BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Rezoning Hearing Stream 12 – Upper Clutha mapping

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SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT COUNCIL AS PART OF COUNCIL'S RIGHT OF REPLY

Hearing Stream 12 – Upper Clutha mapping

11 July 2017

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1. INTRODUCTION

1.1 These supplementary reply submissions should be read alongside the reply legal submissions dated 10 July. Due to the extensive number of submissions covered in the Council's reply, and an overlap with the Council's filing date for its rebuttal evidence in the Queenstown hearing stream, legal counsel was not in a position to complete all of its legal submissions by close of business 10 July 2017. Counsel apologises for any inconvenience this may cause the Panel, in preparing for deliberations which are understood to be starting on Monday 17 July 2017.

2. GLENDHU BAY TRUSTEES LIMITED (583) AND JOHN MAY (FS1094)

2.1 Supplementary evidence has been filed by GBT[1] during the course of the hearing, which the Panel received but does mean that GBT's 'position' including the Glendhu Station Zone (**GSZ**) chapter has moved on significantly from both the submission version and more recently from the EIC version that was rebutted by the Council. It follows that Council's Reply Evidence considers the most recent GBT position, in some detail. Supplementary legal submissions have also been filed, which arguably includes statements of an evidential nature.

2.2 In summary, Council continues to oppose the GSZ, including the most recent position advanced. Mr Barr's Reply Evidence again addresses a number of remaining concerns that the Council considers have not been cured. In light of hearing the case that GBT is pursuing, Council's concerns (in addition to those addressed comprehensively in its Opening Legal Submissions and various statements of evidence) can be summarised as:

(a) GBT's position appears to be predicated on a request that the Panel accept the effects of the consent (ie, by treating them as part of the *Hawthorn* existing environment). However, of those effects, GBT then appears to be asking the Panel to:

1 By Mr Ferguson and Ms Pfulger.

(i) ignore the adverse effects (a number of which appear to be new or different compared to the consent); and

(ii) give significant weight to the positive effects (a number of which are *not* new or different compared to the consent).

(b) careful consideration needs to be given to which effects relate directly to the consent (both positive and adverse) compared to what effects (both positive and adverse) are not "*Hawthorn*" effects. Further, if that is the case being run by GBT, the Panel also needs to carefully consider the likelihood that GBT will not in fact implement the remaining part of its consent, as this is directly relevant to, for example, some claimed positive effects that should not be considered as part of the *Hawthorn* environment. The removal of any staged approach as was confirmed by the Court, is an example of this and is discussed further below;

(c) the relevance of positive effects, or environmental compensation, falls to be evaluated only once the protection elements are satisfied (section 6(b) is encapsulated in Objectives 3.2.5.1 and 6.3.1);

(d) or in other words, environmental compensation is not an exception to the protection objectives in the PDP or section 6(b) of the RMA, particularly when unrelated to the section 6(b) matter;

(e) there is a point where the adverse effects on matters of national importance cannot be 'balanced', or 'tipped', by environmental compensation;

(f) the word "inappropriate" in Objectives 3.2.5.1 and 6.3.3 is to be assessed against the characteristics of the environment that are sought to be preserved (in this case, an ONL); and

(g) any development in the ONL that does not protect its values as required by the RMA, is inappropriate development.

Positive environmental effects

2.3 The GBT Part 2 submissions emphasised the Environment Court's core findings[2] relating to the overall positive benefits being presented by the developer and those contributing to achieving sustainable management 'on balance'.[3] After a detailed and extensive hearing process on the consents, iterative changes were made to the proposal until the proposal finally 'tipped' the balance in favour of the consent being granted. The Environment Court imposed significant protective controls relating to the future development of the land, and the Court's decision is predicated on the idea that the full suite of conditions would ensure that section 6(b) would be achieved.[4] GBT is now looking for further flexibility, despite Mr Darby's oral evidence to the Panel that he wants no more than what the Environment Court granted.

2.4 The legal submissions for GBT address the relevance of positive environmental effects in a plan change or review process, concluding that that there is no question that positive effects should be taken into account.[5] The GBT submissions refer to authority that is accepted in a consenting regime, and then submit it applies equally to a plan change, largely because of the section 3(a) definition of 'effect'.

2.5 Council agrees that the reference to 'effects' within the statutory tests must be considered in light of the definition, which extends to 'positive effects'[6] and accepts that positive effects or environmental compensation are of relevance. It is submitted however that GBT's approach then fails in that, in the Council's submission:

(a) evaluating positive effects is a separate matter to evaluating whether section 6(b) values have been protected; and

(b) the relevance of positive effects, or environmental compensation, falls to be evaluated only once the protection

2 In the Environment Court's Interim and Final decisions on the Parkins Bay consent proposal.
3 GBT Legal Submissions, Part 2, at paragraph 6(c).
4 *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2012] NZEnvC 43 at [66]-[67].
5 GBT Legal Submissions, Part 2, at paragraph 12.
6 RMA, s3(a).

elements are satisfied (section 6(b) is encapsulated in Objectives 3.2.5.1 and 6.3.1);

2.6 While GBT submits that positive environmental effects are relevant in the PDP process, it admits that the only case it has been able to find that expressly takes into account conservation gains and recreation benefits similar to its proposal is *Infinity Group v Queenstown Lakes District Council*.[7] Specifically, GBT notes that in this case the private plan change proponent offered significant public amenity benefits and the Court notes its preferred method to provide those was as follows:[8]

> *Where a private promoter of a variation or plan change wishes that intended public facilities be taken into account as positive environmental outcomes, the better practice is for the obligation to provide them be imposed by rules or other implementation methods in the plan.*

2.7 The Council notes that this discussion is *obiter* and is largely focused on the point that if positive environmental outcomes are to be taken into account, then they should be imposed by rules or other methods, and not by a private agreement, in that case a stakeholders deed.

Relevance of existing environment

2.8 GBT relies on the resource consents as providing the comparison point against which the GSZ provisions should be assessed, in the *Hawthorn* sense. Council considers Mr Page's Legal Submissions on this matter have some merit and are worthy of further consideration:[9]

(a) if GBT say it has implemented the resource consent and will continue to do so (as it must to bring itself within *Hawthorn*), then its complaint that the resource consent lacks sufficient flexibility to be economically viable lacks credibility; and

(b) GBT cannot have its cake and eat it too. If the adverse effects authorised by the resource consent form part of the

7 *Infinity Group v Queenstown Lakes District Council* EnvC Wanaka C010/05, 28 January 2005.
8 *Infinity Group*, at paragraph 104.
9 John May Legal Submissions, at paragraph 10.

environment, then so must the positive effects. GBT cannot rely again on the enhancements proposed in the resource consent to justify zone provisions.

2.9 Council urges caution in accepting that the consent, in a fully implemented form, should be a black and white 'comparison point'. It has become clear through the course of the hearing that a number of the conditions that were pertinent to getting the consent over the line, have been removed from the GSZ in order to allow the 'flexibility' sought by Mr Darby.

2.10 One pertinent example of this is that the three-stage structure imposed by the Court has dropped away. This staged approach was linked to the anticipated growth rates for kanuka, and the need for the development to be embedded within its environment before certain development took place.[10] This relates to the appropriate protection of the ONL. If GBT is not going to implement its consent in full, it cannot argue the benefits of full implementation.

2.11 It is far from clear what are the 'new' effects anticipated from the new GSZ, over and above what is likely to be implemented (and it is submitted that full implementation cannot be the comparison point) – either positive or adverse 'new' effects. Council's position, which is consistent with that of Mr May, is that GBT should not be able to 'double-dip' in terms of claiming positive effects such as increased ecological benefits, increased public access and increased social and economic benefits, if all of those 'effects' form part of the *Hawthorn* existing environment that GBT also relies on.

Part 2 of the RMA

2.12 Consistent with the Council's overall submissions in Section 3 of the Council's Reply Legal Submissions filed on 10 July 2017, GBT submits that the Panel is entitled to go beyond the PDP, because the PDP is not an established or settled planning document (in the *King Salmon* sense). Although Council submits that the Panel can place weight on the Council's strategic chapters (as the evidence before the

10 [2012] NZEnvC 43, at paragraphs 39 and 76.

Panel is that they encapsulate Part 2), it accepts that, as a legal proposition, the Panel can and probably should go beyond them.

2.13 However, Council's evidence is that the protection of ONLs is encapsulated in its strategic directions (although it is accepted that this protection is not unqualified, in terms of 'avoid all adverse effects' for example), and therefore whether or not the Panel goes to Part 2 of the RMA, is not considered to be determinative of the outcome (except for the Beresford submission, discussed elsewhere). The Council's evidence is also that the Rural Zone appropriately protects s6(b) landscapes. The ONL assessment matters relate logically back to Chapters 3 and 6. Other chapters that allow for some urban development, such as the Jacks Point Zone provisions in Queenstown, which both Mr Darby and Mr Ferguson are very familiar with, include zone specific provisions to protect that part of the zone that is identified by the technical landscape experts to be an ONL.

2.14 It is therefore imperative that any special zone located over an ONL, and in this instance the GSZ, must include within it the necessary provisions to protection that ONL. *Man o' War Station* supports this approach, and Council agrees with the John May Legal Submissions in that the Council cannot use positive effects to 'offset' the need to achieve section 6(b).

2.15 Further, Council is concerned with the oral evidence given by Ms Pfulger in response to questions from the Panel that once developed, the zone would no longer have the characteristic natural character of an ONL.[11]

3. ALLENBY FARMS LTD (502)

3.1 Allenby Farms has filed three sets of legal submissions, which are referred to in this Reply as either Part One, Two or Three.

11 On 8 June.

Legal Submissions, Part Two

Process and Natural Justice

3.2 Allenby's Legal Submissions take issue with the fact that Council's Opening Submissions did not set out its position on the merits of the Allenby Case nor address scope. With respect, the merits of the Allenby Case are addressed in the Council's evidence and in particular the planning evidence, which is relied upon in relation to both the Allenby Farms submission, and the 100-odd other submissions before this Hearings Panel. Allenby has had every opportunity to consider the Council's Evidence, and Rebuttal Evidence and therefore understand the Council's 'position', before appearing at the hearing. In addition, Allenby has modified its position significantly compared to their original submission, which has caused complexity and that context is submitted to be important.

3.3 It is acknowledged that in relation to the issue of scope, the Council reserved its position until it had heard Allenby's legal submissions at the hearing, given the Panel had already raised scope concerns directly with Allenby through a minute.[12] Allenby has given comprehensive submissions explaining the legal jurisdiction for its revised relief in its Legal Submissions, Part Two. Counsel for Allenby addresses seven points where scope issues may arise in its revised relief.[13] The Council has read Allenby's legal submissions and generally has no issues with the arguments but for two of its points. The Council considers that there is no scope for:

(a) the proposed provision for the public trails and the general public access to the Protection areas; and

(b) the inclusion of Little Mt Iron in the revised relief.

3.4 The Allenby submissions arguably accept that there are jurisdictional issues for these two points. These are addressed further below, as well as some comments on other matters.

12 Opening Representations / Legal Submissions for Queenstown Lakes District Council, Hearing Stream 12 – Upper Clutha Mapping, dated 12 May 2017, at paragraph 5.24.

13 Changes from LLR to RL zoning, amendments to a different zone, amended SNA, Mt Iron Protection Area, Rules relating to the land outside the zone, public access and Little Mt Iron.

Change from Large Lot Residential to Rural Lifestyle zoning

3.5 The Allenby Legal Submissions (Part Two) focus on the number of houses that could result from the two zone types and density of housing, in submitting that there is scope to seek a rezoning to Large Lot Residential (**LLR**) rather than Rural Lifestyle (**RL**) as originally sought. This submission regarding density is not opposed by the Council. However, in addition the Council submits that, consistent with other submissions in its Legal Reply, the question of scope cannot focus only on density and in isolation from the types of activities enabled in each zone type. For the Panel's convenience, the RL zone is generally more restrictive in terms of activities, and therefore Council is comfortable that there is scope for the change in zoning to RL instead of LLR.

Public Access provisions

3.6 Through its revised relief Allenby seeks to include objectives, policies and methods (comprising rules and a Structure Plan) to provide public access through Recreation Trails over Mt Iron and Little Mt Iron, including over the Protection Area offered by Allenby.

3.7 While Allenby acknowledges that its submission contains no specific reference to public trails, public access or recreational values,[14] it argues that there were three instances the submission was *broad enough* to encompass public access, specifically at paragraphs 6 and 21 and Appendix 6 of its original submission.[15]

3.8 Council submits that Allenby fails at the first step; the issue was not fairly and reasonably raised in the Allenby submission and is not reasonably a consequential (nor neutral) amendment or other matter arising from the submission. The Council does not accept that the parts of the submission referred to in [45(a)-(c)] of Part Two submissions, meet this test.

14 Allenby's Legal Submissions (Part Two), at paragraph 43.
15 Allenby's Legal Submissions (Part Two), at paragraph 45.

3.9 Allenby appear to be relying on the change being positive, as a reason for putting authority relating to scope, to one side. This submission is not accepted. The Allenby Legal Submissions do not offer any authority supporting the approach whereby a change to the plan that is part of an 'environmental compensation' package (ie the public access affects land not previously included in the original submission), does not need to comply with the accepted principles regarding scope.

3.10 Council has accepted from the outset of the PDP hearings (referring back to its opening legal submissions for the Hearing Stream 01) that there are likely to be specific factual circumstances within the 'scope' categories that the Panel will need to carefully consider through the hearings as they arise, and that will require case by case consideration (at [7.15]). While the Council considers the inclusion of the public access provisions would be beneficial to the community as a whole, they are submitted to not be within the scope of Allenby's, or any other submissions, lodged on the PDP.

3.11 As will be addressed in more detail in the section below, Council submits there is no scope for any changes to be made to Little Mt Iron. This includes incorporating Little Mt Iron with the 'Recreation Trails Proposed' shown on the Structure Plan recommended by Mr White in his supplementary evidence.[16]

3.12 Council also holds a further concern in relation to this aspect of Allenby's submission suggesting a very lenient view be taken as to scope to make provision for public access because it is a positive change to the PDP. Allenby acknowledges that it is using this public access positive effect (ensuring access to Mt Iron is legalised in all respects) "*to offset the effects of the proposed 12 new dwellings*".[17] The fact that current public access onto and across Allenby land located on Mt Iron may be unauthorised, should also not be relevant to the question of scope.

16 Supplementary Statement of Evidence of Duncan White for Allenby Farms Limited (#502 and #1254) dated 14 June 2017, at Appendix C.
17 Allenby Submissions, Part Two, at [47].

3.13 Alternatively, Allenby considers jurisdiction may be available under other submissions lodged on the PDP.[18]

3.14 Mr Wellington's (640) submission seeks changes to the Strategic Directions chapter to strengthen public access provisions. His comments are about strengthening the Strategic Directions public access provisions, which apply to *already established* public access trails. He does not seek for new trails to be created and/or shown on the planning maps but instead he seeks a new policy that looks for *Opportunities to provide public access to the natural environment are sought at the time of plan change, subdivision or development*. It is submitted that Mr Wellington is future looking and seeking for there to be opportunity to provide public access when a plan change, subdivision or development is assessed as a whole.

3.15 In regards to the submissions of the Upper Clutha Tracks Trust (625) and the Queenstown Trails Trust (671) (**Tracks Trusts**), their submissions simply sought for recognition that the nature of the trail network is to allow the public to access scenically significant parts of the District. They do not seek new objectives or policies (or for the creation of Structure Plans showing the trails) encouraging public access. Neither do the submissions of Queenstown Park (806) nor Darby Planning Limited (608), which Allenby also refers to. While these submissions are broadly couched to support public access or a trail network, none of these submissions seek for more public trails to be identified and protected by new objectives, policies or through the use of Structure Plans. Consequently, the Council submits there is no scope in these submissions to support Allenby's public access provisions as they were not fairly and reasonably raised in the submissions.

3.16 Allenby's final submission that the provision for public access could be merely an additional positive environmental outcome as part of the overall package of environmental compensation offered by Allenby[19] has been addressed above. The Council respectfully disagrees as these provisions, while beneficial to the community, were not fairly and reasonably raised in the other submissions

18 Allenby's Legal Submissions (Part Two), at paragraph 46.
19 Allenby Legal Submissions, Part Two, at [47].

Allenby seeks to rely on, and are not a 'neutral change' and therefore could have attracted submission.

Little Mt Iron

3.17 As part of its revised relief Allenby now seeks to include the area known as Little Mt Iron. Allenby essentially concedes in Part One of its Legal Submissions that Little Mt Iron is not within the scope of its original submission:

> *.. the Little Mt Iron property .. was not referred to in the original submission by Allenby but which has been acquired by Allenby since submissions were lodged to the PDP*.

3.18 Counsel for Allenby again, in Part Two, "*acknowledges that there is no reference to Little Mt Iron in the Allenby Submission"* and that this was due to Allenby not owning that property when its submission was prepared and lodged.[20] It was also conceded by its counsel that "*I cannot direct the Panel's attention to any specific statement within the Allenby Submission which could reasonably be argued to refer to Little Mt Iron, given that Little Mt Iron was not owned by Allenby Farms Limited when the Allenby Submission was prepared"*.[21]

3.19 Council agrees with these concessions – the original submission is silent on Little Mt Iron, and the various maps attached to the submission do not include this area of land within any of the mapping changes originally sought. There is no need to consider this argument any further given these concessions.

3.20 Allenby then attempts to rely on the submissions of Forest and Bird (706) and the Wakatipu Reforestation Trust (281) to provide scope. The extracts from the Forest and Bird submission that are referred to are the reasons for amendments sought to provisions throughout the PDP. Forest and Bird was seeking to provide a policy and rule framework, to allow for protection of further SNAs, beyond those identified on the planning maps. The extracts do not relate

20 Allenby's Legal Submissions (Part Two), at paragraphs 60 and 62.
21 Allenby's Legal Submissions (Part Two), at paragraph 62.

specifically to Little Mt Iron directly, and none of the Forest and Bird relief seeks the delineation of additional SNAs on the planning maps.

3.21 Council submits that it is not reasonably foreseeable that the Forest and Bird submission would result in a new area of land on Little Mt Iron, being shown as an SNA on the planning maps. If that was the conclusion, it could be argued that the scope of that submission would allow SNAs to be identified on any other similar land where further protection of indigenous biodiversity could occur, which would be likely to be opposed across the District. In any event, the Little Mt Iron Protection Area rules supported by Allenby, does not amount to a new 'SNA', and therefore it is unclear whether the legal submissions are referring to this submission to justify the proposed two new SNAs, or the wider Little Mt Iron Protection Area.

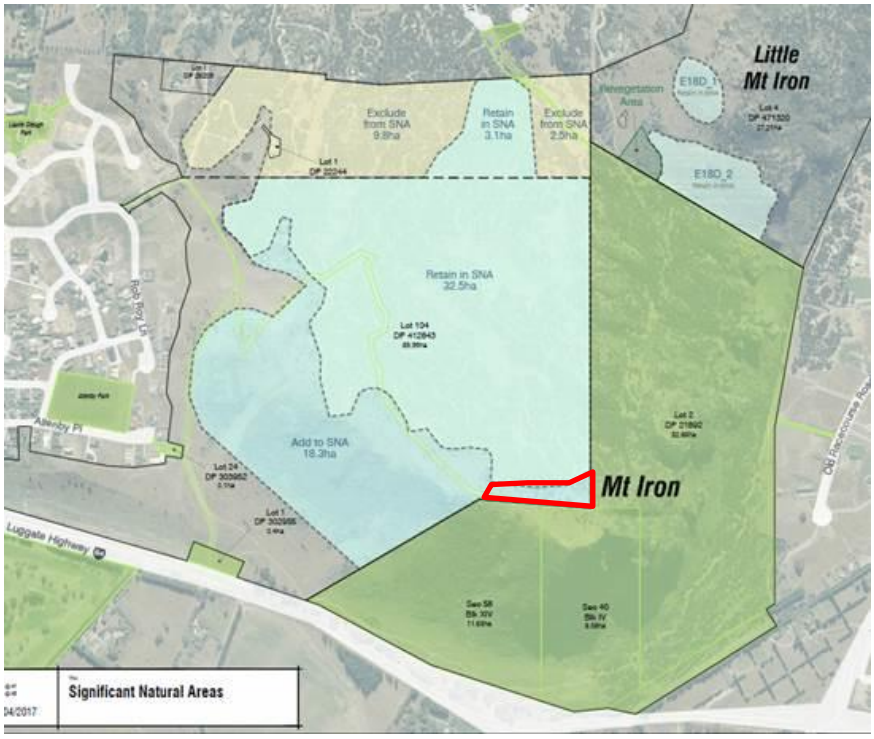
3.22 For the same reasons, it is submitted that the Wakatipu Reforestation Trust submission (281) also does not provide scope for the proposed relief over Little Mt Iron; that submission is seeking an addition to a policy. Also as set out above, Council does not accept that because a change to the plan is asserted to be a positive one, that the principles of scope need not be adhered to.

3.23 Consequently, the Council respectfully submits that there is no scope within the Allenby or other PDP submissions to include Little Mt Iron in Allenby's revised relief. It is also noted that there is a current consent (RM130177) over the Little Mt Iron land that requires an Ecological Management Plan. As Mr Barr has identified in his reply evidence, it is considered that the inclusion of this site as part of the Allenby's compensation package has little merit. It is also potentially 'double dipping' in so far as advancing environmental compensation measures associated with the significant adverse effects of requesting the proposed provisions that would facilitate housing on Mt Iron.

3.24 That Ecological Management Plan is arguably already part of the *Hawthorn* existing environment, and therefore its positive effects also form part of that existing environment.

Amended SNA

3.1 While the Council acknowledges the Allenby Legal Submissions assert that the Panel has jurisdiction to identify the two areas of land sought to be included in the amended SNA,[22] the Council notes that there is another area of land that was not originally identified in Allenby's submission and has not been addressed by Allenby. This is the area outlined in red in the map below:



3.2 The Council considers that Allenby's submissions in relation to the area of 2.3 ha on the eastern side of the SNA are equally applicable to this area of land, and, noting the land is part of Allenby's land title, therefore it considers there is scope for this area to be included in the revised relief sought by Allenby.

Environmental Compensation

3.3 Allenby's submissions in Part Two relating to environmental compensation are considered further below.

22 Allenby's Legal Submissions (Part Two), at paragraphs 24 to 28.

Part Three

3.4 Allenby filed a third set of legal submissions following its appearance at the hearing. Attached to Part Three is an updated and signed version of the Agreement to Grant Easement, which is submitted by Allenby to overcome the issues raised in the *Infinity* case. The purpose of the updated Agreement is to ensure that the positive recreation and access benefits promoted in the Allenby proposal are matters that should be given weight.

3.5 One of the key issues in *Infinity* was that the Deed in that case was a private contract and there was nothing stopping the parties to the Deed resiling from cancelling the Deed after the court hearing. Allenby has included the Upper Clutha Tracks Trust and the 'general public' as beneficiaries to the Agreement, along with a clause that the Agreement cannot be cancelled without the written consent of each of the Beneficiaries. Mr Goldsmith acknowledges that he is uncertain as to the legality of Contracts Privity Act provisions in favour of the public, as this is a novel concept.

3.6 Without focusing on the Agreement in any great detail, Mr Goldsmith's admission as to not being 100% certain as to the validity of the clause raises considerable questions. The Agreement seems to be supported on the basis that it would be impossible to cancel, however it is submitted that in itself creates questions as to whether the Agreement is void for uncertainty, in identifying who comprises the 'general public'. It is also noted that the Agreement is granted in favour of private parties, rather than the general public, which is not a common approach. An Easement in Gross to the Council that preserves rights of public access, may be a more straightforward option.

Relevance of the Allenby enforcement proceedings

3.7 Allenby at [9] submits that the starting point for assessing all effects (including visibility and ecology) against the Allenby Site, is as it existed prior to the clearance of vegetation the subject of the Enforcement Proceedings. No authority is given to support this

submission. Allenby then submits that the possibility that it may, at any time, apply under section 321 to the Environment Court to change or cancel the order, is irrelevant to the 'starting point'.

3.8 Council is concerned with Allenby's suggestion that if the Enforcement Order obligations (ie, to get the vegetation back to the position that it submits is the RMA 'starting point') create difficulties when implementing its proposed zone provisions, then it would have to look to address the Enforcement Order through section 321. It appears that Allenby is accepting that the reference point for assessing landscape and ecological effects (ie, with the vegetation re-grown), may create difficulties for it to be developed under its proposed provisions. How it can then be claimed to be the 'starting point' is difficult to understand. There is no authority that counsel is aware of to support this aspect of Allenby's approach.

Revised MIPRL provisions and Structure Plan

3.9 Otherwise the revised MIPRL provisions, where they have not already been responded to in evidence, are addressed in Mr Barr's Rebuttal and Reply Evidence.

Scope for amendments to Chapter 27 Subdivision

3.10 Although Council does not agree with the inclusion of the MIPRL Zone-specific provisions for the reasons outlined by Mr Barr, Counsel agrees conceptually that there are no scope issues in including MIPRIL Zone-specific objectives and policies within Chapters 22 Rural Residential and Lifestyle and 27 Subdivision.

RMA PART TWO AND ENVIRONMENTAL COMPENSATION

3.1 In a similar vein to GBT's position (but largely without the additional element of the *Hawthorn* existing environment regarding the Parkins Bay consent), Allenby's approach can be summarised as:

(a) it is at least permissible and appropriate for the Panel to have regard to Part 2 (which is accepted by Council);[23]

(b) the concept of environmental compensation, as proposed in the Allenby case, is also subsumed within that proposition;[24]

(c) the majority of *King Salmon* did not find that section 5 set an environmental bottom line *per se*, but rather than it leaves the ability open for planning instruments to set a higher threshold than the starting presumption of the wording within Part 2 itself;[25]

(d) the Council has carried over the qualification of 'inappropriate' in section 6(b), and it is apparent the objectives do not set a bottom line in the nature of 'avoidance of adverse effects' as contrasted with policies 13 and 15 of the NZCPS at issue in *King Salmon*;[26]

(e) the Supreme Court's determination that the protective *element* of section 6 was consistent with the interpretation of the NZCPS 'bottom line' did not preclude that in other planning instruments, it may equally be appropriate that the *other elements* of sustainable management (namely use and development) be provided for consistence with the intergenerational aspects of that definition;[27] and

(f) the case is about the balancing of negative outcomes against positive outcomes and arriving at an overall conclusion as to which zoning outcome is more appropriate.[28]

3.2 If that submission is wrong in stating that the Supreme Court did not apply a bottom line approach to Part 2 in *King Salmon*, in the alternative Allenby submits that:

(a) the section 6(b) requirement of protecting ONL and ONFs from 'inappropriate' subdivision use and development incorporates within it a necessary value-based assessment of competing matters, as determined by the majority

23 Allenby Legal Submissions, Part Three, at [54].
24 Allenby Legal Submissions, Part Three, at [54].
25 Allenby Legal Submissions, Part Three, at [60].
26 Allenby Legal Submissions, Part Three, at [62].
27 Allenby Legal Submissions, Part Three, at [64].
28 Allenby Legal Submissions, Part Two, at [102].

decision, with such an assessment of what is inappropriate to be determined by that which is sought to be protected;[29] and

(b) it is the particular values or characteristics of an ONF or ONL which are sought to be protected which are the determinant of inappropriateness in any given case.[30]

3.3 This ultimately leads to the question of whether the accepted adverse effects that will result from the enablement of the 12 new houses located on the Mt Iron ONF (to a greater or lesser degree), can be weighed up against the positive effects claimed from the proposed MIPRL, or whether there is a point at which those adverse effects are too great and will not enable the Council to achieve sections 6(b) and (c) of the RMA.

Council's reply

3.4 Council's reply to the Allenby submissions is as follows:

(a) Council is not arguing that Strategic Chapters 3 and 6 are unqualified and create an 'environmental bottom line';

(b) nor is the Council arguing that sections 6(b) or 6(c) are 'environmental bottom lines' in themselves;

(c) Council accepts that positive effects or environment compensation (ie, protective elements), however characterised, are relevant elements in making a decision on what zone is the most appropriate; and

(d) while the 'overall broad judgement' is still relevant there is a preliminary step before the Panel gets there in relation to matters of national importance. The Council refers to its legal submissions on positive environmental effects and the overall broad judgement in relation to the GBT relief. There is likely to be a certain point where the effects of a proposal are so adverse, that the effects on the values that resulted in the identification of the section 6(b) or 6(c) landscape in the first place, are too much. No amount of positive effects,

29 Allenby Legal Submissions, Part Three, at [65].
30 Allenby Legal Submissions, Part Three, at [66].

particularly where not directly related to the adverse effects, should enable the zoning to 'tip' over towards giving effect to Part 2.

3.5 The Council's approach is submitted to be consistent with the Court of Appeal in *Man O'War Station*, where the Court warned of the dangers of confusing the classification process of identifying ONLs with the consequences of the ONL classification on the relevant land. The first step is to establish whether there is an ONL (or an SNA, as this is another matter of national importance that it is submitted should be treated similarly) and then apply the relevant provisions, as developed through the PDP process, to those areas.

3.6 Of relevance from *Man o War' Station*, at [33]:

> *MOWS's principal argument is that proposed change 8 was prepared prior to the Supreme Court's decision in* King Salmon*, and that both the policies it contains and the maps showing land identified as ONLs reflected the law as it was understood at that time.* ***This involved a common understanding that the protection to be afforded to an ONL was one factor in the overall judgment called for by s 5 of the Act****. Under that approach, consent might be granted for uses and developments in an ONL, including those adversely affecting the landscape, if considered appropriate by reference to other considerations based on achieving the Act's purpose of sustainable management.* ***Since such an approach is no longer possible after the Supreme Court's judgment in*** **King Salmon***, Mr Casey submitted. …*

3.7 The Court of Appeal then confirmed that, at [61]:

> *However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s6(b) of the act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use,*

and development) ***clearly intends that such landscapes be protected.***

3.8 Consequently, the Council respectfully submits that while the *balancing of negative outcomes against positive outcomes*[31] is relevant in this context, it cannot be used to justify what would otherwise be a failure to follow the direction in section 6(b) and 6(c) of the RMA.

Alternative SNA

3.9 It is noted that Allenby has offered up identification of a 'new' SNA notation on a part of its land, which it has identified as significant and triggering the requirement to protect under section 6(c) based on an ecological assessment (both ecological experts support its identification as SNA). Mr Goldsmith has helpfully set out a quote from the High Court in *Forest and Bird v Christchurch City Council* at his [52] in his Part Two in support of this submission.

3.10 Allenby has given substantial submissions setting out the scope for the Panel to identify this new area as SNA, but is understood to be offering this 'SNA' status only on the proviso that the SNA notation is removed from another part of its site *and* provided it gets the benefit of the proposed Mt Iron Park Rural Lifestyle Zone (**MIPRL**).

3.11 It is respectfully submitted that, if the Panel concludes on the evidence that the Alternative SNA is significant and therefore triggers the requirement to protect it under section 6(c), the Panel must identify it as an SNA. Both ecologists agree that the Alternative SNA should be identified as such and therefore the Panel has no choice in its recommendations. Allenby has also given substantial submissions setting out the scope for the Panel to identify this new area as SNA.

3.12 Further, if the Panel determines on the evidence that the northern section of SNA E18C is also significant and triggers the requirement to protect it under section 6(c), then the Panel must also identify it as an SNA as well. The Panel will need to make a decision on the

31 Allenby Legal Submissions Part Two, at paragraph 102.

evidence on these matters, but it is submitted that Allenby cannot pick and choose as to which area of land is identified. The Council submits that the *Man o' War Station* decision supports a 'top down' approach to landscapes, which can be applied to section 6(c) – if the ecological assessment is that a site is significant and triggers the requirement to protect under section 6(c), then that is when one must consider *how* to protect the SNA through the plan provisions.

3.13 Deciding *if* a site is an SNA (or ONF for that matter) is not determinative on the effect that identification will have on the land, or the wider interests of the owner of that land. Allenby also responded to the Panel's queries as to whether its approach was consistent with the recent case law from the *Shearer* decisions.[32] The Council generally agrees with Allenby's submissions on what the *Shearer* mean, however it is submitted there is an additional point to be drawn from these cases.

3.14 Specifically, the Environment Court determined that the purpose of the West Coast Regional Council's and Solid Energy's representativeness thresholds for determining 'significance' was to capture the best examples of the representative samples.[33] Both of these thresholds were rejected by the Environment Court for a number of reasons, one of which included evidence before the court that whether a wetland was the *best* example was *not relevant to the maintenance and persistence of biological diversity, there is no reasoned basis to impose this qualification*.[34] This finding was not challenged in the High Court.

DATED this 11th day of July 2017

S J Scott / C J McCallum
Counsel for Queenstown Lakes District Council

32 *West Coast Regional Council v Friends of Shearer Swamp Inc* [2012] NZRMA 45 (HC) and *Friends of Shearer Swamp v West Coast Regional Council* [2010] NZEnvC 345.
33 *Shearer* (EnvC), at paragraph 43.
34 *Shearer* (EnvC), at paragraph 44.