QUEENSTOWN LAKES DISTRICT COUNCIL

Hearing of Submissions on Proposed District Plan

Report 1

Report and Recommendations of Independent Commissioners

Introduction

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1. PRELIMINARY MATTERS

1.1 Background

1. The purpose of this introductory report to the series of reports and recommendations following is to outline the procedural background to the Proposed District Plan ("PDP") of Queenstown Lakes District Council ("the Council"), including the arrangements put in place by Council for hearing of submissions on the PDP. The legal framework common to consideration of all aspects of the PDP is also outlined.

1.2 Appointment of Commissioners

2. By resolutions of the Council on 29 October 2015 and 26 November 2015 under section 34A of the Resource Management Act 1991 ("the Act"), the Council appointed a panel of Hearing Commissioners to hear the submissions and further submissions on the PDP, and to make recommendations to the Council on those submissions and further submissions.

3. The appointed Hearing Commissioners were:

Denis Nugent (Chair)
Lyal Cocks
Brad Coombs
Yvette Couch-Lewis
Alexa Forbes
Cath Gilmour
Ella Lawton
Calum MacLeod
David McMahon
Ian Munro
Bob Nixon
Trevor Robinson
Paul Rodgers
Mark St Clair
Simon Stamers-Smith
Scott Stevens
Jane Taylor

4. By further resolution on 5 April 2016, the Council varied its earlier resolution as it related to the hearing of submissions and further submissions on designations included in the PDP. The effect of that resolution was to confer on the specific commissioner(s) appointed to those hearings[1] to act on the Council's behalf, making recommendations to requiring authorities under section 171 of the Act, and, in the case of designations where the Council is the requiring authority, to make decisions pursuant to section 168A of the Act.

5. At its 24 November 2016 meeting, the Council resolved to appoint an additional four commissioners, being:

Jan Crawford
Greg Hill
Jenny Hudson
David Mountford

6. Dr Lawton resigned from the Council effective 21 April 2017 and at the same time withdrew from all involvement in the PDP hearing process.

7. The PDP was divided into sections, each involving one or more chapters of the PDP, or in the case of hearings on mapping issues, defined geographical areas, and Hearing Commissioners allocated to each section.

[1] Commissioners Nugent, McMahon, Rogers and Taylor

8. The reports and recommendations following are accordingly the work of the separate panels of Hearing Commissioners allocated to the separate sections[2] of the PDP.

1.3 Scope of PDP

9. From the outset of preparation of the PDP it appears that the Council's intention was that the PDP would not represent the outcome of a full review of the Operative District Plan ("ODP") under section 79(4) of the Act. Rather, the intention was to undertake a review of most, but not all of the provisions of the ODP in stages, with the PDP representing the first stage of a then proposed two stage review. The Council's resolution of 27 April 2014 recorded that some eight zone provisions and two categories of district-wide provisions would be excluded from the review and approved the general division between stage 1 matters (included within the PDP) and stage 2 matters then proposed by Council staff.

10. It appears that by mid-2015, the position had changed. When the PDP hearings opened on 4 March 2016, counsel for the Council advised that the only matters entirely excluded from the District Plan review were two district-wide chapters of the ODP, being Signs (Chapter 18) and Earthworks (Chapter 22) together with the provisions relating to the Arrowtown South and Northlake Special Zones (within Chapter 12 of the ODP) and the provisions relating to geographical area addressed by Plan Change 50.

11. It follows that the proposed scope of the District Plan review has expanded significantly from the Council's original plan.

12. When queried, counsel advised[3] that the only Council resolution confirming the scope of the District Plan review and of the PDP (as Stage 1 of that review) was the resolution of 30 July 2015 approving the PDP for notification. The scope of the PDP is accordingly determined by the document itself (including the maps that form part of the PDP).

13. Relevantly, section 27.3.3.1 of the PDP stated that the following zones are not part of the PDP: Stage 1:
    a. Frankton Flats A Zone;
    b. Frankton Flats B Zone;
    c. Remarkables Park Zone;
    d. Mount Cardrona Station Zone;
    e. Three Parks Zone;
    f. Kingston Village Special Zone;
    g. Open Space Zone.

14. A number of provisions of the Plan (for example at 27.3.1.) also stated that the provisions of the ODP governing signs, earthworks, transport and hazardous substances are not part of the PDP.

15. Further, the Legend and User Information page of the PDP maps listed the following zones as shown on the maps as either not forming part of the District Plan review, or not being reviewed in the PDP:
    a. Hydro-Generation Zone;
    b. Industrial A Zone;
    c. Industrial B Zone;

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2 Also referred to as Hearing Streams

3 Legal submissions on behalf of Queenstown Lakes District Council as part of the Council's right of reply in relation to hearing streams 1A and 1B, 7 April 2016.

d. Rural General Zone;
e. Rural Residential Zone;
f. Queenstown Airport Air Noise Boundary;
g. Queenstown Airport Outer Control Boundary;
h. Business Zone;
i. High Density Residential Zone;
j. Townships Zone;
k. Penrith Park Vegetation Area A;
l. Penrith Park Vegetation Area B;
m. Penrith Park Visual Amenity Area;
n. Special Zones (although subject to a separate note stating that the Millbrook, Waterfall Park and Jack's Point Special Zones are included in the PDP);
o. Open Space Zone.

16. A separate note on the Legend and User Information page of the PDP Maps stated that land subject to a current plan change is not part of the District Plan review, and notations referring to current plan changes are for information only.

17. It is noted that the PDP as notified included provisions that apply to some or all of the zones and other areas which the provisions noted above state do not form part of the PDP:
    a. Chapters 3-6 were expressed in terms purporting to apply to the entire District.
    b. Section 27.5 contained rules relating to a number of zones that are not part of the PDP.
    c. Section 36.5 specified noise standards for a number of zones that are not part of the PDP.
    d. Chapter 41 included provisions governing the Hanley Downs area, notwithstanding that it was the subject of a then current plan change and therefore not the subject of the PDP.

18. Those provisions purporting to apply to zones and areas not the subject of the PDP need to be read subject to the subsequent resolutions of the Council on 23 October 2015 pursuant to clause 8D of the First Schedule to the Act to withdraw a number of specified provisions related to visitor accommodation from the PDP and to withdraw "*all provisions as they relate to the geographic area addressed by Plan Change 50 – Queenstown Town Centre Zone"*.

19. The Chair drew the attention of Council staff to these and other apparent inconsistencies in the PDP as to what formed part of the PDP and what did not in a Memorandum dated 16 February 2016. As foreshadowed in the submissions of counsel for the Council, the Council subsequently resolved to 'exclude' the land the subject of recent plan changes (PCs 19, 45, 46, 50, 51) together with the Remarkables Park Zone from the District Plan Review on 29 September 2016. Counsel for the Council's memorandum dated 23 November 2016 advising the Hearing Panel of the Council's resolution noted that the Council proposed to separate the District Plan into 2 volumes with Volume A relating to the geographical areas notified either in Stage 1 or the foreshadowed Stage 2 of the District Plan, and Volume B relating to the excluded areas to which the ODP would apply. We were advised that Chapters 1, 3-6 of the PDP would apply to both volumes and that variations under Clause 16A would formalise the separation – among other things, to ensure the appropriate district-wide chapters applied to each volume.

20. Subsequently, on 16 March 2017, the Council resolved to remove any uncertainty as to what the 'exclusions' in its previous resolution meant by formally withdrawing the areas the subject

of Plan Changes 45 (Northlake), 46 (Ballantyne Road) and 51 (Peninsula Bay North) under clause 8D.

21. A further resolution of 25 May 2017 added to the areas withdrawn under Clause 8D, the land covered by Plan Changes 19 (Frankton Flats B Zone), 34 (Remarkables Park Zone), 41 (Shotover Country Estate), 50 (Queenstown Town Centre Extension) and 52 (Mount Cardrona Station). At the same meeting, the Council resolved that Chapters 26-28, 30, 32-36 inclusive be withdrawn insofar as they applied to withdrawn geographical areas.

22. These matters are of relevance to the position taken by Council staff (and its counsel) that a number of submissions are out of scope in the sense of not being "*on*" the PDP. Those issues will be addressed in the appropriate report following.

23. More recently again, Council notified a package of District Plan variations on 23 November 2017 that included deletions and amendments to the text of the PDP as notified.

24. Clause 16B(1) of the First Schedule to the Act means that submissions on PDP provisions the subject of variation are automatically transferred to the hearing process for the variations.

1.4 Notification and Submissions

25. The PDP was publicly notified on 26 August 2015. 845 submissions were lodged within time (by the closing date of 23 October 2015) or were accepted by subsequent decision of the Chair, waiving their late lodgement- see below.

26. The summary of submissions was notified on 2 December 2015. 365 further submissions were lodged within time (on or before 16 December 2015) or were accepted by virtue of a subsequent direction from the Chair waiving their late lodgement.

27. Further and or amended summaries of submissions were publicly notified on 28 January 2016, 3 March 2016 and 24 November 2016. Those summaries of submissions included submissions from 6 submitters who had not previously lodged submissions. Although a number of further submissions were lodged in response to the further / amended submissions, there were no new further submitters, that is to say, all of the further submissions lodged were from submitters who had previously lodged further submissions.

28. Taking account of the subsequent withdrawal of submissions and further submissions, 844 submissions and 355 further submissions had to be considered.

1.5 Procedural Directions

29. The Council by resolution dated 17 December 2015[4] delegated the Council's procedural powers under section 39B of the Act related to the hearings to the Chair of Commissioners. Pursuant to that delegation, the Chair issued seven procedural memoranda affecting the number and nature of submissions and further submissions on the PDP. Those procedural decisions were in chronological order:
    a. On 1 February 2016:

[4] Reconfirmed and expanded to refer to the Chair of any Hearing Panel by resolution dated 24 November 2016

i. Directing that Longview Environmental Trust[5] lodge with the Council a list of the submission numbers and name of the submitter for each of the submissions the Trust opposed and evidence that a copy of the further submission had been served on each of the relevant submitters;

b. On 2 February 2016:

i. The time to lodge submissions was waived for submissions 826 to 856 inclusive;

ii. The time to lodge submissions was waived for submissions 1359 and 1361;

iii. The time to lodge submissions was waived in respect of amendments previously lodged to submissions 407, 430, 437, 604, 615, 632, 636, 638, 655, 702, 716, 774 and 806;

iv. The time to lodge further submissions was waived for further submissions 1350, 1352 and 1356, and that lodged by LJV (NZ) Ltd;

v. Woodlot Properties Ltd[6] was granted 5 working days to lodge documentation specifying the grounds on which it claimed to represent a relevant aspect of the public interest, or to show that it had an interest in the submission greater than the general public has;

vi. Philip Vautier[7] was granted 5 working days to lodge documentation specifying the grounds on which he claimed to represent a relevant aspect of the public interest, or to show that he had an interest in the submission greater than the general public has;

vii. Henry Van Asch[8] was granted 5 working days to lodge documentation specifying the grounds on which he claimed to have an interest in the submission greater than the general public has and to identify whether he supports or opposes submission 761;

viii. Evan Bloomfield[9] was granted 5 working days to lodge documentation specifying the grounds on which he claimed to have an interest in the submission greater than the general public has and to identify whether he supported or opposed submission 761;

ix. Mr R Buckham[10] was granted 5 working days to identify the submissions to the further submissions supports or opposes and at the same time, to identify the grounds on which he comes within one of the categories of further submitters set out in clause 8 of the First Schedule to the Act.

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5 Further Submission 1282
6 Further Submission 1351
7 Further Submission 1353
8 Further Submission 1354
9 Further Submission 1355
10 Further Submission 1358

c. On 11 February 2016:

i. Queenstown Park Limited[11] was directed to lodge plans identifying land affected by aspects of its submission.

d. On 16 February 2016:

i. The time to lodge further submissions 1282.2 to 1282.111 inclusive lodged by Longview Environmental Trust and the time for service of those further submissions on the relevant submitters was waived;

e. On 17 February 2016:

i. The time to lodge further submissions was waived in respect of further submission 1354 lodged by H Van Asch;

ii. The time to lodge further submission 1355 lodged by E Bloomfield and Family was waived;

iii. The time to lodge further submission 1083 lodged by Aviemore Corporation was waived;

iv. The time to lodge amendments to further submissions was waived in respect of amendments lodged by Queenstown Airport Corporation in relation to submissions 704.5, 704.4, 782.1, 141.3, 141.6, 840.1, 840.3, 150.1 and 150.2.

f. On 24 March 2016:

i. The time for Queenstown Airport Corporation to lodge further submissions in relation to submissions 251.11, 251.12, 179.16, 781.15, 191.14, 179.19, 781.18, 191.17, 251.13, 251.14, 251.16, 179.23, 191.21, 251.17, 179.24, 781.22, 191.22, 251.20, 251.21, 251.22, 179.28, 191.26, 781.26, 251.28, 251.29, 383.37 was waived.

g. On 27 February 2017:

i. The Chair determined not to waive the time for lodging a further submission by PAJ Smith (in respect of submission 149-M Beresford).

30. The separate Hearing Stream reports following detail the procedural directions made by the Chair[12] specific to the Hearing Stream concerned.

1.6 Statutory Requirements

31. Because the PDP is not a complete review of the ODP (as discussed above), it is effectively required to be considered as a very large plan change. Counsel for the Council in their submissions at the opening of the Stream 1A and 1B hearings on 7 March 2016, referred that

[11] Submission 806

[12] In its 24 November 2016 resolution already referred to, the Council delegated those procedural powers to the Chair of each Hearing Panel, to enable procedural directions to be made where Commissioner Nugent was not sitting as Chair.

Hearing Panel to the guidance provided by the Environment Court as to the statutory requirements for consideration of proposed district plans and proposed district plan changes in *Colonial Vineyard Limited v Marlborough District Council*[13] as follows:

"A. General requirements

1. *A district plan (change) should be designed to accord with*[14] *- and assist the territorial authority to carry out – its functions*[15] *so as to achieve the purpose of the Act*[16]*.*

2. *The district plan (change) must also be prepared in accordance with any regulation*[17] *(there are none at present) and any direction given by the Minister for the Environment*[18]*.*

3. *When preparing its district plan (change) the territorial authority must give effect to*[19] *any national policy statement or New Zealand Coastal Policy Statement*[20]*.*

4. *When preparing its district plan (change) the territorial authority shall:*
   a. *Have regard to any proposed regional policy statement*[21]*;*

   b. *Give effect to any operative regional policy statement*[22]*.*

5. *In relation to regional plans:*
   a. *The district plan (change) must not be inconsistent with an operative regional plan for any matter specified in section 30(1) or a water conservation order*[23]*; and*

   b. *Must have regard to any proposed regional plan on any matter of regional significance etc*[24]*.*

6. *When preparing its district plan (change) the territorial authority must also:*

   - *Have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations*[25] *to the extent that their context has a bearing on resource management issues of the district; and to consistency with plans and proposed plans of adjacent territorial authorities*[26]

13 [2014] NZ EnvC 55
14 Section 74(1) of the Act
15 As described in section 31 of the Act
16 Sections 72 and 74(1) of the Act
17 Section 74(1) of the Act
18 Section 74(1) of the Act added by section 45(1) Resource Management Amendment Act 2005.
19 Section 75(3) RMA
20 The reference to "any regional policy statement" in the Rosehip list here has been deleted since it is included in (3) below which is a more logical place for it.
21 Section 74(2)(a)(i) of the RMA
22 Section 75(3)(c) of the Act [as substituted by section 46 Resource Management Amendment Act 2005].
23 Section 75(4) of the Act [as substituted by section 46 Resource Management Amendment Act 2005]
24 Section 74(2)(a)(ii) of the Act
25 Section 74(2)(b) of the Act
26 Section 74(2)(c) of the Act

- *Take into account any relevant planning document recognised by an iwi authority[27]; and*

- *Not have regard to trade competition[28] <u>or the effects of trade competition;</u>*

7. *The formal requirement that a district plan (change) must[29] also state its objectives, policies and the rules (if any) and may[30] state other matters.*

B. *Objectives [the section 32 test for objectives]*
   8. *Each proposed objective in a district plan (change) is to be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act[31].*

C. *Policies and methods (including rules) [the section 32 test for policies and rules]*
   9. *The policies are to implement the objectives, and the rules (if any) are to implement the policies[32];*

   10. *Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives[33] of the district plan taking into account:*
      i. *The benefits and costs of the proposed policies and methods (including rules); and*

      ii. *The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[34]; and*

      iii. *If a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[35].*

D. *Rules*
   11. *In making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment[36].*

   12. *Rules have the force of regulations[37].*

   13. *Rules may be made for the protection of property from the effects of surface water, and these may be more restrictive[38] than those under the Building Act 2004.*

   14. *There are special provisions for rules about contaminated land[39].*

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27 Section 74(2A) of the Act

28 Section 74(3) of the Act as amended by section 58 Resource Management (Simplifying and Streamlining) Act 2009

29 Section 75(1) of the Act

30 Section 75(2) of the Act

31 Section 74(1) and Section 32(3)(a) of the Act

32 Section 75(1)(b) and (c) of the Act (also section 76(1))

33 Section 32(3)(b) of the Act

34 Section 32(4) of the RMA

35 Section 32(3A) of the Act added by section 13(3) Resource Management Amendment Act 2005.

36 Section 76(3) of the Act.

37 Section 76(2) RMA

38 Section 76(2A) RMA

39 Section 76(5) RMA as added by section 47 Resource Management Amendment Act 2005 and amended in 2009

15. <u>There must be no blanket rules about felling of trees[40] in any urban environment[41].</u>

E. Other statutes:

16. Finally territorial authorities may be required to comply with other statutes."

[Underlining in original to identify changes resulting from the 2009 amendment to the Act]

32. The *Colonial Vineyard* decision predated the 2013 amendment to the Act coming into effect. Accordingly, the tests poised by the Environment Court need to be read subject to the effect of that Amendment Act, specifically:

a. Points A1 and 2 need to be read subject to the amended section 74(1) of the Act which states:

"A territorial authority must prepare and change its District Plan in accordance with –

a. Its functions under section 31; and

b. The provisions of Part 2; and

c. A direction given under section 25A(2) [by the Minister for the Environment]; and

d. Its obligation (if any) to prepare an evaluation report in accordance with section 32; and

e. Its obligation to have particular regard to an evaluation report prepared in accordance with section 32; and

f. Any regulations".

33. Point C10 needs to be read subject to the amended section 32[42] including in particular:

"(1) An evaluation report required under this Act must - …

a. 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 –

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40 Section 76(4A) RMA as added b the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

41 Section 76(4B) RMA – this "Remuera rule" was added by the Resource Management (Simplifying and Streamlining) Amendment Act 2009

42 Introduced by section 70 of the Resource Management Amendment Act 2013

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*

c. *Assess the risk of acting or not acting if there is uncertainty or insufficient information about the subject matter of the provisions….*

(4) If the proposal will impose a greater prohibition or restriction on an activity to which a national environmental standard applies than the existing prohibitions or restrictions in that standard, the evaluation report must examine whether the prohibition or restriction is justified the circumstances of each region or district in which the prohibition or restriction would have effect."

34. Section 76(4A)-(4D) of the Act have been inserted providing further guidance regarding the permissible scope of rules related to felling of trees.

35. The *Colonial Vineyard* decision also predated the decision of the Supreme Court in *Environmental Defence Society v The New Zealand King Salmon Company Limited*[43], which provides direction on a number of aspects relevant to finalisation of the PDP.

36. The Supreme Court's decision related to the way in which the New Zealand Coastal Policy Statement should be given effect to in considering a Plan Change proposal. The particular Plan Change in issue would have changed the activity status of marine farms in an identified outstanding natural landscape from prohibited to discretionary. The majority of the Supreme Court rejected an approach based on a broad overall judgement of all policies in the New Zealand Coastal Policy Statement, holding that that document had to be considered in terms of each relevant policy.

37. The Supreme Court also confirmed that there is a hierarchy of policy documents under the Act with the documents at each level giving effect to and amplifying those at the next level up.

38. In the context of the Supreme Court's decision, that fact meant that it was unnecessary to refer back to Part 2 of the Act in order to determine how the particular Plan Changes in issue should be decided. The New Zealand Coastal Policy Statement could be taken as implementing the purpose and principles of the Act in the absence of identified invalidity, incompleteness or uncertainty.

39. Subsequent cases have applied that principle more generally, both in the context of District Plan processes (considering the formulation of rules relative to settled objectives) and of resource consent applications[44]. More recent authority[45], however, confirms that it only applies to reference back to Part 2 of the Act. The obligation to give effect for instance to a

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43 [2014] NZSC 38

44 See *Thumb Point Station Limited v Auckland Council* [2015] NZHC 1035 and *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52 respectively.

45 *Royal Forest and Bird Protection Society v Bay of Plenty Regional Council* [2017] NZHC3080

National Policy Statement applies notwithstanding than an intermediate higher level document might have settled provisions that also need to be given effect.

40. Accordingly, the reports considering the individual sections of the PDP have looked initially to the higher order documents that are available to the respective hearing panels to determine what guidance (or direction, where applicable) those documents provide. Where hearing panels have considered the purpose and principles of the Act, notwithstanding the existence of settled higher order documents, this has been in the case of a perceived invalidity, incompleteness or uncertainty in the application of those higher order documents, or to check their validity and/or completeness[46]. While, as discussed below, the Operative Otago Regional Policy Statement is in the process of being reviewed, we do not consider that that document can be regarded as invalid, or deficient[47], either for that reason, or because of its age[48], thereby entitling us to routinely refer back to Part 2 for guidance[49]. The terms of the Operative Regional Policy Statement should be examined on a case by case basis before one can properly come to the view that they are invalid (or deficient) or incomplete.

41. The Supreme Court's *King Salmon* decision is also highly relevant to the settling of the wording of objectives and policies in the PDP. The case before the Supreme Court turned on the meaning to be given to particular policies of the New Zealand Coastal Policy Statement that required that certain outcomes be avoided. The majority of the Supreme Court held that where a particular policy required to be given effect is directive, such as by using the imperative '*avoid*', then that direction must be followed unless it is affected by some issue of invalidity, incompleteness or uncertainty in relation to it.

42. The Supreme Court held further that *'avoid'* means '*not allow*' or *'prevent the occurrence of*'.

43. As noted by the Independent Hearing Panel on the Proposed Auckland Unitary Plan[50], the clarification provided by the Supreme Court promotes a focus on identification of what ought to be avoided. The Independent Hearing Panel observed that objectives and policies seeking avoidance of adverse effects could, without more detail and clarity, result in every human activity being precluded.

44. The Independent Hearing Panel used this as an example. We agree. Care has to be taken with directive language of all kinds, to ensure that it correctly represents the intention of the PDP.

45. Lastly, we record that although the Act was amended in a number of respects by the Resource Legislation Amendment Act 2017, with different provisions of that Act commencing variously on 18 April 2017 and 18 October 2017, we have applied the Act as it stood prior to those amendments in accordance with Clause 13 of the Schedule 12 of the Act (as amended).

46. In relation to the application of the principles set out above it is noted:
    a. The position remains that there are no relevant regulations requiring consideration;
    b. There are no relevant directions by the Minister for the Environment requiring consideration;

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46 It is not possible to form a view on the validity or completeness of higher order documents without considering the application of Part 2 in their absence

47 The term used by the High Court in the Thumb Point Station case

48 It was made operative in 1998

49 As counsel for Darby Planning LP submitted to the Stream 1B Hearing Panel

50 Independent Hearing Panel Report to Auckland Council, Overview of Recommendations at page 39

c. Queenstown Lakes District is entirely landlocked and the New Zealand Coastal Policy Statement accordingly is of no relevance to the PDP;
d. The National Policy Statement for Electricity Transmission 2007, the National Policy Statement for Renewable Electricity Generation 2011, the National Policy Statement for Freshwater Management 2014 and the National Policy Statement on Urban Development Capacity 2016 are all potentially relevant to the PDP;
e. As at the date of this report, there was both an Operative Otago Regional Policy Statement and a Proposed Otago Regional Policy Statement. The Operative Regional Statement predates all of the National Policy Statements listed above and thus does not purport to give effect to them. The Proposed Regional Policy Statement postdates all of the National Policy Statements except the National Policy Statement on Urban Development Capacity 2016, but is the subject of multiple appeals to the Environment Court that are yet to be determined. While we are required to have regard to the Proposed RPS[51], the fact that large sections of that document are the subject of appeal to the Environment Court means that we have necessarily had to pay greater heed to the possibility that it may be deficient in the sense used above.
f. As at the date of this report there were operative Regional Plans governing Water, Air and Waste;
g. As at the date of this report being finalised, there was a Water Conservation Order governing the Kawarau River and its tributaries, including Lake Wakatipu and a number of specified rivers flowing into Lake Wakatipu[52];
h. As at the date on which this report was finalised, there were three relevant planning documents recognised by Iwi Authorities being:
    i. Kāi *Tahu* ki Otago Natural Resource Management Plans 1995 and 2005.
    ii. Te Tangi a Tauira: The Cry of the People, the Ngāti Tahu ki Murihiku Iwi Management Plan for Natural Resources 2008.

47. Each of the reports following considers the extent to which the documents and matters noted above are relevant to the recommendations made on the provisions the subject of the respective report.

48. For those chapters of the PDP other than Chapters 3-6, we have also had to consider the extent to which they are consistent with the strategic direction provided by those chapters. Obviously, Chapters 3-6 are not 'settled', but they represent the recommendations of the relevant Hearing Panels as to what is required to meet the legal obligations summarised in *Colonial Vineyard*. While reference still needs to be made to the relevant higher order documents where relevant to ensure they are given effect, absent issues of scope which might have constrained the Hearing Panel (e.g. from recommending an amendment the Panel felt was required to give effect to a relevant higher order document or to make a provision consistent with Part 2 of the Act) or genuine exceptions not covered (or not fully covered) by the strategic chapters, reference back to Part 2 of the Act, and the higher order documents noted above, is effectively a cross-check in those circumstances, to ensure that this is the case[53].

1.7 Scope to Amend PDP

49. A large number of submissions sought amendments to the PDP to satisfy submitters' concerns. The Section 42A Reports to the respective hearing panels recommended that a number of these submissions either be accepted or be otherwise addressed by amendment to the PDP.

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51 Section 74(2)(a)
52 Water Conservation (Kawarau) Order 1997
53 Cf *Turners and Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 at [48]

50. In accordance with clause 10 of Schedule 1 of the Act, there are five types of possible amendments:
    a. Amendments sought in written submissions;
    b. Amendments that respond to groups of written submissions;
    c. Amendments that address cases presented at the hearing of submissions;
    d. Amendments to wording not altering meaning or effect; and
    e. Consequential amendments arising out of submissions[54].

51. Amendments the respective Hearing Panels may recommend, whether recommended by Council staff or sought by submitters, must fall into one of these categories.

1.8 Approach Taken in Reports

52. The Hearing Commissioners' role is to recommend to the Council a decision on the PDP and the matters raised in submissions, including the reasons for that recommended decision[55]. As noted above, the consideration of submissions and further submissions is the exception to this general position. It is not necessary to address each submission individually[56]. Rather, the Hearing Panels' reports can address decisions by grouping submissions[57].

53. Each of the reports that follows, after having addressed any procedural issues specific to the sections of the PDP in issue, considers the section(s) in issue as a whole before considering the section(s) of the PDP provision by provision. That consideration will in each case incorporate the Hearing Panel's reasons for recommending acceptance or rejection of the submissions made in respect of the section(s) of the PDP as a whole and of each provision as part of that consideration. This may mean that in the discussion of each section and/or provision, not every aspect of the submissions, as categorised by Council Staff, is mentioned. That is so the report is in each case not unnecessarily wordy. It should be recorded, however, that in each case the Hearing Panel concerned has considered all of the submissions and further submissions on the PDP relevant to the section(s) of the PDP before it.

54. It should also be recorded that when a Hearing Panel recommends a submission be allowed, allowed in part, or rejected, that determines whether the further submissions on that submission are allowed, allowed in part or rejected, depending on whether they support or oppose the submission.

55. It is also noted that in discussing the section(s) as a whole and in considering each objective, policy and rule, the Hearing Panel has, in each case, considered the provisions of the PDP in terms of section 32 of the Act. Where amendments are recommended, these have been specifically considered in terms of the obligation arising under s32AA of the Act to undertake a further evaluation of the recommended changes.

56. The approach taken is all of the reports in relation to sections 32 and 32AA is as follows:
    a. There is no separate s.32 evaluation document;
    b. There is no tabulated s.32 (or s.32AA) evaluation within the recommendation reports;
    c. Section 32 and s.32AA evaluation is contained within the discussion leading to our recommendations.

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54 *Foodstuffs (Otago Southland) Properties Ltd v Dunedin CC* (1993) 2 NZRMA 497 as to the first four. The fifth was added by amendment to clause 10

55 Clause 10(1) First Schedule to the Act

56 Clause 10(3) First Schedule to the Act.

57 Clause 10(2)(a) First Schedule to the Act

1.9 Outline/Framework Plan Approvals

57. In various contexts, the notified PDP referred to Structure Plans, Concept Plans and the like. In some cases, the relevant Plan was contained within the PDP[58]. In other cases, the PDP referred to approval having been given or being needed to such a Plan, but did not include it within the PDP[59]. During the course of the hearings of submissions on the PDP, suggestions have been made that new policies or rules should refer to such approvals.

58. Such provisions raise a general issue in the light of recent decisions of the Environment Court decisions on declarations sought in relation to the use of framework plans in the context of the Proposed Auckland Unitary Plan[60].

59. In summary, the Environment Court found that it was not permissible for the Council to give approval to a framework plan or like document guiding the manner in which a subdivision or development of an area might occur and/or that consent status should turn on any approval that a Council might have given to such a plan. The Environment Court reasoned that the role of Council was to give consent to resource consent applications. Unless an application to Council was framed as an application for resource consents, the Council has no jurisdiction to consent to a framework plan or like document and the consent status of future resource consent applications, whether for subdivisions or associated development, cannot turn on consistency with such a plan, or even on its presence or absence[61].

60. The Environment Court was not considering the position where a Framework Plan/Structure Plan has actually been incorporated into a District Plan through the First Schedule process. It seems to us that the reasoning of the Environment Court turned on the fact that framework plan approvals fell into a legislative hole because they were neither First Schedule Plan processes nor resource consent applications.

61. We do not, therefore, consider it is permissible to identify, but not incorporate such a plan within a District Plan. A Framework Plan/Structure Plan/Concept Development Plan does not appear to fit within the scope of matters that can be incorporated by reference under clause 30 of the First Schedule and the Council has not, as far as we are aware, undertaken the procedural steps required in terms of clause 34 to allow any such plans to be incorporated by reference, even if that were possible.

62. We have therefore approached provisions in the PDP (both existing and proposed) that purport to provide for future approvals of Structure Plans and like documents other than by way of a First Schedule process as likely to be *ultra vires*.

63. One possible exception is where a policy or rule provides for a Structure Plan or like document to accompany a resource consent application. The Environment Court was not considering that situation either, but it seems to us that such a plan must operate in the manner of a management plan provided for in consent conditions, and satisfy the normal requirements of not involving a delegation or deferral of important decisions. In addition, given that the Council cannot know what might be in such a plan in advance of it being provided, we have

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58 Several Structure plans and like documents are contained in Chapter 27 for instance.

59 See e.g. notified provision 27.8.2.1

60 *Re Application for declarations by Auckland Council* [2016] NZ EnvC 056 and [2016] NZ EnvC 65

61 *QAC v QLDC* [2014] NZEnvC93 is authority for the proposition that even if the application to the Council is framed as an application for resource consent, the latter is still the case- consent status for future applications cannot turn on a prior resource consent having been granted.

difficulty with any suggestion that the requirement for its provision might justify an activity status moving from a position where consent might be declined (i.e. Restricted Discretionary or Discretionary) to one where consent cannot be declined (i.e. Permitted or Controlled). For submissions that have presented a Structure Plan in support of a rezoning request, we have taken the view that in order to avoid the issues discussed above, the Structure Plan must be included within the PDP at the appropriate location. Accordingly, for example, if consistency with the Structure Plan is relevant to consideration of subdivision activities, we have recommended that it be contained in a section of Chapter 27.

1.10 Unnecessary Provisions and Formatting Issues

64. In the course of deliberations, a number of issues have arisen with the way the PDP has been structured. While individual reports note the required changes, we summarise those points, and the Hearing Panel's recommendations in the following paragraphs.

65. Several Chapters include statements that certain rules have immediate effect under s.86B(3) of the Act. These statements only apply to the period between notification of the PDP and the Council publicly notifying its decision on submissions. From that point on, all rules have legal effect. Thus, we recommend that all these statements included in the various chapters be deleted under cl.16(2) of the First Schedule to the Act as a minor amendment removing information material that is no longer relevant.

66. Many provisions likewise refer to, and distinguish provisions in the Operative District Plan from those on the Proposed District Plan. This is unhelpful as the provisions of the latter will be 'Operative' following the conclusion of the First Schedule process and thus this is not a meaningful distinction. We have consistently recommended that such references be removed, regarding this as a minor change under cl.16(2) of the First Schedule to the Act.

67. Again, in many chapters, the division between rules regulating activities, matters of discretion (for Restricted Discretionary Activities) or control (for Controlled Activities) and standards was unclear and inconsistent.

68. We have adopted the following general approach to rules:
    a. Tables should be used wherever possible;
    b. Rules should specify activities in groups, starting with permitted activities and working from there through the progressively more restrictive rule classifications;
    c. Matters of control and matters to which discretion has been reserved should be specified in Controlled and Restricted Discretionary Activity rules respectively;
    d. Standards should generally be specified in separate rules, with clarity as to what standards apply to what rules;
    e. Standards should specify the consequence in terms of activity reclassification if the standard is not complied with;
    f. Where the consequence of non-compliance with a standard is reclassification as a Controlled or Restricted Discretionary Activity, the matters of control or discretion, as applicable, should generally be stated separately from the standard, to avoid confusion;
    g. Provisions describing how rules should be interpreted and applied should generally be described as under the heading *''Interpreting and Applying the Rules"* to distinguish them from Advice Notes that have no regulatory effect.

69. We have also endeavoured to standardise spelling of frequently used terms like 'Sub-Zone' and have generally recommended that policies and rules with bullets separating subparts be

converted to alphanumeric lists, to aid future reference to individual subparts. Of a similar nature, reference is made in the PDP to written *"consents"* in the context of notification provisions. We have substituted *"approvals"* which both better captures the language of the Act, and avoids the potential ambiguity in relation to Council consents.

70. We regard all of these matters as falling under cl.16(2) of the First Schedule to the Act.

71. Lastly, where provisions of the Proposed District Plan are affected by the variations notified on 23 November 2017, those provisions are 'greyed out' in the recommended versions of the chapters concerned, to make it clear that we had no jurisdiction over them, and are therefore not the subject of recommendation in our reports.

For the Hearing Panel

Denis Nugent, Chair
Dated: 28 March 2018