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 15

REPLY REPRESENTATIONS / LEGAL SUBMISSIONS FOR QUEENSTOWN LAKES DISTRICT COUNCIL

STREAM 15

15 October 2018

Simpson Grierson
Barristers & Solicitors

S J Scott / M G Wakefield
Telephone: +64-3-968 4018
Facsimile: +64-3-379 5023
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 The purpose of these reply submissions is to assist the Hearings Panel (**Panel**) by addressing legal issues that arose during the course of Hearing Stream 15, and to respond to a small number of legal issues raised in the Minute issued by the Panel dated 28 September 2018 (**Minute**).[1] They do not respond to all of the detailed submissions filed by counsel for submitters. The absence of a specific response to any legal issue should not be taken by the Panel as acceptance of the merits of the respective positions as advanced in legal submissions presented on behalf of submitters.

1.2 The Minute is largely replied to, in the reply evidence filed by:

(a) Christine Edgley (Chapter 38 - Open Space and Recreation);
(b) Amy Bowbyes (addressing the Visitor Accommodation provisions);
(c) Rosalind Devlin (Visitor Accommodation Sub Zones - Mapping);
(d) Jerome Wyeth (Chapter 25 - Earthworks);
(e) Vicki Jones (Chapter 29 - Transport); and
(f) Amanda Leith (Chapter 31 - Signs).

and the following expert witnesses which is also filed with these submissions:

(g) Robert Heyes (Visitor Accommodation, economics); and
(h) Jeannie Galavazi (Chapter 38 - Open Space and Recreation, Council parks).

1.3 Having considered the matters raised, and evidence produced, during the course of Hearing Stream 15, these reply statements (including the recommended Reply provisions for the respective

1 The majority of matters listed in the Panel's Minute are responded to in the s42A author's right of replies.

chapters / provisions of the PDP) represent the Council's position on the matters allocated to this hearing stream.

2. CHAPTER 38 OPEN SPACE AND RECREATION

2.1 Three issues are addressed in this Reply in relation to Chapter 38, being:

(a) the extent to which the benefits of a proposal can be considered if not expressly provided for in matters of discretion;
(b) issues raised by Bridesdale Farm Developments Limited; and
(c) Council's position on Rule 35.4.3 (which has been varied through Chapter 38).

Consideration of positive effects as part of Restricted Discretionary Activity applications

2.2 During the hearing the Panel asked Ms Edgley whether 'positive effects'[2] are able to be taken into account as part of the consideration and determination of an application for a restricted discretionary activity (**RDA**). It is submitted that positive effects can be a relevant consideration, but only where the matters of discretion against which that application must be assessed allow that consideration.

2.3 Section 104C(1)(b) of the RMA requires that a consent authority, when considering an application for a RDA consent, "*must consider only those matters over which… it has restricted the exercise of its discretion in its plan…*".

2.4 Subsections (2) and (3) then provide for the grant or refusal of RDA applications, with the power to impose consent conditions limited to the matters over which discretion restricted in: national

2 'Effect' is defined in section 3 of the RMA as including a positive effect.

environmental standards or other regulations, and / or in a plan or proposed plan.[3]

2.5 If follows that positive effects associated with an application for a RDA consent can form a relevant consideration under section 104C, but in order for that to occur such positive effects must be either explicitly included as a matter of discretion, or otherwise captured by a matter of discretion as explored further below.

2.6 In this regard, Council notes that the extent to which positive effects will be a relevant consideration depends on the wording of the matter(s) of discretion. For example:

(a) a matter of discretion may be a type of effect (ie. effects on visual amenity, or cumulative effects). That may allow for the consideration of positive (and adverse) effects of visual amenity or cumulative effects; and

(b) a matter of discretion may be more of a functional nature (ie. vehicle access). This is unlikely to incorporate any positive effects.

2.7 If positive effects of an economic nature are sought to be captured, then that would need to be explicitly listed, as it is unlikely to be captured by the matters of discretion listed in the draft chapter.

Bridesdale Farm Developments Limited (655 and 2391)

2.8 Counsel for Bridesdale has questioned whether there is a jurisdictional challenge to the rezoning of Bridesdale's land (**Site**).

2.9 Council has not formally sought that submission 2391 be struck out. In short, this is because Council accepts that there is scope within Bridesdale's Stage 1 submission (655) to obtain the relief being pursued in Stream 15, that is to rezone the Site to Active Sport and Recreation Zone. This is because the Active Sport and Recreation provides a regulatory framework that sits within the 'spectrum' of available relief through submission 655, being the

3 Section 104(1)(a) and (b) of the RMA.

notified Rural Zone and the MDR Zone. The Stage 1 submission is still a live submission and one to be recommended/decided on in this hearing.

2.10 Therefore Council does not take issue with paragraph 6 of Bridesdale's legal submissions and agrees that the Panel has jurisdiction to consider Bridesdale's request for the Active Sport and Recreation Zone on the Site, through the jurisdiction/scope provided by submission 655.

2.11 To be clear, Council does not agree that Bridesdale has scope to seek this relief through submission (2391). The reasons for this position have been traversed many times before in these PDP hearings, including in the Council's applications for strike out of other Stage 2 submissions, such as Remarkable Parks Limited (2468.25), Glenpanel Developments Limited (2548.1) and Kiromoko No. 2 Limited Partnership (2405.1). The Panel has accepted this position and it is reflected (for example) in the Chair's Decision relating to Submissions not "on" Stage 2,[4] and its Second Decision of 2 August.[5]

2.12 However, in the case of Bridesdale, there was and still is, little point in the Council seeking to strike out submission 2391 on the Site, because Council accepts that the Stage 1 submission lodged by Bridesdale provides the scope for the rezoning relief to be pursued.

2.13 For the avoidance of any doubt, Council wishes to record it is not 'land ownership' that Council is applying in its approach to scope, it is the boundaries of the land that was notified on the Stage 2 plan maps, and application of the *Motor Machinist* principles, including in particular whether an extension to notified land would be incidental or consequential.

4 https://www.qldc.govt.nz/assets/Uploads/Procedure-Decision-Striking-Out-Submissions-17.05.18.pdf.
5 https://www.qldc.govt.nz/assets/Uploads/Procedure-2nd-Decision-Striking-Out-Submissions-2-8-18.pdf.

Rule 35.4.3

2.14 Council notes that the Panel has included in the PDP Stage 1 decisions version of Chapter 35, Rule 35.4.3.[6] This rule was originally notified in Stage 1 (as Rule 35.4.7) (with the rule applying to Council-owned public recreation land), but was subsequently varied in Stage 2 as part of the wider variations relating to the Open Space and Recreation zones.

2.15 The effect of the variation was to include the application of the rule to Open Space and Recreation Zones as well as Council-owned public recreation land.

2.16 The zoning of all Council-owned public recreation land has been varied in Stage 2, through the notification of the Open Space and Recreation zones. Decisions Rule 35.4.3 is referred to in the Panel's Report on Chapter 35 in section 9.6,[7] where the Panel made an amendment under clause 16(2) and then recommended that the rule be adopted as notified, subject to renumbering. The Report does not mention the variation to the Rule that was notified as part of Stage 2.

2.17 It is submitted that the effect of the variation, which was first in time, must prevail. At the time of issuing Stage 1 decisions, the variation and proposed plan were not at the same procedural stage (refer clause 16B of Schedule 1 of the RMA). The Rule can only be subject to a valid decision and appeal, when the variation is determined.

2.18 Appreciating that the memorandum has no legal effect, Counsel notes that this position is consistent with the view set out in its memorandum filed at the outset of Stage 2, dated 23 November 2017, which states: "*… the respective Panels will not need to make any recommendations on PDP (Stage 1) provisions that have been*

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6 Report 8 - Report and Recommendations of Independent Commissioners Regarding Chapter 30, Chapter 35 and Chapter 36, 30 March 2018: https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-1-Decisions/Reports/Report-08-Stream-5-Chapters-30-35-36.pdf.

7 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-1-Decisions/Reports/Report-08-Stream-5-Chapters-30-35-36.pdf.

subject to the variation, nor on whether to accept, accept in part or reject any Stage 1 submissions and further submissions, on such provisions".[8] Such submissions were deemed to be on the variation and to be decided on, in Stage 2 (which included notified Rule 35.4.7, as it was identified as being transferred to the Stage 2, Open Space and Recreation topic).

2.19 Council therefore requests the Panel make a recommendation on Rule 35.4.7 in its Stage 2 report.

2.20 The fact that a decision has been made as part of Stage 1 is more fundamental for the two appeals lodged in relation to that Stage 1 rule (being Decisions Version Rule 35.4.3). Council has raised jurisdictional concerns with both of those appellants and is in discussions about the appropriate course of action for those relief sought on appeal.

3. VISITOR ACCOMMODATION

3.1 Four issues are addressed in these reply submissions in relation to the matter of Visitor Accommodation, being:

(a) the inclusion of a standard requiring registration or notification of RVA / Homestay;
(b) supplementary legal submissions for Coherent Hotels Limited addressing the matter of notification;
(c) the validity of the submission by Queenstown Rafting; and
(d) the submission by Dynamic Guest House.

Standard requiring registration or notification

3.2 The Memorandum of Council filed on 14 September 2018[9] included a response on behalf of Ms Amy Bowbyes regarding the proposed registration and record-keeping standards and scope to

8 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/Hearings-Page/Memorandums/General//S0001-QLDC-ScottS-Memorandum-of-counsel-relating-to-Stage-2-and-variation-to-Stage-1.pdf , at paragraph 16.
9 https://www.qldc.govt.nz/assets/Uploads/QLDC-T15-Scott-S-MoC-re-Visitor-Accommodation.pdf, section 4.

require them under the RMA. This was at the request of the Panel following questions asked during the Council's opening, primarily due to concerns raised in evidence filed on behalf of submitters, and then Ms Bowbyes' rebuttal evidence where she put forward two options that may assist the Council in its implementing its compliance and enforcement functions.[10]

3.3 Counsel has further considered this option and submits that, while the RMA provides flexibility to territorial authorities in terms of how they choose to satisfy their functions (and prepare a district plan), there is no clear ability under the RMA to require the registration of activities before they can be undertaken as a permitted activity (other than through the resource consent process).

3.4 Registration, as an approach to regulate the use of land, is not clearly contemplated by the RMA. While the RMA provides flexibility to territorial authorities in terms of satisfying their functions (and preparing a district plan), there is no clear ability under the RMA for territorial authorities to require the registration of activities before they can be undertaken (other than through the resource consent process).[11] As a result, including a standard with this registration requirement could potentially raise questions as to the validity of the approach

3.5 However, an alternative exists, which was foreshadowed in the 14 September 2018 Memorandum and which Ms Bowbyes has addressed in her Reply evidence[12] and included in the Reply provisions for this topic. In short, this option would require persons undertaking RVA of Homestays to give prior notice of the activity to the Council.

3.6 The High Court, in *TL & NL Bryant Holdings Limited v Marlborough District Council*[13] (**Bryant**) (copy provided with the Council's 14 September Memorandum), has confirmed that a standard

10 Paragraph 7.13.
11 We note that the only application processes for the use of land provided under the RMA are for resource consents, notices of requirement (and heritage orders), permits and plan changes (if the plan change provides a permitted pathway for the use of land).
12 At paragraph 4.1.
13 [2008] NZRMA 485.

requiring the prior giving of notice of an activity is lawful. In that decision, the High Court considered the lawfulness of a permitted activity condition that required prior notification of certain aspects, including the location of the works, description of the works, the date of commencement; and an estimation of the duration.

3.7 The Court in *Bryant* found that the relevant condition was not *ultra vires* section 87A of the RMA, observing that the giving of notice would be of "*administrative convenience for the Council*" and would provide a basis for the Council to "*ensure that the work, when carried out, is done so that the parameters of the permitted activity are not exceeded*".[14]

3.8 Applying *Bryant* to the present scenario, it is submitted that a condition or standard could lawfully be included within a permitted rule framework that requires (for example) prior notice of the location, commencement date and estimation of nights and/or duration of the RVA and Homestay activity over a certain time period.

3.9 While it is accepted that a permitted standard or condition of this type would be similar to a registration requirement, it is submitted that it would not carry with it the same formality, importantly would not reserve any discretion in relation to the activity, and would not create potential unlawful extension of the Council's powers under the RMA. Further, it is submitted that such a notification standard would provide an informed basis for Council to monitor the activity, assess compliance and take enforcement action where required, addressing the concerns raised during the hearing.

Supplementary legal submissions addressing the matter of notification

3.10 Mr Brabant filed supplementary legal submissions on behalf of Coherent Hotels Limited (#2524), dated 27 September 2018, addressing the application of the amended ntification provisions in

14 At [49].

the RMA and the relevant VA provisions to a "hypothetical visitor accommodation development".[15]

3.11 Mr Brabant's submissions reach the following conclusions:

(a) There are rules included in the PDP that preclude both public and limited notification of VA in terms of sections 95A(4) and 95B(5) of the RMA;

(b) The VA-related notification rules will not preclude notification in the event that consent is required by rules other than those applying to VA (to interpolate, the VA rules will only preclude notification for the VA component of any hypothetical proposal); and

(c) The provisions in the RMA precluding the public notification of boundary activities will not apply to the proposed Building Restriction Area (**BRA**).

3.12 Counsel broadly accepts those conclusions and also refers to the reply evidence filed by Ms Rosalind Devlin, where this matter is also addressed.

The validity of the Queenstown Rafting submission

3.13 The legal submissions filed on behalf of Real Journeys (#2466), which has acquired Queenstown Rafting, suggest that the submission made by Queenstown Rafting in relation to Stage 1 will be "carried through" to the Stage 2 decision-making process.[16]

3.14 It is submitted that this is incorrect and that the submission, insofar as it relates to Stage 2, is invalid. The RMA does not allow for that outcome. Submissions only 'carry over' if they fall within the remit of the deeming provision in clause 16B(1) of Schedule 1 of the RMA.

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15 Supplementary legal submissions on behalf of Coherent Hotels Limited, filed after appearance: https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Evidence-PostHearing/S2524-Coherent-T15-BrabantJ-Supplementary-Legal-Submissions.pdf.

16 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2466-Real-Journeys-T15-Maree-Baker-Galloway-legal-submissions.d.pdf, at paragraph 4(b).

3.15 This position was also highlighted in the Council's memorandum to the Panel prior to the notification of Stage 2 of the PDP.[17] Submitters were required to make a separate submission for any of the Stage 2 topics that may interest them. This is the case for this submitter, where the Stage 1 was not recorded in the Council's memorandum as being one of those deemed to be on Stage 2.

Dynamic Guest House (2175)

3.16 The legal submissions filed on behalf of Dynamic Guest House (**Dynamic**)[18] submit that the policy direction referred to by Ms Bowbyes is not appropriate in light of the changes proposed to the Local Government Act 2002 (**LGA**). The submissions on behalf of Dynamic note that those changes:

> *… propose to incorporate The Treasury's Living Standards Framework aiming to achieve long-term sustainability and inter-generational wellbeing by amending the purpose provisions of that Act to include local government promoting the social, economic, environmental, and cultural well-being of their communities.*

3.17 With respect, proposed changes to the LGA (or any other legislation) do not form part of the decision-making framework for the Panel's recommendations on Stage 2 of the PDP.

3.18 The Council's opening legal submissions for Stream 15[19] provide a summary, at paragraphs 2.1 to 2.3, of the mandatory requirements for the preparation of district plans (referring to the *Colonial Vineyards* decision, subject to the recent amendments to the RMA). It is submitted that these requirements provide the relevant decision-making context for the Panel.

4. CHAPTER 29 TRANSPORT

4.1 Five issues are addressed in relation to Transport, being:

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17 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/Hearings-Page/Memorandums/General//S0001-QLDC-ScottS-Memorandum-of-counsel-relating-to-Stage-2-and-variation-to-Stage-1.pdf, at paragraph 6.

18 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2175-N-Vryenhoek-T15-Vryenhoek-N-Legal-Submissions.pdf, at paragraph 8.

19 https://www.qldc.govt.nz/assets/Uploads/S2239-QLDC-T15-Scott-S-Opening-Legal-Submissions2.pdf.

(a) Reply rules 29.3.3.1 and 29.3.3.2;

(b) the reintroduction of Definitions deleted as part of Stage 1;

(c) the amendments requested to Policy 29.2.2.5;

(d) the matter of the Stage 1 decisions on the Airport Zone; and

(e) an issue raised by Willowridge Developments Ltd (2408).

Reply Rules 29.3.3.1 and 29.3.3.2

4.2 Paragraph 14 of the Panel's Minute seeks legal advice in relation to the amendments proposed to "*Section 37.2 in relation to roads and the proposed provisions in 29.3.3.1 and 29.3.3.2*.[20]

4.3 The relevant provisions operate as follows:

(a) Reply Rule 29.3.3.1 applies when land is vested in the Council or Crown as road, with the provisions of the PDP relevant to roads[21] deemed to apply to that land from that date, as opposed to the PDP provisions relevant to the associated zones. Certain overlays and identified features located in the 'district-wide' part of the PDP continue to apply to the land;[22] and

(b) Reply Rule 29.3.3.2 applies when a road is lawfully stopped, with the adjoining zone provisions deemed to apply to the land from that date, as opposed to the PDP provisions relevant to roads. Where the former road meets different adjoining zones, those provisions applying to those zones will meet in the middle of the former road.

4.4 Counsel understands the question about these provisions to be whether they are lawful, due to certain rules being "deemed" to apply to land that would not normally be subject to those rules. In other words, do these rules undertake a plan change by stealth,

20 https://www.qldc.govt.nz/assets/Uploads/S2-Minute-re-Council-Reply-Stream-15-28-9-18.pdf
21 As per Table 29.2.
22 Those overlays and features that continue to have effect are those noted in Reply Rule 29.3.3.1(b), being the: Special Character Area, the ONL, ONF and Rural Landscape classifications, Significant Natural Area, Protected trees, and listed heritage buildings, structures and features.

given the absence of any formal Schedule 1 process to re-zone the vested land or stopped road before a different zone framework applies.

4.5 A plan change process (in accordance with Schedule 1) will be required before any land shown on the PDP plan maps can be rezoned (including land zoned as road). Prior to that process being initiated and completed, these rules operate so that an appropriate set of provisions will apply to the newly vested land or stopped road.

4.6 It is submitted that Reply Rules 29.3.3.1 and 29.3.3.2 are certain, and that the triggers for each are clear. It is further submitted that the rules are lawful, with section 76(4)(c) of the RMA providing for the inclusion of rules which apply "all the time" or for "stated periods". In this case, these provisions do not operate to change the zoning of any land, instead they trigger the application of an appropriate set of rules and standards that reflects the current use of the relevant land (ie. rules providing for / enabling road for newly vested road, or zone rules for newly stopped road). It is submitted that this approach will provide for the sensible use, administration and regulation of that land, up to the point at which a change in zoning is approved through a plan change process, and that these provisions will achieve the sustainable management purpose of the RMA.

Reintroduction of Definitions that were deleted as part of Stage 1

4.7 During the hearing the Panel raised the possibility of reintroducing the definitions of "place of assembly", "place of entertainment", "backpacker hostel" and "rural selling place", as clause 16(2) of Schedule 1 amendments. As the Panel will be aware, those definitions were removed as part of the Stage 1 decisions due to the defined terms not being used at all in the Stage 1 chapters.

4.8 Ms Jones addresses this matter in her reply evidence, at paragraph 4.4, where she considers that there is scope within a

number of original and further submissions[23] to reintroduce the relevant definitions to provide additional clarification in relation to the minimum parking requirements included in the PDP.

4.9 If the Panel is not satisfied that scope exists to make this change as assessed by Ms Jones, it is submitted that the reintroduction of the definitions is available in reliance on clause 16(2) of Schedule 1 to the RMA.

4.10 Clause 16(2) provides for alterations to a proposed plan, without using the Schedule 1 process, so long as those alterations are:

> *… of minor effect, or may correct any minor errors.*

4.11 In relation to the above definitions, it is submitted that it is the first limb of clause 16(2) that is relevant, being alternations of *'minor effect*'.

4.12 The leading authority on the use of clause 16(2) is the Environment Court decision in *Re an application by Christchurch City Council*.[24] The Court in that decision considered the potential for submissions to be made as a relevant factor in determining whether a change would be of *minor effect*, holding that:[25]

> *In deciding what might or might not have drawn a submission I consider the touchstone should be; does the amendment affect (prejudicially or beneficially) the rights of some member of the public, or is it merely neutral. If neutral it is a permitted amendment under Clause 16, if not so then the amendment cannot be made pursuant to Clause 16. Although to put it in that abstract way may seem unhelpful, I rather think that like pink elephants the neutral changes will be easier to recognise than to describe.*

4.13 It is submitted that this is a situation where the alterations (being the reintroduction of certain definitions) would amount to a 'neutral' change. The alterations involved in this case would be to include definitions that would be applied when interpreting the following Reply rules:

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23 Real Journeys et al (2492), the JEA group submissions (2448.39), Remarkables Park Limited (FS2754.2), Queenstown Park Limited (FS2755.2), and Gerry Oudhoff and James Hennessy (2326).
24 *Re an application by Christchurch City Council* (1996) 2 ELRNZ 431.
25 At page 10.

(a) 29.9.8 (place of assembly or place of entertainment);

(b) 29.9.17 (backpacker hostel); and

(c) 29.9.25 (rural selling place).

4.14 The alterations would be for added clarity and certainty of those rules, as opposed to materially changing (or changing at all) the rules in a way that could prejudicially or beneficially impact on the rights of any person. Ms Jones addresses the reintroduction of these provisions in her Reply evidence, at paragraph 4.2 to 4.6, noting that the inclusion of these definitions would assist to reduce potential ambiguity and that, in her view, the absence of these definitions will not change the operation of these rules in any way (ie. it is possible to administer the rules without the definitions).

4.15 On this basis, in terms of the touchstone identified in *Re an application by Christchurch City Council*, it is submitted that the inclusion of these definitions would be neutral in effect.

Submitters requested amendments to amend Policy 29.2.2.5

4.16 Remarkables Park Limited and Queenstown Park Limited (2462, 2755, 2468 and 2754) (**RPL / QPL**) seek the inclusion of an additional criterion (e) for Policy 29.2.2.5, which is sought on the basis of a submission by RPL / QPL on a related rule. Ms Jones for the Council has queried whether there is scope for this change.

4.17 The Panel queried the scope for this policy amendment with these submitters during the hearing, noting that it would be helpful for the legal principles relating to policy amendments to be clarified, where the relevant submission seeks amendments to a rule only (i.e. the principles relating to consequential relief).

4.18 Council accepts that there may be situations where the Panel has jurisdiction to recommend an amendment to an overlaying policy when a submitter has only sought an amendment to a related rule, but submits that such amendments cannot go beyond what is fairly

and reasonably raised in any submission and careful analysis is required before taking that step.

4.19 The authority addressing 'consequential' amendments has approached the matter in a liberal manner, finding that an overly legalistic view in relation to the relief sought in submissions is unrealistic.[26]

4.20 The Environment Court in *Campbell v Christchurch City Council*[27] set out three questions in order to assist whether a submission reasonably raises any particularly relief, being:[28]

(a) Does the submission clearly identify what issue is involved and some change sought in the proposed plan?

(b) Can the local authority rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly in a non-misleading way?

(c) Does the submission inform other persons what the submitter is seeking?

4.21 The legal submissions for RPL / QPL rely on a number of submission points as providing scope for the change to Policy 29.2.2.5,[29] being: 2297.6, 2014.1, 2465.6, 2336.15, as well as a number of other submissions seeking greater flexibility in the operation of Policy 29.2.2.5.[30]

4.22 Ms Jones has assessed these submissions in terms of scope in her reply and rebuttal evidence,[31] which is not repeated in this legal reply. The conclusion is that these submission points do not provide scope for the policy amendment.

4.23 The reason for this is that the amendments requested by these submission points relate to quite discrete matters, including that

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26 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [I9941 NZRMA 145, at 167.
27 [2002] NZRMA 332.
28 At [42].
29 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2462-QPL-T15-WardR-legalsubmissions.pdf.pdf, at paragraph 5.3.
30 2448.13, 2465.10, 2466.44, 2467.5, 2492.38, 2494.42, 2518.4, 2560/11, 2581.44, 2590.7 and 2601.7.
31 At 13.1 to 13.2.

there will be "positive design outcomes", "opportunity for landscaping onsite" or that the "reduction will assist in achieving anticipated higher densities". While there may be situations where the relief sought in a submission could have consequences for related policies, in this case it is submitted that none of the submission points fairly or reasonably raise the matters or concepts now captured by the requested new criterion.

4.24 In applying the *Campbell* test to this scenario, it is submitted that Ms Jones' position is correct, and that there is no scope within those submission points to add an additional criterion to Policy 29.2.2.5.

4.25 Counsel notes that its position on the ability to make consequential changes to a policy, when a submission is only on a rule, is consistent with the views expressed in an earlier memorandum filed with the Panel as part of Stage 1.[32]

Airport Zone

4.26 During the hearing Commissioner Nixon queried the extent to which the Stage 1 Decisions Version Airport Zone could be relied on, noting that appeals had been lodged in relation to the Airport Zone. Council understands that the query broadly relates to the uncertainty arising from these appeals as to the provisions included in Stage 1 apply to the Airport Zone.

4.27 The short answer is that in this context, where the Stage 2 provisions will eventually form part of the same PDP as those decided in Stage 1, the uncertainty arising from appeals in relation to previously decided Stage 1 provisions goes to weight only. It is ultimately for the Panel to determine how much weight it places on any provisions decided as part of Stage 1, insofar as it is required to do so to issue its decisions in Stage 2, but it is submitted that in the event of any uncertainty or doubt arising from appeals, resolving that issue should involve referral to Part 2 of the RMA.

32 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/Hearings-Page/Memorandums/Request-for-Legal-Opinion-regarding-Consequential-Amendments.pdf

Willowridge Developments Ltd (2408)

4.28 During the hearing, counsel for Willowridge Developments Limited sought an assurance that they will be able to submit on the district wide provisions that will apply to Three Parks, with the Panel requesting a response to this matter in legal submissions.

4.29 The Council accepts that there may be scenarios where submissions on later stages of the PDP could engage with the settled district wide chapters of the PDP. However, it is submitted that there is no ability to seek changes to all of the provisions already determined through Stage 2 through a submission on Stages 3, 4 or 5 of the PDP (when relevant).

4.30 While it is ultimately a question of scope as to whether a submission provides the necessary scope to change a provision that is not subject to the notified plan change, it is submitted by Council that there is no basis on which to change any higher order provisions in the way described by this submitter when a site-specific solution would be more appropriate.

4.31 Any submission on Stages 3, 4 and 5 will be able to seek zone specific relief, or relief that relates to specific sites and provisions, but with those provisions acting as carve outs to other rules in Stage 2, rather than re-litigating the fundamental objective/policy framework that is subject to submissions in this hearing.

5. CHAPTER 25 EARTHWORKS

5.1 Two issues are addressed in relation to Earthworks, being:

(a) the relevance of Plan Change 49;
(b) duplication between PDP and Otago Regional Council plans / Wanaka Landfills.

Relevance of Plan Change 49

5.2 Both Real Journeys (2466)[33] and Darby and co (2376)[34] consider that subjecting earthworks within Ski Area Sub Zones (**SASZs**) to "*greater regulation as compared to the Operative position*" is contrary to case law and "*not justified in that it represents a fundamental change to the (recently) approved Operative earthworks chapter (being Plan Change 49)*.[35] The submitters question the need and efficiency of reviewing this chapter.

5.3 Counsel refers to its opening submissions for this hearing stream, which addressed the relevance of Plan Change 48 in relation to the Signs Chapter,[36] and submits that the same analysis can be adapted for Plan Change 49 and these submissions for Real Journeys and Darby and co.

5.4 The Council's opening submissions, at paragraph 8.5, set out a number of factors that go to whether it is reasonable to have regard to, and place some weight on, a decision recently issued by the Court in relation to the same matter now being heard as part of a plan change hearing, including:

(a) the relatively recent consideration by the Court of very similar issues;

(b) the level of scrutiny by the Court in relation to the provisions and alternatives; and

(c) the Council's intention to effectively integrate the plan change approach into the structure and style of the PDP.

5.5 Relying on the Council's opening submissions, there are several reasons why the Real Journeys and Darby and co submissions should not be accepted:

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33 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2466-Real-Journeys-T15-Maree-Baker-Galloway-legal-submissions.d.pdf at paragraphs 21 to 24.

34 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2376-DarbyPlanning-Ltd-T15-Baker-Galloway-M-Legal-Submi.pdf at paragraphs 13 to 16.

35 At paragraph 13.

36 At paragraphs 8.2 to 8.8.

(a) while Plan Change 49 was recently determined, it was determined by a panel of Commissioner's appointed by the Council,[37] without having had any appellate court scrutiny; and

(b) the Council has now notified and recommended a different planning approach for a range of matters across the PDP (both Stages 1 and 2), which it has justified for the purposes of section 32 of the RMA; and

(c) the proposed Earthworks provisions do not "reinvent the wheel" for the entire approach to regulating earthworks, instead, as noted by Mr Wyeth during the hearing, the proposed provisions build on and seek to improve the operative Earthworks provisions, in order to give effect to the new higher order directions included in Stage 1.

5.6 Mr Wyeth has provided extensive evidence, in his section 42A report[38] and rebuttal evidence,[39] as to why it is appropriate for earthworks within the SASZs to have some level of regulation through the PDP. It is submitted that his reasoned analysis on this matter should be preferred to that contained in the Plan Change 49 decision.

Duplication between PDP and Otago Regional Council (ORC)

5.7 The legal submissions filed on behalf of Real Journeys (2466)[40] and Darby and co (2376)[41] consider that there is unnecessary duplication between the PDP and Otago Regional Plan: Water (**Water Plan**), specifically in relation to rules concerning earthworks within or near waterbodies (e.g Water Plan Rules 13.5.1 and 14.3.1), and consider that this duplication should be removed from the PDP.

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37 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan-Changes/49/Att-A-Report-and-Recommendations-of-Independant-Commissioner.pdf.
38 Mr Wyeth's section 42A Report, at paragraph 8.1 to 8.27.
39 Mr Wyeth's Rebuttal evidence, at paragraph 3.5 to 3.10.
40 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2466-Real-Journeys-T15-Maree-Baker-Galloway-legal-submissions.d.pdf at paragraphs 25.
41 https://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/PDP-Stage-2/Stream-15-Submitter-Legal-Submissions/S2376-DarbyPlanning-Ltd-T15-Baker-Galloway-M-Legal-Submi.pdf at paragraphs 17 to 18.

5.8 The Council's opening legal submissions recognised that the management of effects on water quality (ie. sedimentation) is a function that primarily rests with regional councils under section 30 of the RMA, but submitted that the management of earthworks (and effects associated with earthworks (ie. arising from land use activities), are a function of both the Council and ORC. It is submitted that in certain cases, duplication is an appropriate outcome to ensure the proper regulation of activities.

5.9 The Council's opening submissions relied on earlier case authority, the essence of which is that there is a potential for overlapping jurisdiction between regional and territorial local authorities in relation to the management of effects.

5.10 The decision of the Environment Court in *Wanaka Landfills Limited v Queenstown Lakes District Council*[42] provides support for the position expressed in the Council's opening submissions on this matter. That decision, a copy of which is **attached** as Appendix A, disagreed with a submission that "*there is nothing in the Act that suggests the potential for overlap of the control of activities in a river bed in the manner contemplated by QLDC*",[43] and refused to make a declaration that QLDC has "*no legal jurisdiction to consider and decide the effects of gravel extraction activities in the river bed*".[44]

5.11 In this case, the submissions for Real Journeys and Darby note that it is "*generally less efficient, and is unnecessary to duplicate regulation in the District Plan where that is otherwise adequately managed through Regional Plans*".[45] As Mr Wyeth advised the Panel during the hearing, the Council is not striving to create unnecessary duplication, but where a particular matter is <u>not</u> being adequately managed elsewhere, it has proposed provisions that provide for district-level regulation (as is the case with some aspects of the proposed Chapter 25).

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42 [2010] NZEnvC 299.
43 At [20].
44 At [7], which sets out the four declarations sought by Wanaka Landfills.
45 At paragraph 17.

6. CHAPTER 31 SIGNS

6.1 Two issues are addressed in relation to Signs, being:

(a) clarifying where the responsibility to obtain consent / comply with the Signs rules rests; and
(b) the legality of Rule 31.5.18.

Responsibility to obtain consent / comply

6.2 During the hearing the Panel asked whether it is a landowner's responsibility to comply with the signage requirements and seek consent where required, or whether sign writers can also be held responsible. Counsel understands that this question was raised on the understanding that an arborist is required to comply with all district plan provisions relating to tree felling / removal works, including seeking consent.

6.3 It is submitted that the responsibility for complying with a district rule (including having to obtain consent where necessary) rests with the person *using* the land. "*Use*" for the purpose of section 9 is defined (in section 2) as meaning:

(a) alter, demolish, erect, extend, place, reconstruct, remove, or use a structure or part of a structure in, on, under, or over land:
(b) drill, excavate, or tunnel land or disturb land in a similar way:
(c) damage, destroy, or disturb the habitats of plants or animals in, on, or under land:
(d) deposit a substance in, on, or under land:
(e) any other use of land; and

6.4 It is submitted that the installation of signage is clearly captured by the "*use a structure…on...or over land"* part of this definition. It is further submitted that the installation or use of any sign is the responsibility of the person undertaking that use, whether it be the landowner, or tenant of a site. In contrast, a sign writer is creating

a sign for use by others. While it would be helpful for a sign writer to advise of the responsibility to obtain consent (or comply with any PDP rules), there is no separate responsibility to comply.

Legality of Rule 31.5.18

6.5 At the hearing the Panel queried the legality of Rule 31.5.18, where it applies to any vehicle that is legally parked.

6.6 Relevantly, Rule 31.5.18 prohibits signs located so as to be visible from any road or public place for the purpose of advertising, including where signs are on any stationary trailer or vehicle (a) and attached to any stationary trailer or vehicle (b).

6.7 It is submitted that the inclusion of the qualifier "*for the purpose of advertising*" in the rule is important, as it creates a distinction between those vehicles and trailers that are parked legally and those parked legally but also *for the purpose of advertising*.

6.8 Council accepts that a degree of subjectivity will be involved when determining whether a trailer / vehicle is captured by this qualifier, and that it may be difficult to make that determination in certain situations, but it is submitted that there is nothing unlawful about the rule in terms of capturing any vehicles / trailers that are legally parked.

DATED this 15th day of October 2018

S J Scott / M G Wakefield
Counsel for Queenstown Lakes District Council

Appendix A

Wanaka Landfills Limited v Queenstown Lakes District Council [2010] NZEnvC 299

ORIGINAL

BEFORE THE ENVIRONMENT COURT

Decision No. [2010] NZEnvC 299

IN THE MATTER of an application for declarations pursuant to S310 of the Resource Management Act 1991

BETWEEN WANAKA LANDFILL LIMITED (ENV-2009-CHC-236)

Applicant

AND QUEENSTOWN-LAKES DISTRICT COUNCIL

Respondent

Hearing: Queenstown on 28th July 2010

Court: Environment Judge L J Newhook
Environment Commissioner R M Dunlop
Environment Commissioner C E Manning

Counsel: J Caunter and B Irving for Applicant
A Ray for Respondent
J Dippie for herself
A Gordon for himself

DECISION OF THE ENVIRONMENT COURT REFUSING APPLICATION FOR DECLARATIONS

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

A. Application refused.

B. Costs Reserved.

Reasons

[1] The applicant undertakes certain activities in and near the Cardrona River near Wanaka, including:

[a] A cleanfill operation;

[b] Gravel stockpiling and processing, the gravel having been extracted from the Cardrona River pursuant to permits granted by the Otago Regional Council ("ORC");

[c] Stockpiling concrete from demolition sites;

[d] Recycling of waste materials.

[2] Extensive affidavits were filed on behalf of the applicant and the respondent. These were so substantial, and certain of the debates between the planning experts so detailed, that we formed the initial impression that the proceedings were not suitable for the making of declarations. There were however some essential features in the case, and while ourselves undertaking reading of the pre-circulated submissions, we set Counsel the task of producing, if they could, a set of agreed facts.

[3] At the heart of the case was the situation in which gravel extraction from the river had been the subject of a series of consents from ORC over a number of years. In 2003 QLDC asserted that consents were necessary from it as a Territorial Authority, and it threatened enforcement proceedings if activities continued in the absence of such. The applicant was persuaded by the Mayor that the process would be quick and inexpensive, and so was encouraged to follow that course. The applicant now complained that years had gone by, and major difficulties and expense had been occasioned, to the point where the ORC permits have now expired before most of the applications to QLDC have been

resolved. These proceedings have been brought out of an intense feeling of frustration, which, from the factors outlined to us, appeared somewhat understandable.

[4] Another essential feature of the case is that while some of the activities are clearly intended to take place in a river, others take place on adjoining land. The surprise that we had was that the arguments mounted by the applicant alleging lack of legal authority on the part of QLDC to control activities in the bed of the river, appeared extended to other slightly related activities that take place beyond the banks of the river. We will return to the point later.

[5] Counsel managed to agree to the following, before we listened to their submissions:

Counsel agree that:

1. *WLL has applied for 3 resource consent applications:*
   - (a) *RM 050951 – resolved;*
   - (b) *RM 060273 – parked pending RM 090262; and*
   - (c) *RM 090262 – yet to be heard.*

2. *WLL has held the ORC permits identified in paragraph 4 of WLL submissions.*

3. *There is no argument about the nature of WLL activities occurring.*

4. *In relation to RM 060273, this activity involves mining and earthworks as it is land based extraction.*

5. *Activities occurring on the designated site at Ballantyne Road include:*
   - (a) *Landfill (closed);*
   - (b) *Transfer Station;*
   - (c) *Recycling centre;*
   - (d) *Greenwaste;*
   - (e) *Cleanfill; and*
   - (f) *Processing of material (WLL).*

   We accept that for the purposes of this argument, processing is occurring within the designated area.

The Legal Arguments

[6] Ms Caunter accepted logically that her client needed consents from ORC under s13(1)(b) to remove gravel from the bed of the Cardrona River.

[7] The detail of the declarations sought is as follows:

[a] As a territorial authority, Queenstown-Lakes District Council has no legal jurisdiction to consider and decide the effects of gravel extraction activities in the river bed.

[b] Any rules contained within the Queenstown-Lakes Operative District Plan relating to the control of gravel extraction activities in the river bed are *ultra vires*.

[c] A requirement for an applicant to seek resources consents from two separate local authorities for the same activity, resulting in different consent durations and conditions, is contrary to the principle of integrated management stated in sections 30(1)(a) and 31(1)(a) of the Act.

[d] The activities falling under resource consent application RM 090262 are to be assessed under the Operative District Plan as restricted discretionary activities.

[8] Section 9 RMA , concerning territorial authority (district) and regional jurisdictions, provides, to the relevant extent as follows:

> "9. Restrictions on use of land
>
> ...(2) no person may use land in a manner that contravenes a Regional Rule unless the use –
>
> (a) is expressly allowed by a resource consent;
>
> (b) is an activity allowed by section 20A.
>
> ...(3) no person may use land in a manner that contravenes a District Rule unless the use –

(a) is expressly allowed by resource consent; or

(b) is allowed by section 10; or

(c) is an activity allowed by section 10A".

[9] Section 13 RMA, relating to regional council jurisdiction, provides to the relevant extent as follows:

"13. Restriction on certain uses of beds lakes and rivers

...(1) no person may, in relation to the bed of any lake or river –

(a) use, erect, reconstruct, place, alter, extend, remove, or demolish any structure or part of any structure in, on, under, or over the bed; or

(b) excavate, drill, tunnel, or otherwise disturb the bed; or

(c) introduce any plant or any part of any plant (whether exotic or indigenous) in, on, or under the bed; or

(d) deposit any substance in, on, or under the bed; or

(e) reclaim or drain the bed –

unless expressly allowed by a National Environmental standard, a Rule in the Regional Plan as well as a Rule in the proposed Regional Plan for the same region (if there is one), or a resource consent."

[10] Of some note, counsel for the applicant omitted to quote sub-section (4) of section 13 which provides as follows:

"(4) nothing in this section limits section 9".

[11] The Act's definitions of certain words are important, "*land*" from section 9, and "*bed*" from s13.

[12] "*Land*" is defined in s2 RMA as follows:

"land –

(a) includes land covered by water and the air space above land; and

(b) in a national environmental standard dealing with a regional council function under s30 or a regional rule, does not include the bed of a

lake or river; and

(c) in a national environmental standard dealing with a territorial authority function under s31 or a district rule, includes the surface of water in a lake or river".

Parts (b) and (c) of that definition were introduced in the 2009 Amendment Act, and appear on their face to introduce some complications; nevertheless any such complications need not detain us on this occasion, because we are not dealing with national environmental standards.

[13] The definition of "*bed*" in s2 RMA is as follows:

"bed" means –

(a) in relation to any river -

(i) for the purposes of esplanade reserves, esplanade strips, and subdivision, the space of land which the waters of the river cover at its annual fullest flow without overtopping its banks;

(ii) in all other cases, the space of land which the waters of the river cover at its fullest flow without overtopping its banks;

...

[14] Analysis of these definitions and the way in which they have been employed in the two operative sections of the Act quoted, would appear to result in some straight forward propositions. For instance that land includes land covered by water (for instance a river), providing some level of jurisdiction to a territorial authority; and that leaving aside seasonal and climatic variations in riverflows, a river legally extends from bank to bank at its fullest flow. Cases cited by Ms Caunter confirm the latter, and there is no need for us to dwell on the point for present purposes.

[15] Ms Caunter developed the main part of her argument around an analysis of sections 30 and 31 RMA.

[16] Relevant parts of s30 and s31 are as follows :

"30 Functions of regional councils under this Act

(1) Every regional council shall have the following functions for the purpose of giving effect to this Act in its region:

(a) the establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the natural and physical resources of the region;

(b) the preparation of objectives and policies in relation to any actual or potential effects of the use, development, or protection of land which are of regional significance;

(c) the control of the use of land for the purpose of -

(i) soil conservation;

(ii) the maintenance and enhancement of the quality of water in water bodies and coastal water;

(iii) the maintenance of the quantity of water in water Bodies and coastal water;

(iiia) the maintenance and enhancement of ecosystems in water bodies and coastal water;

(iv) the avoidance or mitigation of natural hazards;

(v) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances;

...

(g) in relation to any bed of a water body, the control of the introduction or planting of any plant in, on, or under that land, for the purpose of –

(i) soil conservation;

(ii) the maintenance and enhancement of the quality of water in that water body;

(iii) the maintenance of the quantity of water in that water body;

(iv) the avoidance or mitigation of natural hazards;

...

(h) any other functions specified in this Act".

"31 Functions of territorial authorities under this Act

(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

(a) 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;

(b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of –

(i) the avoidance or mitigation of natural hazards; and

(ii) the prevention or mitigation of any adverse effects of the storage, use, disposal or transportation of hazardous substances; and

(iia) the prevention or mitigation of any adverse effects of the development, subdivision, or use of contaminated

land;

(iii) the maintenance of indigenous biological diversity;

...

(d) the control of the emission of noise and the mitigation of the effects of noise;

(e) the control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes;

(f) any other functions specified in this Act".

[17] Ms Caunter stressed differences between the wording of subsection (a) of each of the two sections, with regional councils having functions to achieve integrated management of natural and physical resources, and territorial authorities having functions to achieve integrated management of the effects of use development and protection of land etc. We do not think that a lot turns on this distinction.

[18] Ms Caunter was also inclined to focus on aspects of section 31 that she considered to be in some contra-distinction from comparable aspects of section 30. However we considered that she was glossing over subsection (1)(b), for instance (i) the avoidance of or mitigation of natural hazards, and (iii) the maintenance of indigenous biological diversity; remembering that these functions are in relation to effects of the use development and protection of land, defined as previously discussed. Ms Caunter's focus tended instead to be on sub-section (1)(e) concerning the surface of water in rivers and lakes, and other aspects of sub-section (1) which she said were relevant to the activities of her client.

[19] Ms Caunter placed before us certain authorities concerning the issue of overlap of jurisdictions between regional and district councils. She did this in a professional and objective manner, drawing to our attention aspects of decisions that ran counter to her case. In particular she placed before us a decision of the Court of Appeal in ***Application by Canterbury Regional Council***[1]. In that case the Regional Council had proposed in a land and vegetation management plan, to exercise jurisdiction to the exclusion of territorial authorities in respect of soil conservation and water quality and quantity. The

[1] [1995] NZRMA 452

territorial authorities in the region challenged the approach, and argued that s 31(1)(b) RMA gave territorial authority to the function of controlling the effects of use of land, including making rules which had the effect of, for example, promoting soil conservation. The Court of Appeal held that there can be an overlap between the functions of regional councils and territorial authorities. In particular, the Court made the following declaration[2]:

> A regional council may, to the extent allowed under s 68 RMA, include in a regional plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s 30(1)(c) to (h). A territorial authority may, to the extent allowed under s76, include in a district plan rules which prohibit, regulate or allow activities for the purpose of carrying out its functions under s31. **Neither a regional council nor a territorial authority has power to make rules for the purposes falling within the functions of the other, except to the extent that they fall within its own functions and for the purpose of carrying out its own functions. To that extent only, both have overlapping rule making powers, but the powers of a territorial authority also subject to s75(2).**

[20] Ms Caunter submit that in the area of endeavour under scrutiny in this case, the functions of territorial authorities and regional councils are clearly demarcated and separate. She submitted that the wording of the relevant provisions was very specific, for instance s75(2) outlines what must be covered in a district plan. She submitted that there is nothing in the Act that suggests the potential for overlap of the control of activities in a river bed in the manner contemplated by QLDC. We disagree, focusing particularly on s31(1)(b) as previously discussed in relation to land that is covered by water.

[21] It follows that her subsequent submissions to the effect that the permits granted by ORC are complete and adequate in every relevant way to control the operation, cannot be correct. For instance she submitted that ORC permits deal with matters such as the period of extraction, volumes of gravel, area from which gravel can be removed, methods, reporting, re-contouring, avoidance of flooding, erosion and scouring, and hours of operation. We find however that other matters arise that can come within the purview of QLDC, arising once again from the terms of s11(b), (d), (e), and perhaps other

[2] At p 459

provisions, such as noise, visual effects, dust, maintenance of biodiversity, and control of natural hazards.

[22] As an aside, while the applicant may be frustrated about the existence of this statutory overlap, there are machinery provisions in the Act which can assist. For instance s33 allows local authorities to transfer functions powers and duties under the Act to other public authorities, as indeed has been done between ORC and QLDC in relation to determination of certain land use consents and monitoring and enforcement powers. We were provided with a copy of a deed dated 23 March 1984 between the two councils in which ORC appoints QLDC to, amongst other things, to process land use consent applications in respect of structures which are proposed to be located in bed of rivers, or involve excavation of the bed or shoreline of lakes. Unfortunately for the present applicant, the processing of resource consent applications in respect of excavation of rivers, is not one of the delegated subjects.

[23] As also pointed out by Mr Ray, there can be the prospect of the authorities being persuaded to hold joint hearings under s102 RMA, noting in particular sub-section (4A) which imposes obligations on the authorities to avoid inconsistent conditions of consent.

[24] In the course of patiently answering our many questions during the hearing, Ms Caunter acknowledged the availability of these provisions, s102 in particular. It appeared that in the circumstances of her client's activities, difficulties had occurred in relation to aligning applications, time-wise. Closer attention to this course might perhaps be recommended in future, particularly in circumstances where the ORC permits have now in fact expired and new ones need to be sought.

[25] The final declaration sought relates to whether activities falling under one of the resource consent applications to QLDC should be assessed under the operative district plan as a restricted discretionary or a discretionary activity. Two problems confront the applicant in this area. First, assessment on the status of a proposed activity is primarily the task of the consent authority, subject to the usual rights of appeal. Secondly, this particular part of the application was the subject of extensive and strongly conflicting opinions of fact and expert opinion as between the planners, meaning the subject is not suitable for consideration as a declaration.

Result

[26] The Court, while sympathetic to the predicament that the applicant says it finds itself in, cannot make any of the declarations sought.

[27] The applications are refused. Costs are reserved, but in view of the sentiments just expressed, it seems to us that it would be appropriate for costs to lie where they fall in this case.

DATED at Auckland this 27th day of August 2010

For the Court:

L J Newhook
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND