

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Proposed District Plan Review,
Stream 4 Hearing: Chapter 27
Subdivision

SYNOPSIS OF LEGAL SUBMISSIONS FOR:

Darby Planning LP (#608)
Soho Ski Area Ltd (#610)
Treble Cone Investments Ltd (#613)
Lake Hayes Ltd (#763)
Lakes Hayes Cellar Ltd (#767)
Mt Christina Ltd (#764)

Jacks Point Residential No.2 Ltd, Jacks Point Village Holdings Ltd, Jacks Point
Developments Limited, Jacks Point Land Limited, Jacks Point Land No. 2 Limited,
Jacks Point Management Limited, Henley Downs Land Holdings Ltd, Henley Downs
Farms Holdings Ltd, Coneburn Preserve Holdings Limited, Willow Pond Farm Limited
(#762)

Glendhu Bay Trustees Ltd (#583)
Hansen Family Partnership (#751)

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MAY IT PLEASE THE PANEL**1. Introduction**

- 1.1 These legal submissions are presented in support of the submitters named on the front cover page ("**Submitters**") in respect of chapter 27 of the Queenstown Lakes Proposed District Plan ("**PDP**").
- 1.2 These submissions rely on the evidence of Christopher Ferguson dated 15 July 2016 in respect of Chapter 27, as well as the evidence previously presented by these Submitters (and others) in respect of other chapters of the PDP:
- (a) Evidence in Chief of Christopher Ferguson in respect of Topic 01B and Topic 02 of the PDP;
 - (b) Evidence in chief of Mike Copeland in respect of Topic 02;
 - (c) Evidence in chief of Yvonne Pfluger in respect of Topic 02;
 - (d) Evidence in chief of Hamish McCrostie in respect of Topic 02;
 - (e) Evidence in chief of Richard Tyler in respect of Topic 02;
 - (f) Legal Submissions by Maree Baker Galloway in respect of Topic 01B and Topic 02.
- 1.3 Those Panel members presiding over this Topic 04 and who were not present to consider the above evidence and legal submissions are urged to read those materials and listen to the available transcripts in order to fully understand the package of relief sought by the Submitters in respect of the PDP.
- 1.4 Counsel has also had the benefit of reading the evidence of Mr Brown, Mr Reid, and Mr Farrell in respect of Topic 02 and relies on that evidence.

2. Executive Summary

- 2.1 The submission by Darby Planning LP ("DPL") is a district wide submission. The other Submissions are site specific submissions. All the Submissions are consistent, and seek an integrated controlled activity subdivision framework:
- (a) The Jacks Point Residential No.2 Ltd, Jacks Point Village Holdings Ltd, Jacks Point Developments Limited, Jacks Point Land Limited, Jacks Point Land No. 2 Limited, Jacks Point Management Limited, Henley Downs Land Holdings Ltd, Henley Downs Farms Holdings Ltd, Coneburn

Preserve Holdings Limited, and Willow Pond Farm Limited ("Jacks Point") submission is concerned with the subdivision provisions for the Jacks Point Zone (Chapter 41), seeking a controlled activity framework specific to the Zone.

- (b) Soho Ski Area Ltd and Blackmans Creek No.1 LP and Treble Cone Investments seek a controlled activity subdivision status for Ski Area Subzones, rather than the standard discretionary framework for the Rural Zone. These entities have provided significant evidence to the Panel to date in the course of Topics 01B and 02 which seek to identify and distinguish the key elements of those subzones from the wider Rural Zone. Specific objectives identify some of those key differences, in particular the important growth and development objectives which recognise those subzones as a vital part of the District's economy and identity. Ski Area Subzones are also enabled through higher order objectives to grow and consolidate within identifiable boundaries of the PDP, and for these reasons are quite different to Rural zoned land. Their different purpose justifies a different subdivision activity status.
- (c) Lake Hayes Ltd (Rural Lifestyle), Lake Hayes Cellar Ltd (Rural Residential) and Mt Christina Ltd (Rural Residential) seek and support the default controlled subdivision status as set out in the DPL submission for these zones. Glendhu Bay Trustees Ltd is seeking an up-zoning and also supports the controlled subdivision framework.

2.2 Because of the major change proposed by Council between the PDP and ODP regimes, all of the above submitters sought a general primary relief to replace notified Chapter 27 with Operative Chapter 15. Since that time, Council have proposed changes to Chapter 27, and the Submitters have had further time to review the proposed changes and prepare their own section 32AA analyses. The preferred relief is set out in Mr Ferguson's appendix 1 (page 48) in the form of a revised controlled activity rule 27.5.5 with revised matters of control, that takes into account matters raised in other evidence.

2.3 The relief sought by these Submitters is therefore consistent and integrated. In summary:

- (a) On a district wide basis (excluding Rural Zone) the default position for subdivision should be a controlled activity framework.

- (b) The exception to this position is the Ski Area Sub Zones. While they are in the Rural Zone, it is sought that subdivision in those zones should also be controlled, not discretionary.
 - (c) DPL submitted opposing the proposed discretionary subdivision regime. It remains the submission of DPL that a controlled activity framework will provide certainty and give Council the ability to ensure good quality subdivision design and protection of landscape and amenity values.
 - (d) This is supported by submitters in the Rural Residential and Rural Lifestyle Zones, as well as the Jacks Point Zone.
- 2.4 These legal submissions also address the legal issues relevant for controlled activity status/ matters reserved for control, and the ability to provide conditions of resource consent on controlled activities as well as the requirements to undertake a section 32 cost benefit analysis under the Act, as this has been squarely raised in Council's opening and evidence as a reason for moving to a restricted discretionary regime.
- 2.5 These submissions also specifically address the justifications from Council's expert evidence in support of a restricted discretionary default subdivision regime as it relates to the following zones:
- (a) Special Zones (namely Jacks Point)
 - (b) Ski Area Subzones
- 2.6 Counsel notes Council's recommended changes to Chapter 27 as far as they go. Mr Bryce's recommendations to provide for a restricted discretionary default subdivision status rather than the notified discretionary default regime, and controlled subdivision dependent on a structure plan, are significant positive steps to providing positive resource management planning outcomes for the District. It is clear from this recommendation that Council intends to respond to and take into account the significant community opposition to chapter 27 in its notified form.
- 2.7 There is still however an important difference in opinion between Council and the Submitters that these legal submissions will address. It is maintained that there is no justification for changing the default controlled activity status (for all zones except Rural General). The section 32 evaluation does not provide any justification, and nor does the reasoning set out in Council's opening. These

submissions will address why, both on the merits, and as a matter of law, the default controlled activity status should be retained.

3. **Specific Submission- Ski Area Subzones Subdivision**

- 3.1 As the SASZ are in the Rural Zone, in respect of which the Submitters have not sought the default controlled activity status, Soho and Treble Cone have sought specific changes to Chapter 27 to enable a departure from the discretionary activity status applying to subdivision for SASZs.
- 3.2 Generally the PDP provides for a permissive approach to development and use within these subzones through the higher order objective 21.2.6, which provides for: *“The future Growth, development and consolidation of Ski Area Activities within identified Ski Area Sub Zones, while avoiding, remedying or mitigating adverse effects on the environment”*.¹
- 3.3 The intent of this permissive structure is to ensure the land can continue to be utilised for its core purpose as a ski area subzone, subject to meeting important standards relevant to vegetation, earthworks, and building requirements (for example).
- 3.4 The fundamental aspect of these subzones is that they are areas which have been modified significantly for a specific important use and which generate valuable income for the District. On this basis there is justification that the SASZs be excluded from the stringent criteria for ONFLs. The Panel is reminded of the submissions of Counsel on this matter in respect of Topic 01B and Topic 02, and in particular the summary of these matters in para 3.11 of legal submissions dated 24 May 2016.
- 3.5 The significant elements of human modification to SASZs must be taken into account in a planning regime which identifies over 96% of the District as ONFL.
- 3.6 These areas are uniquely different from other zones in the District, and in particular from the Rural Zone, which places importance on the preservation protection and enhancement of section 7 amenity landscapes (among other matters).
- 3.7 Subdivision is an important part of optimising ski area operations, to enable their continued prosperity to the District. The evidence of Mr Ferguson

¹ As amended through Council' Right of Reply Chapter 02

evaluates the importance of subdivision to continued development of SASZs' operations in particular at paras 131-133 of his evidence in chief. Specifically, enabling subdivision as a controlled activity will enable investment opportunities for related commercial, recreation, and visitor accommodation, which are also subject to stringent underlying zone provisions. The breadth of planning provisions that protect and enable management of these subzones through chapters 3, 6, and 21, in particular all work together to ensure only Ski Area Activities, already deemed appropriate, can benefit from subdivision.

- 3.8 These provisions comprehensively address the effects of buildings, as well as earthworks and indigenous vegetation removal. As considered in the evidence of Mr Ferguson, *enabling subdivision as a controlled activity under the framework of proposed New Rule 27.5.5 is an effective outcome that will reinforce the objectives relating to ski areas.*

4. **Specific Submission- Special Zone subdivision (Jacks Point)**

- 4.1 As notified, the PDP provided for a default restricted discretionary subdivision regime for the Jacks Point Zone. The various Jacks Point entities (listed above) submitted that Council had not clearly justified a departure from the operative status of default controlled for the Zone in its formulation of the PDP. In particular it was submitted that the ODP provisions provided an effective and efficient framework to address the issues of the zone through a tiered activity status which relied upon site and zone standards being met, otherwise an activity gets moved away from the default controlled status. The default controlled activity status is still preferred by the Jacks Point Submitters, however the alternative controlled activity rule for the Zone advanced by Mr Bryce, in reliance on the Structure Plan, may also be effective. This is addressed below.

Structure Plan

- 4.2 The Jacks Point entities have worked with Council at length on the development of a new Jacks Point Zone, including designing a single Structure Plan for the whole Zone and drafting updated provisions. Whilst areas of the Structure Plan are still to be resolved in the substantive hearings on Chapter 41, it is submitted the Structure Plan provides a solid foundation to understand the likely future development of the Zone, including by addressing spatial outcomes and landscaping of sensitive areas. Although the Structure Plan provides an additional

layer of planning certainty, for the reasons outlined in the general submissions of DPL as well as in the other submissions listed on the front cover page, a default controlled activity status is an equally appropriate outcome where specific design and development standards are met.

- 4.3 Under the Chapter 27 provisions as notified, Rule 27.4.3 provides a default restricted discretionary activity status. The s.42A Report supports controlled activity status in accordance with a structure plan, on the justification this provides a level of certainty in respect of subdivision design.
- 4.4 The Council's position in respect of controlled activity 'structure plan subdivision' is clearly based on the assumption that structure plans provide a high level of certainty as to the spatial planning outcomes and subdivision design envisaged for a whole zone. Mr Ferguson considers that a structure plan approach for subdivision provides confidence that access, open space, landscape and amenity values, recreation values and housing needs are appropriately addressed, and therefore supports subdivision within the Jacks Point Zone as a controlled activity, subject to the further standards and controls set out in the subdivision provisions.
- 4.5 If the existence of a structure plan as proposed by Council is to be used as a prerequisite for controlled activity subdivision status, explicitly defining "structure plan" would provide more certainty. The provisions of chapter 27 could more clearly direct what a 'structure plan' is and what a structure plan must include or may include in order to be relied upon to receive the benefit of the controlled subdivision activity status.
- 4.6 The Jacks Point Structure Plan included in the PDP is the product of significant planning and community consultation which was based upon input from a range of experts including planning, infrastructure, landscape, and engineering. This will be detailed further at the hearing in 2017 on the substantive Jacks Point Chapter 41. Importantly the structure plan is also supported by provisions which hinge on it to provide activity status changes where structure plan activity descriptions are breached.
- 4.7 The use of the structure plan in the zone does provide certainty as to the zone's development and a master-planned approach for quality design outcomes.
- 4.8 However in the event the panel does not prefer the Structure Plan approach advanced by the Council, and as amended by Mr Ferguson (paragraph 115), the Submitters' alternative position is as advanced in

principle in its primary submission, namely use of the standard controlled activity rule (now numbered 27.5.5). For the reasons set out in more detail below, the default controlled activity rule for all zones (excluding Rural) is supported by the Submitters.

- 4.9 It is acknowledged there are submissions seeking amendments to the rules of the Jacks Point Zone as well as the Structure Plan. Some of which will have implications for subdivision. Also, this Zone in the ODP is the subject of three current Environment Court Appeals on Plan Change 44. The outcomes of those appeals are uncertain at the time of writing these submissions. It is therefore likely that some relevant matters in this hearing will again resurface in the substantive hearing for Chapter 41, before a possibly differently constituted Hearing Panel.

5. **General Submissions- controlled activity default subdivision status**

- 5.1 The following parts of these submissions identify the general relief which are common to all of the Submitters listed on the front cover page. As identified in the introduction section, these submissions rely on and support the umbrella submission of DPL which provides comprehensive background to assessing the default status of discretionary subdivision as compared to a controlled status.
- 5.2 In addition, each of these submitters have particular concerns relating to their individual identified zoning in the PDP. Each of those zoneings supports a controlled activity framework, however in addition the legal submissions below, complemented by the specific planning provisions provided by Mr Ferguson, explain that a default controlled activity status is appropriate where there are suitable standards for design, lot sizes, and spatial outcomes, reserved for Council's control.

6. **Matters reserved for control and conditions of consent**

- 6.1 Mr Ferguson concludes that a controlled activity status for all subdivision activities within the District (excluding Rural Zone) is appropriate, in circumstances where:
- (a) In respect of any new zone or any zone under challenge, the Panel is satisfied in the first instance that the spatial planning outcomes and the zoning provided on the planning maps are appropriate to those areas;

- (b) A framework of location specific provisions are established in support of zones where the default controlled activity status is inadequate or needs further support;
 - (c) The Code of Practice for Subdivision continues to be applied through relevant matters of control; and
 - (d) The matters of control incorporate the Council's Subdivision Design Guidelines.
- 6.2 The opening legal submissions for Council dated 22 July 2016 states that the amended RDA activity status provides an 'appropriate level of certainty for developers through defining the matters of discretion' and goes on to confirm the intent of Mr Bryce is to remove the contested matter of 'lot sizes' as a matter of Council's reserved discretion in rule 27.5.6. Council's statement that the RDA status provides refined matters of discretion only makes sense if this matter is removed, however it is still considered that the RDA status and framework is not justified.
- 6.3 Council's recurring theme justifying a shift away from controlled activity status in the ODP is the need to maintain the ability to say 'no' to substandard subdivision design proposals. The objective of retaining the ability to prevent substandard design is supported. It is submitted this can be addressed in a controlled activity framework.
- 6.4 Putting aside the common example of roading widths and access issues (as this is a clear cut matter which can form the basis of a decline decision , under s106 RMA), the Council would still have broad powers to apply conditions of consent and have good subdivision design outcomes in a controlled activity framework with suitable matters of control.
- 6.5 Controlled activities are assessed in accordance with section 104A. Council must grant consent, unless it has insufficient information 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. A 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.
- 6.6 The Environment Court in *Lakes District Rural Landowners Society v Queenstown Lakes District Council* considered where there are land use

controls on the exterior appearance of buildings, it is lawful for the district plan to contain subdivision rules that allow the council to consider, and if necessary to impose, similar conditions as conditions of subdivision consent (i.e. the council is able to have some regard to sensitive landscape areas).

*"There is jurisdiction to impose such conditions but that they may (sometimes) fail the Newbury tests. Just when conditions may fail is a question that would have to be decided by the consent authority on the specific facts of any case. Given that sections 220 and 106 of the RMA expressly deal with land use matters, the boundaries for imposing conditions on subdivision consents with respect to other land use issues may be quite wide. The outcome in any given case may depend more on the provisions of the relevant plan, than on the powers conferred by the RMA."*²

- 6.7 The above principles were confirmed by the High Court in *Waitakere City Council v Kitewaho Bush Reserve Co Ltd*:

*There are other physical effects of subdivision which are routinely the subject of consent conditions imposed under ss 108 and 220 RMA. These ordinarily include provisions for roading and other infrastructure...*³

- 6.8 The *Newbury* tests is summarised as; being for an RMA purpose, having a logical connection to the proposal, and reasonableness. In addition to the *Newbury* tests, it is a fundamental principle of resource management law that neither a consent authority nor the Court may impose conditions on a resource consent which could effectively nullify that consent.⁴ However the imposition of a condition which, if it is not satisfied, will mean that the activities authorised by a consent cannot commence is not uncommon (*Director General v Marlborough District Council* [2004] 3 NZLR 127 (HC), at [23]):

I do not consider that a condition which has two possible outcomes, one of which will enable the activities authorised by the consent to proceed, and one of which will not, is for that reason a condition which would frustrate the consent, or which is otherwise unreasonable under the Newbury test.

- 6.9 The *Director General* case considered the validity of conditions of consent which required a survey to be undertaken and then approved before consent could be carried out. The High Court also considered whether such a condition would be an unlawful delegation of judicial duties. In distinguishing the foundation case of *Turner v Allison*⁵, the Court noted the following:

However, in my opinion the condition in this case is substantially different from those in Turner v Allison. The conditions in that case related to matters of appearance of the buildings and landscaping and planting. Those were

² *Lakes District Rural Landowners Society v Queenstown Lakes District Council* Environment Court, Judge Jackson, 21 June 2001, C100/2001 at [43]

³ *Waitakere City Council v Kitewaho Bush Reserve Co Ltd* [2005] 1 NZLR 208 at [99]

⁴ *Lyttelton Port Company Ltd v Canterbury Regional Council* Environment Court 26 January 2001, Judge Smith C8/2001

⁵ *Turner v Allison* [1971] NZLR 833

matters which necessarily followed the making of the decision to allow the development. The judicial function in that case was the making of that decision. In making that decision, the consent authority wished to impose standards as to certain matters, and required a means of ensuring that those standards were met. Conferring a decision-making power on a third party, as was done in that case, did not involve a delegation of the judicial function of deciding whether the development should be allowed, but rather a delegation of the administrative function of ensuring that appropriate standards were met in relation to the development after it had been allowed⁶

6.10 To draw an analogy with the QLDC PDP, a condition of a controlled activity subdivision consent for example could be that any road layout for subdivision must comply with the QLDC Subdivision Code of Practice prior to section 223 approval of a survey plan. Such a condition would be of the type envisaged in *Turner v Allison* and confirmed by the High Court as above in Director General as means of ensuring appropriate standards are met and continue to be met once a decision on the appropriateness of development has been made.

6.11 Indeed this example is common in other local authority jurisdictions. For example, the Central Otago District Plan, general standards for subdivision, provision 16.7.1 states that:

'the physical design and construction of works to be carried out as part of a subdivision or as required by a condition of consent will generally be in accordance with Council's Code for Practice for Subdivision..'

6.12 The Courts do not distinguish between different categories of activity status of controlled versus RDA when applying the common law principles under s108. A current listed matter of control under rule 27.5.6 is 'property access and roading'; that is a wide matter of over which control is retained, and imposition of conditions to achieve a particular outcome for road design would be valid. The example of a recent resource consent decision tabled by Mr Bryce in this hearing indeed envisages this type of control.⁷ The front page of that decision states that the approved consent *'only applies if the conditions outlined are met.'* The requirement to ensure continual compliance does not negate the consent.

6.13 Counsel for Council's authority for the proposition that controlled activity conditions cannot negate consent is helpful, although in a different context to the PDP subdivision chapter. *Aqua King Ltd v Marlborough District Council* discussed the legality of conditions of consent restricting above surface structures on a controlled marine farm application. The Court considered that the definition of subsurface and above surface types methods of marine farming were provided for as controlled and therefore plan users were entitled to

⁶ *Director General v Marlborough District Council* [2004] 3 NZLR 127 (HC), at [28]

⁷ Referring to decision RM150804 granted to Orchard Road Holdings Limited

certainty that either of those activities could be validly carried out. His Honour therefore held that a condition requiring only subsurface structures was ultra vires and inconsistent with the premise of controlled activities, that these must be granted:

*"to grant consent only for subsurface structures is in essence to decline the consent applied for"*⁸

- 6.14 That situation is different however from the hypothetical 'issues' Council is concerned about in this district. A subdivision development remains a subdivision development regardless of its road design and lot configuration, and in some instances lot numbers and sizes. The fact that a consent condition might change the appearance, layout, and even number of allotments does not mean the consent applied for is declined. Indeed earlier on in *Aqua King Ltd* the decision of *McLaren v Marlborough District Council* was referred to in the Appellant's submissions:

[the case of McLaren was 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 whether altering the structures used is merely a limitation on the consent or a fundamental change to what was originally proposed.*⁹

[Emphasis added]

- 6.15 Again, the contention that a consent application is fundamentally changed by complete moving of a development site is different to requiring different design and layouts in accordance with best practice guides, within the same site.
- 6.16 *Dudin v Whangarei District Council* considered a similar factual scenario and distinguished *Aqua King* to provide a controlled activity consent condition to reconfigure a proposed subdivision layout. Judge Newhook in *Dudin* expressly considered that reconfiguration of the subdivision proposal at hand was not *'tantamount to a refusal of consent for that which had been applied for'*.¹⁰ Although that case reconfigured the subdivision through consent conditions, it ultimately retained the three lots which were applied for.
- 6.17 The case referred to by Counsel for Council in which Judge Smith assessed the bounds of controlled activity conditions takes the proposition from *Dudin* a step further to address reconfiguration as well as overall numbers of allotments. In

⁸ *Aqua King Ltd v Marlborough District Council (1998) 4 ELRNZ 385 At [35]*

⁹ *Ibid* At [25] referring to *McLaren v Marlborough District Council* Decision No. W 022/97

¹⁰ *Dudin v Whangarei District Council* Environment Court Auckland, 30/03/2007, A022/07 at [60]

Mygind v Thames Coromandel District Council his Honour 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 result¹¹.*

- 6.18 The ability in that case for the Court to consider conditions of a controlled activity to restrict development in certain areas was not considered to frustrate or negate the consent.
- 6.19 In this respect it is most helpful to consider what the 'activity' is which is being applied for. For example whether a developer is applying for a 40 lot subdivision which complies with the controlled activity rules in a plan, or whether that developer applies for a subdivision which contains 40 lots. A change to road layout configuration and number and size of allotments for the latter activity through conditions of consent in accordance with matters over which council has clearly maintained control would not fundamentally change, alter, or frustrate the activity applied for. It would still be a subdivision activity.

7. Section 32 Analysis

- 7.1 The requirements for Council to undertake a sufficient section 32 and 32AA analysis in respect of the PDP have already been discussed with this Panel (although before a different makeup of Commissioners). Counsel for the Submitters discussed the requirements of section 32 in section 8 of the Topic 01B legal submissions, and again in Topic 02.
- 7.2 The Submitters' specific concern is that the Council has simply not justified either in the section 32 evaluation, or otherwise, the material change away from the controlled activity status, and has not assessed the costs or adverse effects of the change as required under section 32. The Council has not produced any qualitative analysis in its section 32 report as to the costs of the change in activity status from default controlled to default discretionary or restricted discretionary. The same issue arose in respect of Topic 01B strategic

¹¹ *Mygind v Thames-Coromandel District Council* [2010] NZEnvC 34 at [32] - [33]

directions, and Council's response was to the effect that such higher order or aspirational type provisions in the plan need not be qualitatively analysed in such a way. That reasoning however does not follow through for the subdivision chapter within which a default activity status change has a direct consequential cost to landowners.

- 7.3 Because of the status of section 32 being a process rather than a test there is little case law of assistance as to when a s32 analysis is deficient. There is even less case law on the provisions in s32 (2) as amended in 2013. Those additions require express economic considerations of growth and employment (and where practicable the benefits and costs of such) when assessing the efficiency and effectiveness of the provisions proposed to achieve objectives of the plan.
- 7.4 Section 32 clearly recognises some form of cost benefit analysis where proposals are capable of being quantified in an objective way. Exceptions to that include where factors are difficult to quantify such as intangible natural capital. Despite this, no apparent attempt has been made to quantify the costs and benefits of a controlled default subdivision framework (the status quo) versus a discretionary or restricted discretionary status, but the Council has omitted to do so.
- 7.5 Conversely, the evidence of Mr Ferguson provides a comprehensive section 32AA analysis assessing these very matters. Therefore, the panel is enabled to accept the relief supported by Mr Ferguson, in reliance on his section 32 AA evaluation.
- 7.6 Although the High Court reference above to 'at least two options' was a case analysing provisions of Local Government Act decision making,¹² it is submitted the rationale is equally applicable to s32(1)(b)(i) and 32(3) of the RMA. One reasonably practicable option to consider must be the ODP, and in the case of s32AA, the original notified version of the PDP. That is particularly so when looking at section 79, the section under which the QLDC PDP is being reviewed, which states that after conduction an enquiry into a provision [of a district plan] the local authority considers it requires alteration, the local authority must then change it in accordance with Schedule 1. In order to make such a finding of the need to review and notify the PDP under Schedule 1, Council must quantify the costs and benefits of changing the ODP.

¹² *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 (HC)

The section 11 presumption and a section 32 analysis

- 7.7 It is submitted that the section 11 presumption for the use of land for subdivision as compared to the section 9 for use of land generally does not present a different standard for a section 32 analysis. There is no case law to that effect, and the status of the Resource Legislation Amendment Bill 2015 ("**Bill**") (although only at Select Committee stage) would not suggest such an approach is appropriate.
- 7.8 A number of reform proposals to the Act seek to make subdivision easier:
- (a) New section 95A would preclude public notification for controlled activities, restricted-discretionary or discretionary activities where they are boundary, residential or subdivision activities, or if they are a prescribed activity under section 360G(1)(a)(i).
 - (b) Subdivision is to be permitted unless a rule in a plan changes that. The aim of this proposal being to increase the ease that further land for residential development can be provided.
 - (c) The Bill puts new requirements on councils to ensure sufficient residential and business development capacity to meet long-term demand, and limits appeals on residential resource consents on land already zoned for housing.
- 7.9 It is noteworthy that a report back from the Select Committee on the Bill is due 6 September 2016 at which stage the Bill would progress to a second reading. There is no indication at this stage that this timeframe will not be met. At that stage there will be more certainty as to likely changes to the Bill from its introduced form and in particular any changes affecting how applications for subdivision are addressed. The Panel may need to provide leave for additional presentations from parties, should these changes be material.

8. Conclusion

- 8.1 These submissions identify the reasons to retain the current operative subdivision regime (and the absence of reasons to change it):
- (a) There has been no quantification or qualification of the costs and benefits of a discretionary or restricted discretionary regime;

(b) There is no justification for a departure from the operative planning regime, which as generally agreed between experts, has resulted in successful planning outcomes for the District; and

8.2 Council's concern over a lack of control for subdivision design outcomes through a controlled activity framework is unfounded. The current regime is successful and has been giving effect to the purpose of the Act. Furthermore, case law analysis in these submissions highlights the reality of a controlled activity framework provides for appropriate levels of discretion in Council's control, whilst affording a desirable level of certainty to landowners and the community.

8.3 The evidence presented by Mr Ferguson on behalf of the named submitters endeavours to assist the Panel as much as possible by providing comprehensive section 32AA analysis to support the requested relief. In reliance on this, it is submitted that the ODP default controlled status can be reinstated, subject to potential future refinements over matters of discretion which guide decision making under those provisions.



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1 August 2016

