Before the Queenstown Lakes District Council

In the matter of	The Resource Management Act 1991
And	A requested change to the Northlake Special Zone of the Queenstown Lakes District Council's Operative District Plan – Plan Change 53 (PC53)

CLOSING LEGAL SUBMISSIONS for

Northlake Investments Limited

Dated 21 June 2018

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MAY IT PLEASE THE PANEL

Summary

1. As with the Opening Legal Submissions for NIL, these Closing Submissions only address the provision for a supermarket. The other aspects of PC53 are left to be dealt with and resolved in accordance with the evidence presented, the questions asked and the responses given at the hearing.

2. Following the presentation of the cases for the Submitters, and having considered the comments from Council staff and consultants, NIL's primary position remains that:

    a. On the evidence presented the Panel can reasonably conclude that PC53 can appropriately be approved, as notified, subject to minor amendments to the retail rule which have not and could not be challenged on jurisdictional grounds, and without any amendment to the NSZ objectives and policies;

    b. If considered desirable or necessary, one or two minor amendments could be made to one or two NSZ policies;

    c. Such minor policy amendment(s), if considered desirable or necessary, would be within jurisdiction;

    d. The above submissions are supported by reasons canvassed in detail in the Opening Legal Submissions for NIL which will not be repeated in these Closing Submissions.

3. It became clear from the presentation of the case for WDL/CLHL, and from the comments by Mr Barr, that the primary concern motivating the case for WDL/CLHL and the policy amendments promoted by Mr Barr is less a concern about the proposed small Northlake supermarket on its own and more a future concern, being that PC53 is somehow a 'stalking horse' for future retail and/or commercial expansion. I submit that this future concern is theoretical rather than actual, for two reasons.

4. The first reason arises from the evidence by Mr Bretherton for NIL. It is accepted that Activity Area AAD1 contains a relatively large area. However the reality is that it has now been masterplanned, the proposed commercial/community centre is now surrounded by titled and sold residential lots, and the proposed commercial/community centre itself contains only three small blocks of land surrounded by existing streets. The practical likelihood of that small commercial/community centre expanding is remote.

5. That 'remoteness' would be reinforced if the retail rule were to be further amended, as suggested by the Requestor, to limit the location of the 1,250m² supermarket to one of Lots 1005 and 1006, DP515015 CFR's 803942 and 803943.

6. The second reason arises from Mr Barr's reference to the possibility of the additional 4.2ha AAD1 extension (being sought through PC53) which could theoretically be developed for commercial activities. Mr Barr's concern about that possibility resulted in his recommended commercial GFA limits. I acknowledge the validity of that concern, but I submit that it can easily be dealt with in a different way if that is a significant concern to the Panel. I return to this point later in these submissions.

Real world facts

7. There is a danger of this hearing, and the consequential decision, 'growing legs' beyond what is required or appropriate. The primary purpose of (this component of) PC53 is to enable a small supermarket of maximum size 1,250m² GFA. That is clearly set out in PC53. To the extent that PC53 theoretically goes further, beyond what NIL seeks to achieve or is ever likely to want to achieve, is an issue I return to below when I suggest additional methods of addressing some unnecessary concerns which have been raised.

8. It is important that the various opinions about potential effects be grounded in factual reality. The existing Wanaka New World is 2,100m². The proposed Northlake supermarket, at 1,250m², is only 60% of that size. The obvious consequence, given that a supermarket tends to try and provide as broad a range of food and other household goods as can be achieved within the space available, is a reduction in the variety of goods being sold. For example, the planned new 4,353m² New World supermarket at Three Parks might have on display 20 different kinds of crackers whereas a 1,250m² supermarket may only have room for five different kinds of crackers. That difference is important, to the extent that some customers may be content with the smaller range on occasion but may still travel to the larger supermarket with the larger range on other occasions.

9. In addition there is an obvious competitive element. Mr Polkinghorne noted that there are limited competitive constraints in the Wanaka food retail market without PC53. Foodstuffs' already dominant position will be strengthened by the proposed New World at Three Parks, with the main competition provided by the small Mediterranean Foods market and by consumers' ability to make the hour-long trip to Frankton to access the various food retailers there. In this scenario, Foodstuffs has every incentive to charge higher prices in Wanaka. With a supermarket at Northlake, Foodstuffs is less able to do so. This benefit of lower prices will be felt by everyone at Wanaka, whether they shop at Northlake or not. In other words, an additional smaller supermarket helps to keep the larger supermarkets honest.

10. Evidence has been presented by Ms Devlin for WDL about the range of other attractions which exist or are being developed at Three Parks, including the existing Recreation Centre, the swimming pool about to open (or just opened), the new primary school which has been announced and will be under construction shortly,

and the new road link through to a roundabout on the SH84 entrance to Wanaka which will provide a direct link for North Wanaka residents through to Three Parks. Those separate attractions must have a real impact on the choices made by Wanaka consumers.

11. Developing the previous point, one could draw a line through the wider Wanaka catchment between Three Parks and the Northlake commercial centre, so that the two centres are equally distant from the line. There is no obvious reason to suggest that any resident (or visitor) located south of that line would choose to drive an equal or longer distance to the Northlake supermarket rather than drive an equal or shorter distance to Three Parks. However there are a number of reasons to suggest that many residents (and visitors) located north of that line would choose to drive the longer distance to Three Parks, those reasons being the wider range of supermarket offerings and/or the other LFRs and smaller retail offerings which will develop around the New World and/or the other community attractions near Three Parks detailed above.

12. There will however be a percentage of North Wanaka residents (and visitors) who will choose, on occasion, to drive the shorter distance to the Northlake supermarket. The questions put by the Panel to Mr Polkinghorne relating to 'top up' shopping, and Mr Polkinghorne's answers, go directly to this point. Indeed Mr Polkinghorne advised the Panel of a current trend of supermarket operators opening smaller supermarket retail outlets within suburbs or smaller neighbourhoods in response to this customer move towards 'top up' shopping rather than the traditional major weekly or fortnightly supermarket spend.

13. The fundamental factual question for the Panel is whether the evidence supports a conclusion that that proportion of North Wanaka 'top up' supermarket shopping trips will undermine Three Parks. I submit that the evidence simply does not support that conclusion.

Effects

14. The evidence clearly establishes a range of positive benefits arising from PC53 including greater convenience for North Wanaka residents, increased jobs, cost and emission savings through shorter road trips for 'top up' grocery-type spending, an increased chance of actually establishing a viable small community/commercial centre within Northlake, greater potential for car trips to become bicycle trips or walking trips, and a degree of increased competition in the food retail market in Wanaka. No evidence challenges those benefits. Ms Hampson assesses those benefits as "*minor*"[1]. That assessment is purely an economic assessment. It is at

[1] Evidence Summary & Rebuttal of Natalie Hampson, dated 6 June 2018, at paragraphs 15 and 16

least possible, if not probable, that Northlake and North Wanaka residents might consider those benefits to be more than minor.

15. The extent of potential adverse effects arising from PC53, as established through the evidence, is very limited. All the experts agree that there will be no adverse effect on the Wanaka CBD. A range of somewhat contradictory opinions was expressed about potential effects on Anderson Heights but, whatever effects might actually arise, there was no evidence establishing that such effects would be adverse (as opposed to a possible change in the way Anderson Heights redevelops in the future). Mr Polkinghorne and Ms Hampson were adamant that there would be no adverse effects on Three Parks. The only potential adverse effects on Three Parks identified by Mr Copeland, in his pre-circulated evidence, was a potential delay in the establishment of a second supermarket in Three Parks[2]. In particular that evidence did not identify or suggest any potential adverse effect on the establishment of the first (New World) supermarket at Three Parks or the establishment of the other LFR and smaller retail outlets likely to cluster around that first supermarket.

16. In her Legal Submissions, Ms Macdonald sought to amend and extend Mr Copeland's evidence when she stated[3]:

> "*The evidence of Mr Copeland concludes that there is a potential effect on Three Parks and Anderson Heights that extends beyond trade competition effects (i.e. effects on the amenity and vitality of the centres). While in a best case scenario this may only defer the arrival of a second supermarket at the Three Parks centre (in addition to the one which is imminent), a second supermarket does create a critical mass of activity at Three Parks.*"

17. With respect to Ms Macdonald:

    a. Mr Copeland's written evidence does not use the phrase "*best case scenario*". Mr Copeland's evidence could equally be read as that being a worst case scenario.

    b. While Mr Copeland's evidence refers to a reduction in agglomeration benefits[4], his evidence cannot be read as stating that a second supermarket will "*create*" a critical mass of activity at Three Parks. The best that can be said is that it would add to the critical mass at Three Parks, which is a very different proposition.

18. Under direct questioning from the Commissioners, Mr Copeland extended his assessment of adverse effects somewhat. I submit that the manner of that extension, and how it was arrived at, is a classic example of how careful the Panel must be when

[2] As summarised in Opening Legal Submissions for NIL, at paragraphs 42-47
[3] Legal Submissions of Jayne Macdonald, dated 5 June 2018, at paragraph 45(b)
[4] Evidence of Mr Copeland dated 25 May 2018 at paragraph 5.6(e)

differentiating trade competition effects from more adverse effects which go beyond trade competition.

19. Commissioner Mead questioned Mr Copeland about his various references to "*potentially*" and "*may*". When pressed by Commissioner Mead, Mr Copeland identified an additional potential adverse effect, being that the likelihood of a Briscoes establishing alongside the proposed New World supermarket might be affected by a reduced level of foot traffic if the Northlake supermarket resulted in reduced foot traffic visiting the New World. In response to that comment I submit:

    a. It must follow that any trade competition effect will affect foot traffic. If there is no reduction in foot traffic, there is no trade competition effect. Effectively all Mr Copeland is identifying is a trade competition effect. His evidence does not establish, whether quantitatively or qualitatively, any adverse effect which goes beyond trade competition.

    b. If this potential adverse effect were genuinely a possibility, the one person who would know about it (and could be expected to give evidence about it) is WDL. Not only is that not the case, but the opposite is the case. In her evidence for WDL Ms Devlin stated[5]:

> "*Now that the supermarket has been confirmed as an anchor retailer, Willowridge is in talks with a number of other commercial operators wishing to acquire land or premises in the commercial core and several building designs are underway. Willowridge has engaged consultants to begin preparing a health check and needs assessment in order to release more retail floor space because the 10,000m² threshold will be met quickly.*"

20. Ms Devlin's evidence was obviously prepared within the week or two prior to the hearing, as it was not included in pre-circulated evidence. PC53 was publicly notified on 18 January 2018. If this potential alleged adverse effect was real, one would have expected direct evidence of it. No such evidence has been presented.

21. Commissioner Whitney then specifically pressed Mr Copeland as to whether the Northlake supermarket would undermine Three Parks. Mr Copeland's response was that it would not undermine the economic or financial viability of Three Parks but it could undermine the vitality and vibrancy of Three Parks through lower pedestrian counts. Once again, Mr Copeland failed to distinguish between trade competition effects (which, as stated above, must affect pedestrian counts) compared to more significant adverse effects which would undermine Three Parks to an extent beyond trade competition.

[5] Evidence of Alison Devlin for WDL, dated 7 June 2018, at paragraph 3.7

22. When pressed further by Commissioner Whitney, Mr Copeland stated that if the trading performance of New World is significantly reduced, that would affect (presumably the timing of establishment of) Briscoes and, when pressed even further, Mr Copeland expressed the view that a Northlake supermarket would significantly reduce the trading performance of New World. Quite apart from whether that would still be just trade competition (which I submit it would be), Mr Copeland gave no evidentiary analysis of how he arrived at that opinion in general, or in particular as to how a small 1,250m² supermarket would or could significantly reduce the performance of a 4,300m² supermarket only a matter of 3km away.

23. In respect of those questions put to Mr Copeland, and the responses from Mr Copeland detailed above, I submit:

    a. It must be significant that those suddenly identified additional potential adverse effects were not mentioned in Mr Copeland's written evidence. All experts and counsel in this case are aware of the trade competition issue. To establish an adverse effect which goes beyond trade competition, WDL must establish that the Northlake supermarket will undermine Three Parks. It defies belief that Mr Copeland would have been aware of those potential alleged effects and would not have mentioned them in his written evidence.

    b. Witnesses can be put in a very difficult position when asked very specific questions, the answers to which will either support their client's case or alternatively significantly undermine their client's case. Pressure to provide the right answer (for the client) is significant.

    c. Given the directive RMA requirement that the effects of trade competition "*must*" not be taken into account,[6] the Panel should consider very carefully before placing any weight at all, let alone significant weight, on those particular answers extracted from Mr Copeland under questioning.

24. In addition, I note that the introduction of these additional alleged potential adverse effects by Mr Copeland under questioning by the Panel means that Mr Polkinghorne has not had the opportunity to respond to them. However I submit that Mr Polkinghorne's firm opinion about the lack of adverse effects on Three Parks (beyond trade competition effects) constitutes an adequate evidentiary response.

Response to comments by Council officers/consultants

Natalie Hampson – Evidence Summary & Rebuttal Dated 6 June 2018

25. In paragraph 4 Ms Hampson refers to the separate increase of 250m² GFA of retail floor space which she refers to as an increase in scale which will enable the centre to more effectively attract customers from a far wider catchment than was intended

[6] Section 74(3) RMA

by the policies of the zone. Putting to one side the fact that this appears to be more a planning comment than a retail comment and therefore outside Ms Hampson's professional expertise, I note this was the first time this issue was raised during the hearing. I acknowledge there has been no evidence directly addressing that component of PC53 separately. The figure probably arises from a 'rounding' of the overall retail GFA to 2,500m². This issue is of no particular concern to NIL. If the issue causes the Panel any concern, NIL would not oppose removing that element of PC53 and capping the overall retail GFA at 2,250m².

26. In her paragraph 8 Ms Hampson states "*I disagree with Mr Goldsmith that demand is irrelevant*". She then goes on to make a number of generic statements about demand. With respect, I think that Ms Hampson has missed the point I was making. My point was actually fairly similar to the general point she makes in her paragraph 8, being that provision of excessive zoning capacity in the absence of demand may have adverse effects that go beyond trade competition effects. The only evidence of adverse retail effect in this case is the possibility of deterring or delaying a second supermarket in Three Parks. Even that evidence did not address the likelihood of a competing supermarket being allowed to establish within Three Parks, and was silent on the existence or otherwise of any contractual limitations which might affect that likelihood. In that factual context, I submit that the various conflicting assessments of demand are of little help to the Panel, and that the conflict does not need to be resolved.

27. In her paragraph 10 Ms Hampson states "*Mr Goldsmith also claimed that based on "retail economics" small scale food retail outlets would either be unlikely to be attracted to Northlake Village or would not be viable*". Again with respect to Ms Hampson, I made no such statement. In paragraph 56 of my Opening Submissions I posited two questions which I suggested that the Panel may wish to put to the retail experts, the first relating to the real likelihood of six small shops eventuating and the second relating to the difference between six small shops and one large shop.

28. In her paragraph 10 Ms Hampson responds to the first question by referring to various other existing 'convenience neighbourhood centres' and finishing with a statement that Northlake Village could sustain several small scale food retail stores. Again with respect, I suggest Ms Hampson has not differentiated between existing convenience neighbourhood retail centres, of which there are many in New Zealand, and establishing an entirely new convenience neighbourhood centre within a new development where somebody has to be the first small retailer to take the market risk. If examined in detail those could be two different propositions. I note Mr Polkinghorne expresses the opinion that a single small supermarket, providing a generally similar retail offering to a combination of smaller stores, is more likely to be viable and

therefore has more potential to benefit the community[7]. I see no need to take this point any further.

29. Of greater significance, I submit, is the fact that Ms Hampson failed to respond to my second question in any way, and provided no explanation of the difference between six small shops and one larger shop providing virtually the same range of retail offerings. Interestingly, the only person to whom that question was put (according to my notes) was Ms Macdonald who acknowledged that there was little or no difference between those two scenarios (again according to my notes).

30. The Panel noted Ms Hampson's focus on issues, and expression of opinions, which one would expect to fall within the expertise of a planner rather than a retail or economics expert. Despite that being pointed out to her, when subsequently questioned by the Panel specifically about potential effects (of the Northlake supermarket) on the vitality and amenity of other centres, Ms Hansen's response was that the Northlake supermarket would be "*in direct conflict with the policy framework*". She did not provide a response to the question within her expertise, and did not identify any potential adverse effects on the vitality and amenity of other centres.

31. On the contrary, what I submit is the most significant aspect of Ms Hampson's comments for the purposes of the outcome of this hearing can be found in her paragraph 13 where she reaffirmed the opinion expressed in her pre-circulated evidence that the Northlake supermarket would not undermine Three Parks. She emphasised that point verbally when she expressed a high degree of confidence in the future performance of Three Parks, in part because of the other community activity centres which will form part of the same cluster of activities (recreation centre, swimming pool, primary school).

Craig Barr – "Summary of matters raised at the hearing" dated 8 June 2018

32. My summary assessment of Mr Barr's s42A Report and his Summary Comments following the hearing is that he agrees with the effects assessment which I have summarised above, he considers it desirable and appropriate to enable the Northlake supermarket, he does not think that can be achieved within the existing policy framework, and he has recommended a number of amendments to objectives and policies which he considers appropriate in order to enable the PC53 outcome.

33. With one exception, NIL has no difficulty with Mr Barr's recommended amendments. There may be more scope available than I suggested in my Opening Submissions. I address the issue of jurisdiction below.

34. The one exception to the position stated in the previous paragraph is Mr Barr's recommendation to introduce GFA limits on commercial activities. NIL's concern there arises from the very wide definition of "*commercial activities*". For example,

[7] Summary Evidence of Mr Polkinghorne dated 17 May 2018, at paragraph 113 on page 15

restaurants are a subset of retail activities which are a subset of commercial activities. If Mr Barr's recommended commercial GFA limits were now inserted into the NSZ, it is unlikely NIL could even develop the three blocks which NIL wishes to develop as Northlake's community/commercial centre (in the manner explained by Mr Bretherton in his evidence).

35. To be fair to Mr Barr, I believe he acknowledged in response to a question from the Panel that there was probably no jurisdiction to insert commercial GFA limits in relation to all of AAD1, but he contended that there would be jurisdiction to insert some form of commercial GFA element or control applicable to the 4.2ha extension of AAD1. It will be clear from the evidence of Mr Bretherton that NIL has no intention whatsoever of pursuing commercial activities (other than potentially a retirement village which, by definition, is a commercial activity as well as a residential activity) within that 4.2ha extension of AAD1. That area is intended for medium density residential activity and/or a retirement village. However I acknowledge that the theoretical possibility of commercial development in that area arises as a consequence of PC43.

36. Counsel has given some thought to how to address that theoretical concern. It appears to Counsel that a relatively straightforward consequential amendment could fully address that concern. Rather than Activity Area AAD1 being expanded to include that additional 4.2ha area, a new AAD2 could be created which just contains that expanded 4.2ha area and which differs from AAD1 only to the extent of the exclusion of commercial activities (other than a retirement village). I see no jurisdictional concern about such an amendment as it would arise directly from concerns expressed in the s42A Report and in the presentation of the case for WDL and CLHL.

37. If the suggestion in the previous paragraph were to be taken up, that would require a number of consequential wording changes to a number of the NSZ plan provisions, plus a further amendment to the NSZ Structure Plan. That exercise has not been undertaken at this point. Should the Panel be minded to approve PC53, but also be minded to take up the suggestion in the previous paragraph, Counsel submits that the Panel could either:

    a. issue its final Recommendation recording that it agrees with this suggestion, and directing that the required amendments to the NSZ be made, but leaving it to Council staff to make the required amendments before the Recommendation is put before Council for adoption; OR

    b. issue a Minute requiring the appropriate amendments to the NSZ plan provisions to be made and forwarded to the Panel before the Panel issues its final Recommendation.

38. In his Part 6 paragraphs 6.1 and 6.2 Mr Barr expresses his view "*… nor is the BMUZ considered to be a 'threat' to the Wanaka town centre or Three Parks*" for the primary reasons of the "*… fragmented ownership pattern and relatively small property sizes in the BMUZ …*". With respect to Mr Barr, that statement completely ignores the possibility of purchase and amalgamation of properties. It also ignores the existence of the 7,964m² property owned by CLHL (which currently contains the Mitre 10 store) which is significantly larger than the 4,590m² lot owned by NIL within which NIL proposes to construct its 1,250m² supermarket. Once again I make the point that, if the District Plan provides for an equivalent size or (significantly) larger supermarket in the Anderson Heights BMUZ, and that would not undermine the Wanaka CBD or Three Parks, it cannot be possible that a 1,250m² supermarket at Northlake would undermine the Wanaka CBD or Three Parks.

Response to legal submissions for WDL and CLHL

39. In her paragraph 8 Ms Macdonald expresses concerns about "environmental creep" which she describes as:

> "*… This is the practise of applicants for resource consents or plan changes undertaking a deliberate and sequential series of resource consent applications or private plan changes to achieve an outcome that, had it been promoted at the outset, would likely have been declined."*

40. In her paragraph 10 Ms Macdonald then goes on to state:

> "*This issue of environmental or development "creep" has been recognised by all of the New Zealand Courts, including the Court of Appeal, primarily in the context of resource consents; however the concern equally exists with respect to private plan changes."*

41. With respect to Ms Macdonald, the response to her concern lies in the part of her statement quoted above which reads "*… primarily in the context of resource consents …*". There is no doubt this is a valid concern, on occasion, with resource consent applications. Counsel is unaware of it ever being a concern in relation to private plan changes, and Ms Macdonald does not cite any case law to that effect.

42. I submit that it is part and parcel of any private plan change that the range of issues which might be defined as "environmental creep" are assessed. A fundamental question to be asked, when determining whether a private plan change should be approved, is whether it involves some form of undesirable environmental creep. A private plan change is looked at in the round, in the context of the relevant planning instruments. I query how the phrase "environmental creep" could ever be applied to a private plan change in the way contended for by Ms Macdonald.

43. In her paragraphs 11-13 Ms Macdonald raises the spectre of a further plan change or perhaps resource consent that seeks to increase the size of this "small" supermarket to a larger and potentially full sized supermarket. In response I submit that:

    a. On the evidence presented, the likelihood of that happening within AAD1 is so remote that it can be discounted, particularly if the suggestion of limiting the supermarket location to Lot 1005 or Lot 1006 is taken up;

    b. Any potential concern along these lines about the proposed 4.2ha AAD1 extension can be addressed by the alternative AAD2 zoning suggested above, if that is considered necessary or desirable to address this issue.

44. The remainder of Ms Macdonald's submissions address the two broad issues of the policy framework and jurisdiction. Rather than respond point by point, I will address those two issues broadly, as they go to the heart of this case. Before doing so I will respond to the case presented for EDL.

Response to Legal Submissions for Exclusive Developments Limited (EDL)

45. NIL's primary submission in response to EDL's legal submissions (EDL Submissions) is that:

    a. The EDL Submissions include numerous references to factual matters which are more in the nature of evidence and which cannot be introduced through legal submissions;

    b. To the extent that the EDL Submissions include factual assertions, including assertions about alleged environmental effects, they are unsupported by any evidence at all, let alone any expert evidence;

    c. Because of a. and b. above, no weight at all should be placed upon the statements contained in the EDL Submissions.

46. If the Panel accepts the primary submission above, the Panel need not refer to the balance of these submissions in relation to the EDL Submissions. However in the event that is not the case, or not completely the case, the following points are made (without repeating the submission point in paragraph 45(b) above which applies to most of the factual assertions).

47. The EDL Submissions were represented as being legal submissions on behalf of EDL. However in paragraph 1.4, EDL purports to represent the views of 17 purchasers. EDL has not provided any authority confirming that it is entitled to represent the interests of purchasers. There is no evidence from those purchasers and, in particular, no evidence that the concerns expressed in the EDL Submissions are shared by those purchasers.

48. In paragraph 3.5, EDL asserts that the traffic figures relied upon do not appear to take into account traffic generated by the (future) Hikuwai subdivision. No reference was provided for that assertion. The assertion is entirely incorrect. Mr Carr's assessment was based on traffic generation figures relating to the full development of the NSZ, including the Hikuwai land. I note that, in his verbal comments for the Council, Mr Smith also confirmed that his assessment was based upon traffic figures generated by the full development of the NSZ.

49. In paragraph 3.25, EDL asserts that the increased building heights and setbacks (presumably arising from the change to AAD1 of part of the NIL land) could block views and solar energy for properties within the Hikuwai subdivision. Given the respective locations of those two areas of land, it is very difficult to see how that could occur. This is just one example of the submission point above that the assertions detailed in the EDL Submissions are not supported by evidence.

50. In paragraph 4.2, EDL asserts that it is not a trade competitor to NIL. That statement is patently incorrect as NIL and EDL are two adjoining and competing large scale residential land developers. The original submission lodged by EDL should have identified EDL as a trade competitor. However NIL does not take that point any further. To the extent that EDL raises issues of actual environmental effects on EDL land, those effects (had they have been supported by any evidence) could reasonably be said to not be trade competition effects.

Stormwater

51. This part of these Submissions responds to the comments in the EDL Submissions relating to stormwater. Those comments are factually incorrect and/or incomplete and/or misleading. Counsel acknowledges that this response also contains statements of fact which would not normally be appropriate in legal submissions. However I submit that NIL is entitled to 'set the record straight' under these particular circumstances, albeit at the conclusion of this section I will submit that the issues are not relevant to this hearing.

52. The only stormwater effect arising as a consequence of PC53 is the extent to which an increase in building density, arising from the expanded AAD1 area, may increase the amount of stormwater required to be managed as a result of an increase in impervious surfaces. That issue has been addressed in the expert evidence provided by NIL. That expert evidence has been accepted by the Council. NIL's primary submission is that that expert evidence, which has not been challenged in any way, fully addresses the issue of stormwater.

53. In paragraph 3.9, EDL asserts that PC45 was approved on the basis that post-development stormwater flows are no greater than pre-development stormwater flows, and that this was the basis upon which NIL has obtained its resource consents in accordance with QLDC's Land Subdivision and Subdivision Code of Practice which

includes that requirement. Without necessarily accepting the statement about PC45 (which Counsel has not checked because the EDL Submissions did not provide any reference in support of that statement), NIL accepts and agrees with the second part of the statement. All of NIL's subdivision consents have been obtained upon the basis that post-development stormwater flows are no greater than pre-development stormwater flows, as required by QLDC's Land Development and Subdivision Code of Practice. This is a standard QLDC subdivision requirement.

54. EDL's statements in paragraph 3.12, explaining why EDL supposedly could not provide expert evidence on this point, defy belief. As recorded in paragraph 3.19-3.20 of the EDL Submissions, there have been High Court proceedings in relation to stormwater issues arising between NIL and EDL. Those proceedings, not to mention EDL's own consent applications, contain extensive detailed reports and/or affidavits in relation to stormwater. These documents are not produced with these submissions because they are extensive and are not relevant. They could be provided if required. However there is no doubt that EDL could have provided expert evidence in relation to stormwater issues had it chosen to do so.

55. An example of the extent to which the EDL Submissions are misleading arises from the photographs annexed to the EDL Submissions. A likely assumption from the wording of the EDL Submissions, and the production of those photographs, is that the photographs are somehow relevant to the stormwater issue identified above. The EDL Submissions do not disclose that any additional stormwater arising from more intensive development of the expanded AAD1 area would be located in a completely different stormwater catchment. The photographs annexed to the EDL Submissions are not relevant to that separate stormwater catchment.

56. In paragraph 3.17 EDL asserts that "*EDL's land has been flooded …*". EDL's land is downstream of NIL's land. Stormwater from NIL's land has always drained across EDL's land (through to the Clutha River) and will continue to do so under common law rights. There is nothing inappropriate or unlawful about that.

57. Paragraph 3.17 also refers to a number of press articles. It is worth noting that the article dated 25 May 2018 titled "*QLDC investigating surface flooding*" records that this issue affects both the Northlake (NIL) and Hikuwai (EDL) subdivisions in paragraph 4 which reads:

> "*Wanaka resident Don McKinlay yesterday showed the Otago Daily Times the stormwater runoff from the Northlake and Hikuwai subdivisions flowing through the nearby Hikuwai Reserve and into the Clutha River."*

58. In paragraphs 3.19 and 3.20 EDL refers to High Court proceedings relating to an Easement Agreement. A short summary of that issue is as follows:

a. As part of the PC45 process of satisfying Council that all infrastructure issues could be addressed, Allenby Farms Limited, NIL and the previous owner of the EDL land executed an Easement Agreement which provided, inter alia, that Allenby Farms Limited and NIL or, at their election, QLDC (by easement in gross) could discharge stormwater into and along two natural stormwater gullies running through the EDL land, draining two different catchments. One of those stormwater gullies is pictured in the EDL photographic Appendices 4, 5 and 6.

b. The Easement Agreement provided for stormwater arising under common law rights (effectively post-development flows not exceeding pre-development flows) plus stormwater arising from development (post-development flows possibly exceeding pre-development flows) to be conveyed across the EDL land[8].

c. EDL became bound by the Easement Agreement when it purchased the EDL land.

d. NIL elected that an easement for one of the two catchments be granted in gross to QLDC for the drainage of stormwater down the relevant natural gully identified in the Easement Agreement, being the stormwater gully pictured in the EDL photographic Appendices 4, 5 and 6. QLDC accepted that election.

e. NIL requested EDL to execute and register an easement instrument in gross in favour of QLDC in accordance with the Easement Agreement. EDL refused to execute the instrument. NIL issued High Court proceedings to enforce the Easement Agreement.

f. The Easement Agreement provided for QLDC to have the power to determine what wording it required for its easement. The reference to "*in any quantity*" in paragraph 3.19 of the EDL Submissions was a QLDC requirement, not a NIL requirement. The phrase "*in any quantity*" is a standard phrase found in all stormwater easements in gross registered in favour of the Council. That has nothing to do with NIL.

g. Time moved on. NIL residential lots were titled and sold and ownership of the stormwater infrastructure on the former NIL land vested in QLDC. QLDC then issued a resource consent to EDL permitting EDL to in-fill the relevant natural gully on the EDL land draining stormwater from the QLDC stormwater infrastructure on the former NIL land. NIL concluded that its proceeedings seeking to enforce EDL's obligation to grant an easement in gross to QLDC in respect of that flow path had become redundant. NIL withdrew the High Court proceedings.

[8] Counsel notes that this fact contradicts EDL's assertion (referred to in paragraph 53 above) that PC45 was approved on the basis that post-development stormwater flows are no greater than pre-development stormwater flows. PC45 was actually confirmed in the knowledge that post-development stormwater flows could potentially exceed pre-development stormwater flows.

h. Paragraphs 3.20-3.21 of the EDL submissions imply that QLDC, despite issuing a resource consent enabling EDL to in-fill the natural overland flow path, nevertheless has required EDL to grant it an easement in gross for stormwater. If this were correct, it has nothing to with NIL and nothing to do with the Easement Agreement. Counsel understands, however, that it is not correct. EDL's recently issued subdivision Resource Consent RM170797 does not require EDL to grant QLDC any easement for stormwater.

59. It is submitted for NIL that none of the above is relevant to this hearing. NIL's position is as stated in paragraph 45 above. Counsel apologises for addressing this matter in some detail, but it is important to NIL that NIL's situation is not misrepresented.

Policy framework

Policies 1.7 and 2.6

60. The primary case for the Requestor is that the retail rule amendments requested through PC53 are enabled by, and are not precluded by, the existing NSZ policy framework. For ease of reference I repeat below the two primary relevant policies which were referenced extensively through the hearing:

> *"1.7 To provide for small scale neighbourhood retail activities to serve the needs of the local community within Activity Area D1 and to avoid visitor accommodation, commercial, retail and community activities and retirement villages within Activity Areas other than within Activity Area D1.*
>
> *2.6 To enable visitor accommodation, commercial, retail and community activities and retirement villages within Activity Area D1 including limited areas of small scale neighbourhood retail to service some daily needs for the local community, while maintaining compatibility with residential amenity and avoiding retail development of a scale that would undermine the Wanaka Town Centre and the commercial core of the Three Parks Special Zone."*

61. I summarise the main points I made while opening the case for the Requestor at the hearing:

a. As a matter of principle, the RMA is an enabling statute. Persons are entitled to use their land as they see fit, subject to any environmental constraints imposed through planning documents.

b. The first part of Policy 1.7 quoted above is enabling and does not contain any element of restriction. The second part of Policy 1.7 introduced by "*… to avoid …*" is the limitation, which is not triggered by PC53. Likewise the first part of

Policy 2.6 is enabling, with the second part commencing "*… and avoiding …*" containing the limitation. I address the verb "*undermine*" below.

c. There is nothing in Policies 1.7 and 2.6 which seek to prevent or restrict provision of the small supermarket proposed by PC53.

62. I emphasise the last point made in the previous paragraph. During the hearing there has been detailed consideration of the meaning of "*small scale"* and "*neighbourhood*" and "*small scale neighbourhood*" to try and determine whether those words, individually or in combination, somehow create a restriction to the extent that the provision of a small 1,250m² supermarket would be contrary to Policy 1.7. I submit that the extent of that debate demonstrates the fact that no such restriction is contained in Policy 1.7. If such a restriction is to arise from interpretation of those words then, I submit, the interpretation should be clear and obvious. The limitation in the second part of Policy 1.7 is clear. There is no such clear restriction in the first part. That is because the first part is enabling.

63. In passing I record NIL's position (which I recollect was accepted by Ms Macdonald) that the words "*… within Activity Area D1 …*" in line 2 of Policy 1.7 relates to and constrains the "*… small scale neighbourhood retail activities …*" and not the phrase "*… the local community …*". While the wording of Policy 1.7 is perhaps not chancery draftsmanship, that interpretation is clear when one considers the second half of Policy 1.7.

64. I submit that there is a simple factual consideration which must inform this interpretation debate. It cannot be contended that any small retail shop within AAD1 would only service Northlake residents or would somehow be prevented from servicing North Wanaka residents outside Northlake. Any small retail activity within Northlake AAD1 would, by its location, serve any North Wanaka resident who chose to visit it. That fundamental factual consideration must apply, regardless of whether the retail shop is a 200m² retail shop or a 1250m² retail shop.

65. The next point I make, before leaving this interpretation issue to the Panel, is to note the following:

a. The second part of Policy 1.2 reads: "*… in order to give Northlake a sense of place and to support a neighbourhood commercial and retail precinct*". If the term "*neighbourhood*" was meant to have the same meaning as "*Northlake*" then the same word would have been used. Two different words have been used. It cannot reasonably be contended that the term "*neighbourhood*" means a smaller area than "*Northlake*". Therefore it must mean a larger area of some sort. This is relevant to the interpretation of both Policy 1.7 and Policy 2.6.

b. Policies 1.7 and 2.6 both refer to "*… the local community …*" whereas Policy 1.8 refers to "*… the Northlake community …*". Once again, if those two different

terms were meant to have the same meaning, the same term would have been used. It could not reasonably be contended that "*… the local community …*" is smaller than "*… the Northlake community …*". Therefore it must be larger. This is consistent with interpreting "*the local community*" to have a wider North Wanaka connotation.

c. The points made above add force to the submission that the existing policy regime cannot reasonably be interpreted as seeking to prevent a small 1250m² supermarket which would primarily service Northlake but would also, inevitably, service the wider North Wanaka area to a degree.

66. Finally I refer to the following extract from *Hallswater*[9] referenced in Ms Macdonald's Legal Submissions:

> "*25 Normally of course objectives and policies are broad enough so that a number of different rules could fit within them. However, as recognised by the Court of Appeal in Auckland Regional Council v North Shore City Council:*
>
> > *"It is obvious that in ordinary present day speech a policy may be either flexible or inflexible, either broad or narrow."*
>
> *The Court of Appeal there recognised that a policy of the Auckland Regional Council could be so coercive as to leave no debate or discretion to the North Shore City Council over the rules as to urban boundaries. We respectfully consider the same principle applies within a district plan with, if anything, even more force. The objectives and policies of a district plan may be so inflexible that they effectively direct the content of the methods of implementation (including rules). We find that is the case here.*"

67. I submit that Policies 1.7 and 2.6 are good examples of policies which are broad enough so that a number of different rules could sit within them and are not so inflexible that they effectively direct the contents of the methods of implementation (including rules).

Undermine

68. The Panel posed a number of questions about the meaning of "*undermine*". The Concise Oxford Dictionary definition of "undermine" reads:

[9] *J G & H Shaw and Hallswater Holdings Limited and Applefields Limited v Selwyn District Council* Decision No. C183/2000 at paragraph 25

"***Undermine***

1. Injure (a person, reputation, influence, etc) by secret or insidious means.

2. Weaken, injure, or wear out (health etc) imperceptibly or insidiously.

3. Wear away the base or foundation of (rivers undermine their banks).

4. Make a mine or excavation under."

69. The difficulty with this definition is that, of the four meanings specified in that definition, the third and fourth are probably more relevant to this situation. However the third meaning is a process whereas the fourth meaning is an outcome. The process of undermining starts when the river commences nibbling away at the bank, whereas the outcome of a mine or excavation is the result of an undermining process.

70. This situation is complicated, in this case, by the prohibition on taking into account trade competition. If a potential adverse effect on Three Parks arises from a reduction in foot traffic, a reduction by one person arguably starts a process of undermining. However that process starts with a negligible adverse effect at one end of the spectrum and finishes with a major adverse effect at the other end of the spectrum. To the extent that the 'undermining' adverse effect is trade competition, it cannot be taken into account. Therefore the interpretation of the term "*undermine*" must be where the adverse effect goes beyond trade competition and becomes something more significant than trade competition. That point will be somewhere in the spectrum.

71. I submit that the best answer to this question provided during the hearing can be found in paragraph 13 of Ms Hampson's "Evidence Summary & Rebuttal" dated 6 June 2018. I adopt that response as NIL's submission on this issue.

Jurisdiction

72. Addressing the broad issue of jurisdiction I first address Mr Barr's suite of amendments and I then address the much more limited policy amendments which NIL proposes, as potential additional relief to the primary case stated above.

Mr Barr's amendments

73. I confirm NIL's position that, subject to the one point addressed above (commercial GFA limits), NIL has no difficulty with Mr Barr's suggested amendments if they are within jurisdiction. I expressed concerns about jurisdiction during my Opening Submissions. Those concerns remain.

74. As NIL does not consider that the majority of Mr Barr's amendments are necessary, I leave it to the Panel to determine the extent to which those amendments are within scope and are either necessary or desirable.

75. At this point I respond to Ms Macdonald's Supplementary Submissions dated 13 June 2018 in relation to jurisdiction. At paragraph 2 Ms Macdonald states:

> "*[2] The document produced by Mr Barr is the first time submitters have been provided with the jurisdictional basis for the introduction of new Objective 7, and associated policies.*"

76. The remainder of Ms Macdonald's submissions essentially attack the jurisdictional basis for the reasonably extensive amendments proposed by Mr Barr. As NIL does not consider Mr Barr's extensive amendments to be necessary, I do not respond to Ms Macdonald's submissions further. However I submit that Ms Macdonald's submissions do not address the very limited amendments which NIL suggests might be appropriate, for reasons I address below.

77. As far as the Supplementary Submissions dated 19 June 2018 lodged by Mr Nidd on behalf of EDL, Counsel frankly has difficulty understanding them. In paragraph 4 Mr Nidd states:

> "*… Given the findings of the Court as to submissions 'on' plan changes, and on issues of scope, any proposal seeking to address such fundamental issues as density of housing, the extension of retail areas, the permitting of prohibited activities (meat and fish processing) cannot be 'on' the plan change as such changes are contrary to the nature and intent of the NSZ itself."*

78. PC53 addresses all of the issues listed in the above quotation. I submit that that statement has no reasonable basis, in fact or in law. I submit that the Supplementary Submissions for EDL do not assist the Panel in any way.

NIL's suggested policy amendments

79. Without derogating from NIL's primary position that no policy amendments are necessary, in paragraphs 59 and 60 of my Opening Submissions I addressed two minor policy amendments which (either or both) might be considered by the Panel to be necessary and/or appropriate. For ease of reference I repeat those suggested amendments:

> *"1.7 To provide for small scale neighbourhood retail activities <u>including one small supermarket</u> to serve the needs …"*
>
> *"2.6 To enable visitor accommodation, commercial, ~~retail and~~ community activities, ~~and~~ retirement villages <u>and limited small scale retail activities</u>*

<u>including one small supermarket,</u> within Activity Area D1 ~~including limited areas of small scale neighbourhood retail~~ to service …"

80. On further reflection, depending on the Panel's final interpretation of Policies 1.7 and 2.6, the word "*including*" in the amendments suggested above could be replaced by "*plus*".

81. I submit that either or both of these minor amendments merely provide better clarity or particularisation to the relevant policies, in terms of providing better direction as to what the policies intend to achieve.

82. I submit that the statements in *Hallswater* quoted by Ms Macdonald in her Supplementary Submissions can be distinguished. *Hallswater* involved the proposed addition of a new suite of objectives and policies which would have enabled a significantly different rule regime outcome (applying to minimum lot size rural subdivision). *Hallswater* did not involve minor 'clarification' amendments of the nature suggested by NIL. All of the comments by the High Court are therefore *obiter* because they address a different factual scenario.

83. This part of these submissions addresses the possible scenario that the Panel decides this aspect of PC53 cannot be approved without one or both of the minor amendments suggested by NIL but could be approved with them. Bearing that in mind I note that:

    a. PC53 as notified clearly provided for the enabling of a 1,250m² supermarket;

    b. Submission 53/05 lodged by J & M Harry includes the statement "*… I support the plan for a supermarket to come over to this side of town, and Northlake seems an ideal spot …*";

    c. Submission 53/02 lodged by G Tate includes the statement "*This is a residential area that does not need large scale retail development when there is already sufficient zoned areas in Wanaka for large retail supermarkets …*".

84. I then refer to paragraph 34.c of Ms Macdonald's Legal Submissions dated 5 June 2018 where she refers to previous case law and identifies (relating to submissions and decisions) that the primary test is whether a change is "*fairly and reasonably raised in a submission*", that the assessment should be "*undertaken in realistic workable fashion rather from the perspective of legal nicety*" and that "*the underlying concern … is one of procedural fairness … to ensure that all potentially interested parties are sufficiently informed …*".

85. Taking all those principles into account, I submit that the two submissions referred to above provide the Panel with more than adequate jurisdiction for one or two minor policy tweaks considered necessary to enable the supermarket (as requested by one

submitter) while adding clarity to the avoidance of large scale retail activities (as requested by another submitter).

86. Perhaps another way of looking at this issue is to consider the nonsensical outcome if PC53 were declined, and required to go through the entire process again, just to add those few words to one or two policies, in order to enable the small supermarket which is the clear and stated intention of PC53 as publicly notified.

Urban design

87. While NIL does not consider the additional 'urban design' policies recommended by Mr Barr, NIL has no difficulty with them provided there is jurisdiction to make the necessary amendments. I draw the Panel's attention to two points in relation to this issue.

88. Submission 53/11 by EDL raises the following concerns:

    "- *have detrimental impact on visual amenity values;*

    - *have detrimental impact on landscape, streetscape and ecology values;*

    - *have detrimental impact on urban design and residential environment".*

89. I submit that the submission referred to above provides jurisdiction for the Panel to make such amendments, including policy amendments, as the Panel considers necessary or appropriate to address urban design issues.

90. If the Panel is concerned about urban design, but is also concerned about jurisdiction to amend policies, I submit that an alternative approach could be to amend a rule. Specifically I note that:

    a. From reading Mr Barr's proposed policy amendments, his concerns appear to relate to providing active and articulated building frontages, avoiding large expanses of blank walls fronting public spaces, and utilising variation in form, articulation, colour and texture to add variety and moderate visual scale.

    b. Rule 12.34.5.2.iii(i) contains assessment matters relating to built form in Activity Area D1. It would be easy to make a minor amendment to that rule, to add assessment matters relating to the issues referred to above, thereby providing the additional 'Direction' which Ms Skidmore sought to achieve, without having to amend any policy.

Conclusion

91. I submit that PC53 can appropriately be recommended for acceptance by Council, on the basis publicly notified, subject to:

    a. The minor tweaks to the retail rule which have been sorted out through the hearing process;

    b. The possible additional amendment limiting the location of a supermarket to one of Lots 1005 and 1006;

    c. The possible minor amendments to Policy 1.7 and/or 2.6 as addressed above.

Dated this 21th day of June 2018

Warwick Goldsmith
Counsel for the Requestor Northlake Investments Limited