BEFORE AN INDEPENDENT COMMISSION
AT WANAKA

IN THE MATTER of the Resource Management Act 1991

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IN THE MATTER an application for Private Plan Change 53 filed by Northlake Investments Ltd

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LEGAL SUBMISSIONS ON BEHALF OF WILLOWRIDGE DEVELOPMENTS LTD AND CENTRAL LAND HOLDINGS LTD
DATED: 5 JUNE 2018

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MAY IT PLEASE THE COMMISSION:

Executive summary

1. I act for Willowridge Developments Ltd (**Willowridge**) and Central Land Holdings Ltd (**CLH**), which have each filed a submission on Proposed Plan Change 53 (**PPC53**). The focus of those submissions was on rule 12.23.4.2(viii)(b)(**Retail rule**) of the Northlake Special Zone (**NSZ**).

2. Both of my clients are developers of land and have been active in the Wanaka area for some time. My clients do not lease or operate any retail activities, other than CLH which leases premises to Mitre 10. My clients are primarily land developers.

3. As land developers, Willowridge has recently been involved in the development of the Three Parks centre, which features prominently in the economic assessment undertaken on behalf of the Council. CLH also owns land at Anderson Heights, an area which is zoned for business (including retail) purposes.

4. The issues to be elaborated upon today are:

   a. **Policy concerns** – that the proposed Retail rule does not give effect to the overarching policy framework in the Operative District Plan.

   b. **Jurisdiction** – that there is no jurisdiction, as part of PPC53, to make any changes to the overarching objective and policy framework for the Retail rule.

   c. **Effects** – that, even if there is jurisdiction to make the changes proposed (which is denied), those changes will give rise to potential effects on the centres at Three Parks and Anderson Heights that go beyond trade competition effects, such that the Retail rule in its proposed form should be declined.

5. My clients' position for this hearing, based upon the expert advice received, is that the Retail rule can be amended to provide for an additional food retail offering of up to 300m^2 in the NSZ, and that the cap can be lifted from 1,000m^2 to 1,300m^2. This will be sufficient to provide for a grocery offering such as a Four Square or similar. An amendment in this form:

   a. is consistent with the overarching policy, and therefore no jurisdiction issues arise; and

   b. will not result in effects on other centres that extend beyond trade competition effects.

6. My clients are calling evidence from two expert witnesses in support of its preferred relief:

a. Mr Mike Copeland, Managing Director of Brown, Copeland & Company Ltd; and

b. Mr Carey Vivian, a Principal of Vivian + Espie, a resource management, urban design and landscaping consultancy based in Queenstown.

7. Ms Alison Devlin will also present a short statement of corporate evidence on behalf of the submitters describing the centres at Three Parks and Anderson Heights.

Underlying concern – Environmental creep

8. Before I address the three fundamental issues summarised earlier, I wish to comment briefly on an underlying concern about PPC53, namely "environmental creep" or "environmental incrementalism". 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.

9. As recorded in the recent 4 Sight Consulting report on the efficacy of effects-base plans, [7.6]:[1]

> In the case of cumulative effects, effects based plans often use the existing environment as a baseline for determining what level of effect is appropriate in a particular zone. Council staff in Kaipara, New Plymouth and Taupō all noted that effects based plans do not have a mechanism to help consent staff decide when a cumulative effect is occurring as all applications are judged on their own merits. This often results in development 'creep' – where a few 'out of zone' activities are allowed to establish in a particular area and thereby form a new benchmark for what level of effect the receiving environment can accommodate.

10. 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.

11. I acknowledge that planning is dynamic, and a planning framework must respond to emerging challenges and the changing environment. However, in my submission it is probable that the applicants for PPC53 had always wanted to create a substantial retail centre at the NSZ. But they realised that this would have to be achieved incrementally. The first stage was the zone itself with a very modest retail centre designed (and said) to serve the local community. The second stage, this PPC53, represents an attempt to increase that to allow what is said to be a "small" supermarket. (Mr Vivian's evidence, at [3.49], considers a supermarket of this size to be a medium supermarket in the Queenstown/Wanaka context.) The third stage which, in my respectful submission is almost inevitable, will be a further plan change or perhaps resource consent that seeks to increase the size of this "small" supermarket to a larger and potentially full size supermarket.

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1 *Analysis of Efficacy of Effects-Based Planning in relation to the National Planning Template*, Ministry for the Environment, Final Report, May 2016

12. By breaking up this proposal into smaller applications, the applicants are seeking to downplay the inconsistency with the objective and policy framework (including the hierarchy of centres for Wanaka described within the District Plan, and the deliberate limitation on retail and certain other activities outside of those centres).

13. The applicant's response may be to completely deny any long-term plans to further increase the size of the retail offering at the NSZ, or they might simply argue that flexibility for future development must be preserved. The fact remains, however, that unless any future or expanded retail activity is classified as a prohibited activity or the commercial zone at NSZ is subject to a restrictive covenant preventing any further retail development, then further intensification/expansion of retail activity is a distinct possibility (and, in my submission, a probability).

14. For the reasons I will expand on below, now is the time for the Commission to draw a line in the sand. In planning terms, the ink on the plan change which established the NSZ is still not dry, and it is far too soon to argue that the passing of time has now meant that some more intensive retail is required. The retail provisions of that plan change were included to provide a retail offering for the local community. That is how it should remain.

15. If the applicant considers that further retail is desirable at the NSZ, and if the applicant considers that such retail is consistent with the objectives and policies of the district plan, then there is a consenting path available to them. While it would be a non-complying activity, that status reflects the rigorous nature of any assessment required.[2]

Issue 1 - Policy concerns with proposed amendment to Retail rule

16. Local authorities must establish, implement and review, objectives, policies and methods (including rules), to achieve the integrated management of the effects of the use, development or protection of land and the associated natural and physical resources of a district (s 31(1)(a), RMA).

17. Integrated management is achieved, in part, through an objective, policy and rule hierarchy that will be well known to the Commission. Section 75(1) of the RMA requires a district plan to state:

    a. the objectives for the district;

    b. the policies to implement the objectives; and

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2 I draw attention at this point to [3.19] and [3.20] of Mr Vivian's evidence where he discusses the section 32 assessment by the applicant, and in particular the "high risk of consent applications being refused given the current rule framework in the District Plan".

c. the rules (if any) to implement the policies.

18. It is therefore essential that there is internal consistency between all three tiers; furthermore, this is a "top down" not "bottom up" process. In other words, the objectives define the nature and form of the policies, and the polices define the nature and form of the rules.

19. This has been confirmed by numerous decisions of the Environment Court, both implicitly and explicitly. For example in *Brownlee v Christchurch City Council*, C102/2001, the Environment Court stated at [19] (footnotes omitted):

> In *Shaw & Halswater Holdings Ltd v Selwyn District Council* the Court approved the statement of a resource manager who stated that:
>
> > *The rules should not dictate the objectives and policies, but rather the other way around.*
>
> This is because rules must implement and achieve the objectives and policies of a plan.

20. The Environment Court's decision in *Shaw* was to the effect that because the objectives and policies were very directive, and because there was no submission seeking amendments to the objectives and policies, there was no ability for the Court to make the amendments to the rules as sought. While the appeal to the High Court (*J G & H Shaw & Ors v Selwyn District Council* (2001) AP 41/00, 19/3/2001) was allowed, this appeared to be on the basis that there was jurisdiction for the Environment Court to consider amendments to objectives and policies because this was fairly and reasonably signalled in the original submission. The High Court did not find any fault in the underlying propositions relied on by the Environment Court – namely that rules need to be supported by objectives and policies; and that in some circumstances an objective and policy framework may be so directive as to effectively preclude the making of rules enabling some contrary outcome.[3]

21. The nature and form of policies and methods (including rules) is subject to the rigour of the s 32 assessment, which is designed to ensure that those policies and rules are the most appropriate method of achieving the objective having regard *inter alia* to their efficiency and effectiveness.

22. The hierarchical nature and the rigour of s 32 is summarised by the Environment Court in *Colonial Vineyard*, at [17]. Section C of the list of mandatory requirements for considering proposed plans or plan changes is as follows:

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3 I have a copy of both the Environment Court and High Court's decisions in *J H Shaw* for the Commission. In the Environment Court's decision (C183/2000) refer to [13]-[15], and [25]-[29] in particular.

C. Policies and methods (including rules) [the section 32 test for policies and rules]

9. The policies are to implement the objectives, and the rules (if any) are to implement the policies[36];

10. Each proposed policy or method (including each rule) is to be examined, having regard to its efficiency and effectiveness, as to whether it is the most appropriate method for achieving the objectives[37] of the district plan taking into account:

(i) the benefits and costs of the proposed policies and methods (including rules); and

(ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[38]; and

(iii) if a national environmental standard applies and the proposed rule imposes a greater prohibition or restriction than that, then whether that greater prohibition or restriction is justified in the circumstances[39].

23. Mr Vivian's concern is that the proposed amendment to the Retail rule – which seeks to increase the retail floorspace by 150% - will not implement the related policies, Policy 1.7 and Policy 2.6. The primary reasons for that are explained in his evidence, however in essence his opinion is that the policies are directed towards enabling retail only of a scale that serves the local community.

24. It appears agreed between all the experts that a supermarket of 1,250m^2 will serve more than just the local Northlake community. In my submission, the suggestion that the "local community" was always intended to extend to more than 3,200 houses in the Northern Wanaka area cannot be correct. In the context of Wanaka, and the intent of the original plan change for the NSZ as expressed in the objectives and policies, that number of households is not "local".

25. My reasons for that submission are as follows:

a. The legal principles for interpreting District Plans is well understood, and has been summarised in *Brownlee* as follows:

> [25] In my opinion the relevant factors to consider in interpretation of a plan prepared under the RMA include:
>
> (1) the text of the relevant provision in the plan;
> (2) the purpose of the provision;
> (3) the context and scheme of the plan;
> (4) the history of the plan;
> (5) the purpose and scheme of the RMA being the statute under which the plan is prepared and under which it operates;
> (6) any other permissible guides to meaning (including the common law principles or presumptions of statutory interpretation).

b. Other broader principles of interpretation include:

i. That the meaning of an enactment must be ascertained from its text and in light of its purpose (s 5(1), Interpretation Act 1999). As stated by the Supreme Court in *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] 3 NZLR 767, at [22]:

> *"The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment." [Internal citations omitted]*

ii. Although it is appropriate to seek the plain meaning of a provision from the words themselves, it is inappropriate to do that in a vacuum (*Powell v Dunedin City Council* [2005] NZRMA 174 (CA) at [30]).

iii. An interpretation that avoids absurdity and anomalous outcomes is to be preferred (*Nanden v Wellington City Council* [2000] NZRMA 562 (HC) at [48]).

c. Having regard to those principles:

i. The purpose of Policy 1.7 was designed to limit the extent of any retail activity. This is evident from the words "small scale neighbourhood retail activities" and "local community". The first phrase colours and restricts the latter.

ii. The common meanings of "local" and "local community" implies a restricted (particular) area, and a group of people that live in that area. Defining "local community" is however context specific – what may be a local community in Wanaka will comprise a smaller group of people than a local community in Wellington, for example.

iii. A contextual analysis is instructive. In that regard, the immediately following policy, Policy 1.8, includes the phrases "to serve the needs of the Northlake community and to be available for use by the wider Wanaka community". This reference to the "wider Wanaka community" is a clear indication that Policy 1.7 is very limited, whereas Policy 1.8 is much broader.

iv. Words in policies must be given meaning; they cannot be ignored. With respect to Mr Edmonds, his evidence (para [12.20]) that the policy does not have "any limitation on the catchment that it serves" would require the Commission to effectively ignore a crucial element of Policy 1.7.

v. In the context of the broader Wanaka area having some 7600 households[4], the suggestion that more than 3,200 would represent the "local community" would be the absurd or anomalous outcome that *Nanden* directs us to avoid.

vi. Finally, and responding to Mr Edmonds' evidence (para [12.26]) I should note here that there is no suggestion that Policy 1.7 requires all the *customers* of the retail activities to live within Activity Area D1.

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4 source QLDC Growth Projections to 2058 – Resident Population, Visitor Dwellings, Rating Units; Report prepared by Rationale Limited for QLDC May 2017.

The policy was clearly intended to limit the retail activities to only within Activity Area D1. (The phrase "within Activity Area D1" would be better placed after "small scale neighbourhood retail activities".)

26. Mr Barr, the author of the s 42A report, concludes that if the Retail rule is amended as proposed by the applicant (i.e. allowing a supermarket of 1,250m^2), then the associated objectives and policies must also be amended. Mr Barr recommends the deletion of Objective 1 and Policy 1.7, and Objective 2 and Policy 2.6, and the insertion of a new Objective 7 and associated Policies.

27. The applicants' evidence, no doubt identifying the difficulty with this proposal, disputes the need to amend the objectives and policies, and asserts that the objectives and policies were never directed towards restricting the retail offering to just the local community. That will clearly be a key difference of expert opinion that the Commission will need to resolve.

28. In my submission, based on the evidence of Mr Vivian and the s 42A report, the policies were directed towards a restricted offering serving the local community.

29. Accordingly, the proposed Retail rule:

    a. Does not implement the associated policies, Policy 1.7 or Policy 2.6, and is therefore contrary to s 75(1), RMA.

    b. Is not the most efficient and effective means of achieving the objectives, in terms of s 32(1)(b), RMA.

30. By contrast, the amendment to Retail rule as proposed by Mr Vivian will give effect to the objectives and policies, will comply with s 75, RMA, and is an effective and efficient means of achieving those objectives (as required by s 32, RMA). In other words, enabling a grocery offering of up to 300m^2 will be ample to provide additional food retail choice for the local community of the NSZ, and will be an effective and efficient method of doing so.

Issue 2 - Jurisdiction bar to inserting new Objective and Policies

31. In my submission, the proposed Retail rule (in the form proposed by the applicant) could only be approved if Policy 1.7 and Policy 2.6, and their associated objectives, were deleted and replacement objective and policies inserted.

32. However, these changes were not sought by PPC53, were not requested in any submission, and there is quite simply no jurisdiction to insert them at this stage. The consultant planners for my clients and for the applicant agree on this aspect (Carey, [3.44]).

33. The Courts have rightly remained vigilant about matters of jurisdiction in plan change processes. This is because the ability of

a person to become involved in planning processes that might affect that person's rights or interests lies at the heart of the integrity of plan making.

34. The legal framework in this regard comprises:

    a. A requirement that a local authority must make a decision on the provisions (as notified) and on any submissions (cl 10(1), First Schedule, RMA).

    b. "Submission" is defined as an electronic or written submission and includes either a primary or a further submission.

    c. A series of decisions exploring the scope for local authorities to make changes to provisions in response to submissions. These decisions conclude:

        i. that the primary test is whether a change is "fairly and reasonably raised in a submission";

        ii. this assessment should be "undertaken in realistic workable fashion rather than from the perspective of legal nicety" (*Royal Forest & Bird Protection Society v Southland District Council* [1997] NZRMA 408 at 413 (HC)); and

        iii. the underlying concern – and the touchstone for whether a change is within or outside of jurisdiction - is one of procedural fairness: i.e. to ensure that a local authority and all other potentially interested parties are sufficiently informed about the relief sought by a submitter (*J G & H Shaw & Ors v Selwyn District Council* (2001) AP 41/00, 19/3/2001, at [30]).

35. The most recent elucidation of those provisions is in the Environment Court's decision on jurisdiction in *Hawke's Bay Fish & Game Council v Hawke's Bay Regional Council* [2017] NZEnvC 187, [27] – [39].

36. In respect of PPC53:

    a. An amendment to the relevant objectives and policies was not proposed in PPC53 as notified.

    b. An amendment to the relevant objectives and policies was not sought by any submitter.

    c. The amendment now proposed by Mr Barr in the s 42A report was therefore not "fairly and reasonably raised" in any submission (the prospect of an amendment to the objectives and policies was not raised at all).

    d. Making an amendment at this stage runs the very real risk of prejudicing parties who might have lodged a submission or

further submission had they been aware of this possible change at the time of submissions.

37. I accept that the applicant considers that no consequential amendments to the objectives and policies are needed, and accordingly they might not consider any jurisdiction issue arises. However, if that position is not accepted by the Commission, then (practically) the relief sought by the applicant cannot be granted.

38. In my submission a change to the Retail rule proposed by my clients (i.e. limited to 300m^2), would be within jurisdiction as it represents "lesser relief" than what was sought, and it is consistent with the objectives and policies. Accordingly, there are no jurisdictional barriers to its adoption.

Issue 3 - Effects beyond trade competition effects

39. In assessing the appropriateness of a rule, the Commission must consider any effects on the environment (s 31(1)(b), RMA). The definition of "effect" will be well known to you all, namely:

> **3 Meaning of effect**
> In this Act, unless the context otherwise requires, the term effect includes—
> (a) any positive or adverse effect; and
> (b) any temporary or permanent effect; and
> (c) any past, present, or future effect; and
> (d) any cumulative effect which arises over time or in combination with other effects—
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
> (e) any potential effect of high probability; and
> (f) any potential effect of low probability which has a high potential impact.

40. For today's purposes, I would like to highlight the reference to a "future" effect and a "cumulative effect which arises over time or in combination with other effects".

41. In assessing any potential effects arising from the Retail rule, we must of course bear in mind the prohibition on a local authority having regard to "trade competition or the effects of trade competition" (s 74(3), RMA).

42. For the purposes of this hearing, therefore, you must decide whether the Retail rule (as proposed by the applicant), will have actual or potential adverse effects that extend beyond trade competition effects. These effects may be cumulative effects that arise over time or in combination with other effects.

43. It appears agreed between most (if not all) of the experts that:

    a. Effects beyond trade competition effects are a potential effect that needs to be considered (hence the consideration by RCG for the applicant, and Market Economics for the Council). In respect of such effects:

        i. The Courts have expressed a preference for a qualitative analysis over a quantitative analysis based on mathematical modelling or retail gravity models (*Kiwi Property Management Ltd v Hamilton CC* (2003) 9 ELRNZ 249. In my submission, this requires experts

to apply their judgement with a "real world" perspective, having regard to any particular characteristics of the communities under consideration.

ii. There is widespread acceptance of the role of supermarket(s) as being essential to the success of centres, given their role as anchoring a range of other ancillary retail activities. (The corollary is also true – establishing supermarkets out of centres can have a demonstrable adverse effect on those centres.)

iii. Rendering an existing retail business unviable is an effect of trade competition and more is needed to cross the threshold.

iv. Effects involving "retail flight" out of centre, deferral of investment within a centre, or decay of the amenity and vitality of an existing centre, can all constitute significant effects, i.e. effects beyond trade competition effects.

b. In this case, effects beyond trade competition could include effects on the existing retail centres, including in particular the Town Centre and Three Parks. These effects could comprise a loss of amenity in those centres, including the loss of amenity that might result from a high pedestrian generating activities (such as supermarkets) establishing "out of centre".

c. The proposed Retail rule in the form proposed by the applicant will not have any relevant effects on the Town Centre (i.e. Wanaka's CBD).

44. From my reading of the evidence, the areas in dispute are:

a. Whether relevant effects on Anderson Heights should be assessed?

b. Whether there are relevant effects on either or both Three Parks and Anderson Heights?

45. In my submission:

a. Any assessment of effects should have regard to all identified centres within Wanaka, and that certainly includes Anderson Heights.

b. 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 the vitality of these 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.

c. The Council's section 42A report and Mr Copeland's evidence also demonstrate that, to the extent "need" is relevant under the RMA, there is no such need for a supermarket of some 1,250m^2 to be located within the NSZ.

Conclusion

46. In my respectful submission, the Commission should hold firm against further incremental growth of retail activity at the NSZ beyond that proposed by my clients (i.e. allowing a food offering of up to 300m^2).

47. Enabling additional retail activity beyond this level:

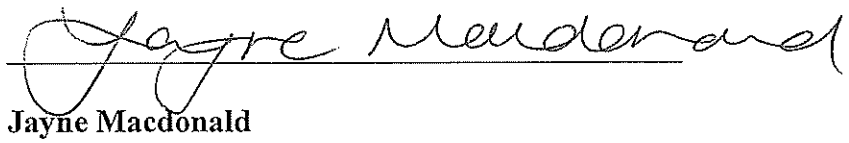
    a. Is inconsistent with the overarching objectives and policies, because it serves a wider catchment than the "local community"

    b. Would compete with Three Parks and Anderson Heights and delay (or prevent) additional supermarkets establishing in those locations. That will reduce the amenity and vitality of those centres, and have potential effects that extend beyond trade competition effects.

    c. Is not consistent with s 75(1) of the RMA.

    d. Does not represent the most efficient or effective means of achieving the relevant objectives of the RMA, as required by s 32 of the RMA.

48. My clients therefore request that any additional retail be limited to one store of up to 300m^2 for a grocery store/food retailing, and that the overall cap be correspondingly increased from 1,000m^2 to 1,300m^2.



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