

**BEFORE THE HEARING PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

IN THE MATTER of the Resource
Management Act 1991

AND

IN THE MATTER of Hearing Streams 16,
17 and 18 – Stage 3
and 3b Proposed
District Plan

**REPLY LEGAL SUBMISSIONS FOR
QUEENSTOWN LAKES DISTRICT COUNCIL**

Hearing Streams 16, 17 and 18

7 September 2020

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Hearing Panel (**Panel**) regarding legal issues that have arisen during the course of Hearings 16, 17 and 18, and to provide the Council's position on specific issues of a legal nature. It also addresses some of the matters raised by the Panel in its Minute 35 dated 24 August 2020 (**Minute 35**).

1.2 Filed alongside this right of reply are the planning replies of:

- (a) Sarah Picard - Wāhi Tūpuna;
- (b) Luke Place - General Industrial Zone;
- (c) Blair Devlin - Residential and Business Mixed Use Design Guidelines (including updated Design Guidelines);
- (d) Nick Roberts – Three Parks Commercial Zone;
- (e) Craig Barr – Universal Developments (Hāwea) Limited rezoning;
- (f) Elias Mathee – 101 Ballantyne Road;
- (g) Emma Turner – Arthur's Point;
- (h) Amy Bowbyes – Settlement Zone (Text and Lake McKay Partnership Ltd rezoning);
- (i) Rosalind Devlin – Settlement Zone (Rezonings);
- (j) Elizabeth Simpson – Variation Firefighting Water Supply;
- (k) Christine Edgley – Variation to Open Space and Recreation;
- (l) Gabriela Glory – Variation to Glare.

1.3 In addition, the following expert witnesses for the Council have provided reply evidence, which is filed alongside these legal submissions:

- (a) Chris Rossiter (General Industrial Zone, Three Parks Commercial Zone, Rural Visitor Zone and Settlement Zone);
- (b) Matthew Jones (General Industrial Zone, Settlement Zone, Rural Visitor Zone);
- (c) Natalie Hampson (NPS-UD, development capacity and General Industrial Zone);

- (d) Richard Powell (Rural Visitor Zone);
- (e) Andrew Edgar (Rural Visitor Zone); and
- (f) Robert Bond (Rural Visitor Zone and Arthur's Point).

1.4 The Council has also filed alongside these Reply Submissions:

- (a) a copy of the Topic 3, Urban Development, consent order, issued by the Environment Court following the adjournment of the hearing (**Appendix A**);
- (b) word versions of all Stage 3 and 3b notified provisions (a full list is in **Appendix B**) (as directed in paragraph 9 of Minute 34);
- (c) a clean copy of the Council's recommended provisions (a full list is in **Appendix C**) (as directed in paragraph 9 of Minute 34). In relation to the 'clean copy' as requested, it is important to note that Stage 3 consists of notification of 'new' Stage 3 chapters (in which case providing a clean set of recommended provisions is a straight forward task), but also variations to Stage 1 or 2 PDP text. Where the latter, the approach the Council has taken is to show a 'clean marked up version' of the recommendations. The Stage 1 or 2 text remains clean, but the recommended variation in Stage 3 contains some underlined and ~~strike-through~~ text (all in black) so the Panel can clearly differentiate what is Stage 1 and 2, or Stage 3 text;¹
- (d) a copy of Stage 1 and 2 of the PDP, as updated by consent orders as at 7 September 2020 (a full list of the chapters filed is in **Appendix D**) (as requested by the Panel during the Council's opening at the hearing). The PDF chapters of the PDP have been downloaded from the Council's website,² and are the 'consolidated decisions chapter' versions;
- (e) Cases referred to in these legal submissions and not yet provided to the Panel (**Appendix E**); and

1 This is important for the Panel's recommendations and Council decisions, as the Stage 3 decisions cannot change Stage 1 or 2 text. If the underlined and ~~strike-through~~ text was not shown, it would be a difficult comparison for the Panel to understand what the final recommendation on the variation was.

2 <https://www.qldc.govt.nz/your-council/district-plan/proposed-district-plan>

- (f) Drafting proposed to Environment Court to clarify role of Strategic Chapters 4, 5 and 6 in the district plan (**Appendix F**).

1.5 These submissions seek to address matters raised either by the Panel or by submitters where the Council considers that further analysis is required. Otherwise, these submissions do not, and feasibly cannot, respond to the detailed submissions filed by various legal counsel that work through the evidence relative to their particular client's interests, in great detail. The absence of a specific response in these submissions should not be regarded as acceptance of the points made by counsel for submitters. Counsel encourages the Panel to consider and evaluate the evidence before it, as tested through questions asked of witnesses during the course of the hearing.

1.6 Ms Emily Grace's reply, the associated reply of Me Helen Mellsop (which only addresses the Arcadia site) and Council's legal reply on Rural Visitor Zone matters, will be filed on Thursday 10 September 2020.

2. NATIONAL POLICY STATEMENT ON URBAN CAPACITY 2020 (NPS-UD)

2.1 Council filed a memorandum on the NPS-UD on 31 July 2020. Nothing that has been advanced during the course of the hearing by submitters, or in the evidence filed by Council section 42A officers relating to the NPS-UD, changes the views expressed in that memorandum.

2.2 Minute 35 asks at paragraph 3: *Does the Council consider any of the strategic chapter provisions that are the subject of Environment Court Consent orders are now 'out of step' with the National Policy Statement – Urban Development (NPS-UD) – given it came into force on the 20 August 2020? If so, what implications does that have for our recommendations?*

2.3 This matter is addressed in the reply evidence of Mr Craig Barr. His conclusions, which counsel submits are correct, mean that there is only some discrete wording in the Purpose section of Chapter 4, Urban Environment, that could be argued to not give effect to the NPS-UD.

This is the reference to the requirement for the district plan to provide for sufficient development capacity over the medium term, when the new NPS-UD requirement is for the district plan to provide 'at least' sufficient development capacity.

- 2.4** The substance of this difference in terminology is addressed by Ms Natalie Hampson in her reply evidence. Given the sufficiency conclusions in the Queenstown and Wanaka urban environments, it is submitted that the Council is achieving this 'at least' requirement, and there is no change to any of the Council's recommendations in order to give effect to the new NPS-UD. In addition, Mr Barr's evidence is that relevant objectives and policies do give effect to the new NPS-UD.

3. MR NOLAN QC'S SUBMISSIONS REGARDING SCOPE

- 3.1** Minute 35 asks at paragraph 5: *Council is requested to respond to Mr Nolan QC's submissions for Scope Resources Ltd on "scope" as they relate to the additional areas of RVZ (and GIZ) sought by submitters – both generally and specifically.*
- 3.2** The thrust of Mr Nolan QC's submissions is that, if land has been rezoned through an earlier stage of the PDP, then that same land cannot be rezoned to a different land through a submission on a later PDP stage. This argument relies heavily on *Motor Machinist*, and that the plan provisions that apply to the CCCL site were confirmed in Stage 1.
- 3.3** The approach that the Council has taken in Stage 3, is to allow submissions seeking the application of a particular zone chapter that forms part of Stage 3 of the plan review, even if the submission relates to land that has already been through its own (earlier) stage of the review.
- 3.4** Legal submissions in response to Mr Nolan QC's submissions have been filed by:
- (a) Mr Gardner-Hopkins for Gibbston Valley Station and Malaghans Investments Ltd;

- (b) Ms Baker-Galloway for Universal Developments Hāwea Limited;
- (c) Mr Holm for Matakauri Lodge Limited;
- (d) Ms Robb for Barnhill Corporate Trustee Ltd and DE, ME Bunn and LA Green;
- (e) Ms Irving for Corbridge Estate Ltd; and
- (f) Mr Stephen Christensen for Upper Clutha Transport Ltd.

The necessary implication of a zoning being operative, is that it cannot be altered

3.5 Council does not agree with Mr Nolan QC's submission that the necessary implication of a zoning being operative, is that it cannot be altered.³ The *Motor Machinist* case itself, is submitted to lead to the opposite implication. The practical outcome of *Motor Machinist* is that landowners not directly affected by a notified plan change (i.e. land beyond the boundaries of the notified plan change), can lodge a submission that is to be considered "on" the plan change if it is an "incidental or consequential extension" of the zoning change proposed. Such land, by its very nature, will be operative given it is not captured by the boundaries of the notified plan change, yet the High Court has held that submissions on such land should be considered as valid. This means that this "incidental or consequential" land, which will have an operative zoning, may be changed to the proposed zoning of the plan change, by nature of its proximity to the notified plan change.

3.6 The practical implication of the "incidental or consequential extension" in *Motor Machinist* is therefore submitted to mean that Mr Nolan QC's argument that the Council is functus officio, must fail. For the same reason, Council submits that the conclusion in Mr Nolan QC's paragraph 3.6 must be incorrect.

3.7 Council also agrees with Ms Irving's submissions that the fact that the RMA reserves to the Council the right to carry on a sequence of plan changes for the same land as it chooses, shows there is no place for the concept of functus officio to apply to decisions across separate plan

3 At paragraph 3.5, for example.

changes. As Mr Irving submitted, if the concept did apply, it would effectively set in stone planning decisions for all time.⁴

- 3.8** Finally on this point, Mr Nolan QC suggests that through section 86F of the RMA, the PDP Rural Zone rules that currently apply to the CCCL land must be treated as operative. That is incorrect – there are a large number of appeals on the Rural Zone chapter that have not been resolved at this point in time (although a draft consent order is with the Environment Court for its consideration).⁵ Although the zone type itself is beyond appeal for the CCCL site, it does not carry with it a (PDP) Rural Zone where the rules are to be treated as operative. Indeed, none of the Rural Zone throughout the District is being treated by Council as operative at this time.

Other reasons why Mr Nolan QC's approach should not be applied to the CCCL and other similar submissions

- 3.1** What Mr Nolan QC's submissions do not address, is the fact that the General Industrial Zone was not notified in Stage 1 or 2 or the review process, and has been notified in the current Stage 3 (the same rationale applies to the Rural Visitor Zone and the Settlement Zone, which is not repeated). Stage 3 clearly changes the pre-existing status quo as it relates to the General Industrial Zone of the ODP – that includes the provisions that make up the text of the chapter, not just boundaries on plan maps.
- 3.2** Mr Nolan QC's submissions focus on the *Motor Machinist* case. As Mr Gardner-Hopkins has pointed out, the Council's review of its ODP is a very different process to what the High Court was considering in *Motor Machinists*, which was instead a discrete, isolated, plan change which consisted only of a contained area of land. The Queenstown Lakes context is very different to an isolated plan change advanced to address issues arising in one, focused location, being extended to another location. Council refers to and adopts Mr Gardner-Hopkins submissions in relation to the ratio of the *Motor Machinists* decision (at his paragraphs 12 to 22).

⁴ At paragraph 9.

⁵ This draft consent order resolves all appeal points *except* those appeal points on the Assessment Matters in Chapter 21.

3.3 Council also agrees with Mr Gardner-Hopkin’s submissions, that the practical consequences of Mr Nolan QC’s interpretation itself weighs heavily against the approach being correct – in the context of the Queenstown Lakes notified stages of plan changes. As Mr Christensen has pointed out (it is submitted, correctly):⁶

A consequence of the staged approach, combined with the intertwined nature of what the zone provisions say and where in the district they should apply means that as a matter of fairness the approach that the Council has taken, as set out by counsel at paragraph 6.5, is the right one.

3.4 Council submits that Mr Nolan QC’s approach ignores the practical reality of a plan review. The reality is that a plan review cannot separate out the relationship between the spatial element of a plan (i.e. what zones/overlays etc, and where), with what should be allowed for in each of those zones, overlays etc. As Mr Christensen succinctly expresses in his submissions:⁷

The reality of course is that these matters are all closely related and it is unrealistic to think that a district plan can be developed in a disaggregated or unintegrated way that denies the relationship between these considerations ...

3.5 Earlier stages of the plan review can also be distinguished in that zones were being sought that had not yet been notified (for example, in Stage 1, various submitters sought that the ODP RVZ be applied to their land, with no section 32 assessment whatsoever being undertaken of that ODP RVZ. Another example is Willowridge Developments Ltd who sought in Stage 1 a rezoning from Rural Zone to Industrial B Zone. This was rejected (and appealed), and has been notified in Stage 3 as GIZ). In Stage 3, this is the first opportunity persons have had an opportunity to see what the Council’s version of the PDP GIZ looks like.

3.6 Given that Scope Resources has made a further submission and is fully engaged in the hearing, this is submitted to mean that the PDP will

6 At paragraph 10.
7 At paragraphs 7 and 8.

not be amended without real opportunity for participation by those potentially affected.

3.7 For the avoidance of doubt, Council does not consider it makes any difference whether there was a submission and or appeal on a particular site, in an earlier stage of the review. Such a suggestion would be 'picking winners and losers', in Council's submission, and cannot be supported by any case law.

3.8 Council's position remains that in Stage 3, submissions seeking a GIZ, RVZ or Settlement Zone on land not notified in Stage 3, should be considered to be 'on' Stage 3. Some of these submissions fall neatly within the "incidental or consequential extension" from *Motor Machinist*, although noting the facts in that decision (and ratio) are very different to what the Council is considering in Stage 3 of its plan review. Other submissions seeking such zones are considered to have a direct connection with the notified GIZ, RVZ and Settlements Zones, which are new zones being notified in Stage 3 of the PDP and change the pre-existing status quo as these new zones are notified into the 'PDP'.

4. THREE WATERS INFRASTRUCTURE

4.1 During the hearing, the Panel asked some questions about the relevance of infrastructure to a rezoning. Consistent with earlier stages of the plan review, Council's position is that a rezoning request should be declined where an urban zone is sought and no or insufficient capacity currently exists in the infrastructure network and no Long Term Plan provision is made for the relevant infrastructure upgrade that would provide for the additional capacity.⁸

4.2 Certain submitters such as Universal Developments have suggested that the fact that there is no current capacity within Council's reticulated infrastructure or funding for upgrades allocated in the Council's Long Term Plan, should not prevent a rezoning to an urban zone going ahead.

⁸ As set out in Council's Upper Clutha right of reply submissions at 5.2, there were three exceptions relevant to that hearing (none of which are urban zones), being the Rural, Residential and Rural Lifestyle zones, where on-site infrastructure can be privately provided and the zonings are not anticipated to connect to the Council network.

Legal submissions on this, including a summary of relevant case law, were presented in earlier stages of the plan review, including in Hearing Stream 12, Upper Clutha Rezonings. Council refers to and adopts its reply legal submissions at paragraphs 5.7 to 5.14: <https://www.qldc.govt.nz/media/u3ynqthy/s0001-qldc-t12-scotts-reply-legal-submissions.pdf>.

- 4.3** No case law has changed this approach since the Stage 1 Council decisions were issued.
- 4.4** The Independent Hearing Panel in its recommendation report for Hearing Stream 12 referred to Council's legal submissions, and in particular to the Environment Court's decision in *Foreworld Developments Limited v Napier City Council*⁹ where the Court held that it is contrary to the purpose of the Act to zone land for an activity where the necessary infrastructure to allow that activity to occur without adverse environmental effects does not exist and there is no commitment to providing it. The Panel confirmed that no submitters cited authority that would call this decision into question and that it was accepted, as it relates to the provision of access to the Council's infrastructure networks for three waters.¹⁰
- 4.5** The submissions from Corbridge Estates, on the relevance of infrastructure for the Rural Visitor Zone, will be addressed in supplementary reply submissions to be filed separately on the RVZ.

5. WĀHI TŪPUNA (HEARING STREAM 16)

- 5.1** There has been some movement in Ms Picard's recommendations through the course of the hearings as more information and evidence has been provided by Kā Rūnaka, and as Mr Bathgate has recommended further amendments to Chapter 39 and the associated variations. Council wishes to acknowledge the positive approach and constructive engagement Kā Rūnaka has taken to the hearing.

9 W08/2005.
10 <https://www.qldc.govt.nz/media/22dpwwoz/report-16-stream-12-upper-clutha-mapping.pdf> at 87 - 90.

- 5.2** Council's reply recommendations are now largely consistent with Mr Bathgate's position, with the exception of the mapping of Take Kārara, Tāhuna and Te Kirikiri. While Ms Picard is not opposed to the identification of these areas per se, it is the absence of a list of potential threats in the Schedule that is the issue. Without such information, it is Ms Picard's view that there is little clarity as to what effects may be considered adverse. Without mapping, notification of certain resource consents within these areas is not precluded.
- 5.3** Many of these changes reduce the regulatory impact or transactional costs of the Chapter 39 provisions, therefore also responding to various submissions seeking that outcome.

6. DESIGN GUIDES (HEARING STREAM 17)

- 6.1** During the Council's opening, the Panel tested whether the Design Guides, as a document to be incorporated by reference, could be amended through the course of submissions and Council decisions. The questions focused on whether the bespoke process required for documents to be incorporated by reference in Part Three of Schedule 1, meant that once notified, no changes could be made to the incorporated document.
- 6.2** While counsel addressed this matter orally at the hearing, submitting that the RMA does not preclude changes to the incorporated document through submissions and decisions, the issue is covered here in writing to assist the Panel. In summary, Council submits that submitters are entitled to seek changes to documents incorporated by reference, in the normal course of submissions lodged under clause 5 of Schedule 1.
- 6.3** Material incorporated by reference into a plan has "legal effect as part of the plan" (clauses 30(3) and 31). This means section 86B of the RMA applies in the normal way. The material incorporated by reference, which will act as a rule or standard in the plan, does not have legal effect at notification, rather it will only have legal effect once a decision on submissions relating to the rule have been made and publicly notified under clause 10(4) of Schedule 1 (unless one of the

exceptions in section 86B applies, which is not relevant to the Design Guides).

- 6.4** Given a document incorporated by reference has legal effect as part of a plan, clause 6 of Schedule 1 logically applies to it, after notification. This provides that persons may make a submission on 'it' (clause 6), being the plan which includes the incorporated material, and a local authority must then give a decision on the provisions and matters raised in submissions (clause 10). There is nothing in the RMA to suggest that an incorporated document is to be treated differently. Instead, the reference to that material having legal effect as part of the plan, in our submission supports an approach where changes can be made to the incorporated material (as if it were a notified rule).
- 6.5** It is worth considering the context of the requirement to consult in clause 34. Different types of documents are routinely incorporated by reference into plans around New Zealand – some are created specifically for the plan in question (i.e. the Design Guides), whereas other material is very technical and comes, for example, from New Zealand Standards. Any changes to the latter are usually specified in the plan, itself, and therefore could naturally be submitted on.
- 6.6** The pre-notification consultation requirements in the RMA for documents incorporated by reference, are in our submission relatively 'loose' – they give very little direction as to what a Council is to do with any comment received. That is significantly different from the strict guidance in Schedule 1 that applies to submissions and further submissions, around jurisdiction and scope to make changes in response to submissions, section 32AA requirements, the need to apply the *Colonial Vineyards* matters, and so on. None of that applies in the pre-notification 'consultation' process.
- 6.7** In summary it is submitted that taking an approach whereby submitters could not submit on incorporated material, which by its very nature acts as rules / standards in the plan, would be inherently unfair and certainly challenge the public participation principle that is inherent in council's decision making on its policy documents.

Absence of consultation prior to notification not fatal

- 6.8** Clause 34(2) of Schedule 1 states that a local authority must make copies of material proposed to be incorporated by reference available for inspection during working hours for a reasonable period at the offices of the local authority, or make copies of the material available for purchase, before the proposed plan is publicly notified. The local authority must give public notice of this, allow a reasonable opportunity for persons to comment on the proposal to incorporate the proposed material by reference, and “consider any comments they make”. The failure by Council to follow these steps is submitter to not be material to Stage 3, given that clause 34(5) states that a failure to comply with this clause does not invalidate a proposed plan that incorporates material by reference.

Process to recommend further changes to the Design Guides

- 6.9** An updated version of the Design Guides has been provided with the Council’s reply. If the Panel, in its recommendations decide to recommend further changes to the Design Guides, Council respectfully considers the most efficient way to do this could be to issue preliminary direction, with very specific requests for changes to the Council, and it can then have Mr Compton-Moen make the necessary changes, and then any updated version of the Design Guides can be included in the Panel Recommendation Report.

7. GENERAL INDUSTRIAL ZONE (HEARING STREAM 17)

Prohibited activity status

- 7.1** The Panel raised with Council witnesses, whether imposing a prohibited activity status on new Office, Commercial and Retail activities is appropriate, where examples of such activities already lawfully exist within the General Industrial Zone (**GIZ**).
- 7.2** Counsel have searched for case law on this matter and have not been able to identify any authority that concludes, or suggests, that this is an unlawful approach.

7.3 *Coromandel Watchdog*¹¹ remains the leading case on when prohibited activities should be imposed and Council retains its position that the categories identified at paragraph 7.17 of its opening legal submissions apply here, and prohibited activity status is available to the Council. Whether the activity status is 'unusual' in a plan has no relevance to whether it should be applied for a certain activity, there is no case law to support such an argument (as was raised by some submitters during the hearing). In any event, Mr Place's reply evidence sets out that he does not agree with that statement in relation to the PDP.

7.4 Council has not been able to identify any case law that directs or even suggests a prohibited activity status cannot, or should not, be applied to an activity over a certain area of land, where activities of the same nature already lawfully exist within the zone. The Council must apply relevant statutory tests (as summarised in *Colonial Vineyard*).

7.5 The Panel queried whether SP 3.3.8 prevents the prohibited activity status recommended by Mr Place. Our submission on this is that the district plan can only be future looking, it cannot include retrospective requirements and stop a lawfully established activity. In Council's submission, SP 3.3.8 can only be interpreted to apply to *new* non-industrial activities not ancillary to industrial activities.

7.6 SP 3.3.8 states:

Avoid non-industrial activities not ancillary to industrial activities occurring within areas zoned for industrial activities.

7.7 Applying *King Salmon*,¹² 'avoid' means to 'not allow' or 'prevent the occurrence of'. The direction in SP 3.3.8 is clear that non-industrial activities not ancillary to industrial activities (i.e. new standalone office, commercial and retail activities) are to be prevented from occurring within the GIZ. A prohibited activity status achieves the outcome directed by SP 3.3.8.

11 *Coromandel Watchdog of Hauraki Incorporated v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473.

12 *Environmental Defence Society Inc. v New Zealand King Salmon Company Limited* [2014] NZSC 38.

- 7.8** Council's evidence is that it is important that the rapidly growing District moves forward with a clearly identified industrial zone that can accommodate and provide for expected industrial growth. In preparing the PDP, Council must assess the current and future situation, not what has occurred in the past, to ensure sustainable management outcomes.

Cardrona Cattle Company Limited (CCCL)

Sale and Purchase Agreement

- 7.9** CCCL has submitted¹³ that the meaning and application of clause 28 of the Sale and Purchase Agreement is of no relevance to the rezoning submission in question. That submission is agreed with by Council.

Reverse sensitivity

- 7.10** Both CCCL and Scope Resources Limited (**SRL**, a further submitter) have addressed reverse sensitivity effects in their legal submissions. Council agrees with the submission for SRL that reverse sensitivity is a direct effect on SRL that qualify under cl 6(4) of Schedule 1. It is important that planning instruments recognise any potential for reverse sensitivity effects, by applying controls both within a zone and to inter-zonal situations. The latter is possible, given the functions of a territorial authority and the power in s 76(3) to classify an activity even if it does not itself create the actual or potential effect at issue: *Winstone Aggregates Ltd v Papakura DC* EnvC A096/98, followed in *Hill v Matamata-Piako DC* EnvC A065/99.

- 7.11** This appears to be accepted by CCCL (as a matter of law) given the site specific changes to the GIZ that Mr Giddens' advanced at the hearing.

Urban Growth Boundary / scope

- 7.12** In Council's opening submissions, the need for a UGB around a new urban GIZ at this site was raised by Council, alongside a submission

13 Legal submissions for CCCL (Submitter 3349) for Stream 17: General Industrial Zone, 7 August 2020, at para 44.

that a UGB around the GIZ boundary cannot be a consequential amendment to a rezoning request through clause 10(2)(b) of Schedule 1. One of the key reasons for this is that the approach relies on the consequential relief being a ‘bottom up’ approach to plan preparation. CCCL responded to this in its submissions, in summary submitting that:

- (a) The inclusion of a UGB would be a consequential amendment as expressly sought in the original submission: “including but not limited to the maps, issues, objectives, policies, rules, discretions, assessment criteria and explanations that will fully give effect to the matters raised”; and
- (b) The relief falls within clause 10(2) of Schedule 1.

7.13 In terms of (a), while the addition of a UGB to the PDP is a change to the plan maps, Council’s case is that a new UGB should not be a consequential amendment to a rezoning, rather the structure of the Queenstown Lakes PDP is that Chapter 3 provides overarching strategic direction for the District. The Chapter 3 strategic objectives and policies are further elaborated on in Chapters 4 - 6, with Chapter 4 providing more detailed objectives and policies for urban development. The principal role of Chapters 3 – 6 collectively is to provide direction for the more detailed provisions related to zones and specific topics contained elsewhere in the district plan. To be more specific, it is SO 3.2.2.1 and Chapter 4 that provide strategic direction for where and how to consider any extensions to existing UGBs, or where any new UGBs should be located.

7.14 The Court in its Second Interim decision, *Darby Planning Limited Partnership v Queenstown Lakes District Council*¹⁴ directed the Council to provide a draft of its proposed explanatory text to provide for cross referencing across the strategic chapters in accordance with the approach outlined in its earlier legal submissions and to give effect to the Court’s findings at [29] to [32] of the Decision. While the Court has not yet made a final decision on that wording, the drafting that the Council provided is set out in **Appendix F** for the Panel’s assistance.

14 [2020] NZEnvC 40

7.15 SO 3.2.2.1 and the policy direction in Chapter 4 must be the first consideration – that is the plan structure of the Queenstown Lakes district plan. And there is a direct link between Chapter 4 and any amendments to the UGBs (and indeed new UGBs) on the PDP plan maps.

7.16 As can be seen from Objective 4.2.1, and associated Policies 4.2.1.1 through 4.2.1.6, the essential function of UGBs as tools is to manage both the growth of urban areas and location of urban development. By intention, the UGBs are mapped in the PDP to define where urban development should take place within the District. The policies in Chapter 4 provide further elaboration on this direction, including through:

- (a) Policy 4.2.1.2, which directs that urban development be focussed primarily within and adjacent to existing larger areas, and to a lesser extent within and adjacent to smaller urban areas, towns and rural settlements (the CCCL submission does not achieve either of these);
- (b) Policy 4.2.1.3, which directs that, other than urban development within existing towns and rural settlements (which will, in most cases, be zoned as Settlement Zone or some type of Special Zone), all other urban development is avoided outside of the defined UGBs (without a UGB, the Panel cannot grant this rezoning); and
- (c) Policies 4.2.2.21 and 4.2.2.23, which direct that “Rural land outside of the Urban Growth Boundaries is not used for urban development until a change to the Plan amends the Urban Growth Boundary and zones additional land for urban development purposes” (these policies refer first to amending the UGB).

7.17 Regarding clause 10(2), the CCCL submissions¹⁵ accept that a judgement is to be made having considered the internal hierarchy of provisions in the relevant plan. The CCCL submissions also clearly accept that changes not sought in a submission should be made to an equal or lower order provision¹⁶ (our emphasis). The case law in

15 At paragraph 24.
16 At paragraph 25.

support then advanced is *Federated Farmers of New Zealand Inc. (Mackenzie Branch) v Mackenzie District Council*¹⁷. That case does not support a situation where a 'higher order provisions' (i.e. a strategic provision of the PDP) needs to be changed.

- 7.18** In Stage 1 of the plan review when the Coneburn Industrial Zone was approved, the Panel noted the absence of a specific submission and did not apply the UGB as a consequential amendment to the rezoning (nor rely on any general relief in the original submission). Instead, the Panel carefully identified a separate specific submission that provided clear scope for the inclusion of a UGB around the new industrial (urban) zone.¹⁸
- 7.19** For all these reasons and referring also to Council's opening legal submissions, Council does not accept that the drawing of a UGB around a 'rezoning request' falls within the consequential relief in the submission, not within clause 10(2) of Schedule 1 of the RMA.
- 7.20** Even if the Panel is to prefer CCCL's approach, it is submitted that the location of this new UGB fails to achieve SO 3.2.2.1 and Chapter 4 of the PDP, including the policies set out above – for the reasons set out in Mr Place's evidence. Council therefore does not accept CCCL's submission that the zone change is consistent with Chapter 4 of the PDP.

NPS-UD

- 7.21** Counsel for CCCL makes submissions in relation to the NPS-UD from paragraph 77. CCCL have provided no evidence that the rezoning will provide 'significant development capacity', which is necessary before the 'responsive planning' policies of the NPS-UD apply.
- 7.22** CCCL have advanced their rezoning on the basis that waste water and water supply will be supplied by on-site (private) reticulated networks. The consequence of this is interesting, in that the NPS-UD is not triggered. To qualify as 'development capacity', you must be

17 [2014] NZHC 2616.

18 [Report 17.08 Stream 13 Mapping of Coneburn Valley Queenstown Park Jacks Point](#)

'infrastructure ready', as is defined in clause 3.4(3) of the NPS-UD. The definition for each timeframe requires:

- (a) Short term: adequate existing development infrastructure to support the development of the land;
- (b) Medium term: either adequate existing development infrastructure, or funding is identified in a long term plan; or
- (c) Long term: either (a) or (b) applies, or development infrastructure is identified in the council's infrastructure strategy.

7.23 None of the 'infrastructure ready' definitions apply for the CCCL land, and therefore CCCL's reliance on the need to rezone the land to give effect to the NPS-UD, including the new requirement to provide 'at least' sufficient development capacity, is submitted to be incorrect.

8. ARTHURS POINT (HEARING STREAM 18)

Robert Stewart

8.1 Ms Robb's submissions for Robert Stewart address amongst other matters, the natural hazard risk for the site. These submissions respond to two matters:

- (a) That Mr Stewart's tolerance of risk is most relevant; and
- (b) That the community has already accepted the risk to a certain degree, given the land adjacent to Mr Stewart's property to the west and north are subject to the same risk, and is already developed or consented for development.

8.2 It is a matter of national importance to recognise and provide for the management of significant risks from natural hazards, which is a direction that applies to the development of the Queenstown Lakes district plan.

8.3 The Panel in its recommendation report on the Natural Hazards chapter in Stage 2, have already considered Ms Robb's first point.¹⁹

19 <https://www.qldc.govt.nz/media/pikfiows/report-14-stream-10-chapters-2-28.pdf>

The Panel's finding is that the zone in the district plan is indicative of whether the level of risk is acceptable/tolerable, or not. In considering the Chapter 28 use of tolerance levels, the Panel considered among other things, "tolerable to whom?". The following paragraphs are of particular relevance to this conclusion:

506. Because the concept of tolerability originates from the Proposed RPS, we sought to discuss these matters with Mr Henderson [for ORC]. His evidence was that reference to tolerability related to the community's view, as expressed primarily through the zoning of particular land. He acknowledged that there are issues about the reliability of any assessment of community tolerance obtained through the resource consent process given that the ability to make submission is not a reliable guide to community opinion, and neither Council staff nor Commissioners hearing and determining applications could purport as a matter of fact to represent the views of the community at large.

*508. Ultimately, **we think the best answer was the one that Mr Henderson gave us, that tolerability has to be determined in the zoning applied to land**, which will necessarily occur through a public process in which the community has the opportunity to participate.*

*509. Given Mr Henderson's evidence, however, **we think it is important to be clear that the tolerability referred to in this objective relates to what is tolerable to the community, as opposed to what individual landowners might tolerate (particularly where those landowners are effectively making choices for their successors in title)**. To that extent, we accept QAC's submission. An amendment to that effect would mean, however, two references in the same objective to the "community". To improve the English without changing the meaning, we suggest the first reference to be "people".*

- 8.4** A recent Council decision addressed this issue. While not binding on the Council, and under appeal, the Hearing Commissioners appointed by the Whakatane District Council and Bay of Plenty Regional Council, when considering the willingness of some individuals to accept the risk

of future debris flows and remain in their houses, accepted the following evidence:²⁰

Risk is something that applies at all scales but by simply focusing on the individual property scale, the potential exists for cumulative effect on community well-being, services and infrastructure to be over-looked.

Risk assessment of each individual property would be burdensome and focus council's attention on the individual rather than the community as a whole.

- 8.5** The decision then goes on to refer to *Taranaki Energy Watch Inc. v South Taranaki District Council*,²¹ to the effect that residents are not the sole arbiter or risk in a situation where hazard risk is involved.
- 8.6** While not case law, Wendy Saunders' chapter "Natural Hazards Planning" in *Planning Practice in New Zealand* (LexisNexis, Wellington, 2017) covers risk acceptability. Ms Sanders' states at 11.17 that land use planning which takes into account natural hazard risk requires a value judgment, and avenues for the deliberative processes involved in making this value judgment. This needs to include input from affected communities, even though this can be difficult due to differing levels of risk acceptability. At 11.20 Miss Saunders further states the lessons can be learned from the Christchurch District Plan. These include defining level-of-risk terminology and thresholds with input from the community, and ensuring that natural hazard policy development is holistic – all hazards, cumulative and cascading, need to be considered and planned for at the same time during the policy development process.
- 8.7** Ms Robb's second point, that the council has issued resource consents on adjacent land and therefore that should be taken as acceptance of community tolerance, is submitter to be incorrect. This is addressed in Ms Turner's reply evidence. The resource consents were granted under different plan frameworks. One of the resource consents was assessed under the old ODP framework. The other was assessed

20 At paragraph 81.

21 [2020] NZEnvC 18 at [77].

mainly under the ODP and only under the PDP as it related to earthworks. For that reason alone, the resource consents should not reflect the approach this Panel should take to the expert evidence it has before it on the level of risk.

8.8 It is submitted that the Panel should apply the evidence before it, that relates to the land in question. It is the land in question that the Panel must decide an appropriate zone for. The natural hazards assessment taken for the neighbouring land, and the relevance of that assessment to the rezoning of the Stewart land, is also addressed by Mr Robb in his reply evidence.

9. 101 BALLANTYNE ROAD (HEARING STREAM 17)

9.1 At the Hearing, the Panel questioned Council's ability to rely on clause 16 to rezone the access strip at 101 Ballantyne road from General Industrial Zone to Active Sport and Recreation Zone (**ASRZ**), observing potential prejudice to parties due to setback standards that are located in the notified GIZ chapter, which would apply across the adjacent GIZ.

9.2 Council has considered the Panel's comments, and agrees that clause 16(2) is not available in this particular circumstance.

9.3 However, this conclusion is not submitted to be of any consequence to Mr Mathee's recommendation on the appropriate zone of the 'access strip'. Many submitters²² (including Willowridge) supported the *notified* ASRZ for 101 Ballantyne Road. Although the notified maps show 101 Ballantyne Road as ASRZ and the access strip as GIZ, the access strip legally forms part of 101 Ballantyne Road. Council submits that zoning the access strip to ASRZ falls within the scope of submissions

22 Sport Otago Limited (3005.1), Nicole Huddleston (3024.1), Sport Central (3029.1), Aspiring Athletes Club (3037.1), Heidi Hall (3048.1), Ian Hall (3051.1), Diana Schikker (3065.1), Southern District Health Board (3109.11), Upper Clutha Hockey Club Inc. (3127.1), Richard Vorstermans (3131.1), Central Otago Football Association (3140.1), Elizabeth Hadida (3164.1), Orchard Road Holdings Limited (3165.2), Ardmore Property Trust (3167.3), Wanaka Associated Football Club (3195.1), Willowridge Developments Limited (3201.8), Cadence Holdings Limited (3231.2), Upper Clutha Sports Community Trust (3260.1) and Otago Cricket (3263.1).

supporting that 101 Ballantyne Road be zoned ASRZ. Mr Mathee's reply evidence also addresses this matter.

DATED this 7th day of September 2020

A handwritten signature in black ink, appearing to read 'S J Scott / R Mortiaux', positioned above a horizontal line.

S J Scott / R Mortiaux
Counsel for the Queenstown Lakes
District Council

APPENDIX A

Topic 3 Urban Development Environment Court consent order

APPENDIX B

List of notified provisions (word version) provided with Reply Submissions

1.	Chapter 18A. General Industrial Zone
2.	Chapter 19A. Three Parks Commercial Zone
3.	Chapter 46. Rural Visitor Zone
4.	Chapter 20. Settlement Zone
5.	Chapter 39. Wāhi Tūpuna
6.	Variation to Chapter 30 Energy and Utilities
7.	Variation to Chapters 7, 8, 9 Residential Design Guidelines
8.	Variation to Chapters 7, 9, 12, 16 Glare
9.	Variation to Chapters 16 and 31 Business Mixed Use Design Guidelines
10.	Variation to Chapters 21, 22, 23, 24, 38 Firefighting
11.	Variation to Frankton Road Height Control
12.	Variations to Chapters 38, 36, 29 Open Space and Recreation

APPENDIX C

List of clean provisions (word version) provided with Reply Submissions

1.	Chapter 9. High Density Residential
2.	Chapter 18A. General Industrial Zone
3.	Chapter 19A. Three Parks Commercial
4.	Chapter 19B. Three Parks Business
5.	Chapter 20. Settlement Zone
6.	Chapter 39. Wāhi Tūpuna
7.	Variation to Chapters 7, 8, 9 Residential Design Guidelines and Chapters 16 and 31 Business Mixed Use Design Guidelines
8.	Variation to Chapters 7, 9, 12, 16 Glare
9.	Variation to Chapters 21, 22, 23, 24, 38 Firefighting
10.	Variation to Chapters 38, 36, 29 Open Space and Recreation

The clean version of Chapter 30 Energy and Utilities was provided to the Panel separately.

APPENDIX D

List of PDP chapters, updated with Environment Court issued consent orders as at 7 September 2020 (does not include Interim Decisions from Court)

1.	Chapter 1. Introduction
2.	Chapter 2. Definitions
3.	Chapter 3. Strategic Direction
4.	Chapter 4. Urban Development
5.	Chapter 5. Tangata Whenua
6.	Chapter 6. Landscapes and Rural Character
7.	Chapter 7. Lower Density Suburban Residential
8.	Chapter 8. Medium Density Residential
9.	Chapter 9. High Density Residential
10.	Chapter 10. Arrowtown Residential Historic Management Zone
11.	Chapter 11. Large Lot Residential
12.	Chapter 12. Queenstown Town Centre
13.	Chapter 13. Wanaka Town Centre
14.	Chapter 14. Arrowtown Town Centre
15.	Chapter 15. Local Shopping Centre Zone
16.	Chapter 16. Business Mixed Use Zone
17.	Chapter 17. Airport Zone
18.	Chapter 21. Rural Zone
19.	Chapter 22. Rural Residential and Lifestyle
20.	Chapter 23. Gibbston Character Zone
21.	Chapter 24. Wakatipu Basin
22.	Chapter 25. Earthworks
23.	Chapter 26. Historic Heritage
24.	Chapter 27. Subdivision and Development
25.	Chapter 28. Natural Hazards
26.	Chapter 29. Transport

27.	Chapter 30. Energy and Utilities
28.	Chapter 31. Signs
29.	Chapter 32. Protected Trees
30.	Chapter 33. Indigenous Vegetation and Biodiversity
31.	Chapter 34. Wilding Exotic Trees
32.	Chapter 35. Temporary Activities and Relocated Buildings
33.	Chapter 36. Noise
34.	Chapter 37. Designations
35.	Chapter 38. Open Space and Recreation Zones
36.	Chapter 41. Jacks Point Zone
37.	Chapter 42. Waterfall Park
38.	Chapter 43. Millbrook
39.	Chapter 44. Coneburn Industrial Zone

APPENDIX E

Case Law

	Cases referred to by Queenstown Lakes District Council (not already provided to Panel)
1.	<i>Environmental Defence Society Incorporated v New Zealand King Salmon Company Limited</i> [2014] NZSC 38
2.	<i>Federated Farmers of New Zealand Incorporated (Mackenzie Branch) v Mackenzie District Council</i> [2014] NZHC 2616
3.	<i>Foreworld Developments Limited v Napier City Council</i> W08/2005
4.	<i>Hill v Matamata- Piako District Council</i> A065/99
5.	Report and Decisions of the Hearing Commissioners in relation to Proposed Plan Change 1 to the Whakatāne District Plan and Proposed Plan Change 17 to the Bay of Plenty Natural Resources Plan, 26 March 2020
6.	<i>Taranaki Energy Watch Incorporated v South Taranaki District Council</i> [2020] NZEnvC 18
7.	<i>Winstone Aggregates Limited v Papakura District Council</i> A096/98

APPENDIX F

Explanatory Text for Strategic Chapters, provided to Environment Court in Topic 1

Council proposes the following explanatory text be added after the Purpose section in Chapter 1:¹

1.1B Structure of the District Plan

The Council has undertaken the review of the 2007 District Plan by way of a series of plan changes (referred to as a Proposed District Plan), notified in a series of stages from August 2015.

The District Plan consists of two volumes, separated by geographic area, and these areas are categorised by way of separate zones that fall into one of Volume A or Volume B. Volume A is the land that has been reviewed (for convenience referred to as the proposed district plan, until such time it is made operative), while Volume B contains land that to date has not been reviewed.

The relationship between the two volumes is as follows:

- a. Chapter 3 provides overarching strategic direction for the Queenstown Lakes District. The Chapter 3 strategic objectives and policies are further elaborated on in Chapters 4, 5 and 6 that provide more detailed objectives and policies for urban development, tangata whenua and rural landscapes. Chapters 3, 4, 5, and 6 apply district wide over Volume A and Volume B land. Where particular landscape related policies are excluded from identified zones, this is specified within Chapters 3 and 6. The principal role of Chapters 3 - 6 collectively is to provide direction for the more detailed provisions related to zones and specific topics contained elsewhere in the District Plan.*
- b. Volume A consists of the zone and district wide chapters notified as plan changes (referred to as the proposed district plan), that have worked their way through the RMA Schedule 1 process and been made operative pursuant to Clause 17 of Schedule 1 of the RMA.*
- c. Volume B of the District Plan consists of the zone chapters, or specific areas not yet reviewed or notified as the Proposed District Plan, and all relevant parts of the 2007 District Plan district wide chapters that need to remain to regulate district wide issues as they relate specifically to that Volume B zone.*

d. Chapters 3, 4, 5 and 6 have encompassed the 2007 District Plan Section 4 (District Wide Issues) with the exception of the following two objectives:

- Natural Hazards Objective 4.8.3(1) and Policies 1.1 to 1.7 (Section 4.8), which still applies as a relevant district wide objective to Volume B zones.
- Affordable and Community Housing Objective 1 and Policies 1.2 – 1.3 (Section 4.10), which still applies to both Volume A and B zones.

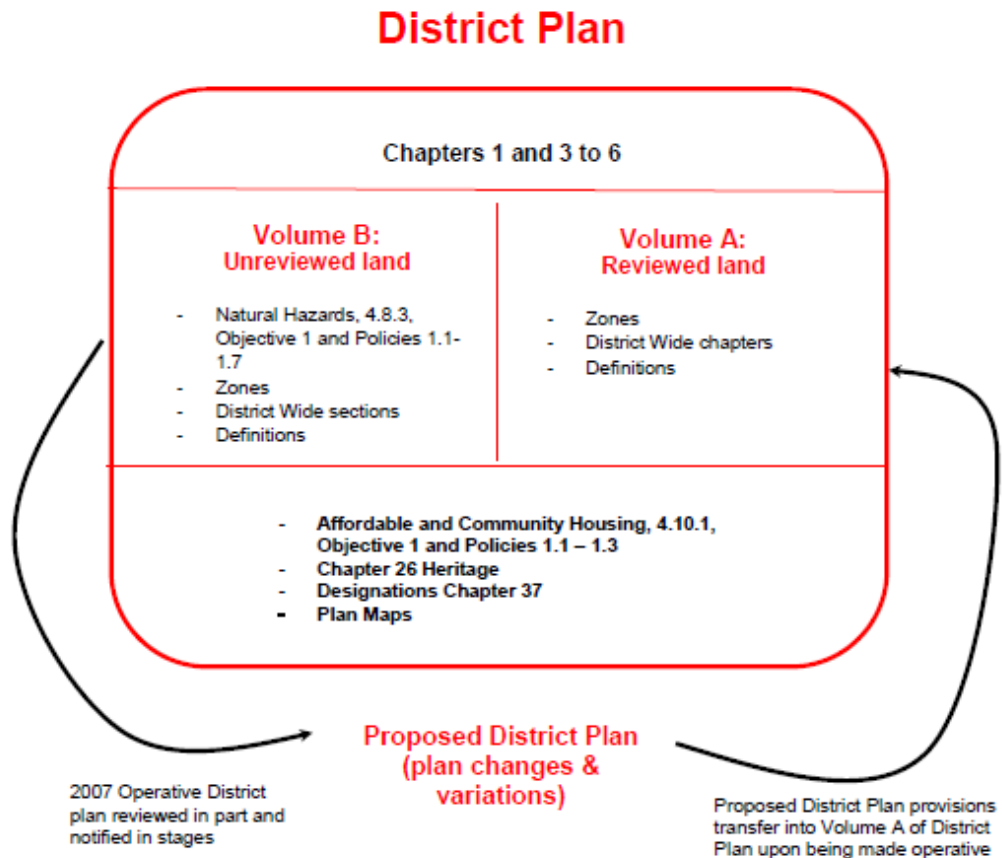
e. There is one designations chapter in the District Plan.

f. The Volume A Heritage Chapter 26 includes listed heritage items. Some of these are located over Volume B land, and therefore Volume A District Wide Chapter 26 applies over Volume B land.

g. The plan maps show both Volume A and Volume B land.

The following diagram shows the Queenstown Lakes District Plan and the relationship between Volume A and Volume B.

[Note: (d) above, second bullet point - the reference to Policy numbers should be Policies 1.1 – 1.3. and the Court is aware of this.]



PDP Chapter 6 (Landscapes and Rural Character)

9. Council proposes the following explanatory text be added under a new heading, "Application of this Chapter", following Section 6.1 (Purpose):⁴

6.1.2 Application of this Chapter

Chapter 1 (Introduction) provides an explanation of the structure of the District Plan including the application of the strategic chapters of the District Plan applying across the Queenstown Lakes District, and the two-volume approach consisting of Volume A and Volume B.

Chapter 3 provides overarching strategic direction for the Queenstown Lakes District. The Chapter 3 strategic objectives and policies are further elaborated on in Chapter 6, which provides more detailed objectives and policies for rural landscapes. Chapter 6 applies district wide over Volume A and Volume B land, with the application of location specific policies as set out in the chapter. The principal role of Chapters 3 to 6 collectively is to provide direction for the more detailed provisions related to zones and specific topics contained elsewhere in the District Plan.

PDP Chapter 4 (Urban Development)

7. Council proposes the following explanatory text be added under a new heading, "Application of this Chapter", following Section 4.1 (Purpose):²

4.1.2 Application of this Chapter

Chapter 1 (Introduction) provides an explanation of the structure of the District Plan including the application of the strategic chapters of the District Plan applying across the Queenstown Lakes District, and the two-volume approach consisting of Volume A and Volume B.

Chapter 3 provides overarching strategic direction for the Queenstown Lakes District. The Chapter 3 strategic objectives and policies are further elaborated on in Chapter 4, which provides more detailed objectives and policies for urban development. Chapter 4 applies district wide over Volume A and Volume B land. The principal role of Chapters 3 to 6 collectively is to provide direction for the more detailed provisions related to zones and specific topics contained elsewhere in the District Plan.

PDP Chapter 5 (Tangata Whenua)

8. Council proposes the following explanatory text be added under a new heading, "Application of this Chapter", following Section 5.1 (Purpose):³

5.1.2 Application of this Chapter

Chapter 1 (Introduction) provides an explanation of the structure of the District Plan including the application of the strategic chapters of the District Plan applying across the Queenstown Lakes District, and the two-volume approach consisting of Volume A and Volume B.

Chapter 3 provides overarching strategic direction for the Queenstown Lakes District. The Chapter 3 strategic objectives and policies are further elaborated on in Chapter 5, which provides more detailed objectives and policies for tangata whenua. Chapter 5 applies district wide over Volume A and Volume B land. The principal role of Chapters 3 to 6 collectively is to provide direction for the more detailed provisions related to zones and specific topics contained elsewhere in the District Plan.

² <https://www.qldc.govt.nz/media/k0mhw3/pdp-decisions-chapter-04-urban-development-june-2019.pdf>
³ <https://www.qldc.govt.nz/media/mzpot5xii/pdp-decisions-chapter-05-tangata-whenua-june-2019.pdf>