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 Streams 16, 17, 18 – Stage 3 and 3b Proposed District Plan

---

OPENING LEGAL SUBMISSIONS FOR QUEENSTOWN LAKES DISTRICT COUNCIL

29 June 2020

Simpson Grierson
Barristers & Solicitors

S J Scott / R P Mortiaux
Telephone: +64-3-968 4018
Facsimile: +64-3-379 5023
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

TABLE OF CONTENTS

1. INTRODUCTION

1.1 These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of submissions made on Stage 3 and 3b (collectively, **Stage 3**) of the Queenstown Lakes Proposed District Plan (**PDP**). The topics that required the Panel's recommendations include submissions allocated to three Hearing Streams - 16, 17 and 18 – as follows:

Hearing Stream	PDP Chapters / variations
Hearing Stream 16	1. Wāhi Tūpuna (Chapter 39)
Hearing Stream 17	2. General Industrial (Chapter 18) 3. Three Parks Commercial (Chapter 19A) 4. 101 Ballantyne Road zoning 5. Design Guidelines for the Business Mixed Use and Residential Zones (applies to Chapters 7, 8, 9 and 16)
Hearing Stream 18	6. Settlement Zone (Chapter 20) 7. Rural Visitor Zone (Chapter 46) 8. Arthurs Point zoning 9. Energy and Utilities (variation to Chapter 30) 10. Open Space and Recreation Zone (variation to Chapters 29, 36 and 38) 11. Glare (variation to Chapters 7-9, 12-16) 12. Firefighting water supply (variation to Chapters 21-24 and 38) 13. Wānaka Medium Density Residential zoning 14. Frankton Road - Height Control (variation to planning maps 31A, 32 and 37)

1.2 The Panel is also required to make recommendations on submissions seeking changes to the plan maps, including changes to wāhi tūpuna overlays allocated to Hearing Stream 16, and changes to zones and Outstanding Natural Landscape (**ONL**) boundaries, allocated to Hearing Stream 17 and 18 topics.

1.3 These submissions do not attempt to address or set out the Council's position on every substantive or legal issue, or rezoning submission, which is instead represented by the Council planners' recommendations. Given the number and breadth of submissions being heard through the course of this hearing, we anticipate that additional legal issues will arise that we can either address during the course of this week, or in the Council's reply. Because a submission or site has been addressed in these opening submissions does not

mean the Council has focussed more or less on that particular rezoning throughout this process. On the contrary, because these submissions do not address a particular issue or site, does not mean a submitter should translate that to there being 'no issue' with what they are proposing.[1]

1.4 These submissions do not seek to 'start from scratch' given we have already had 15 hearings on the PDP and covered numerous legal issues over the course of those hearings. We do appreciate however that we have some new Panel members so some context is necessary, and to that end a summary of statutory functions and legal tests is set out in **Appendix 1** of these submissions.

2. OUTLINE OF LEGAL SUBMISSIONS

2.1 These legal submissions address the following issues:

(a) wider plan matters, Otago RPS, strategic chapters;
(b) jurisdictional issues;
(c) Hearing Stream 16: matters specific wāhi tūpuna;
(d) the following matters that are relevant to both Hearing Streams 17 and 18:
    (i) the approach taken to rezoning submissions sought on land not notified in Stage 3;
    (ii) the existing environment;
    (iii) the 'comparison point' for rezoning submissions (i.e. the strategic chapters);
    (iv) rezoning submissions located in the ONL;
(e) Hearing Stream 17 matters:
    (i) NPS-UDC;
    (ii) Prohibited activity status;
    (iii) Scope for a UGB if the Cardrona Cattle Company submission was successful;
(f) Hearing Stream 18 matters:
    (i) Scope to apply 'protect' threshold to new and existing RVZ;

1 Experience in previous PDP hearings suggests other counsel may undertake a detailed critique of the Council's evidence in their own legal submissions. The Council does not have the time this week, nor capacity to respond in kind. In the Council's submission, the evidence before the Panel must be read in totality and with the context and strategic framework in which it has been prepared in mind.

(ii) Scope to apply 'Rural Zone RCL' threshold to new RVZ;

(iii) Site coverage, building density, external appearance of buildings – scope to apply them on new RVZ;

(iv) Arcadia Rezoning – section 85(2);

(v) Airbnb Legal Submissions;

(vi) Mapping of landscape sensitivity;

(vii) Arthurs Point North – ONLs; and

(viii) Cabo Limited – Wyuna Rural Lifestyle Zone.

2.2 The following documents are attached to these legal submissions:

(a) **Appendix 1:** Council's functions and statutory obligations, and relevant legal tests;

(b) **Appendix 2:** Wāhi Tūpuna Chapter 39, recommended by Ms Picard following consideration of submitter evidence;

(c) **Appendix 3:** Wāhi Tūpuna clause 8D withdrawal;

(d) **Appendix 4:** Consent Order issued on Otago RPS (Chapters 3 and 5) on 24 June 2020;

(e) **Appendix 5:** Map showing Council's recommended zoning for Three Parks, General Industrial and Ballantyne Road;

(f) **Appendix 6:** List of cases referred to in submissions/ evidence.

3. WIDER PLAN MATTERS, OTAGO RPS, STRATEGIC CHAPTERS

3.1 Mr Craig Barr has prepared what we refer to as 'Strategic Evidence', with one of its purposes being to provide an update to the Panel on the progress that has been made on the staged plan review as well as resolution of appeals on Stages 1 and 2 of the PDP, and the proposed Otago Regional Policy Statement (**proposed RPS**).

3.2 His evidence describes the progress made through Environment Court decisions in terms of clearer description in the District Plan as to the role of Chapters 3 – 6. That work continues with the Environment Court through both Topics 1 (Resilient Economy) and 2

(Rural Landscapes). We can address the Panel further on that work if necessary.

3.3 Mr Barr's Strategic Evidence also works through relevant higher order statutory and other documents, so that information was not repeated in each s42A, except of course where directly relevant to a particular matter. For that reason, we will call Mr Barr first. Some further updates since filing that Strategic Evidence are also required and we have asked Mr Barr to do this through his highlights summary.

3.4 One of those updates is a consent order issued last week by Judge Jackson on Chapters 3 and (in part) 5 of the proposed RPS (although noting it is subject to no parties raising any issues with the amendments by 3 July 2020). Assuming no issues are raised, counsel for ORC has advised that this means that it is only the following provisions of the proposed RPS that remain subject to an unresolved appeal:

(a) Policy 4.3.7 (Ports);
(b) Policy 5.4.6 (Offsetting for indigenous biological diversity); and
(c) Methods 3.1.x, 3.1.6, 3.1.10, 4.1.x, 4.1.3 and 5.1.2.

3.5 This recent approval of Chapter 3 of the proposed RPS means that the remaining resources chapters in the 1998 RPS (Land, water, air, coast, biota) will shortly be superseded. The residual mining and port policies are not relevant to any submissions on Stage 3, but for completeness, as we understand it, there are no direct equivalents to the mining and port policies in the 1998 RPS. This means that (when ORC makes the PRPS provisions in the consent order and wider chapters operative), the 1998 RPS will be fully superseded, with no operative provisions remaining.

3.6 For the Panel's reference, copies of relevant versions of the RPS can be found at the following links / locations:

(a) Partially operative Otago RPS 2019: https://www.orc.govt.nz/media/6357/orc-2018-rps-partially-operative.pdf

(b) Partially operative Otago RPS 2019: changes as a result of appeals: https://www.orc.govt.nz/media/6808/rps-version-2019-05-17-tracked-text-draft-partially-operative-plus-approved-sections.pdf

(c) The recent consent order on Chapters 3 and 5 (in part) in **Appendix 4.**

3.7 These documents need to be read together, and we will attempt to explain this (orally).

3.8 The importance of the Court's Topic 2 decision (Rural Landscapes) is addressed below in the Rural Visitor Zone topic. All High Court appeals against this Topic 2 decision have been discontinued, and the Council is progressing the various directions included within the judgment. Again we can speak to those directions in more detail if the Panel wishes.

4. JURISDICTIONAL ISSUES

4.1 There are a number of submissions that have been lodged that Council considers are not 'on' Stage 3, as required by clause 6(1) of the First Schedule of the RMA. The approach taken by the Council has been to set out in the relevant s42A report the particular submission point considered to be out of scope and the reasons why. The recommendation then made in the accept/reject table is for the Chair to strike out the submission under section 41D(1)(b) and/or (c) of the RMA.[2]

4.2 The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:

(a) a submission must first, be *on* the proposed plan; and

(b) a decision maker is limited to making changes within the scope *of the submissions* made *on the* proposed plan.

2 In that they disclose no reasonable or relevant case, or it would be an abuse of the hearing process to allow the submission or the part to be taken further.

4.3 The meaning of “on” was considered by the High Court in *Palmerston North City Council v Motor Machinists Ltd,*[3] where the two-limb approach was firmly endorsed. The questions that must be asked are:

(a) whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

(b) whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

4.4 The principles that then pertain to whether certain relief (or in other words changes to the PDP) is within the scope of a submission can be summarised as follows:

(a) the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;[4]

(b) another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought in a submission; the scope to change a plan is not limited by the words of the submission;[5] and

(c) ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter.[6]

4.5 The Council has made one departure in its approach to scope compared to previous stages of the review. It has accepted the standing of submissions which seek a rezoning of land that has not been notified in Stage 3. This is justified in circumstances where the submitter seeks a particular zone type that is a Stage 3 ‘topic’ (i.e. Rural Visitor Zone (**RVZ**), Settlement Zone or General Industrial Zone

3 [2013] NZRMA 519.
4 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.
5 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.
6 Ibid, at 574.

(**GIZ**)). We return to that matter in more detail below, under Hearing Streams 16 and 17.

5. HEARING STREAM 16

5.1 A bespoke approach was taken to timetabling of evidence on the wāhi tūpuna topic which resulted in there being no opportunity for Ms Picard, the Council's s42A reporting officer, to file rebuttal evidence. Following receipt of the evidence filed by Kā Rūnaka and other submitters, Ms Picard now recommends further changes to Chapter 39 and the associated variations to zone chapters, which reflect some relaxation of the regulatory approach. An updated set of the provisions is attached to these submissions as **Appendix 2** and Ms Picard will take the Panel through those changes**.**

5.2 Council is required, in the preparation of its district plan, to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other Taonga,[7] to have particular regard to kaitiakitanga[8] and the ethic of stewardship,[9] and to take into account the principles of the Treaty of Waitangi.[10]

5.3 These three sections located in Part 2 of the RMA cumulatively protect matters of cultural and spiritual value to Maori. While the principles of the Treaty of Waitangi are to be taken into account, providing an underlying basis for the protection of Maori interests, sections 6(e) and 7(a) are specific. What section 6(e) requires, is not to provide for the protected matters, but to consider the effect of a proposed activity on the relationship of Maori with the relevant land or other matters listed. When dealing with a resource of known or likely value to Maori, section 8 also requires that the District Plan enable active participation in the consultative process by Maori.

5.4 Council must also give effect to the PORPS[11] which provides clear direction as to how councils must recognise and provide for wāhi

7 Section 6(e) RMA.
8 Section 7(a) RMA.
9 Section 7(aa) RMA.
10 Section 8 RMA.
11 Section 74 and 75 RMA.

tūpuna within their respective plans. Of particular relevance is Policy 2.2.2[12] and Method 4[13] which require councils to recognise and provide for the protection of wāhi tūpuna by including provisions in their plans and identifying on plan maps the location of wāhi tūpuna to be protected.

5.5 Ms Picard explains in her s42A report[14] that the extent of the wāhi tūpuna overlays have been informed by Manawhenua who holds the knowledge of wāhi tūpuna values. It is not for others to evaluate the culture beliefs of Maori, that is for Kā Rūnaka to assert and establish. This process facilitates co-governance and seeks to give recognition to the Treaty of Waitangi principles, including Manawhenua participation in resource management processes and decisions.

5.6 As foreshadowed in Ms Picard's s42A report, the Council has formally withdrawn some wāhi tūpuna overlays from the District Plan using clause 8D of Schedule 1 of the RMA. The extent of the withdrawal is limited to five discrete areas within the District, where wāhi tūpuna overlays had been notified over land where the zone is yet to be reviewed through this process. Any submissions and further submissions that were made on these particular parts of the wāhi tūpuna overlays essentially fall away and no longer have any status. No recommendation needs to be made on them. The public notice and relevant maps are attached in **Appendix 3**.

5.7 As a final note, through evidence, Kā Rūnaka has sought some changes to the provisions which are submitted to be out of scope of the notified proposal and submissions. This includes the request to map three additional overlays.

12 Recognise and provide for the protection of wāhi tūpuna, by all of the following:
(a) avoiding significant adverse effects on those values that contribute to the identified wāhi tūpuna being significant;
(b) Avoiding, remedying, or mitigating other adverse effects on the identified wāhi tūpuna;
(c) Managing the identified wāhi tūpuna sites in a culturally appropriate manner.

13 Method 4 of the PORPS requires city and district plans to:
include provisions recognising wāhi tūpuna and to protect the values that contribute to wāhi tūpuna being significant; and identify on plan maps, the location of the wāhi tūpuna to be protected.

14 At paragraph 4.4-4.5 of

6. HEARING STREAMS 17 AND 18

6.1 To assist the Panel, a map of the general Three Parks area is attached as **Appendix 5** showing Council's zoning recommendations for this hearing. Those recommendations are made across section 42A reports from Mr Nick Roberts, Mr Luke Place and Mr Elias Mathee.

Rezoning submissions on land not notified in Stage 3

6.2 As foreshadowed, a number of submitters have sought that a Stage 3 zone type (i.e. Rural Visitor or General Industrial) be applied to land that was not notified with any zone type through the Stage 3 or 3b plan changes.

6.3 It could be argued that these submissions fall foul of the first *Motor Machinist* limb, when a pure geographic view of Stage 3 notified land is taken. In relation to geographic areas covered by a plan change, Justice Kós in *Motor Machinists* identified that "[i]*ncidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of the change…logically they may also be the subject of the submission."* [15]

6.4 Some rezonings sought on non-Stage 3 land are directly adjacent to notified Stage 3 land (i.e. the Universal Developments submission) and fall neatly into Justice Kós' exception.

6.5 Others (for example various requests for RVZ including the Corbridge Estate submission, and those located in the Gibbston Valley seeking GIZ and RVZ) are clearly not directly adjacent or consequential extensions of notified zones on the Stage 3 plan maps. For these submissions, they do however seek a zone type which falls within the scope of the Stage 3 review. Given the staged approach taken to the plan review, and fairness matters, Council has approached all of these submissions as if they were 'on' Stage 3.

15 Motor Machinists above at [81] and [83].

6.6 If submitters were seeking a zone type over land that has not been notified in Stage 3, is not directly adjacent or consequential extensions of notified Stage 3, and was for example seeking a zone such as Business Mixed Use Zone, Council would have taken a different view to scope / standing.

Existing Environment

6.7 The context of the following submissions is that submitters sometimes use the fact of an issued resource consent (usually subdivision, but also land use) to argue that certain (adverse) effects of a proposed zone should be ignored. The focus of the submitter then tends to be the aspects / effects of their proposed zone that are beyond the level of development consented – essentially applying the existing environment concept established in *Hawthorn*. This concept usually becomes relevant when a submitter seeks to 'codify' an existing consent into the zone provisions, for example through the use of a consented structure plan.

6.8 For the purposes of these opening submission, we cover the approach that we submit the Panel must apply to this principle at a general level. They must be applied on a case by case basis, where relevant, for a particular site.

6.9 As some panel members will appreciate, this is not a new issue for these hearings. It was for example covered in the Panel's recommendation reports for the Upper Clutha, in particular in relation to the Glendhu Bay Special Zone sought by Glendhu Bay Trustees Ltd. These submissions are consistent with the Panel's findings on the concept.

6.10 The *Hawthorn* principle arises in the context of resource consents because section 104(1)(a) of the RMA requires consent authorities to have regard to any actual and potential effects on the environment of allowing the activities. The Court of Appeal has allowed consideration of a future state of the environment (rather than the decision date) when resource consents have been granted *where it appears that those resource consents will be implemented*.

6.11 In the context of plan development (i.e. a rezoning), the High Court has held - in *Shotover Park Limited and Ors v QLDC*[16] - that the decision maker is not obliged to consider the environment by reference to the tests contained in the *Hawthorn*[17] decision. The Council has discretion to take it into account. That does not mean a free choice – the exercise of that discretion needs to be exercised (or not) on a principled basis, meaning evidence as to whether a particular consent is being implemented, or is likely to be implement, needs to be considered.

6.12 The approach to take in this hearing is therefore similar to the resource consent context, although we would submit that careful consideration is required as to whether the existing consent is likely to be exercised, when a particular submitter is seeking a rezoning to largely replicate that same consent.

6.13 If the Panel does exercise its discretion to apply the *Hawthorn* approach to any particular rezoning submission, we also urge very careful consideration of positive effects (i.e. economic benefits, and so on). If the adverse effects of a particular resource consent are to be ignored, then so should any positive effects of that same resource consent. Otherwise the submitter is 'double-dipping' in terms of positive effects.

'Comparison point' for submissions seeking rezoning to different zone

6.14 For many submissions, the Panel will be recommending the most appropriate zone for an area of land submitted on. A zone is a method, in that it allocates certain provisions of a plan to a particular area of land. The most appropriate zone type should reflect the broader objectives and policies set out in the Strategic Chapters (which have all largely now been confirmed by the Court as achieving Part 2 of the RMA and the PORPS, or subject to draft consent orders where all parties have confirmed they consider this test to be achieved). It is these strategic objectives and policies which are the

16 [2013] NZHC 1712.
17 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

'comparison point' that the Panel must use to decide on what is the most appropriate zone.

6.15 Comparison of two zones against the strategic objectives and policies cannot be completed in isolation from the provisions within the zones themselves. The application of a zone means that a certain set of rules will be applied to the land in question, and therefore through section 76(3) the Panel must have regard to the actual or potential effects on the environment of any activities that would apply through the application of a rule within a rezoning request.[18]

6.16 While there is no statutory presumption that a notified zone is more appropriate that a zone sought through a submission, submitters still need to provide a level of detail and analysis that corresponds to the scale and significance of the environmental effects that are anticipated from the implementation of the new zone sought.[19] In our submission, submitters need to provide sufficient evidence to assist the Panel in considering whether actual or potential adverse effects are satisfactory, before it makes a recommendation that the zone is more appropriate than the notified zone.

Rezonings located within an ONL

6.17 Positive effects cannot outweigh negative effects where the plan (or the RPS or Part 2) sets environmental bottom lines which must be achieved. For example in ONLs, new subdivision, use and development is inappropriate unless the landscape values of the ONL are protected.[20] Positive effects, whether related to the negative outcomes or not, cannot justify what would otherwise be a failure to follow the direction in section 6(b) of the RMA and those strategic objectives referred to in footnote 20.

6.18 It is submitted that there is a point where the type and/or density and/or location of development proposed within an ONL, cannot be absorbed without protecting the values of that particular ONL.

18 RMA, section 76(3).
19 RMA, section 32(1)(c).
20 Topic 2 Decision, Strategic Objective 3.2.5.xx and 3.2.5.xxx (Appendix to Mr Barr's Strategic Evidence).

7. HEARING STREAM 17

General Industrial Zone

NPS-UDC

7.1 The NPS-UDC is a national policy document that the Panel is required to give effect to in its recommendations.

7.2 The NPS is enabling policy in that it requires the Council to ensure that at any one time, there is sufficient residential and business land capacity to meet expected demand over the short (3 years), medium (10 years) and long term (30 years).

7.3 The *Darby Planning* decision (on Topic 1 appeals) sets out how the PDP responds to the NPS policy directions concerning business land, with the Court confirming that the PDP does give effect to the NPS business land requirements.[21] Further, through Topic 2 the Environment Court confirmed that the PDP is giving effect to the NPS requirements in relation to housing capacity,[22] leaving only the NPS requirements in relation to industrial land to be addressed.

7.4 Ms Hampson considers the NPS requirements in respect of industrial land in detail within her evidence in chief. Her evidence demonstrates that overall, the Council's proposed approach to industrial land (without any additional land beyond the Council's recommendations), combined with the provisions in those zones, will give effect to the NPS over the short and medium term, as required.

7.5 In particular, Ms Hampson explains that the latest sufficiency results show the consolidated District Plan demonstrates sufficient zoned capacity for all industrial land uses in the short and medium term in the Wanaka and Wakatipu Wards. While Ms Hampson identifies a potential shortfall for the Wakatipu Ward in the long term (by 2048),[23] that is not a matter that this district plan must address.

---

21 *Darby Planning Limited Partnership v Queenstown Lakes District Council* [2019] NZEnvC 133 at 176 – 179 and 193.
22 *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 205 at [57 – 59].
23 Natalie Hampson, Evidence in Chief dated 18 March 2020, at paragraph 5.31(c).

7.6 The Council must ensure that there is sufficient industrial land development capacity in the following way:

(a) In the next 3 years, it must be feasible, zoned and serviced with development infrastructure;

(b) In the next 10 years, it must be feasible, zoned and either:

(i) Serviced with development infrastructure; or

(ii) Funding for the development infrastructure required to service that development capacity is identified in the Long Term Plan.

7.7 Development capacity over the long term (the next 30 years) does not need to be zoned in the District Plan, nor does it need to be 'identified' in the District Plan. Rather PA1 of the NPS requires that it be identified in plans and strategies (referring here to the necessary Future Development Strategy), and the development infrastructure has to be identified in the relevant Infrastructure Strategy. In short, Council submits that long term development capacity is best addressed through the wider Spatial Plan process, which is currently underway as a joint process with the Government, Kāi Tahu partners and consultation with local community members (the general public).

7.8 In addition to specific directions for councils, the NPS states in its preamble that:

> *This national policy statement does not anticipate development occurring with disregard to its effect. Local authorities still need to consider a range of matters in deciding where and how development is to occur, including the direction provided by this national policy statement.*

7.9 It follows that the NPS cannot be determinative as to whether various rezoning submissions should be approved, rather each rezoning site must be considered on a case-by-case basis in the local and wider context.

7.10 A number of submitters filed evidence that commented on the potential ramifications of Covid-19, with some submitters seeking a

more permissive zoning framework as a response. Ms Hampson considers these suggestions in her rebuttal, noting that Covid-19 does not erode the basis of the higher order objectives and policies and does not mean the issues that the GIZ is seeking to address, disappear.[24]

7.11 Ms Hampson explains[25] that decisions made at Stage 3 of the PDP will have very limited ability to influence economic development within the District in the next 1-2 years and consequently, it would be inappropriate to make decisions that will continue in the district plan for years to come on what is potentially a short-term economic downturn.[26] On this basis, Ms Hampson concluded that replacing the GIZ with a more flexible zone, as a result of Covid-9, makes little economic sense.

Prohibited activity status

7.12 An area of contention between Council and certain submitters is the proposed approach to managing non Industrial and Service activities within the GIZ and in particular, the restrictive approach proposed to managing Trade Suppliers, and Office, Commercial and Retail activities. These non-industrial and service type activities were identified as prohibited within the notified GIZ.

7.13 Mr Luke Place, supported by the evidence of Ms Hampson,[27] has recommended that the activity status for Trade Suppliers be amended from prohibited to fully discretionary, which may allay some of the submitter's concerns.

7.14 Including a prohibited activity status in the GIZ for Office, Commercial and Retail activities can be justified through the hierarchy of documents ahead of the district plan and is supported by the expert evidence from Ms Hampson. Mr Place discusses this hierarchy within his S42A at section 5 and this is not repeated here however we briefly address the case law around the use of prohibited activities.

24 Natalie Hampson, First Statement of Rebuttal dated 12 June 2020, at [3.16].
25 Natalie Hampson, First Statement of Rebuttal dated 12 June 2020 at [3.14].
26 Natalie Hampson, Statement of Rebuttal dated 12 June 2020, at [3.14].
27 Natalie Hampson, Evidence in Chief dated 18 March 2020, paragraph 3.5.

7.15 The Court of Appeal's decision in *Coromandel Watchdog*[28] is the authoritative judgment in relation to local authorities classifying activities as "prohibited" when formulating plans under the RMA. The question there was whether prohibited activity status could only be used in a situation where the planning authority was satisfied that, within the time span of the Plan, the activity in question should in no circumstances ever be allowed in the area under consideration. The Court of Appeal answered in the negative. In other words, prohibited activity status is *not* limited to being used in that one situation only. At [9] of the judgement:

> *.. it became apparent during the hearing that neither of the respondents disputed that prohibited activity status may be justified in a number of circumstances which were identified by the interveners. The most significant of these is where a planning authority has insufficient information about a proposed activity and wishes to take a precautionary approach, even though it does not rule out the possibility of that activity being permitted in the future.*

7.16 The underlying principle is whether or not the allocation of prohibited activity status is the most appropriate of all options available. The GIZ rules are not a situation where the council has insufficient information to undertake the evaluation of the activities and therefore have applied prohibited activity status as a default. Mr Place has taken a careful evaluation of all relevant statutory requirements and relied on the expert evidence of Ms Hampson in recommending the activity status not change for Office, Commercial and Retail activities in the GIZ.

7.17 Categories identified in the *Coromandel Watchdog* case that may also lead to situations when prohibited activity status should be imposed, that are relevant to the GIZ context, include:

(a) **where the council wants to ensure that new development occurs in a coordinated and interdependent manner**. It may be appropriate to provide

28 *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473.

that any development that is incompatible with the comprehensive development is a prohibited activity. One of the key reasons identified by Mr Place in his s42A for retaining a prohibited activity status for non-industrial activities was because they were considered to be incompatible with the intended outcomes of the GIZ given their propensity to result in reverse sensitivity effects on industrial and service activities.

(b) **where a council wishes to restrict the allocation of resources**. As explained in Mr Place's s42A[29], the industrial economy of the District is growing rapidly with industrial and service activities being a vital component of this economic activity. The GIZ provides a strategic role in responding to key issues facing the District's industrial economy including by allocating certain areas for industrial activities/development. Restricting the allocation of industrial and service activities, and indeed non-industrial activities to particular areas therefore provides a reason for prohibiting non-industrial activities/development within the GIZ.

7.18 Ms Hampson outlines in her evidence in chief, just how important it is that the District moves forwards with a clearly defined Industrial Zone that can accommodate the projected growth of the industrial economy. She explains the need to protect those industrial and service activities that are dependent on a zoned location, from reverse sensitivity effects and ensure their commercial viability can be sustained.[30]

7.19 Ms Hampson also considers the narrow role of the notified GIZ, which is focussed on providing for industrial and service activities, concluding that it is appropriate on the basis that non-complying and prohibited activities are provided for in other zones. Ms Hampson explains that if the GIZ was amended to be a permissive regime, the zone would duplicate the role of other business zones. Ms Hampson points out that the net economic benefits expected to arise from the

29 At [5.12 - 5.13].
30 Natalie Hampson, Evidence in Chief 18 March 2020, at [3.4].

notified GIZ provisions, arise "*most strongly from the **avoidance** of further non-ancillary office, commercial and retail activities…*".[31]

Cardrona Cattle Company (CCC) submission – UGB

7.20 The CCC are seeking a GIZ, an urban zone that provides for urban development as defined in Chapter 2 of the plan. Mr Place's section 42A and second rebuttal evidence works through the relevant provisions in Chapters 3 and 4 of the plan in some detail, and Mr Place's interpretation of those chapters is submitted to be correct and therefore preferable to that of Mr Giddens. At this juncture though, we wish to express caution in terms of any suggestion that the submission seeks that a UGB be drawn around the GIZ, in the new location being pursued.

7.21 The CCC submission is completely silent on 'urban development', and on 'urban growth boundaries', and on Chapters 3 (Strategic) and 4 (Urban Development) of the District Plan. A 'top-down' approach to preparing a plan is well recognised through this process, and is the very reason the Court has focused on resolving appeals on strategic chapters in advance of zone chapters and the plan maps. Chapter 4 is clear that the location of new UGBs, or movement of existing UGBs to allow for expansion of the urban environment is driven by the objectives and policies (and criteria in 4.2.1.4) in Chapter 4.

7.22 While CCC will likely to rely on their "Any other additional or consequential relief to the PDP, including but not limited to, the maps …", this relies on a 'bottom-up' approach to plan preparation and is submitted to require a very liberal interpretation of what is consequential relief.

31 Natalie Hampson, Evidence in Chief 18 March 2020, at [10.32].

8. HEARING STREAM 18

Settlement Zone

Kingston Village Limited (3306)

8.1 Ms Megan Justice has filed evidence that supports moving the ONL boundary to exclude the ODP Kingston Village Special Zone (**KVSZ**). Her evidence suggests that at notification, Stage 3 of the PDP includes a *new* ONL that carves out the SETZ at Kingston and that the proposed new ONL encompasses the yet to be reviewed KVSZ. Any suggestion that the ONL at Kingston is 'new' is incorrect.

8.2 The ONL at Kingston was notified and confirmed in Stage 1 of the PDP, and applies over all of the Kingston area, including the valley floor and mountains. What is new in Stage 3, is the ONL *boundary* excluding the notified SETZ, rather than the ONL itself. This approach aligns with Chapter 4 (Urban Development) and the approach taken to settlements ('townships') – essentially the Settlement Zone is excluded from the ONL at Kingston.

8.3 Ms Justice is essentially promoting a movement of the new ONL boundary line at Kingston which is currently aligned with the boundaries of the Settlement Zone. She seeks that it instead be aligned with (or to capture) both the Settlement Zone and the ODP Kingston Special Zone. The regulatory effect of that change would be to exclude the ODP Kingston Special Zone from the ONL.

8.4 While Council does not oppose the submission on the basis of scope, Council's position is that the relief should not be declined. The Environment Court's Exception Zone Framework (**EZF**) will address the Resource Management issue at hand. That is, Council's position is that the ODP Kingston Special Zone is an 'Exception Zone' for the purposes of Chapter 3, and therefore none of the ONL specific objectives and policies in Chapter 3 (nor Chapter 6) apply to any plan implementation (i.e. resource consents and designations) in that area,

unless an activity is being pursued that is not provided for in the particular Exception Zone.

8.5 If an activity of that nature that is not anticipated in the ODP Kingston Special Zone, there is a requirement to protect the ONL values, which is entirely appropriate in light of section 6(b) of the RMA. The reasoning behind this approach is covered in the Court's Topic 2 decision, and is essentially a 'catch-all' for the section 6(b) landscape.

Rural Visitor Zone

8.6 The Court's interim decision in Topic 2 is particularly relevant for those submissions seeking a new RVZ located within the Rural Zone ONL. The Court in its decision, has redrafted certain Chapter 3 provisions and emphasised that landscape values of ONLs are to be protected. Any new zone located within an ONL needs to achieve this standard. The RVZ is designed in a way that uses different levels of landscape sensitivities to direct development to those areas with lower landscape sensitivity. The ethos behind this zone must be at the forefront in considering whether recommendations on the various new RVZs should be pursued.

8.7 The Topic 2 decision is also relevant in that it sets up an "Exception Zone Framework" (**EZF**) in Chapter 3 of the District Plan. In summary, this EZF is intended to align Chapter 3 with the 'provide a separate regulatory framework' policies sitting under 6.3.1 of Chapter 6, which some members of this panel will be familiar with.

8.8 The purpose of the EZF as described by the Court in Decision 2.2, at [30] is:

> *.. a regime of specified exceptions to the overall regime for ss6(b) and 7(c) of the RMA. Carve Out is premised on a theory that those provisions have already been accounted for in the ODP zones and sub-zones to which Carve Out would apply.*

8.9 The EZF is relevant to rural zones, other than the Rural Zone, which are located in an ONL or ONF. These are generally legacy zones

that came about either through the preparation of, or plan changes to, the previous ODP. The RVZ is one of these 'legacy zones'.

8.10 The key benefit of being listed as an Exception Zone in 3.1B,5 can be found in 3.1B.6 and 3.2.5.1A of the Court's decision:

> *3.1B.6 The following Strategic Objectives and Strategic Policies do not apply to applications for any subdivision, use or development within any of the Exception Zones"*
>
> *a. SO [tbc]*
> *b. SP [tbc]*
>
> *3.2.5.1A In each Exception Zone, located within Outstanding Natural Features and Outstanding Natural Landscapes, any application for subdivision, use and development is provided for:*
> *a. To the extent anticipated by that Exception Zone; and*
> *b. On the basis that any additional subdivision, use and development not provided for by that Exception Zone protects landscape values.*

8.11 These provisions are subject to refinement in drafting through on-going Topic 2 directions. The important takeaway though, is that if there is to be a new RVZ located in the ONL, then the Panel needs to be satisfied that the zone framework provides a regulatory framework, that is protecting the values of the ONL in question.

Scope to apply 'protect' threshold to new and existing RVZ

8.12 The scope available for various rezoning submissions seeking RVZ deserves some attention. For those new RVZ pursued in the Rural Zone ONL, there is scope for any zoning outcome that sits anywhere between the Rural Zone (with ONL) framework, and the RVZ with any site specific changes sought. Given the Rural Zone ONL is a fully discretionary regime, there is clear scope to apply standards, which we return to below. The objective and policy direction that currently

applies to the Rural Zone ONL gives scope to apply 'protect' policies, even if rezoned to RVZ.[32]

8.13 The 'protect' direction already exists in various notified policies (ie. Policy 46.2.1.6 and 46.2.2.1). The scope to make this clearer comes from Christine Byrch's submission (31030) who sought that the purpose and extent of the RVZ be tightened up. The change is also consequential to other submissions seeking that the wording of the chapter allow for RVZ to be located outside of ONLs.

8.14 There are a number of site specific changes to certain rezoning submissions, as mentioned by Emily Grace, that do not fall within the scope available (being the Rural Zone ONL) and the RVZ. If the Panel was to entertain those new RVZs being pursued, Council encourages careful consideration of whether the site specific changes being sought, are available. Examples are specific height limits were sought in submissions, but the evidence filed now seeks a more lenient height limit.

Scope to apply 'Rural Zone RCL' threshold to new RVZ

8.15 Some rezoning submissions are currently located in the Rural Zone RCL. The appropriate policy direction that should be applied to any new RVZ located in this section 7(c) landscape *is maintain landscape character,* and *maintain or enhance visual amenity values.* Essentially, any new RVZ in the Rural Zone RCL would provide an alternative regulatory framework to the Rural Zone RCL – but that does not mean the landscape policy, should be any less.

8.16 Council's recommendations for *new* RVZs include site coverage and building density standards. While there is no scope to recommend these for the four notified RVZs, it is submitted that there is scope for any new RVZ currently located in the Rural Zone. This is because the Rural Zone has a fully discretionary regime and therefore the Council can consider anything when processing a consent. When processing a consent under the Rural Zone regime, Council can impose site coverage and building density standards, for example.

32 Mr Farrell in his evidence filed on the Malaghan's RVZ suggests there is no scope for the word 'protect' in the RVZ objectives and policies.

This fully discretionary regime creates scope to apply standards to any new RVZ that may be approved through this process.

Arcadia Rezoning – section 85(2)

8.17 In the context of an existing consented structure plan and subdivision consent, the Arcadia submission suggests that the proposed non-complying activity status for residential activities in the RVZ (Rule 46.4.13) could render the land incapable of reasonable use under section 85(2) of the RMA.[33]

8.18 Section 85(2) provides a person with an interest in land a reason to challenge a plan provision on the grounds the provision renders the interest in land 'incapable of reasonable use'. 'Reasonable use' is defined in section 85(6) to mean "*in relation to land, includes* ***the use or potential use of the land*** *for* ***any*** *activity whose actual or potential effects on any aspect of the environment or on any person (other than the applicant) would not be significant*" (our emphasis).

8.19 The test to be applied is "*…not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest).*"[34]

8.20 In determining whether this test is met, it is necessary to assess whether the land *as a whole* is incapable of reasonable use.[35] In *Steven v Christchurch CC* the Environment Court held that a provision in a plan that imposes an all or nothing quality on the land owner's options for a property is likely to render it incapable of reasonable use. The Court however, went on to compare this situation with a hypothetical rule in a rural area which makes clearance of indigenous vegetation a discretionary activity. The Court noted that while the land may not be able to be used for grazing or forestry for example, it may be possible to use it for other purposes, such as residential activity or subdivision.

33 Submission of Mr Lloyd Veint (31008), at [26].
34 *Hastings v Auckland CC* A068/01 at [98].
35 *Steven v Christchurch CC* [1998] NZRMA 289 (EnvC).

8.21 In the Arcadia situation there is no "all or nothing" proposed.[36] There are other activities that can occur on the site under the RVZ framework which are aligned to the intention of the RVZ, i.e. rural visitor accommodation. We submit that Ms Grace's view, that the non-complying residential activity status does not render the Arcadia land incapable of reasonable use, is correct and consistent with relevant case law. Further, a non-complying resource consent can still be sought for residential activities.

8.22 If an application was to be made to the Environment Court, we note that section 85(3B) requires not only that the provision or proposed provision makes any land incapable of reasonable use, but also, that it places an unfair and unreasonable burden on any person who has an interest in the land. Both grounds would need to be met.

Airbnb Legal Submissions

8.23 Airbnb filed brief legal submissions on 29 May 2020. Airbnb highlight that they are concerned about aligning the activity status for Residential Visitor Accommodation (**RVA**) in the RVZ, with the outcome of their current appeal filed in Stage 2, where they seek permitted activity status.

8.24 These legal submissions relate to a submission point by Wayfare Group, that is specific to the Walter Peak RVZ. That submission has been deferred, which means the Airbnb further submission has also been deferred.

8.25 As Council does not agree with a suggestion made in those legal submissions, we thought it may be useful to highlight to Airbnb now, that their appeal on Stage 2 creates jurisdiction to change the activity status for RVA in the zones that were varied in Stage 2, but that appeal cannot create scope to change a rule notified in the RVZ in Stage 3. The fact that the PDP RVZ did not even exist when their Stage 2 appeal was filed, makes that clear.

36 Emily Grace, Section 42A dated 18 March 2020, at [14.16].

8.26 The activity status for RVA in the RVZ will need to be pursued through the (deferred) hearing of the Wayfare submission.

Mapping of landscape sensitivity

8.27 If the Panel is to accept any new RVZ through this process, Council seeks that a direction is made to the particular to submitter to provide the high and medium landscape sensitivity data for the plan maps, in a format that Council can use to update its web mapping application. The same applies to any new Structure Plans. Further information on that format, and directions on that could be made in due course.

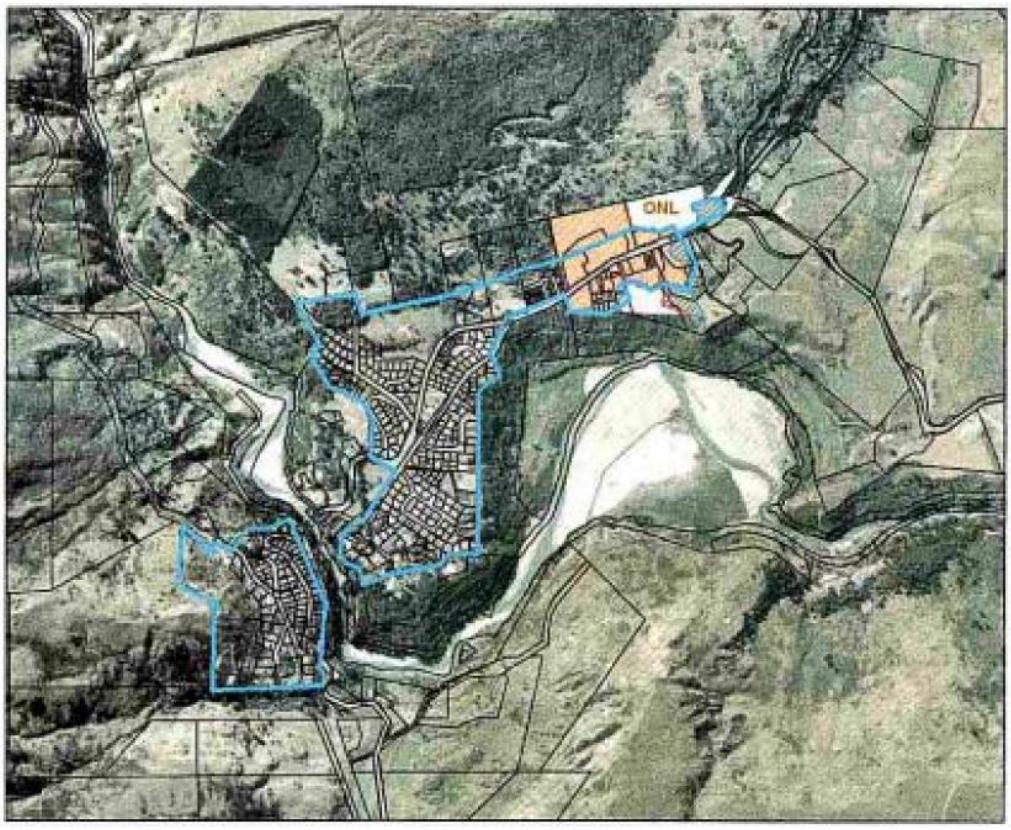
Arthurs Point North – ONLs

8.28 ONL boundaries were notified in conjunction with the notified urban and rural zones, at 'Arthurs Point North'. The purpose (and scope) of Stage 3b of the PDP was not to revisit the location of the ONL at the wider Arthurs Point area, nor revisit it generally.

8.29 It is submitted that part of the Arthurs Point Outstanding Natural Landscape Society (**APONLS**) submission (31041) is not 'on' Stage 3b of the PDP. Where APONLS has sought relief that relates directly to the urban and rural zones notified in Stage 3b, that is submitted to be on Stage 3b. However, where APONLS seeks relief and changes to the ONL and UGB boundary over land that was not notified as part of Stage 3b, that relief should be stuck out.[37] The changes sought go well beyond the scope of the notified ONL and UGB, and seek to incorporate the entire Arthurs Point area, which was subject to review and zoning decisions in Stage 1.

8.30 The ONL boundary that APONLS seeks to revisit, has been subject to Stage 1 decisions and subsequent Environment Court proceedings.

37 Refer to Emma Turner's section 42A report, Figure 2, page 6.



Cabo Limited – Wyuna Rural Lifestyle Zone

8.31 A variation to Policy 27.3.5.1, an area specific policy in the subdivision chapter that applies to the Wyuna Station Rural Lifestyle Zone, was notified as part of Stage 3. The notified amendment was notified in response to a comment from the Stream 4 Hearing Panel Report 7, which states that Policy 27.3.5.1 was restated in the same form as it appeared within the Operative District Plan (ODP) and should be amended.

8.32 Cabo Limited made a submission (**3174**) on the variation made to Policy 27.3.5.1, and correctly pointed out that there is no ambiguity or confusion in Policy 27.3.5.1, and the variation should be deleted (ie. Policy 27.3.5.1 should remain in its Stage 1 decisions version).

8.33 This submission point has not been addressed in any s42A report, but we can confirm that Council's position is that the Cabo Limited submission should be accepted, and the variation declined.

DATED this 29th day of June 2020

S J Scott
Counsel for Queenstown Lakes District Council