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 Hearing Stream 10 – Natural Hazards, Definitions and Whole of Plan

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

Hearing Stream 10 – Natural Hazards, Definitions and Whole of Plan

27 March 2017

Simpson Grierson
Barristers & Solicitors

S J Scott/ C J McCallum/ K L Hockly
Telephone: +64-3-968 4018
Facsimile: +64-3-379 5023
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

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1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen during the course of the hearing on Chapters 2 Definitions, 28 Natural Hazards and the 'whole of plan' matters, and to provide the Council's position on specific issues.

1.2 Filed alongside these legal submissions are the planning replies of:

(a) Ms Amy Bowbyes for Chapter 28 Natural Hazards (**Natural Hazards chapter**);
(b) Ms Amanda Leith for Chapter 2 Definitions (**Definitions chapter**); and
(c) Mr Craig Barr for 'whole of plan' matters.

1.3 Having considered matters raised and evidence produced during the course of the hearing, the above replies and associated revised chapters represent the Council's position.

2. COLLECTIVE SCOPE

2.1 During the Council's opening the Panel questioned whether the summary in Appendix 1 of the Council's opening legal submissions accurately reflects the Council's position on collective scope taken in earlier hearing streams. It was acknowledged orally that the summary was missing an element and a substitute **Appendix 1** is attached to these legal submissions in reply. This replacement reflects the Council's position and should also replace the summaries provided in Council's opening submissions, in Hearing Streams 5 (District Wide), 6 (Residential), 8 (Business) and 9 (Resort Zones).

3. NATURAL HAZARDS CHAPTER 28

Policy Position for Natural Hazards

3.1 Overall, following the hearing of submitter evidence, the Council confirms its position taken in its opening submissions in this hearing that:

(a) the Natural Hazards chapter is consistent with the decisions version of the PRPS in so far as it introduces a policy framework that takes a risk based approach to natural hazards (although this will need to be assessed again at the time that the final version of the PRPS is available);[1]

(b) a risk based approach to natural hazards is appropriate;[2]

(c) the concept of tolerability is an important addition to the PDP and appropriately reflects the approach taken in the PRPS;[3] and

(d) a non-statutory external hazards database is the most appropriate tool for mapping hazard information in the Queenstown Lakes District.[4]

3.2 The outstanding matters raised in the section 42A report on the Natural Hazards chapter were largely resolved prior to the hearing. All remaining matters raised by submitter evidence have been addressed in the planning reply. The result is that the evidence brought by submitters at the hearing now generally aligns with the policy position of the Council. Accordingly, it is submitted that the evidential foundation before the Panel is consistent with the Council's policy position.

Policy 28.3.2.4

3.3 Mr Hanley provided evidence on behalf of Otago Regional Council (**ORC**) (which was subsequently adopted by Mr Henderson at the hearing), requesting that Policy 28.3.2.4 be amended to more closely reflect Proposed Regional Policy Statement (**PRPS**) Policy 4.1.10. The evidence of Mr Henderson was that PRPS Policy 4.1.10 creates a clear and measurable test for allowing hard protection structures, that 4.1.10(b) allows for practicality in provision where it recognises

1 Council's Opening Legal Submissions on Hearing Stream 10 dated 13 March 2017 at paragraph 3.17.
2 Ibid, at paragraph 3.5.
3 Ibid, at paragraph 3.6.
4 Ibid, at paragraph 3.9.

that hard protection structures may be required where there are no reasonable alternatives, and further that Policy 28.3.2.4, as written, is too broad and therefore would not give effect to PRPS Policy 4.1.10.

3.4 As set out in Council's opening submissions in Paragraph 2.4, Ms Bowbyes considers that there would be merit in amending Policy 28.3.2.4 in the manner requested by Mr Henderson, but as neither ORC's submission or further submission relates to hard engineering solutions generally, or to Policy 28.3.2.4, no scope had been identified at that time to make such an amendment.

3.5 The Oil Companies[5] were the only submitter to submit directly on Policy 28.3.2.4, seeking that it be deleted in its entirety.

3.6 Policy 28.3.2.4 promotes the use of natural features in preference to hard engineering solutions in mitigating natural hazard risk. Therefore the effect of deleting the policy as sought by the Oil Companies would be that there would be no preference for the use of natural features over hard engineering solutions (i.e hard engineering solutions would be easier to promote as you would not have to first demonstrate that the use of natural features was not practical).

3.7 Compared to notified Policy 28.3.2.4, PRPS Policy 4.1.10 provides a higher threshold for the use of hard engineering solutions in that it provides for hard protection structures only when certain criteria apply. Therefore, the Council submits that the effect of amending Policy 28.3.2.4 to more closely reflect the PRPS Policy 4.1.10 would be that it would be more difficult to use hard engineering solutions. This is the opposite outcome from what would be achieved through the deletion of Policy 28.3.2.4, as sought by the Oil Companies.

3.8 Therefore the Council confirms its position taken in opening submissions, that, even when a broad view of scope is taken, the Oil Companies' submission does not provide scope for the change now sought by Mr Henderson for ORC.

5 Submitter 768 Z Energy Limited, BP Oil NZ Limited and Mobil Oil NZ Limited.

4. DEFINITIONS CHAPTER 2

Submitters invited to earlier hearings

4.1 Paragraph 1.2 of Council's opening submissions state that recommendations on the majority of submissions on definitions have been made through previous PDP hearings where s42A authors considered the submissions on definitions at the same time as they were considering the substantive and related provisions on a certain topic, and that "*Submission points were allocated, and submitters invited to, the respective hearing*".

4.2 The Panel asked the Council to confirm that all submitters on each definition used in a certain chapter (ie, no matter what the context of the submission) were invited to each substantive hearing. This is not the case. The following approach to making recommendations on and hearing submissions on definitions has been taken:

(a) submissions (on a definition) that had clearly been made in the context of a specific topic or chapter or rule, were considered in the relevant topic of chapter s42A, and invited to the hearing in which that specific topic or chapter or rule was heard;

(b) some defined terms are used across many chapters. Submissions (on a definition) were not invited to every substantive chapter in which that defined term is used; and

(c) all submissions on definitions that had not been heard in Hearing Streams 1 to 9, were invited to this hearing (Hearing Stream 10), being those submission points listed in Appendix 2 to the s42A report.

4.3 Council acknowledges that the approach in (a) requires some subjectivity as to whether a particular submission on a definition was in fact made in the context of a specific topic or chapter or rule, but was based upon the focus of the submitter's primary relief. It was however taken in order to ensure that submissions that were clearly made on definitions in the context of a particular chapter, and that would substantially change the interpretation of a provision under

consideration, were considered and heard at the same time as the provision, and to avoid duplication in calling evidence.

4.4 Ms Leith as the s42A author for definitions, is clear in her s42A that she has taken into account the evidence presented at the substantive hearings, where relevant.

4.5 Those submitters that have *not* had a recommendation made on *their* particular submission in an earlier hearing stream and therefore have not had an opportunity to call evidence and appear before the Panel, had that opportunity in this Hearing Stream 10.

4.6 Counsel has subsequently identified that there are some instances where Ms Leith has recommended additional changes to specific definitions, beyond those recommended in the substantive hearing (ie, air noise boundary and reverse sensitivity). A consequential process issue is that those submitters heard at the substantive hearing would not have had an opportunity to consider and provide evidence on Council's evidence or the supplementary recommendation, and unless they are listed in Appendix 2 of the s42A report due to the relevance of a different submission point, would not have been invited to this definitions hearing.

4.7 In order for there to be no prejudice to those submitters heard in earlier hearings and not invited to this hearing, Council would not oppose the Panel issuing a minute to the effect that:

(a) where Ms Leith has recommended a further change in either her s42A or right of reply to a definition already considered in a substantive hearing, and a submitter who has submitted on that definition has not been invited to this hearing;

(b) that those submitters be served notice of the evidence filed prior to and at the hearing; and

(c) be given a reasonable opportunity to provide written comments/evidence on the further changes recommended by Ms Leith.

4.8 This process should not be a further opportunity for submitters to 're-litigate' matters that have already been heard, but should be focused on any further recommendations made by Ms Leith, compared to the substantive right of replies. Whether the Council would need a right to reply to these written comments and whether there would be a need to resume the hearing, would be dependent on whether any submitters take up the opportunity and the content of their responses.

4.9 If the Panel considers this process is required, Council is in a position to provide information showing affected submitters.

What Panel to make recommendations on Chapter 2

4.10 The Panel sought Council's confirmation about how it expects recommendations to be made on Chapter 2 Definitions, given some submissions on definitions have been heard in earlier Hearing Streams. Where those submissions were heard in earlier hearings, the submitters were not invited to this hearing, and there submission point is listed in Appendix 3 to the s42A report.

4.11 In the absence of a submitter taking an opportunity to provide written comment (in the limited circumstances set out in paragraph 4.7 above), the Council respectfully submits that the Panels for Hearing Streams 1 to 9 should provide written recommendations on definitions to the Stream 10 Panel.

4.12 If the Stream 10 Panel wishes to reach a contrary or differing recommendation, the principles of natural justice and fairness may require that the Panel should itself re-hear all submissions and evidence presented to the panels for the substantive Hearing Streams 1 to 9, by way of *viva voce* rehearing. It would infringe natural justice principles for the Stream 10 Panel to make a recommendation on Chapter 2 that differs from the recommendations on specific submissions made by the other Panels that heard the matter, unless the Stream 10 Panel itself "hears" the application and any submissions on the application.[6]

6 *Jeffs v NZ Dairy Production Marketing Board* [1967] NZLR 1057, 1067 (Privy Council).

4.13 In effect, in the absence of a full reconsideration of the evidence and reports presented to the hearing, the consideration of the Stream 10 Panel's recommendation is limited to an approval of the reasoning and adoption of the recommendation as it stands.

Application of definitions in Designations chapter 37

4.14 At the request of the Panel, further consideration about the application of definitions to designations has been considered by the Council. The definitions of 'air noise boundary' and 'site' were raised as examples of where it would be preferable that the PDP definition is utilised in the airport designations.

4.15 Ms Amanda Leith has reviewed Chapter 37 and has identified one further instance (in addition to Aurora's Designation #570) where a designation specifically refers to a Chapter 2 definition. This is the Queenstown Airport Corporation's Aerodrome Purposes Designation D.1, and Condition 5(i) states clearly that for five specific definitions (including air noise boundary), the district plan definition applies.[7] Otherwise, the designations included within Chapter 37 contain a number of designation specific definitions, that have been drafted with an understanding of the context and background behind that specific designation and their conditions.

4.16 In relation to the Panel's query regarding the use of the term "site" within designations and whether it needs to be linked to the Chapter 2 definition, each designation includes a legal description of the designated site, and therefore it is submitted that there is no need to introduce a new definition (different to the ODP version, which was relevant when the majority of these designations were first sought).

4.17 The Panel asked counsel whether section 171(1)(a)(iv) is relevant to the legal position on the applicability of definitions to designations, in that it provides that when considering a requirement the Council must

7 Ms Leith right of reply, at para 3.3.

consider the effects on the environment of allowing the requirement while having particular regard to a plan or proposed plan.

4.18 This clause of the RMA relates to a territorial authority's consideration of a notice of requirement that has been lodged by a requiring authority under section 169 (ie, it is the designations equivalent to what section 104 is to a consent application), rather than the interpretation of a designation. Council refers back to its opening legal submissions in paragraphs 4.3 to 4.8, and reiterates section 176 of the RMA, which states that the provisions of a district plan (which include definitions) apply in relation to any land that is subject to a designation, only to the extent that the land is used for a purpose other than the designated purpose.

4.19 It remains the Council's position that unanticipated outcomes may arise if Chapter 2 definitions applied throughout Chapter 37, and Ms Leith continues to retain her recommendation as set out in her s42A Report. That is, that unless the designation specifically states that a definition in Chapter 2 is to apply, then in all other instances the definition in Chapter 2 does not apply.

Amendments to Advice note

4.20 In her s42A Report Ms Leith recommended that a number of 'notes' that sat directly under the notified definition, be included in the body of the definition. She considered that for some of the notes it was clear that the intent was to include the content within the definition, and she discusses and provides a recommendation on each definition.[8]

4.21 No submissions were received to relocate 'notes' into the definition itself or to restructure these types of definitions, however the Council respectfully considers it has the ability to do so under clause 16(2) of Schedule 1 of the RMA as it is a change of minor effect. Clause 16(2) of Schedule 1 provides:

8 Section 42A Report for Chapter 2 Definitions at section 33.

A local authority may make an amendment, without using the process in this schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

4.22 The Environment Court in *Re an application by Christchurch City* Council,[9] discussed the meaning of the words "*minor error"* and said:

An error is simply a mistake or inaccuracy which has crept into the plan. The obvious example is a spelling mistake or reference to a wrong paragraph number where there can be no doubt what number is intended. It is analogous to the use of the slip rule in other Court Proceedings. Thus rule 12 of the District Courts Rules 1992 make provisions for correction of a judgment which contains a clerical mistake or error arising from an accidental slip or omission. The fundamental principle applicable to the use of the slip rule is that it may only be used to correct a slip in the "expression" of a judgment not the "content".

4.23 The Environment Court determined a change would be within clause 16 of Schedule 1 of the RMA if "*the draftsperson seeks only to clarify what is clearly intended by the document and does not in any way make a change to it which alters its meaning*".[10]

4.24 On an ordinary reading of the definitions, the Council considers that the Advice Notes were clearly part of the notified chapter, and their content was necessary to correctly interpret the definition. There was also no indication in the chapter that they did not form part of the definition. It is therefore respectfully submitted that the changes to the Advice Notes in Chapter 2, recommended by Ms Leith, do not amend the content (ie, the merits) of the relevant definitions.

4.25 However, if the Panel do not agree with the Council's approach on this matter, Ms Leith considers that these notes can be reviewed further as part of Stage 2.

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9 *Re an application by Christchurch City Council* [1996] NZEnvC 97.
10 At page 11.

Niki Gladding (1170)

4.26 In a statement tabled at the hearing, Ms Gladding seeks that the Panel either:

(a) reject the s42A recommended definition of 'Visitor accommodation'; or

(b) notify the s42A recommendation so that people living within and adjacent to Visitor Accommodation zoned or sub-zoned land, and the wider public, have a chance to submit on the changes.

4.27 Ms Gladding considers that the criteria for bypassing the process in Schedule 1 of the RMA does not have merit as the effects *are certainly not minor nor do they correct any minor errors*.[11]

4.28 With respect to Ms Gladding, it is submitted that she has misunderstood the district plan review process. All members of the public have already had an opportunity to submit on the definition and provide their view on it (and/or make a further submission). The Council is able to recommend amendments to the definition based on the scope provided by those submissions. Following service of the s42A Report and supporting evidence on submissions, submitters are then enabled an opportunity to file evidence, and/or appear at the hearing. Therefore the second ground of relief sought by Ms Gladding, is not available to the Panel.

5. WHOLE OF PLAN

Upper Clutha Environmental Society (145)

5.1 The Upper Clutha Environmental Society (**UCES**) seeks that all rural subdivision activities have a non-complying activity status. This is in light of the Resource Legislation Amendment Bill, which would require all discretionary resource consent applications for residential activity to be processed on a non-notified basis. The Bill is currently before

11 Statement of Niki Gladding dated 16 March 2017, tabled at Hearing Stream 10, at paragraph 5.

the Committee of the whole House stage following its second reading on 14 March 2017.

5.2 The Council respectfully submits that this Bill has no relevance to the District Plan Review process nor the Panel's recommendations, until it is passed into legislation. If and when the Bill is passed, and depending on its final content, there may well also be some transitional provisions that will affect the scope of any changes such as notification requirements.

6. NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT CAPACITY

6.1 The Panel asked the Council a question in relation to its Memorandum of Counsel regarding the National Policy Statement for Urban Development Capacity (**NPSUDC**). This question will be answered through a separate memorandum of counsel.

DATED this 27th day of March 2017

S J Scott
Counsel for Queenstown Lakes District Council

APPENDIX 1 –
LEGAL PRINCIPLES ON SCOPE

1. The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:

1.1 a submission must first, be *on* the proposed plan;[12] and

1.2 a decision maker is limited to making changes within the scope *of the submissions* made *on the* proposed plan.[13]

2. The two limb approach endorsed in the case of *Palmerston North City Council v Motor Machinists Ltd,*[14] subject to some limitations, is relevant to the Panel's consideration of whether a submission is *on* the plan change.[15] The two limbs to be considered are:

2.1 whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

2.2 whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

3. The principles that pertain to whether certain relief is within the scope of a submitter's submission can be summarised as follows:

3.1 the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;[16]

3.2 another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought in a

12 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7.
13 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.
14 [2014] NZRMA 519.
15 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at paragraph 7.3-7.12.
16 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.

submission; the scope to change a plan is not limited by the words of the submission;[17]

3.3 ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter;[18]

3.4 scope is an issue to be considered by the Panel both individually and collectively. There is no doubt that the Panel is able to rely on "collective scope". As to whether submitters are also able to avail themselves of the concept is less clear. However, to the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief. there is no legal constraint on them producing evidence that goes beyond the relief they have addressed in their submissions or further submissions. The Panel is entitled to receive that evidence and give it weight at its discretion, provided it is within the bounds provided by "collective scope";[19] and

3.5 that submitter could not gain standing to appeal a decision through collective scope, in relation to a matter that goes beyond relief sought in either their submission or a further submission.

17 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.
18 Ibid, at 574.
19 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at Part 2.