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 2 – Rural, Rural Residential and Rural Lifestyle, Gibbston Character Zone, Indigenous Vegetation and Biodiversity and Wilding Exotic Trees

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

HEARING STREAM 2 – RURAL CHAPTERS OF THE PROPOSED DISTRICT PLAN

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TABLE OF CONTENTS

1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Panel regarding legal issues that have arisen during the course of the hearing on the Rural, Rural Residential and Rural Lifestyle, Gibbston Character Zone, Indigenous Vegetation and Biodiversity, and Wilding Exotic Trees chapters.

1.2 These submissions seek to address specific matters identified by the Panel during the course of the hearing, where the Panel sought the assistance of legal submissions.

1.3 They also seek to address some matters raised by submitters where the Council considers that further analysis is required, and to address some matters where the Council's position has changed from that set out in the section 42A reports.

1.4 Otherwise, these submissions do not and cannot feasibly respond to every legal issue raised by submitters during the course of the hearings. The absence of a specific response in these submissions should not however be regarded as acceptance of the points made by counsel for various submitters. We return to this point in further detail below.

1.5 Filed alongside this right of reply, are the planning replies of Mr Craig Barr for the following chapters:

(a) Rural;
(b) Rural Residential and Rural Lifestyle;
(c) Gibbston Character Zone;
(d) Indigenous Vegetation and Biodiversity; and
(e) Wilding Exotic Trees.

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

2. COLLECTIVE SCOPE

2.1 While the Council made legal submissions in its right of reply for the Strategic chapters in relation to the issue which has been described as "collective scope", counsel for some submitters[1] have sought to raise the issue again.

2.2 For the assistance of the Panel, without seeking to re-visit the issue in great detail, the submissions warrant a brief response.

2.3 In particular, criticism is made of the Council's previous legal submissions in that they confuse the issues of scope and standing. With respect, it appears that the submissions made for the Rural chapters are not entirely clear in terms of these issues, and how the submitters seek to rely on the concept of collective scope. It appears that they seek to rely on the concept to provide standing on matters that they have not submitted on.[2]

2.4 If the issue is solely about scope, then it remains the Council's position that scope is an issue to be considered by the Panel both individually (in terms of the relief sought in individual submissions) and collectively (in terms of the range of relief sought by all relevant submissions). This is however, in both instances, subject to fairness considerations in terms of the reasonable foreseeability of any relief that might be granted.

2.5 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. To the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief, it is submitted that the submitter could not appeal a decision in that respect or advance relief. It is submitted that submitters could not rely on collective scope to alter that position.

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1 See submissions of Mr Goldsmith dated 20 May 2016 in respect of submitters 502, 1256, 430, 532, 530, 531, 535, 751, 523, 1292, 537, and 515 at paras 3.1 – 3.12. See also submissions of Ms Baker-Galloway dated 24 May 2016 in respect of submitters 608, 610, 613, 763, 767, and 764 at paras 7.1 – 7.11.

2 See submissions of Mr Goldsmith dated 20 May 2016 at 3.12(c).

2.6 If the issue is about there being any legal constraint on submitters producing evidence to the Panel, the Council relies on its right of reply submissions on the Strategic chapters. There is no constraint. If submitters wish to produce evidence that goes beyond the relief they have addressed in their submissions or further submissions, they are entitled to do so. 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".

2.7 Where the Council disagrees with the submitters, is the suggestion that " … *the submissions and evidence presented by the submitters are within scope if they (or any part of them) meet any of the following tests: …* ***the relevant relief is within the scope of all submissions lodged to or in respect of the relevant DPR submissions***".[3] With respect, that cannot be correct even based on a generous interpretation of the *Simons Hill Station* case,[4] unless we have misunderstood the legal submission made; that suggests that a submitter has scope and standing to pursue appeals and relief based on matters that they have <u>not</u> made a submission or further submission on. In that respect, Schedule 1 of the RMA is submitted to be a code.

3. COUNCIL'S IMPLICIT ACCEPTANCE OF SUBMITTERS' POSITIONS

3.1 It appears from the legal submissions for some submitters that a position is advanced that an alleged failure by the Council to respond to evidence or submissions leads to an inference that the Panel is obliged to accept the evidence tendered by a submitter and/or grant the relief sought by that submitter.[5]

3.2 In responding to this suggestion, it is accepted by the Council that there is no presumption in favour of the Council's position and that the Panel's task is to determine the appropriate outcome in accordance

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3 See submissions of Ms Baker-Galloway dated 24 May 2016 at 7.11(c).

4 *Simon Hills Station Limited v Royal Forest and Bird Protection Society of New Zealand Inc* [2014] NZHC 1362.

5 See submissions of Mr Goldsmith dated 20 May 2016 in respect of submitters 502, 1256, 430, 532, 530, 531, 535, 751, 523, 1292, 537, and 515, of Ms Baker-Galloway dated 24 May 2016 in respect of submitters 608, 610, 613, 763, 767, and 764, and of Ms Baker-Galloway dated 23 May 2016 in respect of submitter 519.

with applicable statutory tests and in light of the evidence before it (subject of course to scope and *vires* issues).

3.3 To illustrate some of the legal submissions made on this issue:

(a) submitter 519 refers[6] to the fact that the Council's economic witness Mr Osborne did not specifically address in his evidence the benefits of mining and some of the other specific points raised by that submitter, and states that there is no expert economic nor landscape basis for rejecting the relief sought by that submitter;

(b) submitters 608, 610, 613, 763, 767, and 764 identify a conclusion reached by Mr Barr regarding the influence of farming on the District's landscapes and rural character, and state that it is not based on expert landscape evidence[7], and also that Mr Osborne did not make an assessment of the actual effects of tourism on ONFLs;[8]

(c) submitters 502, 1256, 430, 532, 530, 531, 535, 751, 523, 1292, 537, and 515 suggest that they have produced evidence as to the economic benefits to the wider community of increased rural living opportunities and of the more efficient use of the land resource that will result[9], and then proceed to criticise the Council's case for failing to respond to that evidence;[10]

(d) the same submitters identified in the preceding sub-paragraph also identify an alleged failure of Council's legal submissions to address issues of interest to those submitters and/or respond to their landscape and planning evidence;[11] and

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6 For example, paras 4.7 - 4.11 of Ms Baker-Galloway's legal submissions dated 23 May 2016.

7 Legal submissions dated 24 May 2016, paras 2.12 – 2.14.

8 Ibid, paras 3.13 – 3.15.

9 Legal submissions dated 20 May 2016, paras 6.7 and 6.8.

10 Ibid, paras 7.1 – 7.27.

11 Ibid, paras 7.28 – 7.33.

(e) the consequences of these alleged failures in the preceding two-sub paragraphs are then addressed in detail against the discrete relief and relatively more focused evidence presented by those submitters.[12]

3.4 The first point that should be addressed generally in responding to these matters is that, while the submitters identified that they continued to rely on the evidence that was produced for them in respect of the Strategic hearing stream, they generally do not acknowledge the evidence produced by the Council for those hearings (except to identify alleged errors or inconsistencies).

3.5 For the hearings relating to the Strategic chapters, the Council produced a significant amount of expert evidence which underpinned its strategic approach to the PDP and to the management of natural and physical resources in the District. It is accepted that, at that earlier hearing stage, submitters identified concerns about that strategic approach and suggested modifications to address those concerns.

3.6 A number of the matters raised by those submitters have been reiterated and addressed in more detail as part of the current hearing stream, particularly regarding issues such as the approach to identification and management of landscapes, and the purpose of the Rural zone in terms of making provision for activities other than farming.

3.7 For the sake of clarity, to the extent that it is relevant to the issues which are before the Panel in the current hearings, the Council relies upon the evidence that was produced during the Strategic hearing stream. It maintains its view as to the appropriate higher-level policy direction, which in turn will have an influence on the more specific issues which are before the Panel as part of this and subsequent hearings.

3.8 In addition, the absence of specific comment or acknowledgement of an issue raised by submitters, whether in the Council's evidence or

12 Ibid, sections 8 – 10 (pages 35 – 40).

otherwise, cannot be taken as implicit acceptance of that position or evidence. The scale and extent of matters that might need to be addressed does not always enable an all-encompassing approach in terms of the Council's expert evidence or legal submissions.

3.9 Furthermore, an expert witness will not always be in a position to address every issue raised by a witness for a submitter, but that does not mean that the Panel will not be equipped to assess the merits of the submitter's or Council's position without that specific evidence. The Panel can and does exercise its right to question the Council's experts and counsel about matters that have not been specifically addressed in pre-circulated material, and is able to have regard to the broad range of information which is before it in assessing competing positions.

3.10 The preceding points are identified in order to provide some context to the response to the examples referred to earlier, which essentially raise an inference of "concessions" being made by Council due to an alleged failure to provide direct or relevant evidence. In particular it is submitted on behalf of the Council:

(a) that the absence of express consideration by Mr Osborne of the benefits of mining does not undermine the weight of his evidence which was about the appropriateness of the Council's approach to management of non-farming activities in rural areas. Mr Osborne was clear in accepting that non-farming activities can and do have a range of benefits, but that a management approach such as that proposed by the Council was appropriate in order to effectively address risks and costs. In addition, in terms of landscape matters, the position of submitter 519 does not appear to acknowledge the evidence that was presented by Dr Read during the Strategic hearings;

(b) similarly, in respect of the position advanced for submitters 608, 610, 613, 763, 767, and 764, Mr Barr's evidence regarding the influence of farming was based on Dr Read's landscape evidence (including that presented during the

Strategic hearings), and it was clear that Mr Osborne did not make an assessment of the actual effects of tourism of Outstanding Natural Landscapes (**ONLs**) and Outstanding Natural Features (**ONFs**), but rather gave evidence as to the costs and benefits of the Council's proposed management regime;

(c) the alleged failure of the Council to respond to the evidence for submitters 502, 1256, 430, 532, 530, 531, 535, 751, 523, 1292, 537, and 515 regarding the economic benefits to the wider community of increased rural living opportunities and of the more efficient use of the land resource that is asserted to result, should be considered in the context of the Council's evidence in the Strategic hearing streams regarding its strategic approach to urban and rural development, the capacity of areas within Urban Growth Boundaries (**UGBs**) to accommodate living opportunities (particularly for more affordable housing), and the costs and inefficiencies of sporadic development;

(d) the alleged failure of the Council's legal submissions to address the issue of rural living are of little consequence for the Panel and do not detract from the matters identified in the preceding sub-paragraph – the Council has in fact addressed the submitter's case, while the submitters appear to have not engaged with the Council's case presented at the Strategic hearings which is highly relevant to the issue of rural living; and

(e) the understandably narrow approach adopted by the relevant submitters needs to be seen against the broader context set out above.

3.11 The Council's position on the merits of the issues raised is set out in the right of reply statements from Mr Barr. In terms of Mr Barr's coverage of issues in his section 42A reports, the RMA does not require that a section 42A report identify and respond to all submission points separately.

4. ASSESSMENT CRITERIA VERSUS POLICIES

4.1 The use of assessment criteria in a district plan is a method, other than rules, for implementing policies (section 75(2)(b) of the RMA). The Planning Tribunal in *Re an Application by Christchurch City Council*[13], although declining to make a declaration as to whether a district plan could include assessment criteria in respect of controlled, discretionary or non-complying activities, concluded that there was "ample scope" within the RMA to provide for the inclusion of assessment criteria in district plans in ways that would require a consent authority to have regard to them.[14]

4.2 In *Auckland Regional Council v Auckland City Council*[15] the Environment Court held that the insertion of assessment criteria in the City Council's district plan would be appropriate and would assist those preparing resource consent applications and those deciding them.[16]

4.3 It is submitted that, aside from being a lawful method, the inclusion of assessment criteria can also be helpful for applicants, submitters and the consent authority to indicate the matters that the consent authority will have particular regard to in making decisions on resource consent applications. This raises the related issue of the appropriateness of assessment criteria, which we address below.

4.4 In *Auckland Regional Council v Auckland City Council*, the Court highlighted that some of the wording proposed by the Regional Council would be more appropriate as a condition of a rule, than an assessment criterion. For example, it was suggested that in a criterion regarding public safety which required that "*Applications must demonstrate that adequate measures have been taken…*", it would be more appropriate for the wording to be replaced with "*The extent to which measures have been taken…*".[17]

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13 [1995] NZRMA 129.
14 *Re an Application by Christchurch CC* [1995] NZRMA 129 at page 147.
15 [1997] ELRNZ 54.
16 *Auckland Regional Council v Auckland City Council* (1997) ELLRNZ 54 at page 64.
17 *Auckland Regional Council v Auckland City Council* (1997) ELLRNZ 54 at pages 63 – 64.

4.5 In addition, assessment criteria should not be "exhaustive" or drafted in an exclusive manner, in the sense that they preclude other relevant considerations. The Environment Court in *RDM Consultants Ltd v Manawatu-Wanganui Regional Council*[18] commented on the Regional Council's assessment criteria that it considered would have been more appropriately kept separate from the plan, as guidelines to council committees.[19] The Court noted that the assessment criteria, consisting of some 14 guidelines to be considered for resource consent applications, contained "glaring omissions" and considered that enshrining a purported exhaustive list of criteria in a plan was "*to say the least dangerous*".[20]

4.6 While there is no express judicial authority for the point, to the extent that section 75(2)(b) of the RMA requires that methods in a district plan should implement policies, it is submitted that assessment criteria should not go beyond the scope of a policy, nor should they supplant the role of a policy (ie. if the assessment criteria contain meaningful guidance or direction as to outcomes, it would be more appropriate that such material be included in a policy).

4.7 Chapter 21.7 of the PDP sets out assessment matters for ONFs, ONLs and Rural Landscape Classifications (**RLC**). It is submitted that these assessment matters are both lawful and appropriate, and will be useful for applicants, submitters and the Council in that they indicate the matters that the Council will have regard to when deciding whether to grant applications.

4.8 In light of the case law however, the Council also suggests the addition of a note for the assessment criteria stating that the list of assessment matters are not exhaustive. The Council considers that a note to that effect would ensure that the plan is flexible enough to cover factual situations which may not have been foreseen in the drafting of the proposed plan. In any event, if assessment matters are within the scope of relevant policies, then the policies would be able to be applied in any event to fill any "gaps" in criteria.

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18 EnvC W091/98.
19 *RDM Consultants Ltd v Manawatu-Wanganui RC* EnvC W091/98 at page 2.
20 *RDM Consultants Ltd v Manawatu-Wanganui RC* EnvC W091/98 at page 2.

4.9 It is noted that Ms Lucas, a witness for UCES (#145), suggested that the Council's proposed assessment criteria in provisions relating to ONFs and ONLS created a test, by the use of language such as "*the Council shall be satisfied that* …". It is accepted that this type of language leaves less room for assessment, and creates more of a benchmark for assessment. It is submitted that the issue is not one of lawfulness, but rather appropriateness for this type of approach. If for example the language refers to adequacy of information in order to address a particular matter[21], then it is submitted that it does not operate as a "test" in terms of an outcome or a result. If however the language is used in the context of suggesting an outcome[22], even though it enables the exercise of discretion or judgment, then it may be better included in a policy or the language adjusted to be more open.

4.10 Mr Barr has reflected on the issues raised during the hearing and has also addressed these matters in his right of reply.

5. UPPER CLUTHA ENVIRONMENTAL SOCIETY

5.1 At the hearing the Panel asked the Council to advise on whether the Upper Clutha Environmental Society's (**Society**) (#145) submission gives scope to reduce the size of a building platform (assuming the Panel saw merit in that amendment) when the Society's submission seeks that provisions in the Operative District Plan (**ODP**) relating to construction and alteration of residential buildings located within an approved residential building platform, or outside a residential building platform, are *rolled-over* in the exact same form they appear in the ODP.[23]

5.2 The relief sought by the Society makes it clear that it seeks the retention of the ODP framework. Anything in between the ODP and the PDP framework on the particular provisions submitted on is therefore arguably 'up for grabs'. The paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the

21 Such as at 21.7.1.3.
22 See 21.7.1.4, 27.7.1.6 and 21.7.2.7 for example.
23 Upper Clutha Environmental Society, Submission 145, second to last page of submission.

PDP. This is a question of degree to be judged by the terms of the PDP and the content of the submission. The assessment of whether any amendment is reasonable and fairly raised in the course of submissions should be approached in a realistic and workable fashion, rather than from the perspective of legal nicety. Relevant guidance from case law is set out at paragraph 86 of QAC's opening legal submissions, which is not disputed.

5.3 A comparison of the relevant PDP and ODP provisions is set out below for the Panel's convenience:

Buildings within building platforms

(a) ODP rules 5.3.3.2(i)(a) and (b) require a controlled activity resource consent for the construction or alteration of a building within a building platform, providing the alteration of an existing building is not increased by more than 50%;

(b) the equivalent PDP rules is 21.4.7 which permits the construction or alteration of buildings within a building platform;

(c) the relevant PDP rules as performance standards are 21.5.15 (colour and materials), 21.5.16 (Building Size) that require resource consent as a restricted discretionary activity if not met;

Farm buildings

(d) ODP Rule 5.3.3.2(i)(d) provides that the construction, replacement or extension of a farm building is a controlled activity if it meets the site standards in 5.3.5.1 xi;

(e) the equivalent PDP rule permits farm buildings (Rule 21.4.3) on the basis they comply with the performance standards rules setback from water bodies (Rule 21.5.4), farm buildings used for intensive farming (Rule 21.5.6), and a range of standards for the location, density and bulk of farming buildings (Rule 21.5.18);

Buildings outside building platforms

(f) In the ODP, Rule 5.3.3.3(i) requires a discretionary activity resource consent for the addition, alteration or construction of a building not within a building platform, and the identification of a building platform not less than 70m² and not greater than 1000m²;

(g) The equivalent PDP rules in terms of activities are Rule 21.4.5 for the use of land or buildings for residential activity; Rule 21.4.9 for the identification of a building platform not less than 70m² and not greater than 1000m²; and Rule 21.4.10 for the construction of any building including the physical activity associated with buildings including roading, access, lighting, landscaping and earthworks, not provided for by any other rule. All activities require a discretionary activity resource consent.

(h) In addition, Rule 21.4.8 permits the exterior alteration of buildings not located within a building platform.

5.4 When the relevant provisions are compared and considered in the round, it is submitted that there is a sufficient relationship between the subject matter and coverage of the PDP and ODP provisions such that the UCES relief most likely would provide the Panel with scope to reduce the size of building platforms, particularly given that the ODP approach is generally less permissive. It is finely balanced however, given that the PDP and ODP provisions relating to creation of building platforms appears to be very similar.

6. SHIPPING CONTAINER

6.1 The Panel enquired as to whether a shipping container is a 'building' or a 'farm building'. Relevant definitions are set out below from Chapter 2, Definitions and from the Building Act 2004.

6.2 In addressing this matter, it is noted that standards at 21.5.15 and 21.5.32 suggest that containers are regarded as buildings in the Rural

zone, in that they are regulated in the same manner as buildings if they are intended to or otherwise remain on a site for more than six months.

6.3 Nevertheless, for the sake of completeness, we address the various definitions (both statutory and as included in the PDP) in order to assist the Panel.

Building (from Building Act)	**Section 8:** *A building:* *(a) means a* ***temporary or permanent*** *movable or immovable* ***structure (including a structure intended for occupation by people, animals, machinery, or chattels****); and* *(b) includes—* *(i) a mechanical, electrical, or other system; and* *(ii) a fence as defined in section 2 of the Fencing of Swimming Pools Act 1987; and* *(iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in section 2(1) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or longterm basis; and* *(iv) a mast pole or a telecommunication aerial that is on, or forms part of, a building and that is more than 7 m in height above the point of its attachment or base support (except a dish aerial that is less than 2 m wide); and* *(c) includes any 2 or more buildings that, on completion of building work, are intended to be managed as one building with a common use and a common set of ownership arrangements; and* *(d) includes the non-moving parts of a cable car attached to or servicing a building; and* *(e) after 30 March 2008, includes the moving parts of a cable car attached to or servicing a building.* **Section 9(g)** provides that a building **does not include** *containers as defined in regulations made under the Health and Safety at Work Act 2015.* Clause 26(2) of the Health and Safety at Work (General Risk and Workplace Management) Regulations 2016 provides that 'container' means: *(b) … any enclosure, fixed vessel, pit, structure, sump, vat, or other container of a similar kind –* *(i) that contains any liquid; and* *(ii) the edge of which is less than 1 metre above the adjoining floor, ground or platform; but* *does not include any drinking trough for animals or any system of water collection, disposal, distribution, or storage.*

Building (from Chapter 2)	***Shall have the same meaning as the Building Act 2004****, with the following exemptions in addition to those set out in the Building Act 2004:* • *Fences and walls not exceeding 2m in height.* • *Retaining walls that support no more than 2 vertical metres of earthworks.* • *Structures less than 5m² in area and in addition less than 2m in height above ground level.* • *Radio and television aerials (excluding dish antennae for receiving satellite television which are greater than 1.2m in diameter), less than 2m in height above ground level.* • *Uncovered terraces or decks that are no greater than 1m above ground level.* • *The upgrading and extension to the Arrow Irrigation Race provided that this exception only applies to upgrading and extension works than involve underground piping of the Arrow Irrigation Race.* • *Flagpoles not exceeding 7m in height.* • *Building profile poles, required as part of the notification of Resource Consent applications.* • *Public outdoor art installations sited on Council-owned land.* • *Pergolas less than 2.5 metres in height either attached or detached to a building.* *Notwithstanding the definition set out in the Building Act 2004,* ***a building shall include:*** • *Any vehicle, trailer, tent, marquee,* ***shipping container****, caravan or boat, whether fixed or moveable,* ***used on a site for residential accommodation*** *for a period exceeding 2 months.* (our **emphasis added**)
Farming activity	*Means the use of land and buildings for the primary purpose of the production of vegetative matters and/or commercial livestock. Excludes residential activity, home occupations, factory farming and forestry activity. Means the use of lakes and rivers for access for farming activities.*
Farm Building	*Means a building (as defined)* ***necessary for the exercise of farming activities (as defined)*** *and:* *(a) Excludes buildings for the purposes of residential activities, home occupations, factory farming and forestry activities.* *(b) Excludes visitor accommodation and temporary accommodation.*

6.4 The starting point is the definition of *Building* from the Building Act. A shipping container falls within the wide definition of a temporary or permanent, and movable or immovable structure. The definition specifically includes a structure intended for occupation by people,

animals, machinery, or chattels. The latter three matters may be relevant to a shipping container used for farming purposes.

6.5 None of the specific exclusions in the PDP definition of *building* are relevant to a shipping container. However, the fact that the PDP definition of 'building' expressly provides that a *shipping container* is included in the definition is relevant to a shipping container used for occupation of people (as explicitly included through the Building Act definition), in that the *residential accommodation has to have been for a period exceeding two months* before a shipping container becomes a building. Relevantly, if a shipping container is used for residential purposes for a period over two months, it is then explicitly excluded from the definition of *farm building* as that *excludes buildings for the purposes of residential activities*.

6.6 Before a shipping container can be a *farm building*, it must then be *necessary for the exercise of farming activities (as defined)*. The activity must not fall into the exclusions listed in the *farm building* definition that relate to different types of residential activity.

6.7 Therefore the question as to whether a container is a *building* or *farm building*, turns to whether it is *necessary for the exercise of farming activities*, which means the use of land and buildings for the primary purpose of the production of vegetative matters and/or commercial livestock.

6.8 The answer to this question appears to take us back to the relevant Rural zone standards at 21.5.15 and 21.5.32, which effectively deem a shipping container to be a building (presumably if used for any purpose other than residential activities or farming activities) if it is intended to or remains on a site for in excess of 6 months. This is a matter that can be addressed further at the definitions hearing.

7. 'BED' OF A STREAM

7.1 During the hearing, the Panel requested a brief explanation as to how to measure the 'bed' of a stream. This is relevant to the application of standards, such as that at 21.5.4, regarding minimum setbacks of

buildings from the bed of a wetland, river or lake. Section 2 of the RMA provides the following definition of 'bed' in relation to a river:

> *(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**; and*
>
> *(b) in relation to any lake, except a lake controlled by artificial means*
>
> *…*
>
> *(ii) in all other cases, **the space of land which the waters of the lake cover at its highest level without exceeding its margin.***

7.2 It is respectfully submitted that the correct interpretation of "bed" requires analysis of each of the phrases 'space of land which the waters of the river/lake cover', 'fullest flow', 'highest level' and the words 'banks' and 'margin'. The particular statutory wording requires that the phase 'the space of land which the waters of the river covers' be interpreted in conjunction with the qualifying words 'at its fullest flow'.

7.3 The Environment Court discussed what constitutes the 'bed' of a river in *Whitby Coastal Estates Ltd v Porirua City Council*[24] in reference to the section 2 RMA definition, albeit that this focused on the issue of whether the river qualified for the purposes of esplanade reserves. Accordingly, while this case is of some assistance, the findings need to be considered in the context of the different definition of "bed" when esplanade reserves are not relevant.

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24 W61/2008.

7.4 In *Whitby Coastal Estates*, the Court was assisted by experts who agreed on the following,[25] and with which the Court also agreed that the bed is not defined to be:[26]

(a) the day to day (normal) flow width of the water only because this does not represent the annual fullest flow; or

(b) any area where the flow spills from the channel into an extensive flood plain or to a separate secondary flow path, as this could be regarded as overtopping its banks.

7.5 The experts also observed, and the Court accepted, that vegetation is one of the identifiers of the banks of a watercourse, but cannot be considered in isolation. Factors such as hydrology, landform and professional judgement also need to be applied.

7.6 The Court held that in calculating the 'annual fullest flow' for a river, more than one year's data should be used so that the annual variation may be taken into account.[27] The bed of a river may be but one part of the wider bed of a river,[28] and the mean annual flood (**MAF**) is an appropriate hydrological metric to determine the *annual fullest flow* in the RMA's definition of the bed of a river.[29]

7.7 In summary, the Environment Court held that the extent of the mean annual flood, excluding the water lying on flood plains or taking a secondary flow path, does represent the space of land which the waters of the river cover at its *annual* fullest flow without overtopping its banks.[30] Therefore, this is what is used to measure the 'bed' of a stream/river for esplanade reserves purposes.

7.8 For present purposes however, the definition of "bed" as it applies to rivers uses the term "fullest flow" without the "annual" qualifier. Therefore it is likely to be the maximum extent of any flows that do not result in overtopping of the river's banks. Essentially, this will require a judgment to be made as to where a river's banks are, and

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25 At paragraph 14.
26 At paragraph 36.
27 At paragraph 19.
28 At paragraph 37.
29 At paragraph 48.
30 At paragraph 56.

the indicators such as vegetation, hydrology, landform are likely to be required to inform professional judgment.

7.9 In terms of lakes, the same factors are likely to apply to determine where the "margin" of a lake is in order to calculate setbacks.

7.10 In most instances, the location of a bed/bank/margin of a river or lake may be relatively obvious and not require any specific expert assessment. There is however a potential issue that, for some streams and lakes, it may be necessary for a surveyor to be engaged to determine the extent of the bed of a river or lake for the purposes of assessing compliance with relevant plan standards. This is most likely unavoidable unless some other standard is applied.

7.11 Finally, we note that the definition of "wetland"[31] in the RMA is sufficiently vague (and does not use the word "bed") such that it may well require some expert assessment to determine the extent of a wetland and its bed, and hence whether the minimum building setback standard in rule 21.5.4 is met. Nevertheless, it remains appropriate that the standard applies to this form of water body.

8. NON-COMPLYING ACTIVITY STATUS PRINCIPLES

8.1 In order to assist the Panel, these submissions briefly cover the principles of using a non-complying activity status in the PDP. The Environment Court has recently held that non-complying status is used to "*signal that proposals…will be subject to a higher degree of scrutiny, and have to meet a sterner test, because of the likelihood that at least one adverse effect…will be more than minor".*[32]

8.2 Non-complying activity status also indicates to the community that some activities are likely to be less appropriate in certain locations,[33] and that there will inevitably be a higher chance that consent will be declined.[34] In order for a non-complying activity to be granted, there

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31 **wetland** includes permanently or intermittently wet areas, shallow water, and land water margins that support a natural ecosystem of plants and animals that are adapted to wet conditions.
32 *Mighty River Power Ltd v The Porirua City Council* [2012] NZEnvC 213 at paragraph 32.
33 *Mighty River Power,* at paragraph 32.
34 *Mighty River Power,* at paragraph 34.

must be a true exception which justifies a non-complying activity.[35] While the true exception test is not mandatory it:[36]

> *… can assist the Court in assessing whether issues of precedent are likely to arise and whether the proposal meets the objectives and policies of the Plan by an alternative method.*

8.3 The true exception test is an *appropriate way of measuring the impact of a particular application* of the plan.[37] The Court has held that the word *true* in this context, is used in the sense of *genuine* or *real* so as to distinguish it from points simply of difference.[38] In terms of plan drafting, where objectives and policies provide a very clear direction as to the importance of an issue or significance of adverse effects, non-complying status is appropriate. This is because any activities that can overcome the section 104D gateway tests might be regarded as a true exception to the policy approach. Hence the application for that activity ought to meet the section 104D gateway test and then be assessed under section 104 of the RMA.

8.4 The Environment Court has stated that the purpose of a non-complying activity is not to create a type of de facto prohibited activity, but to allow for activities that are acceptable in the sense that they do not oppose or challenge objectives and policies and therefore qualify for further examination under section 104.[39] There is a requirement that a non-complying activity, if granted, must not effectively change the rules for all comers. It must be clearly restricted to the facts that set the application apart from the norm.

9. WANAKA AIRPORT

Bespoke zone provisions

9.1 QAC filed legal submissions on 16 May that address the scope of QAC's submission on Wanaka Airport, in particular the request for a bespoke set of provisions (at paragraphs 77 to 92). The Panel also

35 *Kohli Enterprises Ltd v Auckland Council* [2013] NZEnvC 146 at paragraph 47.
36 *Mason Heights Property Trust v Auckland Council* [2011] NZEnvC 175 at paragraph 88.
37 *Dunedin Ratepayers and Householders Association Incorporated v Dunedin City Council* C39/2004 at paragraph 92.
38 *Dunedin Ratepayers and Householders Association Incorporated v Dunedin City Council* C39/2004 at paragraph 92.
39 *Price v Auckland City Council* (1996) 2 ELRNZ 443 (EnvC).

asked the Council to address this issue in its closing, in particular whether there was scope for a specific sub-zone or overlay for Wanaka Airport. The Panel also questioned whether there were any legal constraints in an underlying zone being more constraining than the overlay.

9.2 Council has considered QAC's legal submissions on this point and the questions put to legal counsel (for Council and QAC) and Ms O'Sullivan. Council agrees that there is scope for an overlay or subzone approach, or the creation of a new Wanaka Airport zone, within its own right or as a component of the Queenstown Airport Mixed Use Zone within Chapter 17 of the PDP. Council's preference from a planning perspective is that the relief is provided for through the latter concept, as part of Chapter 17.

9.3 Importantly however, QAC have acknowledged that there are 'gaps' in the objective/policy framework proposed by Ms O'Sullivan, even if they formed part of the Airport Mixed Use zone, and that further work is required to draft those objectives / policies. Council's position is that QAC should provide the necessary additional drafting work so that the zone provisions can be incorporated into the Council's section 42A report (and revised chapter) for that hearing.

9.4 In terms of the Panel's jurisdiction to transfer the submission points to another chapter, Council submits that there is nothing in the RMA preventing the Panel from considering the appropriateness of relief sought, within a different chapter. The relevant submission points will need to be reconsidered in the section 42A for that chapter, and all further submitters on the relevant QAC submission points will need to be advised of the proposed approach to considering the relief in the hearing on Chapter 17, Airport Mixed Use. Further, the inclusion of the zone provisions in the Council's revised chapter as recommended through its section 42A, will ensure submitters are fully aware and able to respond through evidence, to any issues as to the merits of the proposed bespoke provisions for Wanaka Airport.

QAC proposed REPA

9.5 Council's position has not changed since opening, in that it does not support the prohibited rule being pursued by QAC in relation to the proposed Wanaka REPA. The further information provided by QAC by memorandum on 30 May 2016 confirms that the proposed REPA affects private property (in addition to QLDC owned land). QAC has not provided any information on the costs to these landowners. Further the proposed REPA does not align with the existing designation and therefore landowners would not have inferred accurately from the quality of the map provided with QAC's submission that they may be affected by the proposed rules, as suggested by counsel for QAC at the hearing.

10. TRANSPOWER AND VEGETATION TRIMMING IN SNAs

10.1 Transpower New Zealand Limited (#805) has sought an exemption from the indigenous vegetation clearance rules in SNAs, in order to make such clearance permitted where it is for the operation and maintenance of existing and in-service lines. This would make Transpower's position consistent with that of other utilities, where such vegetation clearance is permitted in SNAs.

10.2 Transpower's planning witness, Ms Craw, has proposed a permitted activity rule for the trimming of any indigenous vegetation (including in an SNA) if it relates to the operation, upgrade and maintenance of the National Grid. It is accepted by the Council that an outcome which required Transpower to obtain consent for this activity would be an anomaly when compared to the position of other utilities.

10.3 This raises interpretation issues however in terms of the application of the National Environmental Standard for Electricity Transmission Activities (**NESETA**) and whether such an approach might be precluded by NESETA and the operation of the RMA.

10.4 In particular, this raises the issue as to whether the rule, as it relates to SNAs, would be more lenient than the NESETA. Section 43B(3) of the RMA provides that a rule in a plan may not be more lenient than a NES. Clause 30(2)(b) of NESETA states that any tree or vegetation

must not be trimmed, felled or removed if it is in a natural area. NESETA defines a "natural area" as *"… an area that is protected by a rule because it has outstanding natural features or landscapes, significant indigenous vegetation, or significant habitats of indigenous fauna*".

10.5 There appears to be no suggestion that the relevant SNA that Transpower's rule would apply to is not an SNA. On its face therefore, because the SNA is protected by a number of rules because of the features it exhibits, it would usually fall within the scope of the "natural area" definition in NESETA.

10.6 The issue raised by Transpower, and its preferred interpretation, is that a rule which expressly permits tree trimming in the SNA means that the area is not a "natural area" for the purposes of NESETA because it is not protected by a rule. If that interpretation is accepted, then the rule would not be more lenient than NESETA and hence open to be accepted by the Council on the merits. Essentially, it would require the Panel to accept that the SNA is a natural area for some purposes, but not for others.

10.7 It is accepted by the Council that Transpower's interpretation is available, and would provide a solution to the anomalous situation of Transpower being subject to a higher degree of regulation, in respect of the same activity, than other utility operators.

10.8 There is however another interpretation which is available, which the Council considers should be understood by the Panel for the purposes of making a recommendation on this matter. The Council is also anxious to avoid recommending a rule which might be *ultra vires* in terms of section 43B(3) of the RMA and NESETA.

10.9 The alternative interpretation is that NESETA is applied on its face, and that a SNA is a natural area if it is protected by *any* rules because it has one or more of:

(a) outstanding natural features or landscapes;
(b) significant indigenous vegetation; or
(c) significant habitats of indigenous fauna.

10.10 This is potentially a more straightforward interpretation than that advanced by Transpower. If this is accepted by the Panel, then the proposed tree-trimming/vegetation removal activity would not be permitted by clause 30 of NESETA, and it would be *ultra vires* the RMA[40] for a permitted activity rule to be approved in this instance because it would be more lenient than the NESETA.

10.11 The Council acknowledges the anomalous outcome in terms of Transpower being caught by the NESETA in this instance, but notes that this is essentially a NES drafting issue which is likely to arise in other districts. If that is so, then a solution to the problem would appear to lie in re-drafting of NESETA. If however the Panel considers that the outcome and interpretation advanced by Transpower is more appropriate, the Council would not oppose that and takes the view that it would be open to the Panel to adopt Transpower's position.

11. THREATENED ENVIRONMENT CLASSIFICATION

11.1 The Panel enquired at the hearing as to whether the Threatened Environment Classification (**TEC**) maps had been incorporated into the PDP. The TEC maps are referred to at 33.3.2.6, which then refers users to 33.9. These provisions states that the TEC maps identify environments with less than 20% indigenous cover remaining.

11.2 The TEC maps form part of the notified chapter – they follow on under the 33.9 heading. The confusion has arisen during the course of the hearing as they were not replicated in the Revised Chapter attached to the s42A. The TEC maps have been included back into Appendix 1, of Mr Barr's reply for Chapter 33.

11.3 As the maps are printed in the chapter, there is no need for them to be incorporated by reference under clause 30 of Schedule 1 of the RMA.

40 Section43B(3) of the RMA.

12. SIGNIFICANT NATURAL AREAS

12.1 Under PDP provision 33.3.4.1 if a SNA becomes protected by a covenant under the Queen Elizabeth II National Trust Act (**QEII covenant**) it shall be removed from the schedule and be exempt from rules in Table 3.

12.2 It is submitted that such a process is legally problematic, as a district plan cannot be reliant on another statutory process to remove areas from said district plan. In other words, another statutory process cannot of itself remove provisions from a plan. It is noted that a workable alternative which achieves the same outcome could be that the PDP provides that when areas are protected by a QEII covenant, the applicable rules do not apply.

12.3 The Panel has inquired as to whether a plan change would be required to remove the relevant SNA from the PDP/plan or whether it could be removed under clause 16(2) or 20A of Schedule 1 of the RMA. The former provides that an amendment can be made to a proposed plan if the *alteration is of minor effect*, while the latter provides that a local authority may amend an operative plan to *correct minor errors.*

12.4 The appropriate test is taken from the Environment Court in *Re an Application by Christchurch City Council*[41] where the Court made a distinction between altering information on the one hand, and correcting minor errors on the other. The Court held that whether a change would result in a minor effect relates to whether the change might or might not have attracted a submission. In deciding what might or might not attract a submission, the Court said ".. *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*".[42]

12.5 Whether a change is of "minor effect" is submitted to be a question of fact and requires examination of the likely effects of altering a public

41 (1996) ELRNZ 431.
42 *Ibid*, at 440.

document without public input. In terms of removing a SNA from the schedule following the establishment of a QEII covenant, it is submitted that it is at least possible the change would attract a submission. While QEII covenants have strong protections within them, a member of the public may still wish for the relevant area to be protected by the PDP/plan as well.

12.6 The Council therefore respectfully considers that provision 33.3.4.1 requires amendment as it currently is of questionable validity and legal effect.

13. BULLOCK CREEK

13.1 Protection has been sought in submission #461 for Bullock Creek (in Wanaka) as an SNA. The Panel has queried its ability to protect this resource, with specific reference to sections 13 and 31 of the RMA.

13.2 While it is clear that activities on the surface of rivers and lakes are matters within the Council's control, it is less clear whether protecting an entire river as a SNA is within the Council's statutory functions.

13.3 Section 13 of the RMA imposes an arrange of statutory restrictions in terms of the use of beds of rivers and lakes. These restrictions and the management of the land (being the bed of a river or lake) fall within the statutory responsibilities of regional councils under section 30(1)(g) of the RMA. To the extent that water levels or flows in a river might contribute to the values of that river as being a SNA, then this is a section 14 matter which also falls within the responsibility of regional councils under sections 30(1)(e) and (fa).

13.4 It is important to note however that section 13(4) of the RMA expressly provides that nothing in section 13 limits section 9 of the RMA. In theory therefore, the RMA appears to enable territorial authorities to control the use of land (including land covered by water), provided it is in accordance with a statutory function of the territorial authority under section 31 of the RMA. In addition, a "land use consent" is defined under section 2 of the RMA by reference to section 87(a) of the RMA which provides that a land use consent is "*a*

consent to do something that otherwise would contravene section 9 or section 13".

13.5 As we have previously noted, the maintenance of indigenous biodiversity is a function of the Council under section 31 of the RMA. Arguably therefore, it appears that the Council could seek to identify Bullock Creek (in terms of the land of the creek bed and its margins) as an SNA.

13.6 It is not clear however whether that would be the most appropriate approach under the RMA, and the Panel would obviously need to be satisfied on the evidence that the identification of the relevant area was justified. Depending upon the precise nature of the Bullock Creek resource(s) which are sought to be identified and recognised as a SNA, it may be that other mechanisms under the RMA would be better suited to the relief sought by the submitter (eg. water conservation orders under Part 9 of the RMA).

14. APPLICATION OF WATER WITHIN TERRITORIAL AUTHORITY JURISDICTION

14.1 Counsel for Jeremy Bell Investments Ltd (**JBIL**) purports that the Council does not have jurisdiction to control the use of water as provided in the vegetation clearance rules.[43] In addition, JBIL purports that the control of the use of water is not a function held by a territorial authority under section 31.[44] JBIL's reasons include that regional councils control the discharges of contaminants into or onto land, air or water under section 30 of the RMA. It considers that *[w]ater is a contaminant if its discharge to land changes the biological condition of the land.*[45] JBIL's counsel's legal submissions go on to say that *[w]hat this does make clear that controlling the discharge of water by way of spray irrigation is a Regional Council matter*.[46]

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43 Synopsis of Submissions of Counsel for Jeremy Bell Investments Ltd dated 22 April 2016, at paragraph 14.
44 Synopsis of Submissions of Counsel for Jeremy Bell Investments Ltd dated 22 April 2016, at paragraph 14.
45 Submissions of Counsel for Jeremy Bell Investments Ltd at paragraph 4.
46 Submissions of Counsel for Jeremy Bell Investments Ltd at paragraph 4.

14.2 The definition of *Clearance of Vegetation (Includes Indigenous Vegetation)* as amended through the section 42A report[47] provides:

> *Means the removal, trimming, felling, or modification of any vegetation and includes cutting, crushing, cultivation, soil disturbance including direct drilling, spraying with herbicide or burning.*
>
> *Clearance of vegetation includes,* ***the deliberate application of water*** *where it would change the ecological conditions such that the resident indigenous plant(s) are killed by competitive exclusion. Includes dryland cushion field species.*
> (**emphasis added**)

14.3 Section 31 of the RMA provides that every territorial authority shall have the functions of establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of ***the use, development, or protection of land***… . In addition, a territorial authority has:[48]

> *…the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of-*
> *(i) …*
> *(iii) the maintenance of indigenous biological diversity…*

14.4 Comparatively, section 30 of the RMA provides that every regional authority has the functions of establishing the taking or use of water,[49] but also the control of *discharges of contaminants into or onto land, air, or water*.[50] A 'contaminant' under section 2 of the RMA could include water (as a liquid is included in the definition) that *changes or is likely to change the physical, chemical, or biological condition of the land*.

14.5 JBIL's submissions also refer to the case of *Canterbury Regional Council v Banks Peninsula District Council*[51] which is authority for the proposition that the responsibilities of regional and territorial authorities can and do overlap. JBIL submit such an overlap is

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47 Section 42A Hearing Report: Chapter 33 Indigenous Vegetation and Biodiversity dated 7 April 2016, at Attachment A, page 20.
48 Section 31(b)(iii) of the RMA.
49 Section 30(1)(fa) of the RMA.
50 Section 30(1)(f) of the RMA.
51 [1995] NZRMA 452.

permissible provided that it is for the purpose of carrying out their own functions.

14.6 Council is not seeking to control the take or use of water, it is seeking to control activities that result in the application of water to land. That activity falls within the use of land, and also the development of land. It does not mean that the functions of the regional council with regard to discharges of contaminants or taking of water are being assumed by the Council. The Council is clearly entitled to control land management practices such as irrigation (which clearly fall within the use, development and protection of land) where it relates to a matter over which the Council has an express statutory function (the maintenance of indigenous biodiversity).

14.7 As a matter of fact, the application of irrigation water to certain dryland areas, which have significant biodiversity values and significant vegetation, has the direct consequence that vegetation is cleared through the succession of other plants. There is no undue strain on the statutory language, nor any attempt by the Council to step beyond its statutory functions, in seeking to regulate this matter in the manner proposed.

DATED this 3rd day of June 2016

J G A Winchester / S J Scott
Counsel for Queenstown Lakes District Council