

Before the Queenstown Lakes District Council

Under the Resource Management Act 1991

and

In the matter of the Queenstown Lakes Proposed District Plan Stage 3 Stream  
18 – Proposed Morven Ferry Rural Visitor Zone

---

**Legal submissions on behalf of Barnhill Corporate Trustee Limited and DE, ME  
Bunn & LA Green**

24 July 2020

---

**Submitter's solicitors:**

Vanessa Robb  
Anderson Lloyd  
Level 2, 13 Camp Street, Queenstown 9300  
PO Box 201, Queenstown 9348  
DX Box ZP95010 Queenstown  
p + 64 3 450 0700 | f + 64 3 450 0799  
vanessa.robbs@al.nz

**anderson  
lloyd.**

## May it please the Panel

### Introduction

- 1 These legal submissions are made on behalf of Barnhill Corporate Trustee Limited and DE, ME Bunn and LA Green (**Barnhill**), submitter 31035.
- 2 Barnhill owns land along Morven Ferry Road legally described as Lot 2, Lot 3 and Lot 4 DP 397602 (**Site**).
- 3 The Site was zoned Rural General in the Operative District Plan (**ODP**) and notified as Rural Zone in Stage 1 of the Proposed District Plan (**PDP**). The Site was then included in the Stage 2 Wakatipu Basin Variation and zoned Wakatipu Basin Rural Amenity Zone (**WBRAZ**).
- 4 In Stage 2 Barnhill sought that the Site be rezoned to a bespoke zoning of 'Morven Ferry Road Visitor Precinct A' and 'Morven Ferry Road Visitor Precinct B', as part of a larger rezoning of land owned by Barnhill and Morven Ferry Limited to enable a combination of rural visitor and rural residential activities. That relief was not granted by the Stage 2 Hearings Panel and is now subject to appeal before the Environment Court.
- 5 When Stage 3b was notified Barnhill lodged a submission seeking that the Site be rezoned to Morven Ferry Rural Visitor Zone (**RVZ**), and that site specific amendments be made to the Chapter 46 provisions to:
  - (a) provide for farm buildings (permitted), commercial activities (restricted discretionary) and residential activities (discretionary);
  - (b) introduce more enabling height and building size standards; and
  - (c) introduce a more restrictive standard for setbacks from roads.
- 6 The Bunn family have farmed the Site since the 1950s. Their vision for the Site is to create a hub of rural visitor activity at the intersection of the Arrow River, Gibbston Wine and Twin Rivers Trails, to service locals and tourists. Their plan for the Site includes options for a winery and cellar door, gift shop, gallery, café, rural style visitor accommodation such as cottages, glamping and camping, and bike hire.

### Revised proposal

- 7 The council was opposed to the Morven Ferry RVZ as proposed in the Barnhill Stage 3b submission on the basis that Ms Mellsop considered effects on landscape character and visual amenity would be inappropriate.

- 8 However, Ms Mellsop did consider the Site has some of the key characteristics of an RVZ, being a sense of remoteness, tranquillity and quietness, and proximity to the Queenstown Trail.
- 9 Ms Mellsop indicated she might support a smaller Morven Ferry RVZ if the proposal included:
- (a) Development which is single storey 'low-key' commercial and visitor/tourism development;
  - (b) Location in Zone A near the trail or adjacent to the lake in the centre of Zone B;
  - (c) An assessment of visibility from public and private places;
  - (d) A landscape assessment of high, moderate and low landscape sensitivity areas;
  - (e) An assessment of the landscape character and visual amenity values of Landscape Character Unit (**LCU**) 18;
  - (f) Commentary as to how the proposed relief will maintain or enhance these values; and
  - (g) The notified RVZ provisions (not bespoke provisions), along with a standard which limits the maximum ground floor area of all buildings to 500m<sup>2</sup> (non-compliance status: restricted discretionary) and a standard regarding the external appearance of buildings.
- 10 Based on Ms Mellsop's position Barnhill now proposes an amended Morven Ferry RVZ considerably reduced in size, comprising of 2.8ha of land, including 7000m<sup>2</sup> along Morven Ferry Road identified as an area of High Landscape Sensitivity and 2.1ha identified as an area of Low Landscape Sensitivity<sup>1</sup>. Barnhill accepts Ms Mellsop's position that the notified Chapter 46 provisions should be retained for the Morven Ferry RVZ, with the exception of amendments sought to policy 46.2.1.a and standard 46.5.2 regarding the maximum ground floor area<sup>2</sup>.
- 11 The council's outstanding concerns with the proposal, as raised in its rebuttal evidence, are that:
- (a) Mr Espie's landscape assessment is insufficient to give confidence that the Morven Ferry RVZ provision framework will ensure that landscape effects will be appropriately managed, primarily because it

---

<sup>1</sup> See Appendix 1 of Ms MacColl's evidence in chief, dated 29 May 2020.

<sup>2</sup> See Ms MacColl's evidence in chief at [31]-[33].

does not justify the identification of the Low Landscape Sensitivity and High Landscape Sensitivity areas; and

- (b) The proposed building size rule to allow for a maximum ground floor area of 1500m<sup>2</sup> will enable development that would adversely affect visual amenity values.

### Identification of RVZs in non-ONLs

- 12 Council considers, and Barnhill agrees, that RVZs can appropriately be located in landscapes which are not Outstanding Natural Landscapes (**ONL**), such as the Rural Character Landscape (**RCL**).
- 13 In her s 42A Report Ms Grace proposes a new policy 46.2.1.a to identify the 'key characteristics of the RVZ' and 'clarify how areas suitable for RVZ can be identified'<sup>3</sup>. Her proposed policy 46.2.1.a reads:

*46.2.1.a Areas identified as a Rural Visitor Zone shall be generally remote in location, difficult to see from public places, and largely comprised of areas of lower landscape sensitivity, with any areas of Moderate – High and High Landscape Sensitivity specifically identified.*

- 14 It is understood that the policy is intended to apply to the identification of RVZ in both ONLs and RCLs. However, the terminology "difficult to see" is terminology specific to ONLs that comes from policy 6.3.3.1<sup>4</sup>.
- 15 Barnhill considers that if the policy is intended to apply to RVZ in RCLs, the terminology "have limited visibility" should be used. This terminology better corresponds to policy 6.4.3.6<sup>5</sup> regarding activities within the RCL.
- 16 If the intention is for the policy to apply to the identification of RVZs in both ONLs and RCLs, both phrases should be used in the policy, and it should be clear which visibility threshold applies to which landscape. In the alternative, it may be more appropriate to have two separate policies for the identification of RVZ, one for ONLs and one for RCLs.
- 17 If the council considered RVZs could be located in the Wakatipu Basin Rural Amenity Zone (**WBRAZ**), a third phrase related to visibility, or a separate policy regarding identification of RVZs in the WBRAZ, may be

---

<sup>3</sup> S 42A Report at [4.22].

<sup>4</sup> As per the Topic 2 interim decision [2019] NZEnvC 205.

<sup>5</sup> As per the Stage 2 decisions version of the Chapter 6 Variation.

required. This is because policy 6.3.1.4<sup>6</sup> states that a separate regulatory framework is provided for the WBRAZ, to which the ONL, ONF and RCL categories and policies of chapter 6 related to those policies do not apply.

- 18 The terminology relevant to the WBRAZ will come from the provisions of Chapter 24, and will link to the landscape characteristics and visual amenity values of the WBRAZ listed in Schedule 24.8.

## Landscape

- 19 Ms Mellsop criticises the landscape evidence of Mr Espie as not addressing the specific rezoning sought in Stage 3, and not providing an analysis of the landscape sensitivity of the Site.<sup>7</sup>

- 20 Mr Espie's Stage 2 landscape assessment considered Barnhill's Stage 2 proposal which included 1.5ha of RVZ (Area A) in the same location as that sought in Stage 3, and 18.7ha of RVZ (Area B) on the surrounding sites. Mr Espie's assessment included, most relevantly:

- (a) An assessment of the landscape characteristics of the Site and LCU 18, in light of the Wakatipu Basin Land Use Planning Study<sup>8</sup>;
- (b) An assessment of the capacity of the Site and LCU 18 to absorb additional development<sup>9</sup>, concluding the following:

As is elaborated upon below, I consider that the specific relief sought by Submissions 2449 and 2509 can be absorbed into this LCU (and the broader Wakatipu Basin landscape) in a way that appropriately maintains the landscape character of LCU18 as described in Schedule 24.8 of the PDP (bearing in mind that the LCU descriptions of Schedule 24.8 were prepared as part of the WBLUPS before any of the zonings of the Wakatipu Basin Variation were proposed).<sup>10</sup>

...

I consider that development enabled by the specific relief sought can be absorbed into the specific part of LCU18 on which it is located without inappropriately degrading the

---

<sup>6</sup> As per the Stage 2 decisions version of the Chapter 6 Variation.

<sup>7</sup> Rebuttal evidence of Ms Mellsop, dated 19 June 2020, at [3.3]-[3.4].

<sup>8</sup> Evidence of Mr Espie in relation to Stage 2, dated 13 June 2018, at [5.1].

<sup>9</sup> Evidence of Mr Espie at [5.5], [5.8], and [10.2]-[10.3].

<sup>10</sup> Evidence of Mr Espie at [5.8].

landscape character and visual amenity of the LCU or the broader Wakatipu Basin landscape.<sup>11</sup>

- (c) Consideration of and response to the council's landscape assessment<sup>12</sup>, including specific responses to Ms Mellsop's concerns regarding the proposed RVZ area, concluding<sup>13</sup>:

Overall, I consider that a visitor related development as restricted by the proposed provisions can sit appropriately and proudly in the proposed location without inappropriately detracting from the landscape character and visual amenity of the Morven Ferry Road vicinity or the wider Wakatipu Basin.

- (d) An assessment of the receiving environment<sup>14</sup>;
- (e) An assessment of the appropriateness of development in proximity to ONLs and Outstanding Natural Features (**ONF**) and potential effects of development on the values of ONL/F<sup>15</sup>;
- (f) An assessment of visibility from public places<sup>16</sup> and visual amenity effects, concluding<sup>17</sup>:

In terms of visual effects, development that results from the proposed relief will not be discordant with a pleasant rural landscape and will be in a relatively hidden part of the Wakatipu Basin.

- 21 Therefore Ms Mellsop's opinion regarding Mr Espie's evidence is opposed. It is submitted that the landscape assessment completed by Mr Espie in relation to the proposal put forward by Barnhill in Stage 2 of the district plan review was sufficiently detailed and considered the effect of development beyond the scale and intensity of what is sought in Stage 3. Mr Espie continues to support his conclusions reached in his Stage 2 assessment. It is submitted that the Panel can rely on Mr Espie's earlier landscape assessments as they consider essentially the same proposal for RVZ zoning, but to a lesser scale and intensity.

---

<sup>11</sup> Evidence of Mr Espie at [10.3].

<sup>12</sup> As above at sections 7 and 8.

<sup>13</sup> As above at [8.16].

<sup>14</sup> As above at [8.2].

<sup>15</sup> As above at [8.4]-[8.5].

<sup>16</sup> As above at [8.7] and [9.3].

<sup>17</sup> As above at [4.7].

- 22 Ms Mellsop also considers that Mr Espie's current position is contrary to his evidence given in Stage 2. As Mr Espie will clarify, when he commented in his Stage 2 evidence that more detailed design was needed to ensure appropriate outcomes, he did not mean that the RVZ as proposed wasn't supportable. Mr Espie considered that detailed design could be achieved under a controlled activity status for buildings – he did not intend to suggest that council would need greater discretion to ensure appropriate development outcomes in the RVZ.

### **Proposed building size standard**

- 23 Council's position is that the proposed building size standard of 1500m<sup>2</sup> maximum ground floor area would result in development that is not 'small scale' and that "sensitive design of building location, form and appearance, access, parking and landscaping would be required to allow 1500m<sup>2</sup> of development to be absorbed on the site without adverse effects on the visual amenity values of the landscape". Ms Mellsop considers that controlled activity status is not sufficient to ensure this 'sensitive design' is achieved.<sup>18</sup>
- 24 The reason for the proposed 1500m<sup>2</sup> maximum is to ensure development on the Site is economically viable. Ms MacColl's evidence is that the range of rural visitor activities proposed to be provided on the Site cannot be supported by buildings limited to a total building footprint of 500m<sup>2</sup>.
- 25 Mr Espie's evidence is that the 500m<sup>2</sup> standard for all RVZs is arbitrary and does not take into consideration the lot size, dimensions and topography of individual RVZs. His opinion is that development to a limit of 1500m<sup>2</sup> can be accommodated within the Site without adverse effects.
- 26 In accordance with Rule 46.4.11 the construction of buildings within a High Landscape Sensitivity Area is a non-complying activity. The council will have full discretion to approve or decline applications for buildings within the identified 0.7ha area along Morven Ferry Road, including discretion over building size. The council must be satisfied that any activity within this area does not have adverse effects that are more than minor, or is not contrary to the objectives and policies of the PDP<sup>19</sup>.

---

<sup>18</sup> Rebuttal evidence of Ms Mellsop, dated 19 June 2020, at [3.6].

<sup>19</sup> S 104D RMA.

- 27 Therefore Ms Mellsop's concern with the controlled activity status for the construction of buildings in accordance with Rule 46.4.6 applies only to the 2.1ha identified as Low Landscape Sensitivity Area.
- 28 Controlled activities are determined in accordance with section 104A Resource Management Act 1991. Council must grant consent unless it has insufficient information to determine whether the activity is a controlled activity (or if section 106 applies), and may impose conditions under s108 (or s220 for a subdivision) in respect of matters to which it has reserved itself control in the plan. Council's ability to apply conditions on a controlled activity consent is limited by section 87A (conditions may only be applied in respect of matters to which Council has reserved control in its plan); and through common law principles developed on section 108.
- 29 The Courts do not distinguish between different activity statuses when applying the common law principles under s108. Consent conditions must comply with the *Newbury* tests, and cannot fundamentally alter the activity so as to effectively nullify the consent<sup>20</sup>.
- 30 However, it is submitted that there is adequate flexibility in the application of ss 104A and 108 for council to require conditions of consent for controlled activities which sufficiently manage the potential or actual adverse effects of the activity.
- 31 For example, in *Director General v Marlborough District Council* the council held it was lawful to impose a condition which, if it is not satisfied, would mean that the activities authorised by the consent cannot commence.<sup>21</sup> In *Director General* a survey was required to be undertaken and then approved before consent could be carried out.
- 32 While consent conditions cannot fundamentally change the nature of an activity, it is accepted that consent conditions can limit the scale and intensity of an activity in accordance with the matters of discretion. This concept was discussed by the Environment Court in *Aqua King* citing *McLaren v Marlborough District Council*:

The case of *McLaren v Marlborough District Council* Decision No. W22/97 was also referred to, which states that a resource consent cannot go beyond the scope of the application (in that example, the location of the farm could not be altered from that notified in the application). **However, the proposal may be limited or reduced.** In this case, the issue remains

---

<sup>20</sup> *Dudin v Whangarei District Council* Environment Court Auckland, 30/03/2007, A022/07 at [60].

<sup>21</sup> *Director General v Marlborough District Council* [2004] 3 NZLR 127 (HC) at [23].



whether altering the structures used is merely a limitation on the consent or a fundamental change to what was originally proposed.<sup>22</sup>

[emphasis added]

33 In *Dudin v Whangarei District Council* the court held that a controlled activity consent condition to reconfigure a proposed subdivision layout was lawful. The Court reconfigured the subdivision through consent conditions but retained the number of lots which were applied for. The Judge in *Dudin* considered that reconfiguration of the subdivision proposal was not '*tantamount to a refusal of consent for that which had been applied for*'.<sup>23</sup>

34 In *Mygind v Thames Coromandel District Council* the Court considered relevant provisions of the plan which were associated with a controlled activity rule and could be used where applicable to impose a condition, but could not be read as providing a discretion to refuse consent:

Equally, almost all of these provisions can be read as allowing a consent authority to **impose consent conditions for a controlled activity to properly control the particular effect identified**. For example, in respect of the hazard issue, although the activity is controlled, **there may be certain sites proposed by an applicant which could not be included because they represented significant hazard**. In this regard, the two areas of subsidence, for example, between Lots 66 & 67 are in that category and have properly been excluded from development as a result.<sup>24</sup>

[emphasis added]

35 It is submitted that council retains sufficient control under the Rule 46.4.6 matters of control to address potential adverse effects on visual amenity. The matters of control for Rule 46.4.6 are:

- (a) The compatibility of the building density, design and location with landscape, cultural and heritage, and visual amenity values;
- (b) Landform modification, landscaping and planting;
- (c) Lighting;
- (d) Servicing including water supply, fire-fighting, stormwater and wastewater;
- (e) Natural Hazards;

---

<sup>22</sup> *Aqua King Ltd v Marlborough District Council* (1998) 4 ELRNZ 385 at [25] referring to *McLaren v Marlborough District Council* Decision No. W 022/97.

<sup>23</sup> As above n 20 at [60].

<sup>24</sup> *Mygind v Thames-Coromandel District Council* [2010] NZEnvC 34 at [32] - [33].

- (f) Design and layout of site access, on-site parking, manoeuvring and traffic generation; and
  - (x) For x and y RVZ only, where Electricity Sub-transmission Infrastructure or Significant Electricity Distribution Infrastructure as shown on the Plan maps is located within the adjacent road or subject site any adverse effects on that infrastructure.
- 36 In particular the council's control over building density, design, location and, landscaping and planting enables it to enforce conditions requiring a building design that is compatible with the surrounding landscape, and landscaping and planting that assists in maintaining visual amenity values.
- 37 It is relevant that buildings that come under controlled activity Rule 46.4.6 must be for activities anticipated to occur in the RVZ, i.e. visitor accommodation, commercial recreation, and recreational activities. Farm buildings and buildings for residential and commercial use are not controlled activities, meaning consent can appropriately be declined.
- 38 Also, given that the council's concern is effects on visual amenity, it is relevant that Barnhill does not oppose the standards for building height and setbacks from roads. In particular the permitted standard of 6m height for buildings goes some way to address visual amenity concerns. Buildings which do not meet this standard require non-complying consent.
- 39 For the avoidance of doubt, Barnhill's intention is not to build large buildings unsympathetic to the landscape character and visual amenity of the Site. The proposed 1500m<sup>2</sup> limit is to ensure a number of smaller buildings to accommodate various activities contemplated by the RVZ can be developed to service the rural visitor activities proposed on the Site. To approve a rezoning of the Site to RVZ but limit development to 500m<sup>2</sup> would be an illogical outcome that would not be the most efficient and effective use of the land.

**Evidence presented by submitter**

- 40 Landscape evidence – Ben Espie
- 41 Planning evidence – Scott Freeman
- 42 Layperson evidence – Debbie Bunn
- 43 Layperson evidence – Susan Cleaver

Dated this 24<sup>th</sup> day of July 2020



---

Vanessa Robb

Counsel for Barnhill Corporate Trustee Ltd and DE, ME Bunn & LA Green