

Before Queenstown Lakes District Council

In the matter of The Resource Management Act 1991

And The Queenstown Lakes District proposed District Plan –
Rezoning Hearing Topic 12 – Upper Clutha mapping

LEGAL SUBMISSIONS (Part Two) FOR

Glendhu Bay Trustees Limited (#583)

Dated 07 June 2017

Solicitors:

Maree Baker-Galloway | Rosie Hill
Anderson Lloyd
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348
DX Box ZP95010 Queenstown
p + 64 3 450 0700 | f + 64 3 450 0799
maree.baker-galloway@al.nz | rosie.hill@al.nz

**anderson
lloyd.**

MAY IT PLEASE THE COMMISSIONERS

Introduction

- 1 These (**Part Two**) legal submissions are presented on behalf the submitters identified on the front cover page, Glendhu Bay Trustees Ltd (**GBT**) or (**Submitter**) in respect of Hearing Stream 12, Upper Clutha Mapping of the Queenstown Lakes District Council Proposed District Plan (**PDP**).
- 2 These Submissions are supplemented by Part One legal submissions already presented to the Commission.
- 3 **Part Two** of the legal submissions will address the following matters:
 - (a) Legal issues in relation to:
 - Introduction and context for the proposed Glendhu Station Zone (**GSZ**);
 - Those aspects of the GSZ proposal agreed between Council and the Submitter;
 - The relevance of part 2 of the RMA in the PDP process and as related to the GSZ relief sought; (**Appendix One**)
 - The relevance of the 'existing environment' in the PDP process;
 - The relevance of environmental compensation in the PDP process and an overview of the Environment Court decisions in Parkins Bay on environmental compensation;
 - An explanation of the future intent of development under GSZ and the overlap of covenant areas and GSZ activity areas;
 - Alternative options for refining the extent of the GSZ over rural land.
 - (b) Key issues in relation to the activity areas proposed in the GSZ as follows:
 - Open Space / Farm Activity Area (**OS/F** and **GS(OS/F)**)
 - Lakeshore Activity Area (**LS**)
 - Residential Activity Area (**R**)
 - Golf (**G**)

- Glendhu Station Farm Homestead (**GS(FH)**)
 - Glendhu Station Campground (**GS(C)**)
 - Location of public access trails, covenant protection area overlay.
- (c) Key issues for consideration arising from the Council's expert evidence and the GSZ expert evidence (not addressed in Part One).

Introduction and Context

- 4 The purpose of the GSZ through the PDP review is to create a framework that will better manage an area of high quality landscape in a way that protects and enhances natural character, biodiversity and recreation values, and that enables an economically sustainable use of the land with activities that are complimentary to that protection and enhancement. Lessons learnt on the practicality of implementing the consent 8 years on from the final Environment Court decision inform the development of a zone that will provide incentive for wider enhancement of natural character and biodiversity values than the consent and Rural Zone combined. The proposed Zone is intended to:
- (a) Provide for a similar level and type of development as provided for through the Environment Court's Parkins Bay consents, with additions of the Camp Ground and Farm Homestead activity area and 8 further dwellings in the Residential activity area;
 - (b) Be more flexible and easier to implement;
 - (c) Secure the same or better environmental protection and enhancements as the consent;
 - (d) Enable medium to long term planning and future development to occur on an integrated and comprehensive basis.
- 5 The Submitter is not seeking to 'codify' the existing consents, which stand on their own. Rather, the GSZ proposal should be viewed as an alternative means of providing for:
- (a) 42 homesites (i.e. with 1000m² building platforms and design controls) in the same areas of the consented areas, rather than precise dwelling designs in those areas as consented;
 - (b) 8 additional homesites (again with 1000m² building platforms and design controls) in areas where the landscape can absorb change;

- (c) An extensive Revegetation Strategy securing at least the same outcome as the consent, and the potential for its extension;
- (d) Non-complying status for buildings in that are in excess of the scale of development contemplated in the Consent as set out in the Covenants;
- (e) Opportunity to apply as a restricted discretionary activity for two dwellings in Covenant Area CH of Lot 6 and CI of Lot 7, as provided for in the land covenant;
- (f) Opportunity to apply for limited activities within the FH area and establishment of campground in the C area, as restricted discretionary activities.

6 Part One legal submissions have already addressed significant background and context to the Parkins Bay development and the GSZ proposal now before the Commission. Those submissions are not intended to be repeated here, however I do refer to some critical extracts which importantly set the scene for discussions today:

- (a) The original Parkins Bay proposal, prepared by Darby Partners and the McRae Family as owners of Glendhu Station, was a joint vision to create a diversified and sustainable use of the unique Glendhu station land. As covered in the evidence of Mr. McRae, the Glendhu Station land had been managed according to traditional high country farming practices for generations, however in more recent time this evolved into initiatives to farm in a more environmentally sustainable manner and alternative and complementary land uses, such as eco-tourism, weddings, recreation, tourism and residential activity complement the move away from traditional farming.
- (b) The foundation of Parkins Bay was, and still is, the large scale holistic management regime over the Glendhu Station Zone land. The case before the Environment court was clearly not just a landscape case (although it was an important factor the proposal had to align with the protective Operative District Plan (**ODP**) chapter 4 and 5 provisions relating to ONLs). The proposal is of regional tourism and recreational significance and provides a comprehensive framework for increasing the indigenous biodiversity of Glendhu Station.
- (c) Core findings from the Environment Court's interim and final decisions on the Parkins Bay proposal, related to the overall positive benefits being presented by the developer and those contributing to achieving sustainable management 'on balance'. Those considerations are now

of equal importance in this District plan Review process. Importantly, GBT has ensured that the specific reference in the Zone purpose to ensuring a wide range of recreational opportunities and indigenous vegetation benefits, which underlines the importance to the district of recreation and tourism activities and its nature conservation values. In all other respects, the intent of the GSZ is to replicate and build on the covenanted environmental benefits achieved through the Parkins Bay proposal into a zoning framework in the PDP, so that those benefits continue to be secured in a transparent way.

- (d) The proposal to zone the wider area as a special zone is consistent with the existing District Plan framework which includes other special zones and associated development opportunities including, for example, SASZs that are not underpinned by an existing overall set of consented entitlements.

Aspects of the GSZ supported by Council

- 7 Those aspects of the GSZ refined relief submitted in Evidence in Chief which are supported by Council are important to note at the outset. Those aspects are primarily included in Dr Read's evidence at para 3.2 and include as follows:
 - (a) The Submitter has removed the proposed Lodge Activity Area from the evidence;
 - (b) Refinement of the LS Activity Area to the lower terraces;
 - (c) Removal of the 'fifth' residential pod located on the northern side of Wanaka Mt Aspiring Road and aggregation of 4 residential pods in to one;
 - (d) The infrastructure experts are in agreement that adequate infrastructure can be made available to service the GSZ.
- 8 The above specific examples listed support the general sentiments expressed by Dr Read that 'in the main' the GSZ as amended would give rise to development which is closely in keeping with that consented (at 4.2) and Mr Barr's support in principle for the reasons and vision behind the GSZ proposal (at 15.45). It is particularly relevant that those comments were made following the lodgement of Evidence in Chief by the Submitter. Since that time, further refinements have been made to the GSZ provisions and Structure Plan addressing each of Mr Barr's helpful comments on the draft Zone and further responding to matters raised by Council witnesses.

- 9 The Submitter considers that the best outcomes for PDP planning come when many eyes have input, the comments of the Council's experts have therefore been appreciated, and the submitter is open to further refinement that might be arrived at by way of post-hearing caucusing between planning experts at the least.

The relevance of positive environmental effects in the PDP process

- 10 The Environment Court's interim and final decisions in Parkins Bay approved of the package securing environmental benefits offered by the Applicant, as ultimately weighing on the scales to bring the overall proposal in line with sustainable management. In particular, the Court placed material weight on the fact the benefits are "logically connected to the development", along with the scale of the benefits such as fencing and removal of stock ultimately offered as part of the whole package:

The test for environmental compensation is whether it is reasonably related to the natural and physical resources being used in the application. Whether that test is satisfied as a mixed matter of fact, opinion and degree we should assess on an issue by issue basis. However, the PBPL's proposal is not like the cases where an applicant offered a \$4 million fund plus \$250,000 per year to a district council for " ... investigating recreational possibilities ...": see the North Bank Tunnel case". The court has described its concern about that approach. In these proceedings the environmental compensation is all "logically connected to the development" to use the test stated by the Supreme Court in Waitakere City Council v Estate Homes Limited^o because it remedies problems (water quality, weeds) on both the golf course site and adjacent land, it is close to the site and with fencing is likely to be effective.¹

What has changed since the interim decision is, as we have stated, the amount of compensation (and mitigation) now offered by PBPL and the McRae family. Indeed, the proposals for fencing and removal of stock have increased markedly since Mr Kruger assessed them as "limited, insufficient". When the environmental compensation, as amended by this decision, is added to the scales, we consider it brings them down on the side of the proposal. We judge that the proposal as now put forward, subject to the minor changes suggested by this decision, will be sustainable management of resources under the RMA. The appellants need not fear that a Millbrook is coming to west Wanaka. That is not this proposal. We hold that the proposal when amended as

¹ *Upper Clutha Tracks trust v Queenstown Lakes District Council* [2010] NZEnvC 43 at [11].

approved in this decision will achieve the purpose of the Act, and will make orders accordingly².

11 The relevance of positive effects in the nature of environmental compensation have relevance as "effect". This is established in a long line of case stems pre-King Salmon. Section 104(1)(c)'s 'effects on the environment' is interpreted subject to Part 2 of the Act which brings into play positive effects as they are relevant to Part 2 matters. Whether King Salmon will be applied in the future to change that approach by removing Part 2 to a large extent from decision making is yet to be seen. However that has not yet occurred, and as such the leading cases on relevance of environmental compensation and positive effects (i.e. NZ Forest and Bird) to decisions under the RMA remain authoritative.³

12 Counsel has not found any other cases which expressly take into account conservation gains and recreation benefits similar to the Submitter's proposal in a plan change setting, other than *Infinity Group* already cited in Part One submissions, which stated in obiter this approach was acceptable. It is submitted however that there is no question that positive effects that not only protect but also enhance the natural character, landscape, biodiversity and recreation values are relevant to take into account for the following reasons:

- (a) As discussed in **Appendix One**, Counsel considers section 5 has application to this hearing, and as such the enhancement and community wellbeing aspects of section 5 are relevant;
- (b) The Council's section 31 role includes the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district. That is a broad role which also includes the broad term 'effects' under the Act including positive effects (section 3);
- (c) The protective and enhancement aspects of the proposal are consistent with and give effect to the strategic objectives of the PDP as promoted by Council in its right of reply and overall ensure the proposed zone is the most appropriate planning framework to give effect to the strategic objectives as well as the wider purpose of the Act:

² Ibid, at [78].

³ *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 293

- (i) **3.2.1.6 Objective** – *Diversification of land use in rural areas providing adverse effects on rural amenity, landscape character, healthy ecosystems, and Ngai Tahu values, rights and interests are avoided, remedied or mitigated.*⁴
- (ii) **3.2.4.1 Objective** – *Ensure development and activities maintain indigenous biodiversity and sustain or enhance the life-supporting capacity of air, water, soil and ecosystems*
- (iii) **3.2.4.7 Objective** – *Facilitate public access to the natural environment*
- (iv) **6.3.6 Objective** – *The protection, maintenance, or enhancement of indigenous biodiversity where it contributes to the visual quality and distinctiveness of the District's landscapes*
- (v) **6.3.7 Objective** – *The use and enjoyment of the District's landscapes for recreation and tourism*
- (vi) **3.2.1 Objective** – *Indigenous biodiversity is protected maintained and enhanced*
- (vii) **3.2.3 Objective** – *Land use and development maintains indigenous biodiversity values*

13 Also refer to Appendix 6 of Mr Ferguson's evidence in chief which contains relevant provisions requiring promotion and enhancement of positive outcomes from the operative and proposed RPS, in particular:

- (a) Operative objective 5.4.1 (a)
- (b) Operative policy 5.5.4
- (c) Operative policy 9.5.5
- (d) Proposed objective 3.2
- (e) Proposed policy 3.2.4
- (f) Proposed policy 3.2.6

⁴ In Chris Ferguson evidence 29 February 2016 it was submitted this objective be amended as follows:

Objective 3.2.1.6 The natural and physical resources of the rural areas are valued for their potential to:
i) enable tourism, employment, rural living, visitor accommodation and recreation based activities; and
ii) accommodate a diverse range of rural based activities and industries that have a functional need to locate in rural areas

14 In summary, the protective and enhancement aspects of the proposed zone, as they relate to natural character, landscape, biodiversity and recreation values are squarely relevant to the implementation of the above objectives and policies in the PDP and RPS.

The relevance of the 'existing environment' in the PDP process;

15 It is submitted that in considering whether the GSZ is the most appropriate zone to achieve the higher order objectives of the PDP and Part 2 of the Act (as discussed in Appendix One), the decision of effects on the 'environment'⁵ is the environment so modified by the Environment Court's consents already granted.

16 The Council's opening legal submissions accept that effects associated with the [Parkins Bay] consent form part of the existing environment.⁶ The Council's concerns are therefore limited to the following:

- (a) That the activities proposed go well beyond that consented, as does the geographic area of the proposed GSZ; and
- (b) Whether the existing, and complex, consent conditions have been fully reflected in the proposed GSZ.

17 In respect of the first concern, I submit that the proposition the GSZ goes 'well beyond' what has been consented is a misunderstanding of what is proposed. Mr Ferguson's evidence in chief carefully analyses those aspects of the GSZ which are beyond the level of development provided for in the consent with respect to each activity area of the GSZ. These are limited to the 8 additional homesites in the R activity area, a small amendment to the G activity area, limited development in the FH activity area in a restricted discretionary framework, and the C activity area in a restricted discretionary framework. The evidence supporting the ability for the Zone to manage any adverse effects arising from development in each of those areas has been carefully considered by the Submitter's experts and is further analysed in the submissions below.

18 In respect of the extended geographic area referred to; this was an intentional aspect of the Submitter's relief, in order to provide for activities on the Glendhu Station land which are complementary of the Parkins Bay development already consented (such as FH and C areas) as well as to ensure an overall holistic management approach to enhancement of the station's natural values. It is submitted that the size of the proposed zone should not be primarily of concern, but rather how activities provided for within that zone are suitably managed. In

⁵ As per section 76(3) RMA: In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect.

⁶ Para 6.3 Council's opening legal submissions

any event, the question of geographic extend has been further considered by the Submitter and is analysed at 'alternative options' set out below.

- 19 In respect of the concern regarding reflection of the consent in the GSZ rule framework; the intent of the Submitter has been to reflect all critical aspects of the consent in the GSZ, however in terms of the 'complex' consent conditions it has been a very deliberate objective of the Submitter to refine those conditions where possible and appropriate. Where conditions provided in the Environment Court decision have in fact eventuated as having little utility or practicality on the ground, those conditions have not been implemented through the proposed zone framework. Where this has occurred, such a change has been justified in expert evidence; for example the evidence of Ms Pfluger addressing the utility of staging implementation of the consent in terms of landscape effects.⁷

An explanation of the future intent of development under GSZ and the overlap of covenant areas and GSZ activity areas;

- 20 The evidence of Mr Ferguson summarises the substantial progress made already in respect of implementing the Parkins Bay consents at para 4.9. This substantial list provided evidences the complex nature of the consents, and the significant cost and effort which has been put into the process so far to give effect to the consents.
- 21 Importantly, the first matter listed in Mr Ferguson's summary includes the carrying out of:

*The initial subdivision of Glendhu Station into the main development titles necessary to facilitate the approved land use consent. This resource consent has also resulted in the creation of the open space covenants (through the registration of covenants and consent notices) and the creation of each of the public access easements, as required through the Environment Court's decision on the land use consent (RM120558⁸). See **Appendix 3** for copies of relevant consents.*

- 22 Mr Ferguson also details the variations to consent that have been needed to date to make implementation more practical and amend important matters of detail. These variations demonstrate that when a finer grained analysis is applied, it results in more appropriate outcomes. The Submitter seeks this zone in part to ensure future variations are processed efficiently, or to minimise or avoid the need for more variations of the original consent by providing a

⁷

⁸ There have also been some subsequent amendments to the conditions of this consent (RM130274 and RM130491).

consenting pathway for new consents. Such applications can then be evaluated within a site specific, fit for purpose planning framework.

- 23 Mr Ferguson's evidence appends the relevant consents and their conditions. For the assistance of the Commission to better understand the relationship between these registered instruments and the proposed GSZ, I list the resulting titles in **Appendix Two** of these Submissions and provide copies for the Commission of the consent notice and restrictive covenant that is lodged over the titles. A visual representation of the different covenant areas as prescribed through the consent conditions is provided in appendix 2 to the Supplementary evidence of Mr Ferguson.
- 24 Only the most relevant registered instruments have been included in Appendix Two, and which exemplify the registration of the conditions directly from the Environment Court Parkins Bay decisions. Consent Notice 9486490.2 is largely replicated in Land Covenant 9486490.5 detailing the covenanted restrictions on the GSZ land which reflect those consent conditions. The Submitter is aware that in the future, if development is to be progressed by way of consent under the GSZ (if successful in this DPR process) in a way that is contrary to those covenants then there may be a separate process required to vary, amend, or remove underlying encumbrances on the title where those conflict with the development being sought. That process, be it a discretionary application to vary the consent notice under the Act, and a private process to amend registered covenants, is not directly relevant to the Commission's decisions in this PDP hearing.
- 25 What is however relevant, is to understand a potential way forward for the landowners to realise the development opportunities within the GSZ if implemented.
- 26 It is submitted that, given the consent is presently being implemented, but will not be fully 'given effect to' until 'implementation' conditions are completed (as opposed to 'continuing' conditions)⁹ then the likely, but possibly not only, future way forward will be for the landowner to apply for requisite consents under the GSZ framework while also seeking a contemporaneous variation or surrender of existing consents. To otherwise surrender the existing consent while it has been partially given effect to, and before new consents are sought, would leave any development activities already undertaken on the GSZ land as unauthorised.

⁹ Referring to the Environment Court's decision of *Koha Trust Holdings Limited v Marlborough District Council* [2016] NZEnvC 152 at [62]: *the possibility may remain that some conditions can be identified as implementation or establishment conditions and others as continuing conditions. It is possible that conditions of the latter type might generally be more amenable to enforcement than to operation of the lapse provisions in s 125. Conditions of the former type, particularly where they involve a prohibition against operation of the consent until the required steps are completed, are likely, if those steps are not carried out before the end of the lapse period, be amenable to testing against the standard in s 125(1A)(a) "the consent is given effect to".*

The above, is only of relevance insofar as to give the Commission context and assurance that the GSZ is not a mechanism by which conditions of the existing consents in train can be obviated.

- 27 The GSZ framework is intentionally set up to require the majority of activities in the zone to apply for consent. Albeit such consent is generally of a lesser activity status than under the current Rural Zone, and would be assessed against a more specific set of objectives and policies.

Alternative options refining the extent of the GSZ

- 28 The Submitter has considered the comments made in Mr Barr's and Dr Read's evidence with respect to the recommendation that the PDP Rural Zone would be a better zone for the management of that rural resource land to achieve the strategic objectives of the PDP. As stated in Mr Ferguson's supplementary evidence, the intent and design behind the GSZ originally was to provide an integrated package for landscape management which reflected the cadastral boundary of the Glendhu Station land and reflected all protective and enhancement aspects of the Environment Court's decision. The Submitter has however taken on board the Council experts' comments and considered alternative ways to achieve intended the GSZ outcomes.

- 29 As a result, an alternative option has been developed to reduce the boundary of the GSZ, by reducing Activity Area OS/F, to correspond with the back of covenant protection areas CH, CI and CJ and around Lot 9. A Structure Plan illustrating this alternative GSZ boundary is included within **Appendix 3** of Mr Ferguson's supplementary evidence.

- 30 As summarised in Mr Ferguson's supplementary evidence, he considers that, on balance, refining the GSZ boundary and including those areas previously in the GSZ but outside of the Covenant Protection Area Overlay, would better meet the objectives of the PDP. Partial or the full rezoning of the Station, as proposed by GBT, will better provide for the integrated management of the protection and enhancement of natural character, landscape, biodiversity and recreation values along with the sustainable economic use of the land, than the Rural Zone.

Key issues for consideration:

Traffic

- 31 Ms Banks holds concern with the increase in traffic from activities that have not been assessed by Mr Carr at this stage, to give some assurance that the impacts on the road network will be minimal. Mr Barr also makes the following assessment in his rebuttal:

Mr Carr's evidence at paragraphs 37-46 places reliance on the resource consent process of future activities to manage traffic impacts, and has not quantified traffic generation estimates because the respective activities cannot be established as of right. Given the certainty claimed in the submission and the overall limits on the footprint of buildings in areas such as the Lake Shore, Golf and Farm Homestead Activity Areas, I consider Mr Carr could have provided more quantified evidence as to the likely traffic generation of these activities¹⁰.

- 32 Firstly, notably 17 of the 33 PDP chapters notified do not mention traffic in the Section 32 report at all, evidencing that the level of detail required by QLDC for PDP submissions far outweighs the traffic analysis that has been undertaken by QLDC for their own zone change proposals. This includes substantial zones being densified under the PDP such as the Low Density Residential Zone, which will double density in some instances, only provides one passing comment on the effects of increased traffic in the LDR Zone (at page 22, section 32 report). The expansion of areas to be up zoned similarly lacks a rigorous assessment, such as the Rural Lifestyle Zone expansions.
- 33 That discrepancy aside Mr Carr's summary statement provides further assessment of the likely scale of traffic generation (that will subsequently be assessed in a restricted discretionary framework for key elements) and concludes that traffic safety will not be compromised by the scale of development contemplated in the zone.

Open Space / Farm Activity Area (OS/F and GS(OS/F))

- 34 Whether the boundary of the Zone encompasses the full Station as originally submitted, or the reduced option in combination with the Open Space Protection Overlay, the proposed package provides a superior planning framework to the Rural Zone for this site. The Zone provisions are intended to achieve the same or better outcomes than the consent in terms of protection and more importantly enhancement of the landscape, natural character, biodiversity and recreation values of the land. As an integrated package the proposed Zone ensures the land will be managed coherently in the long term, which is not otherwise provided for in the Rural Zone.
- 35 Within the OS/F and GS(OS/F) the provisions are intended to be consistent with the underlying covenants. Two dwellings are anticipated within the covenanted area as restricted discretionary activities as provided for under the existing consent.

Lakeshore Activity Area (LS)

¹⁰ Craig Barr rebuttal evidence at para 15.10

36 No material issues have been raised with respect to the LS activity area. The LS provides for the same nature and scale of development authorised by the consent (visitor accommodation, golf course club house, public access trails, public jetty). The location of built development and surrounding curtilage has been amended and improved based on further site investigations, leading to the difference between the boundary of covenant compared to the activity area.

Residential Activity Area (R)

Height

37 Dr Read's concerns regarding the additional 8 homesites in the R activity area appear to relate to, primarily, over domestication from this additional development, combined with potential increased visibility due to height increases and potentially varied designs.

38 Ms Pfluger assesses the effects of both the additional 8 sites, as well as the controls over heights and variation of design in her evidence in chief and supplementary statement. Based upon clarification from Mr Ferguson as to the actual increase in height being only 0.2m, Ms Pfluger considers that would be visually barely discernible when viewed from public viewpoints such that adverse visual effects would be avoided.

39 I submit that Dr Read's contrary rebuttal evidence, based upon an incorrect and assumed height increase of 0.5m and the following conclusion that can therefore be disregarded.

40 Furthermore, Dr Read has not assessed where such views are from, not provided any visual assessment attached to her evidence to support such a finding, nor even established whether such a height increase would be visible at all.

8 Homesites

41 As provided in Mr Ferguson's Evidence in Chief, the location of the eight additional homesites has been investigated further since the Council and Environment Court hearings to identify how these could be better integrated into the site and wider landscape without causing adverse effects (para 55-56). It is important to note that the eight sites were never declined by the Environment Court, as they were not pursued at the appeal stage. Conversely, the Court reflected on the findings that the site was within a lower and comparatively small part of the landscape with different (and somewhat lesser qualities of naturalness due mainly to the non-native vegetation which denoted the site), and:

In respect of the 42 houses the proposal comes close to exceeding a threshold, but may not if an appropriate set of conditions and covenants is imposed¹¹.

- 42 A reflection that the eight homesites were not pursued and that the threshold for development was not necessarily reached with 42 homesites is also seen in the consent conditions and in the Consent Notice wording as follows:

Lot 2, 10 and 11 DP 457489 (CFR 602575)

ii. Lots 2, 10 and 11 DP 457489 shall be covenanted in perpetuity from the date of the grant of consent against further development but not prohibiting subdivision of the golf course and the 42 house-sites, and the subdivision and development of eight visitor accommodation/ residential units.

*Advice Note: For the avoidance of doubt this consent only authorises 42 visitor accommodation/residential units. **Any future application for up to eight additional visitor accommodation/residential units within Lots 2, 10 and 11 OP 457489 will require a variation to this consent or a new consent** and a rigorous assessment of the measures proposed to sufficiently mitigate any potential adverse visibility/ domestication effects.¹²*

- 43 The R activity area retains a framework for that assessment to be carried out.
- 44 Ms Pfluger assessed the eight additional homesites on site in detail along with the detailed designs for the building platforms on each of these eight Homesites developed by the Submitter, which include choice of appropriate RLs, earth mounding and specific planting and retention of existing native vegetation to ensure that at most only very small parts of the buildings (less than the top metre) will be visible from any of the viewpoints along the road between the Fern Burn bridge and the Glendhu Bluffs. Ms Pfluger considers this level of visibility appropriate and in line with potential visibility of the other consented Homesites. In her view, this detailed site analysis and micro-siting will ensure that inappropriate adverse effects, over and above the effects of the consented development, can be avoided. The introduction of an additional eight homesites in the context of the overall development will not introduce a higher level of domestication in this part of the landscape, given that the mitigation measures in the form of planting were originally designed for the overall development of 50 residential sites. It should be noted that the ecological enhancement planting and screening vegetation was developed for the originally proposed 50 sites and none of the planting areas subsequently withdrawn when eight sites were not further pursued. The consented development will introduce a higher level of

¹¹ *Upper Clutha Tracks trust v Queenstown Lakes District Council* [2010] NZEnvC 432 at [152].

¹² Consent Notice 9486490.2, clause 3(ii).

domestication within this contained part of the landscape than is currently found and Ms Pfluger considers that the additional eight Homesites would be in character with this development in terms of their location, siting and mitigation measures.

Design

- 45 In respect of Dr Read's conclusions that the variability of homesite designs would result in a 'high end housing suburb; rather than consistent character of a resort (para 3.6), I note that there is no policy direction against providing for a high end housing suburb, nor is there any evidence that the R activity area and associated controls would result in something out of character with a resort type development. In response to those concerns for amenity, Mr Ferguson has refined the provisions relating to buildings in R activity area through the addition of set of assessment matters designed to provide further guidance on factors relating to the external appearance of the buildings and to preserve built form coherence and amenity. This supplements **Rule 44.5.2** including a wide ranging list of controls Council would have in consenting any building, including in particular, the integration with revegetation and mitigation planting contained within the Revegetation Strategy provided for within **Rule 44.5.4**. Ms Pluger supports those additional controls as they will allow for maintenance of overall amenity of the development.

Golf (G)

- 46 The provisions in respect of the golf course continue to ensure the ecological revegetation and regeneration and public access benefits otherwise required by the consent. The proposed extension of the golf course area over Fern Burn is addressed by Mr Thomson, and to the extent that it does not involve built form in that area, will remain consistent with open space protection established under the underlying covenant. The large areas of covenanted open space within the OS/F area are directly tied to the development of the golf course, public amenities and residential / visitor accommodation units.

Glendhu Station Farm Homestead (GS(FH)) and Glendhu Station Campground (GS(C))

- 47 The amended provisions as set out in Mr Ferguson's supplementary evidence for GS(FH) are intended to ensure that built development in the FH remains consistent with the underlying covenant, while enabling the diversification of economic activity complementary to the wider farming activities.
- 48 The provisions enabling establishment of an additional Camp Ground area are intended to further allow for diversification in a manner consistent with, and complementary to, existing activities in the immediate vicinity.

49 The FH and C areas in particular, are proposed to enable the McRae family to continue to plan in the medium and long term for the Station's viability.

Conclusion

50 In conclusion, the proposed zone is intended to build upon the positive benefits secured by the consent, both in terms of the scale of appropriate development enabled and also and equally importantly in terms of the protection and enhancement of important natural character, biodiversity, landscape and recreation values. The package as a whole does more than just protect the values as they currently exist. It is intended to ensure enhancement of those values, and enablement of activities suited to the site, in a way that is more appropriate than the Rural Zone as notified.

51 For a site of this significance and scale, it is more appropriate to embed the changes provided for under the substantive consent into the District Plan in a similar way to other special zones of a similar nature and scale.

Dated this 7th day of June 2017



Maree Baker-Galloway

Counsel for Glendhu Bay Trustees Limited

Appendix One – legal analysis

The relevance of part 2 in the PDP process

52 Part One legal submissions referred to and relied upon the Council's opening legal submissions for this hearing stream in respect of the 'permissibility and appropriateness to have regard to Part 2 in the evaluation of rezoning relief sought by submitters'. In the anticipation that the Commission are wanting further assurance as to the legal basis for that proposition, the following brief submissions are made which reach the same conclusion, that Part 2 is intrinsically relevant to the Commissions' decisions on rezoning in the PDP:

The application of *King Salmon* to a plan review

- (a) King Salmon started a change in the tide for what was a long standing approach¹³ to resource management decision making and the relevance of Part 2. The Supreme Court's focus in King Salmon was consideration of whether it was an error of law to interpret whether the proposed plan change at hand 'gave effect to' the New Zealand Coastal Policy Statement (as required by section 66 of the Act) by making that assessment against Part 2. The majority held that because the NZCPS had been prepared in accordance with Part 2 of the Act, then by giving effect to the NZCPS, a regional council is necessarily acting in accordance with Part 2 and there is no need to refer back to that Part when determining a plan change.¹⁴
- (b) The ratio of the Supreme Court has since been applied in other plan change decisions and more recently by the High Court in resource consent decisions.¹⁵ I submit that those subsequent court decisions apply the King Salmon reasoning only in the context of reliance on the settled provisions of an operative higher order planning instrument. That certainly makes sense when considering the Supreme Court's reasoning behind its majority decision was on the premise that the NZCPS was the mechanism by which Part 2 had already been given effect to and it would be implausible that parliament intended the ultimate determinant of a plan change application to be Part 2 and not the NZCPS. The High Court's reasoning in *RJ Davidson Family Trust* clearly relied on that ratio being connected to the 'settled' plan provisions:

¹³ Referencing the commonly termed 'overall broad judgement approach' originating from the seminal case of *New Zealand Rail Limited v Marlborough District Council* [1994] NZRMA 70 (HC).

¹⁴ *Environmental Defence Society v New Zealand King Salmon Company* [2014] NZSC 38, (2014) 17 ELRNZ 442, [2014] 1 NZLR 593, [2014] NZRMA 195at [85] – [86]

¹⁵ See *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

*I find that the reasoning in King Salmon does apply to s 104(1) because the relevant provisions of the **planning documents**, which include the NZCPS, have already given substance to the principles in Part 2.¹⁶*

- (c) Similarly, the High Court in Thumb Point made the same finding, that:

*In most cases, the Environment Court is entitled to rely on a **settled plan** as giving effect to the purposes and principles of the Act.¹⁷*

- (d) The critical difference here is the PDP under review is not a settled plan; it is unlike the NZCPS in *King Salmon*, or the operative instruments under consideration in *RJ Davidson* and *Thumb Point*. It cannot be assumed to have already particularised the purpose and principles of Part 2 of the Act, thereby obviating the need for Council to interpret whether an alternative zoning achieves that purpose by reference to those legislative provisions. Indeed, the very question under consideration in these hearings before the Commission is whether the PDP (its objectives, policies, other methods) achieve Part 2 of the Act. A lack of higher order planning instruments in this instance which are settled or binning means that this PDP cannot be 'slotted into' a higher an already designed puzzle.
- (e) To assess all policies, rules, methods, and rezoning requests from submitters only against the higher order objectives of the PDP which are the subject of significant litigation) only, would not achieve a comprehensive planning document, as envisaged by Section 74 of the Act, and which will be critical for decisions for the next 20 years on the allocation and planning of resource use will hang. Counsel has also reviewed subsequent case law applying and relying on *King Salmon* and notes that there are no cases of a district plan review (where all objectives are under consideration) and which is not subject to a settled higher order instrument.
- (f) Furthermore, the more recent case of *Turners & Growers Horticulture v Far North District Council*¹⁸ essentially confined the Supreme Court's decision in *King Salmon* on the role of Part 2 in plan-making decisions to its own particular facts. Gilbert J found that Part 2 remains relevant to plan-making decisions under the RMA, by virtue of the Council's obligation to prepare a plan change "in accordance with" the matters

¹⁶ Ibid, at [76] – [77]

¹⁷ *Thumb Point Station Limited v Auckland Council* [2015] NZHC 1035, [201] NZRMA 55, at [31].

¹⁸ *Turners & Growers Horticulture v Far North District Council* [2017] NZHC 764

provided in s74 (1)(a)-(f) RMA, which includes a reference to Part 2. In doing so, Gilbert J found that King Salmon turned on the requirement for lower-order plans to "give effect to" a national policy statement (or other higher-order planning document), rather than whether proposed rules were the "most appropriate way" to achieve the objectives and policies of the District Plan under s 32:

I do not accept the submission that the Court was wrong to consider the purpose and principles in Part 2 and Council's functions under s 31 when evaluating the proposed rules. Section 74 specifically requires a territorial authority to change its district plan in accordance with its functions under s 31 and the provisions of Part 2 (ss 5 to 8). The Supreme Court did not suggest in New Zealand King Salmon that those making decisions under the Act should disregard these mandatory provisions. On the contrary, the Court stated "the obligation of those who perform functions under the RMA to comply with the statutory objective is clear".¹⁹ The Court explained that "[s]ection 5 is a carefully formulated statement of principle intended to guide those who make decisions under the RMA. It is given further elaboration by the remaining sections in Part 2, ss 6, 7 and 8."¹⁹

The issue in New Zealand King Salmon concerned the nature of that obligation in the particular circumstances of that case where a higher order planning document, the New Zealand Coastal Policy Statement (NZCPS), required a lower order decision-maker, a Board of Inquiry, to avoid adverse effects of activities on areas of outstanding natural character such as those the subject of the private plan change application it was tasked to consider. The Court concluded that this was a mandatory requirement that had to be given effect to, as required by the Act, when considering the plan change. Consequently, the Board of Inquiry was wrong to disregard this requirement by resorting to Part 2 of the Act and treating it as no more than a relevant consideration.²⁰

...

The suggestion that Council and the Environment Court were wrong to have regard to Part 2 and s 31 when considering the

¹⁹ Ibid, at [43].

²⁰ Ibid, at [44].

proposed plan change is directly contrary to s 74 of the Act, which requires this. The Supreme Court did not suggest that Part 2 would be an irrelevant consideration in a case such as the present where decision-makers have choice. On the contrary, the Court said this:

Reflecting the open-textured nature of Part 2, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s 5 and the remainder of Part 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though Part 2 remains relevant.²¹

[Footnotes omitted]

- (g) For the above reasons, it is submitted that King Salmon is distinguishable on its facts.

The express wording of the Act for a plan review

- (h) Applying section 32 as a process step for a plan review, it is clear that objectives are set in accordance with Part 2 (s32(1)(a)), then 'provisions' must be applied which best achieve those objectives having regard to a range of decision making factors (s32(1)(b)). Provisions are defined within the same section as the 'policies, rules, or other methods that implement, or give effect to, the objectives of the proposed plan or change'. I submit that interpreting a rezoning request on a notified plan over a submitter's land as an 'other method' within the meaning of 'provisions' would be an unduly narrow interpretation. Other methods in this context are clearly meant to relate to text of the PDP within its overall framework which directs land use. Such methods are often even prescribed in plans with that same name, and indicate how councils implement various policies and rules for a specific purpose. A 'method' within the meaning of 'provision' is clearly not intended to encompass a proposed alternative zoning of land compared to a notified zoning.

The alternative position

- (i) Even if the above submissions are not accepted, and the Commission considers that the draft PDP objectives are the only goal posts by

²¹ Ibid at [46] referring to King Salmon at [151].

which to assess rezoning proposals against, then in the alternative, it is submitted those draft objectives already notified give policy support for the relief sought by the Submitter in respect of the GSZ. Higher order objectives include the ability to enhance and increase public access and recreation for example.²² Where those positive aspects are considered to be in conflict with other objectives, and the directive or non-directive nature of the wording cannot reconcile such a conflict, then recourse must be had to Part 2 to interpret that conflict anyway (as per the first of the three *King Salmon* caveats).

²² 3.2.4.7 Objective – Facilitate public access to the natural environment

Appendix Two – List of Titles and Instruments

1. Certificate of Title 602575
2. Certificate of Title 697171
3. Certificate of Title 602577
4. Certificate of Title 685765
5. Consent Notice 9486490.2 **attached**
6. Land Covenant 9486490.5 **attached**



View Instrument Details

Instrument No. 9486490.2
Status Registered
Date & Time Lodged 28 Aug 2013 12:54
Lodged By O'Donnell, Kerry Amanda
Instrument Type Consent Notice under s221(4)(a) Resource Management Act 1991



Affected Computer Registers	Land District
602576	Otago
602577	Otago
602578	Otago
602575	Otago

Annexure Schedule: Contains 5 Pages.

Signature

Signed by Kerry Amanda O'Donnell as Territorial Authority Representative on 28/08/2013 12:36 PM

*** End of Report ***

**CONSENT NOTICE PURSUANT TO SECTION 221
RESOURCE MANAGEMENT ACT 1991**

IN THE MATTER of Section 221 of the Resource
Management Act 1991

A N D

IN THE MATTER of subdivision consent by Parkins Bay
Preserve Limited RM120588 (as varied
by RM130274 and RM130491)

BACKGROUND

- A. PARKINS BAY PRESERVE LIMITED of Queenstown has applied to the Queenstown Lakes District Council pursuant to provisions of the Resource Management Act 1991 for its consent to subdivide land comprised and described in Certificate of Title 478353 (Otago Registry) ("the land").
- B. Council has granted consent to the proposed subdivision subject to certain conditions which are required to be complied with on a continuing basis by the Owner of the land being those conditions specified in the Operative Part hereof.
- C. In this Consent Notice, the below terms have the following meanings:
- i. **"Resource Consent"** means RM120588 (as varied by RM130271 and RM130491).
 - ii. **"Land Use Consent"** means the land use consent granted pursuant to Environment Court decision [2012] NZEnvC 79 and any subsequent variation of that consent.
 - iii. **"Stage 3"** has the meaning given to it in the Land Use Consent including any variation.

OPERATIVE PART

2. The following conditions (being condition 5 of the Resource Consent) pertaining to this Consent Notice are to be registered against the Computer Freehold Register for the following allotments.

Lot 2, 9, 10 and 11 DP457489 (CFR 602575)

- a. Prior to any further subdivision the owner of Lots 2, 9, 10 and 11 DP457489 shall establish a management organisation and structure (and secure that structure for successors in title by registration of the relevant documents on the titles of all of those lots) to ensure joint responsibility (by those lot owners) for implementation and maintenance of the following:
- i. Establishing and management of a communal water supply (in accordance with condition 18g of the Land Use Consent).
 - ii. Implementation and on-going management of the re-vegetation strategy (in accordance with conditions 6, 8, 9, 10, 12, 13, 14, 41 m – r) of the Land Use Consent.
 - iii. Formation of cycle and walking trails within the registered public access easements (in accordance with condition 18d and 41 b - l of the Land Use Consent).
 - iv. Fencing (In accordance with condition 41 w - z of the Land Use Consent).
- b. No development contributions have been assessed under the Resource Consent as no demand on Council infrastructure is being created at this time. Therefore, at the time of future development on these lots, development contributions will be calculated and shall be payable on the relevant Council development contribution policy. No historic dwelling equivalent credits (deemed credits) as set out in the Council's Policy on Development Contributions are available for these lots.
- In the event that the necessary development contributions are paid as per (b) above, this consent notice condition shall be deemed to have expired and may be removed from the Computer Freehold Register for the affected lots.
- c. Within approximately 24 months of the works commencing that were approved under the Land Use Consent all public walking and cycling tracks approved under that consent (marked by blue and purple dotted lines on the plan referenced "Parkins Bay Glendhu Station Concept Master Landuse Plan dated 12 April 2012" attached to that consent) should be created (in accordance with condition 5(i) of that consent). The minimum standard for construction (that can be exceeded) shall be in accordance with the Walking Track Standard as defined in the Standard New Zealand Handbook for Tracks and Outdoor Visitor Structures (SNZ HB 8630; 2004) except as specified in condition 41 of that consent.

Once the public walking and cycling tracks have been created as per (c) above, this consent notice condition shall be deemed to have expired and may be removed from the Computer Freehold Register for the affected lots.

OPERATIVE PART

3. The following conditions (being condition 6 of the Resource Consent) pertaining to this Consent Notice are to be registered against the titles of the following allotments.

Lot 1 DP 457489 (CFR 602576)

- i. Lot 1 DP 457489 shall be covenanted as follows:
 - aa. For a period that commences on the date of the grant of the Land Use Consent until the date that is ten years from the implementation of Stage 3 there shall be no further development except that this restriction does not prohibit subdivision and the development of the club house with restaurant and café, twelve visitor accommodation units spread over three buildings, any part of the jetty, part of the golf course and associated landscaping, earthworks, vehicle access and associated activities.
 - bb. Regardless of titling structure and/or ownership, the clubhouse shall at all times be available to cater to, and for use by, users of the golf course as a place for rest, shelter, refreshment and possibly entertainment. If at any time in the future the land containing the proposed or existing clubhouse is subdivided from the land containing the proposed or existing golf course, a consent notice shall be registered against both resulting titles recording this ongoing consent obligation.
 - cc. All activities which are carried out within, and any future allotments which are created from Lot 1 DP 457489 shall share one access off Mt Aspiring Road.

Lot 2, 10 and 11 DP 457489 (CFR 602575)

- ii. Lots 2, 10 and 11 DP 457489 shall be covenanted in perpetuity from the date of the grant of consent against further development but not prohibiting subdivision of the golf course and the 42 house-sites, and the subdivision and development of eight visitor accommodation/residential units.

Advice Note: For the avoidance of doubt this consent only authorises 42 visitor accommodation/residential units. Any future application for up to eight additional visitor accommodation/residential units within Lots 2, 10 and 11 DP 457489 will require a variation to this consent or a new consent and a rigorous assessment of the measures proposed to sufficiently mitigate any potential adverse visibility/domestication effects.

Lot 8 DP457489 and Section 1 and 2 SO 347712 (CFR 602578)

- iii. Lot 8 DP 457489, Section 1 SO 347712 and Section 2 SO 347712 shall be covenanted, for a period that commences on the date of the grant of the Land Use Consent until the date that is ten years from the implementation of Stage 3, against further development not associated with usual farming activities.

Lots 4 and 5 DP 457489 (CFR 602577)

- iv. Lots 4 and 5 DP 457489 shall be covenanted, for a period that commences on the date of the grant of the Land Use Consent until the date that is 20 years from the implementation of Stage 3, against further development not associated with usual farming activities, but not prohibiting:
 - aa. Activities for camping purposes;
 - bb. Subdivision to separate Lots 4 and 5 DP 457489 from the rest of the land currently contained in Certificate of Title 478353;
 - cc. A subdivision which will create a separate certificate of title for an area surrounding the homestead within Lot 4 DP 457489; and
 - dd. Any boundary adjustment which does not create additional titles.

Lot 3 DP 457489 (CFR602576)

- v. Subject to subclause vi below, Lot 3 DP 457489 shall be covenanted in perpetuity from the date of the grant of the Land Use Consent against further development, but not prohibiting:
 - aa. Subdivision to separate Lot 3 DP 457489 from the rest of the land currently contained in Certificate of Title 478353 and any boundary adjustment which does not create additional titles;
 - bb. Any alterations, repairs or extensions to the existing dwelling located on the land;
 - cc. The construction of a shed for the purpose of storing farming and landscaping equipment;
 - dd. The erection of any temporary buildings such as marquees and other shelters used for the purpose of conducting weddings and reception functions, for not more than 12 calendar days per year, and a maximum of 6 occasions; and
 - ee. The construction of a chapel.
- vi. The restriction detailed in v. above relating to temporary buildings for weddings and reception functions shall take effect on and from the date the clubhouse is constructed and operational.

Lot 6 and Lot 7 DP 457489 (CFR602578)

- vii. Areas CH and CI shown on DP 457489 shall be covenanted for a period that commences on the date of the grant of the Land Use Consent until the date that is 35 years from the implementation of Stage 3, against any further development, but not prohibiting:
 - aa. Subdivision to separate Areas CH and CI shown on DP 457489 from the rest of the land currently contained in Certificate of Title 478353;
 - bb. Subdivision for farming purposes;
 - cc. Any boundary adjustment which does not create additional titles;
 - dd. The relocation, repair and replacement of the existing homestead and ancillary buildings;
 - ee. The construction, repair and relocation of any improvements or buildings which relate to the farming activities carried out on the land;
 - ff. The construction of two further residential dwellings on the land and any subsequent repairs and alterations to those residential dwellings.

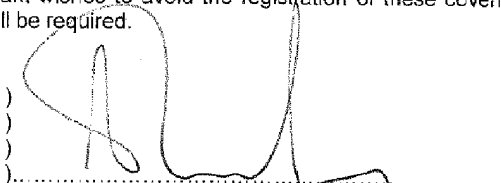
Lot 7 DP457489 (CFR602578)

- viii. Area CJ shown on DP 457489 shall be covenanted in perpetuity from the date of the grant of the Land Use Consent against any development not associated with farming activities or regeneration of native forest or other vegetation, but not prohibiting any boundary adjustment which does not create additional titles.

Advice Notes:

- Council has no liability to undertake any maintenance of the pedestrian and cycleway access easements until they have been formed and signed off as per the requirements of the Land Use Consent. Once approved by Council there is a one year maintenance period to be undertaken by the developer before Council accepts maintenance and management of the formed accessways.
- It should be noted that no physical infrastructure is contained with the water easements E & D, these easements are to secure access rights to an existing bore which is proposed to service the development proposed by the Land Use Consent. All related physical works will be done in conjunction with the Land Use Consent.
- The Resource Consent does not preclude the requirement to register the covenants imposed in the Land Use Consent. If the applicant wishes to avoid the registration of these covenants a variation to the Land Use Consent will be required.

SIGNED for and on behalf
of the **QUEENSTOWN LAKES**
DISTRICT COUNCIL by its
Chief Executive Officer



Adam John Jud Feeley

DATED the 27th day of August

2013