

## SUBMISSION ON A PUBLICLY NOTIFIED PROPOSAL FOR PLAN (VARIATION)

**TO:** Queenstown Lakes District Council (“**QLDC**”)

**NAME OF SUBMITTER:** Milstead Trust (“**Submitter**”)

**ADDRESS FOR SERVICE:** As specified below

### **Introduction**

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1. This is a submission on proposed variation to Chapter 21 Rural Zone to introduce landscape schedules 21.22 and 21.23 (“**Variation**”).
2. QLDC has explained the purpose of the Variation as follows:

Queenstown Lakes District Council is proposing a variation to Chapter 21 Rural Zone of the Proposed District Plan (PDP), to introduce landscape schedules that set out the landscape values for 29 Priority Area landscapes within the Queenstown Lakes District. These schedules aim to identify which aspects of these landscapes are to be protected, maintained, or enhanced.

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Landscape schedules will be used to assess applications for resource consent for development on properties within the identified areas. The schedules will detail a landscape’s values and make it easier to understand how a proposal for development might affect those values. There are no changes to the rules for development as part of this proposal. The schedules are intended to make assessments more efficient.

### **Specific provisions of the Variation that the submission relates to**

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3. The Submitter has an interest in the entire Variation, at least in respect of the methodology behind its development, and the identification of what the community values in respect of the particular landscape and features in question.
4. The Submitter has particular interest in the schedule for Slope Hill ONF 21.22.6.
5. The Submitter opposes:
  - (a) all aspects of the Variation; and
  - (b) in particular, all aspects of Proposed Schedule 21.22 Outstanding Natural Features and Outstanding Natural Landscapes.

### **No trade competition**

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6. The Submitter could not gain an advantage in trade competition through this submission.

### **Submission / Reasons for submission**

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## Part 2

7. It is appropriate to have regard to Part 2, given the context.
8. In particular:
  - (a) Section 5, and its elements that promote the use and development of natural and physical resources which enables people and communities to provide for their social, economic, and cultural well-being.
  - (b) Section 6(b), which requires that all persons exercising functions and powers under the RMA to recognise and provide for the protection of outstanding natural features and landscapes from *inappropriate* subdivision, use, and development. In that regard, the Variation effectively seeks to prevent any subdivision, use and development by stating that there is “**no** landscape capacity” eg for Visitor accommodation and tourism related activities, Urban expansions, and Rural living in most of the ONFLs identified.
  - (c) Section 7(b) which requires that all persons exercising functions and powers under the RMA to have particular regard to the efficient use and development of natural and physical resources. It is inefficient to prevent subdivision, use and development as identified above at paragraph (b).

### Section 85 – Incapable of reasonable use

9. In providing that there is “**no** landscape capacity” (eg for Visitor accommodation and tourism related activities, Urban expansions, and Rural living), the Variation unreasonably constrains private property rights and the ability of a landowner to reasonably subdivide, use and develop their land, particularly given the repeated statements that there is “no landscape capacity” for such activities.
10. The effect of “no landscape capacity” is identified briefly in the s32 report as follows:
 

The schedules intend to provide better management of cumulative effects on landscape values, via the concept of landscape capacity. Each schedule identifies the capacity of the particular Priority Area landscape to absorb subdivision and development without compromising the identified values. While a landscape has capacity to absorb development without compromising landscape values, development can potentially proceed without creating cumulative effects.

However, where a landscape has no, very limited, or some capacity for development, the schedules alert plan users to the fact that the landscape is nearing capacity, meaning there is a real threat of cumulative effects from further subdivision and development. The schedules identify the capacity of each landscape for 12 different categories of development, as indicated by Policies SP 3.3.38 and SP 3.3.41 of the PDP.
11. It is submitted that the s32 report is overly “generous” in addressing “no, very limited, or some capacity” together. Plainly, identifying an ONFL as having “**no** capacity” is a very strong signal, not that the landscape is “*nearing* capacity”, but rather that it has *reached* capacity; and no further development can be allowed without adverse effects on the identified values. The Policy framework is to avoid such effects, and the Supreme Court (*King Salmon*) has been very clear that “avoid” means to “not allow”, with the Court of Appeal (*RJ Davidson*) also being

clear that recourse to Part 2 cannot be used to subvert such directive policies in a consent application.

12. In other words, identification in the landscape schedules as “**no** capacity”, is tantamount to providing for any further development as a prohibited activity. It is hard to see how a consent applicant could circumvent that position.
13. This is reinforced by the Methodology Statement which forms an appendix to the s32 Report. It describes “no landscape capacity” as meaning:
 

*No landscape capacity*: This corresponds to a situation where development of this type will materially compromise the identified landscape values.
14. A “material” compromise is an adverse effect that is more than minor, and so is not allowable under the Supreme Court’s approach to “avoid” (it noted that a minor or transitory adverse effect did not need to be prohibited, at [145]).
15. Accordingly, the provisions of the Variation that prescribe “**no** landscape capacity” will render the land incapable of reasonable use, and place an unfair and unreasonable burden on landowners under section 85(2) of the RMA.
16. If the Variation is not intended for its identification of “**no** landscape capacity” to have the consequences identified above (ie to effectively prohibit further development), then its purpose, effectiveness, and efficiency is highly questionable. The following “guidance note” recommended in the Methodology Statement has not been carried through into the Variation text:

The capacity descriptions are based on the scale of the PA and should not be taken as prescribing the capacity of specific sites; landscape capacity may change over time; and across each PA there is likely to be variations in landscape capacity which will require detailed consideration and assessment through consent applications.

17. Any such “advice note” even if included in the Variation text, is of questionable effect as advice notes are not operative provisions. If the advice note is to have effect, then is it supposed to open the door to consent applications, such that “**no** landscape capacity” doesn’t really mean what it says. There is a considerable difference in there being “**no** landscape capacity”, as opposed to “**very limited** landscape capacity”. The former closes the door, while the other leaves it open (or at least ajar). Identification of “**no** landscape capacity” should only be provided where there is, in fact, no landscape capacity. It should mean what it says, and be applied only where that is the case – even if that does trigger obligations under s85 for the Environment Court to order QLDC to acquire the relevant land in question.

#### **Inadequacy of the s32 assessment**

18. The section 32 assessment is inadequate and/or erroneous, in particular in respect of:
  - (a) Its consideration of the planning consequences of identifying land as having “**no** landscape capacity” for further development (as explained above).
  - (b) Its consideration of the economic costs, which states that “there are not considered to be any economic costs of the implementation of the

proposal”, when, clearly the identification of land as having “**no** landscape capacity” for further development will place an economic cost on landowners who will no longer be able to undertake any form of development on that land. The s32 Report specifically states, in respect of economic costs:

**Economic (costs)**

There are not considered to be any economic costs of the implementation of the proposal. The policy direction to protect ONFLs and maintain or enhance RCLs has already been set. Careful analysis by the landscape architects, following the methodology set by the Court, ensures that a bespoke set of values is identified for each Priority Area, and nothing unnecessary is captured by the schedules. In addition, there are no new activities that require consent, no change to the existing rule framework, and no change to the objectives and policies.

(c) In contrast, the s32 Report states the economic benefits as follows:

**Economic (benefits)**

The certainty provided by the schedules will reduce the cost to applicants for resource consent, as applicants will not need to identify the landscape values, landscape character or visual amenity values of the landscape.

This is a **moderate** economic benefit.

There is an economic benefit to the District by greater certainty that the landscape outcomes set in the PDP will be achieved. The District’s landscapes are important to the tourism industry, and there is an economic benefit in protecting and maintaining them.

This is a **low** economic benefit.

19. This is contrary to the requirements of s32, which require, in particular:

- (a) the s32 report to examine whether the identification of land as having “**no** landscape capacity” for further development is the most appropriate way to achieve the objectives, including assessing the efficiency and effectiveness of the “**no** landscape capacity” provisions in achieving the objectives (s32(1)(b)(ii)); and
- (b) in respect of the assessment of the efficiency and effectiveness of the “no landscape capacity” provisions:
  - (i) the identification and assessment of the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for—
    - economic growth that are anticipated to be provided or reduced; and
    - employment that are anticipated to be provided or reduced; and
  - (ii) the quantification of those identified benefits and costs (if practicable).

20. Accordingly, a “qualifying” s32 Report has not been prepared in support of the Variation and/or the requirements of section 32 have not been met. This is a matter that may be, and is being, raised in a submission under s32A(1).

### **Flawed methodology**

21. It is understood that the Values Identification Framework (VIF) is a result of Commissioners Decisions on strategic topics of the PDP and the Environment Court Topic 2 Decision. The intent of the VIF and these schedules is to identify those attributes or values of landscapes and features that, in particular, contribute to them being outstanding. It is submitted that a number of statements and values included within the schedules go beyond this focussed objective and are not limited to just values that are of particular importance to outstandingness. The submitter was not involved with this particular appeal and has not provided input into the identification of Priority Areas and Schedules, thereby raising the issue of natural justice.
22. QLDC and its experts claim to have been informed by the public consultation QLDC undertook in the development of the Variation. However:
- (a) that public consultation was fundamentally flawed, and largely failed to elicit the public’s views as to what values they attributed to the ONFLs in question; and
  - (b) to the extent that the feedback did identify values, that feedback was essentially ignored by QLDC and its experts in developing the Variation.<sup>1</sup>
23. This is particularly significant given that:<sup>2</sup>
- (a) “Landscapes are not the sole preserve of landscape assessors: everyone experiences and holds views (often heart-felt) about landscapes.”
  - (b) “Landscape embodies the relationship between people and place: It is the character of an area, how the area is experienced and perceived, and the meanings associated with it.”<sup>3</sup>
  - (c) “An area as perceived by people, including how the area is experienced, understood, interpreted, and regarded.”<sup>4</sup>
24. In addition, Te Tangi a te Manu dedicates a section to the role of the landscape assessor with respect to the community, acknowledging that landscapes are not the sole preserve of landscape experts: everybody experiences and holds views (often heart felt) about landscapes. It states that a landscape assessor should remain aware of the range of community perceptions of landscape matters and draw on available sources of information. The purpose for such knowledge is not to speak on behalf of others, but to help with the balance and insight of an impartial

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<sup>1</sup> The feedback was only considered after the second final draft of the landscape schedules had been prepared and just before the final draft was presented to the QLDC. In fact, the information pack supporting QLDC’s decision to adopt the Variation for notification didn’t include the summary of the feedback as part of the expert reports.

<sup>2</sup> Te Tangi a te Manu \_Aotearoa New Zealand Landscape Assessment Guidelines [Final Draft].

<sup>3</sup> This definition focuses on the relationship between people and place (one of the two strands of meaning of ‘landscape’) and describing the three dimensions (physical, associative, and perceptual) in ordinary terms.

<sup>4</sup> This definition focuses on perception of an area (the other of the two strands of meaning of ‘landscape’) and describing perception in its broadest terms.

professional assessment. The values identified within the Schedules do not read as community described values.

25. “Residents, for instance, will be the most familiar with the amenity values they enjoy and best placed to describe such values (and their interpretation of effects on those values) from an ‘insider’ perspective. An ‘expert’ landscape assessor, on the other hand, is typically an outsider.” Without proper public and landowner consultation having been undertaken, the schedules do not reflect community values, which is the very purpose of the schedules.
26. In the ONF, ONL and RCL Priority Area Landscape Schedules Methodology Statement, paragraph 3.11 states the following, in justifying the following scale for landscape capacity:
- (a) **Some** landscape capacity;
  - (b) **Limited** landscape capacity;
  - (c) **Very limited** landscape capacity; and
  - (d) **No** landscape capacity.
27. The overall rating scale of capacity that is proposed is misleading as it applies to the Priority Area as a whole, but within sites within Priority Areas there often is capacity, as evidenced through resource consent applications that have been approved in ONLs. The scale proposed above is likely to result in the situation where a site has capacity, but the Schedule states ‘No capacity’.
28. It is also stated:
- The choice of wording here is deliberate. Given the uncertainty around what a specific landuse might entail, the authors have not applied the seven-point rating scale (described above) but favoured a ‘less absolute’ terminology.
29. The use of the ‘Some, Limited, Very limited and No’ categories for landscape capacity is opposed and is misleading and is not “less absolute” than the seven-point scale, as is stated in the section 32 report. It is in fact a ‘more absolute’ scale that provides no room to move and does not recognise the scale of the assessment.
30. Footnote 19 provides the following example:
- For example, under the landuse type of ‘renewable energy generation’ this can range from a single wind turbine for domestic use to a large scale windfarm.
31. The example provided is not an effective justification for a ‘less absolute’ terminology for landscape capacity, as the example places small scale developments (in this case domestic scale renewable energy) in the same scale as large-scale developments (in this case large scale windfarm). This will lead to erroneous conclusion with regard to landscape capacity e.g., both the small and large examples could fall into the “no landscape capacity” category.
32. It is also submitted that the scale of development should be a point of consideration for the Landscape Capacity summary, rather than treating all types of development under the same Landscape rating scale.

### **General issues**

33. Strategic Policies 3.3.36 to 3.3.42 set out what the Priority Area Schedules are to identify. For ONF/L Priority Areas the key things to be identified are:
- (a) The landscape attributes (physical, sensory and associative) that contribute to the values that are to be protected;
  - (b) The landscape values; and
  - (c) The related landscape capacity for various types of development.
34. The notified schedules generally achieve the above but they conflate landscape attributes and landscape values through the body of the schedules, and then summarise landscape values under the heading of “Summary of Landscape Values”. Overall, the format generally makes sense but the Schedules become long and wordy and will become a very large appendix to the PDP. It appears that they can be made more concise.
35. In relation to capacity that the schedule identifies for certain activities, the methodology statement that forms part of the notified variation sets out that “tourism activities” equates to resort development. Therefore, it is perhaps understandable why these activities are generally identified as having “very low” or “no” capacity rating. It is noted that tourism activities are not currently defined within Chapter 2 Definitions PDP, and can be interpreted in a number of ways. It is therefore submitted that ‘Tourism Activities’ be defined within Chapter 2, or clarified within the landscape schedule as it relates mainly to resort development and not tourism activities as a whole, e.g., in the Queenstown Lakes district, tourism often includes commercial recreation activity (which is a key part of what makes Queenstown unique).
36. The Variation does not seek to change any objectives, policies or provisions in the Plan. Therefore, the relevant provisions that refer to the Schedules are Strategic Objectives 3.2.5.2, 3.3.29, and 3.3.34. Effectively, these provisions require that landscape values set out in the schedules are protected and that capacity is not exceeded. When considering a proposed activity in an ONF/L or RCL Priority Area, the usual assessment matters would also be used in addition to the consideration of protection of values set out in the Landscape Schedules. It is submitted that the use of assessment matters for the Landscape Schedules should be clarified to prevent interpretation and weighting issues at resource consents stage.

#### **Schedule for Slope Hill ONF 21.22.6**

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37. The Slope Hill Schedule is fundamentally flawed and should be rejected and re-notified, including because the schedule:
- (a) fails to recognise the Slope Hill ONF is a highly modified landscape that has been extensively farmed and is therefore has a very low naturalness natural, highly influenced by human activities;
  - (b) fails to recognise the western end of Slope Hill ONF is more modified than the eastern end and has a much greater capacity to absorb development;
  - (c) fails to recognise that Slope Hill ONF is more extensively modified below the irrigation race than above it;
  - (d) incorrectly states at [7] there is “particularly noteworthy” indigenous vegetation features, when this:

- (i) appears to be on the basis of the presence of Matagouri, which is not “particularly noteworthy; and
  - (ii) fails to reflect the fact that Slope Hill ONF has been extensively farmed for over 100 years, and it is misleading to suggest it has noteworthy indigenous vegetation;
- (e) at [9], under the heading “Important ecological features and vegetation types” lists animal pest species, which are not relevant to “Important ecological features and vegetation types”;
- (f) at [10], the description fails to acknowledge:
- (i) the irrigation race which has been an important land use pattern and feature;
  - (ii) the significant rural living use on Slope Hill as a whole, outside of the ONL boundary, for example Springbank Grove;
  - (iii) the greater extent of activity and modification at the western end of Slope Hill, associated with the historic Glenpanel Homestead;
  - (iv) other farm buildings which exist but that have not been identified;
- (g) at [11], the description fails to recognise the historic Glenpanel Homestead which is outside of the ONL boundary but is highly relevant in terms of the historic use of the land for farming activity;
- (h) at [12], under the heading mana whenua features and their locations, no mana whenua features or locations have been identified. Instead it notes the following:
- ‘the entire area is ancestral land to Kai Tahu whanui, and, as such, all landscape is significant given that whakapapa, whenua and wai are all intertwined in te ao Maori’;
- Whilst it is acknowledged that mana whenua associations are often intangible and interconnected to each other, it is not clear whether the intention is to require all applications located within a Priority Area to consult with mana whenua in every instance or whether the intention is to consult with mana whenua only where an activity is located within a Wahi Tupuna (as directed under Chapter 39 Wahi Tupuna). The former is considered to be a duplication of process that has already been determined, where applications in Rural Zones and identified in a Wahi Tupuna area must consider the effects on mana whenua values under the relevant rules of Chapter 39. The latter is consistent with Wahi Tupuna chapter; however, the roles of each chapter is not clear from this variation. It is submitted that the relationship of mana whenua associations, Wahi Tupuna Chapter and consultation with mana whenua for applications are clarified;
- (i) at [14], under the heading “important historic attributes and values” the description fails to recognise the historic Glenpanel Homestead and associated farming activity, as well as the irrigation race;
  - (j) at [15], a very generic statement is made that “the descriptions and photographs of the area in tourist publications”, but provides no evidence provided as to what publications or photographs are referred to;

- (k) at [17], the majority of the planting in the gullies are exotic weeds such as willow, Hawthorne and broom, and not “indigenous gully plantings” as stated;
- (l) at [25], where the “Naturalness attributes and values are described”, incorrectly states Slope Hill as “natural” and “undeveloped”, when it has been completely modified for agriculture / farming and includes an airport radar system on its highest point.
- (m) at [31], refers to “mana whenua features in the area”, when no mana whenua features are identified in paragraph 12 which refers to the whole area, and also refers to “vegetation features”, when, as noted earlier, the gullies on Slope hill contain exotic weed species and cannot be considered to have “very high physical values”.

### **Relief sought**

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38. The Submitter requests the following decision:
- (a) *Primary relief:* reject, refuse, or otherwise decline the Variation.
  - (b) *In the alternative:* if the Variation is to be adopted, to amend, vary or otherwise modify the Variation and its schedules (including the Schedule for Slope Hill ONF 21.22.6) to address the concerns, issues, and other matters raised in this submission (including any necessary additional or consequential relief).
39. Granting the primary relief sought will:
- (a) achieve the sustainable management purpose of the RMA and otherwise meet the requirements of Part 2;
  - (b) enable the social, economic and cultural well-being of the community;
  - (c) meet the reasonably foreseeable needs of future generations;
  - (d) allow the s32 and other deficiencies in the methodology used to develop the Variation to be remedied “from a re-start”, rather than having to try to “fix” a Variation that has been developed inappropriately from the start; and
  - (e) represent the most appropriate means of exercising QLDC’s functions, having regard to the efficiency and effectiveness of the provisions relative to other means.
40. Granting the alternatives relief sought will:
- (a) to a lesser extent, achieve the outcomes identified in the above paragraph in respect of the primary relief, although:
    - (i) the s32 and other deficiencies in the methodology used to develop the Variation will need to be “fixed” within a Variation that has been developed inappropriately from the start;

- (ii) there may be scope limitations that prevent an appropriate “fix” from being adopted, or necessitate the Environment Court’s exercise of its powers under s293 go address; and
- (b) should “**no** landscape capacity” findings continue to be recorded in the Variation, facilitate access to s85 and the Environment Court’s powers to require QLDC to acquire the afflicted land that will no longer be capable of reasonable use.

**Wish to be heard**

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- 41. The Submitter wishes to be heard in support of its submission.
- 42. If others make similar submissions, the Submitter will consider presenting a joint case at any hearing.

**DATED** 19 August 2022

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