BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Hearing Stream 16, Stages 3 & 3B Proposed District Plan

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REPLY SUBMISSIONS BY KĀ RŪNAKA ON IDENTIFIED ISSUES

Te Rūnanga o Moeraki, Kāti Huirapa Rūnaka ki Puketeraki, Te Rūnanga o Ōtākou, Hokonui Rūnanga, Te Rūnanga o Waihōpai, Te Rūnanga o Awarua, Te Rūnanga o Ōraka-Aparima

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INTRODUCTION

1 By minute dated 27 July 2020, Kā Rūnaka was granted leave to present a limited reply, addressing issues identified below. Kā Rūnaka has now had opportunity to confer with its kaumatua, [1] to address these issues, and is grateful to the Panel for the additional time to enable a tikanga process.

2 Most of the issues have been answered by:

(a) preparation of further recommended amendments to proposed Chapter 39 (and related provisions) by Michael Bathgate. This includes recommended changes to Schedule 39.6 (based on advice from kaumatua);

(b) revised maps that:
(i) address mapping anomalies, in most cases by reducing the areal extent of proposed wāhi tūpuna;
(ii) identify urban areas in Queenstown, Frankton and Wānaka considered wāhi tūpuna;

c) reduction in mapping extent of Punatapu and (correspondingly) Te Taumata o Hakitekura, and Paeatarariki & Timaru (Hāwea). These reductions are a response by kaumatua to submitter evidence to the Panel.

3 Relevant issues are as follows:

Scope

(a) Whether there is scope to map urban centres at Queenstown, Frankton, wider Wanaka; these not having been mapped in the notified version, or whether descriptors used (by words) in Chapter 39 are sufficient to identify these areas.

(b) Whether river mapping or other anomalous mapping errors may be amended as within scope, if within the description used in table 39.6, in reliance on Clause 16 of 1st schedule RMA, or relevant case law on scope.

(c) Whether there is scope to move Policy 39.2.1.1 to Chapter 5 Tangata Whenua; whether appropriate in light of objectives in Chapter 5.

[1] Kaumatua (including Edward Ellison and David Higgins).

4 The relevant test for scope is identified in *Countdown Properties*[2]. The 'reasonably and fairly raised' test is orthodox, but requires judgement ("question of degree").[3]

Urban centres

5 The urban centres were identified by words in the notified schedule to Chapter 39. This alerted the general public, including potentially affected landowners within these urban areas, that they may be affected by the rules framework in Chapter 39. The Panel received submissions seeking a range of relief (including deletion) of the urban wāhi tūpuna.[4] Council's s42A report recommended deletion, following review of those submissions. Affected persons were therefore directly 'on notice', and took steps through the plan review process by lodging submissions. There was no element of surprise or prejudice.

6 The Panel has received evidence that the urban wāhi tūpuna have significant tangible and intangible values for mana whenua. These values have been identified, including by kaumatua evidence of associations, relationships and tikanga with these areas.

7 Mapping creates certainty, which benefits both the consent authority and landowners (in relation to future consenting processes). The underlying intent of Chapter 39, reflecting the relevant RPS policies, is to "identify" the wāhi tupuna, and their associated values. The proposed maps are comparatively modest in areal extent. The identified urban wāhi tūpuna do not trigger a rule, and are a legitimate planning

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[2] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at p166-167 (HC):

> "Adopting the standpoint of the informed and reasonable owner is only one test of deciding whether the amendment lies fairly and reasonably within the submissions filed. In our view, it would neither be correct nor helpful to elevate the "reasonable appreciation" test to an independent or isolated test. The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.
>
> The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in Haslam v Selwyn District Council (1993) 2 NZRMA 628. The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based *[1994] NZRMA 145 at 167* upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them."

[3] The *Albany North Landowners* decision (relating to the Auckland Unitary Plan, with some differences to general plan reviews) referred to this as the reasonably forseeable logical consequence test: *Albany North Landowners v Auckland* Council [2017] NZHC 138. Legality and fairness underlie scope issues.

[4] Thus Queenstown Airport Corporation (submitter #3316) directly raised the need for greater certainty as to the "not mapped" urban wāhi tūpuna areas: discussed at [4.6-]-[4.63] of that submission. Kā Rūnaka's proposed response improves certainty and reduces the areal extent conveyed by the wording used in the Schedules.

method to identify important s6(e) RMA values that may be affected by discretionary and non-complying applications. It is submitted that scope is not in issue.

Mapping anomalies

8 Recommended changes to mapping are identified in the **Mapping Attachments**. There are arguably 2 categories, for scope purposes: **reductions** and **extensions** to the notified wāhi tūpuna line:

(a) As to reductions, the Appendices identify reductions to the notified wāhi tūpuna line. Reductions are intermediary relief, reduce the regulatory impact on landowners, and are therefore within scope.[5] This includes river mapping and private land (such as the reduced areal extent at Punatapu);

(b) As to extensions, these are identified by the Appendices (river mapping); with the intent being that all extensions are limited to publicly owned land, held by Council or the Crown. Proposed changes are shown in red on each map. Extensions may increase the areal extent of wāhi tūpuna on the river, river banks, and margins. Some river "holes" are filled in, which are self-explanatory on the maps.

9 As noted, Kā Rūnaka's position is that extensions should be limited to riverine areas (including river margins) that are public land (Crown or Council owned). This militates against prejudice or unanticipated outcomes for private landowners. The form of tenure is identified by each map, such as conservation estate, Crown or Council reserve, including Crown marginal reserve.

10 It is submitted that a reasonable person, having regard to the notified maps, and submissions (including those by Kā Rūnaka), would consider the mapping changes as within reasonable contemplation. The wāhi tūpuna relating to rivers/awa were identified in words by Schedule 39.6, so it was arguably within contemplation that all parts of the river and riverbanks would be identified, with an associated river margin. Many of the mapping corrections are obvious errors – such as River Maps 5.2 & 5.9 (which show a "hole" in the centre of the river; River Map 5.10 (which excludes part of the river itself); River Map 5.15 (which creates an incongruous "gap" between two mapped areas at Lake Wānaka outlet). Prejudice is unlikely to arise, given the public and open space qualities of riverine areas where the wāhi tūpuna line is extended. To the extent there is any residual doubt, corrective powers under Clause 16(2) RMA are available to deal with anomalies caused by minor errors in mapping.

11 Policy considerations support protection of riverbeds subject to intermittent flow; and the margins of riverbeds (c.f. s6(a) and 6(e) RMA). Ancestral waterways are taonga, and sensitive receiving environments. According to the *Dewhirst* decision:

[5] Intermediary in the *Re Vivid Holdings* sense– i.e. reduced restrictions from the notified line; but not wholesale deletion as sought by some submitters: [1999] NZRMA 468.

> **[57]** The Judge accepted that, in the context of a s 13(1) prosecution, there was merit in protecting riverbeds subject to intermittent flows. He added:
>
> > [37] ... There are, of course, many creeks in New Zealand that can be reasonably found to qualify as "rivers" because they do flow intermittently. Many side creeks of high country rivers fall into that category. They do have a bed which regularly fills and, in extreme weather environments, floods, as in extends beyond its natural bed. You can say that they are streams, even though in late summer and autumn they may have dried up, at least visibly from the surface. It is important that the beds of those side creeks not be disturbed, as they fulfil an important function of clearing water from a catchment without doing damage to the bush on either side of the creeks.
> >
> > [38] Similarly, there are riverbeds in pastoral areas which have the same function. One thinks immediately of the Selwyn River in Canterbury. Many Cantabrians have never seen water in that riverbed. It does not mean that the riverbed does not have a function and a need for it to be preserved. [Footnotes omitted]
>
> **..[65]** The term "margins" requires more attention. First, it is not defined in the RMA. Second, it is plainly important, as it is referred to in s 6(a) in which the "preservation of the natural character of ... lakes and rivers and their margins" is stipulated as a matter of national importance…[6]

12 River beds are those lands covered by water during the ordinary rainy season, but contained within the banks of the river, and extending from bank to bank. This definition requires assessment of context, especially where "riverbanks" (and margins) are located. It is submitted that the proposed extensions identified by Kā Rūnaka fall within the river banks, as defined in *Dewhurst*, or the river margins.[7]

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[6] *Canterbury Regional Council v Dewhirst Land Co Ltd* [2020] NZRMA 1 (CA) (**Dewhirst**):

[7] According to *Dewhirst*:

> **"[51]** To assist the analysis in this case, the following principles emerge from the above common law authorities:
>
> (a) The description of a river or watercourse includes as essential features the channel (or bed) and its banks.
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> (b) The bed comprises the space between the banks occupied by the river at its fullest flow.
>
> (c) Ascertaining the bed in a given case will require consideration of all relevant geographical, meteorological and hydrological features such as banks, channels, shores, seasonal flows, as well as unseasonable wet weather events which produce a flood where the water overflows the banks and spreads into the surrounding areas.
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> (d) The bed of a river is not limited to the portion between the banks through which the water flows only in dry weather. Equally, though a river or watercourse is dry for part (even the greater part) of the year, it is nonetheless a river or watercourse…"
>
> **..[77]** It follows that we also agree with the view of Gendall J that a river's "fullest flow" for the purposes of the definition of "bed" must be something less than the point where it floods.
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> **[78]** It was at this point of his analysis that Gendall J invoked the principle (correctly in our view) that the bed of a river comprises those lands covered by water during the ordinary rainy season, but contained within the banks of the river and extending from bank to bank. Such an approach is entirely consistent with the common law and the principles set out in the treatises discussed above.
>
> **[79]** Accordingly, we consider that the determination of the "bed" of a river, as defined in s 2(a)(ii), will depend not only on the position of the banks of the river, but also on the water coverage measure as determined by the river's fullest flow which occurs within those banks. This latter criterion is qualified by the words "without overtopping its banks". This qualifying term serves to exclude flows or

Chapter 5

13 At least two submitters identified that provisions in Chapter 39 could be better provided for in Chapter 5. The submission points were not specific to Policy 39.2.1.1, and sought wholesale deletion of Chapter 39, in favour of the more generic Chapter 5.[8]

14 A more challenging issue is that Chapter 5 is operative, creating difficulties for scope. But there is planning merit in moving the policy to support vertical and horizonal integration within the Plan, and better give effect to the RPS. This was identified as a basis for scope in the *Albany North* decision, noting that submissions should be read in light of the cascade of planning instruments.[9] If the Panel decides against scope, then Mr Bathgate has recommended further changes so that Policy 39.2.1.1 is a "better fit" for the specificity taken towards identifying wāhi tūpuna and their associated values.

Issues: Mapping, Table 39.6 (values and descriptors)

(d) Whether to amend proposed mapping of wāhi tūpuna, following further review by Kā Rūnaka kaumatua, to address potential anomalies identified during the hearing on 21 July 2020.

(e) Whether to amend values and descriptors in Table 39.6, potentially by merging two columns, and providing greater detail on relevant tangible and intangible values, to provide greater certainty for wāhi tūpuna.

15 Mr Bathgate has produced a revised version of Chapter 39.6, which includes amended descriptors for individual wāhi tūpuna. The descriptors, and revised values column, were amended, based on advice of kaumatua. Importantly, the spiritual and intangible dimension for wāhi tūpuna has been updated. Each site now clearly states the spiritual dimension that was at best implicit in earlier iterations.

16 The spiritual dimension forms part of the s6(e) RMA relationships, tikanga and beliefs of Kai Tahū; and has substantial importance, based on kaumatua evidence. Examples of recognition of the spiritual dimension of s6(e) RMA values include the Court of Appeal decision in *Ngawha* (beliefs as to taniwha) decision;[10] *TV3* (spiritual values of ancestral maunga);[11] and the Environment Court's identification that there is no necessary priority between tangible and intangible values, subject to probative evidence.[12]

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inundations arising from major storms where the water extends temporarily beyond the banks. [Footnotes omitted]

[8] Submitter #3207 (E & H Rendel); Submitter #3310 (Glenorchy Trustee Ltd). Both submitters propose deletion of Chapter 39, and reliance or if needed amendment to Chapter 5 (in lieu of a separate Chapter 39), but not specific to this policy).

[9] *Albany North Landowners v Auckland Council* (*supra*) at [148]-[153]

[10] *Friends and Community of Ngawha Inc v Minister of Corrections* [2003] NZRMA 272 (CA)

[11] *TV3 Network Services Ltd v Waikato District Council* [1997] NZRMA 539 (HC)

[12] *Ngāti Whātua Ōrākei* [2019] NZEnvC 184 (subject to appeal, High Court decision pending).

Issue: Case law

(f) Brief submissions referring to case law on the relevance of time and memory to wāhi tūpuna mapping methodology.

17 Whakapapa, time and memory are relevant to identification of ancestral landscapes. This is relevant to s6(b) RMA landscapes, but has equal relevance to s6(e) wāhi tūpuna. Relationships, tikanga and beliefs are intergenerational, and passed forward, as sacred knowledge from ancestors/tipuna to future generations. The Court of Appeal has confirmed that landscapes exist in 4 dimensions, including the dimension of time. [13]

18 This supports Kā Rūnaka's methodology, which identified wāhi tūpuna based on relationships, beliefs and tikanga derived from whakapapa and collective memory: discussed in *Matakana*.[14]

Issue: Amended relief

Whether further amendments to Chapter 39 are recommended by Aukaha's planning experts to address the above matters, and questions raised by Commissioners during Kā Rūnaka's presentation.

19 Addressed above: refer tracked changes prepared by Michael Bathgate in track-changes version of Appendix One to his evidence **(**refer **Attachments)**. .

Nohoaka Panel Question

(iv) Specifically in relation to the listed Nohoaka, the extent to which the mapped wāhi tūpuna extend beyond Crown land and the rationale for the location of the wāhi tūpuna boundaries in each case.

20 Under the Ngāi Tahu Claims Settlement Act 1998, Nohoanga sites are specific areas of Crown owned land adjacent to lakeshores or riverbanks and usually one hectare in size. Ngāi Tahu Whānui have temporary, but exclusive rights to occupy these sites between

[13] *Man O'War Station Ltd v Auckland Council* [2017] NZRMA 121 at [79], [97] (CA)

[14] *Western Bay of Plenty District Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (in relation to recognition of cultural landscapes under s6(b) and the NZCPS):

"[137] The admonition to stand back begs the question of the most appropriate point of view. This is an issue not only of a viewpoint in space but also in time or over a period of time, given the four-dimensional existence of a landscape. Just as a viewer can see a landscape from close up, or in the fore- or middle ground or from a long distance, so the time dimension may be fleeting, or last for few years, or the life of the relevant plan, or for a generation, or over a much longer term: the process elements of a landscape or feature may be appropriately considered over geological epochs. It seems unlikely that there will ever be a single viewpoint or viewing time: that would simply be to adopt a snapshot approach which we understand is not supported by expert opinion (although it seems to be integral to the analysis of preferences using the Q-Sort methodology). So one must stand back conceptually and bring together in one's mind the full range of views, along with whatever one may know of relevant processes and associations which can inform one's understanding of those views."

the middle of August and the end of April each year. There are 72 allocated nohoanga sites within Te Wai Pounamu.

21 The Ngāi Tahu Claims Settlement (Resource Management Consent Notification) Regulations 1999 come into force on 22 April 1999 and expired on 22 April 2019. The regulations required consent authorities to give Te Rūnanga o Ngāi Tahu a summary of every application for a resource consent for activities that—

- were within a statutory area
- were adjacent to a statutory area
- impact directly on a statutory area.

22 The Regulations confirm that buffer areas ("adjacent areas" or areas that "impact directly") may impact exercise and use of nohoaka and statutory acknowledgement areas. The Regulations gave a 20 year window to ensure that these areas were addressed through RMA processes, including plan review processes, to protect their exercise and use. The notified district plan wāhi tūpuna maps include buffers around statutory areas to trigger assessment for relevant activities in adjacent sites. In some cases the nohoaka buffers extend beyond Crown land, but are typically smaller than the full extent of the adjacent cadastral site boundaries. The buffers were mapped in consultation with kaumatua in consideration of possible surrounding activities that could impact on reasonable use of the sites.

23 The Settlement Act and (now expired) Regulations are relevant considerations but do not bind the Panel, in terms of the resource management appropriateness of having modest buffer areas that affect private land. The planning and effects-based rationale, on a site by site basis, is to address interface issues that may affect use and enjoyment of the nohoaka according to customary and contemporary practices. In short, the buffer areas attempt to avoid nuisance or more permanent effects, on directly appurtenant land, absent a resource consent process that allows consideration of the relevant sections 6(e), 7(a) and 8 RMA wāhi tūpuna values.

Summary

24 In summary, it is submitted that the recommended changes to Chapter 39 (including Schedule 39.6), and maps, create greater certainty, and are more appropriate, in terms of the relevant statutory framework. As noted in the application for leave to produce this material:

(a) Responses to relevant questions will ensure that the best evidence is placed before Commissioners to assist in identifying appropriate provisions for Chapter 39;

(b) the issues on which reply are provided are relevant and material issues relating to sections 6(e), 7(a) and 8 RMA, giving effect to the partly operative RPS, and consistency with Chapters 3 & 5 of the District Plan.

Dated this 12th day of August 2020

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Rob Enright
Counsel for Kā Rūnaka

Attachments

1 Reply Version recommended amendments to Schedule 39.6
2 Reply Version recommended amendments to Wāhi tūpuna provisions (Appendix One to Michael Bathgate evidence)
3 Urban Centre Wāhi Tūpuna recommended maps - Take Kārara, Tāhuna, Te Kirikiri
4 Recommended boundary amendments – Paeatararikiki & Timaru, Punatapu, Te Taumata o Hakitekura
5 Recommended amendments to correct river mapping anomalies