BEFORE THE HEARINGS PANEL APPOINTED BY QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	Of Stage 3 Proposed District Plan Settlement and Lower Density Residential Zones Mapping.
	SOUTHERN VENTURES PROPERTY LIMITED Submitter 3190

SUBMISSIONS OF COUNSEL FOR SOUTHERN VENTURES PROPERTY LIMITED

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42A REPORT

1. Southern Ventures Property Limited (SVPL) submission 3190 is in Group 3 Albert Town and is evaluated at pages 55-62 of the 42A report.

2. Hazard and foundation issues were assessed as being manageable with specific treatment (paras 20.13 and 20.15).

3. The issue leading to a negative recommendation was the lack of evidence confirming availability of infrastructure to serve the development (para 20.17).

4. Since that report was released SVPL's engineering advisor has been working with Council's Mr Powell and now understands that the infrastructure constraint issue has been resolved to Council's satisfaction.

5. SVPL now understands that there is no opposition from the Council to SVPL's submission being accepted. Evidence in support of SVPL's submission has been filed from:

   (a) Engineering issues: Nichola Greaves.

   (b) Planning assessment in the light of the engineering evidence: Scott Edgar.

NPS UD 2020

6. The Commission has sought submissions and planning evidence on the significance of the NPS UD 2020.

7. MfE's introductory guide says this:

> *The NPS-UD is designed to improve the responsiveness and competitiveness of land and development markets. In particular, it requires local authorities to open up more development capacity, so more homes can be built in response to demand. The NPS-UD provides direction to make sure capacity is provided in accessible places, helping New Zealanders build homes in the places they want – close to jobs, community services, public transport, and other amenities our communities enjoy.*

8. Objectives 3 and 4 are relevant:

> ***Objective 3:*** *Regional policy statements and district plans enable more people to live in, and more businesses and community services to be located in, areas of an urban environment in which one or more of the following apply:*
>
> *a) the area is in or near a centre zone or other area with many employment opportunities*
>
> *b) the area is well-serviced by existing or planned public transport*
>
> *c) there is high demand for housing or for business land in the area, relative to other areas within the urban environment.*
>
> ***Objective 4:*** *New Zealand's urban environments, including their amenity values, develop and change over time in response to the diverse and changing needs of people, communities, and future generations.*

9. Land use intensification in urban environments is a key objective. This is implemented by policy 5 for tier 2 Councils:

> ***Policy 5:*** *Regional policy statements and district plans applying to tier 2 and 3 urban environments enable heights and density of urban form commensurate with the greater of:*
>
> (a) *the level of accessibility by existing or planned active or public transport to a range of commercial activities and community services; or*
>
> (b) *relative demand for housing and business use in that location.*

10. Because the current proceeding is a Plan Change, policy 8 is also relevant:

> ***Policy 8****: Local authority decisions affecting urban environments are responsive to plan changes that would add significantly to development capacity and contribute to well functioning urban environments, even if the development capacity is:*
>
> *a) unanticipated by RMA planning documents; or*
>
> *b) out-of-sequence with planned land release.*

11. Of interest is Policy 6:

> ***Policy 6:*** *When making planning decisions that affect urban environments, decision-makers have particular regard to the following matters:*
>
> *a) the planned urban built form anticipated by those RMA planning documents that have given effect to this National Policy Statement*
>
> *b) that the planned urban built form in those RMA planning documents may involve significant changes to an area, and those changes:*
>
> *(i) may detract from amenity values appreciated by some people but improve amenity values appreciated by other people, communities, and future generations, including by providing increased and varied housing densities and types; and*
>
> *(ii) are not, of themselves, an adverse effect*
>
> *c) the benefits of urban development that are consistent with well-functioning urban environments (as described in Policy 1)*
>
> *d) any relevant contribution that will be made to meeting the requirements of this National Policy Statement to provide or realise development capacity*
>
> *e) the likely current and future effects of climate change.*

12. A "planning decision" is defined to include a decision on a District Plan or Proposed District Plan.

13. It is submitted that the effect of policy 6(b) is that any adverse amenity effects on neighbours caused by expanding a zone boundary are no longer relevant adverse effects. That is significant because those who live on zone boundaries will often enjoy an outlook across other zones that may create significant amenity values.

14. However where the zone boundary is expanded, then those same amenity values will henceforth be enjoyed by somebody else. There is an amenity substitution as the boundary shifts. Policy 6(b) removes the usual complaints about zone boundary changes by requiring you to ignore amenity substitution effects as an adverse effect in your assessment of SVPL's submission.

SCOPE

15. Although not raised as concerns in counsel for the Council's opening submissions, or the section 42A report, counsel has been instructed to address potential legal issues as follows:

    (a) Whether there is a submission "on" Stage 3 of the PDP?

    (b) Have Council undertaken an adequate section 32 analysis? Can this be addressed through submission?

16. The essence of these submissions may be summarised this way:

    (a) Zone boundaries, Urban Growth Boundary lines, and landscape classification boundaries shown on maps are all "provisions" that defines the spatial extent where an objective applies.

    (b) Where a Plan Change seeks to introduce a new zone, line, or boundary to a Plan, the Council must decide where to draw the proposed zone's boundaries.

    (c) Boundaries affect the owners of land on either side of the proposed boundary. A section 32 assessment must therefore contain a level of detail concerning the reasons for selecting boundaries that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the zone.[1]

    (d) It cannot be assumed that the operative zone or mapped boundaries for the zone being replaced are the most appropriate[2] boundaries to achieve the objectives of the new zone. The new

[1] Section 32(1)(c).
[2] Section 32(1)(b)

zone boundaries thus require an assessment that they are the most appropriate boundaries.

(e) A submission made on the location of a zone boundary must therefore be a submission that is not only "on" the Plan Change, but also goes to the heart of the section 32 analysis for the zone proposed. For the question about where an objective must be implemented is exactly the purpose served by zone maps.

Scope of PC3

17. The Public Notice on PC3 said this:

> *The Stage 3 zones apply to the areas of land notified with these zones as shown on the Stage 3 Web Mapping Application Viewer. The notified Stage 3 zones vary the zoning applied to some land already notified in Stages 1 and 2 of the Proposed District Plan, including Frankton Road and Atley Road in Queenstown and Brownston Street and Ballantyne Road in Wānaka.*
>
> *There may be zoning proposals that affect you, even if the zoning of your land was decided as part of Stage 1 or 2. We invite you to take a look and see what Stage 3 could mean for you.*

18. The issue was also discussed in the Council's legal submissions dated 10 July 2017 (Stream 12).[3]

> *10.1 "The Panel has queried through the Reply Minute:*
>
> *Projecting forward to Stage 2 of the PDP process, how does Council see submissions seeking rezoning of current ODP Zones, where the relief sought is a Stage 1 PDP Zone e.g. land currently zoned Township where a submitter seeks a Low Density Residential Zone. Will that be possible, or is it the Council's view that such a submission would be out of scope? Would it make a difference if the future rezoning application seeks some local variation to the zone provisions the outcome of the PDP Stage 1 process (e.g. with additional standards)?*
>
> *10.2 In later stages of the PDP process, submitters would be entitled to request a Stage 1 PDP zone (e.g. notified Township zone to LDRZ) or any other zone, that would be clearly be within scope, and becomes an evidential test. In fact, depending on timing, there could be significantly more certainty than what exists in Stage 1, if Stage 1 decisions have been released.*

[3] Legal Submissions of Ms Scott, Hearing Stream 12, Dated 10 July 2017 at [10.1]-[10.3]

> *10.3 A submitter would be entitled to seek any zone type for its land, whether included in the PDP at any stage or not (ie, as the Glendhu Bay Trustees are seeking in this hearing). If they seek a Stage 1 zone, they are entitled to seek variations to those Stage 1 zone provisions, but it submitted that such variations would need to be specific to the land in question. This may be by way of site specific standards, or possibly a site specific objective and policies, if justified under the statutory tests."*

19. The legal submission suggests that submitters can seek any rezoning as part of later stages of the District Plan review.

20. The following submissions are made in case there is any remaining concern about SVPL's relief based on scope.

When is a Submission "On" a Plan Change?

21. When determining whether a submission is "on" a Plan Change, the leading case *Clearwater Resort Limited v CCC*[4] which applies a two-step test:

> *1. Is the relief sought in the challenged submission incidental to, consequential upon or (perhaps) directly connected to the plan change (or variation)?*
>
> *2. have potential submitters been given fair and adequate notice of what is proposed in the submission or has their right to participate been removed?*
>
> *Neither of the higher authorities suggests other than that each case must be determined on its own facts, and there is no clear line: whether there is jurisdiction is a matter of fact and degree.*

22. *PNCC v Motor Machinists Limited* elaborated and provided an exemption as follows: [5]

> *"One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the Halswater decision. Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under*

[4] *Clearwater Resort Limited v CCC* (HC) Christchurch AP 34/02
[5] *PNCC v Motor Machinists Limited* [2013] NZHC1290; [2014] NZRMA 519

schedule 1, clause 10(2). Logically they may also be the subject of submission."

23. These principles have recently been applied in the context of QLDC plan change sequence through *Tussock Rise Limited v QLDC,* and *Well Smart Investments Limited (NZQN) v QLDC*.[6]

24. In *Well Smart*, the Court assessed whether submitters outside of the PC50 area could submit to be included within PC50. A significant aspect of the factual context was that earlier documents identified a broader area for potential zoning, while the section 32 restricted the assessment of alternative uses assessment to the sites with proposed PC50 only. The Court held the following:

    (a) The Court rejected the proposition that because the land was outside the area identified within PC50 that it was automatically beyond scope. The Court applied the exception within *Motor Machinist* that incidental or consequential extensions are appropriate provided no substantial section 32 assessments are required to inform potentially affected persons.[7]

    (b) Applying the second limb of the *Clearwater* test above, the Court was concerned with whether allowing the submission would result in a 'sidewind' where potentially affected parties were not given fair opportunity to assess the proposal.[8]

    I find (if barely) that the potential submitters on the appellants' submissions were not given sufficient notice by the combination of the Section 32 Evaluation, and the Council's summary of submissions.

    (c) However ultimately, the Court found that the appellant's submission to extend PC50 did not fit within the limited exemption of *Motor Machinists* above. In short, the fact that potential third parties were not given fair notice of the extension of PC50 was determinative for the Court.

[6] *Clearwater Resort Limited v CCC* [2015] NZEnvC 214
[7] *PNCC v Motor Machinists Limited* [2013] NZHC1290; [2014] NZRMA 519 at [81]
[8] *Well Smart Investments Limited (NZQN) v QLDC* [2015] NZEnvC 214 at [39]

25. The Court in *Tussock Rise* applied the same principles to reach a different outcome. The significant factor for the Court was that the site was adjoining a proposed residential zone subject to appeal. The risk of prejudice to other submitters could be remedied in this circumstance:[9]

> *I hold that TRL can bring itself within the exception to some extent because its land is immediately adjacent to the proposed Low Density Residential zone. On the other hand, the Industrial B zone is not discussed in the section 32 analysis….*
>
> *For present purposes I consider that the site, because it is adjacent to the proposed zone, comes within the consequential exemption contemplated by Kos J*.

26. *Bluehaven Management Limited v WBOPDC* takes a much broader interpretation of the *Motor Machinist exemption* and adopts an additional criterion of whether the s 32 evaluation report should have covered the issue raised in the submission. Otherwise, the Court reasoned, a Council would be able to ignore potential options for addressing the matter that is the subject of the plan change, and prevent submitters from validly raising those options in their submissions.[10]

> *Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.*

27. *Tussock Rise* criticised the approach in *Bluehaven* on the basis that the approach still has the potential to undermine fairness to persons who might have wished to lodge submissions.[11]

28. *Bluehaven* was followed in *Calcutta Farms Limited v Matamata-Piako District Council* which adopted their reasoning:[12]

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[9] *Tussock Rise Limited v QLDC* [2019] NZEnvC 111 at [67]-[69]
[10] *Bluehaven Management Limited v WBOPDC* [2016] NZEnvC 191 at [39]
[11] *Tussock Rise Limited v QLDC* [2019] NZEnvC 111 at [60]
[12] *Calcutta* at [87]-[88]

> *Much will depend on the nature of the plan change which can assist to determine its scope, (whether it is a review or a variation for example) and what the purpose of it is. In this case, the purpose of the plan change is to review the future need for residential areas in Matamata, and to identify areas next to urban areas where future residential activity is proposed to occur. The method by which the latter is proposed to occur in PC47 is by the application of the Future Residential Policy Area notation. Underpinning the need for the size and scale of both new Residential Zones and the Future Residential Policy Area are the population predictions, which Calcutta Farms' submission directly sought to challenge. I agree with Mr Lang that the District Plan review process should be such that differing views on the appropriate scale of such policy areas can be considered, rather than assuming that the Council's nominated scale of policy areas represents the uppermost limit for future planning. I therefore agree with Mr Lang that the difference and scale and degree of what is proposed by Calcutta Farms is a matter going to the merits of the submission rather than to its validity.*
>
> *For the above reasons, I consider that Calcutta Farms' submission does address the extent to which PC47 changes the existing status quo.*[13]

Summary of Principles

29. In applying the High Court Principles, there are two distinct lines of reasoning:

    (a) Judge Jackson (*Tussock Rise & Well Smart)* applied the *Motors Machinist* exemption strictly to avoid prejudice to potential third parties who might have made a submission. Weight is given to the interest of those who are not before the Court. Judge Jackson then introduced remedies to ensure that Council does not benefit from inadequate section 32 assessments and to cure any prejudice in relation to notification of potentially interested parties.

    (b) Judge Smith, Judge Kirkpatrick (*Bluehaven)* and Judge Harland (*Calcutta*) preferred a broader interpretation and assessed the submission against the purpose of the Plan Change or Variation. Considerations include the appropriate scale and location of policy areas (i.e *should* an area have been included within Council's assessment).

[13] Status quo is referring to first limb of Clearwater.

30. It is submitted that the second approach is a better reflection of the Council's function under section 31(1)(a):

> ***31 Functions of territorial authorities under this Act***
>
> *(1)Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:*
>
> *(a)the establishment, implementation, and review of objectives, policies, and methods <u>to achieve integrated management</u> of the effects of the use, development, or protection of land and associated natural and physical resources of the district:*

31. The key understanding here is what "integration" requires. When introducing objectives, policies, and methods to a Plan, understanding where the boundaries of those things apply requires consideration of how those boundaries achieve the integrated management of the relevant resources.

32. It is submitted that the notified boundaries fell short because they simply drew lines around existing land use patterns. The Council's mind did not seem to have turned to the question of whether the existing southern urban boundary for Albert Town will be the most appropriate boundary for the Low Density Suburban Residential zone for the life of the Plan. The section 32 report does not explain the criteria for determining the zone boundary or the deliberative process followed that resulted in excluding SVPL's land from the zone. The Council cannot therefore have been satisfied that the notified zone boundary defines the most appropriate location for the implementation of the zone's objectives.

33. That question is fundamental to the exercise of the Council's function. It is submitted that the question about who should participate in setting those boundaries is an important, though secondary consideration about procedural fairness, rather than a question of jurisdictional scope. For his reason the *Bluehaven* approach should be preferred.

34. Judge Jackson's approach in *Tussock Rise* should also now be approached with caution in the light of policy 6(b) of the NPS UD 2020. Prejudice to third parties will be irrelevant where that prejudice arises

from the adverse effects of changes to the urban form that will be substituted for by improved amenity values for other people.

35. Perhaps nothing much turns on the different approaches to the issue in the present case because nobody is raising a scope issue and no prejudice issues have been raised about SVPL's submission.

Date 29 July 2020

P J Page

Counsel for Southern Ventures Property Limited