mitchell Report the possibility of changes to the zoning of these appellants' properties was clearly raised.

[28] The Council asks "How were the Appellants' neighbours to know that they needed to make a submission on PC50 if they had any concerns about land adjacent to them being zoned?"[33] If a neighbour lives one lot away from a road the far side of which is a zone boundary then they should probably lodge a primary submission[34] rather than wait for a summary of submissions. But, if they do wait for the notified summary and it contains details of a submission seeking rezoning of the intervening lot then that may be considered to be sufficient notice to them.

[29] However, that is not quite the situation before me, since the Kelso/Cheng land includes a number of lots so that the nearest potential affected neighbour to the northeast has a number if lots between them and the proposed zone boundary. As for QGL it is some distance (about 100 metres) from the existing QTCZ boundary: closer to part of the PC50 proposed zone boundary, but rather disconnected from the existing zone.



32 *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519 (HC) at para [81].
33 J C Campbell and B A Watts, reply dated 3 December 2015, para 13.2.
34 Under clause 6, Schedule 1 of the RMA.

[30] While the Council's summaries of submissions gave some notice to neighbouring owners and other persons with an interest greater than the public generally, that the TC Zone boundaries might change to include the further extensions, particularly since Appendix A — the McDermott report — of the Section 32 Evaluation included their land, is that enough?

[31] In their submissions in reply counsel for the Council deplored the over-emphasis by Mr Todd on the McDermott report. They countered that the McDermott report provided[35]:

> ... only the economic rationale for providing additional commercial development opportunities to support the Queenstown town centre. Nobody reading the McDermott Miller study would have confused its Figure 5.1 with the actual PC50 proposal, especially when read alongside the various other reports that related specifically to the PC50 Area.

[32] That is of concern because without Appendix A the Section 32 Evaluation appears to be light on consideration of practicable options on other land (if that is required, and I do not decide that point here). In fact, as recorded earlier, the Council did not look at that aspect of the evaluation at all. Their counsel, Ms Campbell, submitted[36] that:

> The Council had no wish to reconsider the zoning of land outside of the PC50 Area as part of the PC50 process. It wished to confine the scope of the PC50 inquiry to the PC50 Area. The Council wished to do so in an orderly and efficient manner, so that the opportunities to be provided by PC50 could be realised as soon as possible.

It appears the Council deliberately restricted the analysis of alternatives.

[33] As a result it is only by looking at one of the many appendices to the Section 32 Evaluation that neighbouring landowners and occupiers would appreciate the appellants' land (amongst other parcels) might be rezoned if a submitter sought that. I consider that

35 J C Campbell and B A Watts, submissions dated 3 December 2015, para 11.1.
36 Submissions for QLDC dated 30 October 2015 at 1.9(b).

the total notice, including the notice that was given by the notified summary, was inadequate to fairly alert potential parties in relation to the further extension appeals.

Submitters on the amendment appeals

[34] Ms Campbell advised the court[37] that:

> The bulk, location and relative height of buildings in the vicinity of the Queenstown town centre have proved to be of keen interest to parties whose views could be affected.

She then submitted that:

> The deletion of the TCTZ might well have elicited submissions from affected parties on the issue, who could legitimately consider themselves prejudiced if the deletion occurred by way of a "submissional sidewind" as Kos J put it in *Motor Machinists*.

[35] The first question to ask in this unusual situation is "who might those potential submitters be?". As a result of the Commissioners' Decision the Transitional Zone is now surrounded by Town Centre Zone, not by a residential zone which the TCTZ was partly designed to protect. I consider that any persons who stood to benefit directly from the rezoning proposed by PC50 were on notice that neighbours might seek similar benefits by making submissions on joining the zone, especially where those neighbours would be surrounded by Town Centre Zoning.

[36] On the other hand, the TCTZ was also designed to protect the important amenities of the existing town centre. It is easy to imagine that building higher within the TCTZ might have undesirable effects on the town centre in respect of shading and being out-of-scale. Would businesses in the town centre be denied an effective response if I allowed the challenged parts of the amendment submissions to remain in? The answer is "yes" because adjacent lot owners or building occupiers in Shotover Street might lose sun and/or views.

[37] Submissions for QLDC dated 3 December 2015 para 13.3.

[37] While the relevant Appendix A — the McDermott Report — to the Section 32 Evaluation did give some notice to owners and businesses in the area of changes to the zoning of land near the TCTZ (and of consequential changes to the rules governing land) I hold that was insufficient. That is because while potential submitters should look at the Section 32 Evaluation, it is unfair to expect them to pore over the Appendices.

[38] The *Clearwater* approach as explained by *Motor Machinists* now creates the situation that if a local authority's section 32 evaluation is (potentially) inadequate, that may cut out the range of submissions that may be found to be 'on' the plan change. While that does not seem fair to the primary submitters, I must not overlook that it is the fairness to persons with an interest greater than the public generally in the matters raised in a primary submission which I must consider here. Simply because a local authority may have put forward what is possibly an inferior section 32 evaluation at the initial step does not mean that a further wrong should be done to interested persons by denying them the right to participate.

Summary

[39] In these unusual circumstances, I find (if barely) that the potential submitters on the appellants' submissions were not given sufficient notice by the combination of the Section 32 Evaluation, and the Council's summary of submissions. This has been a difficult decision to make and I am relieved that the appellants have apparently sought similar outcomes on the review of the district plan.

Result

[40] I hold that the affected parts of all four challenged appeals are not within jurisdiction and will make orders accordingly.

[41] It seems potentially unfair that the right of submitters to be heard about different resources should be strictly circumscribed by the proponent of a plan change if those resources possibly should be one of the other reasonably practicable options which should have been considered under section 32 RMA. That concern is strengthened

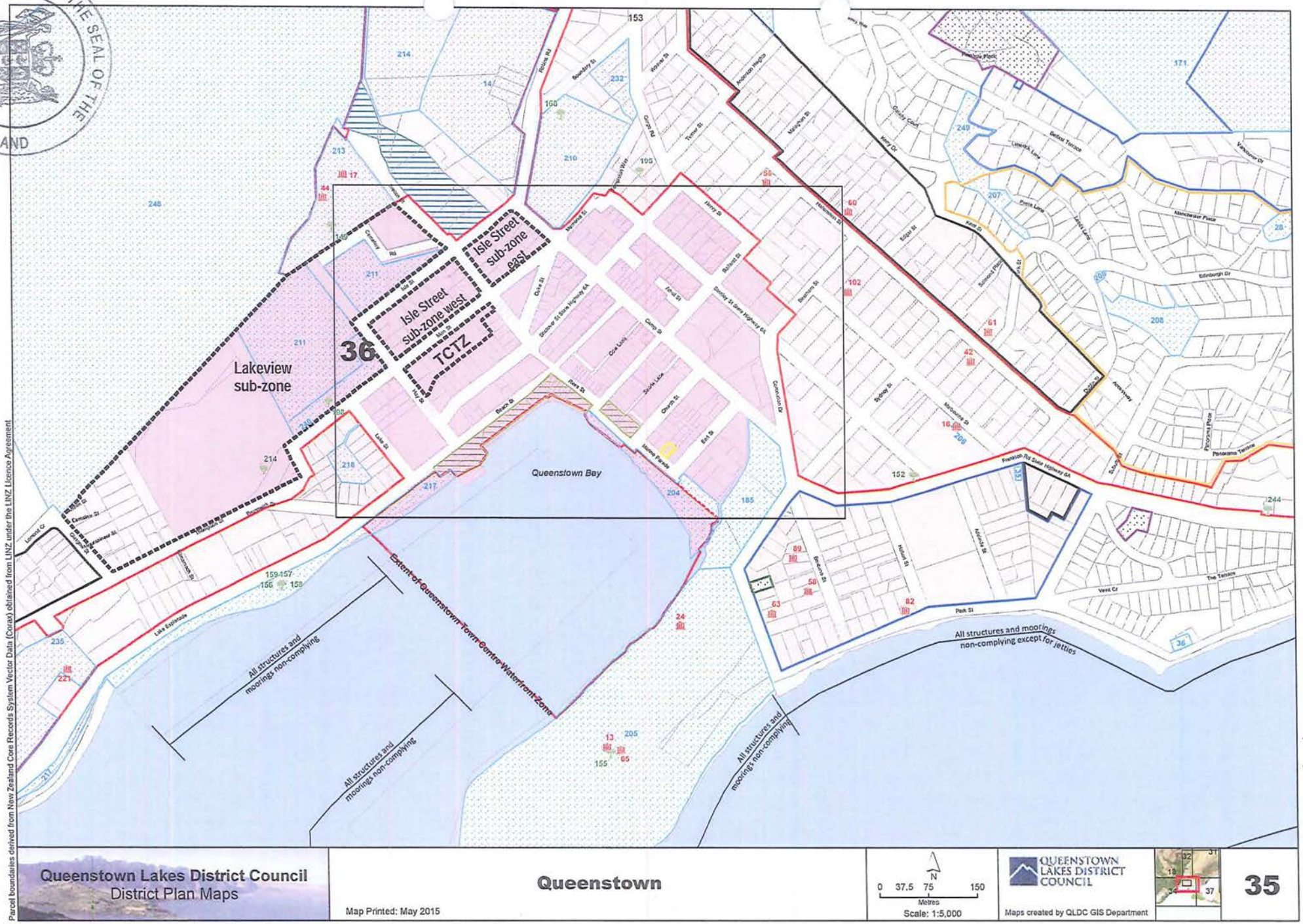
where (as here) the Council has a financial interest in the outcome. These matters may be relevant to costs.

J R Jackson
Environment Judge

ANNEXURES

A: Copy of map for PC50 as notified.

B: Copy of QLDC Map 36 with appellant's land identified.


Isle Street sub-zone east
Isle Street sub-zone west
TCTZ
36
Lakeview sub-zone
Queenstown Bay
Extent of Queenstown Town Centre Waterfront Zone
All structures and moorings non-complying
All structures and moorings non-complying except for jetties
Parcel boundaries derived from New Zealand Core Records System Vector Data (Corax) obtained from LINZ under the LINZ Licence Agreement
Queenstown Lakes District Council
District Plan Maps
Map Printed: May 2015
Queenstown
0 37.5 75 150
Metres
Scale: 1:5,000
QUEENSTOWN LAKES DISTRICT COUNCIL
Maps created by QLDC GIS Department
35

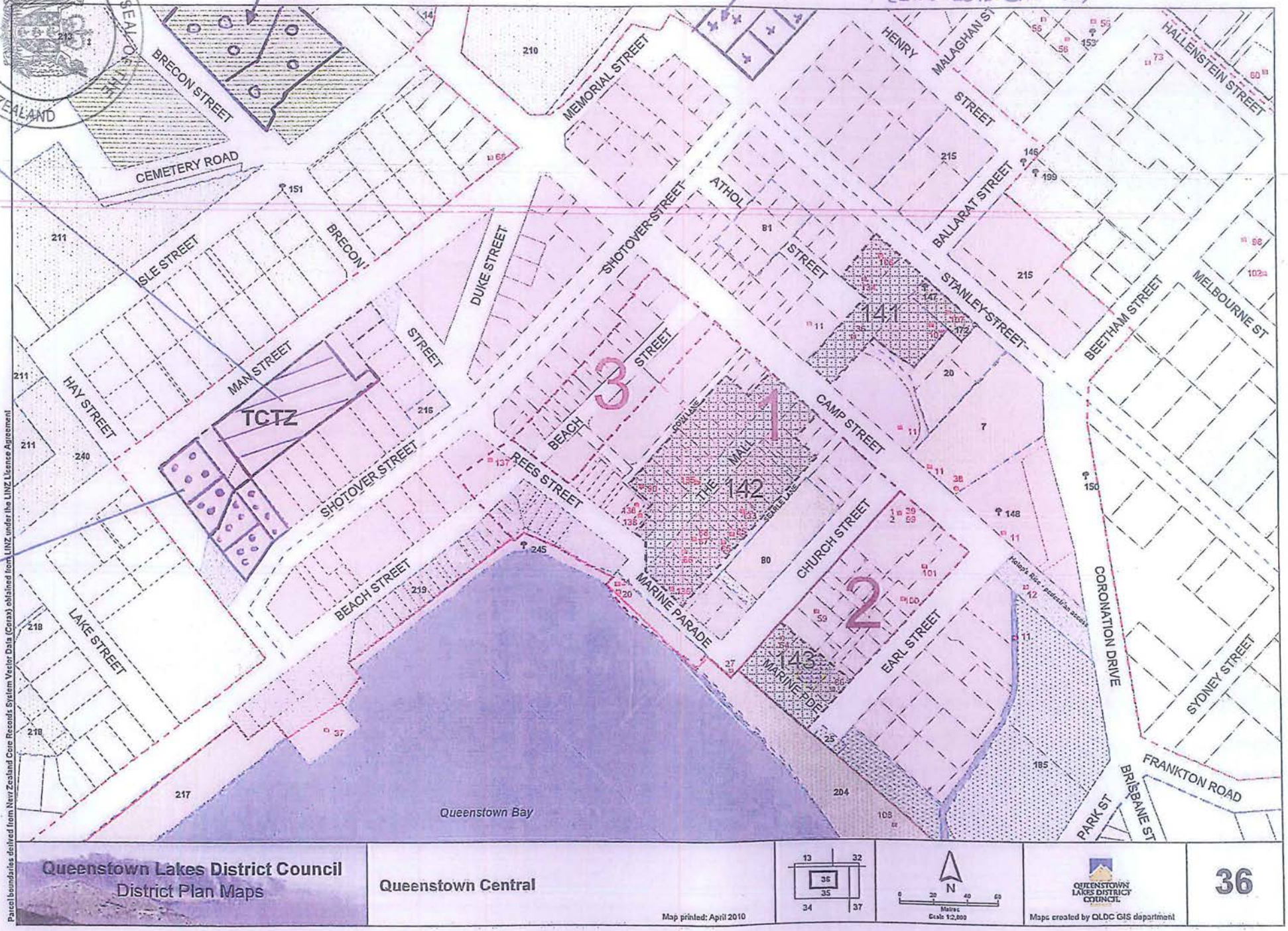
"A"

Queenstown Gold Limited (ENV-2015-CHC-71)

Kelso Investments Limited & Cheng's Capital Investments Limited (ENV-2015-CHC-73)

Well Smart Properties Limited (ENV-2015-CHC-72)

Well Smart Investment Holding (2020) Limited (ENV-2015-CHC-70)



Parcel boundaries derived from New Zealand Core Records System Vector Data (Corax) obtained from LINZ under the LINZ Licence Agreement

Queenstown Lakes District Council
District Plan Maps

Queenstown Central

Map printed: April 2010

Maps created by QLDC GIS department

36

B