

**BEFORE THE QUEENSTOWN LAKES
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

SUPPLEMENTARY LEGAL SUBMISSIONS FOR:

**Ayrburn Farm Estate Limited (430)
Bridesdale Farm Developments Limited (655)
Shotover Country Limited (528)
Mt Cardrona Station Limited (407)**

**[SUPPLEMENTARY ONFL ISSUES]
15 March 2016**

**ANDERSON LLOYD
LAWYERS
QUEENSTOWN**

Solicitor: W P Goldsmith/ R E Hill
(warwick.goldsmith@andersonlloyd.co.nz/
rosie.hill@andersonlloyd.co.nz)

Level 2,
13 Camp Street,
PO Box 201,
QUEENSTOWN 9348
DX ZP95010
Tel 03 450 0700
Fax 03 450 0799

1. Introduction

- 1.1 These Supplementary Legal Submissions are presented on behalf of the Submitters named on the front cover page. Those Submitters have an interest in the identification and management of ONLs and ONFs ("**ONFLs**") within the District.
- 1.2 In particular, these Submissions focus on the appropriateness of notified Objective 3.2.5.1;

"3 Strategic Direction

....

3.2 Goals, Objectives and Policies

3.2.5.1 **Objective** - *Protect the ~~natural character~~ quality of the Outstanding Natural Landscapes and Outstanding Natural Features from subdivision, use and development.*"

- 1.3 Counsel presented to this Panel on 10 March 2016 with respect to this same provision. These Submissions seek to clarify matters raised in the course of that discussion.

2. The effect of King Salmon in determining 'Inappropriate'

- 2.1 Counsel has submitted that the above Objective 3.2.5.1 should be amended by the qualification of 'inappropriate'. The Panel appears to have indicated its reluctance to do so in light of its interpretation of the Supreme Court's determinations of what are 'inappropriate' adverse effects on ONLs in *King Salmon*¹.
- 2.2 The Supreme Court in *King Salmon* made findings as to whether, as a matter of law, the NZCPS² could take a harder line than that provided for in section 6(b) of the RMA, or whether those policies in the NZCPS which were directive in nature (requiring the avoidance of adverse effects on coastal ONFLs) should be qualified by way of an interpretive approach that reflects section 6(b) of the RMA.

¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* SC 82/2013; [2014] NZSC 38; [2014] NZRMA 195.

² New Zealand Coastal Policy Statement 2010, in particular considering policy 15(a) "*avoid adverse effects of activities on outstanding natural features and outstanding natural landscapes in the coastal environment*".

- 2.3 That question helpfully determines the scope of the Supreme Court's findings, and how that relates to the current inquiry before the Panel.
- 2.4 It is submitted that, without trying to over-simplify the findings of the majority Supreme Court decision, *King Salmon* had the following two outcomes (with relevance to the current inquiry)
- (a) Authority that a planning instrument prepared under the RMA can provide a more stringent level of protection than as worded in Part 2; and
 - (b) An interpretation of the meaning of the term 'inappropriate' within section 6(b) RMA in the context of coastal ONLs and the NZCPS.
- 2.5 Subsequent Environment Court decisions, and the Basin Bridge Board of Inquiry decision have distinguished *King Salmon's* interpretation of 'inappropriate' in the context of resource consents and notices of requirement. Those cases are equally applicable to the current situation of a District Plan review, as the immediate statutory context under which the PDP must be considered is only the Operative RPS, the proposed RPS, and the RMA itself.
- 2.6 The Environment Court stated in *Calveley v Kaipara District Council*³ that the requirement to avoid adverse effects was used by the Supreme Court in the specific context of the NZCPS:
- "We understand that submission to draw on observations in King Salmon as to the meaning of a requirement to "avoid adverse effects" in certain policies of the New Zealand Coastal Policy Statement 2010 (NZCPS). However, the Court was careful to note it was interpreting those words in the context of how they were used in that instrument."*⁴
- 2.7 *Calveley* held that the proper interpretation of "inappropriate" when considering a resource consent application was that used by the Court of Appeal in *Powell v Dunedin City Council*⁵ namely, to consider the provision in its immediate plan context.⁶

³ *Calveley v Kaipara District Council* [2014] NZEnvC 182.

⁴ *Ibid* at para 126

⁵ *Powell v Dunedin City Council* [2004] 3 NZLR 721.

⁶ *Calveley* at 128

3. **Giving effect to part 2 RMA**

- 3.1 The Supreme Court in *King Salmon* made its findings on the interpretation of 'absolute' policies based on an understanding that the NZCPS had been prepared by Government following a rigorous analysis under Part 2 of the RMA. Therefore a subsequent plan change in accordance with the NZCPS need not go all the way back to Part 2 RMA in assessing its provisions, so long as it accords with the NZCPS - Part 2 is presumed to be inherent and complied with. That situation is fundamentally different from the current District Plan Review.
- 3.2 Whilst it is possible to provide provisions in the Plan which are more stringent than those in Part 2 RMA, that must be done so after careful analysis and application of the purpose and principles of the RMA. The Panel's role in this inquiry is to seek an optimal outcome of sustainable management. In arriving at such a decision it must be considered whether Objective 3.2.5.1 of the PDP accords with the objectives of sustainable management of Part 2 of the Act and fits well with the various considerations under section 6, section 7, and section 8.
- 3.3 It therefore follows that in achieving the above outcome, substantial analysis and justification for the identification of absolute provisions such as Objective 3.2.5.1 is needed.

4. **Authority for 'absolute objectives'**

- 4.1 The Panel also mentioned the Environment Court case of *Ngati kahungunu* with respect to status of 'goals' within Chapter 3, and as being authority for the provision of 'absolute objectives'.
- 4.2 Similar to *King Salmon*, that case was in the context of a higher order instrument, namely the NPSFM - 2014. That instrument was also similar to the NZCPS, being an instrument produced by central government which has been interpreted as providing for a higher level of protection than that expressed in Part 2.
- 4.3 The interpretation of the Environment Court regarding the regional plan, the subject of that appeal, was to determine that those proposed provisions were inconsistent with the Court's reading of the absolute nature of the requirements of regional councils under section 30 of the Act, and the corresponding interpretation of the NPSFM policies in light

of that. That is importantly different to the current PDP Review for the following reasons;

- (a) Under Section 30(c)(ii) RMA, regional councils are required to '*control the use of land for the purpose of... the maintenance and enhancement of the quality of water in water bodies and coastal water*'.
- (b) The Court's interpretation of that provision was that it was an '*unqualified function*' and in light of the NPSFM Objective A2 which requires that the '*overall quality of fresh water within a region is maintained or improved*'. The Court found that any water body could not be degraded (it had to be improved, or maintained at the least).

- 4.4 The above is quite different to the current context; under Section 31(1)(a) a territorial authority has the following functions for the purpose of giving effect to the Act, in its district;

*"The establishment, implementation, and review of objectives, policies and methods to achieve **integrated management** of the effects of the use, development, or protection of land and associated natural and physical resources of the district."*

- 4.5 That function is quite different from the function examined by the Court in *Ngati Kahungnu*, and is importantly a qualified function, not an absolute one.
- 4.6 The other important difference with the current PDP Review is that it is not subject to the NPSFM, nor the NZCPS, nor any other national instrument which dictates a higher order of protection for ONFLs than that which is contained in section 6(b).
- 4.7 The requirement to provide for 'integrated management' is a term which has been used synonymously with 'sustainable management'; that encompasses all of the qualitative judgments which reside in Part 2 of the RMA; it does not stop at protection. The Panel must therefore apply that assessment to each of the proposed provisions of the PDP. *King Salmon* does not change that statutory requirement, nor does it justify

Objective 3.2.5.1 as currently drafted.

A handwritten signature in black ink, appearing to be 'WP Goldsmith/RE Hill', written in a cursive style.

WP Goldsmith/RE Hill

Counsel Acting