

**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 3 –  
Historic Heritage and  
Protected Trees chapters

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**OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR  
QUEENSTOWN LAKES DISTRICT COUNCIL**

**Hearing Stream 3  
Historic Heritage and Protected Trees**

**24 June 2016**

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## **MAY IT PLEASE THE PANEL:**

### **1. INTRODUCTION**

1.1 These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of submissions made on the Historic Heritage and Protected Trees chapters of the Proposed District Plan (**PDP**).<sup>1</sup>

### **2. OUTLINE OF LEGAL SUBMISSIONS**

2.1 These submissions should be read together with the synopsis of Council's legal submissions that were filed on 17 June 2016. At the time of filing the Council's synopsis, evidence from submitters and legal submissions in support had not been filed. Therefore, for the assistance of the Panel, these submissions address key legal issues that have been raised in legal submissions for submitters, and also identify issues arising from submitters' evidence. They are not a comprehensive response to all evidence that has been filed, which will be covered in the Council's right of reply if necessary.

2.2 Despite the fact that there are a number of issues raised in evidence for submitters that are contested and/or not accepted by the Council, because there is no direction for rebuttal evidence, the summaries of the Council's evidence have responded, at a very general level, to some of the key issues raised in submitters' evidence. Late evidence has been received this morning from Ms Jackie Gillies. That evidence will be addressed orally at the hearing, if necessary.

2.3 Council refers to and adopts the opening legal submissions presented at the Strategic Direction hearing, in terms of Council's functions and statutory obligations (section 3), relevant legal considerations (section 4), and whether various submissions are "on" Stage 1 of the PDP (section 7).<sup>2</sup> Those submissions are not repeated here.

2.4 These opening submissions address key/legal issues raised in evidence filed in relation to the Historic Heritage Chapter, followed by a brief

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<sup>1</sup> Chapters 26 and 32 respectively.

<sup>2</sup> Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B – Strategic Chapters in Part B of the Proposed District Plan, dated 4 March 2016.

discussion of the Resource Management Act 1991 (**RMA**) requirements in respect of the Protected Trees Chapter. It is noted that no submitters have filed legal synopsis in advance,<sup>3</sup> in accordance with the Panel's directions in its Fourth Procedural Minute dated 8 April 2016.

### 3. HISTORIC HERITAGE CHAPTER 26

#### TSS Earnslaw (Earnslaw)

3.1 Chapter 26 of the PDP contains an inventory of protected features (**Inventory**) to which the rules of that chapter apply. The notified version of the Inventory included Item 37, *TSS Earnslaw, Berthing located at Steamer Wharf, Beach Street*. In the Council's recommended revised version of Chapter 26, Item 37 has been amended to *TSS Earnslaw (the ship), whose berthing is located at Steamer Wharf, Beach Street*. By way of Memorandum of Counsel,<sup>4</sup> Real Journeys Limited has challenged the jurisdiction under the RMA to regulate the Earnslaw as a heritage feature in the PDP. Real Journeys submit that the rules within Chapter 26 pertaining to protect the Earnslaw are *ultra vires*, as the ship does not fall within the definition of historic heritage contained within section 2 of the RMA. The Council accepts that the RMA does not contemplate regulation of mobile heritage and that as a matter of law, the listing is *ultra vires* and as a consequence Item 37 should be removed from the Inventory.

#### Slipway

3.2 Ms Black's evidence, on behalf of Real Journeys Limited (**Real Journeys**), is that the "'TSS Earnslaw" slipway at Kelvin Peninsula" is not appropriately accommodated in the PDP framework as the slipway is not a static feature or a building.<sup>5</sup> It is unclear whether this part of Ms Black's evidence is referring to all the features contained within item 3 of the Inventory. Item 3 includes the Antrim Engines Slipway and Cradle, the Winch House, and the Antrim's former boiler (**Slipway**).

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<sup>3</sup> However, Council acknowledges the Memorandum of Counsel filed on behalf of Real Journeys Limited, 17 June 2016.

<sup>4</sup> See Memorandum of Counsel filed on behalf of Real Journeys Limited, 17 June 2016.

<sup>5</sup> See paragraph 3.17 Katherine Fiona Black evidence.

3.3 Unlike the Earnslaw, legal counsel for Real Journeys have not challenged the *vires* of the rules protecting Item 3. Mr Farrell's planning evidence also does not raise any *vires* concerns, except that he recommends amendments to the features within Item 3 so that the Slipway and Cradle are moved from Category 2 to 3, and the Antrim Engine remain in Category 2.<sup>6</sup> It is understood from this evidence that all elements deserve protection for their heritage values, it is just the category that is not agreed.

3.4 In terms of the *vires* of the rules, section 2 of the RMA defines *historic heritage* as *natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures*, which encompasses the term *historic structures*. Structure is defined in section 2 of the RMA as:

**structure** means any **building, equipment, device, or other facility** made by people and which is **fixed to land**; and includes any raft [our emphasis].

3.5 The beams of the Slipway and the Winch House fall within the meaning of building as defined in section 8 of the Building Act 2004. The Cradle and the Antrim's former boiler reasonably fall within the term *equipment* contained within the definition of structure in section 2 of the RMA. Although the cradle itself moves up and down the Slipway, the cradle is fixed permanently to the Slipway, both elements are manmade and the Slipway itself is fixed to land. In a more extreme example, the Environment Court in *Hauraki District Council v Moulton*<sup>7</sup> found that in some circumstances it would be enough for a boat to be permanently moored, for it to be a structure, fixed to land.

3.6 In terms of whether the structure is historic, Mr Richard Knott has assessed the heritage characteristics of the Slipway and his evidence is that it is of historical significance.<sup>8</sup> Real Journeys has not provided any technical evidence opposing Mr Knott's views. Accordingly, the Council submits that, the Slipway listing in its entirety falls within the definition of *historic heritage* contained within section 2 of the RMA, and the rules contained within Chapter 26 are also *intra vires* in respect of the Slipway.

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<sup>6</sup> See paragraph 25 Ben Farrell evidence.

<sup>7</sup> *Hauraki District Council v Moulton* (Environment Court, C38/987, 15 May 1997) at page 10.

<sup>8</sup> See paragraphs 5.5 – 5.12 Richard John Knott evidence.

- 3.7 Given this view, the Council further submits that there is no scope to accept the recommendation of Ms Black to remove the bed and rails component of the Slipway from the Inventory.<sup>9</sup> The submission made by Real Journeys on the notified chapter sought for the category of the Slipway be amended, not removed.

#### *Historic consenting issues*

- 3.8 Mr Farrell in his evidence has raised the history of consenting at the Slipway (see his paragraph 7). His evidence is that until recently, Real Journeys has not been required to obtain any resource consents/planning permissions to operate, maintain or upgrade the Earnslaw or the Slipway, and then refers to the Council "intervening by requiring resource consents for these works" in September 2015.
- 3.9 The Slipway is listed as a Category 2 protected item under the Operative District Plan (ODP).<sup>10</sup> Accordingly, any alteration to the Slipway requires a discretionary resource consent<sup>11</sup> and any demolition a non-complying<sup>12</sup> resource consent under the ODP. If works fall within general maintenance then no consent is required.
- 3.10 The Slipway is located on Council reserve land. On 9 September 2015, the Council was alerted of unconsented works being undertaken on the Slipway. Photographs taken at the time are appended as **Appendix A**. As these photos illustrate, the hardwood beams have been removed and replacement with steel beams is in progress, activity that is beyond the concept of maintenance.
- 3.11 Real Journeys was instructed to stop works on account of the need to apply for a resource consent under the ODP. In paragraph 8, Mr Farrell states that "*this particular intervention by QLDC resulted in significant risks, costs and inconveniences to Real Journeys.*" With respect, Council had a legal obligation to enforce the ODP. The risks, costs and inconveniences referred to in Mr Farrell's evidence resulted from Real Journeys failure to obtain a resource consent. There was no prosecution

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<sup>9</sup> See paragraph 3.19 Katherine Finoa Black evidence.  
<sup>10</sup> Queenstown Lakes District Council Operative District Plan, A3-1.  
<sup>11</sup> Ibid, 13-7.  
<sup>12</sup> Ibid, 13-8.

or abatement / infringement notice, as Real Journeys acknowledged its breach, agreed to cease works, and sought retrospective consent.

- 3.12 Finally on this matter, Counsel does not understand Mr Farrell's statement about the "intervention" in September 2015 being after Real Journeys made its submission on the PDP, which is dated 23 October 2015. The inference in Mr Farrell's evidence that the Council somehow acted inappropriately, is not accepted. Council also refutes the inference that can be taken from Mr Farrell's evidence that there is a link between the Real Journey submission on the PDP, and matters of monitoring and enforcement the heritage provisions of the ODP.

### **Heritage Landscapes**

- 3.13 In terms of scope (or the lack of), in his evidence for New Zealand Tungsten Mining Limited (**NZTML**), Mr Vivian states that he does not consider that the heritage landscapes are necessary at all, but then goes on to accept that there is no scope for the removal of the overlays. Council agrees that there is no scope to consider the removal of the heritage landscape classifications/ overlays and, furthermore, from a merits perspective, considers them to offer an appropriate level of additional protection

## **4. PROTECTED TREES CHAPTER 32**

- 4.1 The purpose of Chapter 32 is to promote the protection of trees that have been identified as providing significant benefits to the District and contribute to the character and amenity of the Arrowtown Residential Historic Management Zone (**ARHMZ**). Sections 76(4A) and 76(4B) of the RMA provide that a rule in a district plan may not restrict the felling, trimming, damaging, or removal of any tree or group of trees in an urban environment allotment unless that tree or group of trees is described in a schedule to the plan and the allotment is specifically identified by street address, legal description or both.
- 4.2 The trees that are to be protected by way of Chapter 32 are identified in the plan in three ways:

- (a) **Protected trees:** the trees to be protected by the rules contained in Table 1 are identified on 32.8 Schedule of Protected Trees District Wide;
- (b) **Character trees:** the trees to be protected by the rules contained in Table 3 are listed in 32.7 Schedule of Character Trees in the ARHMZ; and
- (c) **ARHMZ public realm trees:** the trees to be protected by the rules contained in Table 2 are not contained within an urban environment allotment. Accordingly, they are not required to be identified within a schedule to the plan.

4.3 The Council submits that the above methods of identification meet the requirements of subsections 76(4A) and 76(4B) of the RMA.

4.4 The only evidence filed by submitters in relation to the Protected Trees chapter is the company evidence of Ms Black. Accordingly, the only technical evidence before the Panel in relation to the listings in the chapter, is that of Mr Spencer and Mr Blakely.

## **WITNESSES**

5. The Council will call the following evidence:

- (a) Mr Richard Knott, Heritage Specialist, on technical heritage matters;
- (b) Ms Vicki Jones, Planner, who is the author of the section 42A report on the Historic Heritage chapter;
- (c) Mr David Spencer, on arboriculture matters related to the Protected Trees Schedule;
- (d) Mr Philip Blakely, on landscape matters relevant to the Character Trees Schedule; and

- (e) Ms Rachael Law, Planner, who is the author of the section 42A report on the Protected Trees chapter.

**DATED** this 24<sup>th</sup> day of June 2016

A handwritten signature in blue ink, appearing to be 'S J Scott / K L Hockly', written over a light blue horizontal line.

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S J Scott / K L Hockly  
Counsel for Queenstown Lakes  
District Council



Appendix A







