

**BEFORE THE QUEENSTOWN LAKES
DISTRICT COUNCIL**

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of Plan Change 44 of the
Queenstown Lakes District
Plan

**CLOSING SUBMISSIONS OF COUNSEL FOR HENLEY DOWNS FARM
HOLDINGS LIMITED AND HENLEY DOWNS LAND HOLDINGS LIMITED
8 JULY 2015**

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Introduction

- 1 This right of reply:
 - (a) Identifies further changes to the plan provisions that have been made since the opening of the hearing, to respond to feedback and questions from the Commissioners and section 42A officers ("officers"). This includes changes made as a result of taking on feedback from the officers replies on Friday afternoon in the **attached as A** is an updated Structure Plan and **B (1 – 4)** are the plan provisions incorporating proposed changes detailed through these closing submissions (highlighted in green)
 - (b) Addresses legal and substantive issues specific to particular parts of PC 44 arising from questions at the hearing;
 - (c) Details the effect of various non-objection covenants and the JPROA Constitution particularly on the natural justice element of the scope test;
 - (d) Explains why there is scope for each of the changes proposed for each activity area;
- 2 The reply addresses questions or comments that arose during the hearing to ensure they are answered and that the updated package of provisions and Structure Plan attached to these submissions fully respond to all environmental and policies issues to enable PC 44 to be confirmed.
- 3 If the Commissioners are minded to confirm PC44 but have residual questions, then the submitter agrees with Ms Jones' comments towards the end of the hearing on the possibility of issuing of an Interim Decision with a direction for the officers, Requestor and submitter to undertake expert conferencing to resolve any such matters.

Section 32

Need

- 4 Much of the Commissioners' questions, were along the lines of whether or not there was a need for the type of development that could be enabled by PC 44. This particularly relates to the EIC, but is

relevant generally. It is submitted "need" is not a relevant consideration and there is a long line of case law that consistently confirms this when assessing a proposition for a consent or a plan change. In *Gulf District Plan Association Inc v Auckland City Council*¹, in respect of clean fill disposal the Environment Court stated that "need" is not a relevant consideration at paragraph 101. Effects were relevant, but not the need (or lack of) for the facility.

- 5 Cornerstone Group Limited v North Shore City Council² identifies the unproductive dangers in trying to predict demand:

[202(b)] *"Matching demand for retailing and the capacity for it provided by a district plan is not susceptible of precise prediction, and is a matter on which respected experts may reasonably and responsibly differ in their considered opinions. Uncertainties (including those identified by counsel for Cornerstone and accepted by Dr Fairgray in cross-examination, and provisions for mixed activities referred to by Mr Warren) and the dynamic nature of markets (referred to by Mr Cullen) preclude greater precision."*

[202(c)] *"A planning authority has to make the most appropriate provisions to achieve the objectives of the district plan, and to assist it to carry out its functions in order to achieve the purpose of the Act and in accordance with Part 2. That does not require it to concern itself with the relative degree of success of particular businesses or classes of retailing activity carried on in differing locations in a centre over various periods in the future as a centre develops. This would come close to allocating resources (Wellington International Airport v Board of Airline Representatives Environment Court Decision W102/97; Kiwi Property Management v National Trading Environment Court Decision A 045/2003) and the prohibited topic of trade competition (RMA, s 74(3))."*

¹ A101/2003

² A042/07

- 6 In *Johnsonville Community Association Inc. v Wellington City Council*³, the Environment Court considered an argument that there was no, or insufficient, demand for medium density residential housing proposed under a plan change. The Court decided that:

[37] *"...We need to point out, first, that planning is permissive. PC 72 would not require every piece of land in the MDRA areas to be developed in that way. If someone wished to build a conventional single-unit dwelling there, that can be done. What PC 72 does is to provide the opportunity for more intense development, in an area thought likely to be attractive for it, and for it to be done in a way that will provide reasonable assurance of an outcome that is acceptable from an amenity point of view. Whether that opportunity will actually be taken up remains to be seen."*

- 7 In *Cook Adam Trustees Ltd v Queenstown Lakes District Council*⁴ the Environment Court evaluated evidence and arguments that there was no evidence of demand for rural residential living sections, so the plan change should be disallowed. The Court confirmed that questions of demand should be left to the market:

[50] *"... The answer is that questions of demand should be left, in the absence of relevant matters of national importance (or policy directions in a national policy statement or regional plan), to the market. We consider it is not necessary to make any findings on the issue."*

- 8 These authorities confirm that questions of demand or need are not matters that must be demonstrated or that the council must consider. These matters should be left to the market.

Alternative sites

- 9 There was a line of questioning from the Commissioners that queried whether the PC 44 site was the most appropriate site in the wider Queenstown area for the type of development that would be enabled

³ [2013] NZEnvC 159

⁴ [2014] NZEnvC 117

by PC 44 (in particular but not limited to the EIC). It is submitted there is no requirement for a private plan change proposal to be assessed against alternative sites, beyond the private plan change site. The Supreme Court in *Environmental Defence Society v NZ King Salmon Co Ltd*⁵ ruling upheld and clarified three main points on this issue, arising primarily from the High Court's decision in *Brown v Dunedin City Council*⁶.

- (a) Firstly, the consideration of alternative sites is "permissible, but not mandatory."⁷
- (b) Secondly, there would be real practical difficulties were such an assessment mandatory.⁸
- (c) On one point, very specific to the NZCPS, the Supreme Court took the *Brown* reasoning a step further. In specific, narrow contexts, specifically where there is exclusive use of a public resource proposed for private gain, the Supreme Court made *obiter* comment that the consideration of alternative sites may be necessary.⁹ For PC 44, and for the Education Innovation Campus in particular which is not an ONL (and therefore not affecting a section 6 matter of national importance), there is no requirement that alternative sites beyond the boundary of the private plan change area be assessed or compared.

Suitable not superior

- 10 In response to questions from the Commissioners whether PC 4 was superior to the operative Plan, in terms of the purpose of the Act, it is submitted that there is no requirement to establish superiority, Gendall J noted in *Rational Transport v NZTA*¹⁰ that the 'most appropriate way to achieve the purpose of the Act' as set out in s 32(3) requires a value judgement as to what on balance, is the most

⁵ *Environmental Defence Society v NZ King Salmon Co Ltd* [2014] NZSC 38.

⁶ *Brown v Dunedin City Council* [2003] NZRMA 420 (HC).

⁷ *Environmental Defence Society* [166].

⁸ *Ibid* [167].

⁹ *Ibid* [170] - [173].

¹⁰ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298.

appropriate, with appropriate meaning "**suitable**" not "superior". These comments were in respect of the appropriateness of policies, rules or other methods in achieving the objectives under s 32(3)(b) of the pre-2013 RMA:¹¹

[45] I do not accept the submission by the appellant's counsel that the policy "most appropriate" must be the superior method in terms of stream protection. Section 32 requires a value judgement as to what on balance, is the most appropriate, when measured against the relevant objectives. "Appropriate" means suitable, and there is no need to place any gloss upon that word by incorporating that it be superior.

- 11 It is submitted that the proposed PC 44 provisions are more suitable than the operative plan for the Henley Downs. PC 44 will enable specific forms of use and management of land not enabled by the operative plan, while providing greater controls and ensuring continued protection of important landscape and open space values, just as the operative plan does.

Coneburn Study

- 12 The evidence confirmed that the Coneburn Study is the guiding document for management, use and development of the Jacks Point Zone. Notably, it is the only such study and no evidence was produced by any person that provided the nature or detail of the Coneburn Study in terms of identifying areas for appropriate use, management or development of land.
- 13 Also, it is important to note that the Henley Downs land was held under different ownership at the time of the original study and did not include detailed contour information. It was therefore a more coarse mapping, than the update to the Study which does include that detail. The current owner, Henley Downs, have undertaken a more refined study that includes that additional level of detail.
- 14 As pointed out by the Commissioners the methodology applied for in the Updated Coneburn Resource Study Document was different than the original study in one key respect by taking into account the flood bank and possible mitigation measures it provides in terms of

¹¹ At [45].

screening future built form.. It is submitted this does not undermine the Study's findings at all, but ensures they are of most assistance to assessing the effects of PC 44. The Study's methodology was appropriate given the purpose the Study is being used for. Detailed analysis of required landscape mitigation that would have previously been done through the ODP was instead front loaded into the Updated Study specifically to ensure that the Structure Plan reflected the detailed mitigation required. That detailed analysis of the effectiveness of mitigation would have previously been undertaken at the ODP stage. With the knowledge that the ODP framework was not being advanced either for the District Plan Review or PC 44, that analysis had to be undertaken upfront, and it was most logical for that analysis to be undertaken as part of the updated Study as an integrated approach rather than separately.

- 15 As the flood bank along the State Highway is necessary for the PC 44 development and therefore an inevitable part of that development, it was also necessary for the Updated Study to take an integrated approach and take into account the effects of that flood bank on visibility and landscape values. To provide further clarity the amended Structure Plan **attached as A** now shows the indicative location of the flood bank and site standard 15.2.10.2.iii cross refers to it (page 15-44).

Design Guidelines

- 16 Throughout these closing submissions I will note where Henley Downs are now proposing provisions that enable council to impose a legal mechanism to ensure compliance with design guidelines for the EIC, FP-1 and FP-2 activity areas. This, along with further narrowing of matters of discretion is intended to address the point made by Ms Jones¹², as well as various comments by the Commissioners regarding the ability to better ensure a quality outcome is achieved through the consenting process.

¹² Supplementary Comments to section 42 Report for Plan Change 44. 3 July, paragraph 1.3.6

- 17 The use of design controls through covenants is referred to by Ms Pfluger at her paragraph 44 primarily in the context of the balance of the Jacks Point Zone (not PC 44). Having taken on board the comments of the Commissioners and the 42A officers Henley Downs wish to propose the ability for design guidelines to be registered on the titles for FP-1 and 2 also.

Control on density and diversity of lot sizes in residential areas

- 18 Ms Jones recommended at her paragraphs 1.4.2 – 1.4.3 additional controls over location of medium density uses and diversity of lot sizes at the policy level and at time of subdivision. For the residential land owned by Henley Downs it is submitted additional provisions are not required. Council already has discretion over subdivision design (15.2.7 page 15-35 onwards) which gives the council significant discretion.
- 19 Also in response to Ms Jones at 1.4.10 a description of R(HD) has been inserted into the Structure Plan site standard 12.2.5.1 at page 12-13)

Stakeholder Deed

- 20 Ms Jones has referred the Commissioners to the Stakeholder Deed from 2003.¹³ The Deed is a useful tool that needs to sit outside the RMA process and this is acknowledged specifically at the Background clause D of the Deed. . It is submitted the Deed is not relevant to your decision making on PC 44 considerations, but it, and any future iterations of it, is part of the wider context within which PC 44 will operate.

Woolshed Road

- 21 The plan change requestor and Henley Downs agree that the intersection between Woolshed Road and the state highway should be upgraded to NZTA required standards prior to any new residents or occupiers being able to access through that point. The

¹³ Supplementary Comments paragraph 1.3.6, 1.6.2 and 1.7

Commissioners queried how residents or the public could be prevented from using the part of Woolshed Road that is a legal Road.

22 As a result of that query we propose a new subdivision matter of discretion at 15.2.3.3.ix.c page 15-15, which would for example enable a consent notice to be registered requiring landowners to comply with particular restrictions.

23 In addition to a consent notice, section 342(1)(b) and schedule 10 clause 11 of the Local Government Act 1974 ("LGA 1974") enable Councils to temporarily close any road or part of a road to traffic or any specified type of traffic (including pedestrian traffic). Councils may use this power for road construction or for any reason they consider desirable, for instance public safety (emphasis added):

11 The council may, subject to such conditions as it thinks fit (including the imposition of a reasonable bond), and after consultation with the Police and the New Zealand Transport Agency, close any road or part of a road to all traffic or any specified type of traffic (including pedestrian traffic)

*(a) **while the road**, or any drain, water race, pipe, or apparatus under, upon, or over the road, **is being constructed or repaired**; or*

...

*(d) **when for any reason it is considered desirable that traffic should be temporarily diverted to other roads**; ...*

24 To provide access for the existing 2 residents (Troon and Paterson) and the farmer the temporary closure could be framed to close the road to all traffic except specified types of traffic i.e. 'farm vehicles and residential vehicles servicing residents of xxxx road'. The temporary closure can be made subject to reasonable conditions, for example to address safety there could be conditions requiring traffic controls to guide those road users through the construction zone (for instance speed limits and/or a stop/go operation) and to avoid conflict with construction vehicles there could be set times when traffic can use the road.

25 There is no specified statutory procedure for temporarily closing a road and no obligation on Councils to consult the public. Accordingly Councils usually follow a fair and transparent procedure when a temporary closure is requested that includes: consulting with Police, NZTA and affected parties; considering their feedback; deciding to temporarily close the road and impose reasonable conditions; sending

the consulted parties a copy of the decision on temporary closure, conditions and reasons; and often as a matter of good practice (because it is not a statutory obligation) publically notifying the closure.

- 26 Mr Gousmett provided practical examples of how traffic can be managed to allow existing uses to continue and prevent new owners and occupiers from accessing the legal road until access is authorised. Changes to site standard 12.2.5.1.iv.b enable the Traffic Management Plan to allow for some access (page 12-15).

Education and Innovation Campus (EIC)

- 27 Henley Downs' intention is to ensure the EIC is dominated by technology based commercial and higher education activities, with activities such as retail, office space, community and residential activities only encouraged to the extent they support and are ancillary to the technology and education hub focus. Particular focus to date has been on investigating the feasibility of and attracting, a film studio and the United World College. The Submitter has been in discussions with the education providers such as the United World College since 2008 as evidenced by the email **attached** as **C** with respect to the possibility of siting the college at the Jacks Point Zone. The submitter has also been in active discussions with Film Otago Southland to locate a film studio in the Jacks Point Zone, specifically in the EIC area (see **attached** letter from Kevin Jennings as **D**). These are key reasons Henley Downs has proposed the EIC.
- 28 As noted earlier in these submissions determining demand and need is a matter for the landowner, not the Court or Councils, when assessing the merits of a consent application or plan change. Henley Downs is confident there is a niche market and service for the wider Queenstown community that will be met by the activities provided for in the EIC. That is the vision and the plan provisions have been drafted in a way to enable applications for consent to be assessed on their merits, bottom lines set to ensure adverse effects avoided and quality assured to the level appropriate for the entry to the Henley Downs part of Jacks Point Zone.
- 29 The proposed limitations on site coverage (20%) and height (10m) reflect the intention that the use of the land should be balanced with

large areas of open space. That is necessary for this site given its visibility from the State Highway, and its role as part of the entrance to Henley Downs. The plan provisions are intended to attract activities that require reasonable amounts of land (requiring parking, playing fields and open space) and for that reason serve a very different function to the village, and other commercial areas.

30 The changes in the **attached** plan provisions make changes from relevant policies down through to the rules highlighted in green, to address and respond to questions raised in the hearing, including:

- (a) Policy 3.20
- (b) New definitions for "commercial film or video production" and "technology based activity" and new use of those definitions in Restricted Discretionary rule 12.2.3.3.d (page 12-6) as well as in the Structure Plan site standard rule on page 12-13
- (c) Activities that do not comply with zone standard in the EIC are non complying (rule 12.2.3.5.xii page 12-11)
- (d) Ancillary commercial activities restricted to maximum total of 2,500m² by new site standard 12.2.5.1.xv.d page 12-26 (approximately 10% of the total allowable site coverage).

31 These changes address matters raised by Ms Jones and the Commissioners.¹⁴

32 The requirement that commercial activity must be greater than 200m² is to ensure the EIC attracts a different type of commercial tenant, and therefore does not compete with but instead compliments, the Village. This should clarify Ms Jones query as to purpose.¹⁵

EIC Scope

33 The Table appended to my opening submissions setting out where scope is derived from for the EIC and should be referred to when assessing scope and reading these submissions. As notified PC 44

¹⁴ Supplementary Comments, paragraph 1.4.8 and 1.6.6

¹⁵ Supplementary Comments, paragraph 1.4.7

made any building activity in the ACRAA discretionary and any non residential activity restricted discretionary in a location approved by an ODP. The Henley Downs Farm Holdings Limited submission sought a more permissive planning regime from objectives through to rules enabling education, rural based tourism, community, visitor accommodation and service activities, in areas that can absorb effects. The combination of the provisions as notified and the submission gives scope for the restricted discretionary regime proposed for the EIC regime.

- 34 Mr Troon who lives nearby the EIC site submitted, would have received notice of new EIC provisions but did not present at the hearing. The same goes for the Scope, Pure 1 and Hensemen submissions from the other side of the State Highway. Mr Paterson also lives nearby but did not submit. As detailed in paragraph 83 below Mr Paterson's land is subject to a non-objection covenant in favour of Henley Downs so he would not be entitled to submit in any event. The potentially affected landowners either submitted but did not appear at the hearing to oppose the EIC, or have no ability to submit (and in respect of Mr Paterson is bound to provide written support or approval).
- 35 Notably, the EIC Activity Area is the only relatively flat land with sufficient area where education, technology or other activities proposed for the area could realistically have been anticipated, so the EIC and activities proposed for the area could not have come as a complete surprise to any submitters upon reviewing the Henley Downs submissions.
- 36 In summary there is scope for the EIC, and there are no natural justice concerns with regards to surrounding landowners.

Summary

- 37 The further changes to the EIC provisions are intended to ensure the scale of commercial and retail activity is limited, and to focus on enabling and attracting technology, film and higher education institutions. As activities that require comparatively large areas of land, it is more appropriate the EIC is located on the edge of the zone, and not adjacent to the village. These points address all the concerns

raised by Ms Jones.¹⁶ The combination of enabling specific use of the land, and provisions to ensure protection of the area's important values, mean it is more appropriate and more consistent with sustainable management than the current operative provisions (which make development in the area non-complying).

RD (HD-SH) 1 and 2

38 There are only technical matters to clarify in respect of the 2 residential area near the State Highway.

- (a) Dr Read addressed the panel on the number of sites contemplated for R(HD-SH)2. To be clear, zone standard 12.2.5.2.xviii.b on page 12-26 sets the maximum number of dwellings at 7. This has to take into account that there are already two homes in the area (Troon and Patterson) which means there may only be an additional 5 new properties in this activity area.
- (b) The **attached** amended Structure Plan **as A** now shows the indicative location for the flood bank required between the State Highway and Henley Downs, as referred to in rule 12.2.3.4.xix. As set out in the evidence of Messers Dent and Gousmett the mitigation and protection provided by a flood bank of the general nature described will protect not only the proposed development, but also the existing 2 houses in RD(HD-SH)2.

RD (HD-SH) 1 and 2 Scope

39 Scope should again be considered with reference to the table appended to the Opening Submissions for Henley Downs. The boundary of the areas are largely as notified. Density is similar. The flood bank would have been required with the proposed residential areas notified. The status for development of the areas is restricted discretionary as it was under the notified regime. As with the EIC, the existing submitters Scope, Pure 1, Hensemen and Troon did not come to the hearing to express any concerns with the amendments made to

¹⁶ Supplementary Comments, paragraph 1.4.4

RD (HD-SH) 1 and 2. Mr Paterson is not entitled to object and if asked, would be required to provide written support. In any event, as outlined below, the submitter and Mr Paterson are working positively together on PC 44.

RD (HD) F

- 40 The proposed changes to what is now named RD(HD) F help reduce visibility to the point its effects cannot be distinguished from the wider urban area. Part of it now sits in FP-1 which has a significantly lower density. The higher more visible part has been removed. There is now a smaller area to be developed than as notified.

Scope

- 41 Given the reduction in size, there is no issue as to scope or natural justice issues arising, and the residential yield as a whole over the plan change area has reduced.

RD (HD) G

- 42 Density in G is proposed to be limited to between 2 and 10 sites. This density is supported by the expert witnesses and well within scope of what was notified for the area.

FP-1

Variation 16

- 43 There were points raised by Commissioners and Mr Schrantz questioning why the 2003 decision on Variation 16, particularly with regards to the area Henley Downs has identified as FP-1, should be revisited. In response to that it is submitted no weight should be given to the 12 year old council decision, there have been several important changes in circumstances and other important considerations apply:

- (a) In 2005 the Environment Court confirmed in the decision *Wakatipu Environmental Society Inc v QLDC C90/2005* decided that the ONL-WB line within the Jacks Point Zone lay along Peninsula Hill. FP-1 does not lie within the ONL-WB.
- (b) In 2002 the Coneburn Area Resource Study Figure 14 identified the area now known as FP-1 as "3 – *potential for low density development within areas of open space for recreation, farming*

and conservation". This has not changed, and the more detailed assessment undertaken by Ms Pfluger and Mr Tyler has resulted in their recommendation that across the area proposed to be FP-1 there is the potential for up to 34 dwellings (whether they be residential or visitor accommodation, it is 34 in total) to be placed, while still protecting the open space and landscape values of the site. This is consistent with the Coneburn findings in 2002. There is now better and more detailed information available for decision makers to rely upon when determining the planning provisions appropriate for this site.

- (c) The economy and market has changed.
- (d) There is now proof of the effectiveness of quality control and mitigation measures, and confidence that those outcomes can continue to be achieved.

44 In summary the circumstances and context in which you are now being asked to make a decision are substantially different to in 2003.

45 The RMA requires and anticipates that plan provisions be revisited and reassessed to ensure they remain appropriate, and in this context revisiting the merits of the Variation 16 decision, with the benefit of new evidence is entirely consistent with the Act.

Landscape

46 In respect of the parts of FP-1 that were identified as development areas J and K in the notified plan, Dr Reid confirmed on 3 July that there was "no landscape argument against" 14 dwellings in that area. Ms Jones also supports only 14 platforms in that area.¹⁷ However the evidence of Ms Pfluger and Mr Tyler is that the topography and landform for the remainder of FP-1 is similar to that part previously known as areas J and K. On the same basis therefore it is submitted there is no landscape argument against expanding the 14 to 34 over the entire FP-1 site, particularly when the granting of consent for 34 sites is subject to the further detailed Spatial Layout Plan requirement

¹⁷ Supplementary Comments to section 42A Report for Plan Change 44. 3 July. Paragraph 1.3.10.1.1

- proposed by Henley Downs. that will include identification of areas to be retained as open space.
- 47 The submitter Mr Schrantz did not call expert evidence, and nor was he certain he would even be able to see the FP-1 area from his home. I will return to the status of his submissions and evidence at the hearing.
- 48 The submitter intends to continue to work with Mr Schrantz as a member of the Jacks Point community. In summary on any potential effects, it is noted that he seemed more opposed to the principle of the proposed development than the actual effects of it. His home is just over 350m from the boundary of FP-1 and FP-1 is not visible from his home. Some parts of FP-1 will be visible from his land, but only from his access over Preserve Drive, just as the existing Preserve Homesites are visible. The potential effects on Mr Schrantz of the development of FP-1, controlled by the suite of provisions being proposed by Henley Downs, will be de minimus.
- 49 In response to questions and comments from the Commissioners regarding ability to control quality outcomes, Mr Ferguson has recommended additional changes to the plan provisions set out below. These also address the matters raised by Ms Jones.¹⁸
- 50 The edits in the **attached** plan provisions make changes from relevant policies down through to the rules highlighted in green, to address and respond to questions raised in the hearing, including:
- (a) Policy 3.25
 - (b) Restricted Discretionary rule 12.2.3.3 on page 12-5 and 6
 - (c) External building colours restricted by new site standard 12.2.5.1.xvi.b (page 12-21)
 - (d) Any use of development of land that is not in accordance with a consent granted with a SLP is full discretionary (12.2.3.4.xv page 12-10)

¹⁸ Supplementary Comments, paragraph 1.3.10.2.1 – 3.

- (e) Clarification the cap of 34 applies to combined total of dwellings and visitor accommodation (zone standard 12.5.2.2.xvii.b. page 12-26)
 - (f) New subdivision matters of discretion on open space, ecological values, building platforms, land management framework and design guidelines 15.2.3.3.xiii.a - e page 15-16
 - (g) Minimum and maximum building platform size of 70 – 1000m² set in zone standard 15.2.6.3.viii. page 15-33 and site standard (d) on page 12-21.
 - (h) Further control over cohesive land management with additions to assessment matter 15.2.17.4.x page 15.53
- 51 Ms Jones confirmed she is comfortable the Spatial Layout Plan process will be effective.¹⁹

Scope - boundaries

- 52 Attachment 7 of Mr Tyler's evidence shows the plan change boundary adjustment proposed by Henley Downs over lot 28 owned by JPROA. JPROA is a submitter, and has provided a letter of support **attached as E** for the extension.
- 53 A second proposed boundary adjustment is shown over lot 29, currently owned by Fiordland Tablelands (not a submitter). Henley Downs is currently in negotiation to purchase the lot and counsel will update the Commissioners when that goes unconditional. As noted below at paragraph 88 onwards, Fiordland Tablelands is a member of JPROA and as such is bound by the Constitution to not object to the changed plan provisions being advanced by Henley Downs in any event.
- 54 Contrary to Ms Jones' opinion, it is submitted by Henley Downs it is appropriate these plan change boundary adjustments be made in order to better integrate suitable land with the plan change.²⁰

¹⁹ Supplementary Comments, paragraph 1.6.3

²⁰ Supplementary Comments. Paragraph 1.4.1

- 55 Scope for the boundary adjustment is found from two submissions. JPROA sought that where necessary plan change provisions apply to the balance of the Jacks Point Zone and Henley Downs Farm Limited sought "refinement of the Structure Plan".

Scope – activity

- 56 The Table appended to the Opening Submissions illustrates there is clearly scope for the FP-1 provisions. As notified there was a combined of discretionary (for buildings) restricted discretionary for the activity authorised by the ODP and controlled for submission. The FP-1 regime of restricted discretionary and tight controls is clearly within scope compared to this, and the submissions noted in the table strengthen the scope position, including the reliance and cross reference to the publicly available 2002 Coneburn Study which identified the FP-1 area as a 3 – being capable of absorbing low density development.

Public access benefit

- 57 The proposed FP-1 will secure a public access route from the Henley Downs residential area to Preserve Drive on the Tablelands. This public access would not have been practicable through the working farm that is currently subject to the operative Open Space classification.

Summary

- 58 In summary, the proposed provisions for FP-1 and protection measures provide benefits that are not provided by the operative plan provisions. The provisions enable the landowner to develop the site, and require provision of public access through the site not currently available. In providing these benefits and enabling this use, the plan provisions **attached** to this closing are intended to ensure the same open space and landscape values protected by the operative plan provisions (non complying status) will remain protected. Therefore, the proposed PC 44 provisions Henley Downs is advancing will better achieve the purpose of the Act than the operative plan, by both enabling development and public access, as well as protecting important landscape, open space and recreational values.

FP-2*Variation 16*

59 Similar to FP-1 above, questions were raised in the hearing why the 2003 Council decision in on Variation 16 should be departed from. In response:

- (a) In 2002 the Coneburn Area Resource Study Figure 14 identified the two fingers along Peninsula Hill pointing towards the Lake as *"3 – potential for low density development within areas of open space for recreation, farming and conservation"*. Importantly this has not changed. The more detailed assessment described on the second column of page 2 of Mr Tyler's attachment 1 sets out the more detailed assessment undertaken as part of the preparation for the District Plan Review Coneburn Study update.
- (b) The Update attached to Mr Tyler's evidence notes that *"due to the higher landscape sensitivity of the identified Peninsula Hill ONF, this area had not been analysed in more detail in the Study regarding the landform's ability to absorb change based on visibility. For PC 44 a more detailed assessment has been carried out on site on Peninsula Hill, which allowed for a visibility analysis at a localised scale, taking the broader-scale findings from the Coneburn Study into account. This site-based assessment highlighted that two distinctive folds in the roche moutonee landform provide a significantly higher capacity absorb development than the remainder of the landform with its generally highly visible slopes."*

60 The recent and more detailed assessment by the experts justifies a department from the Variation 16 decision findings.

61 Dr Read agrees the 2 identified sites can absorb development including to the extent they are not visible at night, but she and the Commissioners asked how density, nature and scale of that development can be controlled.

62 The changes in the **attached** plan provisions make changes to the rules highlighted in green, to address and respond to questions raised in the hearing, including:

- (a) Matter of discretion over access 12.2.3.3.c.v page 12-6 requiring access remain out of site in the gullies and where practicable follow farm tracks;
- (b) Matter of discretion over design guidelines 12.2.3.3.c.viii page 12-6
- (c) Clarification all building development (including farm buildings) and visitor accommodation activities is fully discretionary in the area of FP-2 outside of the Farm Preserve Home Sites and Peninsula Hill Landscape Protection Area (12.2.3.4.xiv page 12-10). Within the Homesites Visitor Accommodation that is not ancillary to the principle residential activity is also full discretionary. (12.2.3.4.xiv.b page 12-10)
- (d) New site standard 12.2.5.1.xv.d sets site coverage at 25% within the Farm Preserve homesite (page 12-20)
- (e) External building colours restricted by new site standard 12.2.5.1.xvi.b (page 12-21)
- (f) New subdivision matters of discretion on open space, ecological values, building platforms, land management framework and design guidelines 15.2.3.3.xii.a - e page 15-15 and 15-16.
- (g) New zone standard 15.2.6.3.vii on page 15-33 makes it non complying to subdivide in FP-2 outside of the FP Homesites without a building platform
- (h) Further control over cohesive land management with additions to assessment matter 15.2.17.4.x page 15.53

63 The above amended plan provisions now address the points raised by Ms Jones²¹ with the exception of her suggestion at 1.3.10.3.3 that subdivision with building platforms are full discretionary. As noted above within the 2 Homesites instead of building platforms Henley Downs is proposing a 25% site coverage restriction. Subdivision and any development outside of the Homesites and the Peninsula Hill

²¹ Supplementary Comments. Paragraph 1.3.10.3.

Landscape Protection Area is full discretionary, and within the Peninsula Hill Landscape Protection Area is non-complying.

Consent Notice

- 64 As pointed out by Mr Schrantz there is a consent notice registered on lot 36 as identified on Mr Tyler's attachment 7, which amongst other things prevents subdivision other than a boundary adjustment which does not create an additional lot, (condition k) and building outside of designated homesite areas (condition b). The process to amend this consent notice in accordance with section 221 of the RMA is common and is effectively a variation of consent condition. This would enable a boundary adjustment to align lot 36 with the plan change boundary, retain the consent notice over the large balance of lot 36, and remove the consent notice from the smaller portion of the lot that would effectively become part of lots and 8. The process might be notified to affected parties. However due to the non-objection covenant binding Mr Schrantz (detailed below at 79), he would be deemed to have provided written approval of any application to vary the consent notice such that any potential effects on the Schrantz Lot 35 can not be taken into account.

Scope – Boundary

- 65 A small portion of the western-most tip of FP-2 is proposed to be amended as shown on Mr Tyler's attachment 7. The land the subject of the boundary adjustment, and adjacent to it, is all owned by Henley Downs. There are no affected parties and no scope issues. There is no reason for this geographic extension not to be included, contrary to Ms Jones' position.²²

Scope – activity

- 66 As notified, development in the ACRAA in this area was discretionary and subdivision controlled. The operative provisions make buildings in the FP-2 area non complying. Some submissions sought tighter restrictions than that as notified (such as Schrantz and Fong) and

²² Supplementary Comments. Paragraph 1.4.2

other submissions sought the ability for buildings (Henley Downs Farm Holdings). Henley Downs have proposed a package that is tighter than that as notified with a combination of restricted discretionary, discretionary and non-complying rules that tightly restrict development to two sites that the experts all agree are not visible. The proposed changes reduce effects from that as notified as is well within scope of than what was notified.

Summary

- 67 The suite of provisions proposed for FP-2 is more suitable for the site, now that the more in depth assessment has identified two sites that are not visible and that are able to absorb development. Tight control of the scale of development within the two sites, along with controls over the landscape effects of access, and even tighter controls on development beyond the two Farm Preserve Homesites provides a set of rules that both enables development and protects the outstanding natural landscape values of the site.

Non Objection obligations (Covenants and JPROA Constitution)

- 68 In summary there is a suite of non-objection covenants over most of the land in and around the Jacks Point Zone preventing landowners and occupiers from objecting to the RM planning mechanisms used by the Jacks Point developer from continuing to develop the zone. All landowners connected to services are also required to be a member of the JPROA, and agreed to be bound by the terms of the Constitution which contain further obligations to both not object, and if called upon to support planning proposals. These obligations are raised primarily to address the part of the natural justice part of the test in respect of scope, that requires there be no third parties that would have been likely to submit had the summary of submissions notified by council set out the change. The fact is, potentially affected parties at Jacks Point are bound not to submit under the various covenants and obligations. The natural justice aspect of the scope test is not at issue as the covenants in most cases do not only require landowners and occupiers to not submit, they are deemed written support of a plan or consent proposal by the Jacks Point developer. The JPROA Constitution requires landowners to not object, and if requested to sign in support of plan or consent proposals by the Jacks Point Developer.

The instruments relevant to PC are set out briefly below. Henley Downs has been nominated to benefit from the various covenants and the Constitution in this manner.

- (a) The Jacks Point Covenant applies to all of the residential land in the Jacks Point Zone (except Mr Troon's land). The covenant requires non objection and is also deemed written support. In response to some of the concerns raised by Dr Read regarding views from within Jacks Point towards the Farm Preserve Activity Areas, this means that such effects can not be taken into account in relation to the Plan Change;
- (b) The Patterson land (lots 1 and 2 on Mr Tyler's attachment 7) next to the EIC has a no complaints covenant that also requires the owners to provide affected party approval/support.
- (c) The Schrantz land (being Lot 35 DP381477) has a no objection covenant that is also deemed written support.
- (d) The JPROA Constitution requires no objection, and requires landowners to provide written support if requested.

Jacks Point Primary Covenant

- 69 In *Coneburn Planning Limited v QLDC* [2014] NZEnvC 267 (**attached as F**) the Environment Court issued a procedural decision in respect of EI7017246.2 (**Primary Covenant, attached as G**) and whether it constitutes deemed written approval under section 104 (3) of the RMA in respect of resource consents from **all** owners and occupiers' of residential tenements of the Jacks Point Zone.
- 70 The certificates of titles for the residential land within Jacks Point are subject to the land covenant contained in EI7017246.2 (**Primary Covenant**). The Primary Covenant, amongst other things, provides for non-objection and deemed written approval covenants in relation to "planning proposals" for land contained in historic certificates of title OT147423 and OT147424 (being the original certificates of title for the Henley Downs land and which Henley Downs' land now forms part).²³

²³ Clause 8.2 (e)

The Henley Downs' submitters are the entity that specifically benefit from the Primary Covenant in respect of the Henley Downs land.

- 71 "Planning Proposal" is defined as *"includes (without limitation) any application for resource consent and/or plan change and/or variation of any nature under or to the relevant District Plan or proposed District Plan or the Jacks Point Zone."* And therefore clearly applies here.
- 72 The Decision summarises the line of case law confirming the validity and role of non-objection covenants²⁴ in the RMA context and usefully provides the background and context to the Primary Covenant. The relevant clauses in the Primary Covenant are identical to the Schrantz covenant, and materially similar to the Patterson covenant, so Judge Jackson's findings apply to those covenants also.
- 73 The Court found that the Primary Covenant not only legitimately prevents submissions in opposition (if enforced) it does constitute deemed written approval and support under section 104 (3), and that authorising general approval under section 104 (3) is consistent with the purpose of the Act both procedurally and substantively²⁵. This analysis applies equally to a plan change. The Primary Covenant constitutes deemed written support for the plan change of all the owners and occupiers in Jacks Point..
- 74 The Court also stated that *"All the Developer needs to do under that covenant is to provide a copy of the covenant to the authority as evidence that approval is given. That seems to be conclusive."*²⁶
- 75 The relevant clause in the Primary Covenant refers to written approval generally and is not specific to section 104 (3):

8.6. The Grantor hereby gives written approval for the purposes of the Resource Management Act 1991 to any Planning Proposal referred to in clauses 8.1 and 8.2. The Grantor shall provide any necessary further written approval to any such Planning Proposal if requested by any of the persons named in

²⁴ Paragraph 18 and 19

²⁵ Paragraph 38

²⁶ Paragraph 41

clauses 8.1 and 8.2 and in the event of failing to do so those persons shall be entitled to provide a copy of this clause 8 to the relevant consent authority as evidence that such written approval is given.

- 76 The Court's interpretation can therefore be equally applied to a Plan Change. The Primary Covenant not only prevents the owners of land that is subject to the Primary Covenant from objecting to Henley Downs' Planning Proposal, it is deemed written support for that proposal.²⁷ For this reason there is no natural justice issue arising in respect of scope for the changes now being pursued in respect of the owners and occupiers of Jacks Point.
- 77 The Decision usefully provides the background and context to the Primary Covenant. The Court observed that the covenant is not for the benefit of owners of the land in perpetuity because of the way "Developer" is defined. The covenant only gives approval as long as the Developer or its successors own land in Jacks Point.²⁸ The Court confirmed that purchasers of lots in Jacks Point are effectively giving the developer flexibility in the period before the development is complete, and that after completion and when the Developer no longer owns land, that flexibility disappears and certainty for the purchasers of the land increases.²⁹
- 78 In summary therefore, the Primary Covenant:
- (a) restricts the owners and occupiers of land that are subject to the Primary Covenant from lodging submissions against planning proposals (including plan changes) relating to the Henley Downs

²⁷ The following parties lodged submissions on PC44 and own land within Jacks Point that is subject to the Primary Covenant:

Hannah Clowes and Joshua Clowes, registered proprietors of Lot 5023 DP 367532 contained in certificate of title 274167;

Peter Knox and Julie Horwood, registered proprietors of Lot 4133 DP 380605 contained in certificate of title 322788; and

John and Susan Pritchard, registered proprietors of Lot 6009 DP 418420 contained in certificate of title 470699.

²⁸ Paragraph [26]

²⁹ Paragraph 38

land that are not materially inconsistent with the provisions of the Jacks Point Zone (clause 8.2(e)); and

- (b) deems that the owners of land that are subject to the Primary Covenant have given written support for the purposes under the Resource Management 1991 to any such planning proposal (clause 8.4 and 8.6).

EI8349562.1 (Schrantz land)

- 79 As noted above Alexander Schrantz and Jayne Schrantz (**Schrantz**) are registered proprietors of Lot 35 DP 381477 (**Lot 35**) contained in certificate of title 326408.
- 80 Lot 35 is subject to the land covenant contained in EI8349562.1 (**Lot 35 Covenant, attached as H**). Lot 35 is subject to a very similar covenant to the Primary Covenant. The Lot 35 Covenant, amongst other things, provides for non-objection covenants in relation to the Henley Downs Land (including lots 34 and 36). Clause 7.3 of the Lot 35 Covenant contains nearly identical wording to clause 8.6 from the Primary Covenant referred to above, and therefore the Environment Court ruling deeming it written support to the plan change applies.
- 81 Henley Downs has been nominated by the entities with the benefit of the covenant to receive the benefit of the non-object provisions contained in clause 7.1(b)(i) and (iii), 7.1 and 7.3 of the Lot 35 Covenant in relation to the majority of the land in Henley Downs. A similar nomination process occurred in the *Coneburn* case with the nominated developer entity then being able to benefit from the covenant.³⁰
- 82 Henley Downs wishes to emphasise that although it is entitled to and does ultimately rely on the covenant, it relies in the first instance on the merits of the Plan Change to avoid effects (ie effects that are more than de minimus) on the Schrantz property. Henley Downs is committed to continuing to work with the Schrantz's as members of the

³⁰ Paragraph 13

Jacks Point community to address any matters that relate to the Plan Change or use and management of FP-1 and FP-2 Activity Areas.

Easement instrument 9777181.4 - Paterson Land

- 83 In July 2014, Henley Downs transferred the land contained in certificate of title 655559 (shown as "lots 1 and 2 Paterson" on the Ownership Plan) to the Patersons. The Paterson Land is subject to a land covenant contained within easement instrument 9777181.4 registered in favour of the HDFHL and HDLHL Land (and other land within the Jacks Point Zone)(**Paterson Covenant attached as I**). Clause 2 of the Paterson Covenant contains non-object covenants in favour of the Henley Downs' Land, requires the Patersons to provide approval and provides that the Patersons have granted Henley Downs a power of attorney to provide affected party approval on their behalf.
- 84 I am advised that Henley Downs and Mr Patterson continue to work together positively and in that respect that Mr Patterson is happy, for example, to work together on the flood bank which helps protect his property along with the wider Jacks Point Resort Zone.

Jacks Point Residents and Owners Association Constitution

- 85 All landowners connected to the JPROA Society services are members of the Society and are bound by the Constitution (**attached as J**). The Constitution requires, amongst other things, members to:
- (a) not oppose, or take part in any opposition to, the development of Jacks Point (clause 8.1(d)); and
 - (b) sign any document or do anything reasonably necessary to support any resource consent or other authorisation applied for or on behalf of the "Developer" in respect of development at Jacks Point (clause 8.1(f)).
- 86 Henley Downs Farm Holdings Limited and Henley Downs Land Holdings Limited are "Developers" as that term is defined in the Constitution and they have been nominated as such, and the Henley Downs Land is included in "Jacks Point" as that term is defined in that Constitution.

- 87 **Attached** as **E** to these submissions is a letter from the Chair of the JPROA which supports the inclusion of the quarry in PC44.

Fong Tablelands Limited and Fiordland Tablelands Limited

- 88 Fong Tablelands Limited (**FTL**) is the registered proprietor of the land contained in Lots 26, 27, 28 DP410922 and Lot 30, 32 DP381477 (**FTL Lots**) Fiordland Tablelands Limited (**FTL2**) is the registered proprietor of the land contained in Lot 29 DP410922 (**Lot 29**). FTL has lodged a PC44 submission but did not appear.

- 89 The FTL Lots and Lot 29 are located in an area of Jacks Point known as the "Tablelands" or "Preserve". Two of the FTL Lots, being Lot 28 DP 410922 and Lot 30 DP381477 are shown as surrounding land owner no.5 on the PC44 Land Ownership Plan. Lot 29 is shown as Lot 29 on the PC44 Land Ownership Plan.

- 90 FTL and FTL2:

- (a) are members of the Jacks Point Residents & Owners Association Incorporated (**Society**);
- (b) pay the Society's membership levies; and
- (c) on signing the Society's membership application and acknowledgement forms on 9 July 2010, agreed to be bound by the Society's Constitution (**Constitution**).

- 91 The Constitution, amongst other things, provides that members (such as FTL and FTL2) agree:

- (a) to not oppose, or take part in any opposition to, the development of Jacks Point (clause 8.1(d)); and
- (b) to sign any document or do anything reasonably necessary to support any resource consent or other authorisation applied for or on behalf of the "Developer" in respect of development at Jacks Point (clause 8.1(f)).

- 92 On this basis, upon giving FTL and FTL2 notice that HDFHL and HDLHL has been nominated as a Developer under the Constitution:

- (a) FTL is in breach of the Constitution if does not withdraw its submission relating to PC44 as it relates to the HDFHL and HDLHL Land; and
- (b) FTL and FTL2:
 - (i) cannot lodge submissions relating to PC44 as it relates to the HDFHL and HDLHL Land; and
 - (ii) are required to provide written support for PC44 in relation to the HDFHL and HDLHL Land.

Implications: The Covenants can be relied upon as evidence of support

- 93 As noted above, Henley Downs submits that PC 44 should be approved on its merits, and therefore has not taken a heavy handed approach and sought to immediately enforce the Covenants, or the Constitution by using the legal avenues available to require submitters to withdraw submissions and provide written support. However it is noted that in accordance with the *Coneburn* decision, presentation of those Covenants is sufficient to show written support for the plan change.
- 94 The primary reason for setting out these covenants is to illustrate that that is no natural justice issue for the identified potentially affected parties, in relations to the changes to PC 44 since notification, as those changes could not have been objected to in any event in accordance with the relevant covenant, and/or the constitution and are, in fact, supported by the owners of nearby property by virtue of the Covenants provided to the Commissioners as part of these submissions.
- 95 While it is understandable that the Commissioners might query the nature or effect of the Covenants, bear in mind that landowners' bought their land knowing that it was subject to those covenants and obligations for the benefit of the development of the Jacks Point Resort Zone.

Conclusion

- 96 In conclusion, Henley Downs have addressed all matters raised during the hearing, and the expert evidence presented remains sound.

By comparison the officer and submitter evidence lacks the detail and veracity of the Requestor and Henley Down's evidence, including but not limited to the Coneburn Study as a guiding tool for, avoiding effects in Residential, FP-1 and FP-2, and mitigating effect in other areas (egg EIC and SH Activity Areas). The Henley Downs' proposed provisions provide significantly greater certainty, benefits and protections than the Operative District Plan. Council's role and discretion is preserved on future applications for land use and subdivision and generally, making land available as a genuinely more efficient and appropriate use of physical and nature resources.

- 97 Overall, the submitter has taken on board the comments and recommendations that arose at the hearing and submits that the package attached to these submissions achieves the sustainable management purpose of the Act and is more appropriate than the status quo under the Operative District Plan or any other options.

8 July 2015



Maree Baker-Galloway

**Counsel for Henley Downs Farm Holdings Limited and Henley Downs
Land Holdings Limited**