**BEFORE THE ENVIRONMENT COURT**
**I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2019] NZEnvC 59**

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| IN THE MATTER | of the Resource Management Act 1991 |
| AND | of an appeal pursuant to section 120 of the Act |
| BETWEEN | BUNNINGS LIMITED |
| | (ENV-2018-CHC-015) |
| | Appellant |
| AND | QUEENSTOWN LAKES DISTRICT COUNCIL |
| | Respondent |

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| Court: | Environment Judge J R Jackson<br>Environment Commissioner D J Bunting<br>Deputy Environment Commissioner J T Baines |
| Hearing: | at Queenstown on 8 and 9 October 2018<br>(Final submissions received 16 November 2018) |
| Appearances: | D J Minhinnick and A M Cameron for the appellant<br>R J Wilson and Z T Burton for the respondent |
| Date of Decision: | 5 April 2019 |
| Date of Issue: | 5 April 2019 |

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**DECISION**

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A: Under section 290 of the Resource Management Act 1991 the Environment Court:

(1) cancels the decision of the Queenstown Lakes District Council in relation to the application by Bunnings Limited for consent for a trade supplier warehouse at 148-150 Frankton–Ladies Mile Highway, State Highway 6; and

(2) grants resource consent on the conditions in attachment "F" to the evidence of Ms Panther-Knight for the construction and use of a trade supplier and ancillary retail activity but subject to final checking and updating by the

parties so as to give effect to this decision.

B: Leave is reserved for any party to apply by **12 April 2019** if conditions cannot be agreed.

C: Costs are reserved. Any application should be made within 15 working days, any response within a further 15 working days, and any reply within a further 10 working days.

## REASONS

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## 1. Introduction

### 1.1 The application, the Commissioners' hearing and the appeal

[1] In April 2017 the appellant, Bunnings Limited, sought resource consent from the Queenstown Lakes District Council to develop its 1.62 ha property ("the site") at 148-150 Frankton–Ladies Mile Highway, State Highway 6 ("SH6"), Frankton, to construct and operate what it describes as a trade supplier activity.

[2] The application was publicly notified on 23 August 2017. Four submissions were received by the time of the Council hearing. Three were in opposition. The fourth, from the New Zealand Transport Agency took a neutral position following agreement on access arrangements to and from SH6.

[3] Commissioners appointed by the Queenstown Lakes District Council ("the Council") declined resource consent in a decision dated 9 March 2018. Bunnings Limited ("Bunnings") lodged an appeal with the Registrar of the Environment Court on 29 March 2018.

### 1.2 Some detail of the application and the context of the site

[4] The proposed trade supplier activity includes a very large warehouse, a nursery and a yard for timber trade sales, and space for building and landscaping materials with associated parking, access, site landscaping, earthworks, and signage.

[5] Consent is sought for a warehouse of around 8,100 m² GFA within the Frankton

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Flats Special Zone (B) Activity Area E1. The building area contains various parts, of which a breakdown by floor area is (approximately)[1]:

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|---|---|---|
| (a) | main entry | 58 m² |
| (b) | goods inward | 86 m² |
| (c) | main area | 3,692 m² |
| (d) | staff amenities/office space | 150 m² |
| (e) | timber trade sales | 1,750 m² |
| (f) | building materials and yard | 1,457m² |
| (g) | crop cover | 362 m² |
| (h) | bagged goods | 524 m² |

[6] The site and surrounding area is located on the Frankton Flats – the principal gateway to the Queenstown urban area. The environment is currently in a state of development and urbanisation, with a variety of commercial, retail and light industrial developments, either constructed, under construction or recently consented. These include a number of retail activities for which non-complying resource consents have recently been granted, including a Resene ColorShop and an Armstrong Motor Group vehicle showroom and service hub. Businesses called Mitre 10 MEGA, PlaceMakers and Pak'nSave have also been established in the Frankton Flats area, within 1 kilometre of the site[2].

[7] Bunnings considers the site is the ideal location for it to serve the currently booming Queenstown construction and trade supply market. It claims there is "exponential" demand for housing in Queenstown and that Bunnings' national pricing policy and "lowest cost guarantee" will increase competition between trade suppliers in the Queenstown market and lower the costs of construction, and therefore housing, in addition to other projects. The site's gateway location and its unique position as the only lot of sufficient size in the area with frontage to SH6 (providing optimum convenience for customers) were factors in the decision to seek consent. The site is also in close

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1 T J Heath evidence-in-chief [3.1] [Environment Court document 7].

2 The Mitre 10 MEGA and Pak'nSave proposals in particular were subject to the factual scrutiny of this court: *Foodstuffs (South Island) Limited v Queenstown Lakes District Council* ("*Pak'nSave*") [2012] NZEnvC 135; *Cross Road Properties Limited v Queenstown Lakes District Council* ("*Mitre 10 MEGA*") [2012] NZEnvC 177, and of the High Court in *Queenstown Central Limited v Queenstown Lakes District Council* [2013] NZHC 815; (2013) 17 ERLNZ 585; [2013] NZRMA 239 (with different results). The Council then granted consent to both activities on fresh consent applications as non-complying activities on nearly identical terms to those which had been set by the Environment Court in the decisions cited above.

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proximity to the existing industrial area, which would assist Bunnings to supply trade goods to its trade market in an efficient manner.

[8] Since the Council hearing, the application has been re-designed both to fit in to the surrounding area and to contribute positively to the amenity values of the wider gateway to Queenstown. Adjustments have been made to the site layout such as landscaping and use of materials and colours in response to comments received from the Council. The design differs from a standard "Bunnings Warehouse" in relation to the choice of materials, signage, and orientation of the building. Apparently the design now complies with almost all of the relevant bulk and location controls in the Operative District Plan ("ODP") by using recessive colours and a natural palette of construction materials to avoid or mitigate visual effects. Substantial landscaping (claimed to be more than anywhere else along SH6 in the proximity of the site) is proposed to partially screen the development from SH6.

1.3 The issues

[9] By the time the appeal came to hearing the disagreements between the parties over design, amenity and transport issues had resolved so the only disputes were related to wider economic and planning issues. That is interesting because the Hearing Commissioners decided the latter in favour of Bunnings but turned the proposal down because of its effects on amenities and on the landscape. Before us the issues are:

(1) what is the adverse effect of the proposal "on the supply of industrially zoned land in Queenstown"[3]?
(2) does the proposal pass one of the threshold tests in section 104D RMA?
(3) does the proposal implement the objectives and policies of the ODP better than the status quo?
(4) does the proposal implement the other relevant statutory instruments?
(5) are there other relevant considerations?
(6) overall, should consent be granted having regard to all the relevant considerations?

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[3] Opening submissions for Queenstown Lakes District Council [1.5(a)] [Environment Court document 10].

[10] There is no doubt that the quantity of industrial land supplied (or at least zoned) is part of the social and economic conditions affecting people and communities. That means the area of zoned industrial land is part of the environment[4] and the effects of a proposal on it are relevant under the RMA.

[11] Before we turn to consider those issues we need to outline the relevant considerations identified in section 104(1) RMA.

1.4 The matters to be considered

[12] The site and surrounding area is zoned as Frankton Flats Special Zone B ("FFB"), Activity Area E1 under the ODP. The planners and the economists in their joint witness statements all agreed that the development is classified as a "retail activity" and is therefore a non-complying activity in that zone. That means that one of the threshold tests in section 104D RMA must be passed before we get to the section 104 matters.

[13] We note that, because Bunnings' application was lodged before 18 October 2017, the applicable version of the Resource Management Act 1991 ("the RMA" or "the Act") is at 17 October 2017, and therefore the changes made by the Resource Legislation Amendment Act 2017 do not apply.

[14] Section 104 RMA identifies the matters we are to have regard to in coming to a decision. In this case the relevant matters, subject to Part 2 of the Act, are:

- the actual and potential effects of the activity on the environment[5];
- the National Policy Statement on Urban Development Capacity 2016 ("NPS-UDC");
- the provisions of the Otago Regional Policy Statement ("the RPS") and the proposed Otago Regional Policy Statement ("the PORPS"), the ODP and the QLDC Proposed District Plan ("the PDP")[6]; and
- any other relevant matters, if it is reasonably necessary[7] to consider them.

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4 See the definition of 'environment' section 2 RMA.
5 Section 104(1)(a) RMA.
6 Section 104(1)(b) RMA.
7 Section 104(1)(c) RMA.

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[15] Those matters are stated by section 104(1) to be "subject to Part 2". The recent decision of the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council* ("*Davidson (CA)*")[8] confirms the earlier decision of the Environment Court[9] ("*Davidson (EC)*") that it may not be necessary to have recourse to Part 2 of the Act when considering a resource consent application[10]. Where it is clear that the relevant plan has been prepared having regard to Part 2 and the applicable statutory documents under it, reference to Part 2 could not justify an outcome contrary to the plan[11]. Only where the consent authority is not confident that the plan has been properly prepared under the Act and the statutory documents, should it refer to Part 2[12].

[16] The Court of Appeal took the opportunity to explain that it was not only in circumstances where a district plan (or intermediate statutory instrument) was uncertain, incomplete or illegal – to use the criteria set out by the majority of the Supreme Court in *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited*[13] (*"King Salmon"*) – that assistance should be sought from Part 2 RMA. Cooper J, writing for the Court of Appeal, stated[14]:

> In all such [resource consent applications] the relevant plan provisions should be considered and brought to bear on the application in accordance with section 104(1)(b). A relevant plan provision is not properly had regard to (the statutory obligation) if it is simply considered for the purpose of putting it on one side. Consent authorities are used to the approach that is required in assessing the merits of an application against the relevant objectives and policies in a plan. What is required is what Tipping J referred to as "a fair appraisal of the objectives and policies read as a whole"[15].
>
> It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with section 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would

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8 *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316 (*Davidson (CA)*).
9 *R J Davidson Family Trust v Marlborough District Council* [2015] NZEnvC 81 at [262] (*Davidson (EC)*).
10 *Davidson (CA)* above n 8 at [82].
11 *Davidson (CA)* above n 8 at [74].
12 *Davidson (CA)* above n 8 at [75].
13 *Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited* [2014] NZSC [2014] NZSC 38; (2014) 7 ELRNZ 442; [2014] 1 ELRNZ 593; [2014] NZRMA 195.
14 *Davidson (CA)* above n 8 at [73] and [74].
15 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

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> likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[17] We consider that there are two (inter-related) key points here. The first is that it must be "clear that a plan has been prepared having regard to [part] 2". That is, with respect slightly confusing to us for two reasons. A plan must be prepared "in accordance with ... the provisions of part 2"[16] not merely having regard to them, but we suspect that is what the Court of Appeal meant so nothing turns on it. The other uncertainty is over the enquiry that needs to be made into how a plan has been "prepared" and we return to that shortly.

[18] The second and important part of the test stated by Cooper J is whether the [district] plan contains "... a coherent set of policies designed to achieve clear environmental outcomes". In passing we note this may also be a useful test for the drafters of a regional or district plan to ensure it does not degenerate into requiring broad overall judgments on everything. For purposes of the present application for resource consent the test is whether the policies are coherent and achieve clear environmental outcomes.

[19] The Court of Appeal continued[17]:

> If a plan ... has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.
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> We prefer to put the position as we have in the preceding paragraphs rather than adopting the expression "invalidity, incomplete coverage or uncertainty" which was employed by the Supreme Court in *King Salmon* when defining circumstances in which resort to pt 2 could be either necessary or helpful in order to interpret the NZCPS[18]. While that language was appropriate in the context of the NZCPS, we think more flexibility may be required in the case of other kinds of plans prepared without the need to comply with ministerial directions.

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16 Section 74(1)(b) RMA.
17 *Davidson (CA)* above n 8 at [75] and [76].
18 *King Salmon* above n 13 at [90].

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[20] With respect, this part of the Court of Appeal's decision is, at least at first sight, over-subtle and rather difficult to apply in practice. We say that with some concern that we might be misunderstanding the Court of Appeal's point because Cooper J, the author of *Davidson (CA)* is the leader on RMA interpretation and application in the Court of Appeal. The difficulties we see are first, that both local authorities and the Environment Court will be reluctant to say that a plan has been "not competently" prepared especially when it may be the result of decisions by the Environment Court itself. Further, the phrase "competently prepared" suggests the test relates to process rather than outcome, with the implication that the consent authority should retrospectively "review" the process leading to the applicable provisions rather than attempt to apply the provisions themselves.

[21] We find some comfort in the fact that *Davidson (CA)* also introduced the "coherent set of policies with clear environmental outcomes" test which can be applied by looking at (but not behind) and applying the relevant plan's provisions. Further, *Davidson (CA)* did not preclude the invalid/ incomplete/uncertain test from *King Salmon* but rather adds to it in the section 104 context.

1.5 The direct effects of the proposal and of the status quo

[22] As recorded, the planning witnesses agreed[19] that all matters relating to infrastructure, transportation, urban design, landscaping, signage, natural hazard and soil contamination have been resolved[20]. We infer that any adverse effects of those are less than minor. As for economic effects, Mr Foy stated[21] – and all the retail economic witnesses agreed – that there are likely to be no more than minor retail impacts and distribution effects on any existing centre. The planning witnesses also agreed[22].

*Positive effects*

[23] The positive effects of the proposal were described by Mr Moody and Ms Panther Knight and agreed upon by Ms Stagg[23] for the Council. They include:

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19 Planning joint witness statement.
20 E C Stagg evidence-in-chief [3.7] [Environment Court document 12].
21 D R Foy evidence-in-chief [4.1] [Environment Court document 11].
22 Planning joint witness statement [5.7].
23 Planning joint witness statement [5.15].

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- the provision of additional trade supply into the District market, which would result in competitive pricing for the construction sector;
- increased employment opportunities in the District both during construction and when the trade supply activity is fully operational.

[24] The positive effects of the status quo are either that the site is used for an industrial activity or is banked until someone else tries to use this prime site with frontage to SH6 for some other business purpose. We discuss Mr Heath's reference to the 'highest and best' use later.

## 2. The relevant statutory instruments

### 2.1 The Operative District Plan (ODP)

[25] The district plan position is not straightforward. The ODP has been amended by Plan Change 19 ("PC19") which became operative on 12 December 2014. For its part, the PDP Stage 1 has been subject to a variation with the effect that part of the Frankton Flats (and a much larger area of the Wakatipu Basin) has been removed from its ambit and placed in "Stage 2". Consequently only the higher-level objectives and policies of the PDP are relevant. We discuss those later, and now turn to the provisions of the ODP.

*Urban form, land use patterns and use of industrial land*

[26] There are district-wide general objectives and implementing policies in the ODP. They include objectives[24] seeking "a pattern of land use which promotes a close relationship and good access between living, working and leisure environments" and that "the scale and distribution of urban development is effectively managed"[25].

[27] There is an objective and set of implementing policies for maintaining the quality of the natural environment landscape values which while relevant, we will not quote here since no issue is raised under it. There is a specific objective in the ODP for the Frankton Flats area which reads:


24 Objective 4.9.3.4 ODP.
25 Objective 4.9.3.7 ODP.

> Objective (4.9.3) 6 – Frankton
> Integrated and attractive development of the Frankton Flats locality providing for airport operations, in association with residential, recreation, retail and industrial activity while retaining and enhancing the natural landscape approach to Frankton along State Highway No. 6.

[28] The relevant implementing policy is:

> Policy: (4.9.3) 6.2 – To provide for expansion of the Industrial Zone at Frankton, away from State Highway No. 6 so protecting and enhancing the open space and rural landscape approach to Frankton and Queenstown.

The stated reason[26] for the policy is to provide for expansion of industrial activity in a manner which does not detract from the amenities of other uses in the area (which includes use of SH6 and adjacent cycle and pathways). This strategic policy appears to push industrial activity away from SH6. This quite specific policy sits uncomfortably with the zoning of the site under the provisions we now turn to, although the methods (but not the policies) in the latter ameliorate this to some extent by providing for setbacks and other landscaping controls.

*Frankton Flats B zone objectives and policies*

[29] Also directly focused on the environment of the site is the set of objectives and policies for the zone called Frankton Flats B ("FFB") introduced by PC19 and now contained in Chapter 12 of the ODP (which, rather strangely, does not refer to objective (4.9.3) 6 and its policies). The statement of issues for the FFB zone in Chapter 12 of the ODP is more of an explanation of the zone. It starts with a statement[27] that the FFB "... provides the ability to accommodate a range of urban activities for which there is demonstrated demand, including residential, ... industrial, commercial and certain 'forms of retail'." There is no demonstration of "demand" in this chapter. We have checked the Interim Decision[28] on PC19 and while it discusses "demand" for industrial land in some detail it does not list any prices at which the alleged quantities of land are "demanded". That may have been an appropriate approach for PC19[29] but, whether it meets the sort

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26 ODP p 4 to 72.

27 ODP p 12 to 138a.

28 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* [2013] NZEnvC 14.

29 Although how it had particular regard to the efficient use of resources under section 7(b) RMA is problematic.

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of analysis now required under the NPS-UDC is an issue we come to later.

[30] "Issue"[30] 12.19.1.4 states that high quality urban design is to characterise the area except within (relevantly) Activity Area E1 which will have "... a lesser amenity standard". It is difficult to reconcile this with both issue 12.19.1.2 and with district-wide policy (4.9.3) 6.2 (quoted above) for that part of E1 which includes the site close to SH6.

[31] The following objectives and policies of the FFB zone are relevant. The first objective is to provide for the needs of the District "by utilising the zone for a range of urban activities"[31]. The implementing policies are:

> 1.1 To provide for a wide range of non-residential activities including retailing, community activities and commercial uses, mixed live/work units and industry (including yard based) to help meet projected land use requirements.
>
> ...
>
> 1.3 To ensure that development within the Zone is structured so that:
>
> a. compatible activities are co-located and incompatible activities are adequately separated by the position of activity areas and roads, and suitable interface controls;
>
> b. the Zone is effectively integrated with adjacent zones;
>
> ...

It will be noted that there is no direction for the "projected land use requirements" to pay attention to different quantities which may be supplied or demanded at <u>different prices</u>. That is important because as the Environment Court stated in *Wallace Group Limited v Auckland Council*[32] "At one level, there is always demand. However, development is contingent on whether the price offered is viable for the seller". This is a point we will return to.

[32] The most relevant implementing policy is:

> 1.6 To ensure quality urban design occurs within the public and private realms so that the built environment provides an appropriate level of amenity for residents, visitors and workers.

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30 "Issue" is in inverted commas because it reads more like a policy than an issue.

31 FFB 12.19.2 objective 1.

32 *Wallace Group Limited v Auckland Council* [2018] NZEnvC 92 at [49].

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[33] There is an objective 2[33] as to Visual Amenity and Connections:

> a. Visual connections to surrounding Outstanding Natural Landscapes are maintained.
> b. All development visible from State Highway 6 is of a high standard in terms of visual appearance.

Objective 5 then seeks a high-quality urban environment with integrated built and open space elements, including roads. We do not need to detail the implementing policies for these two objectives here since the parties agree they are met by Bunnings' proposal.

[34] The most challenging objective and policies for the applicant are those for the site's subzone (Activity Area E1):

> **Objective 10 Activity Area E1 (Industrial)**
> An area for industrial and service activities, which has a standard of amenity that is appropriate to the function of the Activity Area.
>
> Policies
> 10.1 To enable a wide variety of industrial activities and service activities ranging from lighter industrial activities through to those of a yard based nature.
> 10.2 To ensure that any office space is ancillary to the use of the site for industrial and service activities.
> 10.3 To exclude retailing unless retail activities are:
> a. ancillary to, and minimal in comparison with the use of the site for industrial and service activities; or
> b. in addition to (a) where located on a site with frontage to, and not extending more than 50 m from the [Eastern Access Road], then to enable yard based retailing ancillary to industrial or service activities.
> 10.4 Unless otherwise provided for in the policies for this Activity Area, to exclude activities (such as residential, retail and visitor accommodation activities) that conflict with the intended purpose of the Activity Area through the generation of reverse sensitivity effects; or will result in the reduction of land available for industrial and service activities.

This objective and its policies clearly seek to exclude[34] retail activities from Activity Area E1, and promote industrial activities. The whole of Activity Area E1 is zoned industrial but this must be read (somehow) with the earlier more specific Frankton Flats' policy (4.9.3) 6.2 that provides for the industrial zone to be moved away from SH6. We hold

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33 FFB 12.19.2 objective 2.
34 Transcript p 100 lines 4 to 14.

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that the district plan when read as a whole is not completely coherent on the issue of industrial zoning adjacent to SH6.

[35] The ODP and the PDP (discussed in section 2.4 below) share the following relevant definitions:

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| **Industrial Activity** | Means the use of land and buildings for the primary purpose of manufacturing, fabricating, processing, packing, or associated storage of goods. |
| **Retail** | Means the direct sale or hire to the public from any site, and/or the display or offering for sale or hire to the public on any site of goods, merchandise or equipment, but excludes recreational activities. |

[36] In addition the ODP contains the following definitions:

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| **Light Industrial Activity (ODP)** | Means the use of land and building for an industrial activity where that activity, and the storage of any material, product or machinery (including waste storage) incidental to the activity occurs wholly indoors, within and enclosed by a building. The requirement for the activity to occur indoors does not apply to required car parking and maneuvering areas. These activities will not require the use, storage or handling of large quantities of hazardous substances nor require air discharge consents. |
| **Yard Based Industrial Activity (ODP)** | Means the use of land and buildings for the primary purpose of manufacturing, fabricating, processing, packing or associated storage of goods, where no more than 40% of the site is covered by built form. |
| **Yard Based Service Activity (ODP)** | Means the use of land and buildings for the primary purpose of the transport, storage, maintenance and repair of goods, where no more than 40% of the site is covered by built form. |

[37] An overall quantity of industrial land likely to be demanded was assessed in the Interim Decision[35] leading to PC19 but neither the decision nor the ODP provides any information about the prices at which land will be demanded. Nor does it provide a supply line, only a quantity of zoned land which may or may not (depending on prices amongst other factors) be put on the market. Similar methods were used in these proceedings

35 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* above n 28.

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and we describe them below.

## 2.2 National Policy Statement on Urban Development Capacity 2016

[38] The NPS-UDC came into force on 1 December 2016. The relevant objectives of the NPS-UDC are:

> *Objective Group A – Outcomes for planning decisions*
>
> QA1: Effective and efficient urban environments that enable people and communities and future generations to provide for their social, economic, cultural and environmental wellbeing.
>
> QA2: Urban environments that have sufficient opportunities for the development of housing and business land to meet demand, and which provide choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations, working environments and places to locate businesses.
>
> QA3: Urban environments that, over time, develop and change in response to the changing needs of people and communities and future generations.
>
> ...
>
> *Objective Group D – Coordinated planning evidence and decision-making*
>
> OD1: Urban environments where land use, development, development infrastructure and other infrastructure are integrated with each other.
>
> OD2: Coordinated and aligned planning decisions within and across local authority boundaries.

[39] Objectives QA1 to QA3 show that the NPS-UDC is primarily an enabling document. It is designed to provide opportunities, choices, variety and flexibility in relation to the supply of land for housing and business. Important secondary themes are the integration of development and land use with infrastructure (objective OD1) and coordinated planning across local authority boundaries (objective OD2). While there may be a justified need to manage development – expressly in relation to the infrastructure objective, and implicitly in relation to the bottom lines of section 6 of the RMA – the NPS-UDC is basically designed to open doors for and encourage development of land for business and housing, not to close them.

[40] The only term in those objectives which is not used in Part 2 of the RMA is the concept of "demand". That is defined by the NPS-UDC[36] as meaning:

> In relation to business land, the demand for floor area and lot size in an urban environment

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36 NPS-UDC p 6 *Interpretation*.

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in the short, medium and long term, including:

(a) the quantum of floor area to meet forecast growth of different business activities;

(b) the demands of both land extensive and intensive activities; and

(c) the demands of different types of business activities for different locations within the urban environment.

Curiously, the "demand for different price points" – which is identified as part of the concept of "demand" for housing – is not expressly included in the concept of demand for business land. However, the latter definition is inclusive so we hold that the quantity of land demanded at different price points is part of the concept of demand as shown in any basic demand curve[37]. In fact, "demand" is usually thought of as simply a list or schedule of the quantity of widgets, in this case areas of land, demanded at different prices. This is often shown on a graph as a "demand curve".

[41] The list of objectives, and in particular objective OD2 would be of relevance for the Central Otago District Council which, at Cromwell, already effectively provides a dormitory town and some industrial areas for its neighbour, the Queenstown Lakes District, as well as for its own communities.

[42] Since the District is expected to experience growth there is a list of applicable policies in the NPS-UDC. There are four relevant sets of policies: those called "PA" are the substantive policies under the heading "*Outcomes for planning decisions*"; the second set, identified as "PB", are assessment policies mainly of interest in a local authority's preparation of plans rather than when granting resource consents. The third, are those identified as "PC" under the heading "*Future Development Strategy*". This too is mainly directed at preparation of instruments – statutory or otherwise[38]. Finally there is a set called "PD" which direct "coordinated planning".

[43] The first of the substantive policies is that:

PA1: Local authorities shall ensure that at any one time there is sufficient housing and business land development capacity according to the table below:

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37 Plotting the quantity demanded on the x-axis and the price on the y-axis, and producing an inverted curve which reflects the intuitive result that, as the price goes up, the quantity of widgets demanded goes down.

38 Policy PC14 NPS-UDC p 15.

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| Short term | Development capacity must be feasible, zoned and serviced with development infrastructure. |
| Medium term | Development capacity must be feasible, zoned and either: serviced with development infrastructure, or the funding for the development infrastructure required to service that development capacity must be identified in a Long-Term Plan required under the Local Government Act 2002. |
| Long term | Development capacity must be feasible, identified in relevant plans and strategies, and the development infrastructure required to service it must be identified in the relevant Infrastructure Strategy required under the Local Government Act 2002. |

[44] The NPS-UDC defines "feasible" in the following way:

> "Feasible means that development is commercially viable taking into account the current likely costs, revenue and yield of developing; and feasibility has a corresponding meaning".

It should also be noted that the NPS-UDC does not oblige local authorities to supply business land, but to ensure there is "sufficient ... development capacity". This is important because it makes a clear distinction between development capacity (usually zoning) which is a plan matter under the RMA, and the areas supplied (which is a matter for the real estate market).

[45] The policies continue (relevantly):

> PA2: Local authorities shall satisfy themselves that other infrastructure required to support urban development is likely to be available.
>
> PA3: When making planning decisions that affect the way and the rate at which development capacity is provided, decision-makers shall provide for the social, economic, cultural and environmental wellbeing of people and communities and future generations, whilst having particular regard to:
>
> (a) Providing for choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations, working

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environments and places to locate businesses;

(b) Promoting the efficient use of urban land and development infrastructure and other infrastructure; and

(c) Limiting as much as possible adverse impacts on the competitive operation of land and development markets.

These policies are the substantive directions to local authorities. The contrast between policy PA3 of the NPS-UDC and the ODP's policy 10.4 for the AA1 in the FFB subzone is marked. The ODP simply seeks to exclude activities which will reduce the land available for industrial activities. The NPS-UDC is much more complex: it directs that when a local authority is considering any application which might reduce the land available for industrial activities[39] then decision-makers are to provide for people and communities' wellbeing while having particular regard to three factors – provision of choices, promoting efficient use of urban land, and "limiting as much as possible" adverse effects on the real estate market. In our tentative view (we did not receive submissions on this) "efficient use" in (b), given the wording of (a) and (c), means "the highest value use determined by the market". Policy considerations are irrelevant to the determination of efficiency in policy PA3. They may of course be considered in providing for (should this be 'enabling' to be consistent with section 5 RMA?) the wellbeing of people and communities under the introductory words of PA3.

[46] Since a policy to avoid other activities in an industrial zone cannot be said to promote efficient use of urban land or limit adverse effect on competition in real estate, we hold that the ODP cannot be said to anticipate the NPS-UDC. Indeed the ODP appears to be inconsistent with the NPS-UDC and will probably need to be changed to give effect to the latter.

[47] In an attempt to ensure that there is a good information base for action, policy PB1 of the NPS-UDC directs each local authority to produce, at least once every three years, a housing and business development capacity assessment that:

(a) Estimates the demand for dwellings, including the demand for different types of dwellings, locations and price points, and the supply of development capacity to meet that demand, in the short, medium and long terms; and

(b) Estimates the demand for the different types and locations of business land and floor area for businesses, and the supply of development capacity to meet that demand,

39 The actual phrase in NPS-UDC policy PA3 is 'affect the rate at which development capacity is provided'.

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in the short, medium and long terms; and

(c) Assesses interactions between housing and business activities, and their impacts on each other.

[48] Policy PB3 then stipulates that:

> The assessment under policy PB1 shall estimate the sufficiency of development capacity provided by the relevant local authority plans and proposed and operative regional policy statements, and Long-Term Plans and Infrastructure Strategies prepared under the Local Government Act 2002, including:
>
> (a) The cumulative effect of all zoning, objectives, policies, rules and overlays and existing designations in plans, and the effect this will have on opportunities for development being taken up;
>
> (b) The actual and likely availability of development infrastructure and other infrastructure in the short, medium and long term as set out under PA1;
>
> (c) The current feasibility of development capacity;
>
> (d) The rate of take up of development capacity, observed over the past 10 years and estimated for the future; and
>
> (e) The market's response to planning decisions, obtained through monitoring under Policies PB6 and PB7.

[49] Policy PB4 requires "the assessment under policy PB1 [to] estimate the additional development capacity needed if any of the factors in PB3 indicate that the supply of development capacity is not likely to meet demand in the short, medium or long term."

[50] This group of policies contains a further one that shows the NPS-UDC recognises further complexities in the interactions between (different) zonings and different markets. Policy PB7 directs that:

> Local authorities shall use information provided by indicators of price efficiency in their land and development market, such as price differentials between zones, to understand how well the market is functioning and how planning may affect this, and when additional development capacity might be needed.

[51] Under the heading "Responsive planning" there is a list of policies PC1 to PC4 which apply to all local authorities that have part, or all, of either a medium growth urban area or high growth urban area within their district or region. It is expressly noted in the NPS-UDC that "the application of these policies is not restricted to the boundaries of the urban area". The policies are:

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PC1: To factor in the proportion of feasible development capacity that may not be developed, in addition to the requirement to ensure sufficient, feasible development capacity as outlined in policy PA1, local authorities shall also provide an additional margin of feasible development capacity over and above projected demand of at least:

- 20% in the short and medium terms, and
- 15% in the long term.

PC2: If evidence from the assessment under policy PB1, including information about the rate of take-up of development capacity, indicates a higher margin is more appropriate, this higher margin should be used.

PC3: When the evidence bases or monitoring obtained in accordance with Policies PB1 to PB7 indicates that development capacity is not sufficient in any of the short, medium or long term, local authorities shall respond by:

(a) providing further development capacity; and

(b) enabling development

in accordance with policies PA1, PC1 or PC2, and PC4. A response shall be initiated within 12 months.

PC4: A local authority shall consider all practicable options available to it to provide sufficient development capacity and enable development to meet demand in the short, medium and long term, including:

(a) Changes to plans and regional policy statements, including to the zoning, objectives, policies, rules and overlays that apply in both existing urban environments and greenfield areas;

(b) Integrated and coordinated consenting processes that facilitate development; and

(c) Statutory tools and other methods available under other legislation.

[52] There is then a list of minimum targets which local authorities are "encouraged" to meet in relation to housing. Since they are not relevant here we will not quote them.

[53] There is a tendency in district plans, e.g. in both the ODP and PDP plans here, to conflate the amount of the land zoned Industrial (plus more general zones allowing industrial activities) with the supply of industrial land. That is a false equivalence. Zoning land so that industrial activities are allowed and protected to some extent may approach[40] being a necessary condition for the supply of land for industrial development but it is certainly not a sufficient condition. Many other factors, usually reflected in the price at

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40 We discount for present purposes the possibility (with extra transaction costs) of applying for discretionary or non-complying industrial activities. In fact for large projects this is quite common.

which particular land is put on the market, come into play when establishing supply as shown on a supply curve.

[54] One of the benefits which the NPS-UDC gives to local authorities is in making clear the difference between zoned capacity and the quantity of land supplied. The NPS-UDC's policies are designed to ensure there is plenty of business development capacity so that even the lower land value uses such as industrial (when compared with commercial or residential use) can – in most cases – be left to the market[41] to actually ensure demand is met at different price points.

## 2.3 The regional documents

*The Operative Regional Policy Statement*

[55] The ORPS is a very general document and all the relevant objectives and policies add little particularisation of Part 2 of the RMA. The ORPS itself has been particularised in and given effect to in both the operative and proposed Queenstown Lakes District Plan referred to below. However, the Council's planner Ms E C Stagg made some issue of it.

[56] Objective 9.4.1 of the ORPS is (relevantly) to promote the sustainable management of Otago's built environment in order to meet the present and reasonably foreseeable needs of Otago's people and communities. Ms Stagg disagreed with Ms K Panther Knight, the planner for Bunnings, that the proposal is neither contrary to nor inconsistent with objective 9.4.1. Ms Stagg considered that currently there are constraints in Queenstown in relation to the adequate provision of land zoned for industrial purposes[42]. The proposal would reduce the amount of land available for industrial activities, and they would not meet the reasonably foreseeable needs of the community. Therefore, she considered that the proposal was inconsistent with this objective. Similarly objective 9.4.3 of the ORPS is "to avoid, remedy or mitigate the adverse effects of Otago's built environment on Otago's natural and physical resources". Ms Stagg considered that the proposal will have an adverse effect on the physical resource of land zoned for industrial purposes, close to Queenstown, and that this effect cannot be remedied or mitigated. Ms Panther Knight was of the opposite view. These

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41 Although in districts like Queenstown, quasi-monopolistic ownership of developable land may be a factor: see *Appealing Wanaka Inc v Queenstown Lakes District Council* [2015] NZEnvC 139 at [174] and [190].

42 E C Stagg evidence-in-chief [13.7] [Environment Court document 11].

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arguments encapsulate the issue before the court and we consider the evidence about them (in the context of the ODP) below.

*The Proposed Otago Regional Policy Statement*

[57] The PORPS was notified on 23 May 2015 and decisions were issued in September 2016. All appeals have now been provisionally resolved through mediation or decisions. Not all the proposed consent orders have been issued by the court as the proposed orders are quite elaborate.

[58] Objective 1.1, included in the PORPS confirmed through a consent order, seeks that Otago's resources are used sustainably to promote economic, social, and cultural wellbeing for its people and communities. It has general implementing policies which we have considered.

[59] The objectives and policies in PORPS chapters 4 (Communities in Otago are resilient, safe and healthy) and 5 (People are able to use and enjoy Otago's natural and built environments) are relevant to the proposal. In particular a more focused objective is objective 4.5 of the PORPS (also amended by a consent order issued by the Environment Court) especially by implementing policy 4.5.1 which includes the objective's wording and now reads (relevantly)[43]:

> **Policy 4.5.1 Providing for urban growth and development**
>
> Provide for urban growth and development in a strategic and coordinated way, including by:
>
> (a) Ensuring future urban growth areas are in accordance with any future development strategy for that district;
>
> (b) Monitoring supply and demand of residential, commercial and industrial zoned land;
>
> (c) Ensuring that there is sufficient housing and business land development capacity available in Otago;
>
> (d) Setting minimum targets for sufficient, feasible capacity for housing in high growth urban areas in Schedule 6;
>
> (e) Coordinating the development and the extension of urban areas with infrastructure development programmes, to provide infrastructure in an efficient and effective way;
>
> (f) Having particular regard to:
>
> (i) Providing for rural production activities by minimising adverse effects on significant soils and activities which sustain food production;
>
> (ii) Minimising competing demands for natural resources;
>
> ...

43 Policy 4.5.1 as amended by Consent Order of the Environment Court dated 28 June 2018.

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(g) Ensuring efficient use of land;

(h) Restricting urban growth and development to areas that avoid reverse sensitivity effects unless those effects can be adequately managed;

...

[60] Policy 4.5.1 (a) to (e) is clearly designed to give effect to the NPS-UDC. In particular policy 4.5.1(b) and (c) makes the important distinction between the quantity of business (commercial and industrial) land demanded and supplied, and the "business land development capacity" of the Region. There is to be "sufficient" (policy (c)) land development capacity while at the same time ensuring the efficient use of land. The PORPS is even more market-oriented than the NPS-UDC which only requires limiting "as much as possible" any adverse impacts on the competitive operation of land development markets.

[61] In chapter 5, policy 5.3.4[44] (Industrial land) of the PORPS is particularly relevant to this application. It is to:

> Manage the finite nature of land suitable and available for industrial activities, by all of the following:
>
> a) Providing specific areas to accommodate the effects of industrial activities;
>
> b) Providing a range of land suitable for different industrial activities, including land-extensive activities;
>
> c) Restricting the establishment of activities in industrial areas that are likely to result in:
>
> i. Reverse sensitivity effects; or
>
> ii Inefficient use of industrial land or infrastructure.

This policy is definitely incomplete and/or uncertain: what is an inefficient use of industrial land? In particular is it "inefficient" to use land zoned industrial for some other business activity if the land owner can obtain higher rents for it? It appears not, provided there is zoned capacity elsewhere in the region (or market) and there is no externality which needs to be taken into account and which, if uncosted, would lead to inefficiency.

## 2.4 The Proposed District Plan (PDP)

*The review of the operative plan*

[62] In 2014 the Council decided to review the ODP. Stage 1 of the PDP was notified


44 As amended by Consent Order of the Environment Court dated 28 June 2018.

on 26 August 2015 and decisions on submissions on Stage 1 were notified on 7 May 2018. All references to the PDP are to the decisions version as notified.

[63] Between those two events, on 29 September 2016 the Council resolved[45] to separate the PDP into two volumes, A and B, based on geographic location. Volume A contains the chapters of the PDP notified in Stages 1 and 2 of the PDP. All other land is proposed to form volume B of the PDP.

[64] Council's original proposal[46] was to review the Frankton Flats B zone as part of Stage 4 of the review to be notified in the first quarter of 2019. However, Ms Stagg advised us at the hearing[47] that "the Council will not review the Frankton Flats 'B' zone as part of this district plan review". The reason given was that this area (FFB) had only recently been made operative after a seven-year process"[48]. It appears to us that it ignores the fact that the ODP in general and PC19 in particular were prepared before and therefore without regard to the NPS-UDC. PC19 will probably need to be amended to give effect to that national policy statement.

*The higher-level objective and policies of the PDP*

[65] Some of the strategic provisions in Chapter 3 of the PDP are particularly relevant. All are subject to one or more appeals unless specifically stated otherwise. The first is:

> Objective 3.2.1.2
> The Queenstown and Wanaka town centres are the hubs of New Zealand's premier alpine resorts and the District's economy.

That objective relates specifically to Frankton and seeks that the Frankton urban area functions as a commercial and industrial service centre and provides community facilities for the people of the Wakatipu Basin. The complementary objective 3.2.1.5 seeks that "Local service and employment functions served by commercial centres and industrial areas outside of the Queenstown and Wanaka town centres, Frankton and Three Parks, are sustained".

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45 E C Stagg evidence-in-chief [7.2] [Environment Court document 12].
46 E C Stagg evidence-in-chief [7.3] [Environment Court document 12].
47 Transcript p 175 lines 14 to 20.
48 E C Stagg evidence-in-chief [7.3] [Environment Court document 12].

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[66] There is also an important objective[49] "enabling diversification of the District's economic base and creation of employment opportunities through the development of innovative and sustainable enterprises".

[67] Objective 3.2.2.1 seeks that urban development will occur in "a logical manner" so as to:

> (a) promote a compact, well designed and integrated urban form;
>
> ...
>
> (c) achieve a built environment that provides desirable, healthy and safe places to live, work and play;
>
> ...
>
> (e) protect the District's rural landscapes from sporadic and sprawling development;
>
> ...
>
> (h) be integrated with existing, and planned future, infrastructure.

[68] A further strategic policy[50] (not subject to appeal) to "avoid non-industrial not ancillary to industrial activities occurring within areas zoned for industrial activities". This is clearly relevant, although it is difficult to see how the policy gives effect to policy PA3 of the NPS-UDC. The opposite appears to be the case. At the least it appears to be incomplete even when read with the other provisions of the PDP. We return to this issue later.

*Rezonings*

[69] The PDP also proposes to rezone 27.5 ha at Coneburn from rural to industrial. That decision has been appealed and consequently the planners recorded[51] "... there is a difference of opinion in respect of the extent of weighting to be applied when assessing available and plan-enabled supply of industrial land in the District relative to this proposal".

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49 PDP Objective 3.2.1.6.

50 PDP strategic policy 3.3.8.

51 Planning joint witness statement [5.8].

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## 3. What is the effect of the proposal on industrial land capacity?

### 3.1 Introduction

[70] The first issue relates, in Mr Wilson's words, to the effects of the Bunnings' proposal "on the supply of industrial land in Queenstown"[52]. It is a matter of simple arithmetic that the proposal will reduce the quantity of land zoned for industrial activities, i.e. it will reduce the industrial development capacity of the District and we discuss the scale of that reduction next. In fact we have no evidence as to what the proposal will likely do in relation to the quantity of land to be put on the market (i.e. the actual supply of industrial land).

### 3.2 The figures on zoned industrial land capacity

[71] The economic witnesses were Mr T J Heath and Mr M G Tansley for Bunnings and Mr D R Foy for the Council. We set out below their analyses of the "supply" of land zoned for industrial activity. We understand the Council's position on the supply of business land is that set out in the *Business Development Capacity Assessment 2017* ("*the BDC Assessment*")[53] prepared by Mr Foy's firm "Market Economics". The *BDC Assessment* was prepared as part of the Council's obligations under the NPS-UDC and was adopted by the Council in May 2018.

[72] The *BDC Assessment* projects both the "supply"[54] and "demand" for industrial zoned land within the Queenstown Ward and the District under two scenarios. Using the *Base Scenario* the *BDC Assessment* concludes that there is "sufficient supply" in the short, medium and long term (taking into account the buffers required under the NPS-UDC)[55]. Using an *Alternative Scenario,* in which assumptions[56] are made that flexible multi-use zones will not be used for industrial activity, the *BDC Assessment* concludes there is still sufficient supply in the short and medium terms, but insufficient supply in the

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52 Opening submissions for Queenstown Lakes District Council [1.5] [Environment Court document 10].

53 ME Consulting (15 March 2008) accessed from: https://www.qldc.govt.nz/assets/uploads/council-documents/committees/planning-and-strategy-committee/10-may-2018/item-1-attachment-a-business-capacity-assessment-2017-final-1.5.2018.pdf.

54 These concepts contain minimal reference to prices. Certainly the quantity of land demanded at different price points is not systematically set out. We refer to supply when the witnesses did but it seems to us that much (though not all of the time) they were referring to zoned capacity not supply.

55 ME Report at Table 7.11; M G Tansley evidence-in-chief [5.3] [Environment Court document 8].

56 Appendix 14 of the *BDC Assessment* describes the rationale for excluding areas where industrial activities could be developed.

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long term. How much that should concern us is unclear since limitations of the *Alternative Scenario* have been responded to in the expert evidence of Messrs Tansley and Heath[57] where they note that the Council is obliged under the NPS-UDC to undertake three-yearly monitoring to assess and address any potential lack of supply.

[73] Two background concerns in this proceeding are first that the parties have not been able to see the wood (the quantity of industrial land demanded at different price points) for the trees (the assessed demand for industrial land on a business as usual ("BAU") basis). We were given little explanation of how the demand for industrial land might be affected by factors other than the increase in usually resident population, for example by the "demand" for residential land (and other classes of business land), and of the implications of those matters for the efficient use of resources. Second there is a conflation of zoned land capacity with supply. In reality they may be quite different things as the NPS-UDC recognises.

[74] With those qualifications the *BDC Assessment* represents the most up-to-date assessment of vacant industrial land/capacity and industrial land demand in both Wakatipu and Wanaka. This information is detailed in Tables 7.11, 7.12 and 7.13 of the report (copied to Appendix 1 to the Retail/Economic Joint Witness Statement ("JWS") dated 31 July 2018):

- Table 7.11 details the zoned land on which industrial activity could go (43.6 ha from Table 11 of the Report);
- Table 7.12 the land on which industrial activity is likely to go (28.1 ha); and
- Table 7.13 the land on which industrial activity could go, less the Airport Mixed Use Zone land ("MUZ"). Excluded is land zoned industrial in the decisions version of the PDP at Coneburn (south of the Kawarau River) which we discuss later.

[75] The analysis in the *BDC* Assessment is largely duplicated by Mr Foy in his evidence, although he then reduces the quantity of land available for industrial activities in ways that have been challenged by Bunnings. In assessing the land on which industrial activity is "likely", in Table 1 of the JWS Appendix, Mr Foy allocated a portion (15.5 ha) of the Wakatipu vacant industrial land supply (43.6 ha) to non-industrial uses

57 M G Tansley evidence-in-chief [5.4-5.5] [Environment Court document 8]; T J Heath evidence-in-chief [4.27] to [4.30] [Environment Court document 7].

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in the future, based on what he calls "highest value land use". This left a total of 28.1 ha for industrial activities. Thus he clearly recognises first that the supply of industrial land and land development capacity are two completely different things, and second that if land can be used for industrial and other (commercial) uses for which buyers are prepared to pay more, then the latter uses are likely to win in the real estate market.

[76] Mr Foy then removed the MUZ (Non-Structure Plan Area) of 10.6 ha in his estimated vacant land provision for industrial activities in Wakatipu to give a figure of 17.5 ha. His justification for this is the advice from a Mr Devlin (employed by the QAC) that he had communicated with the landowner who advised its intentions were not to use its industrial land for that purpose. Mr Devlin regarded that as reinforced by the QAC's Master Plan. We accept Mr Minhinnick's criticism of the use of a landowner's expressed "intentions" at one point in time (especially given the leading question[58] that prompted the QAC's email): intentions can change. Further, the Master Plan has been abandoned[59] as Mr Foy accepted.

[77] After analysing Wakatipu's "remaining" vacant land supply on a site-by-site basis, Mr Foy also discounted a number of other areas for various reasons concluding that there would be an area of 10.2 ha remaining which would be potentially available for development[60]. He said that this excludes the Wakatipu High School site because that "site is likely to be developed for residential uses"[61].

[78] Finally, Mr Foy subtracted the 1.6 ha of the Bunnings' site from the 10.2 ha to leave 8.5 ha which he said would be the area of vacant industrial land in the Wakatipu ward (which includes Arrowtown).

*Coneburn*

[79] As noted, the *BDC Assessment* does not include the Coneburn 27.5 ha industrial zoning recently confirmed by the Council's decisions (subject to appeal) on the Proposed District Plan. Mr Foy noted that even if the Coneburn appeal against the decisions version of the PDP was unsuccessful, the net area of industrial land at Coneburn could

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58 Transcript p 155 lines 20 to 31 and p 156 lines 30 and 31.
59 Exhibit 11.5 – extract from Otago Daily Times 2 October 2018.
60 D R Foy evidence-in-chief [7.59] [Environment Court document 11].
61 D R Foy evidence-in-chief [7.60] [Environment Court document 11].

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be in the order of 20 ha rather than 27.5 ha because some of this land is already occupied[62].

[80] Mr Heath included the Coneburn land in his assessment of the land availability for the Wakatipu Ward as set out in the following table from his evidence[63]:

*Table 2: Queenstown Vacant Industrial Land Availability*[64]

| **Land on which industrial activity can establish (ha)** | | | |
|---|---|---|---|
| | **Wakatipu** | **Wanaka** | **District total** |
| Vacant land | 43.6 | 37.8 | **81.4** |
| Coneburn | 27.5 | | **27.5** |
| **Total vacant (ha)** | **71.1** | **37.8** | **108.9** |

[81] Mr Heath went on to make a subsequent assessment of the land on which industrial activity is likely in both the Wakatipu and Wanaka wards using data from Table 1 of the JWS Appendix and adding Coneburn as follows:

*Table 3: Wakatipu and District Vacant Industrial Land Availability Breakdown*[65]

| **Vacant Industrial Land** | **Land Area (ha)** |
|---|---|
| **Wakatipu Ward** | |
| Current<br>– Structure Plan Area | 17.5 |
| Airport MUZ<br>– Structure Plan Area | 10.6 |
| Industrial A (Operative)<br>– Non Structure Plan Area | 1.2 |
| **Wakatipu Ward Subtotal** | **29.3** |
| Coneburn | 27.5 |
| **Wakatipu Ward Total** | **56.8** |
| | |
| **Wanaka Ward** | **37.8** |
| **District Total** | **94.6** |

62 D R Foy evidence-in-chief [7.28] [Environment Court document 11].

63 T J Heath evidence-in-chief [4.22] Table 2 [Environment Court document 7].

64 Source: *Summary of Business Development Capacity Assessment*, Table 7.7; Retail/Economic Joint Statement, Appendix 1; PDP decisions version rezoning of Coneburn.

65 Heath Source: Retail/Economic Joint Statement 3 August 2018, Appendix 1; PDP decisions version.

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[82] Mr Heath's comment on the areas detailed in Table 3 is[66]:

> This approach speculates the likely land uptake by non-industrial activities in the future to present a potential future land supply scenario, but does not reflect the current day position of available land supply for industrial activity. I consider it fair to assume land will be developed for its highest and best use over time, but some land owners of the 15.4 ha[67] land allocation removed from the industrial land supply may decide to develop industrial activities first (if current day commercial demand does not evoke commercial development) as a way to generate income from the land as a transition to future commercial development in the longer term. This makes the removal of the entire 15.4 ha a conservative approach.

Mr Heath includes[68] in his total the 1.2 ha Industrial A (Operative) Non-Structure Plan Area[69] whereas, as noted above, Mr Foy did not include this 1.2 ha because he assumed this land will be occupied by commercial activity[70].

[83] For the sake of completeness, we record that the witnesses also referred to a Business Mixed Use Zone ("BMUZ") opposite the appellant's site on SH6. Mr Foy considered that this is likely to involve the development of other land uses. Mr Heath did not consider the potential for the BMUZ to be utilised for industrial activity in the future, so any potential for industrial land provision within this zone would be additional to the outcomes of his analysis in his evidence-in-chief. He considered that to dismiss the possibility of using the BMUZ for potential "light industrial" activities that "... can function comfortably within a mixed-use zone seems to carry on the thread throughout [Mr Foy's] evidence to dismiss vacant industrial land opportunities where potential exists"[71]. We were initially inclined to ignore this criticism as carping, but in fact we consider there is some merit in it: if industrial activity is allowed to establish in a mixed-use zone and the sale (supply) price of the land is right it may well be purchased and used for industrial. In other words, the synergistic potential for light-industrial activities to establish in mixed-use zones should not be underestimated.

*Summary of industrial land demand and supply assessments*

[84] Mr Heath's and Mr Foy's assessment of the quantity of land demanded and the

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66 T J Heath evidence-in-chief [4.27] [Environment Court document 7].
67 Mr Heath uses 15.4 ha whereas Mr Foy has used 15.5 ha.
68 T J Heath rebuttal evidence [2.4] [Environment Court document 7A].
69 Refer to Retail Economic Joint Statement 3 August 2018, Appendix 1, Table 3.
70 D R Foy evidence-in-chief Appendix B 5(a)(iii) [Environment Court document 11].
71 T J Heath rebuttal evidence [2.9] [Environment Court document 7A].

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quantity zoned for supply are summarised in the following table:

*Table 4: Quantities of land demanded and zoned for industrial in Wakatipu Ward*

| Demand/Supply (ha) | Heath | Foy |
|---|---|---|
| | | |
| **Demand (Including NPS-UDC Buffers)** | | |
| Medium Term (2016-2026) | 19 | 11.3 |
| Long Term (2016-2046) | 37.6 | 34.0 |
| | | |
| **Supply (Based on Existing Zonings)** | | |
| With Coneburn and With Airport MUZ (Heath Only) | 56.8 | NA |
| With Coneburn and Without Airport MUZ (Heath Only) | 46.2 | NA |
| Without Coneburn and With Airport MUZ (Heath Only) | 29.3 | NA |
| Without Coneburn and Without Airport MUZ | 18.7 | 8.5 |

There appears to be a consistent assumption that zoning land industrial is equivalent to supplying land for industry, although Mr Foy then weakens that as we have described.

## 4. Does the proposal pass a threshold test under section 104D RMA?

4.1 Is the effect more than minor?

[85] We have set out the evidence on the quantities of industrial land zoned for supply above. However the assessment of the area of industrial zoned land differs under each of the relevant statutory instruments. We hold that the section 104D(1)(a) test under the ODP is the effect of the proposal on the capacity of undeveloped but zoned land in which industrial activities can take place under the ODP's zonings. Questions of the feasibility or likelihood of development of (other) industrially zoned land are not mentioned in and therefore do not arise under the ODP. Accordingly Coneburn should be excluded when the effects are being assessed under the ODP.

[86] Under the ODP the quantity of zoned industrial land in the Wakatipu Basin is approximately 29 ha (29.3 ha according to Mr Heath, 28.1 ha is Mr Foy's initial figure). Based on the 29 ha total land zoned for industrial activity in the Wakatipu Basin, removing the 1.6 ha of the site is a 5.5% reduction.

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[87] Another way to look at the effect of the proposal on the supply of land for industry is that it will take up to 1 ½ years' worth of supply as Mr Foy accepted[72]. Assessed in that way we still find the adverse effect is minor. Accordingly we find that a 5.5% reduction in the "supply" of industrial zoned land in the Wakatipu Basin is a less than minor effect.

[88] The Council also suggested that the use of the large (1.6 ha) site will limit the number of large industrial sites available in the Wakatipu catchment and this also would be a more than minor adverse effect[73]. It relied on an answer given by Mr Heath to Commissioner Bunting as[74] the evidential basis for the assertion. We do not consider the evidence leads to that conclusion. The exchange went:

> Q. So even though Bunnings is going to use up one or two hectares, you haven't done any analysis as to how many different, other sorts of industry could fit in that site, and whether they would be disadvantaged by someone taking up a big share of the site, or an area?
>
> A. Well, yes I think I have a level of comfort when I include the Wanaka market, that there'd be a range of sites available knowing the land up there as well, so I don't think the proposition that there's going to be a shortage of large sites will come to play in the market, because the Wanaka industrial landscape forms part of my market, it has a number of large sites, but I can't tell you exactly the proportion.
>
> Q. Sure, and if you just restricted your purview to Queenstown –
>
> A. Oh I think –
>
> Q. Like Wakatipu?
>
> A. Yes, I think there's a general agreement that there is a limited number of large sites, industrial sites, in the Wakatipu market pending on how the airport may or may not break up their land.
>
> Q. Is that a concern, there may not be a large enough availability of the bigger sites?
>
> A. I don't think, it's not a concern from will Queenstown be serviced by those larger industrial businesses, because I think over time I think Cromwell will become more of a player in the triangle, so to speak, the Wanaka / Cromwell / Queenstown triangle, and to service a more central Otago, a location which Queenstown can be serviced from and Wanaka, so I don't think because Queenstown and the Wakatipu Basin itself has a limited number of small sites that's not going to be serviced by larger industrial businesses. And I think the, the other thing to factor in there is also the land price differential with the land prices in Cromwell lower than in Queenstown, which probably may make it more attractive for some of those larger land-hungry businesses to locate in Cromwell over time. It's going to be cheaper but they can still

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72 Transcript p 127 lines 5 to 10.

73 Queenstown Lakes District Council closing submissions [4.37] [Environment Court document 13].

74 Transcript p 46 line 10 to p 47 line 11.

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service both Wanaka and Queenstown.

Q. So this all supports your view that the wider region should be brought into play in this analysis?

A. Yes, I think a wider take than Wakatipu is important when assessing industrial market. It's, Wakatipu is certainly not a closed industrial market, put it that way.

Mr Heath's answers[75] also make the important point – ignored by the Council – that land price differentials in different places are relevant and that the Wakatipu area is "not a closed industrial market"[76].

[89] The Council pointed to the fact that Mr Heath did not identify any specific large sites but we do not consider that Mr Heath had to go so far in relation to section 104D RMA. The Council is confusing the requirements of the NPS-UDC with the threshold test which only arises under the ODP.

[90] We have recorded that in Mr Foy's opinion[77] there are effectively only 10.2 ha of current vacant industrial land in the Wakatipu Basin. In his view the effect of the Bunnings' proposal "... and the resulting constraint on new industrial activities being able to establish on vacant sites in Queenstown, would result in more than minor effects on the efficient economic functioning of Queenstown's economy"[78]. We do not accept the basis of that evidence for the reasons explained earlier: in short we consider Mr Foy has incorrectly calculated the amount of industrial land which may be supplied (at unknown prices). We prefer Mr Heath's calculations over Mr Foy's revised figure for three reasons. First it is supported by Mr Tansley's evidence and expert opinion; second we have doubts – for reasons elaborated on below – about Mr Foy's independence in this case; and third we consider the Council's approach is unfair and unprincipled. It is not appropriate to zone land as industrial but then to say certain areas cannot be counted as industrial because it may be used for other purposes. While "the RMA says nothing specific about the priority of competing claims to use a natural resource" – as the Court of Appeal stated in *Ngāi Tahu Properties Limited v Central Plains Water Trust*[79] – there is a principle that first come is usually first served: *Fleetwing Farms Limited v Marlborough District*

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75 Particularly at transcript p 47 lines 1 to 6.

76 Transcript p 47 line 10.

77 D R Foy evidence-in-chief [7.71] [Environment Court document 11].

78 D R Foy evidence-in-chief [7.76] [Environment Court document 11].

79 *Ngāi Tahu Properties Limited v Central Plains Water Trust* [2008] NZCA 71; (2008) 14 ERLNZ 61; [2008] NZRMA 200 at [34].

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*Council*[80]. That principle would be vitiated if the first comer at any point can be effectively turned down because other applications may be made (on other land), unless a district plan expressly states that to be the case.

[91] We have referred to the conclusions of Mr Foy in his evidence. He said that his position was "unchanged"[81] from what he had written in the *BDC Assessment*. However cross-examination elicited that in his first advice[82] to Ms Stagg (the Council's planner) about the matter he was of a different view and supported the proposal. He wrote there[83]:

> In my opinion, there is only one reason why the application may be declined on retail economics grounds, and that is that the application would make it more difficult for Council to meet its NPS obligations in regard to providing adequate industrial land.
>
> However, for the following reasons I recommend that the application be approved on retail economics grounds, because:
>
> - the extent to which the application worsens any undersupply of industrial land will be limited by virtue of taking up only around half a year's growth of industrial land demand;
> - Council's NPS obligations are unlikely to be met with or without the Bunnings being developed;
> - There would (even with the Bunnings) be in the order of a decade of industrial land available in Queenstown.

Mr Foy did not disclose that assessment in his evidence which is of concern given his statement that his view was unchanged. We emphasise that there is no harm in an expert changing his opinion for good reason. In fact, not changing an opinion, depending on circumstances, can be unprofessionally inflexible in the face of new evidence.

[92] However, in this case when cross-examined by Mr Minhinnick, Mr Foy confirmed[84] that he was asked why the application might be declined. Mr Devlin suggested[85] changes and comments to Mr Foy's original assessment[86]. Those suggestions resulted in Mr Foy reaching a different conclusion – stated in his evidence –

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80 *Fleetwing Farms Limited v Marlborough District Council* (CA) [1997] 3 NZLR 257; [1997] NZRMA 385; (1997) 3 ELRNZ 249.

81 D R Foy evidence-in-chief [1.6] to [1.7] [Environment Court document 11].

82 Exhibit 11.1 (letter to Ms Stagg dated 29 May 2018).

83 Exhibit 11.1 (letter to Ms Stagg dated 29 May 2018 at p 5).

84 Transcript at p 129 lines 1 to 15.

85 By email on 13 July 2017 (exhibit 11.2) and phone discussion.

86 Transcript at p 130 lines 1 to 15, 23 to 30.

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on the effects of the proposal on "industrial land supply". We accept the submission that Mr Foy's conduct throws some doubt on the objectivity and independence of his evidence.

[93] We also accept Mr Minhinnick's submission that the issues with Mr Foy's evidence undermine the weight that can be placed on Ms Stagg's evidence because she confirmed in the answers to counsel that her views were reliant on the evidence of Mr Foy[87], and prepared with the assistance of, and under the supervision of, Mr Devlin[88].

[94] For its part, the Council submits that Mr Heath's expert evidence borders on advocacy[89]. We do not accept that. We consider his evidence should be given significantly more weight than that of Mr Foy in this case.

[95] Even if we are not correct in our findings above (in this section) we find that the Bunnings' proposal only reduces the quantity of industrial land capacity by 16% on Mr Foy's calculations[90] which is still a minor effect in the circumstances.

4.2 Is the proposal contrary to the objectives and policies of the ODP?

[96] The first threshold test having been passed, there is no need to consider the second. However, we record that Bunnings' planning witness Ms Panther Knight acknowledged[91] in her evidence-in-chief that the proposal is contrary to policies 10.3 and 10.4 of the ODP.

## 5. Does the proposal implement the ODP?

5.1 Is the Bunnings' store just a big shop?

[97] One of the first matters to consider is whether the Bunnings' proposal is simply a big shop, i.e. whether it is a retail activity covered by the ODP, or whether it is, at least in part, in a category of its own, not fully covered by the plan. In Mr Heath's opinion[92] the operation is not a retail store in commercial terms but a trade store with a range of building

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87 Transcript at p 177 lines 26 to 30.
88 Transcript at p 181 lines 4 to 16.
89 Queenstown Lakes District Council closing submissions [5.11] [Environment Court document 13].
90 D R Foy evidence-in-chief [7.71] [Environment Court document 11].
91 K Panther Knight evidence-in-chief [7.2] [Environment Court document 9].
92 T J Heath evidence-in-chief [5.9] and [5.10] [Environment Court document 7].

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supply and construction trade products. There is "an intrinsic link" according to Mr Heath between products sold and potential effects, and the consensus that there are no more than minor retail impacts and distribution effects on any existing centre reinforces that Bunnings contains a significant amount of trade supply products.

[98] Mr Heath stated[93] that in his assessments for home improvement and building supply stores around the country over the last decade, in the majority of cases the trade activity contribution to total store sales equated to over 50%. He continued[94]:

> This was particularly the case in high growth areas where higher volumes of construction activity was underway and associated materials required. Given Queenstown District's high construction requirement both now and forecast over the next 20-year period, I consider the proposed Bunnings' store is also likely to have a higher proportion of its total store sales being derived from trade activities.

[99] Mr Foy identified[95] four trade-related aspects of the proposed Bunnings' store:

(a) the proportion of sales made to trade customers;
(b) the large, utilitarian, warehouse nature of the building;
(c) provision for internal vehicular access for vehicles visiting the timber trade sales area; and
(d) the building materials and landscape yard

He also identified a number of other trade-characteristics which he said distinguished somewhat, but not completely, the Bunnings' store from other retail activities[96]. However, he considered[97] Bunnings is more a retail store than a trade store because (in part) he visited a Bunnings' store and observed "a large number of non-trade customers".

[100] Mr Heath observed that Mr Foy appears to be able to customer profile and determine a 'trade customer' from the 'general public customer' simply by looking at them[98]. We agree that is a casual and unscientific method of operating. Further we received uncontradicted evidence that many (trade) customers order online or over the

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93 T J Heath rebuttal evidence [6.5] [Environment Court document 7A].
94 T J Heath rebuttal evidence [6.5] [Environment Court document 7A].
95 D R Foy evidence-in-chief [5.5] (a)-(d) [Environment Court document 11].
96 D R Foy evidence-in-chief [5.6] [Environment Court document 11].
97 D R Foy evidence-in-chief [5.2] [Environment Court document 11].
98 T J Heath rebuttal evidence [6.3] [Environment Court document 7A].

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phone, place the transaction on a trade account and either[99]:

(a) drive through the store to pick up ordered materials (not requiring them to enter the store); or
(b) have their purchases delivered by Bunnings.

In fairness to Mr Foy, we should record that some of Mr Heath's evidence on these issues was rather anecdotal also.

[101] In Mr Heath's view there are features as to why home improvement and building supply stores should not be "treated like" a retail store[100]:

(a) the first is the proposed Bunnings' stores will have operational and functional requirements similar to trade/industrial activity (i.e. significantly higher level of truck movements compared to a "standard" retail store; and
(b) the second is that the proposed Bunnings store will support other industrial services and business just as Mitre 10 MEGA, PlaceMakers, ITM, etc. currently do in Frankton Flats.

Bunnings claims that as a "trade supplier" it serves not only a retail function but also an industrial purpose[101].

[102] We consider it is relevant that the Frankton Flats area is not a "pure" industrial area. There are already a range of non-industrial activities within the zone, including the Mitre 10 MEGA, Pak'nSave and a number of more recent resource consent applications, many authorised as "service activities" which are permitted in Activity Area E1, with some including a retail component. The Council submits this exacerbates the 'precedent effect'[102] and we consider that next.

5.2 Would granting consent undermine the integrity of the ODP?

[103] This issue was largely argued by the Council as one of 'precedent effect' but we consider the real issue is one of plan integrity. We respectfully adopt what the

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99 T J Heath rebuttal evidence [6.4] [Environment Court document 7A].
100 T J Heath rebuttal evidence [6.6] [Environment Court document 7A].
101 B L Moody evidence-in-chief [4.2] [Environment Court document 6].
102 Queenstown Lakes District Council closing submission [6.5] [Environment Court document 13].

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Environment Court stated in *Blueskin Bay Forest Heights Limited v Dunedin City Council*[103]:

> [44] The issue of what was argued as plan integrity, sometimes rather unhelpfully described as precedent effect, can also be considered under this head.[104]
>
> [45] We have said before (see, for instance *Beacham v Hastings District Council*[105]) and must say again, that the plan integrity argument does tend to be somewhat overused, and needs to be treated with some reserve. The short and inescapable point is that each proposal has to be considered on its own merits. If a proposal can pass one or other of the section 104D thresholds, then its proponent should be able to have it considered against the section 104 range of factors. If it does not match up, it will not be granted. If it does, then the legislation specifically provides for it as an exception to what the District Plan generally provides for.
>
> [46] Cases such as *Dye v Auckland Regional Council*[106] make it clear that while there is no precedent in the strict sense in this area of the law, there is an expectation that like cases will be treated alike and that the Council will consistently administer the provisions of the Plan. And cases such as *Rodney District Council v Gould*[107] also make it clear that it is not necessary for a proposal being considered for a *non-complying activity* to be truly *unique* before Plan integrity ceases to be a potentially important factor. Nevertheless, as that Judgment goes on to say, a decision maker in such an application would look to see whether there might be factors which take the particular proposal outside the generality of cases.

[104] The Environment Court concluded[108]:

> [48] Only in clear cases, involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperiled to the point of dictating that the instant application should be declined. In such a case it is unlikely in the extreme that the resource consent would be granted in any event.

[105] In Mr Heath's opinion[109] granting consent does not represent "a precedent for the

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103 *Blueskin Bay Forest Heights Limited v Dunedin City Council* [2010] NZEnvC 177 at [44] to [46].
104 Section 104(1)(c) other relevant matters.
105 *Beacham v Hastings District Council* (EnvC) W75/2009.
106 *Dye v Auckland Regional Council* [2011] NZRMA 513.
107 *Rodney District Council v Gould* [2006] NZRMA 217.
108 *Blueskin* above n 103 at [48].
109 T J Heath rebuttal evidence [7.3] [Environment Court document 7A].

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potential of already occupied industrial land to seek consents for retail activities". The contention by Mr Foy is that it does[110]. We prefer Mr Heath's opinion on the grounds that a substantive part of the proposed Bunnings' operation is not retail.

[106] Further, the proposal has unique features. By reference to scale product range there is no similar operator in New Zealand at present[111]. The difference between a Bunnings Warehouse and a traditional retail store was summarised by Mr Minhinnick as follows[112]:

(a) Bunnings carries approximately 36,000 different product lines for the home improvement, DIY, and trade markets[113]. The range and type of these means that unlike most other retail chains, Bunnings' stores do not operate centralised warehouses to replenish trading stock[114]. Each store effectively combines retail with industrial warehousing of its own stock awaiting sale, with manufacturers and suppliers delivering their goods directly to the store[115];

(b) a large proportion of the goods sold are of a bulky nature (for example timber and other construction materials) meaning customers require sufficient and accessible parking to carry trade goods away in a motor vehicle[116]. For delivery of goods straight from the manufacturer, there must also be sufficient room for trucks to manoeuvre[117];

(c) the store layout of Bunnings combines not only the warehouse area where the "retail" goods are stocked, but also the timber trade sales area, and the outdoor nursery[118]. Of these, the warehouse and bulk goods collectively represent over half of the store footprint of the proposal[119]. In this regard, Bunnings is unique in that the majority of its floor plan represents industrial-type activities;

(d) Bunnings requires large sites where there is space for warehousing and car parking – needs that are unique to the trade suppliers. As Bunnings is the last retailer of this kind to enter the Queenstown market, this further makes the proposal unique. PlaceMakers, Mitre 10, Carters and ITM all have stores within the vicinity[120]. No other type of retailer can legitimately claim, by reference to scale and product range,

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110 T J Heath rebuttal evidence [7.3] [Environment Court document 7A].
111 M G Tansley rebuttal evidence [4.1(b)] [Environment Court document 8A].
112 Bunnings' opening submissions [5.16] [Environment Court document 2] (order of presentation altered).
113 B L Moody evidence-in-chief [4.4] [Environment Court document 6].
114 B L Moody evidence-in-chief [4.13] [Environment Court document 6].
115 B L Moody evidence-in-chief [4.4] [Environment Court document 6].
116 B L Moody evidence-in-chief [4.12] [Environment Court document 6].
117 B L Moody evidence-in-chief [4.16] [Environment Court document 6].
118 B L Moody evidence-in-chief [4.4] [Environment Court document 6].
119 M G Tansley evidence-in-chief [7.2] to [7.10] [Environment Court document 8].
120 K Panther Knight rebuttal evidence [4.2] [Environment Court document 9A].

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a similarity to Bunnings Warehouse[121].

We accept those submissions. Both by floor plan and by sales we find that the proposal is more industrial/trade supply than retail.

[107] In Ms Panther Knight's opinion future applications elsewhere in the Industrial zone can be distinguished because they would be on sites without frontage to SH6. Other sites in the zone would be less attractive to retail operators or trade suppliers[122]. In answer to Mr Wilson she appeared to backtrack[123], but neither the question nor the answer referred to policy (4.9.3) 6.2 which itself distinguishes between this site and other (industrial) sites. We therefore consider Ms Panther Knight made a valid (if minor) distinguishing point.

[108] We received evidence from Ms Panther Knight[124] that the ODP has already been undermined to some extent by the Council granting resource consents contrary to the objectives and policies of the Frankton Flats zones. Indeed Ms Stagg conceded[125] that one consent simply should not, in her view, have been issued by the Council. We consider there has been some weakening of the objectives and policies, but ultimately this is a minor issue compared with the inconsistency in approach between the ODP (and PDP as we shall see) and the more flexible, competition – and choice – supporting approach to the supply of industrial land capacity mandated by the NPS-UDC. Further, the presence of the Mitre 10 MEGA and Pak'nSave both suggest PC19 lacked a measure of coherence from the outset since they were not considered by the Environment Court in the PC19 decisions.

## 5.3 Conclusions with respect to the ODP

[109] We find that the proposal is not contrary to the strategic objectives and policies in Chapter 4 of the ODP. We note that a trade supplier and ancillary retail activity better meets policy (4.9.3) 6.2 than an industrial zoning of the site. The proposal achieves most of the ODP's objectives and policies relating to the Frankton Flats. However we accept

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121 M G Tansley rebuttal evidence [4.1(b)] [Environment Court document 8A].
122 K Panther Knight Transcript 107 lines 1 to 16.
123 K Panther Knight Transcript 107 lines 17 to 21.
124 K Panther Knight evidence-in-chief [9.4(d)] [Environment Court document 9].
125 Transcript p 188 lines 5 to 9 (consent for the Armstrong Motor Group).

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that "it is contrary to policies 10.3(a) and 10.4 and is inconsistent with objective 10 and policy 10.1 of the [FFB zone]"[126].

[110] Mr Wilson submitted that the correct approach to the ODP generally is to give greater weight to the latter provisions as being the "most specific as to geographic location than those that apply district-wide"[127]. He identified the most specific provisions as being those applicable to Activity Area E1. We hold that he is incorrect about that. Policy (4.9.3) 6.2 whilst it is located in the "District-Wide" provisions of the ODP is actually as focused on a small geographic location – the land adjacent to SH6 – as policies 10.1 and 10.4. Policy (4.9.3) 6.2 seeks zoning which is not industrial adjacent to SH6 and that was ignored by PC19.

[111] PC19, and the decisions which put it in place works on a *dirigiste* approach, that the demand for industrial land can be met by simply zoning land for that purpose and excluding retail because that "... will likely push out [industry] activities through higher land values"[128]. This equivalence of zoning with supply tends not to work, i.e. it is not effective because landowners may bank their land or apply for resource consent[129] for other activities as Bunnings has done here (and the owners of the land in Pak'nSave and Mitre 10 have already done). Nor is there any substantive discussion in the *Queenstown Airport Corporation* decision on PC19 as to how its zoning of industrial land is the most efficient use of the land resource of the Wakatipu Basin.

[112] PC19 was approved before the NPS-UDC came into force so it is out-of-date in that respect, particularly because the approach of the NPS-UDC is to work with land price differentials for different activities, not to make activities non-complying so as to defeat the operation of the real estate market. Since the NPS-UDC postdates PC19 it is necessary to consider it anyway.

[113] Accordingly we consider it is appropriate to put greater weight on the NPS-UDC and, if necessary, on part 2 of the RMA (especially section 7(b)). The NPS-UDC demands greater weight because it is a later document, is higher in the statutory hierarchy, and has better regard to section 7(b) RMA.

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126 K Panther Knight evidence-in-chief [7.2] [Environment Court document 9].

127 Queenstown Lakes District Council closing submissions [5.2(a)] [Environment Court document 13].

128 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* above n 28 at [507].

129 Which is the reason the Environment Court gave for the "failure" of Chapter 11 (Industrial). It did not explain why PC19 would be more effective or efficient (beyond aspects of technical efficiency such as infrastructure layout).

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## 6. Does the proposal give effect to the NPS on Urban Development Capacity?

### 6.1 Calculating demand: population and the industrial sector growth

[114] The population and household projections for the District were agreed by the retail economic witnesses[130], as inputs into the determination of future industrial land demand.

[115] As we understand the *BDC Assessment* it projected future demand for business land in the following way – with each figure derived from the previous one multiplied by a conversion factor (which is often less than one):

(a) it ascertained the projected population increase within the District - (P)
and from that
(b) estimated the predicted increase in workers as a fraction of (P) - (W)
(c) estimated the predicted increase in workers per business type ($W_1$, $W_2$) etc
and then
(d) multiplied the average area required for each worker ($A_1$)
in each business type by the number of predicted workers ($A_1$ X $W_1$)

— to ascertain the total demand for commercial space. Similar exercises were carried out to assess the demand for industrial land as part of that overall exercise.

[116] A similar detailed (but with respect, simplistic) analysis was undertaken for PC19 as the length of the (First) Interim Decision[131] attests. Neither in PC19 nor in the evidence before us was the reason for simply projecting the existing quantity of demand into the future on the same demand curve explained. That is important because that type of analysis both assumes that the future is going to be like the past (i.e. the demand curve will be the same for each business type) and makes no allowance for the competition for land between business types or between business and residential demand. That is, it does not reflect possible movements in the demand curves (as opposed to movements along it as a response to changes in the quantity of land demanded) for different uses (e.g. industrial, commercial and residential).


130 The Retail Economic Joint Statement, Issue 4, [6.1].
131 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* above n 28.

[117] It is basic economics that changes in population may also change demand for land (as distinguished from the quantity of land demanded at a price). The future of this district is unlikely to be like the past. It is obvious that flat(ish) land of the sort desired for housing and business activities is in short supply in the District, especially when constraints in Part 2 of the RMA (e.g. section 6(b)) are recognised and provided for. That is largely a matter for the plan review and the proposed district plan. However, if it was not considered in PC19 (as appears not) then the weight to be given to the ODP should be reduced and more emphasis given to an assessment under the NPS-UDC (which post-dates the ODP).

[118] The demand for business land will also be affected by other factors such as incomes and the demand for land for competing uses (notably commercial and housing). In fact, we were also given projections for the increase in dwellings in the District. The dwelling projections represent the total residential dwelling requirement for the District. They incorporate holiday home demand but not (as we understand it) demand for visitor accommodation such as motels and hotel rooms. The projections do not take into account the significant additional level of tourism inflow and visitor accommodation requirements projected to occur within the District. Those figures were excluded by Mr Heath[132] in order to highlight the underlying growth patterns of the District because industrial land demand will be primarily driven by population growth distribution. However, Mr Heath added that given the high proportion of visitors to the District, and its direct implications for construction sector demand, visitor growth has also been accounted for in the industrial land forecasts. We find these two approaches to be contradictory but are not concerned to resolve that issue because the fundamental proposition that "underlying growth patterns" can be adequately explained by "population growth" without unpacking the relationships between future trends in usually resident population (including retirees), visitor numbers, non-resident workforce numbers, holiday home demand, etcetera, seem totally inadequate. That is particularly so when the three experts each start from different geographical definitions of the relevant market.

[119] Mr Heath adopted a projected average annual industrial land demand over the long term for the District of around 1.6 ha per year and 1.25 ha per annum on average for the Wakatipu Ward.[133] His assessment is set out in the following Table 1:

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132 T J Heath evidence-in-chief [4.10] [Environment Court document 7].

133 T J Heath evidence-in-chief [4.32] [Environment Court document 7].

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*Table 1: Queenstown Industrial Land Demand 2016-2046*[134]

| Cumulative industrial land | | | |
|---|---|---|---|
| **Demand (ha)** | **Wakatipu** | **Wanaka** | **District total** |
| Short term (2016-2019) | 7.6 | 1.7 | **9.3** |
| Medium term (2016-2026) | 19 | 4.6 | **23.6** |
| Long term (2016-2046) | 37.6 | 9.7 | **47.3** |

[120] These figures include the "buffer margin" required under policy PC1 of the NPS-UDC with short and medium-term buffers of 20%, and a long-term buffer of 15% (for the remainder of the 30-year period). Mr Heath observed that[135]:

> If the buffers were not included, the projected industrial land demand would be lowered accordingly for each assessed NPS-UDC period for industrial activities in the Wakatipu and Wanaka Wards. For example, the long-term industrial land demand projections would reduce to 32 ha and 8.3 ha respectively (or 40.3 ha district total) lower than the figures shown in Table 1

[121] Mr Foy adopted[136] the *BDC Assessment* which calculated the (NPS-UDC) cumulative long-term land demand in the Wakatipu/Arrowtown ward as increasing by 34.0 ha between 2016 and 2046 based on an average rate of 1.13 ha per year.

## 6.2 Assessment of the evidence on industrial land capacity under the NPS-UDC

[122] As background to an assessment of the industrial land capacity in the District we consider that there are difficulties with a narrow application of the NPS-UDC to this district: a one-size-fits-all approach is particularly inappropriate for the Queenstown Lakes District. The principal difficulty is to make an assumption that there is an adequate supply of land (at market prices) to enable all types of demand for both residential and business land at "market prices" to be met. It is unlikely that is true for the District as a whole and it is almost certainly not true for the Wakatipu Basin in general and the Frankton Flats in particular.


134 T J Heath evidence-in-chief Table 1 [Environment Court document 7].
135 T J Heath evidence-in-chief [4.14] [Environment Court document 7].
136 D R Foy evidence-in-chief [7.60] [Environment Court document 11].

[123] There are two preliminary questions to answer: first what is the relevant time frame for the assessment and, second, what is the relevant catchment?

*Time frame for assessing industrial land supply*

[124] In Mr Heath's opinion[137] a planning horizon to 2028 (9 years) is sufficient to test the merits of a current day application, while the long-term 30-year projection reflects the NPS-UDC timeframe. The NPS-UDC itself defines short term as being within the next 3 years, medium term between 3 and 10 years and long term between 10 and 30 years. "Medium term" thus corresponds roughly to the projected life of a district plan.

[125] When considering an application for resource consent the standard period for assessing "sufficiency" of the quantity of land zoned for industrial (or any other) purposes is the life of the district plan, i.e. 10 years. However, Mr Foy considered that the NPS-UDC 30-year time frame is relevant with respect to consideration of industrial land supply, to place short-term industrial land demand and supply in context, and to provide a long-term picture of any land supply issues. Both Mr Heath and Mr Tansley also accepted this 30-year time frame noting that the NPS-UDC requires the Council to undertake monitoring every 3 years to confirm the adequacy of future supply requirements[138].

*Catchment*

[126] Bunnings' position – given in Mr Heath's evidence – is that the relevant catchment for assessment is the District as a whole which includes both Wakatipu and Wanaka[139]. Mr Tansley agreed and added that Cromwell is also relevant[140].

[127] In his evidence-in-chief Mr Foy had this to say about Wanaka and Cromwell.

(Wanaka)[141]:

> ... [it is] not appropriate that Queenstown rely on the supply of industrial land in any other

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137 T J Heath evidence-in-chief [4.6] [Environment Court document 7].

138 Retail/Economic JWS [8].

139 Bunnings' closing submission [3.7] to [3.11] [Environment Court document 14].

140 M G Tansley rebuttal evidence [2.1(a) and (b)] [Environment Court document 8A] and underpins Mr Tansley's evidence-in-chief [4-6] and exhibited in Map One.

141 D R Foy evidence-in-chief [7.16] [Environment Court document 11].

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> place to support local demand. As discussed ... some level of imports from other markets is inevitable, and efficient, given the specialised nature of many industrial goods and services. However, a large part of industrial activity is more efficiently supplied locally, with the additional benefit of providing local employment.

(Cromwell)[142]:

> The importance of adequate local supply is recognised in the NPS-UDC. This adequacy applies both at an aggregate level (i.e. across the whole District), and also with respect to "different types, sizes and locations of development"[143]. There is nothing in the NPS-UDC that indicates that a Council can rely on supply in another jurisdiction to meet its obligations.
>
> It would not be an efficient or sustainable outcome, in my opinion, for the demand arising from within the Wakatipu and Arrowtown wards to rely on supply of industrial land in Cromwell, as Mr Tansley suggests might occur. QLDC would have no control over that provision of land outside its boundaries, and therefore no ability to ensure that Cromwell industrial land adequately provided for the quantum of industrial land demand arising in Wakatipu ...

[128] He considered that the "starting point" for the assessment of industrial land supply should be restricted to the Wakatipu ward boundaries within the District. Within that ward 43.6 ha is zoned for industrial. He excluded Wanaka on the grounds that "large trucks are unable to use the Crown Range Road", and that the distance between Wanaka and Queenstown makes servicing both locations unfeasible[144]. There is an air of unreality about Mr Foy's evidence especially when it is considered that Bunnings currently services Queenstown customers from Dunedin[145]. In industrial distribution terms, the distance from Frankton Flats to Wanaka is minor. It is less than the distance from one end of Auckland to the other[146]. Further we read evidence that Bunnings uses a range of vehicle sizes to supply its customers. It is not reliant solely on the use of large vehicles.

[129] Even on more general principles, Mr Foy is not realistic. As Mr Tansley said[147] there is no relationship between market efficiency and ward boundaries, hence industrial land outside of the Wakatipu ward is relevant to this assessment. Mr Heath added that

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142 D R Foy evidence-in-chief [7.17] [Environment Court document 11].
143 D R Foy citing the NPS-UDC preamble, p 4.
144 D R Foy evidence-in-chief [7.10] and [7.11] [Environment Court document 11].
145 T J Heath rebuttal evidence [4.6] [Environment Court document 7A].
146 T J Heath rebuttal evidence [4.3] [Environment Court document 7A].
147 M G Tansley rebuttal evidence [2.3(d)] [Environment Court document 8A].

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for the Queenstown District the urban environments of Wanaka, Wakatipu and of Cromwell, all form part of the wider urban environment under the NPS-UDC. All have different land values[148]. We prefer Mr Tansley's and Mr Heath's view.

*The competing assessments*

[130] Mr Heath's assessment of vacant industrial land supply was that an appropriate and conservative benchmark would be to consider the application in terms of the current vacant industrial land supply in Wakatipu which is 56.8 ha (including 27.5 ha at Coneburn). His worst-case scenario would be to assess the application against 46.2 ha of vacant industrial land supply (the difference being the complete removal of the Airport Mixed Use Zone land of 10.6 ha). If Coneburn was also excluded, this would reduce the Wakatipu supply to 29.3 ha (including the airport land) and 18.7 ha (excluding the airport land). Mr Heath said that, based on the availability of 29.3 ha of vacant industrial land (excluding Coneburn), and an average long-term industrial land demand of 1.25 ha, there would be 23 years of available land (or 45 years including Coneburn). If the Airport MUZ land is excluded, there would be sufficient vacant industrial land for 15 years which Mr Heath considers to be more than enough to meet Wakatipu's needs over the medium term of the NPS-UDC (or 36 years if Coneburn is included)[149].

[131] Mr Heath considered that the 1.62 ha required for the Bunnings' application should be assessed in the context of the Wakatipu land demand of 19 ha and 37.6 ha over the medium and long term respectively. In his opinion, the allocation of 1.62 ha would have less than minor adverse effects in an economic context.

[132] Mr Foy said that his assessed 8.5 ha of available vacant industrial land would be used up in about 7.5 years[150]. Mr Heath said[151] that Mr Foy:

(a) dismisses all the potential provision for industrial land in Coneburn and the SH6 BMUZ as identified in the PDP (decisions version);
(b) removes all land for 30 years of commercial demand from vacant industrial land supply at the front end;
(c) removes the QAC vacant zoned industrial land entirely;

148 Transcript at p 49.
149 T J Heath evidence-in-chief [6.2] and [6.3] [Environment Court document 7].
150 D R Foy evidence-in-chief [7.62] [Environment Court document 11].
151 T J Heath rebuttal evidence [2.11] [Environment Court document 7A].

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(d) removes all Wanaka vacant industrial zoned land from his consideration.

— all at the same time as assuming no new industrial land will be rezoned over the next 30 years.

[133] Consequently Mr Heath considered Mr Foy's discounting to reach an available land supply of 8.5 ha to have been based on speculative assumptions[152]. For example, he noted that Mr Foy placed strong emphasis on generic terminology such as "given the likely future occupation for retail activities"[153] and "land that is unlikely to be available for industrial development by virtue of its ownership"[154] (emphasis added). Mr Foy also excluded the Wakatipu High School site because he said that the "site is likely to be redeveloped for residential uses"[155].

[134] Mr Heath added that[156]:

> Removing vacant land capacity available for industrial activity based on assumed future retail/commercial development is problematic in my view as in effect it potentially results in preventing a development today for an activity that may (or may not) occur sometime into the future. This is despite the Council having ample opportunity under the NPS-UDC to rectify any capacity issues in any intervening period.
>
> The Alternative Capacity Scenario also assumes that very little industrial land (3.1 ha over 30 years) would be developed on the 10.6 ha Airport Mixed Use Zone. I find this proposition unlikely given the push by many airports around the country in recent years diversifying their income streams into non-aviation related industrial and commercial activities. However, even without the Airport Industrial land, there would still be around 18.7 ha[3] of vacant industrial land available in Wakatipu[157].

[135] He added[158] that Mr Foy's approach had "ingrained layers of speculation and selective conservatism" and that his position was implausible and unlikely to play out in reality. For example, one of Mr Foy's assumptions appeared to be that the Council was not going to zone any more industrial land within the Wakatipu Ward for the next 30 years.

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152 T J Heath rebuttal evidence [2.7] [Environment Court document 7A].
153 D R Foy evidence-in-chief [7.47] [Environment Court document 11].
154 D R Foy evidence-in-chief [7.53] [Environment Court document 11].
155 D R Foy evidence-in-chief [7.41] [Environment Court document 11].
156 T J Heath evidence-in-chief [4.28] and [4.29] [Environment Court document 7].
157 It is not clear from Appendix 1 of the JWS as to the source of Mr Heath's 3.1 ha.
158 T J Heath rebuttal evidence [2.12] [Environment Court document 7A].

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Mr Heath said that this is difficult to reconcile with the Council's NPS-UDC obligations[159] and that this assumption could also be incorrect since the Council has already rezoned 27.5 ha of additional industrial land at Coneburn identified in the PDP (decisions version).

[136] Mr Heath's assessment of the available vacant industrial land for the overall District is 67.1 ha (excluding Coneburn) and 94.6 ha (including Coneburn)[160] compared with a whole of District medium term industrial land demand of 23.6 ha and a long-term demand of 47.3 ha.

*Inclusion of the PDP zoned land at Coneburn*

[137] From that discussion, it can be seen that an important issue is whether the recently confirmed industrial zoned land at Coneburn should be considered (along with other newly zoned land on which industrial activities can locate). Coneburn by itself is projected to add some 20-25 (and potentially up to 27.5) ha of industrial land within the Wakatipu ward[161]. Mr Heath and Mr Tansley considered that Coneburn forms part of the supply of land[162]:

(a) Mr Heath, while acknowledging that Coneburn is subject to appeal, considers it should be recognised due to its inclusion in the PDP[163];
(b) Mr Tansley also considers it appropriate, if not necessary, to include Coneburn and that the ME Report's Wakatipu capacity estimates should be updated to reflect this[164].

[138] Mr Foy gives the Coneburn zoning "limited weight when assessing the adequacy of industrial land supply in Wakatipu"[165]. His justification is first, the Coneburn zoning is under appeal. Further, even if the appeal is unsuccessful the Coneburn site is not

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159 Refer to D R Foy evidence-in-chief [2.3] [Environment Court document 11] where he determines sufficient vacant industrial land supply until 2026 (in consideration of Wakatipu and Arrowtown areas only).
160 See Table 3 of this decision.
161 M G Tansley evidence-in-chief [5.15] [Environment Court document 8] – the varying figures depend on the extent to which existing activities on that land reduce the amount of additional industrial zoning it offers.
162 T J Heath evidence-in-chief [4.31] to [4.35] [Environment Court document 7]; M G Tansley evidence-in-chief 5.14 [Environment Court document 8].
163 T J Heath rebuttal evidence [3.5] [Environment Court document 7A].
164 M G Tansley evidence-in-chief [5.14] [Environment Court document 8].
165 D R Foy evidence-in-chief [7.24] [Environment Court document 11].

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currently serviced so it may take some time before industrial development can be accommodated[166].

[139] We accept that Coneburn is not referred to in the Council's Long-Term Plan but that is because of the speed with which Coneburn was zoned through the PDP process. While that may be relevant to the Council's obligations under the NPS-UDC, it is not relevant to the consideration of the effect of the proposal on industrial land supply. Ms Stagg acknowledged that the Council's ability to comply with the NPS-UDC is not an effect on the environment[167].

*Conclusions on "supply" of vacant Industrial land*

[140] Mr Foy assessed[168] that, excluding the Bunnings' site, there would be 8.5 ha of available vacant industrial land in the Wakatipu Ward and that this would be used up in about 7.5 years. We find that is hypothetical in that it removes all likely future demand for non-industrial activities for the next 30 years at the front end. In effect Mr Foy assessed the consent application in today's environment in the context of subsequent removal of vacant industrial land by other (potential) activities over the next 20 or 30 years. We are troubled by that because it appears that Mr Foy discounted any new industrial land being rezoned over the next 30 years. That approach is clearly inconsistent with the NPS-UDC.

[141] Mr Foy also dismissed the potential for the provision of industrial land at Coneburn and the SH6 BMUZ and removed all of QAC's vacant zoned industrial land. For reasons given earlier we find that he considered too narrow a catchment when he excluded all the Wanaka vacant industrial zoned land.

[142] Mr Heath's worst case scenario for the Wakatipu Ward was that even if the Coneburn land and the Airport MUZ land were excluded, there would still be sufficient vacant industrial land for 15 years which should be more than enough time to meet Wakatipu's needs over the medium-term period defined in the NPS-UDC.

[143] On a district-wide basis, Mr Heath's assessment of the available vacant industrial

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166 D R Foy evidence-in-chief [7.22] and [7.23] [Environment Court document 11].
167 E C Stagg evidence-in-chief [10.16] [Environment Court document 12].
168 D R Foy evidence-in-chief [7.62] [Environment Court document 11].

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land, excluding Coneburn, is 67.1 ha compared with a whole of District medium term industrial land demand of 23.6 ha and a long-term demand of 47.3 ha. We prefer Mr Heath's evidence. We consider he has adopted a suitably cautious approach in assessing the supply of vacant industrial land for both the Wakatipu Ward and the District with this being backed up by the requirement under the NPS-UDC for the Council to undertake monitoring every 3 years to confirm the adequacy of future supply capacity.

6.3 Conclusions under the NPS-UDC

[144] Ms Stagg, the Council's planner, identified policies PA1, PA3, PA4 and PC1 of the NPS-UDC as relevant to the application[169].

[145] In relation to policy PA1, which requires Council to ensure business land development capacity to service medium term requirements, she observed that Coneburn is not serviced and the funding for the servicing of the zone is not identified in the Council's Long-Term Plan. Therefore in her view it is not feasible. She also wrote[170]:

> ... policy PA3 directs Council to provide for the social, cultural and economic wellbeing of people and communities while having particular regard to providing choices, promoting the efficient use of urban land and limiting the adverse impacts on the competitive operation of land and development markets. Policy PA4 states that when considering the effects of urban development, decision-makers shall take into account the benefits of development in respect to people's ability to provide for their wellbeing and the benefits and costs at a regional scale.
>
> The NPS-UDC requires local authorities to identify the required capacity for land required for urban development and, subsequently, policy PC1 requires Council to factor in an additional 20% of land for particular uses to be zoned in the short and medium terms. If the development capacity is in short supply, policy PC3 requires local authorities to respond by providing further development capacity and enabling development. Policy PC4 directs local authorities to consider all practicable options to provide sufficient development capacity.
>
> ...
>
> Mr Foy has identified[171] that the Wakatipu Ward will exhaust its supply of land zoned for industrial purposes by 2026 ... As such, with current zoning the Wakatipu Ward will likely not have enough industrial land zoned to meet its medium-term obligations and possibly not meet its short-term obligations.

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169 E C Stagg evidence-in-chief [13.42] and [13.43] [Environment Court document 12].
170 E C Stagg evidence-in-chief [13.42] to [13.44] [Environment Court document 12].
171 Referring to D R Foy evidence-in-chief [2.3] [Environment Court document 11].

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[146] The planners had little to say about this issue in their JWS[172]:

> ... we agree that Council already needs to look at ways to achieve its obligations as a high-growth area under the National Policy Statement on Urban Development Capacity ("NPS") in respect of zoning an appropriate supply of industrial land. We agree that Coneburn will help achieve this.
>
> If Coneburn is excluded from an assessment, we agree that more industrial zoned land is required to meet the NPS obligation in the medium or medium-long term.
>
> We agreed that there is a need to assess the extent to which the proposal exacerbates or affects the ability of the Council to meet its obligations under the NPS ...
>
> Relying on the evidence of our different economic experts, we disagree in relation to the extent to which the proposal adversely affects Council's ability to meet its obligations under the NPS.

[147] Objective OA2 of the NPS-UDC places high expectations on the QLDC when it seeks that the District's urban environments have "sufficient opportunities for the development of housing and building land to meet demand". Recall that "demand" is simply a list of quantities of houses or areas of land at different prices and that it is affected by all sorts of variables. If 750 m² sections were for sale in the Wakatipu or Upper Clutha Basins for $100,000 there would be quite a large quantity demanded (cheap sections in 2017 ranged from $200,000 to $340,000 in the Wakatipu Basin). It is unlikely that the District can both supply affordable housing and retain its landscape and ecological values even into the medium term, let alone supply all the business land needed to support residential and tourist accommodation.

[148] Those difficulties aside, the NPS-UDC directs a radical change to the way in which local authorities have approached the issue of development capacity for industry in the past. That has traditionally come close to the "Soviet" model of setting aside X ha for the production of pig iron. The ODP[173], PDP[174] and even the PORPS[175] all come close to that when they direct that non-industrial activities are to be avoided on land zoned industrial.

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172 Planners' JWS [5.9] to [5.12].
173 ODP policy (12) 10.4.
174 PDP policy 3.3.8.
175 PORPS policy 5.3.4.

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[149] In contrast the NPS-UDC's substantive policy PA3(b) requires us to have particular regard to providing choices for consumers. The proposal by Bunnings will do that. This provision of choices can work in unforeseen ways too: we heard no evidence about this but it occurs to us that if a major earthquake occurs in this region and Queenstown is cut off from road access, then having the Bunnings' inventory as described by its witnesses might be very useful to the community in the short term. Obviously we can place no weight on this last point.

[150] Importantly NPS-UDC policy PA3(b) requires us to promote the efficient use of urban land. The evidence is clear that other commercial uses of land in Frankton Flats give higher returns from industrial. Indeed that is one of, if not the, major reason given in the PC19 decision[176] for confirming land uses in Activity Area E1 of the FFB zone to industrial. We find that on the facts the proposal is a more efficient use of the site than waiting for an industrial activity to occur.

[151] The final 'outcomes' policy, PA3(c), requires us to have regard to limiting – as much as possible – the adverse impacts of, in this case the Industrial zoning, on the competitive operation of land markets. The proposed activity is not prohibited, and so the undoubted adverse effect on competition in the land market should be limited by granting consent to this unusual application.

[152] The NPS-UDC then contemplates under the responsive policies PC1 et ff that the Council will react to the removal of this small amount of land for its development capacity to provide more industrial land capacity elsewhere. This is a flexible responsive policy not a directive one and its application will minimise the (less than minor) adverse effects of the proposal on industrial land capacity in the District.

[153] We have summarised the evidence on the demand for and 'supply' of zoned industrial land because of the emphasis placed on that by the parties. However, we have to say that those matters appear to us to be more appropriate for the hearings on the review of the PDP, rather than an application for resource consent.

[154] On our reading of the NPS-UDC, the most relevant policy is PA3 as we have explained it. The Council's case applied a different policy. Its approach was to use PA1 as a barrier to the proposal. It was saying, in effect, that the proposal should not be


176 *Queenstown Airport Corporation Limited v Queenstown Lakes District Council* above n 28 at [507].

allowed because the Council could then not ensure that there was sufficient business land (specifically industrial land) development capacity. There are a number of problems with that approach. First, it may not be correct on the evidence as we discuss above; second, even reading policy PA1 by itself suggests it is for the Council to react to the use of land for other than zoned purposes by rezoning other land to ensure that there is sufficient development capacity over the three periods identified in the policy; not to use the policy to hinder a proposal.

[155] There are further, major, problems with the Council's approach to PA1 which become obvious when the NPS-UDC is read as a whole. The spirit and intent of the substantive objectives is to open development doors (subject to the express limits and implicit bottom lines discussed in part 2.2 of these Reasons), not to close them. Further, policy PA1 must be read with policy PA3 which expressly requires the local authority (as consent authority) and on appeal, this court, to have particular regard to providing for choices, promoting efficient use of urban land and limiting adverse impacts on the competitive operation of land matters "as far as possible". This last matter is a strong test and it is difficult to see how policy 10.4 of the ODP can survive it. All these matters favour the application rather than hinder it.

## 7. What are the other relevant considerations?

### 7.1 Having regard to the Proposed District Plan

[156] The most relevant strategic policy in the PDP is to avoid[177] non-industrial activities occurring within Industrial zones. Of course this assumes (as we will) that the site remains zoned 'Industrial' in some way under the more detailed 'stages' of the Council's plan review.

[157] The key general question is how much weight should we give this policy and the general provisions of the PDP? To answer this question we should consider:

(a) how far through the Schedule 1 process the PDP is, i.e. "the extent (if any) to which the proper measure may have been exposed to testing and


177 PDP strategic policy 3.3.8.

independent decision-making" (*Hanton v Auckland City Council*[178]);

(b) whether the policy (or objectives about it) are subject to appeal[179] and (possibly) whether the policy was "competently" prepared: *Davidson (CA)*[180];

(c) "the extent to which a new measure ... might implement a coherent pattern of objectives and policies in a plan": *Keystone Watch Group v Auckland City Council*[181];

(d) whether the new provisions accord with the NPS-UDC (section 74(1)(ea) RMA);

(e) "whether the new provisions accord with Part 2": *Keystone*[182].

In addition the court stated in *Keystone*[183]:

> Where there has been a significant shift in Council policy and the new provisions are in accord with part [2], the court may give more weight to the proposed plan.

*(a) How far has the PDP been tested?*

[158] The PDP has been tested and amended by a panel of independent Commissioners who issued decisions in May 2018. That suggests at first sight that more weight should be given to the PDP. However the Commissioners' decision[184] on policy 3.3.8 reads in full:

> Policy 3.2.1.2.3 as notified read:
>
> 527 *"Avoid non-industrial activities occurring within areas zoned for industrial activities"*.
>
> 528. Submissions on this policy sought to soften its effect in various ways. Mr Paetz recommended that Submission 361 be accepted with the effect that non-industrial activities related to or supporting industrial activities might occur within industrial zones, but otherwise that the policy not be amended.
>
> 529. Policy 5.3.4 of the Proposed RPS is relevant on this point. It provides for restriction of activities in industrial areas that, among other things, may result in inefficient use of industrial land.

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178 *Hanton v Auckland City Council* [1994] NZRMA 289 at p 33; referred to in *Lee v Auckland City Council* [1995] NZRMA 241 at p 19.

179 *Lee v Auckland City Council* [1995] NZRMA 241.

180 *Davidson* (CA) above n 8 at [75].

181 *Keystone Watch Group v Auckland City Council* (EnvC) A7/2001 at [45(iii)].

182 *Keystone Watch* above n 181 at [34].

183 *Keystone Watch* above n 181 at [45].

184 Report 3 (on chapters 3, 4 and 6 of the PDP) by Commissioners D Nugent and others.

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530. We accept in principle that, given the guidance provided by the Proposed RPS, the lack of land available for industrial development, and the general unsuitability of land zoned for other purposes for industrial use, non-industrial activities in industrial zones should be tightly controlled.

531. The more detailed provisions governing industrial zones are not part of the PDP, being scheduled for consideration as part of a subsequent stage of the District Plan review. At a strategic level, we recommend acceptance of Mr Paetz's suggested amendment with the effect that this policy (renumbered 3.3.8) would read:
"*Avoid non-industrial activities not ancillary to industrial activities occurring within areas zoned for industrial activities*".

532. We consider that this policy is the most appropriate way, in the context of high-level policies, to achieve the aspects of Objectives 3.2.1.3 and 3.2.1.5 related to industrial activities.

[159] While Report 3 is in many ways an admirable document with penetrating comments on many of the issues before the Commissioners, we respectfully doubt if it is 'competently' – in the *Davidson* sense[185] – prepared on policy 3.2.1.2.3 (now 3.3.8) for several reasons. First there is no reference to the NPS-UDC whatsoever, nor to other relevant policies in the PORPS. Further the Commissioners did not have the benefit of any quantitative analysis of benefits and costs as recorded earlier in the Report. Finally, the Commissioners referred to a 'principle' but did not identify it, which is unsatisfactory.

*(b) Subject to appeal?*

[160] While strategic policy 3.3.8 is not subject to appeal, the strategic objectives it implements (3.2.1.3 and 3.2.1.5) are. That reduces any weight we can place on it.

*(c) Does policy 3.3.8 implement a coherent pattern?*

[161] It is hard to see how this policy 3.3.8 logically[186] promotes a compact, well designed and integrated urban form[187]. Nor does it obviously enable the development of innovative and sustainable enterprises. Rather it limits opportunities and choices.

*(d) Do the new provisions give effect to the NPS-UDC?*

[162] The short answer is that the strategic objectives are not inconsistent with the NPS,

185 *Davidson (CA)* above n 8 at [75].
186 The word used in objective 3.2.2.1.
187 Objective 3.2.2.1 PDP.

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but policy 3.3.8 seems to breach the NPS-UDC policy PA3(a) to (c). This is not to say that a policy cannot provide that non-industrial activities must be avoided in industrial zones but we would expect there to be a comprehensive analysis (including under section 7(b)) before such a draconian step was taken. That is an issue for the Environment Court on the appeals in respect of the PDP which are to be heard soon, and we make no finding on the issue. We consider the uncertainty reduces the weight which can be given to policy 3.3.8 of the PDP.

*(e) Accord with Part 2 RMA?*

[163] We note that the PDP's Hearing Commissioners were given no quantitative analysis of the benefits and costs of any of the strategic policies[188]. There may have been good reasons for that in general terms given the difficult-to-quantify landscape, amenity and ecological values of the District. However, when it comes to inflexible policies choosing between urban activities, i.e. residential versus commercial versus industrial, it is difficult to see why some sort of analysis could not have been prepared. Again that is a matter for the appeals on the PDP so we say no more than that it appears that industrial land is valued by the real estate market in the Wakatipu Basin at less than commercial or residential land. Thus zoning for industrial uses is – absent any externalities[189] – at first sight less efficient than under a more general zoning although we record that we make no conclusive finding on this either. Our doubts undermine the weight to be given to the PDP.

*Conclusions*

[164] We conclude that we should give minimal weight to policy 3.3.8 of the PDP, and some weight to the general strategic objectives and policies which the proposal largely implements. But overall the most important statutory document remains the NPS-UDC.


188 Report 3, above n 184 at [27].

189 In answer to a question from the court Mr Foy could only suggest transport costs: Transcript p 124 lines 20 to 28. It is impossible for us to assess those in absence of figures.

## 7.2 The ORPS and PORPS

*The ORPS*

[165] The issues raised by this document have been considered in our discussion of the ODP (which gives effect to the ORPS) so we do not need to consider them separately here beyond recording that we find that the proposal would meet the reasonably foreseeable needs of the community[190].

*The PORPS*

[166] Ms Stagg considered that the proposal is inconsistent with:

- policy 4.5.1 c) "as the proposed retail use of land zoned for industrial purposes will make it more challenging for Council to ensure there is sufficient industrial land zoned for industrial purposes" [191].
- policy 4.5.1 g)[192], as the proposal does "not relate to" the efficient use of industrial land.

[167] As to the sufficiency of business land development capacity we consider that our findings in respect of the NPS-UDC apply here also. We discuss efficiency below.

[168] Ms Stagg also considered[193] the proposal to be contrary to policy 5.3.4, particularly policy 5.3.4 c) ii), which directs decision-makers to restrict the establishment of activities in industrial areas that are likely to result in an inefficient use of industrial land. Ms Stagg presumably meant that it is inefficient in the sense of a "waste" of industrial land if it is to be used for something else. But absence of waste is not the only meaning of "efficient" in the RMA. In the absence of non-use values efficiency is not simply an abstract concept hanging in mid-air about which a subjective judgement needs to be made but can be a quantifiable comparative assessment of the social benefits and costs of the proposal compared with the social benefits and costs of retaining the land for industrial use. We elaborate on this below.

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190 As required by policy 9.4.1 ORPS.
191 E C Stagg evidence-in-chief [13.27] [Environment Court document 12].
192 E C Stagg evidence-in-chief [13.29] [Environment Court document 12].
193 E C Stagg evidence-in-chief [13.36] [Environment Court document 12].

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## 7.3 "Subject to Part 2" and having regard to the efficient use of resources

*Is it necessary to apply Part 2?*

[169] Recalling the introductory words of section 104(1) RMA we next have to decide whether it is necessary[194] to look at the proposal in the light of Part 2 of the RMA. We do not have to say much about this because the Council's case was that section 7(b), at least, should be had regard to and we do not understand Bunnings to say otherwise.

[170] In this proceeding we do not have to decide, although we do comment on, whether the ODP in general (and PC19 in particular) were "competently" prepared (in the *Davidson (CA)* sense) because both the ODP and PC19 were resolved before the NPS-UDC came into force. In the light of the completely different approach to supplying urban development capacity in general – and business land (including industrial) in particular – in the national policy statement, we consider the Ministerial directions in that document were not particularised (in anticipation) in the ODP. So the NPS should prevail.

[171] In any event, there is one aspect of Part 2 RMA which almost always requires particular attention on a resource consent application: section 7(b). The Environment Court observed in *Davidson (EC)*[195] that it is nearly impossible to decide in advance (in a plan) whether a particular proposal is a more efficient use of the resources than the plan's status quo even if the plan gives a general policy direction that a type of activity is usually regarded as inefficient in a specific area (zone).

[172] There is no discussion in the decisions on the PDP of how the plan might affect "price differentials between zones" (to use the phrase in the NPS-UDC policy PB7). To the contrary, the scheme of the argument accepted in the decisions on the PDP seems to be:

(1) the "demand" for industrial land in the Wakatipu was X ha;
(2) (implicitly) the value of X ha for industrial land purposes is less than the value of X ha for other commercial (or residential) activities, and therefore:
(3) X should be "supplied" or protected by zoning:


194 See *Davidson (CA)* above n 8 at [75].
195 *Davidson (EC)* above n 9.

(a) an approximately equivalent area of land as industrial; and

(b) excluding (relevantly) "retail" activities by making them non-complying.

[173] How that is an efficient use of the land resource is not discussed so far as we can see in the Commissioners' decisions on the PDP. There were so many individual issues for the Commissioners to deal with that they did not step back and look at the overall efficiency issues raised by PC19's provisions for industrial land zoning. Because of its near-complete silence on the efficiency of using the scarce land of the Wakatipu Basin for industrial rather than commercial or housing activities it is not for us to disagree with, second guess or even review the local authority's decision. It is the complete absence of analysis of efficiency that counts as absence of competence. We tentatively doubt that the PDP was "competently" prepared in the technical sense of that word adopted by the Court of Appeal. We have mentioned this principally to record how uncomfortable we would feel if having to make such an assessment in a definitive way.

[174] Accordingly we should consider the application under Part 2 of the RMA. The most relevant provision is section 7(b) and we now turn to that.

*Having regard to the efficient use of resources*

[175] In *Lower Waitaki River Management Society Inc v Canterbury Regional Council*[196] the Environment Court said that "the potential power of s 7(b) is in giving a relatively more objective measure of the efficiency of the proposal". Despite the advantages of that – at least in cases where section 6 and 8 matters and other section 7 factors are not relevant – section 7(b) RMA has been discussed in remarkably few cases. Interestingly one decision which did – *Queenstown Airport Corporation Ltd* ("*re QAC*")[197] – also relates to Frankton Flats. The Environment Court was concerned with a notice of requirement for the Queenstown Airport. It wrote that "section 7 plays an important role but should not be approached in a way that obscures the purpose of the Act"[198]. It is difficult to see how section 7(b) (at least) can be applied in a way that obscures the purpose of the RMA: rather the result of applying section 7(b) may illuminate whether or not the purpose of the

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196 *Lower Waitaki River Management Society Inc v Canterbury Regional Council* (EnvC) C080/09 at [197].

197 *Re an application by Queenstown Airport Corporation Limited* [2012] NZEnvC 206; (2012) 18 ELRNZ 489.

198 *re QAC* above n 197 at [208].

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Act is being achieved by demonstrating the costs (and the benefits) of implementing policies. We consider that what the Environment Court may have been alluding to is that the ultimate test (if Part 2 of the Act needs to be looked at) is whether the purpose of the Act is better met by the application[199] than by the status quo. We accept this cannot be over-ridden by a qualitative (or even a quantitative) assessment under section 7(b) RMA. The latter is simply one matter to be had particular regard to. But its utility is, in certain situations, its capacity to give an independent, more objective test of the proposal against alternatives. This seems to be routinely ignored.

[176] In *re QAC* the Environment Court continued[200]:

> [211] Decisions on costs and economic viability, or profitability of a project are not matters for the court. As Justice Wild in *Friends and Community of Ngawha Inc and Others v Minister of Corrections*[201] said, these matters should:
>
> > ... sensibly be regarded as decisions for the promoter of the project. Otherwise, the Environment Court will be drawn into making, or at least second-guessing, business decisions. That is surely not its task.

While we agree about the financial viability of a project in itself, with respect the (producer's) costs of a project are of some relevance under section 7(b). This seems to be assumed in many cases. For example, in *Wallace Group Limited v Auckland Council*[202] the Environment Court wrote in relation to consideration of costs and benefits of a proposed spot zoning "... it is important not to lose sight of the ... evidence concerning whether the site is commercially viable as a development prospect under each Zoning Option".

[177] Indeed a similar concern can be seen in *re QAC* when the court continued[203]:

> In these proceedings efficiency can be understood in terms of allocative, social and operational efficiency. Allocative efficiency seems to accord with a general rule of economics given by Mr Ballingall – that an efficient level of any activity occurs where its marginal costs matches its marginal benefits and social efficiency, where the externality costs are identified

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199 In that case a notice of requirement, here for an application resource consent.

200 *re QAC* above n 197.

201 *Friends and Community of Ngawha Inc and Others v Minister of Corrections* (HC) Wellington AP 110/02 at [20].

202 *Wallace Group Limited v Auckland Council* above n 32 at [13].

203 *re QAC* above n 197 at [221].

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> and if possible, quantified and brought to account.
> (footnotes excluded)

It is hard to reconcile this with the passage quoting *Ngawha* because the efficiency test enunciated seems to include at least part of the financial viability test rejected earlier. The economist Dr M Pickford has stated in a useful paper[204] that "if the production costs are not taken into account that can skew the analysis in favour of an application: and if the producer's surplus (which takes those into account) is not added to the benefits of a proposal then the net benefits cannot be properly identified".

[178] A related point is that efficiency under section 7(b) RMA is a relative concept as explained in *Davidson (EC)*[205] and *Self Family Trust*[206]. The *Treasury Guide* quoted in those decisions gives a useful example[207]:

> **Example: Bridge over river**
> Suppose that the bridge costs $20 million, and that it will save travellers $25 million worth of travel time and vehicle operating costs, in present value terms. The bridge would appear to have benefits that exceed the costs. The net present value (NPV) of the bridge is $5 million.
>
> But suppose that in the absence of a bridge being built, there is every expectation that a private ferry operator will start business. The cost is $10 million in present value terms, and the social benefits are $20 million in present value terms. The ferry operation has an NPV of $10 million.
>
> Compared with the ferry operation, a bridge would cost $10 million more, and would produce $5 million more benefits. Against this counterfactual, the bridge has an NPV of -$5 million.
>
> Against the "no bridge, no ferry" counterfactual, the bridge would seem worthwhile. But against the "ferry" counterfactual, the bridge is not.
>
> Equivalently, the ferry could be presented to decision-makers as an alternative to the bridge. This would still show the ferry to be the better option, despite the fact that the bridge has greater total benefits.

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204 M Pickford *Economic Efficiency and the [RMA]* (2014) 18 New Zealand Journal of Environmental Law p 149.

205 *Davidson (EC)* above n 9 at [266].

206 *Self Family Trust v Auckland Council* [2018] NZEnvC 49; overturned (possibly) on appeal but not on this point: see *Gock v Auckland Council* [2019] NZHC 276.

207 The New Zealand Treasury's *Guide to Social Cost Benefit Analysis* p 9, also quoted in *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council* [2017] NZEnvC 53 at [460].

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[179] It is possible that in *re QAC* the court may have then tangled itself up with its consideration of alternatives. This is easy to do – see the confused analysis by the Environment Court (Judge Jackson presiding) in *Meridian Energy Limited v Central Otago District Council*[208] – because there are two types (at least) of alternatives to be considered under the RMA:

- alternative use of the same resources as required under section 7(b) RMA;
- alternative locations for an activity which may be required in an Assessment of environmental effects for a resource consent[209] and is compulsory for a notice of requirement[210].

The latter comparison is a special case. It is required when a proposed activity (or requirement) is likely to cause adverse effects to non-use values which have not been quantified but which are (for example) matters of national importance under section 6 RMA. That was the situation identified in *TV3 Network Services Limited v Waikato District Council*[211]. We are unsure what the effect of the Full Court decision in *Meridian Energy Limited v Central Otago District Council*[212] is on this issue, but do not have to determine it because the appeal was principally about the assessment of alternative sites, not the efficient use of the resources which were the subject of the application.

[180] In the latter, standard case the requirements of section 7(b) were explained in *Port Otago Limited v Otago Regional Council*[213] as follows:

> Because there is no such thing as absolute efficiency, any analysis of efficiency involves comparison of the status quo ... against at least one of the other ... options...

[181] Consequently we consider the correct test under section 7(b) on a resource consent application was stated in *P & E Limited v Canterbury Regional Council*[214]. There, in respect of competing options for use of a water resource the Environment Court wrote:

> Subject to those qualifications, section 7(b) clearly requires a consent authority to have

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208 *Meridian Energy Limited v Central Otago District Council* [2011] 1 NZLR 482; [2010] NZRMA 47.
209 Schedule 4 clause 6(1)(a).
210 Section 171(1)(b) RMA.
211 *TV3 Network Services Limited v Waikato District Council* [1998] 1 NZLR 360; [1997] NZRMA 539.
212 *Meridian Energy* Limited above n 208.
213 *Port Otago Limited v Otago Regional Council* [2018] NZEnvC 183 at [96].
214 *P & E Limited v Canterbury Regional Council* [2015] NZEnvC 106 at [57].

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> regard to an end user of the water. In effect, the consent authority needs to compare the value of the proposed use of the water with its value for its current use (being the next best use in the absence of evidence of another, better, use). For example, what is required in this case can be summarised as a comparison of the net benefit of the water take with the net benefit of leaving the water in the Cass River, which includes of course the benefits of the current (below Woodstock) take. The net benefit can be defined for each of the options (the proposal and the best alternative on the evidence) as:
>
> nb = ps + cs + pe – ne
> where:
> nb = net benefit of the use of the water taken
> ps = producer surplus
> cs = consumer surplus
> pe = positive externalities
> ne = negative externalities
>
> Efficiency would then favour the application if:
> (a) the net benefit of the P & E take
> - is more than:
> (b) the net benefit of leaving the water in the Cass River plus the net benefits of the below Woodstock take of the same volumes.

While that case concerned water rather than land the principle is the same.

[182] We emphasise that the assessment of comparative costs and benefits does not have to be a rigorous exercise – the *Treasury Guide* almost endorses a back of the envelope approach[215]: "if nothing else, it will give an indication of what is at stake ...". The point is that even an approximation can show that a proposed use of a resource may be inefficient on the known qualifications (without taking into account non-use valuations). A good example is *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council*[216] ("*the Mackenzie decision*")where the use of water for irrigation from the Tekapo Canal was found to be a less efficient use of the water than letting the water go through the hydro dams to be used for the generation of renewable electricity and then used for irrigation downstream of the lowest (Waitaki) dam.

[183] It is puzzling that more evidence is not given about the efficient use of resources

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215 *Treasury Guide* (2015) above n 207 p 6 at [4].

216 *Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council* [2017] NZEnvC 53 at [505] to [514].

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especially where section 6 "bottom lines" are not in play[217]. For a useful analysis by an economist of how *King Salmon* might cause practitioners to reconsider section 7(b) RMA we refer to another paper by Mr Pickford: *The "Environmental Bottom Line" and Economic Efficiency*[218] . We hope this is not a self-fulfilling prophecy, but there is fecund ground for appeals on this issue.

*The evidence*

[184] Turning to the evidence: neither Mr Foy nor Mr Heath made a detailed attempt to compare the efficiency of the proposal with the status quo in this case, although it was implicit in Mr Heath's evidence that the 'highest and best' use of the land was for a non-industrial use.

[185] The Council's case on this was quite obscure. Mr Wilson submitted[219] that Mr Heath admitted in cross-examination that the rezoning of greenfields' land comes with costs not all of which are economic[220] and that it "may be more efficient or otherwise preferable to exclude non-industrial activities from existing industrial zones than to seek a rezoning of greenfields' land elsewhere"[221]. However, there was no exploration with the witness of what the non-economic costs might be. We accept of course that there are some costs which are usually not quantified – see *Self Family Trust v Auckland Council*[222]. Under the RMA these non-use values are often very important. But it is not obvious there are any such unquantified non-use values in this case: to the contrary, the costs of the proposal to the landscape (the foreground to the Remarkables) have either been mitigated or avoided by conditions.

[186] Mr Wilson submitted[223] that the appellant's approach is fundamentally in error because the proposal may be less efficient than "to seek a rezoning of greenfields ... elsewhere". That submission shows it is the Council which has taken the incorrect

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217 But note that the *Mackenzie decision* also illustrates that a section 7(b) analysis may be useful even where section 6 factors are present. It shows that a proposal to use a resource may be inefficient merely based on quantifiable factors and without even needing to make a qualitative assessment of the 'non-market' values.

218 M Pickford *The "Environmental Bottom Line" and Economic Efficiency* (2014) 20 Canterbury Law Review 39.

219 Queenstown Lakes District Council closing submissions [4.7] [Environment Court document 13].

220 Queenstown Lakes District Council closing submissions [4.7] [Environment Court document 13] referring to the transcript p 25 line 25, p 26 line 8.

221 Referring to Transcript p 26 lines 9 to 21.

222 *Self Family Trust v Auckland Council* above n 206 at [357].

223 Queenstown Lakes District Council closing submissions [4.7(d)] [Environment Court document 13].

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approach, we suspect by conflating the ODP and the NPS-UDC. We have found that under the ODP the Bunnings' proposal will leave available 84% of the currently zoned land on which industrial activities can be undertaken – on the Council's own figures. On Mr Heath's figures 94.5% is available (to use a neutral word). There is no need – simply because of the proposal – to rezone more greenfields' land for industrial activities for some years.

[187] Nor do we see Mr Heath's other concessions as important. The idea that it might be "otherwise preferable" to exclude non-industrial uses for the site is simply an acknowledgement that the efficient use of resources is a matter to which particular regard must be had, not the overall test for Bunnings' application.

[188] Ms Stagg repeated that the proposal does not "relate" to the efficient use of natural and physical resources, in this case, the scarce amount of industrial land. She therefore considered the proposed development is not consistent with the intent of section 7[224]. Later she added[225]:

> While I agree with Ms Panther Knight[226] ... that the proposal would contribute to growing and diversifying the construction industry in Queenstown, there are alternative available sites, including: Activity Area 3 and 5 of the Remarkables Park Special Zone[227] that could accommodate this activity. In addition, the loss of industrial land could potentially have an adverse effect on the efficient functioning of the construction sector, if industrial activities associated with this sector cannot find suitable locations within the Wakatipu Ward.

There are several points to make about that evidence. First it does not apply the correct comparative approach to section 7(b) RMA. Second, we are concerned that the witnesses for the Council have focused only on the supply of industrial land and have not taken into account the supply of commercial land beyond the general assumption that there is such land available elsewhere[228]. Considerations of location, price, etc. have not been referred to. Third and more importantly there are precise evidential difficulties: we have found that the calculation of Mr Foy, on which Ms Stagg relied, as to the quantity of

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224 E C Stagg evidence-in-chief [14.4] [Environment Court document 12].

225 E C Stagg evidence-in-chief [15.2] [Environment Court document 12].

226 Referring to K Panther Knight evidence-in-chief [6.14] [Environment Court document 9].

227 A map showing the activity areas in Remarkables Park Zone is shown in E C Stagg evidence-in-chief Appendix E.

228 E C Stagg evidence-in-chief [15.2] [Environment Court document 12].

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industrial land supplied is not correct. Fourth, her statements about efficient functioning of the construction sector are contradictory in that in consecutive sentences she writes[229] both that the proposal would "contribute to growing and diversifying the construction industry" and that it would have an "adverse effect on the efficient functioning of the construction sector".

[189] As for the PDP on which Ms Stagg relied, while it post-dates the NPS-UDC, it is based on the *BDC Assessment* which was also produced to us. The latter expressly relies on a business-as-usual ("BAU") approach which may be inappropriate in this District for reasons we have stated. Further it is not clear as to how the PDP gives effect to the Ministerial directions in the NPS-UDC. It would be wrong according to Arnold J in *King Salmon*[230] to use the provisions of the (lower-order) PDP as a reason to decline to implement aspects of the instructions in a NPS.

### 7.4 The decision appealed from

[190] On the economic issue, the Commissioners agreed with the appellant that the application was an appropriate and compatible activity on the site, which would support construction activities[231]. In particular, they held that effects on the District's industrial zoned land would be minor only. We have come to the same conclusion.

## 8. Outcome

### 8.1 The weighing exercise

[191] In the light of *Davidson (CA)*[232] and *New Zealand King Salmon*[233] we consider the correct way of applying section 104(1)(b) RMA in the context of section 104 as a whole is to ask[234]: does the proposed activity, after —

(1) assessing the relevant potential effects of the proposal in the light of the

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229 E C Stagg evidence-in-chief [15.2] [Environment Court document 12].
230 *King Salmon* above n 13 at [90].
231 Decision (RM170347) [166] to [168].
232 *Davidson (CA)* above n 8.
233 *King Salmon* above n 13.
234 This is a modified version of [262] of *Davidson (EC)*.

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objectives, policies and rules of the relevant district plans[235];

(2) having regard to any other relevant statutory instruments[236] and placing different weight on their objectives and policies depending on whether:
   (a) the relevant instrument is dated earlier than the district (or regional) plan particularises or has been made consistent with the superior instruments' objectives and policies;
   (b) the other, usually superior, instrument is later, in which case more weight should be given to it and it may override the district plan even if it does not need to be given effect to; and/or
   (c) there is some doubt whether the district plan was competently prepared[237]; and/or
   (d) possibly, there is any illegality, uncertainty or incompleteness in the district plan[238], noting that assessment may be remedied by an intermediate document or by recourse to Part 2 of the Act;
(3) having particular regard to the (preferably quantified) benefits and costs of the proposal compared with the status quo (or, possibly, any alternative use of the relevant resources proposed in the evidence);
(4) applying the remainder of Part 2 of the RMA if there is still some other relevant deficiency in any of the relevant instruments or other good reason which makes it necessary or useful to do so; and
(5) weighing these conclusions with any other relevant considerations[239]

— achieve the purpose of the Act as particularised (unless point 2(c) above applies) in the objectives and policies of the relevant statutory instruments apportioning different weight to them as dictated by the relevant factors identified (if they lead in different directions)?

[192] We have found that the proposal will have an indirect and minor effect on both the industrial land development capacity and the supply of industrial land in the District. We accept that the proposal will not implement all the policies of the FFB zone under the ODP or of the PDP, although it will implement many of them.

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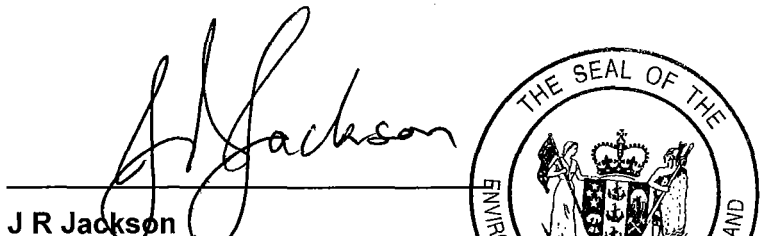
235 i.e. the operative district plan and any proposed plan (including a plan change).
236 Under section 104(1)(b) RMA.
237 *Davidson (CA)* above n 8 at [75] and [76].
238 *King Salmon* above n 13 at [90].
239 e.g. under section 104(1)(c) and 290A RMA.

[193] We consider the proposal is consistent with the NPS-UDC, and that we should place considerably more weight on the latter, and higher-order, NPS-UDC than on the ODP or PDP. Notwithstanding the inadequately quantified extent of potential retail activity, the undisputed scale of industrial/trade supply activity associated with the Bunnings' proposal means that it is appropriate to allow it to locate in the vicinity of the four competitors, particularly with a view to its consistency with the NPS-UDC. The effect on industrial land capacity can be remedied as set out in the NPS-UDC. Accordingly under that instrument and having regard to the efficient use of the site, we consider the more appropriate use of the site is for Bunnings' proposal.

[194] In the circumstances it is not necessary to consider Part 2 of the Act beyond having particular regard to the efficient use of the land resource under section 7(b) RMA. This (qualitatively)[240] favours the proposal over the status quo.

[195] Our decision is consistent with the Commissioners' decision on the points raised in this appeal. Their concerns have been met by the amended designs. Weighing our conclusions on those matters and bearing in mind the Commissioners' decision on the relevant issue, we consider that resource consent(s) should be granted on the terms agreed by the parties.

For the court:




**J R Jackson**
**Environment Judge**

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240 And quantitatively if market prices for land in the vicinity (commercial versus industrial) are taken into account.