Before Queenstown Lakes District Council

In the matter of	the Resource Management Act 1991
And	**The Queenstown Lakes District Proposed District Plan – Stage 14 Wakatipu Basin**

Legal Submission for Wakatipu Equities Limited

Submitter #2479

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May it please the Panel

Introduction

Introduction

1 These legal submissions are presented on behalf of Wakatipu Equities Limited (**Submitter**) in respect of a rezoning proposal located at 258 Speargrass Flat Road (**Site**), concurrent with various amendments sought to the objectives, policies, and rules of Chapter 24.

2 These legal submissions address the following matters relevant to rezoning of the Property and the wider Site:

(a) Context of Site and relief sought;

(b) Legal decision making framework;

(c) General provisions for the Wakatipu Basin Lifestyle Precinct (**Precinct**) and Wakatipu Basin Rural Amenity Zone (**WBRAZ**);

(d) The Council's economic case;

(e) Rezoning proposal

(i) The Submitters' case for rezoning

(ii) Comments on the Council's case for WBRAZ

(f) Traffic issues;

(g) Disconnect between WBRAZ and the Proposed Regional Policy Statement (**RPS**).

Context of Site and relief sought

3 The Wakatipu Equities' Site is approximately 130ha of land south of Speargrass Flat Road. Mr Skelton describes the varying nature of the Site as:

> Its northern extents are within the Speargrass Flat LCU8 (**Attachment B**). This more northern part of the WEL site falls down from the elevated foothills across scoured cliffs and steep rolling slopes to meet the Speargrass Flat Road corridor. This part of the WEL site has a distinctly different character than the upper lands in that it is part of a corridor landscape characterised by the naturalness embodied in the steep, north facing cliff band and the open pastoral areas to the north of Speargrass Flat Road. This cliff band is populated in mostly exotic vegetation (hawthorn) while the rolling hills between the cliffs and Speargrass Flat Road are

covered in pasture grass, broken by shelterbelts and rural amenity planting (**Image 1**). While there are strong rural living elements to the east and west of the WEL site, the Speargrass Flat part of the site and surrounding landscape is mostly open in character.[1]

4 The Submitter sought through Stage 1 of the PDP that the Site be rezoned from Rural to Rural Lifestyle with a 1ha average / minimum allotment size.

5 Through the Stage 2 variation the Submitter seeks rezoning from WBRAZ to Precinct, with a modified minimum allotment size of 4ha. The Submission on Stage 2 identifies a range of sub precincts applying in chapter 4, which would mean the Site is not necessarily viewed as its own discreet subzone.

6 As discussed in the evidence for the Submitter and in these submissions, it is considered overall that the proposed rezoning will better maintain and enhance the amenity values that the local residents in particular value in respect of the site and surroundings, and will enable better opportunities for environmental enhancement.

Legal issues

7 Counsel does not intend to substantially repeat legal submissions relevant to the DPR decision making framework which have already been tabled in previous hearings. In summary the salient legal points in this framework are:

(a) When preparing or changing a district plan the Council must have regard to the matters listed in section 74 which include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts;

(b) Given the unsettled nature of higher order provisions of the PDP and RPS in this instance, the Commission must still look beyond those documents and apply Part 2 of the Act in order to determine whether a proposed zoning or specific provision is most appropriate in accordance with section 32;

(c) There is no presumption as to the most appropriate zone, rule, policy or objective for decision makers when embarking on a section 32 analysis.[2]

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[1] Evidence of Mr Skelton, at 13.

[2] *Eldamos Investments Limited v Gisborne District Council* W47/05, affirmed by the High Court in *Gisborne District Council v Eldamos Investments Ltd*, CIV-2005-548-1241, Harrison J, High Court, Gisborne, 26/10/2005. See also *Sloan and Ors v Christchurch City Council* C3/2008; *Briggs v Christchurch City Council* C45/08, and *Land Equity Group v Napier City Council* W25/08.

(d) A section 32 analysis seeks to provide for the optimum planning solution ultimately within the scope of submissions.[3] Such an analysis should be an effects-based decision, rather than based upon a desired outcome or directive planning purpose[4] and should take into account the existing consented and developed environment on the ground rather than providing a zone which makes that existing environment and development incongruous within the proposed DPR zone.[5]

(e) In considering what rule may be the *most appropriate* in the context of the evaluation under s 32 of the Act, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*[6] namely where the purpose of the Act and the objectives of the Plan can be met by a **less restrictive** regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by being **enabling** so that people can provide for their well-being while addressing the effects of their activities.[7]

8 I submit in particular the case of *Cerebos* is of relevance to the Site, where it currently exhibits a number of consented building platforms for rural living on approximately 20ha sites, and as discussed in Mr Skelton's evidence, parts of the Site exhibit strong rural living elements (to the east and west). An application of the WBRAZ over those rural living character parts of the Site will result in an inefficient planning outcome in the future whereby existing and previously lawfully established and anticipated activities will suddenly become entirely contradictory and inconsistent with the planning framework within which they sit. This is problematic for existing activities and activities which can be appropriately expanded and enhanced to continue to provide for sustainable use and development of land resources.

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[3] *Eldamos* paragraph [129]

[4] *Cerebos Greggs Ltd v Dunedin City Council*, Environment Court, Judge Smith, C169/2001, at [21].

[5] *Milford Centre v Auckland Council* [2014] NZEnvC 23 *at para 120; Shotover Park Limited v Queenstown Lakes District Council* [2013] NZHC 1712; *Cerebos*.

[6] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C153/2004 at [56].

[7] *Royal Forest and Bird Protection Society of New Zealand Inc v Whakatane District Council,* [2017] NZEnvC 051, at [59].

9 In the case of those parts of the submission pertaining to general provisions of Stage 2, and in particular where rights are being removed from the Operative District Plan (**ODP**) regime, the last case cited above, *Forest and Bird,* is particularly relevant to the submission point that a less restrictive rule framework is appropriate where this gives effect to the objectives and policies of the PDP[8] and this is consistent with the enabling purpose of the RMA. I submit that recent case is directly relevant to your considerations in particular on rules, policies, and objectives notified under Chapter 24 for both the Precinct and the WBRAZ which provide unnecessary and onerous controls on land use in a Zone / precinct which should otherwise be intended to give certainty as to future use to landowners. I further add to this submission that there must be a very strong and clear policy need to remove existing established rights under the DPR.

General provisions for the Wakatipu Basin Lifestyle Precinct (Precinct) and Wakatipu Basin Rural Amenity Zone (WBRAZ)

10 As detailed in this Submitter's submission, a number of amendments are sought to the general rules, policies, and objectives of Chapter 24 to:

(a) Modify the wording of the policies to provide a more focused set of provisions, which better reflect s7 of the Act, particularly in terms of what the key focus of this Variation should be, namely how particular regard should be had to the maintenance and enhancement of the amenity values of the Basin.

(b) Remove the policies, rules and assessment matters relating to the retention of all existing vegetation greater than 4m

(c) Recognise established residential building platforms and enable building within them

(d) Recognise and provide for existing rights to subdivide and build within compliant rural residential sites

(e) Increase the maximum height of building from 6m to 8m

(f) Amend the road boundary setback within the Lifestyle Precinct from 75m to 20m

[8] In my submission, as discussed in topics 01B and 02, this reference point to objectives in section 32 are those as sought by the Submitter (or appellant in the case of higher order provisions under Stage 1 and under appeal).

11 The submission also seeks to enable subdivision within the Lifestyle Precinct subject to compliant densities as a controlled activity. The approach to subdivision generally in Stage 1 of the PDP has opted for restricted discretionary activity status as the default within both the rural living and urban areas. Counsel presented significant legal submissions in respect of Topic 04 on these matters, and I refer the Commission to that information rather than repeat it here.

12 My primary submission is that the only justification for moving from a controlled activity regime (subdivision and buildings in building platforms) in rural living areas under the PDP to a restricted discretionary regime under the PDP, can be to retain the ability to turn down or refuse consent applications. That is a significant departure from the ODP regime and one which is of concern to many landowners who will lose certainty and land values as a consequence. This is further evidenced by the amount of appeals on this point on stage 1.

13 As submitted in Topic 04, and supported by the *Forest and Bird* case cited above, a less restrictive regime of a controlled activity subdivision in the Precinct and rural living zones can achieve the objectives of those zones. My earlier submissions particularly discussed this detail with respect to the Council's ability to control potentially adverse effects with a wide range of controls, including over matters such as control on bulk and location.

14 Where subdivision meets anticipated density and minimum / average allotment size rules in the Precinct there should be no justification to refuse this, given that those areas have been zoned for further rural living and development.

15 I further submit that the Panel cannot rely on the justification that a controlled activity subdivision right in the Precinct would be contrary to rural living zones under stage 1 because:

(a) The Basin is distinctly different in character to other areas and should not be comparatively assessed in such a broad brush way;

(b) Restricted discretionary status for rural living subdivision has been appealed under Stage 1.

16 As discussed in the opening of these submissions, the *Forest and Bird* case is also particularly relevant to where ODP rights are being removed without justification. The Submitters strongly oppose the removal of a controlled activity building right on established building platforms on this basis and the controlled activity right to build within a compliant rural residential sized allotment. It is also questioned whether the Council's section 32 analysis initially proposing this amendment could have taken into account economic costs and benefits when the number of building platforms across the Basin / rural residential sites to be

removed would have to be multiplied by the significant property and development right attached to each platform. Counsel acknowledges the changed approach in Mr Barr's s42a report since notification and supports this amendment.

17 In respect of the proposed Precinct setback of 75m, it is submitted this has been applied broad brush and completely arbitrarily to all land within the Precinct. There are a number of consented building platforms and existing houses within rural living zones which would become contrary to this rule, the subsequent development of those or alteration might therefore breach a restricted discretionary activity standard. There appears to be no logical landscape basis for this significant setback, and in many instances it will result in an inefficient use of land, which, as already discussed in these submissions, is in an area of rural living zoned entirely to achieve a further rural living purpose. It may well be that certain areas of the Precinct are more susceptible to degradation from built form introduced within 75m of the road, however there are clear instances where this will also not be contrary to the purpose of the Zone / precinct. I submit given the relatively few number of roads within the Basin, it would not be a difficult exercise for Council to consider with more detail where exactly this increased setback rule should apply and where it need not. It is submitted that greater protection of important view shafts and exposed areas of the Site will be afforded through the more site-specific regime provided in the evidence for the Submitter.

18 With respect to the new rules pertaining to removal of exotic vegetation, the associated policies for the restricted discretionary rule are particularly uncertain to apply and would result in difficulties, uncertainties, and inconsistencies in the future in the Council's administration of its District Plan. It is difficult to understand how one exotic tree in the Precinct could be fundamental to the Precinct amenity character and therefore its retention would be required. Although not technically *ultra vires* the Act, I submit the intention and outcome of this rule is entirely inconsistent with the parliamentary intent of removing the right to blanket protect trees in urban areas under section 76. Furthermore, in a number of cases, exotic trees are required to be removed under consent orders, covenants and consent notices as a result of the ODP (and Stage 1 decisions now on the PDP) providing a policy approach opposed to shelter belt planting and the blocking of views which are open in the landscape. This would result in an internal inconsistency in the Plan where for example, exotic trees and shelter belt planting historically established could not be removed without consent to further enhance open views. If a rule is required to protect specific amenity trees, I submit this would be more efficiently administered on a case by case basis through landscape plans and consent conditions at the time of proposed subdivision.

Council's economic case

19 I refer to extensive rural living submissions presented in Topic 02 relevant to the appropriateness of reflecting the positive benefits of rural living and development in the Basin, which appears to have been overlooked in notified Chapter 24. As discussed in those earlier hearing topics, post the Supreme Court's determination in *King Salmon*, it is important that planning instruments under the RMA provide for complete coverage of RMA issues otherwise they are likely in the future to be rendered void by want of completeness. Not providing for the established and ongoing rural residential nature of the Basin and its associated socio-economic benefits ignores a large and important aspect of Part 2 of the RMA relating to providing for people and their communities and their ongoing social, cultural, and economic wellbeing.

20 Having established the law relating to the existing environment, it must be considered what the Panel's obligations are in respect of making decisions on a planning instrument which must be forward looking for two generations.[9]

21 In accordance with section 5(2) of the Act, decision makers are required to assess the 'reasonably foreseeable needs of future generations'. The PDP, in accordance with section 79 of the Act, will be in place for at least a decade (up to twice that possibly, as is the case with the Operative Plan).

22 In summary it is submitted that:

(a) There is clear evidence of a demand for further rural living in the Basin. This is a relevant matter to consider in terms of providing for future generations in accordance with section 5(2)(c) of the Act.

(b) There is a desire for landowners to realise the economic benefits of developing their lifestyle land for rural living as evidenced by the breadth of submissions lodged to the PDP.

(c) The expressions of the people currently living in the Slopehill Road vicinity, is generally in support of enabling the rural amenity values of the area to be maintained and enhanced by enabling more rural living in line with the Precinct provisions.

23 Section 32(2)(a)(i) and (ii) requires that the opportunities for economic growth and employment that are anticipated to be provided or reduced are assessed. This recognises that Part 2 of the Act includes economic wellbeing of individuals as well as the wider community, and the use and development of natural and

[9] Referring in support to cases relied upon in legal submissions of Ms Baker Galloway for Darby Planning Limited Partnership and others, dated 18 March 2016

physical resources invariably involves economic activity. The reference to "*economic growth*" in subsection (i) must include the economic growth resulting from the increase in realisable land value which benefits a subdividing landowner, and the reference to "*employment*" in subsection (ii) must include specific employment opportunities which arise from rural living, both short term in terms of house construction and long term in terms of ongoing property maintenance.

24 The Council has declined to present economic evidence in respect of the Stage 2 Variation to the Basin planning regime, despite it representing a significant departure from the ODP approach, and to a lesser extent, the originally notified Stage 1 approach.

25 Legal submissions for rural living submitters discussed this aspect in Topic 02 rural hearings, noting:

(a) There is no challenge to various generic statements in Council evidence to the effect that the landscapes in the district, particularly the Outstanding Natural Landscapes (currently in the PDP comprising 96.7% of the district), are very important to the economic wellbeing of the district;

(b) There was no specific evidence that the existing character of the section 7 landscape components of the Wakatipu Basin (excluding ONLs and ONFs) is important to the economic wellbeing of the district;

(c) There was no specific evidence to the effect that providing for additional rural living opportunities within the RLC components of the Wakatipu Basin would adversely affect the economic wellbeing of the district.

26 The Council's economic evidence in Stage 1 Rural Topic 02 presented the following case:

(a) The key focus of Mr Osborne's evidence is on the economic contributions of tourism to the District, and the economic contributions derived from ONFLs.

(b) Mr Osborne omits any reference to rural living, rural lifestyle, or rural residential activities. Notably, Mr Osborne does not comment on whether additional rural living within the Wakatipu Basin would have an adverse effect on tourism for the District, or on the economic wellbeing of the District;

27 Despite having now had the opportunity to present economic evidence in relation to the specific issue subject to these submissions, the Council has elected not to provide such evidence in respect of the Wakatipu Basin hearings in Stage 2. Mr Osborne's evidence further discussed (generally) that agricultural land use is an important tool in the management of natural landscape. (Paras 5.9 and 8.7). This predates the Basin Study and subsequent Basin Variation which acknowledges the predominant land use of the Basin is not working agricultural land.

28 This evidence is not a qualitative cost benefit analysis under section 32, and the Council has declined to provide this information in Stage 2. I submit there is a clear section 32 case made out that, as suggested in the submissions, the benefits of rural living and development should be specifically recognised and provided for within Chapter 24. There is certainly no clear case to the contrary which justifies the removal of existing rights.

Wakatipu Equities Limited rezoning

The Submitter's case

29 The Submitters rely on the evidence of Mr Skelton and Mr Farrell in respect of a revised precinct zoning over the Site, including site-specific protections.

30 Mr Skelton considers that a rezoning of portions of the Site to the Precinct Zone with a minimum 4ha allotment size and associated ecological restoration and enhancement opportunities will reflect the nature of existing development in Landscape Unit 11 (LCU 11) and can be appropriately absorbed within the landscape:

> 32 Further subdivision and development should be permitted across parts of the WEL site with a minimum lot size of 4ha. This would repeat the existing patterns to the east and south of the WEL site.
>
> 33 There is scope for additional dwellings and ancillary units in parts of the landscape where their visibility or the visibility of associated effects and vegetation will not adversely affect views across the landscape of ONLs and ONFs. I have identified two views of particularly high value along the Slope Hill Road corridor (**Image 4 and Image 5** with the locations shown on **Attachment F**). I consider these views should be protected such that further subdivision and development does not adversely affect the public's visual access to and appreciation of the ONLs and ONF.
>
> …

> 35 There is also opportunity for the protection and enhancement of the north facing escarpment within the WEL site (**Attachment D**) and I recommend this forms part of any future development on that site.[10]

31 Mr Farrell relies on Mr Skelton's landscape recommendations and recommends that further rural living opportunities be provided over the Site in those areas recommended by Mr Skelton, to a 4ha density of development regime.

32 Mr Farrell provides examples of how these landscape recommendations for rezoning of the Site could occur within in amended chapter 24, including by:

(a) Providing for a new policy to promote or incentivise nature conservation enhancements and landscaping that enhances environmental quality or amenity values;

(b) A site specific policy included referencing a subzone, landscape unit, or drawing to reflect the recommendations of Mr Skelton to protect important and more sensitive parts of the Site and a supporting rule to manage / discourage rules within those areas as a non-complying activity.[11]

33 Overall Mr Farrell considers that:

> In terms of the overall purpose of the Act, it is appropriate to amend Chapter 24 so that it:
>
> > Specifically identifies and articulates the landscape values (environmental bottom lines) where development should be avoided in order to irreversibly compromise very important landscape values (in line with proposed policy 3.3.23)
> >
> > Provides for further rural living opportunities throughout the Rural Amenity Zone (including to an average density of 4ha on the submitters land), subject to inclusion of rules or standards that manage and/or discourage built development affecting the significant landscape values identified by Mr Skelton.[12]

Comments on the Council's case

34 Ms Gilbert for the Council considers the rezoning to be inappropriate in the Site, principally due to adverse visibility concerns to the Site and the potential for

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[10] Mr Skelton, evidence in chief, at 32, 33, 35.

[11] Evidence in chief, Mr Farrell, at 125.

[12] Ibid, at 131.

further rural living development to over-domesticate the landscape which acts as a buffer between denser pockets of development in the Hawthorn Triangle and north Lake Hayes.

35 In respect of the concerns of visibility of development Ms Gilbert considers:

> …there is a variable degree of visibility across the WEL land ranging from exposed ridgelines to gullies and a similarly variable patterning in terms of slope profiles. Generally, vegetation patterning is limited to gullies and lake edges with the odd shelterbelt along fence lines. Within a landscape of this nature, I expect that rural residential development would focus on the easier, open and exposed ridgelines within the property which optimise amenity and minimise earthworks.[13]

36 It is submitted that the location of the rezoning proposed over the Site has been deliberately selected by Mr Skelton to be contained within those parts of the Site with very limited visibility. As discussed in Mr Skelton's evidence, there are existing ancillary units, structures and sheds within the LCU 11 to an approximate 4ha density and it is still considered that 'spaciousness and ruralness is maintained to a high degree' (at [28]).

37 It is anticipated that applications for resource consent for future rural living development over the Site would comprehensively assess potential adverse effects of visibility of development. Matters of control in Chapter 24 could adequately ensure that development were not inappropriately located within the Site, for example on 'open exposed ridgelines'.

38 Ms Gilbert goes on to consider that:

> Whilst I accept that both the WEL and SPL properties are currently relatively well screened from Slope Hill Road and the Queenstown Trail, I note that the screening effect with respect to the WEL land relies on vegetation on neighbouring properties that is outside the control of WEL. 51 on behalf of WEL and SPL recommends that the exotic vegetation rules are deleted, which would enable the removal of this screen vegetation as a permitted activity, thereby potentially exposing the WEL land in views from Slope Hill Road and the Queenstown Trail[14].

39 Mr Skelton does not however rely on the existing hedge or screening effect to the Site in terms of supporting the proposed rezoning.

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[13] Rebuttal evidence, Ms Gilbert, at 12.7.

[14] Ibid, at 12.8

40 It is submitted that Mr Skelton is more familiar with the site, and the Wakatipu Basin, and that his site specific assessment should be preferred over that of Ms Gilbert.

41 Mr Langman relies on Ms Gilbert's concerns as to visibility of potential development on the Site when viewed from 'Slopehill Road, the Queenstown Trail and Threepwood'. Mr Langman should be aware of the construction of the PDP to exclude view from the Queenstown Trail as a public place in such considerations, and it is similarly unclear whether the reference to Threepwood is to private or public places.

42 Mr Langman concludes that:

> Turning to the matter addressed in Mr Farrell's evidence, I consider that Mr Farrell has undervalued the potential cost of loss of amenity (which is an unquantifiable cost) as a result of the requested rezoning. While the short term economic gain for the landowner is acknowledged, as a whole, I consider when weighed against the potential loss of amenity, the notified Amenity Zone is more appropriate than either a return to Rural Lifestyle as requested in Stage 1, or Precinct zoning for WEL's site. This is supported by Ms Gilbert's landscape evidence[15].

43 This conclusion fundamentally overlooks the concept of amenity values as defined in the Act and through significant case law which recognises the inherently anthropocentric and subjective nature of amenity, and that this is not something just derived from a natural or unmodified landscape. Mr Langman does not refer to the people's views as expressed to date on what they value and how they want to see the rural amenity values of the Wakatipu Basin and the Slope Hill/Speargrass Flat Road area in particular evolve into.

44 Mr Langman also assumes that creation of further rural living opportunities will have an adverse amenity affect and would be contrary to the section 7 requirement to maintain and enhance amenity. However this cannot be correct. Rezoning to Precinct still retains rural character, as it certainly will not enable urban character. The area already support rural living amenity, and the Precinct will continue to enable that.

45 Further detail on the threshold of amenity is discussed in the following section of these submissions. Ms Gilbert does also not refer to amenity values being compromised in her evidence.

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[15] Rebuttal evidence, Mr Langman, at 11.10.

Maintaining and enhancing amenity values

Amenity values subjective and broader than landscape

46 The Act defines 'amenity values' as;

> "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".[16]

47 The above definition of amenity embraces a wide range of elements and experiences, and recognises that the appreciation of amenity may change depending on the audience;

> We do not understand the words "pleasantness, aesthetic coherence and cultural and recreational attributes" to be some form of combined absolute value which members of the public appreciate to a greater or lesser extent. In our view the definition is embracing a wide range of elements and experiences. Appreciation of amenity may change, depending on the audience[17].

48 The threshold for management of section 7 landscapes is also relevant to the discussion in Mr Farrell's evidence, that in his opinion, provisions relating to amenity landscape values should not "protect" those values (as opposed to being "maintained and enhanced").

49 Previous Court determinations on the meaning of maintain and enhance in the context of section 7 are relevant to this Panel's enquiry as to whether further rural living development of the type proposed in this submission will achieve maintenance and enhancement.

Does change or modification of the landscape contravene 'maintain and enhance' in the context of amenity values?

50 In the RMA context "maintain" in Part 2 of the Act does not mean the same thing as the dictionary definition. The dictionary definition relates to the requirement to keep in an existing state but according to the High Court and Court of Appeal's determination in *Shell v Auckland City Council:*

> if the adverse effects are minor they can be treated as inconsequential and so, broadly speaking, the environment is "maintained"[18]

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[16] Section2 RMA.

[17] *Phantom Outdoor Advertising Ltd v Christchurch City Council* (NZEnvC C90/2001, 7 June 2001) at [18]

[18] *Shell New Zealand Ltd v Auckland City Council* (1996) ELRNZ 173 [1996] NZRMA 189, at page 3.

51 Therefore, it is submitted that in the context of s7(c), and the rest of Part 2, the definition of maintain will allow a minor incursion on the environment so long as the effect is not significant. And in respect of amenity values specifically, that assessment needs to be in respect of the actual, specific "attributes" that people consider contribute to their enjoyment of a place.

52 In *Shell,* the High Court interpretation of the phrase in s7(c) "maintenance and enhancement of amenity values" was upheld by the Court of Appeal. Here the High Court disagreed with the Environment Court and held that s7(c) did not require a proposal for a resource consent both to maintain and enhance amenity values in the sense of the ordinary dictionary meaning. It is worth repeating the whole statement of the High Court referred to by the Court of Appeal:

> "The appellant's argument is that the Tribunal is wrong in law to hold (as it did) that an application is required by the general policy factors in s7(c), not only to maintain the amenity in question but also to enhance it. Taken literally, that is what s7(c) says but it cannot mean that every application must be declined if it fails both to maintain and to enhance as well.
>
> I say that because the words of a paragraph in an Act must be interpreted against the section in which they are found and the part of the act in which the section is placed and the scheme of the Act as a whole. There seems to me no doubt that the Act contemplates applications for consent that not only do not enhance an amenity but also do not even maintain it, see for example s105(2)(b)(i) which empowers a consenting authority to give consent to an application if "the adverse effects on the environment will be minor". Plainly adverse effects will not "enhance" the environment because they are judged to be adverse to it and if they are adverse those effects cannot even be said to "maintain" the environment because the adverse effect must be inimical to that maintenance. Perhaps the Legislature intended to convey that if the adverse effects are minor they can be treated as inconsequential and so, broadly speaking, the environment is "maintained" in the sense that a minor incursion upon it is not significant.
>
> It seems difficult to argue that when the Act provides for adverse effects to be ameliorated by conditions, as in s108, and contemplates management of resources by "avoiding, remedying or mitigating any adverse effects of activities on the environment" (as in s5(2)(c)) that there must be both maintenance and enhancement of the amenity in question before a resource consent can be granted."[19]

53 The Environment Court in *Yaldhurst Quarries* discussed rural character and amenity in respect of a resource consent application to establish a gravel quarry as a discretionary activity in the Waimakariri Zone. The Court considered that 'change *per se* does not mean that there is an adverse effect on rural character or an effect on amenity values':

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[19] Ibid, at pages 3-4.

> [116] Amenity values are not solely concerned with visual amenity, although in this proceeding visual amenity is an important consideration. We are also concerned here with the effect on amenity of any change in background levels of noise, dust, vibration and the increase in volume of heavy goods vehicles. That there will be further change in the environment if the land use consent were confirmed is certain. **That said, change per se does not mean that there is an adverse effect on rural character or an effect on amenity values.** To test the proposition that the scale and intensity of effects will be adverse, experts need first to establish the baseline environment against which the effects are evaluated.[20]

Traffic

54 Mr Smith's position for the Council is to refuse all Wakatipu Basin rezoning requests on the basis of a concern of cumulative adverse traffic effects on the road network.

55 Mr Smith's evidence in chief considers that the Shotover Bridge will be operating at capacity at around year 2035 with the notified zoning under Stage 1 and Stage 2 of the PDP. In response, it is submitted that:

(a) There is evidence to show that within 17 years the Shotover Bridge will be required to be upgraded based on the status quo. It is submitted that the Submitter's rezoning, whether considered cumulatively with other rezoning proposals or not, should not be singled out as inappropriate as otherwise development throughout the Wakatipu Basin and Arrowtown would need to be halted, even to maintain the status quo. This is clearly a wider and inevitable issue that the Council needs to address, and which will be assisted by knowing clearly what zonings are in place sooner rather than later for funding/business case purposes.

(b) There is no justification to rely on a 17 year panning period for capacity of the Bridge to be reached and decline rezoning proposals in this District Plan Review, where the Plan should technically only be in place for ten years[21].

(c) The RPS infrastructure provisions are not directive in terms of requiring infrastructure provision to be available and developed at the time of zoning.

(d) The issue of cumulative effects of rezonings in the Basin should not concern the Commission, given that the evidence shows upgrades

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[20] *Yaldhurst Quarries Joint Action Group v Christchurch City Council*, [2017] NZEnvC 165 at [116].

[21] NZTA Research Report 422. Section 5.5: Where no validated and comprehensive regional transportation forecasts are available, then the assessment year should not be more than 10 years ahead, given the uncertainty of predicted development and the construction of transport infrastructure after this time.

will be required to the Shotover Bridge in any event, and it is preferable to know zoning now and in advance of such upgrade requirements so as to plan for this in an integrated way.

(e) The Council's reliance on traffic evidence to refuse rezoning submissions is somewhat concerning given there is no clear infrastructure plan from Council throughout the DPR process. It is apparent the Council has taken a principally landscape-based approach to rezoning and then retrofitted its infrastructure (traffic) evidence around that. The removal of the Stage 1 rural living zoning over many sites in the Basin and the new Precinct zoning over other areas in the Basin not identified in Stage 1 for rural living further highlights this (lack of) strategy.

Disconnect between RPS and Wakatipu Zones

56 I submit the following consent orders are of particular relevance to this case:

Chapter 1 – resource management in Otago is integrated

(i) This is an entirely new chapter of the RPS seeking to specifically recognise the enabling aspects of Part 2 without qualification of protective provisions. The chapter recognises that Otago's resources are used sustainably to promote economic social, and cultural wellbeing for its people and communities. And seeks to provide for the economic wellbeing of Otago's people and communities by enabling the resilient and sustainable use and development of natural and physical resources.

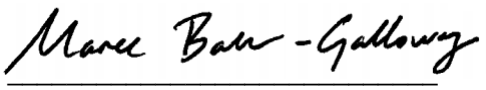
Chapter 3 natural resources (draft consent order lodged with Court but not yet approved by the Court)

(ii) Seeks to 'maintain or enhance' highly valued landscapes by 'avoiding significant adverse effects on those values that contribute to the high value of the natural landscape' (Pol 3.2.6). And seeks to 'minimise the subdivision of productive rural and into smaller lots that may result in a loss of its productive capacity or productive efficiency' (pol 5.3.1).

57 The above provisions of the RPS are of direct relevance to this case and provide no basis for opposing the rezoning of this (already somewhat developed) section 7 landscape for rural living purposes. As evidenced by Wakatipu Equities' submission, the productive capacity of their land is minimal and they seek to retain the ability to enhance the rural living amenity of the site in the future. Furthermore, the provisions of Chapter 3 and chapter 6 relevant to

natural resources and rural activities provide very little support for the way in which Chapter 24 seeks to protect landscape and restrict development of a section 7 landscape.

Dated this 25th day of July 2018



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