

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

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of Hearing Stream 18
and 20 – Stage 3b
Proposed District Plan

**SECOND REPLY LEGAL SUBMISSIONS FOR
QUEENSTOWN LAKES DISTRICT COUNCIL**

Rural Visitor Zone - Hearing Stream 18 and 20

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 **Simpson Grierson**
Barristers & Solicitors

S J Scott / R Mortiaux
Telephone: +64-3-968 4018
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

MAY IT PLEASE THE PANEL:

1. INTRODUCTION

- 1.1** The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen in relation to the Rural Visitor Zone (**RVZ**), during the course of Hearing Stream 18 and 20, and to provide the Council's position on specific issues of a legal nature. It also addresses some of the RVZ matters raised by the Panel in its Minute 35 dated 24 August 2020 (**Minute 35**).
- 1.2** Filed alongside this right of reply is the planning reply of Ms Emily Grace and the expert landscape reply evidence of Helen Mellsop, both in relation to the RVZ.
- 1.3** The Council has also filed alongside these Reply Submissions:
- (a) The clean version of the RVZ provisions.

2. CORBRIDGE ESTATE LIMITED PARTNERSHIP

Granted resource consents / existing environment concept

- 2.1** Minute 35 asks at paragraph 5: *What is the relevance to our decision making (if any) of the resource consents granted for the ... RVZ site sought by Corbridge Estate Limited Partnership?*
- 2.2** The Corbridge site is subject to an existing consent (issued in 2013) to subdivide it into 35 residential allotments with a balance farming allotment (RM120572). Each residential allotment has a residential building platform, and the consent enables the establishment of communal work and social buildings, for guest accommodation units, a boat shed and jetties at the location of the lake, two utility buildings and associated earthworks.¹ Land use consent RM150918 approved the use of the wool shed for up to 65 events per calendar year, this consent has been exercised but is of limited relevance to the existing environment.

¹ Mr Curley's EIC, from paragraph 25.

2.3 Interestingly, and as emphasised in Ms Irving’s submissions,² Mr Watkin’s evidence is that the subdivision consent will be exercised if the RVZ rezoning is not successful – the evidence is not that the subdivision consent will be implemented, or is likely to be implemented, notwithstanding the rezoning submission. Mr Curley’s evidence is that there is a “better alternative” than development of the nature approved by RM120572.³

2.4 Despite that evidence, Ms Irving then submits⁴ that the existing environment is a relevant consideration for the Corbridge site, and the implementation of the consents will see the establishment of rural living activity, associated community hub and the commercial activity associated with the events venue. The latter (the events venue) is not disputed given that consent has already been implemented.

2.5 The correct approach for the Panel to take in exercising its discretion as to the relevance of the resource consents is covered in Council’s opening submissions⁵ and not repeated here, except to summarise the correct approach to be that:

- (a) The decision maker is not obliged to consider the environment by reference to the tests contained in the *Hawthorn*⁶ decision;
- (b) The Council has discretion to take it into account; and
- (c) That discretion needs to be exercised (or not) on a principled basis, meaning evidence as to whether a particular consent is being implemented, or is likely to be implemented, needs to be taken into account.

2.6 Mr Watkin’s and Mr Curley’s evidence goes to whether the Panel should apply the *Hawthorn* ‘existing environment’ concept to the Corbridge site. The evidence and case of Corbridge relies to an extent, on the ‘change’ to the environment that the subdivision consent will have on the site. Yet, the case advanced in the Corbridge evidence

2 At paragraph 2.

3 At paragraph 38.

4 At paragraphs 14 – 15.

5 At paragraphs 6.7 – 6.13.

6 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

and again in Ms Irving's submissions at paragraph 15, is that the subdivision consent will not be implemented if the rezoning is successful.

2.7 In addition, Corbridge's argument that the RVZ can be recommended, given they do not need to connect to Council's infrastructure, gives a very clear direction to the Council (and the Panel) that it is not likely that they are going to implement their subdivision consent.

2.8 It follows that the Panel should not consider the subdivision consent as part of the existing environment for the purposes of its recommendations.⁷

Scope for residential activity to be permitted

2.9 Ms Irving submits that there is scope for up to 35 residential units within AA1, and residential activity for onsite construction and staff accommodation within AA5, as permitted activities. In summary her reasoning is that:

- (a) For AA1, Rule 21.4.5 of the Rural Zone makes residential activity permitted (if a consent for an approved building platform has been granted); and
- (b) For AA5, Rule 46.4.3 permits commercial recreational activities and *onsite staff accommodation*.

2.10 In relation to AA1, more specifically, Rule 21.4.5 makes "one residential unit" a permitted activity, if "within a building platform approved by resource consent". In Council's submission, this is the extent of relief available for the Corbridge site. In other words, residential activity is only permitted by nature of the use of the defined term, 'residential unit', and of course only within a building platform approved by resource consent. Rule 21.4.5 does not create scope for wholesale permitted residential activity (not within AA1 nor across the rest of the site), nor

⁷ This is consistent with Mr Grace's second rebuttal evidence at paragraph 4.12: *My understanding from the submission and the evidence filed on behalf of the submitter, is that it is not likely that the subdivision consent will be implemented. If the Structure Plan proposed was to align with the subdivision, then that might be more likely, but the re-zoning is an alternative to the implementation of the subdivision and therefore I do not consider it is likely to be implemented. I consider this consent should not factor into the consideration of the re-zoning.*

does it even amount to scope for 35 permitted dwellings located anywhere within AA1. What Rule 21.4.5 is submitted to create scope for, is a rule similar in nature / effect only, to Rule 21.4.5. Council therefore urges care in considering the scope of relief available, against the actual provisions advanced by Corbridge within AA1.

- 2.11** In relation to the onsite staff accommodation, this term is not defined in Chapter 2 of the PDP. While it is accepted that Rule 46.4.3 creates scope for staff directly engaged by the land owners or person operating the commercial recreation or tourism related activity on the site, Council does not agree that 'onsite staff accommodation' can reasonably extend to contractors who are contracted to complete the development of the site (or people working nearby). Ms Irving's submissions suggest that AA5 would extend to *construction* of the site (ie. the earth movers and builders, plumbers and so on who are contracted to build the physical structure on the site), which is not agreed with.
- 2.12** Overall, while the rules referred to create some bespoke jurisdiction for limited residential activity rules, Council is firmly of the view that they do not create scope for full-scale permitted residential activity in the Corbridge RVZ or any alternative resort/special zone at the Corbridge site.

Infrastructure

- 2.13** Ms Irving's submissions are correct that there is nothing in the RVZ objectives or policies that requires development within the RVZ to connect to council infrastructure. The reason for that is fairly obvious, in that all of the notified RVZs are found in remote locations. No Council infrastructure networks exist in such remote areas.
- 2.14** That is not to say that a RVZ at the Corbridge site, should be treated in the same way. Indeed, it is the location of the Corbridge site, in the vicinity of existing Council infrastructure, that raises real concerns for Council, as set out in Mr Powell's evidence.
- 2.15** If there is any expectation at all that Corbridge will rely on connecting to Council infrastructure for development on the site, including in the

future (noting the submitter already holds consent RM120572 which provides approval for connection to the Council waste water network and potable water supply)⁸, then Ms Irving's submissions⁹ on *Foreworld* are submitted to be incorrect. It is the location of the site in the vicinity of Council infrastructure that distinguishes this site from notified RVZs.

- 2.16** Corbridge is running a case that the site can be serviced on-site and it does not seek to rely on connections to Council infrastructure at all. It follows that, if the Panel was to recommend a RVZ at the site, then in Council's submission, given its proximity to existing Council infrastructure, the RVZ provisions for Corbridge would need to be make it very clear that this was a requirement for any development at Corbridge and that there should be no future expectation that Council provide upgrades to service the Corbridge site.

3. VEINT / ARCADIA

Relevance of Structure Plan and Subdivision consents

- 3.1** Minute 35 asks at paragraph 5: *What is the relevance to our decision making (if any) of the resource consents granted for the notified Arcadia RVZ ...?*

- 3.2** In summary it is submitted that:

- (a) The Structure Plan consent gives no development rights to Arcadia given that further consents are required before any activity can be undertaken; and
- (b) The Subdivision Consent could be taken into account by the Panel in terms of exercising its discretion to consider the 'existing environment' concept.

- 3.3** Starting with the Structure Plan consent, all this grants is a structure plan for the Arcadia site, rather than any right to undertaken land use activities. The decision includes a number of relevant statements (our emphasis):

8 Brief of Evidence of Michael James Botting, dated 21 May 2020, at paragraphs 16 and 20.
9 B Irving, Submissions of Counsel in Response to Questions dated 13 August 2020.

- (a) “It is intended that the Structure Plan will provide a framework to **guide** future land use development by ...”. (page 2);
- (b) “It is noted that while the Rural Visitor Zone contains a controlled activity rule for a structure plan, **it does not contain a corresponding standard or rule requiring that a structure plan must be approved prior to development**” (page 3);
- (c) “It is of relevance that the **Structure Plan does not provide any certainty with regards to the granting of further consents. All buildings and visitor accommodation require controlled activity consents, commercial and retail activities require discretionary resource consents. Equally, as identified above, the District Plan does not contain any provisions requiring an approved Structure Plan to be complied with** although the applicant is volunteering this as a condition of consent” (page 4); and
- (d) (under the heading conclusion) “**The proposed Structure Plan is in effect providing a mechanism to limit the possible outcomes of future development within the site, without determining them**” (page 7).

3.4 Importantly, the existence of a consented Structure Plan makes no difference to the need to apply for further consents under the ODP RVZ (and indeed the PDP RVZ), because it does not actually grant the right to undertake any land use activities. While the consent stands, the ODP RVZ rule under which the structure plan consent was sought, would, under current case law authority be likely to be found unlawful.

3.5 Turning to the Subdivision Consent, the Arcadia land notified as RVZ is made up of six legal parcels. Only three of these parcels are subject to the Subdivision Consent. Condition 13(o) of the subdivision consent requires a covenant to be registered against Lots 1 to 12, and Lots 100 and 101 of the subdivision. There is no requirement to register the covenant against the balance of the original three subdivided lots.

3.6 Council considers that the Panel can exercise its discretion to take the Subdivision Consent into account as part of the existing environment

concept, referring again to the summary of the legal position as set out in Council's opening submissions and at paragraph 2.5 above.¹⁰ Section 223 approval has been given, and building platforms for the 'residential' lots have been registered on the survey plan (noting there is no building platform for the 'commercial' lot). The effect of this submission is that the 'environment' at the site, can be considered as if the Subdivision Consent has been implemented. It is submitted this can be the conclusion, quite separately from the Structure Plan consent conclusion above.

3.7 It is also submitted that the relevance of the Subdivision Consent to the existing environment is not simply that the consent and its conditions should be replicated in the PDP RVZ provisions. Such an approach confuses the different processes that are the development of a district plan, and the granting of a resource consent for a subdivision or land use, under that district plan. Rather, it is relevant to the existing environment *Hawthorn* concept, which the Panel has a discretion to apply.

3.8 Requirements relating to building platforms and conditions of consents, including landscaping or other visual mitigation, that are registered on each of the 11 site's computer freehold register as part of the Subdivision Consent, will remain relevant and remain binding unless altered or cancelled under the process provided for by the RMA.

Section 85 of RMA

3.9 This matter is addressed in Council's opening submissions and the only additional submission that is made is to point out that Ms Robb's submissions focus only on the residential use of the site. Binding case law confirms that what is a reasonable use is not limited to a use that is reasonable to the submitter. The RVZ does not impose an "all of nothing" quality on the land owner's options for the property.

10 At paragraphs 6.7 – 6.13.

Controlled activity

3.10 Ms Robb and Mr Gardner-Hopkins address the use of controlled activities in the RVZ, with:

- (a) Ms Robb considering whether controlled activity status give the council sufficient discretion to manage potential adverse effects and the option to decline applications for inappropriate activities; and
- (b) Mr Gardner-Hopkins considering whether the council can, in the context of a controlled subdivision activity, impose conditions that could amend the number and size of the allotments proposed.

3.11 While the respective submissions have addressed slightly different questions, they are understood to be responding to the same issue. Mr Gardner-Hopkins' submissions are submitted to give a more accurate summary of the position. At the outset, he acknowledges that there is no direct authority on the point.¹¹

3.12 In particular, in relation to Ms Robb's submissions, while it is not likely to be substantive to the Panel's recommendations, it is noted that:

- (a) Ms Robb quotes an extract from the *Aqua King* case, citing a *McLaren v Marlborough District Council* decision. Upon searching for the *McLaren* decision, it quickly became apparent that the reference in *Aqua King* (at [25]) is incorrect and the reference should instead be to *Marchant v Marlborough District Council (W22/97)* – the correct reference in that case is made at paragraph [26];
- (b) All the *Marchant* case adds in our submission is that a resource consent cannot go beyond the scope of the application (in that example, the location of the farm could not be altered beyond that notified in the application, which is a well-accepted resource consent concept). That does not appear to be of any relevance to the Panel's questions; and

11 At paragraph 16.

(c) The *Aqua King* case is about the Council's ability to impose conditions effectively declining an application, but again is submitted to not assist the Panel in relation to the RVZ query. In *Aqua King*, the conditions applied to the consent effectively changed the nature of the 'marine farm' beyond what had been applied for. The Court concluded: *To interpret the definition of marine farm as giving the Council a discretion over the type of structures to be used is to reserve a discretion so wide as to be incompatible with the requirement in s105 that a controlled activity be granted, subject to conditions.*¹²

3.13 Council agrees with Mr Gardner-Hopkins' submission that it must be a matter of fact and degree as to the bounds of what a consent authority can impose by way of conditions, before those conditions amount to an effective decline of a proposal, or the grant of consent to a different proposal to that which consent was sought for.¹³

4. MALAGHANS INVESTMENTS LIMITED

4.1 The section directly above responds to Ms Gardner-Hopkin's submissions as they relate to controlled activities.

4.2 Minute 35 asks at paragraph 6: *Of the specific changes to the notified RVZ provisions (either generally or bespoke) sought by submitters, including through evidence/legal submissions, which do the Council consider are not within "scope"? This includes a response to the legal submissions on this matter from James Gardner-Hopkins on behalf of Gibbston Valley Station Ltd and Malaghans Investments Ltd.*

4.3 The first part of this question is addressed by Ms Grace. In terms of the second, while paragraphs 5 and 6 of Mr Gardner-Hopkins' legal submissions are agreed with, the suggestion that a submission seeking "refinement to better achieve the purpose of sustainable management" allows for changes to the notified RVZ that are more enabling than specifically sought in the submission, is not agreed with (for example, allowing new activities into the chapter, or making the activity status of certain activities more enabling).

¹² At paragraph [34].

¹³ At his paragraph 17.

- 4.4** It is also not agreed that the reason that the notified RVZ may need to be 'tailored' for a particular site, means that the RVZ provisions can become more enabling. The Cambridge on-line dictionary defines refinement as "a small change that improves something". The concept of 'improvement' is not submitted to expand to a concept of allowing for more enabling zone provisions for a particular site. Rather, it is submitted that the term 'refinement' instead suggests small changes to the zone provisions that would provide for the same outcome, are permissible.
- 4.5** It follows that it is submitted that the 'more enabling' approach advanced by Mr Gardner-Hopkins stretches the meaning of refinement. If the change under consideration is one that impacts on the regulatory effect of the zone provisions by, for example, providing a more enabling activity status, that is submitted to go beyond refinement.
- 4.6** For the avoidance of doubt, this same submission is made in the context of any submission seeking 'any consequential relief', and in the context of clause 10(2) of Schedule 1 of the RMA.
- 4.7** In response to Mr Gardner-Hopkins' specific submissions on the inclusion of a structure plan in the RVZ in order to 'tailor' the notified provisions to a particular site:
- (a) Council agrees with the Panel's concern that the consequential effect of a structure plan enabling subdivision is a controlled activity.¹⁴ To deal with the issue of scope, there is an alternative solution where restricted discretionary activity status could be applied, instead of controlled;
 - (b) The consequence of Mr Gardner-Hopkins' explanation at paragraph 13(a), is there is no scope for controlled activity subdivision (in accordance with a structure plan) over a high landscape sensitivity area;

¹⁴ As a matter of plan integrity / consistency of plan preparation, whether controlled activity status is even appropriate depends on the level of detail in a particular structure plan. Controlled activity status would not be appropriate with a basic structure plan that did not set out key elements that are to be complied with.

- (c) Council considers the GFA rule to be relevant to scope for activity status; and
- (d) Finally, Mr Gardner-Hopkins has suggested the fact that 'buildings' in the RVZ had a certain activity status, gives scope for the activity of subdivision (consistent with a structure plan) to have the same activity status. This is not agreed. Subdivision is much more than the ability to construct a building. For example, while requiring the division of a continuous area of land, subdivision also constitutes matters such as the completion of works in relation to roading and three waters infrastructure, and the vesting of roads or reserves in council. This goes well beyond a 'building' activity.

5. R & S BURDON AND GLEN DENE LIMITED (31043)

- 5.1** Minute 35 asks at paragraph 13: *What weight should we put on the ability for the Council to manage visitor activities, and associated changes to the site, under the Hawea camping ground lease in the context of the rezoning of the site RVZ, as sought in the Glen Dene submission.*
- 5.2** In Council's submission, very little weight, if any should be given to the ability for Council to manage visitor activities, and associated changes to the site under the camping ground lease. The district plan provisions need to stand on their own. The camping ground lease sits outside and is independent of the PDP and the terms and conditions attached to it have the potential to change at any time in the future.

DATED this 10th day of September 2020



S J Scott / R Mortiaux
Counsel for the Queenstown Lakes
District Council