Legal Submission on Queenstown Lakes Proposed District Plan Stage 3

Under Clause 6 of the First Schedule, Resource Management Act 1991

To: Queenstown Lakes District Council

Submitters: Nicola and Mark Vryenhoek and Dynamic Guest House Limited and Lake House Mooring Company Limited (joining)

1. This submission is further to and in addition to my earlier submission (3394) dated 21 November 2019 on the Queenstown Lakes District Proposed District Plan – Stage 3, Chapter 39 Wāhi Tūpuna. Joining as a submitter (if permitted) is Lake House Mooring Company Limited, a wholly owned company of Mark and Nicola Vryenhoek. The mooring company owns resource consent for a lake mooring located more or less where indicated on photograph (v) Annexure l and marked in red with the letter Y. Our two sites are shown marked with a red cross and dot on the QLDC maps in Annexure lV.

2. The Crown has an obligation derived from the Treaty of Waitangi to protect wāhi tapu (sites of significance to Maori) although this obligation is not absolute and needs to be balanced against broader public interests. The government policy defining and clarifying that obligation were referred to in my earlier submission and are included with this submission as Annexure ll and lll.[1] Those broader public interests include rights and obligations protected by the New Zealand Bill of Rights Act 1991 (the NZ Bill of Rights). The NZ Bill of Rights protect some personal and property rights that are more specifically protected by numerous other statutes as well as the common law. Apart from the obligations owed under the Treaty of Waitangi the Crown should as a matter of good government actively protect sites of significance to both Maori and non-Maori. It is my submission that the QLDC has failed to actually identify any "significant sites" as opposed to everyday sites of former occupation in progressing the mapping overlay methodology of wāhi tūpuna. It is our submission that the mapping overlay methodology combined with rules that contradict the strategic objectives of the QLDC PDP do not serve a resource management purpose.[2]

3. There are numerous statutory mechanisms that may be used to protect sites of significance to Maori and non-Maori. As previously submitted sites of significance are generally considered as discrete sites when in private ownership and in my view those discrete sites are better protected by the use of the Heritage New Zealand Pouhere Taonga Act 2014 (the HNZPT Act). The long title of the RMA states that the RMA is an Act to restate and reform the law relating to the use of land, air, and water, the purpose being to promote the sustainable management of natural and physical resources. That purpose is significantly wider than that of the HNZPT Act which is specifically to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand. While both pieces of legislation speak at the same time, HNZPT Act was clearly intended as a guide to process and form for the protection of wāhi tūpuna through identification of wāhi tūpuna involving site specific notification and evidence pursuant to sections 68 and 69 of that Act.[3] I draw your attention to a recent public notification of a proposal to enter Te Kamaka o Arowhenua,

[1] In good faith the Government agreed on methods for protecting sites of significance for Maori on surplus crown land for use in settlements arising out of Waitangi Tribunal proceedings. See CSC (96) 30 4 March 1996 and Review of Protection Mechanism CAB (96) M 8/15 (after 11 March 1996). These methods meet with statutory obligations under s8 of the RMA.

[2] *Attorney-General v Trustees of Motiti Rohe Moana Trust* [2019] NZCA 532 at para [66].

[3] *Pora Teina v R* [2000] CA 225/00 paras [30]-[45].

Huirapa St, Temuka as wāhi tūpuna on the NZ Heritage List made by Heritage New Zealand pursuant to section 68 of the HNZPT Act.[4] This recent application raises the possibility that in QLDC promoting an extensive spatial mapping methodology of wāhi tūpuna without substantive evidence presented to individual property owners as required by HNZPT Act, the wāhi tūpuna zones of QLDC might later be duplicated through this and other legislation at significant costs to the community, including land value depreciation. There is a risk that QLDC shall pre-empt evidential requirements of any reserve application for land covered by a wāhi tūpuna for those persons subject to Te Ture Whenua Maori Act 1993 for example. None of this has been quantified by QLDC in its section 32 or section 42A reports.

4. We have been advised in evidence presented by Edward Ellison and David Higgins for Te Rununga o Moeraki, Maree Kleinlangevelsloo and Michael Bathgate for Aukaha for Ka Runaka, that Wakatipu-Wai-Maori including the esplanade reserve, includes values important to Maori including some place names. Listed values in the schedule of wāhi tupuna for **Wakatipu-Wai-Maori (#33)** are wāhi taoka, mahika kāi and ara tawhito. It is not abundantly clear whether specific values attach to our Frankton Road properties although ara tawhito is the most apparent value for reserve front properties with steep topography. The edge of the mapped area includes the lower section of the steps leading onto Frankton Walkway and includes an exotic five finger boundary tree (ornamental chestnut) whose root system retains the stability of the bank and steps. These two sites are several kilometres from what was formerly the Queenstown pā located in the Queenstown Gardens. Although #33 is mapped as Wakatipu-Wai-Maori mauri of the water is not listed as a value for the Statutory Acknowledgement Area.

<u>Mapping of Wāhi Tūpuna - Wakatipu-Wai-Maori</u>

5. Any boundary bound by a moveable natural feature such as water is called an ambulatory boundary and is subject to the common law doctrine of accretion and diluvion. Application can be fraught with doctrinal difficulties.[5] The Wakatipu-Wai-Maori boundary varies several metres between dry and wet seasons. That changeable boundary is the legal boundary of the Statutory Acknowledgment Area of Wakatipu-Wai-Maori referred to in the Ngai Tahu Claims Area 1998. The lake is also zoned Rural General in the QLDC PDP. The red line drawn in the sand in photograph (ii) of Annexure l indicates the approximate natural legal boundary of the lake closest to our properties and adjacent to Frankton Walkway. That natural boundary shown is my estimation of the annual high-water mark of the lake (experienced over the last 20 years).

6. In accordance with the doctrine of accretion the annual average mean high tide water mark is no higher than the pebble beach supporting the base of the rock retaining wall supporting the Frankton Walkway adjacent to our land and marked on photograph (ii) Annexure I.[6]

7. The wāhi tūpuna #33 extends the boundary of Wakatipu-Wai-Maori out from the annual mean high-water mark onto the esplanade lake reserve referred to as Frankton Walkway (controlled by QLDC and subject to the Reserves Act 1977) and over the cadastral boundaries of our privately owned land at 193 and 197-199 Frankton Road. The higher red line drawn on photographs (ii) and (iii)) indicates our site boundary at 197-199 Frankton Road zoned High Density Residential (HDR). It is our submission that there is no justifiable resource

[4] List No.9828 submissions close 19/06/20, News and Current Awareness Regional and District Plans, Westlaw NZ Database published 27/05/2020.
[5] *Ken Crosson Architects v Rotorua D.C* (1992) 1A ELRNZ 198
[6] Halsbury Laws of New Zealand

management purpose for that extension as the associated values of the Frankton Walkway are already protected by other PDP rules and more permanently by the esplanade reserve that forms a buffer between two zones. Urban HDR land in private ownership should not be set apart without ownership rights, even temporarily. The narrative of chapter 39 could and should be amended to reflect the knowledge that has now passed into the collective domain of what is a New Zealand environmental jurisprudence thereby eliminating the need for "cultural assessment reports" and further consultation with Kāi Tahu in the HDR zone.

8. Many of the problems arising from the natural movement of watercourses have already been resolved in the QLDC PDP by zone rules that relate to cadastral boundaries. While the wāhi tūpuna is a very small area on our two 'sites' wiggling around the chestnut tree, the wāhi tūpuna mapping #33 has the effect of triggering consultation requirements for activities occurring on the balance of our land not included in the wāhi tūpuna mapping overlay which forms the bulk of the two sites. That is because under section 95B of the RMA the wāhi tūpuna as currently mapped by is immediately adjacent to all Frankton Road lakeside properties. Both the rules and initial public consultation with QLDC staff at drop-in sessions are misleading in this regard. The suggested wording change from 'sites' to 'areas' at para 144 of Michael Bathgates evidence in respect of proposed provision 39.3.2.1 does not alleviate our concerns.[7]

9. The identified threats of #33 are all matters that are addressed in the granting of building and resource consents through the HDR zone rules and other chapters of the PDP including chapter 25 Earthworks. The PDP and RMA provides for limited notification of some resource consents. That in turn gives effect to section 7 matters such as (b) the efficient use and development of natural resources. Limited notification to neighbours is appropriate when specific technical issues impact only other residential dwellings immediately in the vicinity of possible development. Notification only to parties effected by these technical issues is efficient and practical while achieving the purpose of the RMA and fulfilling the strategic objectives of the PDP and NPS-UDC. Cultural values are not impacted by these technical issues.

10. The proposed wāhi tūpuna Wakatipu-Wai-Maori #33 overlay on the QLDC PDP has the effect of being a trigger to consult Maori for all and any development activity however minor, inside all HDR property adjacent to esplanade lake reserve whenever a resource consent is required. At present consultation is not required for residential development due to the esplanade reserve between the lakebed and properties in that zone. Any sediment or runoff from permitted activities are effectively covered by building consents, rules and mitigation measures that apply to consented residential developments in urban areas. Engineering standards are strict and enforced.

11. The vehicle driveway established by subdivision prior to 1991 is only partly formed. The driveway is shown by two red dashed lines in photograph (v). The unformed lower section of the driveway gives access to that site and the lower portion of the property above to enable completion of that development. The driveway is not located within the identified wāhi tūpuna. Completing formation even with a limited notification consent would trigger consultation and a cultural assessment report as noted above. Driveways enable development and that has progressively funded indigenous planting along the esplanade reserves for the betterment of the public domain. Our consultation is complete.

[7] Furthermore Policy 2.2.2 of the Partially Operative Regional Policy Statement (PORPS2019) implies a discrete site response rather than an all of rohe spatial mapping approach to wāhi tūpuna.

12. The submitters being adjacent property owners to the esplanade reserve have cleared wilding pines and relocated flax to the lake bed, albeit not on the impressive scale near Kelvin Heights esplanade reserve boat ramp. While our efforts to date have been limited to saving indigenous species, the submitters have also nurtured matagouri and beecb. Unfortunately, the beech trees did not survive recent dry summers. In contrast pest species predominate on vacant sites owned by absentee land bankers. The yellow gorse is visible on the left-hand side of photograph (v) Annexure 1. Undeveloped sites in the vicinity make good land management difficult for everyone. Driveways therefore are not a threat nor incompatible with values of public access to the lake for fishing – both introduced and indigenous species, and recreational pursuits. These natural values (including bird habitat) are protected permanently for Maori and Non-Maori by the esplanade reserve. It is our submission that any temporary "tapu" or restrictive notation over these public places is simply not appropriate.

13. The submitter supports the planning evidence of Mr Bair Devlin (3067) referred to as the Cabo Ltd Evidence (and others) and in particular the removal of urban chapters including all HDR zone from the 10m3 Earthworks rule. Adequate context was not given to the receiving environment of the HDR zone, including topography and presence of existing tracks reflecting the ara tawhito narrative of Mr Edward Ellison (the lakeshore and existing state-highway) whose evidence at paragraph 55 states that Kāi Tahu have no interest in consultation on small developments. That statement would apply to our driveway and site which in addition to being a partly unformed driveway from a pre-1991 subdivision has a compliance certificate for two apartments. It is our submission that a different mapping approach to wāhi tūpuna is necessary.

14. Wakatipu-Wai-Maori (#33) must reflect the legal boundary of the Statutory Acknowledgment Area of Lake Wakatipu and should not include esplanade reserve or privately owned housing. This would achieve integrated management of resources under section 31 of the RMA. The spatial mapping of a separate wāhi tūpuna with a 2-metre ribbon marking the walkway and other associated lake/river tracks could be included in the QLDC PDP as site #33(b) – ara tawhito. Alternatively, this ribbon could be marked as a new #46 valued for ara tawhito & mahika kāi with each section being named appropriately in accordance with the evidence of Dr Lynette Carter for Mana Whenua eg. Tāhuna-a-Te Kirikiri (Queenstown-Frankton) and Te Nuku-o-Hakitekura (Kelvin Peninsula). Also appropriate is the inclusion of further narrative in Chapter 39 of the PDP to reflect the exchange of knowledge that has occurred in these planning hearings. Additional planning rules are not necessary to achieve the purpose of providing for the relationship of Maori and their cultural and traditions (section 6(e) of the RMA for #33). The RMA is imbued with the environmental philosophies of Tikanga Maori.

15. Consultation involving the exchange of knowledge in the plan change process recognises and provides the required acknowledgement of the principles of the Treaty of Waitangi pursuant to section 8 of the RMA. The extent of local government protection should therefore be considered in light of all relevant laws including private property rights of Maori and Non-Maori and rights of due process owed under the NZ Bill of Rights.[8]

NJ Vryenhoek, Barrister

[8] *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 at [50]. See also a record of Government policy of active protection since the Lands case Sites of Significance policy n1 above.