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 11 - Ski Area Sub Zones

LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT COUNCIL AS PART OF COUNCIL'S RIGHT OF REPLY

Hearing Stream 11 – Ski Area Sub Zones

19 May 2017

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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 Hearing Stream 11 (Ski Area Sub Zones), and to provide the Council's position on specific issues.

1.2 Filed alongside this right of reply is the planning reply of Ms Kim Banks. Having considered matters raised and evidence produced during the course of the hearing, Ms Banks' reply (including recommended amendments to Chapters 2, 6 and 21) represents the Council's position.

1.3 Ms Banks' recommended amendments include a number of changes to the text of Chapter 21, one change to Chapter 6 and three changes to Chapter 2. The Council will identify the submissions that have been made on these provisions, and for fairness reasons considers that the Council's right of reply should be served on those that have not already been involved in the Ski Area Sub Zone (**SASZ**) hearing, along with a brief explanation as to whether the Panel will give the submitters a right to respond. Council considers that those submitters should be given an opportunity to lodge a written response (legal submissions or lay submissions) in relation to the Council's suggested amendments to Chapters 2, 6 and 21, and then the Council be given a final opportunity to reply.

1.4 The Council is in the process of compiling this information.

2. RECOMMENDED FRAMEWORK TO ADDRESS SKI AREA ACTIVITIES AND ACTIVITIES UNDERTAKEN OUTSIDE OF SASZ

2.1 The Council's position remains that the extensions of the boundaries of the notified SASZ at Coronet Peak, the Remarkables (Areas A and B) and at Cardrona (excluding the reduced rezoning sought by Soho Ski Area Limited and Blackmans Creek No. 1 LP (**Soho**), which Ms Banks recommends should be accepted) are not necessary nor appropriate. Instead Ms Banks has recommended an amended framework for Ski Area Activities (**SAA**) (including the SAA and Passenger Lift Systems (**PLS**) definitions) outside SASZ, which in

particular is submitted to address NZSki's concerns for The Remarkables Area A, and Coronet.

2.2 The key elements of the recommended amended framework are described in the following paragraphs.

2.3 The definition of SAA is amended to encompass the range of activities associated with SASZs, as follows:

> Means the use of natural and physical resources for ~~the purpose of~~ ~~providing for~~ ~~establishing, operating and maintaining~~ the following activities and structures associated with Ski Area Sub Zones:
>
> (a) recreational activities either commercial or non commercial
>
> (b) ~~chairlifts, t-bars and rope tows to facilitate commercial recreational activities~~ passenger lift systems. Transportation and servicing infrastructure
>
> (c) use of snowgroomers, snowmobiles and 4WD vehicles for support or operational activities.
>
> (d) activities ancillary to commercial recreational activities ~~including, avalanche safety, ski patrol, formation of snow trails and terrain.~~
>
> (e) ~~Installation and operation of~~ snow making infrastructure including reservoirs, pumps and snow makers.
>
> (f) in the Waiorau Snow Farm Ski Area Sub Zone vehicle and product testing activities, being activities designed to test the safety, efficiency and durability of vehicles, their parts and accessories.

2.4 The notified definition contained a list of specific activities. However, because a refined framework for SAA outside of the SASZ is considered necessary, the definition is recommended to be broadened so that it encompasses activities and structures "associated with" SASZ. By replacing specific activities in the definition with broader umbrella terms (for example, replacing "chairlifts, t-bars and rope tows" with "transportation and servicing infrastructure"), a simpler and more flexible framework is created. The status of a SAA is determined under Table 1 (Activities Rural Zone) and Table 7 (Activities within the SASZ).

2.5 The definition of SAA is decoupled from the definition of PLS, by replacing the specific reference to PLS in the SAA definition with a reference to "transportation and servicing infrastructure", and providing a separate definition of PLS, as follows:

> Means any mechanical system used to convey or transport passengers ~~within or to a Ski Area Sub-Zone~~, including chairlifts, gondolas, T-bars and rope tows, and including all moving, fixed and ancillary components of such systems such as towers, pylons, cross arms, pulleys, cables, chairs, cabins, and structures to enable the embarking and disembarking of passengers. Excludes base and terminal buildings.

2.6 PLS are controlled activities within SASZ; controlled activities if directly linking the Mount Cardrona Station Special Zone to the Cardrona SASZ; and restricted discretionary activities as a default status outside SASZ. PLS are also excluded from Table 3 (Standards for Structures and Buildings), because consent is always required for PLS and so matters of control or discretion will apply.

2.7 Rule 21.4.19 is deleted, under which SAA outside SASZ is a non-complying activity.[1] Instead Ms Banks has recommended a new rule (21.4.27A) to specify that some activities (such as commercial and non-commercial recreation) are permitted outside the SASZ. As a consequential amendment, she also recommends deleting "excluding ski area activities" from the definition of "commercial recreational activities". New Rule 21.4.27A contains a Note to clarify that heli-skiing is subject to the Rules for Informal Airports and Table 6.

2.8 A new rule (21.4.27D) will enable the construction of vehicle access or other transport infrastructure as a restricted discretionary activity where that is used to convey passengers to and from SASZ.

1 The deletion of "Passenger Lift Systems, heli-skiing and non-commercial skiing" from Rule 21.4.19 was recommended in Mr Craig Barr's Right of Reply for Chapter 21 (Rural) dated 3 June 2016, in hearing stream 2.

2.9 In summary, it is submitted that the amended framework described above (now recommended by Ms Banks and representing the Council's position), is a simpler, more straightforward framework that addresses the concerns of a number of parties (including NZSki in relation to Coronet Peak) as to the ability to undertake the now recommended definition of SAA, outside of notified SASZ.

Differing frameworks pursued by submitters through submissions and evidence

2.10 During the course of the hearing, counsel for Mount Cardrona Station Limited (**MCSL**) criticised the Council's opening submissions relating to the complexity of the various frameworks being promoted by submitters and the submission that this in itself demonstrates that the SASZ is not designed for the areas of land being pursued by submitters. This submission was clearly made in the context of *all* of the varying frameworks being pursued by submitters considered collectively (not simply in relation to MCSL's case), which can be demonstrated by the fact that the Council was responding to the following suggestions from submitters:

(a) Remarkables Area A: SASZ extension generally, but with a 'no build area' over part of the extended SASZ that precluded buildings, infrastructure and earthworks;

(b) Remarkables Area B: SASZ B, which is directed at providing for buildings and activities that directly support the continued operation of the Remarkables SASZ, but is too low in altitude for SAA to be physically possible.[2] Area B is also sought by NZSki for its potential to provide residential/ visitor accommodation (or as clarified by NZSki at the hearing, specifically worker) for its seasonal staff;[3]

(c) MCSL: SASZ with PLS overlay or corridor shown on planning maps, that allowed for a PLS only as a controlled activity;

(d) Soho: SASZ extension generally, and to amend the rules in Chapter 21 (Rural) to better enable the provision of vehicle access and passenger lift access to both the Cardrona

2 Summary of Evidence of Mr Sean Dent dated 9 May 2017 at paragraph 1.5.
3 Legal submissions for NZSki Limited dated 9 May 2017 at paragraph 8.

SASZ and the Treble Cone SASZ from outside the SASZ;[4] and

(e) Treble Cone: that the primary submission sought a SASZ extension generally, but with a focus on providing for the gondola, and the relief sought had been amended by the time the hearing commenced).

3. EXISTING ENVIRONMENT – THE *HAWTHORN* CONCEPT

3.1 The issue of the *Hawthorn*[5] existing environment concept was addressed by various legal counsel at the hearing, in relation to existing but unimplemented consents that are held for gondolas at Treble Cone, and the Snowfarm (in the Cardrona Valley).

3.2 For Treble Cone, it is relevant to how the existing consent for the gondola is referenced as part of the existing environment when considering the appropriate plan provisions and boundaries. At Cardrona, it is relevant to how the existing consent for the Snowfarm gondola is assessed as part of the existing environment and the potential for cumulative effects.

3.3 Although the Treble Cone consent expires in approximately 1.5 years,[6] Treble Cone submitted that the consent is likely to be implemented, even though they would likely need to make an application to the Council to extend the period after which the consent lapses, and the Council would then need to decide to grant an extension taking into account the matters in s 125(1A)(b) of the RMA. Therefore, whether the consent is likely to be implemented is conditional upon the Council's decision.

3.4 In any event, all experts were alive to the unimplemented consent at Treble Cone and the unimplemented Snowfarm consent at Cardrona in their assessments.

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4 Statement of Supplementary Evidence with Revised Appendix of Mr Christopher Ferguson dated 5 May 2017 at paragraphs 5 and 7. This evidence was received following the hearing.

5 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA).

6 The evidence of Mr John Darby dated 28 March 2017 at paragraph 17 states that resource consent was obtained in 2008 for a gondola. A copy of this consent (RM060587) is attached to the legal submissions of Mr Warwick Goldsmith for Mount Cardrona Station Limited dated 5 May 2017. The consent is dated 4 December 2008 and condition 4 states that the consent shall not lapse until ten years after the date of commencement.

3.5 The intention of Council's submissions on the *Shotover Park*[7] case were to advise the Panel on the correct approach to take in considering whether to apply the *Hawthorn* 'existing environment' concept in a plan preparation context, and confirm the Council's view that case law does not make it mandatory in this context. It was acknowledged during the Council's opening that the written submissions had not identified that the High Court 'kept the door open' in terms of allowing Councils to include unimplemented consents in the 'environment', under s32 and s76 of the RMA. It is accepted that the High Court decision in *Shotover Park* enables this approach, but goes no further.

3.6 Therefore the purpose of the Council's submissions was not to suggest that either of the two existing but unimplemented consents should be ignored for the purposes of a s32 evaluation. This is consistent, as Mr Goldsmith pointed out, with the approach taken by the Council in including existing building platforms obtained under the ODP framework, in its consideration of what is the most appropriate planning framework for the PDP Rural zone.

3.7 Therefore the only difference in legal submissions is whether it is mandatory to apply the *Hawthorn* existing environment concept to a s32 evaluation of what is the most appropriate zone or method to achieve the PDP's strategic objectives.

3.8 The starting point is paragraph [4] of the judgment. In his summary Fogarty J clearly gives one reason for why the Council was not obliged to assume that the environment within PC19 contained the Pak'nSave supermarket and Mitre 10 Mega. The one reason given is "*because when deciding the content of a plan for the future, as distinct from the grant of a particular resource consent, the Court* ***is not obliged to*** *confine "environment" to the "existing environment", as defined in [84] of* Hawthorn." Fogarty J does not state that the reason why the Council was not obliged to assume that the environment within PC19 contained the Pak'nSave and Mitre 10 Mega, was because the consents for those activities were still under appeal and therefore did not meet the likely to be implemented test.

7 *Shotover Park Ltd v Queenstown Lakes District Council* [2013] NZHC 1712.

3.9 In the body of the decision, the High Court goes on to consider the likelihood of implementation concept, after the words (at [117]) "*In any event, **if I am wrong on that point**, the likely to be implemented test in [84] was ….*". Counsel's oral submissions at the hearing were that the rest of the Court's analysis in this section sits under this proviso; that the Court is only giving the analysis about the meaning of "likely to implement", in case it was wrong in deciding (at [115]) that the Court of Appeal in *Hawthorn* intended [84] to be a real world analysis in respect of the application of resource consents, under s 104, not the application of ss 31 and 32. Fogarty J acknowledges that in deciding the plan for the future, there is nothing in the Act intended to constrain a forward-looking thinking, but that statement is not determinative to his previous conclusion that *Hawthorn* [84] was intended to apply to s 104, not ss 31 and 32.

3.10 Ms Baker-Galloway's written submissions at paragraph 29 are that the High Court did not overturn the Environment Court's reasoning, that "*a grant of consent **may** be relevant to an assessment of the environment, which we find **would** include the future environment as it may be modified by the implementation of resource consents…in circumstances where those consents are likely to be implemented…*" (our emphasis added), and her oral submissions were that it is this part of the case that goes to it being mandatory to apply in a plan review context.

3.11 That submission essentially seeks to place a gloss on the Environment Court's first use of the word **may**, by replacing it with **will,** in any circumstances where the consent is "likely to be implemented." Nothing in the Environment Court's reasoning requires Council to follow a two-step process, whereby step one is to ask if the consent is likely to be implemented, and if the answer is yes, step two is that the consent **must** be considered as part of the environment. Put another way, there is nothing to suggest that imposing a gloss to transform **may** to **will** is required to make sense of the reasoning. This approach also ignores the clear summary of the High Court judgment, which is that when deciding the content of a plan for the future, as distinct from the grant of a particular resource

consent, the Court **is not obliged to** confine "environment" to the "existing environment", as defined in [84] of *Hawthorn*."

3.12 As to the Environment Court case of *Milford Centre v Auckland Council*[8] (cited by Ms Baker-Galloway at paragraph 30 for the proposition that *Hawthorn* applies to plan changes)*, Shotover Park* is the higher authority. Similarly, *Re Auckland Council*[9] (cited by counsel at paragraph 32) is an Environment Court case and is therefore not binding on this Panel.

3.13 The Council submits that it is placing undue strain on *Shotover Park,* a decision that turned very much on specific facts, to stretch it into a mandatory two step test for plan preparation. The language of the decision does not support a cut-and-dried approach. Rather, *Shotover Park* and the other cases cited by counsel all indicate that the "likelihood" test is key (as all counsel accepted at the hearing). *Shotover Park* went no further than that.

3.14 In any event, Council submits this is immaterial to the Council's recommendations, as all evidence considered the relevance of the existing consents, as likely to be implemented.

3.15 Further, in relation to the Treble Cone submission and again this now appears moot given Treble Cone provided amended relief, even if an existing but unimplemented consent is part of the 'environment' under ss 31 and 32, it is the Council's position that it does not automatically follow that there is an obligation to provide a statutory framework for it, particularly if there is a disjoint between what is authorised by consent and strong or directive objectives and policies in the plan.

3.16 For example, it would not be appropriate to provide for large-scale office activities in a residentially zoned area, simply because someone had an existing but unimplemented non complying consent. It would be even more inappropriate to provide this, if there was a strong centres-based commercial approach within the objectives and policies of the plan. In summary, the Council accepts that it is

8 *Milford Centre v Auckland Council* [2014] NZEnvC 23.
9 *Re Auckland Council* [2016] NZEnvC 65.

appropriate to have regard to the consent, but that consent should not necessarily dictate the planning framework.

4. THE REMARKABLES – AREA A - BOUNDARY WITH UPPER CLUTHA DISTRICT COUNCIL

4.1 Ms Banks in her reply evidence notes that NZSki's evidence was prepared using Council's webmaps, which showed the District boundary incorrectly.[10] Ms Banks has attached a map as Appendix 3 to her reply, illustrating the area of NZSki's rezoning submission for Area A that lies within the QLDC District and is therefore within the Panel's jurisdiction.

4.2 NZSki continues to seek rezoning to SASZ for the area that is within scope of this hearing. However, Ms Banks maintains her view that the rezoning is unnecessary in light of her recommended amendments to the planning framework. In particular, Ms Banks has recommended a new rule (21.4.27A) to specify that particular SAA, including commercial recreation, avalanche control and ski patrol, are permitted outside the SASZ. This new rule recognises and provides for SAA in the area sought to be rezoned.

4.1 The Council's position is that Ms Banks' recommended amended framework is the most appropriate for this area and that it should remain Rural zoned. As noted above at paragraph 2.9, the revised framework for SAA outside the SASZ is a simpler, more straightforward way of addressing the concerns of more parties. The Council submits that the Rural zone is the most appropriate for that part of Area A within the Panel's jurisdiction.[11]

10 See also Mr Sean Dent's Response to the Panel Regarding CODC and QLDC Territorial Boundary dated 17 May 2017.

11 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55. See also paragraph 1.4 of the Council's opening legal submissions dated 4 May 2017.

5. THE REMARKABLES – SASZ AREA 2 / AREA B - INFRASTRUCTURE

5.1 As noted at paragraph 2.10(b) above, the rezoning sought for Area B (at the base of the Remarkables access road) is intended to provide for buildings and activities to support the operation of the Remarkables SASZ, including residential / visitor accommodation for staff. Mr Dent acknowledged at the hearing that NZSki was pursuing something more in the nature of a special or bespoke zone, that related to SAA at the Remarkables, and that provision for workers accommodation was an important component.

5.2 Council's position remains that it is not appropriate to rezone Area B to SASZ. Ms Banks' view is that the Rural zone is more appropriate to manage the range of possible effects that could arise. However, Ms Banks recognises the need to provide for some degree of buildings and activities in this area, within the Rural framework. Accordingly she has recommended a new policy (21.2.9.9) under which regard must be had to the role of commercial activities and worker accommodation in supporting the future growth and development of ski field operations in SASZ. This new policy will sit under Objective 21.2.9, requiring that such activities do not degrade landscape values or impinge upon permitted and established activities in the Rural Zone. Ms Banks has also recommended an amendment to Policy 21.2.6.5 to provide for visitor and worker accommodation within SASZ or associated with SAA. The Council submits that Area B is most appropriately zoned Rural, within an amended policy framework providing more recognition of visitor and worker accommodation.

5.3 Counsel for NZSki acknowledged at the hearing that the developer of Area B would need to provide on-site infrastructure. If the Council accepts a proposed rezoning where specific information about infrastructure and servicing has not been provided, the Council is concerned that both the submitter and the public will assume the Council will ultimately provide the required infrastructure in its long term plan (**LTP**). As noted in Mr Glasner's rebuttal evidence, the Council has no plans to provide services to Area B.

5.4 The Council's position remains that the proposed rezoning of Area B should be rejected.

6. MOUNT CARDRONA STATION LIMITED (MCSL)

6.1 As noted at paragraphs 2.1-2.9, Ms Banks has recommended an amended planning framework for SAA outside the SASZ. Key elements of this framework in relation to the submission of MCSL are a separate definition for PLS (decoupled from the SAA definition), and a new rule (21.4.27B) under which a PLS connecting the Mount Cardrona Station Special Zone (**MCSSZ**) to the Cardrona SASZ becomes a controlled activity.

6.2 The Council submits that a site specific, controlled activity rule is more appropriate in this particular location, than extending the SASZ to cover the PLS corridor as sought by MCSL. This is because in Ms Banks' view, extending the SASZ at this low elevation to join with a zone that enables urban activities (the MCSSZ) is inappropriate and could set a precedent for a similar outcome in other locations.

6.3 The new controlled activity rule is consistent with Objective 21.2.6, which Ms Banks has recommended should provide for the future growth, development and consolidation of SAA ‘and’ SASZ. Inclusion of the word "and" enables this objective to apply to activities outside the SAA. Policy 21.2.6.4 (providing for appropriate means of transport to and within SASZ) also supports the new controlled activity rule.

7. REZONING SOUGHT BY SOHO AT CARDRONA SASZ

7.1 At the hearing, Soho reduced the extent of the rezoning sought, to 181ha within the upper reaches of Callaghan's Creek and Blackmans Creek Basin. Ms Banks has reviewed her position and she now supports this rezoning, provided it remains fully outside the boundaries of the QEII Mana Whenua (Open Space) Covenant adjoining the Cardrona SASZ. Ms Banks considers that the reduced scale and elevation of the rezoning sought is a better fit with the purpose of the SASZ. A map of the area recommended to be

rezoned is provided within Ms Banks' s32AA evaluation, attached as **Appendix 2** to her Right of Reply.

DATED this 19th day of May 2017

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