

**BEFORE THE HEARINGS PANEL
FOR THE PROPOSED QUEENSTOWN LAKES DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of re-notified Stage 1
submissions: Gertrude's
Saddlery Limited and
Larchmont
Developments Limited
at Arthurs Point

OPENING LEGAL SUBMISSIONS FOR QUEENSTOWN LAKES DISTRICT COUNCIL

26 January 2023

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CONTENTS

1. SUMMARY OF SUBMISSIONS AND RELIEF	1
2. OUTLINE OF LEGAL SUBMISSIONS	2
3. COUNCIL'S POSITION.....	2
4. THE RELEVANT STATUTORY TESTS	3
5. ONL BOUNDARY	5
6. JURISDICTION OF THIS PANEL IN RELATION TO THE KIMIĀKAU SHOTOVER RIVER ONF PRIORITY AREA.....	8
7. WILL VALUES OF ONL AND THE PRIORITY AREA ONF BE PROTECTED BY LLRB?.....	9
8. OTHER MATTERS.....	11

1. SUMMARY OF SUBMISSIONS AND RELIEF

- 1.1 In 2018, the Queenstown Lakes District Council (**Council**) made decisions on Stage 1 of the Queenstown Lakes Proposed District Plan (**PDP**), including on the submissions by Gertrude's Saddlery Limited (**GSL**) and Larchmont Enterprises Limited (**Larchmont**).¹
- 1.2 In 2019, the Environment Court ordered the Council to renotify the two submissions with an amended summary of decisions requested. The decision to rezone the land and move the ONL boundary was 'suspended' (i.e. those changes to the PDP no longer have legal effect). These legal submissions are prepared for the purposes of the hearing on the renotified submissions.
- 1.3 The submissions seek rezoning of land at 111 Atley Road and 163 Atley Road from rural zone to low density residential zone. This residential zone is now called the Lower Density Suburban Residential Zone (**LDSR**) in the PDP.²
- 1.4 The submissions also seek that the Urban Growth Boundary (**UGB**) be relocated to include the proposed LDSR zone, and implicitly the submissions seek that the rezoned land be excluded from the ONL, by drawing the ONL boundary around the submission site.³
- 1.5 The relief being pursued by the submitters was refined through a Memorandum of Counsel dated 13 October 2022, with further details such as drafting of bespoke provisions provided in the submitters' evidence filed in November 2022.⁴ Because of the timing of the provision of the refined relief, Council's s42A report was not able to make recommendations on it.
- 1.6 The revised relief proposed by the submitters consists of:
- (a) LDSR over part of the northern portion of the site, adjoining the existing LDSR;

1 Submissions #494 and #527.

2 Ruth Evans, EIC at paragraph 5.1.

3 As was the finding of the Environment Court in *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150.

4 Ms Espie, Ms Pfluger and Mr J Brown EIC.

- (b) Large Lot Residential B Zone (**LLRB**) over the balance of the site; and
- (c) A structure plan and bespoke provisions for the part of the site proposed to be zoned LLRB.

1.7 The structure plan shows 17 building platforms on the proposed LLRB land, and Building Restriction Areas (**BRAs**) over three areas within the rezoned site.

1.8 The UGB would be moved so that it was drawn around (and therefore would include) the proposed LDSR and LLRB. The ONL overlay would be moved off the rezoned area.

1.9 This means the zoning options before the IHP are:

- (a) The 'existing proposal' that is the Rural Zone; or
- (b) The 'amending proposal' that is the rezoning of the land to a combination of LDSR and LLRB zones, as described above.

2. OUTLINE OF LEGAL SUBMISSIONS

2.1 These legal submissions address the following issues:

- (a) Council's position;
- (b) Relevant statutory tests;
- (c) Jurisdiction of this Panel in relation to landscape matters;
- (d) Statutory decision making principles;
- (e) Landscape matters; and
- (f) Council's position on other evidence filed.

3. COUNCIL'S POSITION

3.1 Council's s42A recommendations (as updated in rebuttal evidence):

- (a) Supports the refined extension to the LDSR zone now sought by the submitters; and
- (b) Opposes the proposed LLRB zone, any changes to the subdivision chapter and the bespoke structure plan. The

primary reason for this opposition is that they would have a moderate-high adverse effect on the values of the adjacent Kimiākau Shotover River ONF and a moderate adverse effect on the wider ONL context.⁵

4. THE RELEVANT STATUTORY TESTS

4.1 Given the submissions relate to a part of the PDP notified in 2015, the version of the Resource Management Act 1991 that must be applied is the version that predates the Resource Legislation Amendment Act 2017.

4.2 The Environment Court has recently outlined the statutory framework and related legal principles in its decision in *Bridesdale Farm Developments Ltd v Queenstown Lakes District Council*. The Bridesdale appeal was a Stage 2 rezoning appeal on the PDP. We summarise the Court's key points:⁶

- (a) the Council must evaluate which (zone) option is the most appropriate for achieving relevant PDP objectives,⁷ and where new bespoke policies and rules are sought, the Court must include them in its consideration;
- (b) in relation to proposed rules, the Council must have regard to the actual and potential effect on the environment of the activities they would enable, including any adverse effects,⁸ and must assess whether these rules achieve the objectives and policies of the PDP;⁹
- (c) other matters for consideration include the provisions of Part 2, the territorial authority's functions¹⁰ and national policy statements.¹¹

4.3 The relevant provisions of the operative RPS relating to landscape (and in particular ONLs such as Policies 3.2.3 and 4.2.2 and Schedule 3) must be given effect to. While a proposed RPS has been notified

5 H Mellsop rebuttal evidence, at paragraph 3.5.

6 [2021] NZEnvC 189, at [27] to [30].

7 RMA, s 32.

8 RMA, s 76(3).

9 RMA, s 76(1).

10 RMA, s 31.

11 RMA, s 74(1).

and submissions have been lodged, hearings have just commenced and no decisions issued. Little weight can be afforded to the pRPS – although in relation to ONL provisions, Ms Evans’ evidence for Council is there is little change in what the pRPS provides.¹²

- 4.4** Relevant chapters in the PDP that the submissions must be assessed against are Chapters 3 (Strategic Direction), 4 (Urban Development), 6 (Rural Landscapes), 6 (Tangata Whenua) and Chapters 7 (Low Density Suburban Residential) and 11 (Large Lot Residential). Chapter 3 in particular provides direction for the development of the more detailed provisions to be contained elsewhere in the plan, including specifically in relation to outstanding natural features and landscapes, and their identification and protection.
- 4.5** There is no legal requirement that the Council take into account or consider in any way, the ‘suspended’ Stage 1 IHP recommendation and report and subsequent Council decision, in its recommendations. Indeed, given the relief has been amended, Council would strongly caution against that approach.
- 4.6** The location of the boundary of the ONL is (as already acknowledged by the Environment Court) implicitly raised through the submissions. Despite the jurisdiction for the change to the ONL boundary being an ‘implicit’ part of the submission, that is not to say that the well-accepted principle from *Man O’War*¹³ should not be applied. A ‘top-down’ approach must be taken to the categorisation of ONLs, which means that the first task is to assess whether the land in question forms part of the ONL. The planning consequences that flow from categorisation of land as ONL are irrelevant in determining whether or not it is an ONL – they are conceptually different ideas.
- 4.7** It is therefore submitted that the first task for the Panel, is to determine if the submission site is ONL or not. If the submission site (or any part of it) forms part of an ONL, then the recommended zone provisions will need to protect the values of the ONL. If the boundary of the ONL is directly adjacent to or near to the submission site, then the

12 Ruth Evans, EIC at paragraph 7.48.

13 *Man O’War Station Limited v Auckland Council* [2017] NZCA 24.

recommended zone provisions will still need to protect the values of the adjacent ONL, as far as they might impact on it.

5. ONL BOUNDARY

5.1 The differing positions advanced in evidence are as follows:

- (a) Ms Mellsop for QLDC: ONL boundary as shown on Appendix D to her evidence in chief (but also including the two very small slices of land to the east and south-east of the LDRZ, proposed in the refined relief, refer Ms Mellsop's rebuttal evidence, Figure 1);¹⁴
- (b) Mr Espie for submitters: site does not form part of the ONL;¹⁵
- (c) Ms Pfluger for submitters: site does not form part of the ONL;¹⁶ and
- (d) Mr S Brown for APONLS: all of site forms part of the ONL.

5.2 It may be that Mr Espie and Ms Pfluger consider that the two areas of BRA where the escarpment of the Shotover River intrudes into the site are not part of the ONL. Mr Espie's evidence is that the two BRAs do form part of the Shotover River ONF, but it is not clear on his views on whether the two BRAs form part of the ONL as well.

5.3 It is submitted that Mr Espie's evidence - that the site is not part of any ONL because it does not form part of any of QLDC's ONL Priority Areas - is an incorrect interpretation of the PDP and does not apply proper landscape methodology. The Priority Areas are just a subset of the wider ONL or ONF across the District, and were identified as a consequence of the Environment Court's decision to direct that the council prepare schedules of values, for just the *priority* parts of the District's ONL, rather than the entire ONL across the District (being ~97% of the District).

5.4 The fact that an area of land is not located within a 'Priority Area', does not mean it is not within an ONL. The submission site was notified in Stage 1 as ONL. This Panel remains tasked with a factual evaluation

14 Helen Mellsop, rebuttal evidence, at paragraph 3.3.

15 Ben Espie, EiC at paragraph 10 and - elsewhere.

16 Yvonne Pfluger, EiC at paragraph 56.

of whether the site forms part of the ONL or not – essentially there is a difference in opinion as to the appropriate boundary of the wider ONL that needs to be resolved.

5.5 Ms Pfluger’s peer review evidence on the landscape classification accepts that the Shotover River ONF is nested within the wider ONL both upstream and downstream of the Arthurs Point settlement, and it appears she accepts the Shotover River ONF is nested within the wider ONL directly adjacent to the submission site. However, it is understood that she does not consider the “slither of Rural Zoned land within the Site” to be part of the wider ONL because wider ONL values are not present, and the submission site does not represent an ONL in its own right.¹⁷

5.6 Interim Decision 2.1 of the Environment Court, issued in ‘Topic 2’ of the Stage 1 PDP appeals (the Rural Landscape bucket of appeals),¹⁸ issues some principles for landscape assessment that were considered pertinent to its determination of appeals that sought to dispute ONL or ONF boundaries. Paragraph 80(b) states:

- (b) *we agree that ONF and ONL boundaries should be legible and coherent to the community. That is a factor against which we evaluate the expert evidence. Related to that, we also accept the consensus opinion in the Landscape Methodology JWS that:*
- (i) *geomorphological boundaries are a desirable first preference for determining appropriate ONL and ONF boundaries;*
 - (ii) *acceptable alternative boundaries, if geomorphology does not so assist, include marked changes in land cover or use patterns (and, potentially, road corridors); and*
 - (iii) *localised cut-outs from ONL or ONF boundaries, for example for developments, are not generally appropriate where evaluation demonstrates that, with the development included, the landscape or feature remains an ONL or ONF (eg by reason of its scale or character).*

5.7 Ms Mellsop’s evidence is¹⁹ that the site is an integral part of the wider ONL that surrounds Arthurs Point (to be clear her evidence is not that the submission site is an ONL in its own right). It is also the case that

17 Yvonne Pfluger EIC, at paragraph 47.

18 *Hawthenden v Queenstown Lakes District Council* [2019] NZEnvC 160.

19 Helen Mellsop, Rebuttal Evidence, at paragraph 3.15.

ONFs such as the Kimitiākau Shotover River are often nested ‘within’ larger continuous ONLs and that is the case here. It would be both contrary to people’s perceptions of the landscape and illogical to artificially separate an ONF from the ONL it sits within.

5.8 In consideration of the principles emphasised by the Environment Court, Ms Mellsop has acknowledged that these were generally not taken into account when the Arthurs Point area was originally zoned through the ODP. She has also acknowledged that the existing (operative) LDRZ on the site extends in a triangle up to the crest of the knoll in a way that is completely unsympathetic to the natural landform lines. In response to this, she has recommended a revised ONL boundary that is more sympathetic and better aligned with existing topography and landscape elements.

5.9 However, that does not mean the rest of the site should simply be excluded from its ONL classification. In Mellsop’s view, the rest of the site forms part of a prominent and sensitive area of the wider ONL landscape.²⁰

5.10 Ms Mellsop has assessed the level of naturalness in both her evidence in chief and rebuttal²¹ – noting that the Environment Court concluded in Decision 2.1 that there is no necessary ‘threshold’ to be met in order for an area of land to qualify as part of an ONL.²² Instead the Court accepted QLDC’s argument that the primary enquiry should be as to whether the area of land in question belongs within the landform that properly defines the boundaries of the ONL.²³ The Court then went on to say:²⁴

The fact that a landscape or feature is classed as an ONF or ONL on the basis of expert opinion that it has ‘moderately high’ or even ‘high’ naturalness does not necessarily dictate that the same threshold must be passed for land to be added to, or excluded from it. Rather, an overriding consideration must be to ensure the overall legibility of the ONL or ONF is

20 Helen Mellsop, Rebuttal Evidence, at paragraph 3.16.
21 Helen Mellsop, EiC at 8.7 – 9.1, Rebuttal Evidence, at 3.13.
22 At paragraphs 55 – 61.
23 At paragraph 62.
24 At paragraph 63.

maintained. Again, that question is one for properly informed judgement.

- 5.11** It is submitted that Ms Mellsop's evaluation and approach aligns with the principles and findings endorsed by the Environment Court in Decision 2.1, whereas the submitters' does not.

6. JURISDICTION OF THIS PANEL IN RELATION TO THE KIMIĀKAU SHOTOVER RIVER ONF PRIORITY AREA

- 6.1** Through decisions on appeals lodged on Stage 1 decisions, a number of ONL or ONF 'Priority Areas' were confirmed by the Environment Court (and associated policies located in Chapter 3 of the PDP). Of most relevance, Decision 2.5 confirmed the proposed Priority Area boundaries as appropriate and this included the Shotover River ONF Priority Area. Decision 2.7 confirmed that the Priority Areas (geographically) accompany the listing of Priority Areas.

- 6.2** The associated values schedules for each of the Priority Areas were notified into Chapter 21 of the PDP on 30 June 2022.

- 6.3** For the purposes of this hearing, it is relevant that neither the Priority Areas (as confirmed by the Environment Court), nor the associated schedules (currently subject to a Schedule 1 process) formed part of notification of Stage 1 of the PDP, and therefore did not exist at the time the two submissions were lodged on Stage 1 of the PDP. The clear legal implication of this is that no submission could have been lodged "on" the ONF Priority Area boundary, and the Panel on this renotification hearing has no jurisdiction over either the boundary of the Shotover River ONF, or the contents of the relevant schedule.

- 6.4** Whether there is scope or not to change the boundaries of the Priority Areas will be a matter to be addressed at the hearing on the schedules – noting that submissions have been lodged on other Priority Area boundaries, so the issue is not just limited to the Arthurs Point area.

- 6.5** Given the relevance of the Shotover River ONF Priority Area and values schedule to the rezoning request (refer *Man o'War* discussion

above), the various landscape experts have considered its relevance and it is understood that Ms Mellsop, Mr Espie and Ms Pfluger are all in agreement as to the correct ONF boundary – as shown on Appendix D of Ms Mellsop’s evidence in chief. That is not to say that the provision of such evidence gives a view on the jurisdiction to change the boundary in the separate decision making on the proposed values schedules.

6.6 Ms Mellsop has applied that ONF boundary in her evaluation of whether the proposed relief will protect the values of that ONF, concluding that only the extension of the LDSRZ will achieve that test.

7. WILL VALUES OF ONL AND THE PRIORITY AREA ONF BE PROTECTED BY LLRB?

7.1 In Council’s submission, the answer to this question is no. Ms Mellsop’s rebuttal evidence includes the following concerns in relation to the proposed LLRB, and will speak to this further when she appears:

- (a) Several platforms are either on steeper slopes or high on the southern slopes of the knoll;²⁵
- (b) several platforms are close to the ONF boundary with minimal or no intervening planting (setbacks of 2 - 25m on Lots 28, 30, 31, 33 and 38);²⁶
- (c) buildings on a number of the LLRB platforms would break the skyline when viewed from public and private places;²⁷
- (d) the substantial alteration to the natural landform of the knoll resulting from necessary earthworks, in addition to earthworks required to form building platforms and widen the access road – with planting not being an adequate mitigation;²⁸
- (e) the proposed planting would not completely screen dwellings or associated domestic activities. Only 30% of plant species

25 Rebuttal Evidence at paragraph 3.6(a) and (c).
26 Rebuttal Evidence at paragraph 3.6(b).
27 Rebuttal Evidence at paragraph 3.6(d).
28 Rebuttal Evidence at paragraph 3.7.

to be used are required to be taller species capable of growing more than 5m in height at maturity;²⁹

- (f) considerable uncertainty about how revegetation planting would be maintained once it is compartmentalised within individual private lots following subdivision;³⁰
- (g) visibility of an urban pattern of development that would be widely visible from public and private places around Arthurs Point, that would detract from the naturalness, legibility and memorability of the knoll, as well as the aesthetic quality and scenic values of the landscape;³¹
- (h) the attributes that make this knoll a part of the wider ONL – its natural and now open and legible landform, its landmark role as the ‘bookend’ to urban development on Atley Terrace and the ‘turning point’ of the river gorge, its memorability and its connection to other schistose landforms and mountains – would be substantially degraded;³² and
- (i) urban development (albeit of a lower density than that originally proposed) in close proximity to the river escarpments and within the visual enclosure of the river corridor would still adversely affect the naturalness, scenic and wildness/remoteness attributes of the adjacent ONF to a moderate-high degree.³³

7.2 In addition, the relief seeks to place an urban zone within what Council considers to form part of the ONL. If Council’s evidence on the ONL is preferred, then the relief sought is considered to essentially ‘clash’ with Chapters 3 and 6 of the PDP, in the following way:

- (a) Chapter 3: the LLRB is not listed as an ‘Exception Zone’ in 3.1B.5(a). This would mean that the policies listed in 3.1B.6 would apply to the consideration or determination of any applications for any subdivision, use or development; and
- (b) Chapter 6: none of the ‘carve-out’ policies located at 6.3.1.2 – 6.3.1.5 would apply. This would mean that in a particular resource consent, the policies sitting under the ONL heading

29 Rebuttal Evidence at paragraph 3.8.
30 Rebuttal Evidence at paragraph 3.9.
31 Rebuttal Evidence at paragraph 3.10.
32 Rebuttal Evidence at paragraph 3.10.
33 Rebuttal Evidence at paragraph 3.11.

at 6.3.3 would need to be applied alongside the enabling 'urban' bespoke LLRB provisions being pursued.

7.3 If the Panel decides that any of the submission site forms part of the ONL, those same policies from Chapters 3 and 6 also apply to plan development. The Panel would need to conclude that the bespoke provisions being promoted by the submitters achieve those ONL policies.

7.4 If Council's evidence is preferred, it is submitted that a finding that the bespoke LLRB zone cannot achieve the relevant Chapter 3 and 6 objectives and policies must be reached.

8. OTHER MATTERS

National Policy Statement for Highly Productive Land 2022 (NPS-HPL)

8.1 The NZLRI LUC mapping information identifies the site as LUC 3, and meeting the definition for being classified as Highly Productive Land (HPL) in the NPS-HPL. For the submitters, Mr J Brown relies on the evidence of Dr Reece Hill to exclude the land from the NPS-HPL on the basis it is not LUC 1, 2 or 3.

8.2 Council engaged Mr Ian Lynn to complete a peer review of Dr Hill's evidence. Mr Lynn agrees with Dr Hill's findings that the site is not LUC 3 land, and a memorandum confirming this view is attached to Ms Evan's rebuttal evidence. Based on the more detailed mapping undertaken, and the findings of Dr Hill and Mr Lynn, Council accepts that the NPS-HPL does not apply to the submitter's proposal, and consequently, the NPS-HPL is not a reason to reject the rezoning request.³⁴

34 Ruth Evans, Rebuttal Evidence at paragraph 4.4.

Transport

8.3 Council does not consider transport issues a reason to oppose the rezoning. In response to Mr Smith's evidence in chief for the Council, Mr Bartlett has undertaken additional analysis of the rezoning as well as a more detailed investigation of the proposed road design.

8.4 Mr Smith has reviewed this additional information and has concluded in his rebuttal evidence that all traffic issues can be addressed at the consenting stage. Since that date, Mr Smith has been in discussions with Mr Bartlett about some matters, and his summary of evidence will provide an update (albeit his view remains that the matters can be addressed at the time of subdivision consent).

Infrastructure and Servicing

8.5 Council does not consider infrastructure or servicing a reason to oppose the rezoning. For the submitters, Mr John McCartney has provided infrastructure and servicing evidence, and concludes that servicing the site with stormwater, wastewater and water supply services is feasible.³⁵ Mr Richard Powell (for Council) has considered Mr McCartney's evidence and agrees with his findings. It is therefore submitted that infrastructure and servicing is no longer a reason to oppose rezoning.



S Scott

26 January 2022

35 John McCartney, EIC at paragraphs 41 - 46.