49/1

**Submission on Publicly Notified Plan Change**

*Clause 6 of the First Schedule of the Resource Management Act 1991*

To: Queenstown Lakes District Council
Private Bag 50072
Queenstown 9348

1. Name of submitter: Blackmans Creek Holdings No. 1 LP ("**Submitter**")

2. This is a submission on the following public plan change:

Plan Change 49: Earthworks – to the Queenstown Lakes District Plan ("**PC49**").

3. The Submitter could not gain an advantage in trade competition through this submission.

4.1 The Submitter is a landowner potentially affected by PC49. This submission requests amendments to the provisions proposed to be inserted into the Queenstown Lakes District Plan by PC49.

4.2 For ease of reference and consideration by the consent authority, the issues raised in this submission are set out below under separate headings. Each section of the submission contains the submission point relevant to that heading, the reasons for the submission point, and the relief requested.

5. **Positive v Negative – Change in Emphasis**

5.1 Earthworks are essential to the prosperity and wellbeing of the District. In accordance with the general approach of the RMA, the focus should be on enabling appropriate earthworks while ensuring that adverse effects are avoided, remedied or mitigated. Part 4.11 Earthworks of the District Plan (proposed to be deleted under PC49) reflects the correct approach of enabling subject to environmental protection.

5.2 The Section 22.1 introduction to new Part 22 Earthworks (proposed through PC49) reverses that focus by placing primary emphasis on adverse effects before addressing the important enabling aspect. This is then inconsistent with Section 22.2 which reverts to the original focus first on enabling and then on environmental protection. The reversal in Section 22.1 is inappropriate and creates inconsistency.

*Relief Requested*

5.3 That the first two paragraphs in Section 22.1 be reversed, in order to reinstate the original order of focus and to achieve consistency with the order of objectives and policies in Section 22.2.

6. **Major Change in Policy**

6.1 Under the (pre-PC49) District Plan, Part 4 addresses District Wide issues and contains the primary District Wide Objectives and Policies. Each separate Section in Part 4 addresses a different issue and specifies a different set of Objectives and Policies. It is necessary to read the relevant Sections as a whole in order to understand the balance between the way different issues are addressed, and to arrive at overall decisions relating to sustainable management. For example, and relevantly for the purpose of this Submission Point, Part 4.2 deals with landscape and visual amenity issues and Part 4.11 deals with earthworks. This is an appropriate approach because specific issues arise in respect of earthworks which do not arise in respect of landscape and visual amenity effects. Importantly Part 4.11 achieves consistency with Part 4.2 by only touching upon visual amenity issues in passing (because they have already been dealt with under Part 4.2) and by using general language to ensure

that Part 4.2 retains priority on the subject of landscape and visual amenity issues and is not contradicted by Part 4.11.

6.2 The PC49 s32 Report does not recognise the existing District Plan structure (this being one of the dangers of isolating a subject such as Earthworks and dealing with it separately, rather than as part of an overall District Plan Review). The PC49 s32 Report gives the impression that the Earthworks section of the District Plan must also deal with landscape and visual amenity issues relating to earthworks. The s32 Report does not recognise or assess the significance of the Part 4.2 Objectives and Policies.

6.3 As a consequence of the matters detailed in the previous two paragraphs, PC49 includes a major change in policy in respect of landscape and visual amenity values. The new policy direction contained in Objective 2 of PC49 simply requires avoidance of a range of outcomes. Not only is that obviously impossible to achieve, it is fundamentally different from the policy direction contained in Part 4.2. As a consequence PC49 creates a major inconsistency within the District Plan.

6.4 The concerns detailed above are compounded by the introductory words to Objective 4 which read "*Subject to Objective 2, to enable earthworks...*". The underlined introductory words give Objective 2 priority over Objective 4. This drafting will operate to significantly prevent the positive outcomes anticipated by Objective 4, because many of the activities detailed in Policies 4.1 – 4.4 cannot be carried out in compliance with the higher priority Policy 2.1 and/or Policy 2.2.

6.5 This problem is further compounded by the fact that there has been extensive litigation, and a number of Environment Court judgements, which provide guidance and interpretation on the implementation of Part 4.2. That includes, for example, interpretation of the "*reasonably difficult to see*" concept. PC49 effectively throws all that case law out the window. If PC49 were to be confirmed in its current form, the District Plan would contain one policy approach relating to buildings in sensitive landscapes and a different policy approach relating to earthworks in sensitive landscapes. This is obviously inappropriate, because many developments comprise both buildings and earthworks.

6.6 This problem is further compounded by the fact that PC49 largely retains the current (pre-PC49) assessment matters, and does not amend the assessment matters to be consistent with the new policy approach. By way of example, the new PC49 Objective 2 "*avoidance of adverse effects*" policy approach is inconsistent with the relevant assessment matters which adopt a "*Whether and to what extent...*" policy approach. The latter is consistent with the Part 4.2 Landscape and Visual Amenity Objectives and Policies but is inconsistent with the new PC49 Objective 2 policy approach.

6.7 This basic flaw in PC49 is further compounded by the second major change inherent in PC49 which is to remove earthworks plan provisions from each different part of the District Plan and consolidate them into a new Part 22. Under the pre-PC49 plan provisions, assessment matters relevant to consents for earthworks were considered in the context of the objectives and policies relevant to the activity being undertaken. By way of example, an application for consent for earthworks in the Rural General zone is (pre-PC49) considered against the Part 5 objectives and policies of the Rural General Zone as informed by the relevant Part 4 objectives and policies, whereas an application for consent for earthworks in relation to a residential development within a zoned residential area is considered in the context of the Part 7 Residential objectives and policies which are in turn informed by the Part 4 objectives and policies relevant to residentially zoned areas.

6.8 PC49 fundamentally changes this approach. PC49 appears to be attempting to address earthworks in a global manner with very little, if any, reference to development context in terms of the zone within which the proposed activity is taking place. As a result, for example, new Policy 2.2 which requires avoidance of adverse visual effects of earthworks on visually prominent slopes, natural landforms and ridgelines applies to all earthworks, regardless of

whether the particular '*prominent slope*" is located on a Rural General VAL hillside or within the residentially zoned area of Queenstown Hill.

6.9 One intended objective of PC49, being the removal of numerous duplicated District Plan provisions, is understood and accepted. However this still involves a major change to the structure of the District Plan. The current PC49 approach actually involves a step backwards rather than a step forwards because, although it minimises duplication of plan provisions (which merely reduces the number of 'pages' in a largely online document), it increases consent complexity (and will inevitably increase consenting costs) because it duplicates plan provisions relating to landscape and visual amenity values in a manner which creates fundamental inconsistencies.

*Relief Requested*

6.10 That the following amendments be made:

a. Delete Objective 2 and Policies 2.1 – 2.4 (and, if considered necessary for the purposes of clarity, cross-reference the Part 4.2 District Wide Objectives and Policies relevant to landscape and visual amenity values).

b. Amend Objective 4 by deleting the words "*Subject to Objective 2...*".

c. Retain Rule 22.4.iv [Landscape and Visual Amenity Assessment Matters] generally in their current form (as they are virtually the same as contained in the District Plan pre-PC49) but add a specific assessment matter which requires consideration to be given to the zone within which the earthworks are being carried out and the relevant objectives and policies of that zone.

## 7. "*Avoiding*" v "*Avoiding, remedying or mitigating*"

7.1 Objective 1 addresses the enabling aspect of earthworks, and does so by recognising that earthworks are essential to subdivision, development and access. However Objective 1 then requires those enabling earthworks to be undertaken in a manner which "*avoids adverse effects*". It is plainly impossible to carry out earthworks in a manner which avoids all adverse effects. It is inappropriate for an Objective to seek an outcome which is impossible to achieve.

7.2 That Objective 1 is implemented by Policy 1.2 and Policy 1.5 which again require avoidance. The same point applies. A policy should not seek to achieve the impossible.

7.3 The submitter acknowledges that policies should be directive to the extent reasonably possible, and that it is generally undesirable to parrot the "*avoid, remedy or mitigate*" mantra of the RMA. However that is the reality when it comes to earthworks. Some effects are avoided, many effects are mitigated, and sometimes effects are remedied. There is nothing inappropriate about using the phrase "*avoid, remedy or mitigate*" when it is directly applicable and is appropriate.

7.4 This submission point also raises, in a wider context, Submission Point 6 above. If one considers earthworks for a particular activity in the context of the objectives and policies of the relevant zone, informed by Part 4 Objectives and Policies where relevant, then the inevitable outcome is an "*avoid, remedy or mitigate*" outcome. It is inappropriate for a separate Earthworks Part 22 of the District Plan to seek more stringent outcomes than are anticipated by other relevant objectives and policies in the District Plan. That creates inconsistencies within the District Plan which will cause interpretation problems.

*Relief Requested*

7.5 In Objective 1, Policy 1.2 and Policy 1.5 amend "*... avoids adverse effects...*" to read "*... avoids, remedies or mitigates adverse effects*".

## 8. Ski Area Sub-Zones

8.1 Ski Area Sub-Zones are specifically identified on the Planning Maps. Those identified areas anticipate and provide for the kinds of activities traditionally carried out within skifields. Those activities, of necessity, include 'terraforming' the landscape involving extensive earthworks. Such earthworks are an integral and essential aspect of the construction, operation and maintenance of skifields.

8.2 Given that a District Plan should be forward thinking, it is also appropriate to take into account climate change, together with current and likely future attitudes towards recreational activities. Mountain biking and hiking are obvious examples. Skifields have the benefit of readymade access which can enable extensive recreational activities within Ski Areas at times when the skifield cannot operate. Such activities may also involve earthworks, such as the creation of trails for mountain bikes. Such earthworks, while being essential for such activities, are generally of relatively minor scale compared to the extent of earthworks for a skifield.

8.3 The inevitable outcome of providing for skifields is that those identified Ski Areas undergo major change through earthworks, resulting in major effects on natural landforms, prominent ridgelines, and the like. These areas of major effect are limited in scope, and in area, when considered in the context of the Queenstown Lakes District. When one considers the recreational opportunities which are enabled by such earthworks, it is arguable that those effects are not adverse. However that is a debatable point, and it is essential that the District Plan resolve that debate by enabling and providing for such earthworks on the basis that they are not adverse.

8.4 One advantage of skifields is that they are generally not visible (from outside the Ski Area) except from below and from a considerable distance, which minimises the impact of earthworks associated with activities such as roading. However they are visible from the air, with Cardrona Skifield being a prime example. It is impossible to disguise or hide the effect of earthworks on Cardrona Skifield when viewed from the many planes which fly overhead and relatively close to that particular skifield.

8.5 The current (pre-PC49) District Plan recognises all of the above by exempting earthworks within the Ski Area Sub-Zones from any form of direct control. That regime has been in place since at least 1995 (and possibly considerably longer). That is an appropriate approach for this activity.

8.6 PC49 radically changes this policy approach. While PC49 exempts earthworks within Ski Area Sub-Zones from the new proposed controls relating to volume of earthworks, that exemption does not extend to 'Bulk Earthworks', and PC49 imposes restricted discretionary activity status on earthworks within Ski Area Sub-Zones if any cut exceeds 1m. That new control is then compounded (in effect) by Submission Point 7 above relating to "*avoidance*" and Submission Point 6 above relating to compliance with new and very stringent objectives and policies relating to landscape and visual amenity effects.

8.7 The reality is that it is virtually impossible to carry out meaningful upgrades of existing skifield runs and/or provide access trails to different parts of a skifield and/or extend a skifield into new territory (within the Ski Area Sub-Zone) without carrying out earthworks which create cuts over 1m in height and/or exceed 50,000m3 in volume. The new policy approach then makes it virtually impossible to obtain consent, despite the restricted discretionary activity status of the activity. This amended approach to Ski Area Sub-Zones is fundamentally inappropriate.

8.8 In addition, there is no apparent justification for this new proposed approach. Neither the Monitoring Report dated May 2012 (refer to the s32 Report for PC49) or the s32A Report itself identifies any difficulties or concerns with the regime, which has operated for at least 20 odd years, which would justify this amended approach.

8.9 PC49 does contain a provision exempting all earthworks within a Ski Area Sub-Zone if carried out in accordance with a Conservation Management Plan or Concession approved by the

Department of Conservation. The assumptions underlying that provision appear to be firstly that all skifields are located on Crown land and secondly that the criteria applied by the Department of Conservation will adequately address all relevant effects. This approach is inappropriate, for the following reasons:

a. It is doubtful whether the exemption actually works as intended. The terms "*Conservation Management Plan*" and "*Concession*" are technical terms which do not include all of the various different forms of tenure from the Crown that Ski Areas could (and do) operate under.

b. Any assumption that all existing Ski Areas are located on land owned by the Crown is incorrect (specifically in relation to Cardrona). Whatever controls are imposed by the Crown under whatever tenure is in place, and whatever the potential outcome of those controls (neither of which is known), it is inappropriate that different Ski Areas be subject to different earthworks control regimes.

c. It is possible that a single Ski Area could partially be located on Crown land and partially on private land, in which case PC49 would result in two different earthworks regimes applicable within the same Ski Area.

d. The Council has no control over what land may or may not be privatised by the Crown in future. The PC49 exemption might actually become a disincentive to private ownership, because private ownership would result in loss of the exemption, when private ownership might otherwise be an effective and efficient outcome in terms of management of the Ski Area land resource.

e. In summary on this point, all Ski Area Sub-Zones should be subject to the same (if any) control. However the Submitter contends that no such control is necessary, for the reasons expressed above.

*Relief Requested*

8.10 Amend Rule 22.3.2.1(b) as follows:

a. Amend subclause (i) by deleting subclause (e) relating to trails and operational areas within Ski Area Sub-Zones.

b. Delete Rule 22.3.2.1(c)(i) relating to approvals by the Department of Conservation.

c. Amend Rule 22.3.2.1(c)(ii) by exempting earthworks within Ski Area Sub-Zones from Rule 22.3.3 and Rule 22.3.2.4(b).

d. Make any other amendments that are required to ensure that all earthworks within a Ski Area Sub-Zone are a permitted activity.

## 9. Volume Control

9.1 The Submitter questions the justification for any form of volume control relating to earthworks. In making this Submission Point the Submitter acknowledges, and emphasises, the importance of the height and slope trigger control. In sensitive landscapes it is the height of a cut above the level of earthworks activities and/or the height and extent of the fill batter below the level of earthworks activities which primarily gives rise to adverse effects. Within areas zoned for development it is the height of a cut and/or fill which potentially creates stability issues and/or creates other residential adverse effects in respect of neighbouring properties. The Submitter questions what the volume trigger control achieves which is not achieved by the height and slope trigger control.

9.2 In making this Submission Point, and in putting the questions detailed in the following paragraph, the Submitter notes that the following potential effects are addressed separately by Site Standards which trigger restricted discretionary activity consent control if breached:

a. Height of cut and fill and slope.

b. Engineering requirements for residential building platforms and retaining walls.

c. Environmental protection measures, including sediment and erosion control, dust control and revegetation.

d. Potential adverse effects of activities close to water bodies or which will affect aquifers.

e. Potential effects on cultural heritage and archaeological sites.

f. Construction noise.

g. Potential effects on transmission lines.

9.3 Taking into account all of the above the Submitter asks:

a. What does the volume control achieve, in terms of a consent trigger, that is not already achieved by the Site Standards summarised above?

b. If all of the potential effects which arise under the Site Standards detailed above are addressed, what difference does it make (in respect of any particular site) whether the volume of earthworks excavated or deposited is 100m3, 200m3, 300m3, 400m3, 500m3, 1,000m3, 2,000m3 or 50,000m3?

c. What assessment matters come into play upon breach of the volume control which do not come into play upon breach of any of the other Site Standards summarised above?

d. What condition can be imposed as a consequence of the volume trigger control that cannot be imposed as a consequence of breach of the Site Standards summarised above?

e. What condition can be imposed as a consequence of the volume trigger control that is necessary to address any concern if there is no breach of the Site Standards summarised above?

f. How many resource consents potentially will have to be applied for, processed, and paid for, in respect of earthworks activities which breach the volume control but which do not breach any of the other Site Standards [particularly given that a purported objective of PC49 to reduce consenting costs]?

9.4 One issue which may need to be addressed if the volume trigger control were to be deleted may be the issue of hours of operation within residential areas. If that is the case however, requiring a large number of resource consents to be applied for in order to be able to impose a control on hours of operation is an inefficient method of addressing this concern. A more efficient method would be to insert a Site Standard imposing limits on hours of operation (in relation to earthworks activities) within specified zones (or possibly all zones other than Rural General zone). Appropriate hours of operation could be 8am to 6pm on Monday to Saturday of each week, or something similar. If that method were adopted, consent would only be required if someone wanted to carry out earthworks activities outside those hours.

*Relief Requested*

9.5 That all PC49 provisions which impose a earthworks volume trigger level for consent purposes, or which relate to an earthworks volume trigger control rule or requirement, be deleted.

9.6 Possibly insert a new Site Standard specifying permissible hours of operation for earthworks activities in specified zones, or within all zones other than the Rural General Zone.

10. **Legal issue – ONL/ONF Consent Status Trigger**

10.1 Rule 22.3.3.i is a site standard which imposes resource consent 'trigger' controls relating to maximum total volumes of earthworks as detailed in Table 22.1 referenced in that Rule. Table 22.1 contains a 200m3 Tier 2 consent trigger in relation to ONL's and ONF's which is different from a 1,000m3 Tier 6 trigger rule applicable to the Rural General zone excluding ONL's and ONF's. The Submitter contends that this provision is *ultra vires.*

10.2 This issue arises from the combination of the following factors:

a. The District Plan does not formally determine the extent and boundaries of ONL's and ONF's. ONL's and ONF's are identified on the Landscape Category Maps which, effectively, record ONL's and ONF's as determined through a sequence of Environment Court decisions, many of which are resource consent decisions and are not District Plan plan change decisions. The Landscape Category Maps can be, and are, amended from time to time as a result of Environment Court consent decisions which do not arise from any review of the District Plan.

b. The issue of the status of the landscape category lines on the Landscape Category Maps has been a matter of some debate. The current position of the Council appears to be that the solid black lines can only be amended by the Environment Court (whether through resource consent appeal or plan change appeal is unclear) whereas the dotted lines can be amended by the Council at resource consent stage.

c. An Interim Decision issued in respect of PC19 (EnvC93 (2014)) has determined that the status of an activity must be specified in the District Plan, and cannot be determined through a resource consent process.

d. It appears to follow from the above that, as the landscape categories lines are boundaries which have or will be determined thorough a resource consent process, and as the proposed 200m3 resource consent trigger control is based upon whether or not the relevant land is within an ONL or an ONF, that proposed trigger control is *ultra vires.*

10.3 The Submitter notes that this problem does not arise under the current (pre-PC49) District Plan because the differentiation between the three landscape categories generally only arises in respect of policies and assessment matters. There are few, if any, instances where consent status depends upon an ONL/ONF determination (and it is noted that, if there are any such instances, it would appear that those are also *ultra vires* as a consequence of the PC19 Interim Decision).

*Relief Requested*

10.4 Amend or delete any rules which purport to determine consent activity status as a consequence of the relevant earthworks activity being located within an ONL or an ONF.

10.5 In the alternative, if this is legally valid, defer the operative date of any such rules until a review of the District Plan identifies the ONL/ONF boundaries as part of the District Plan.

11. **Bulk Earthworks**

11.1 Rule 22.3.2.4 introduces a new consent requirement requiring fully discretionary activity consent for earthworks with a total volume of over 50,000 cubic metres within one consecutive 12 month period. The Submitter contends that this new consent provision is unnecessary, and inappropriate, for the following reasons:

a. There is no identifiable difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same issues arise. The same kinds of conditions can be imposed. The trigger level of 50,000m3 is meaningless.

b. If a volume 'trigger' control is retained, then the difference between restricted discretionary and fully discretionary has little meaning. The same considerations apply under both consent categories. The same conditions can be imposed. Consent can be refused if considered appropriate. The addition of a trigger level of 50,000m3, and the change in status from restricted discretionary to fully discretionary, is unjustified.

c. If Submission Point 9 above is accepted and any volume control is deleted, there is still no difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same Site Standards are relevant. Breach of any Site Standard will require consent. If none of the Site Standards are breached, there is no need for resource consent control because there will be no need to impose consent conditions.

11.2 Part of the rationale for introducing a new Bulk Earthworks consent status appears to relate to the issue of bonds. However a bond can be imposed in respect of any earthworks consent. It is difficult to see why consideration of the possibility of requiring a bond should be triggered by an arbitrary volume figure rather than being considered in respect of the extent of the actual extent of earthworks being carried out and the actual environmental effects arising which might need to be remedied (as has been the practice in the past).

*Relief Requested*

11.3 Delete Rule 22.3.2.4(b) Bulk Earthworks and all other plan provisions relating to that consent category.

12. **Notification**

12.1 The Submitter contends that Rule 22.3.2.6 Non-notification of Applications is far too restrictive. A primary objective of PC49 is to reduce consent compliance costs. There is no need to notify the vast majority of earthworks applications because the issues concerned can be adequately dealt with between the consent applicant and the Council without needing to involve anybody else. Rule 22.3.2.6 should be amended to provide for a default starting position that all applications for earthworks consent under Part 22 are dealt with in a non-notified basis (noting that of course the "*special circumstances*" provisions of the RMA are always applicable).

12.2 The point made in the previous paragraph is supported by the Monitoring Report appended to the s32A Report which records only seven earthworks applications being notified within a two year period, all of which related to quarrying activities.

12.3 The primary exception to the previous point should be a breach of Rule 22.3.3.(ii) [height of cut and fill slope] where the breach relates to a distance of a cut or fill from the site boundary, in which case the starting presumption should be limited notification to the relevant adjoining landowner.

12.4 In addition to the above points, the Submitter notes that existing Rule 22.3.2.6 is badly drafted and is difficult to understand.

*Relief Requested*

12.5 Amend Rule 22.3.2.6 to address the concerns detailed above, to simplify the rule, and to provide for a default position that applications for consent for earthworks activities do not need to be notified (possibly subject to exceptions).

13. **Minor Drafting Amendments**

13.1 Submission Points 5 - 12 above set out the Submitter's primary concerns. In addition the Submitter expresses the following concerns about the drafting of PC49. The primary purpose of identifying the following Submission Points is to draw these drafting issues to the Council's attention and to establish jurisdiction for the Council to address these issues, so that PC49 ends up with improved clarity, internal coherence, drafting accuracy and legal robustness. In respect of some or all of the following submission points the Submitter, rather than requesting specific relief, requests that the issues be considered and that appropriate amendments be made to address the concerns raised.

13.2 In Section 22.2, Objective 1 Policy 1.2, there is a list of six bullet points in respect of which the following concerns are expressed:

a. Four of the six identify a technique or method without stating a desired outcome whereas two of the six identify a technique or method and state a desired outcome. The drafting is inconsistent. The desired outcomes are or should be obvious. In the second and sixth bullet points, the second part commencing "*... to avoid... etc*" should be deleted.

b. The fourth and fifth bullet points refer to "*construction*" which is unnecessary, and potentially inappropriate, when referring to earthworks activities. That word should be deleted from the fourth bullet point and should be replaced by the words "*earthworks activities*".

c. In the fifth bullet point the words "*... taking into account the receiving environment.*" should be deleted because consideration of every consent should take into account the receiving environment.

13.3 In Section 22.2, Objective 3, Policy 3.2 the reference to "*... avoid de-watering*" is inappropriate. De-watering is frequently an inevitable consequence of development. Not all de-watering has adverse effects, and some de-watering may have positive effects. In addition the reference to avoidance is inappropriate for reasons canvassed in Submission Point 7 above. That wording should be amended to read "*... avoid or mitigate any adverse effects caused by de-watering*".

13.4 In respect of Section 22.2, Objective 3, Policy 3.3, the following points are made:

a. Much of the land zoned for development in the Queenstown area is located on steeply sloping sites. It is impossible to avoid earthworks on steeply sloping sites, and many earthworks activities on steeply sloping sites will not necessary have adverse effects.

b. There is an illogicality between the first sentence which requires avoidance and the second sentence which anticipates non-avoidance.

c. The above two points could be addressed by rewording Policy 3.3 as follows:

"*3.3 To avoid the adverse effects of earthworks on steeply sloping sites, where land is prone to erosion or instability, where practicable. Where these effects cannot be avoided, to ensure techniques are adopted that minimise the potential to decrease land stability*".

13.5 In Part 22.2, Objective 4, the reference in the heading to "*Rural Areas*" is ambiguous, because the term "*Rural Areas*" includes Rural Lifestyle and Rural Residential zones. As all Policies 4.1 – 4.4 appear to be applicable only to the Rural General zone, the heading should be reworded "*Earthworks in the Rural General Zone*". The reference to Ski Area Subzones is unnecessary because those sub-zones are located within the Rural General Zone.

13.6 In Section 22.2, Objective 4, Policy 4.4, the reference to "*skifields*" is inappropriately and unnecessarily restrictive. There is existing and future potential for other recreational activities within Ski Area Sub-Zones. The reference to "*...skifields...*" should be amended to read "*...recreational activities...*".

13.7 In Section 22.2, Objective 5, Policy 5.2, the following points are noted:

a. There is no need to avoid earthworks in close proximity to water bodies if no adverse effects will arise. The second sentence is unnecessary because that sentence merely repeats Policy 5.1. If the only concern about locating earthworks within close proximity to water bodies is sediment runoff, then Policy 5.1 fully addresses the issue. Policy 5.2 should be deleted.

b. In respect of Policy 5.3, the four main aquifers have already been noted in the final paragraph of Section 22.1. There is no need to repeat them here. The reference to "*... including ... etc*" can be deleted.

13.8 In Part 22.2, Objective 6, Policies 6.4 and 6.5 (and elsewhere within PC49) references to "*NZ Historic Places Trust*" should be corrected to read "*Heritage New Zealand Pouhere Taonga*" and references to "*Historic Places Act 1993*" should be corrected to read "*Heritage New Zealand Pouhere Taonga Act 2014*".

13.9 The heading to Rule 22.3.1 reads "*General Provisions/Cross-Referencing*". This heading is confusing because the term "*General Provisions*" suggests general provisions which apply as rules. The heading would be better worded to read "*Cross-Referencing/Other Legislation*".

13.10 In respect of Rule 22.3.ii(a) the following points are noted:

a. Subclause (i) appears to be intended to apply to subdivisions going forward which are consented under proposed new Rule 15.2.20. That is considered appropriate, but the wording is awkward. The following alternative wording is suggested:

"*(i) That are approved as part of a subdivision consented under Rule 15.2.20; or*"

b. Subclause (ii) appears to be intended to apply to consents which precede PC49 and are therefore not consented under proposed new Rule 15.2.20. Assuming that is the case, the following points are noted:

i. The existing (pre-PC49) District Plan is known to be ambiguous on the issue of whether earthworks which form part of a subdivision activity are dealt with and consented under Part 15 as part of the subdivision consent or require separate land use consent under the relevant zone provisions. Because of that ambiguity, many subdivision consents (which inevitably include earthworks) have been dealt with only under Part 15, whereas other subdivision consents have been required to obtain separate land use consent under the relevant zone provisions. There are numerous subdivision consents in existence where it would be difficult to determine whether the relevant earthworks "*... have been explicitly included...*".

ii. The applicable 'changeover' date should not be the date of notification of PC49 because PC49 did not take effect upon notification. The 'changeover' date should be the date PC49 takes legal effect, being the date Council issues decisions on submissions to PC49 [regardless of any appeals].

iii. The above two points could be addressed by rewording subparagraph (ii) as follows:

"*(ii) That are approved as part of a subdivision consented prior to [**date of release of Council decisions on submissions to PC49**]*".

13.11 Rule 22.3.1.ii(a) does not include an exemption for earthworks relating to the construction of a dwelling within an approved residential building platform. The current exemption has not been carried forward. Once a residential building platform has been approved, that must anticipate earthworks required to build a house, whether or not earthworks have been specifically consented. In many cases the extent of earthworks which will be required is unknown because the house has not been designed when the residential building platform is consented. Rule 22.3.1.ii(a) should include a specific exemption for earthworks associated with the construction of a house within an approved residential building platform.

13.12 Rule 22.3.1.(iii) Noise reads as if it is a rule, whereas in fact the relevant (restricted discretionary activity) rule is repeated later (in the correct location) as Rule 22.3.3.vii. There is no need for a cross-reference here because the later rule is located in this Part 22. This reference should be deleted.

13.13 In respect of Rule 22.3.1.iv Archaeological Sites the following points are noted:

a. Because there is no definition of "*archaeological sites*", either in the District Plan or in the RMA, the first sentence of subparagraph a is unclear and potentially inaccurate. Only pre-1900 archaeological sites are protected under the Heritage New Zealand Pouhere Taonga Act 2014. This sentence is unnecessary and should be deleted.

b. Archaeological sites are not defined within "*Historic Heritage*" in Section 2 of the RMA. They are not defined at all in the RMA. The second sentence adds nothing and should be deleted.

c. If the first two sentences are deleted from subparagraph (a), the remaining two sentences achieve the required cross-referencing (with a question mark over why the words "*... (a consent)...*" are included).

d. Subparagraph (b) appears to purport to be a definition, in which case it is in the wrong place. It is also unnecessary [refer point (e) below]. Subparagraph (b) should be deleted.

e. Subparagraph (c) is inappropriate, and should be deleted, for the following reasons:

i. The statement is incorrect. Archaeological sites are not subject to the Rules in Section 13 of the Plan.

ii. There is already a cross-reference to Part 13 in Rule 22.3.1.i.(a)(i).

iii. Point c above adequately deals with this issue.

13.14 In Rule 22.3.2.1(b)(i), in the proviso at the end, the word "*exposed*" should be replaced by the word "*the*" for the following reasons:

a. The word "*exposed*" implies the removal of vegetative cover. That is a temporary effect, which ceases when revegetation occurs. In addition there is a Site Standard requiring revegetation of exposed surfaces. Many earthworks activities will be caught by this reference which should not be caught because the "*exposure*" will be remedied.

b. This proviso is presumably aimed at incremental increases in earthworks areas, such as the width of access tracks. The proviso should target the permanent outcome, not a temporary effect.

13.15 In Rule 22.3.2.2(c) it is unclear why the words in subparagraphs (ii) and (vii) are capitalised. The same point applies to Rule 22.3.2.3(b) subparagraphs (ii) and (vii).

13.16 In Rule 22.3.3.(i), Table 22.1, Tiers 2, 3, 4, and 5, referring to the final bullet point in each Tier relating to Special Zone Activity Areas, the following points are noted (assuming that, despite Submission Point 9 above, the volume 'trigger' control rule is retained, and this complicated approach of a number of separate Tiers is retained):

a. It is necessary that a District Plan provides certainty when it comes to consent status. Any person reading the District Plan should be able to identify, without any ambiguity, the consent status of any particular activity.

b. The four bullet points refer to different specific zones which do not necessarily apply within all of the Special Zones. For example, Tier 4, bullet point 6, refers to "*Rural Residential and Rural Lifestyle Activities*" when none of the Special Zones contain Rural Residential or Rural Lifestyle zoning.

c. It is therefore left to a consent applicant to try and work out which 'equivalent' zoning would apply to the density applicable within that particular part of the relevant Special Zone.

d. That degree of ambiguity is unnecessary and inappropriate, in both a legal and a planning sense.

13.17 In Rule 22.3.3.i, Table 22.1, Tier 6, why does the first bullet point refer to Section [which should be Rule] 5.3.5.1(v) instead of referring directly to Appendix 5?

13.18 In Rule 22.4.(ii)(e) [compared to the current pre-PC49 equivalent Environmental Protection Measures], the words "*The effects on traffic generated and...*" have been added. The justification for that addition is unclear. Noise is covered by a separate Site Standard. Hours of operation are dealt with by the preceding subclause (d). Deposition of sediment, particularly in residential areas, is dealt with in the rest of this subclause and also by a separate Site Standard. The purpose of roads is to accommodate traffic. Those words should be deleted.

13.19 Rule 22.4.(ii)(f) introduces a new assessment matter based upon the track record of the applicant/operator. In respect of this new assessment matter the following points are made:

a. When most applications for resource consent involving earthworks are made, the choice of earthworks contractor has yet to be made. If this new rule intends to impose a requirement that such choice be made when the consent application is made, then the requirement is unreasonable. If that is not the intention, then the new rule is pointless.

b. Compliance with resource consent conditions is an enforcement/compliance matter. It is inappropriate to include such a consideration in a consent assessment matter of this nature.

13.20 Rule 22.4.vii(c) is an assessment matter in relation to impacts on sites of cultural heritage value which reads:

> "*Whether the subject land contains a recorded archaeological site, and if so the extent to which the proposal would affect any such site and whether any necessary archaeological authority has been obtained from the NZ Historic Places Trust*".

The following comments are made:

a. While it is accepted that archaeological sites fall within the definition of "*historic heritage*" in the RMA, that does not necessarily mean that archaeological sites have to be protected through District Plan provisions. The Council should consider whether there is any other statutory regime in place which will ensure that any required policy direction is implemented.

b. Pre-1900 archaeological sites are subject to separate procedures under the Heritage New Zealand Pouhere Taonga Act 2014, which requires an Archaeological Authority to be issued before any such archaeological site can be disturbed.

c. The common practice in the past has been to apply for the required Archaeological Authority concurrently with the processing of the relevant resource consent application, or after the consent has been obtained. The wording of this new rule implies that the Archaeological Authority should be obtained first. That will potentially add months of delay to the consenting process without any justification.

d. The rule also implies that, if an Archaeological Authority has not been obtained, the Council may impose conditions on the relevant earthworks consent in respect of any archaeological site. That raises the possibility that consent conditions imposed by the Council may be inconsistent with conditions imposed under the required Archaeological Authority. That is both inefficient and inappropriate.

e. This issue can easily be addressed by the Council including a standard condition in every earthworks consent requiring the consentholder not to carry out any earthworks which would damage a pre-1900 archaeological site without first obtaining the required Archaeological Authority from Heritage New Zealand Pouhere Taonga.

f. Accordingly Rule 22.4.vii(c) should be deleted.

13.21 PC49 adds new definitions of "*Bed*" and "*River*". The following comments are made:

a. The two definitions are copied from the RMA. As those definitions are already in the RMA, the Submitter queries why they need to be included in the District Plan. There are many other terms which are not defined in the District Plan because they are defined in the RMA.

b. Because the definitions are quoted in full, that wording becomes enshrined in the RMA. If either of those definitions is subsequently amended in the RMA, the District Plan will have to be amended to maintain consistency. That is undesirable. If it is considered necessary to insert these definitions into the District Plan, they should not be quoted in full. Instead they should be directly cross-referenced, as is the case with the definition of Building (which cross-references to the Building Act 1991) and the definition of "Road" (which cross-references to the Local Government Act 1974).

**Alternative or Consequential Relief**

14. The Submitter requests such alternative, additional or consequential amendments to the PC49 Plan Provisions as may be considered necessary or appropriate in order to address the issues raised in this submission.

**Request to be Heard**

15. The Submitter wishes to be heard in support of this submission.

Date: 30 July 2014

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49/2

**Submission on Publicly Notified Plan Change**

*Clause 6 of the First Schedule of the Resource Management Act 1991*

To: Queenstown Lakes District Council
Private Bag 50072
Queenstown 9348

1. Name of submitter: Coronet View Holdings Limited ("**Submitter**")

2. This is a submission on the following public plan change:

Plan Change 49: Earthworks – to the Queenstown Lakes District Plan ("**PC49**").

3. The Submitter could not gain an advantage in trade competition through this submission.

4.1 The Submitter is a landowner potentially affected by PC49. This submission requests amendments to the provisions proposed to be inserted into the Queenstown Lakes District Plan by PC49.

4.2 For ease of reference and consideration by the consent authority, the issues raised in this submission are set out below under separate headings. Each section of the submission contains the submission point relevant to that heading, the reasons for the submission point, and the relief requested.

5. **Positive v Negative – Change in Emphasis**

5.1 Earthworks are essential to the prosperity and wellbeing of the District. In accordance with the general approach of the RMA, the focus should be on enabling appropriate earthworks while ensuring that adverse effects are avoided, remedied or mitigated. Part 4.11 Earthworks of the District Plan (proposed to be deleted under PC49) reflects the correct approach of enabling subject to environmental protection.

5.2 The Section 22.1 introduction to new Part 22 Earthworks (proposed through PC49) reverses that focus by placing primary emphasis on adverse effects before addressing the important enabling aspect. This is then inconsistent with Section 22.2 which reverts to the original focus first on enabling and then on environmental protection. The reversal in Section 22.1 is inappropriate and creates inconsistency.

*Relief Requested*

5.3 That the first two paragraphs in Section 22.1 be reversed, in order to reinstate the original order of focus and to achieve consistency with the order of objectives and policies in Section 22.2.

6. **Major Change in Policy**

6.1 Under the (pre-PC49) District Plan, Part 4 addresses District Wide issues and contains the primary District Wide Objectives and Policies. Each separate Section in Part 4 addresses a different issue and specifies a different set of Objectives and Policies. It is necessary to read the relevant Sections as a whole in order to understand the balance between the way different issues are addressed, and to arrive at overall decisions relating to sustainable management. For example, and relevantly for the purpose of this Submission Point, Part 4.2 deals with landscape and visual amenity issues and Part 4.11 deals with earthworks. This is an appropriate approach because specific issues arise in respect of earthworks which do not arise in respect of landscape and visual amenity effects. Importantly Part 4.11 achieves consistency with Part 4.2 by only touching upon visual amenity issues in passing (because they have already been dealt with under Part 4.2) and by using general language to ensure

that Part 4.2 retains priority on the subject of landscape and visual amenity issues and is not contradicted by Part 4.11.

6.2 The PC49 s32 Report does not recognise the existing District Plan structure (this being one of the dangers of isolating a subject such as Earthworks and dealing with it separately, rather than as part of an overall District Plan Review). The PC49 s32 Report gives the impression that the Earthworks section of the District Plan must also deal with landscape and visual amenity issues relating to earthworks. The s32 Report does not recognise or assess the significance of the Part 4.2 Objectives and Policies.

6.3 As a consequence of the matters detailed in the previous two paragraphs, PC49 includes a major change in policy in respect of landscape and visual amenity values. The new policy direction contained in Objective 2 of PC49 simply requires avoidance of a range of outcomes. Not only is that obviously impossible to achieve, it is fundamentally different from the policy direction contained in Part 4.2. As a consequence PC49 creates a major inconsistency within the District Plan.

6.4 The concerns detailed above are compounded by the introductory words to Objective 4 which read "*Subject to Objective 2, to enable earthworks...*". The underlined introductory words give Objective 2 priority over Objective 4. This drafting will operate to significantly prevent the positive outcomes anticipated by Objective 4, because many of the activities detailed in Policies 4.1 – 4.4 cannot be carried out in compliance with the higher priority Policy 2.1 and/or Policy 2.2.

6.5 This problem is further compounded by the fact that there has been extensive litigation, and a number of Environment Court judgements, which provide guidance and interpretation on the implementation of Part 4.2. That includes, for example, interpretation of the "*reasonably difficult to see*" concept. PC49 effectively throws all that case law out the window. If PC49 were to be confirmed in its current form, the District Plan would contain one policy approach relating to buildings in sensitive landscapes and a different policy approach relating to earthworks in sensitive landscapes. This is obviously inappropriate, because many developments comprise both buildings and earthworks.

6.6 This problem is further compounded by the fact that PC49 largely retains the current (pre-PC49) assessment matters, and does not amend the assessment matters to be consistent with the new policy approach. By way of example, the new PC49 Objective 2 "*avoidance of adverse effects*" policy approach is inconsistent with the relevant assessment matters which adopt a "*Whether and to what extent...*" policy approach. The latter is consistent with the Part 4.2 Landscape and Visual Amenity Objectives and Policies but is inconsistent with the new PC49 Objective 2 policy approach.

6.7 This basic flaw in PC49 is further compounded by the second major change inherent in PC49 which is to remove earthworks plan provisions from each different part of the District Plan and consolidate them into a new Part 22. Under the pre-PC49 plan provisions, assessment matters relevant to consents for earthworks were considered in the context of the objectives and policies relevant to the activity being undertaken. By way of example, an application for consent for earthworks in the Rural General zone is (pre-PC49) considered against the Part 5 objectives and policies of the Rural General Zone as informed by the relevant Part 4 objectives and policies, whereas an application for consent for earthworks in relation to a residential development within a zoned residential area is considered in the context of the Part 7 Residential objectives and policies which are in turn informed by the Part 4 objectives and policies relevant to residentially zoned areas.

6.8 PC49 fundamentally changes this approach. PC49 appears to be attempting to address earthworks in a global manner with very little, if any, reference to development context in terms of the zone within which the proposed activity is taking place. As a result, for example, new Policy 2.2 which requires avoidance of adverse visual effects of earthworks on visually prominent slopes, natural landforms and ridgelines applies to all earthworks, regardless of

whether the particular '*prominent slope*" is located on a Rural General VAL hillside or within the residentially zoned area of Queenstown Hill.

6.9 One intended objective of PC49, being the removal of numerous duplicated District Plan provisions, is understood and accepted. However this still involves a major change to the structure of the District Plan. The current PC49 approach actually involves a step backwards rather than a step forwards because, although it minimises duplication of plan provisions (which merely reduces the number of 'pages' in a largely online document), it increases consent complexity (and will inevitably increase consenting costs) because it duplicates plan provisions relating to landscape and visual amenity values in a manner which creates fundamental inconsistencies.

*Relief Requested*

6.10 That the following amendments be made:

a. Delete Objective 2 and Policies 2.1 – 2.4 (and, if considered necessary for the purposes of clarity, cross-reference the Part 4.2 District Wide Objectives and Policies relevant to landscape and visual amenity values).

b. Amend Objective 4 by deleting the words "*Subject to Objective 2...*".

c. Retain Rule 22.4.iv [Landscape and Visual Amenity Assessment Matters] generally in their current form (as they are virtually the same as contained in the District Plan pre-PC49) but add a specific assessment matter which requires consideration to be given to the zone within which the earthworks are being carried out and the relevant objectives and policies of that zone.

## 7. "*Avoiding*" v "*Avoiding, remedying or mitigating*"

7.1 Objective 1 addresses the enabling aspect of earthworks, and does so by recognising that earthworks are essential to subdivision, development and access. However Objective 1 then requires those enabling earthworks to be undertaken in a manner which "*avoids adverse effects*". It is plainly impossible to carry out earthworks in a manner which avoids all adverse effects. It is inappropriate for an Objective to seek an outcome which is impossible to achieve.

7.2 That Objective 1 is implemented by Policy 1.2 and Policy 1.5 which again require avoidance. The same point applies. A policy should not seek to achieve the impossible.

7.3 The submitter acknowledges that policies should be directive to the extent reasonably possible, and that it is generally undesirable to parrot the "*avoid, remedy or mitigate*" mantra of the RMA. However that is the reality when it comes to earthworks. Some effects are avoided, many effects are mitigated, and sometimes effects are remedied. There is nothing inappropriate about using the phrase "*avoid, remedy or mitigate*" when it is directly applicable and is appropriate.

7.4 This submission point also raises, in a wider context, Submission Point 6 above. If one considers earthworks for a particular activity in the context of the objectives and policies of the relevant zone, informed by Part 4 Objectives and Policies where relevant, then the inevitable outcome is an "*avoid, remedy or mitigate*" outcome. It is inappropriate for a separate Earthworks Part 22 of the District Plan to seek more stringent outcomes than are anticipated by other relevant objectives and policies in the District Plan. That creates inconsistencies within the District Plan which will cause interpretation problems.

*Relief Requested*

7.5 In Objective 1, Policy 1.2 and Policy 1.5 amend "... *avoids adverse effects...*" to read "... *avoids, remedies or mitigates adverse effects*".

Not in Stewart

## 8. Specific Provisions Carried Forward

8.1 PC49 effectively carries forward, by retaining and reinstating, certain provisions applicable to specific zones. This is considered to be an appropriate approach because those provisions have previously been subject to specific consideration in the context of earlier plan changes, have been found to be appropriate, and no reason or concern has arisen to justify amending those provisions. However if the provisions are to be carried forward, they should be carried forward accurately, and in full, and consequential amendments should be made if appropriate in the context of PC49.

*Jacks Point Zone*

8.2 Rule 22.3.2.1(b)(iii).a carries forward an exemption in the Remarkables Park Zone relating to earthworks approved as part of any building granted resource consent. The Jacks Point Zone also contains (in current Rule 12.2.5.1.vi) an exemption from the site standards for earthworks associated with a subdivision, the construction, addition or alteration of any building, and golfcourse development. The exemption for earthworks relating to subdivision is effectively carried forward by a new PC49 Part 15 Rule. The exemption for earthworks in relation to the construction, addition or alteration of any building, and in relation to golfcourse development, should also be carried forward.

8.3 Rule 22.3.2.2(b) carries forward a specific rule relating to golfcourse development within the Jacks Point Zone. That rule includes an area limitation of 2,500m2. As PC49 does not generally carry forward controls based on area relating to earthworks, this specific area control should be deleted as a consequential amendment.

8.4 The justification for carrying forward Rule 22.3.2.4(c) is questioned. There does not seem to be any logical basis for applying fully discretionary activity status to earthworks within the Jacks Point Zone which breach the earthworks Sites Standards, rather than the restricted discretionary activity status which applies in every other zone.

8.5 In Rule 22.3.3.(i), Table 22.1, Tier 7 should include an exemption for earthworks associated with golfcourse development exceeding 1,000m3 in volume.

*Relief Requested.*

8.6 a. Amend Rule 22.3.2.1(b) by adding a new subclause (iv) as follows:

"*(iv) In the **Jacks Point Zone**, earthworks in relation to the construction, addition or alteration of any building and earthworks in relation to golfcourse development.*"

b. Amend Rule 22.3.2.2(b) by deleting the words "*...and/or 2,500m2 of exposed topsoil...*".

c. Delete Rule 22.3.2.4(c).

d. In Rule 22.3.3.(i), Table 22.1, amend Tier 7 (middle column) to read as follows:

"• *Any zone or Special Zone Activity Area not listed above in Tier 1 to 6 provided that this does not apply to Ski Area Sub-Zones or to earthworks within the Jacks Point Zone associated with golfcourse development exceeding 1,000m3 in volume.*"

## 9. Volume Control

9.1 The Submitter questions the justification for any form of volume control relating to earthworks. In making this Submission Point the Submitter acknowledges, and emphasises, the importance of the height and slope trigger control. In sensitive landscapes it is the height of a

cut above the level of earthworks activities and/or the height and extent of the fill batter below the level of earthworks activities which primarily gives rise to adverse effects. Within areas zoned for development it is the height of a cut and/or fill which potentially creates stability issues and/or creates other residential adverse effects in respect of neighbouring properties. The Submitter questions what the volume trigger control achieves which is not achieved by the height and slope trigger control.

9.2 In making this Submission Point, and in putting the questions detailed in the following paragraph, the Submitter notes that the following potential effects are addressed separately by Site Standards which trigger restricted discretionary activity consent control if breached:

a. Height of cut and fill and slope.

b. Engineering requirements for residential building platforms and retaining walls.

c. Environmental protection measures, including sediment and erosion control, dust control and revegetation.

d. Potential adverse effects of activities close to water bodies or which will affect aquifers.

e. Potential effects on cultural heritage and archaeological sites.

f. Construction noise.

g. Potential effects on transmission lines.

9.3 Taking into account all of the above the Submitter asks:

a. What does the volume control achieve, in terms of a consent trigger, that is not already achieved by the Site Standards summarised above?

b. If all of the potential effects which arise under the Site Standards detailed above are addressed, what difference does it make (in respect of any particular site) whether the volume of earthworks excavated or deposited is 100m3, 200m3, 300m3, 400m3, 500m3, 1,000m3, 2,000m3 or 50,000m3?

c. What assessment matters come into play upon breach of the volume control which do not come into play upon breach of any of the other Site Standards summarised above?

d. What condition can be imposed as a consequence of the volume trigger control that cannot be imposed as a consequence of breach of the Site Standards summarised above?

e. What condition can be imposed as a consequence of the volume trigger control that is necessary to address any concern if there is no breach of the Site Standards summarised above?

f. How many resource consents potentially will have to be applied for, processed, and paid for, in respect of earthworks activities which breach the volume control but which do not breach any of the other Site Standards [particularly given that a purported objective of PC49 to reduce consenting costs]?

9.4 One issue which may need to be addressed if the volume trigger control were to be deleted may be the issue of hours of operation within residential areas. If that is the case however, requiring a large number of resource consents to be applied for in order to be able to impose a control on hours of operation is an inefficient method of addressing this concern. A more efficient method would be to insert a Site Standard imposing limits on hours of operation (in

relation to earthworks activities) within specified zones (or possibly all zones other than Rural General zone). Appropriate hours of operation could be 8am to 6pm on Monday to Saturday of each week, or something similar. If that method were adopted, consent would only be required if someone wanted to carry out earthworks activities outside those hours.

*Relief Requested*

9.5 That all PC49 provisions which impose a earthworks volume trigger level for consent purposes, or which relate to an earthworks volume trigger control rule or requirement, be deleted.

9.6 Possibly insert a new Site Standard specifying permissible hours of operation for earthworks activities in specified zones, or within all zones other than the Rural General Zone.

10. **Legal issue – ONL/ONF Consent Status Trigger**

10.1 Rule 22.3.3.i is a site standard which imposes resource consent 'trigger' controls relating to maximum total volumes of earthworks as detailed in Table 22.1 referenced in that Rule. Table 22.1 contains a 200m3 Tier 2 consent trigger in relation to ONL's and ONF's which is different from a 1,000m3 Tier 6 trigger rule applicable to the Rural General zone excluding ONL's and ONF's. The Submitter contends that this provision is *ultra vires*.

10.2 This issue arises from the combination of the following factors:

a. The District Plan does not formally determine the extent and boundaries of ONL's and ONF's. ONL's and ONF's are identified on the Landscape Category Maps which, effectively, record ONL's and ONF's as determined through a sequence of Environment Court decisions, many of which are resource consent decisions and are not District Plan plan change decisions. The Landscape Category Maps can be, and are, amended from time to time as a result of Environment Court consent decisions which do not arise from any review of the District Plan.

b. The issue of the status of the landscape category lines on the Landscape Category Maps has been a matter of some debate. The current position of the Council appears to be that the solid black lines can only be amended by the Environment Court (whether through resource consent appeal or plan change appeal is unclear) whereas the dotted lines can be amended by the Council at resource consent stage.

c. An Interim Decision issued in respect of PC19 (EnvC93 (2014)) has determined that the status of an activity must be specified in the District Plan, and cannot be determined through a resource consent process.

d. It appears to follow from the above that, as the landscape categories lines are boundaries which have or will be determined thorough a resource consent process, and as the proposed 200m3 resource consent trigger control is based upon whether or not the relevant land is within an ONL or an ONF, that proposed trigger control is *ultra vires*.

10.3 The Submitter notes that this problem does not arise under the current (pre-PC49) District Plan because the differentiation between the three landscape categories generally only arises in respect of policies and assessment matters. There are few, if any, instances where consent status depends upon an ONL/ONF determination (and it is noted that, if there are any such instances, it would appear that those are also *ultra vires* as a consequence of the PC19 Interim Decision).

*Relief Requested*

10.4 Amend or delete any rules which purport to determine consent activity status as a consequence of the relevant earthworks activity being located within an ONL or an ONF.

10.5 In the alternative, if this is legally valid, defer the operative date of any such rules until a review of the District Plan identifies the ONL/ONF boundaries as part of the District Plan.

## 11. Bulk Earthworks

11.1 Rule 22.3.2.4 introduces a new consent requirement requiring fully discretionary activity consent for earthworks with a total volume of over 50,000 cubic metres within one consecutive 12 month period. The Submitter contends that this new consent provision is unnecessary, and inappropriate, for the following reasons:

a. There is no identifiable difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same issues arise. The same kinds of conditions can be imposed. The trigger level of 50,000m3 is meaningless.

b. If a volume 'trigger' control is retained, then the difference between restricted discretionary and fully discretionary has little meaning. The same considerations apply under both consent categories. The same conditions can be imposed. Consent can be refused if considered appropriate. The addition of a trigger level of 50,000m3, and the change in status from restricted discretionary to fully discretionary, is unjustified.

c. If Submission Point 9 above is accepted and any volume control is deleted, there is still no difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same Site Standards are relevant. Breach of any Site Standard will require consent. If none of the Site Standards are breached, there is no need for resource consent control because there will be no need to impose consent conditions.

11.2 Part of the rationale for introducing a new Bulk Earthworks consent status appears to relate to the issue of bonds. However a bond can be imposed in respect of any earthworks consent. It is difficult to see why consideration of the possibility of requiring a bond should be triggered by an arbitrary volume figure rather than being considered in respect of the extent of the actual extent of earthworks being carried out and the actual environmental effects arising which might need to be remedied (as has been the practice in the past).

*Relief Requested*

11.3 Delete Rule 22.3.2.4(b) Bulk Earthworks and all other plan provisions relating to that consent category.

## 12. Notification

12.1 The Submitter contends that Rule 22.3.2.6 Non-notification of Applications is far too restrictive. A primary objective of PC49 is to reduce consent compliance costs. There is no need to notify the vast majority of earthworks applications because the issues concerned can be adequately dealt with between the consent applicant and the Council without needing to involve anybody else. Rule 22.3.2.6 should be amended to provide for a default starting position that all applications for earthworks consent under Part 22 are dealt with in a non-notified basis (noting that of course the "*special circumstances*" provisions of the RMA are always applicable).

12.2 The point made in the previous paragraph is supported by the Monitoring Report appended to the s32A Report which records only seven earthworks applications being notified within a two year period, all of which related to quarrying activities.

12.3 The primary exception to the previous point should be a breach of Rule 22.3.3.(ii) [height of cut and fill slope] where the breach relates to a distance of a cut or fill from the site boundary, in which case the starting presumption should be limited notification to the relevant adjoining landowner.

12.4 In addition to the above points, the Submitter notes that existing Rule 22.3.2.6 is badly drafted and is difficult to understand.

*Relief Requested*

12.5 Amend Rule 22.3.2.6 to address the concerns detailed above, to simplify the rule, and to provide for a default position that applications for consent for earthworks activities do not need to be notified (possibly subject to exceptions).

13. **Minor Drafting Amendments**

13.1 Submission Points 5 - 12 above set out the Submitter's primary concerns. In addition the Submitter expresses the following concerns about the drafting of PC49. The primary purpose of identifying the following Submission Points is to draw these drafting issues to the Council's attention and to establish jurisdiction for the Council to address these issues, so that PC49 ends up with improved clarity, internal coherence, drafting accuracy and legal robustness. In respect of some or all of the following submission points the Submitter, rather than requesting specific relief, requests that the issues be considered and that appropriate amendments be made to address the concerns raised.

13.2 In Section 22.2, Objective 1 Policy 1.2, there is a list of six bullet points in respect of which the following concerns are expressed:

a. Four of the six identify a technique or method without stating a desired outcome whereas two of the six identify a technique or method and state a desired outcome. The drafting is inconsistent. The desired outcomes are or should be obvious. In the second and sixth bullet points, the second part commencing "*... to avoid... etc*" should be deleted.

b. The fourth and fifth bullet points refer to "*construction*" which is unnecessary, and potentially inappropriate, when referring to earthworks activities. That word should be deleted from the fourth bullet point and should be replaced by the words "*earthworks activities*".

c. In the fifth bullet point the words "*... taking into account the receiving environment.*" should be deleted because consideration of every consent should take into account the receiving environment.

13.3 In Section 22.2, Objective 3, Policy 3.2 the reference to "*... avoid de-watering*" is inappropriate. De-watering is frequently an inevitable consequence of development. Not all de-watering has adverse effects, and some de-watering may have positive effects. In addition the reference to avoidance is inappropriate for reasons canvassed in Submission Point 7 above. That wording should be amended to read "*... avoid or mitigate any adverse effects caused by de-watering*".

13.4 In respect of Section 22.2, Objective 3, Policy 3.3, the following points are made:

a. Much of the land zoned for development in the Queenstown area is located on steeply sloping sites. It is impossible to avoid earthworks on steeply sloping sites, and many earthworks activities on steeply sloping sites will not necessary have adverse effects.

b. There is an illogicality between the first sentence which requires avoidance and the second sentence which anticipates non-avoidance.

c. The above two points could be addressed by rewording Policy 3.3 as follows:

"*3.3 To avoid the adverse effects of earthworks on steeply sloping sites, where land is prone to erosion or instability, where practicable. Where these effects*

*cannot be avoided, to ensure techniques are adopted that minimise the potential to decrease land stability*".

13.5 In Part 22.2, Objective 4, the reference in the heading to "*Rural Areas*" is ambiguous, because the term "*Rural Areas*" includes Rural Lifestyle and Rural Residential zones. As all Policies 4.1 – 4.4 appear to be applicable only to the Rural General zone, the heading should be reworded "*Earthworks in the Rural General Zone*". The reference to Ski Area Subzones is unnecessary because those sub-zones are located within the Rural General Zone.

13.6 In Section 22.2, Objective 4, Policy 4.4, the reference to "*skifields*" is inappropriately and unnecessarily restrictive. There is existing and future potential for other recreational activities within Ski Area Sub-Zones. The reference to "*...skifields...*" should be amended to read "*...recreational activities...*".

13.7 In Section 22.2, Objective 5, Policy 5.2, the following points are noted:

a. There is no need to avoid earthworks in close proximity to water bodies if no adverse effects will arise. The second sentence is unnecessary because that sentence merely repeats Policy 5.1. If the only concern about locating earthworks within close proximity to water bodies is sediment runoff, then Policy 5.1 fully addresses the issue. Policy 5.2 should be deleted.

b. In respect of Policy 5.3, the four main aquifers have already been noted in the final paragraph of Section 22.1. There is no need to repeat them here. The reference to "*... including ... etc*" can be deleted.

13.8 In Part 22.2, Objective 6, Policies 6.4 and 6.5 (and elsewhere within PC49) references to "*NZ Historic Places Trust*" should be corrected to read "*Heritage New Zealand Pouhere Taonga*" and references to "*Historic Places Act 1993*" should be corrected to read "*Heritage New Zealand Pouhere Taonga Act 2014*".

13.9 The heading to Rule 22.3.1 reads "*General Provisions/Cross-Referencing*". This heading is confusing because the term "*General Provisions*" suggests general provisions which apply as rules. The heading would be better worded to read "*Cross-Referencing/Other Legislation*".

13.10 In respect of Rule 22.3.ii(a) the following points are noted:

a. Subclause (i) appears to be intended to apply to subdivisions going forward which are consented under proposed new Rule 15.2.20. That is considered appropriate, but the wording is awkward. The following alternative wording is suggested:

"*(i) That are approved as part of a subdivision consented under Rule 15.2.20; or*"

b. Subclause (ii) appears to be intended to apply to consents which precede PC49 and are therefore not consented under proposed new Rule 15.2.20. Assuming that is the case, the following points are noted:

i. The existing (pre-PC49) District Plan is known to be ambiguous on the issue of whether earthworks which form part of a subdivision activity are dealt with and consented under Part 15 as part of the subdivision consent or require separate land use consent under the relevant zone provisions. Because of that ambiguity, many subdivision consents (which inevitably include earthworks) have been dealt with only under Part 15, whereas other subdivision consents have been required to obtain separate land use consent under the relevant zone provisions. There are numerous subdivision consents in existence where it would be difficult to determine whether the relevant earthworks "*... have been explicitly included...*".

ii. The applicable 'changeover' date should not be the date of notification of PC49 because PC49 did not take effect upon notification. The 'changeover' date should be the date PC49 takes legal effect, being the date Council issues decisions on submissions to PC49 [regardless of any appeals].

iii. The above two points could be addressed by rewording subparagraph (ii) as follows:

"*(ii) That are approved as part of a subdivision consented prior to [**date of release of Council decisions on submissions to PC49**]*".

13.11 Rule 22.3.1.ii(a) does not include an exemption for earthworks relating to the construction of a dwelling within an approved residential building platform. The current exemption has not been carried forward. Once a residential building platform has been approved, that must anticipate earthworks required to build a house, whether or not earthworks have been specifically consented. In many cases the extent of earthworks which will be required is unknown because the house has not been designed when the residential building platform is consented. Rule 22.3.1.ii(a) should include a specific exemption for earthworks associated with the construction of a house within an approved residential building platform.

13.12 Rule 22.3.1.(iii) Noise reads as if it is a rule, whereas in fact the relevant (restricted discretionary activity) rule is repeated later (in the correct location) as Rule 22.3.3.vii. There is no need for a cross-reference here because the later rule is located in this Part 22. This reference should be deleted.

13.13 In respect of Rule 22.3.1.iv Archaeological Sites the following points are noted:

a. Because there is no definition of "*archaeological sites*", either in the District Plan or in the RMA, the first sentence of subparagraph a is unclear and potentially inaccurate. Only pre-1900 archaeological sites are protected under the Heritage New Zealand Pouhere Taonga Act 2014. This sentence is unnecessary and should be deleted.

b. Archaeological sites are not defined within "*Historic Heritage*" in Section 2 of the RMA. They are not defined at all in the RMA. The second sentence adds nothing and should be deleted.

c. If the first two sentences are deleted from subparagraph (a), the remaining two sentences achieve the required cross-referencing (with a question mark over why the words "*... (a consent)...*" are included).

d. Subparagraph (b) appears to purport to be a definition, in which case it is in the wrong place. It is also unnecessary [refer point (e) below]. Subparagraph (b) should be deleted.

e. Subparagraph (c) is inappropriate, and should be deleted, for the following reasons:

i. The statement is incorrect. Archaeological sites are not subject to the Rules in Section 13 of the Plan.

ii. There is already a cross-reference to Part 13 in Rule 22.3.1.i.(a)(i).

iii. Point c above adequately deals with this issue.

13.14 In Rule 22.3.2.1(b)(i), in the proviso at the end, the word "*exposed*" should be replaced by the word "*the*" for the following reasons:

a. The word "*exposed*" implies the removal of vegetative cover. That is a temporary effect, which ceases when revegetation occurs. In addition there is a Site Standard requiring revegetation of exposed surfaces. Many earthworks activities will be caught

by this reference which should not be caught because the "*exposure*" will be remedied.

b. This proviso is presumably aimed at incremental increases in earthworks areas, such as the width of access tracks. The proviso should target the permanent outcome, not a temporary effect.

13.15 In Rule 22.3.2.2(c) it is unclear why the words in subparagraphs (ii) and (vii) are capitalised. The same point applies to Rule 22.3.2.3(b) subparagraphs (ii) and (vii).

13.16 In Rule 22.3.3.(i), Table 22.1, Tiers 2, 3, 4, and 5, referring to the final bullet point in each Tier relating to Special Zone Activity Areas, the following points are noted (assuming that, despite Submission Point 9 above, the volume 'trigger' control rule is retained, and this complicated approach of a number of separate Tiers is retained):

a. It is necessary that a District Plan provides certainty when it comes to consent status. Any person reading the District Plan should be able to identify, without any ambiguity, the consent status of any particular activity.

b. The four bullet points refer to different specific zones which do not necessarily apply within all of the Special Zones. For example, Tier 4, bullet point 6, refers to "*Rural Residential and Rural Lifestyle Activities*" when none of the Special Zones contain Rural Residential or Rural Lifestyle zoning.

c. It is therefore left to a consent applicant to try and work out which 'equivalent' zoning would apply to the density applicable within that particular part of the relevant Special Zone.

d. That degree of ambiguity is unnecessary and inappropriate, in both a legal and a planning sense.

13.17 In Rule 22.3.3.i, Table 22.1, Tier 6, why does the first bullet point refer to Section [which should be Rule] 5.3.5.1(v) instead of referring directly to Appendix 5?

13.18 In Rule 22.4.(ii)(e) [compared to the current pre-PC49 equivalent Environmental Protection Measures], the words "*The effects on traffic generated and...*" have been added. The justification for that addition is unclear. Noise is covered by a separate Site Standard. Hours of operation are dealt with by the preceding subclause (d). Deposition of sediment, particularly in residential areas, is dealt with in the rest of this subclause and also by a separate Site Standard. The purpose of roads is to accommodate traffic. Those words should be deleted.

13.19 Rule 22.4.(ii)(f) introduces a new assessment matter based upon the track record of the applicant/operator. In respect of this new assessment matter the following points are made:

a. When most applications for resource consent involving earthworks are made, the choice of earthworks contractor has yet to be made. If this new rule intends to impose a requirement that such choice be made when the consent application is made, then the requirement is unreasonable. If that is not the intention, then the new rule is pointless.

b. Compliance with resource consent conditions is an enforcement/compliance matter. It is inappropriate to include such a consideration in a consent assessment matter of this nature.

13.20 Rule 22.4.vii(c) is an assessment matter in relation to impacts on sites of cultural heritage value which reads:

"*Whether the subject land contains a recorded archaeological site, and if so the extent to which the proposal would affect any such site and whether any necessary archaeological authority has been obtained from the NZ Historic Places Trust*".

The following comments are made:

a. While it is accepted that archaeological sites fall within the definition of "*historic heritage*" in the RMA, that does not necessarily mean that archaeological sites have to be protected through District Plan provisions. The Council should consider whether there is any other statutory regime in place which will ensure that any required policy direction is implemented.

b. Pre-1900 archaeological sites are subject to separate procedures under the Heritage New Zealand Pouhere Taonga Act 2014, which requires an Archaeological Authority to be issued before any such archaeological site can be disturbed.

c. The common practice in the past has been to apply for the required Archaeological Authority concurrently with the processing of the relevant resource consent application, or after the consent has been obtained. The wording of this new rule implies that the Archaeological Authority should be obtained first. That will potentially add months of delay to the consenting process without any justification.

d. The rule also implies that, if an Archaeological Authority has not been obtained, the Council may impose conditions on the relevant earthworks consent in respect of any archaeological site. That raises the possibility that consent conditions imposed by the Council may be inconsistent with conditions imposed under the required Archaeological Authority. That is both inefficient and inappropriate.

e. This issue can easily be addressed by the Council including a standard condition in every earthworks consent requiring the consentholder not to carry out any earthworks which would damage a pre-1900 archaeological site without first obtaining the required Archaeological Authority from Heritage New Zealand Pouhere Taonga.

f. Accordingly Rule 22.4.vii(c) should be deleted.

13.21 PC49 adds new definitions of "*Bed*" and "*River*". The following comments are made:

a. The two definitions are copied from the RMA. As those definitions are already in the RMA, the Submitter queries why they need to be included in the District Plan. There are many other terms which are not defined in the District Plan because they are defined in the RMA.

b. Because the definitions are quoted in full, that wording becomes enshrined in the RMA. If either of those definitions is subsequently amended in the RMA, the District Plan will have to be amended to maintain consistency. That is undesirable. If it is considered necessary to insert these definitions into the District Plan, they should not be quoted in full. Instead they should be directly cross-referenced, as is the case with the definition of Building (which cross-references to the Building Act 1991) and the definition of "Road" (which cross-references to the Local Government Act 1974).

**Alternative or Consequential Relief**

14. The Submitter requests such alternative, additional or consequential amendments to the PC49 Plan Provisions as may be considered necessary or appropriate in order to address the issues raised in this submission.

**Request to be Heard**

15. The Submitter wishes to be heard in support of this submission.

Date: 30 July 2014

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49/3

**Submission on Publicly Notified Plan Change**

*Clause 6 of the First Schedule of the Resource Management Act 1991*

To: Queenstown Lakes District Council
Private Bag 50072
Queenstown 9348

1. Name of submitter: Glencoe Land Development Company Limited ("**Submitter**")

2. This is a submission on the following public plan change:

Plan Change 49: Earthworks – to the Queenstown Lakes District Plan ("**PC49**").

3. The Submitter could not gain an advantage in trade competition through this submission.

4.1 The Submitter is a landowner potentially affected by PC49. This submission requests amendments to the provisions proposed to be inserted into the Queenstown Lakes District Plan by PC49.

4.2 For ease of reference and consideration by the consent authority, the issues raised in this submission are set out below under separate headings. Each section of the submission contains the submission point relevant to that heading, the reasons for the submission point, and the relief requested.

5. **Positive v Negative – Change in Emphasis**

5.1 Earthworks are essential to the prosperity and wellbeing of the District. In accordance with the general approach of the RMA, the focus should be on enabling appropriate earthworks while ensuring that adverse effects are avoided, remedied or mitigated. Part 4.11 Earthworks of the District Plan (proposed to be deleted under PC49) reflects the correct approach of enabling subject to environmental protection.

5.2 The Section 22.1 introduction to new Part 22 Earthworks (proposed through PC49) reverses that focus by placing primary emphasis on adverse effects before addressing the important enabling aspect. This is then inconsistent with Section 22.2 which reverts to the original focus first on enabling and then on environmental protection. The reversal in Section 22.1 is inappropriate and creates inconsistency.

*Relief Requested*

5.3 That the first two paragraphs in Section 22.1 be reversed, in order to reinstate the original order of focus and to achieve consistency with the order of objectives and policies in Section 22.2.

6. **Major Change in Policy**

6.1 Under the (pre-PC49) District Plan, Part 4 addresses District Wide issues and contains the primary District Wide Objectives and Policies. Each separate Section in Part 4 addresses a different issue and specifies a different set of Objectives and Policies. It is necessary to read the relevant Sections as a whole in order to understand the balance between the way different issues are addressed, and to arrive at overall decisions relating to sustainable management. For example, and relevantly for the purpose of this Submission Point, Part 4.2 deals with landscape and visual amenity issues and Part 4.11 deals with earthworks. This is an appropriate approach because specific issues arise in respect of earthworks which do not arise in respect of landscape and visual amenity effects. Importantly Part 4.11 achieves consistency with Part 4.2 by only touching upon visual amenity issues in passing (because they have already been dealt with under Part 4.2) and by using general language to ensure

that Part 4.2 retains priority on the subject of landscape and visual amenity issues and is not contradicted by Part 4.11.

6.2 The PC49 s32 Report does not recognise the existing District Plan structure (this being one of the dangers of isolating a subject such as Earthworks and dealing with it separately, rather than as part of an overall District Plan Review). The PC49 s32 Report gives the impression that the Earthworks section of the District Plan must also deal with landscape and visual amenity issues relating to earthworks. The s32 Report does not recognise or assess the significance of the Part 4.2 Objectives and Policies.

6.3 As a consequence of the matters detailed in the previous two paragraphs, PC49 includes a major change in policy in respect of landscape and visual amenity values. The new policy direction contained in Objective 2 of PC49 simply requires avoidance of a range of outcomes. Not only is that obviously impossible to achieve, it is fundamentally different from the policy direction contained in Part 4.2. As a consequence PC49 creates a major inconsistency within the District Plan.

6.4 The concerns detailed above are compounded by the introductory words to Objective 4 which read "*Subject to Objective 2, to enable earthworks...*". The underlined introductory words give Objective 2 priority over Objective 4. This drafting will operate to significantly prevent the positive outcomes anticipated by Objective 4, because many of the activities detailed in Policies 4.1 – 4.4 cannot be carried out in compliance with the higher priority Policy 2.1 and/or Policy 2.2.

6.5 This problem is further compounded by the fact that there has been extensive litigation, and a number of Environment Court judgements, which provide guidance and interpretation on the implementation of Part 4.2. That includes, for example, interpretation of the "*reasonably difficult to see*" concept. PC49 effectively throws all that case law out the window. If PC49 were to be confirmed in its current form, the District Plan would contain one policy approach relating to buildings in sensitive landscapes and a different policy approach relating to earthworks in sensitive landscapes. This is obviously inappropriate, because many developments comprise both buildings and earthworks.

6.6 This problem is further compounded by the fact that PC49 largely retains the current (pre-PC49) assessment matters, and does not amend the assessment matters to be consistent with the new policy approach. By way of example, the new PC49 Objective 2 "*avoidance of adverse effects*" policy approach is inconsistent with the relevant assessment matters which adopt a "*Whether and to what extent...*" policy approach. The latter is consistent with the Part 4.2 Landscape and Visual Amenity Objectives and Policies but is inconsistent with the new PC49 Objective 2 policy approach.

6.7 This basic flaw in PC49 is further compounded by the second major change inherent in PC49 which is to remove earthworks plan provisions from each different part of the District Plan and consolidate them into a new Part 22. Under the pre-PC49 plan provisions, assessment matters relevant to consents for earthworks were considered in the context of the objectives and policies relevant to the activity being undertaken. By way of example, an application for consent for earthworks in the Rural General zone is (pre-PC49) considered against the Part 5 objectives and policies of the Rural General Zone as informed by the relevant Part 4 objectives and policies, whereas an application for consent for earthworks in relation to a residential development within a zoned residential area is considered in the context of the Part 7 Residential objectives and policies which are in turn informed by the Part 4 objectives and policies relevant to residentially zoned areas.

6.8 PC49 fundamentally changes this approach. PC49 appears to be attempting to address earthworks in a global manner with very little, if any, reference to development context in terms of the zone within which the proposed activity is taking place. As a result, for example, new Policy 2.2 which requires avoidance of adverse visual effects of earthworks on visually prominent slopes, natural landforms and ridgelines applies to all earthworks, regardless of

whether the particular '*prominent slope*" is located on a Rural General VAL hillside or within the residentially zoned area of Queenstown Hill.

6.9 One intended objective of PC49, being the removal of numerous duplicated District Plan provisions, is understood and accepted. However this still involves a major change to the structure of the District Plan. The current PC49 approach actually involves a step backwards rather than a step forwards because, although it minimises duplication of plan provisions (which merely reduces the number of 'pages' in a largely online document), it increases consent complexity (and will inevitably increase consenting costs) because it duplicates plan provisions relating to landscape and visual amenity values in a manner which creates fundamental inconsistencies.

*Relief Requested*

6.10 That the following amendments be made:

a. Delete Objective 2 and Policies 2.1 – 2.4 (and, if considered necessary for the purposes of clarity, cross-reference the Part 4.2 District Wide Objectives and Policies relevant to landscape and visual amenity values).

b. Amend Objective 4 by deleting the words "*Subject to Objective 2...*".

c. Retain Rule 22.4.iv [Landscape and Visual Amenity Assessment Matters] generally in their current form (as they are virtually the same as contained in the District Plan pre-PC49) but add a specific assessment matter which requires consideration to be given to the zone within which the earthworks are being carried out and the relevant objectives and policies of that zone.

## 7. "*Avoiding*" v "*Avoiding, remedying or mitigating*"

7.1 Objective 1 addresses the enabling aspect of earthworks, and does so by recognising that earthworks are essential to subdivision, development and access. However Objective 1 then requires those enabling earthworks to be undertaken in a manner which "*avoids adverse effects*". It is plainly impossible to carry out earthworks in a manner which avoids all adverse effects. It is inappropriate for an Objective to seek an outcome which is impossible to achieve.

7.2 That Objective 1 is implemented by Policy 1.2 and Policy 1.5 which again require avoidance. The same point applies. A policy should not seek to achieve the impossible.

7.3 The submitter acknowledges that policies should be directive to the extent reasonably possible, and that it is generally undesirable to parrot the "*avoid, remedy or mitigate*" mantra of the RMA. However that is the reality when it comes to earthworks. Some effects are avoided, many effects are mitigated, and sometimes effects are remedied. There is nothing inappropriate about using the phrase "*avoid, remedy or mitigate*" when it is directly applicable and is appropriate.

7.4 This submission point also raises, in a wider context, Submission Point 6 above. If one considers earthworks for a particular activity in the context of the objectives and policies of the relevant zone, informed by Part 4 Objectives and Policies where relevant, then the inevitable outcome is an "*avoid, remedy or mitigate*" outcome. It is inappropriate for a separate Earthworks Part 22 of the District Plan to seek more stringent outcomes than are anticipated by other relevant objectives and policies in the District Plan. That creates inconsistencies within the District Plan which will cause interpretation problems.

*Relief Requested*

7.5 In Objective 1, Policy 1.2 and Policy 1.5 amend "... *avoids adverse effects...*" to read "... *avoids, remedies or mitigates adverse effects*".

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8. **Ski Area Sub-Zones**

8.1 Ski Area Sub-Zones are specifically identified on the Planning Maps. Those identified areas anticipate and provide for the kinds of activities traditionally carried out within skifields. Those activities, of necessity, include 'terraforming' the landscape involving extensive earthworks. Such earthworks are an integral and essential aspect of the construction, operation and maintenance of skifields.

8.2 Given that a District Plan should be forward thinking, it is also appropriate to take into account climate change, together with current and likely future attitudes towards recreational activities. Mountain biking and hiking are obvious examples. Skifields have the benefit of readymade access which can enable extensive recreational activities within Ski Areas at times when the skifield cannot operate. Such activities may also involve earthworks, such as the creation of trails for mountain bikes. Such earthworks, while being essential for such activities, are generally of relatively minor scale compared to the extent of earthworks for a skifield.

8.3 The inevitable outcome of providing for skifields is that those identified Ski Areas undergo major change through earthworks, resulting in major effects on natural landforms, prominent ridgelines, and the like. These areas of major effect are limited in scope, and in area, when considered in the context of the Queenstown Lakes District. When one considers the recreational opportunities which are enabled by such earthworks, it is arguable that those effects are not adverse. However that is a debatable point, and it is essential that the District Plan resolve that debate by enabling and providing for such earthworks on the basis that they are not adverse.

8.4 One advantage of skifields is that they are generally not visible (from outside the Ski Area) except from below and from a considerable distance, which minimises the impact of earthworks associated with activities such as roading. However they are visible from the air, with Cardrona Skifield being a prime example. It is impossible to disguise or hide the effect of earthworks on Cardrona Skifield when viewed from the many planes which fly overhead and relatively close to that particular skifield.

8.5 The current (pre-PC49) District Plan recognises all of the above by exempting earthworks within the Ski Area Sub-Zones from any form of direct control. That regime has been in place since at least 1995 (and possibly considerably longer). That is an appropriate approach for this activity.

8.6 PC49 radically changes this policy approach. While PC49 exempts earthworks within Ski Area Sub-Zones from the new proposed controls relating to volume of earthworks, that exemption does not extend to 'Bulk Earthworks', and PC49 imposes restricted discretionary activity status on earthworks within Ski Area Sub-Zones if any cut exceeds 1m. That new control is then compounded (in effect) by Submission Point 7 above relating to "*avoidance*" and Submission Point 6 above relating to compliance with new and very stringent objectives and policies relating to landscape and visual amenity effects.

8.7 The reality is that it is virtually impossible to carry out meaningful upgrades of existing skifield runs and/or provide access trails to different parts of a skifield and/or extend a skifield into new territory (within the Ski Area Sub-Zone) without carrying out earthworks which create cuts over 1m in height and/or exceed 50,000m3 in volume. The new policy approach then makes it virtually impossible to obtain consent, despite the restricted discretionary activity status of the activity. This amended approach to Ski Area Sub-Zones is fundamentally inappropriate.

8.8 In addition, there is no apparent justification for this new proposed approach. Neither the Monitoring Report dated May 2012 (refer to the s32 Report for PC49) or the s32A Report itself identifies any difficulties or concerns with the regime, which has operated for at least 20 odd years, which would justify this amended approach.

8.9 PC49 does contain a provision exempting all earthworks within a Ski Area Sub-Zone if carried out in accordance with a Conservation Management Plan or Concession approved by the

Department of Conservation. The assumptions underlying that provision appear to be firstly that all skifields are located on Crown land and secondly that the criteria applied by the Department of Conservation will adequately address all relevant effects. This approach is inappropriate, for the following reasons:

a. It is doubtful whether the exemption actually works as intended. The terms "*Conservation Management Plan*" and "*Concession*" are technical terms which do not include all of the various different forms of tenure from the Crown that Ski Areas could (and do) operate under.

b. Any assumption that all existing Ski Areas are located on land owned by the Crown is incorrect (specifically in relation to Cardrona). Whatever controls are imposed by the Crown under whatever tenure is in place, and whatever the potential outcome of those controls (neither of which is known), it is inappropriate that different Ski Areas be subject to different earthworks control regimes.

c. It is possible that a single Ski Area could partially be located on Crown land and partially on private land, in which case PC49 would result in two different earthworks regimes applicable within the same Ski Area.

d. The Council has no control over what land may or may not be privatised by the Crown in future. The PC49 exemption might actually become a disincentive to private ownership, because private ownership would result in loss of the exemption, when private ownership might otherwise be an effective and efficient outcome in terms of management of the Ski Area land resource.

e. In summary on this point, all Ski Area Sub-Zones should be subject to the same (if any) control. However the Submitter contends that no such control is necessary, for the reasons expressed above.

*Relief Requested*

8.10 Amend Rule 22.3.2.1(b) as follows:

a. Amend subclause (i) by deleting subclause (e) relating to trails and operational areas within Ski Area Sub-Zones.

b. Delete Rule 22.3.2.1(c)(i) relating to approvals by the Department of Conservation.

c. Amend Rule 22.3.2.1(c)(ii) by exempting earthworks within Ski Area Sub-Zones from Rule 22.3.3 and Rule 22.3.2.4(b).

d. Make any other amendments that are required to ensure that all earthworks within a Ski Area Sub-Zone are a permitted activity.

## 9. Volume Control

9.1 The Submitter questions the justification for any form of volume control relating to earthworks. In making this Submission Point the Submitter acknowledges, and emphasises, the importance of the height and slope trigger control. In sensitive landscapes it is the height of a cut above the level of earthworks activities and/or the height and extent of the fill batter below the level of earthworks activities which primarily gives rise to adverse effects. Within areas zoned for development it is the height of a cut and/or fill which potentially creates stability issues and/or creates other residential adverse effects in respect of neighbouring properties. The Submitter questions what the volume trigger control achieves which is not achieved by the height and slope trigger control.

9.2 In making this Submission Point, and in putting the questions detailed in the following paragraph, the Submitter notes that the following potential effects are addressed separately by Site Standards which trigger restricted discretionary activity consent control if breached:

a. Height of cut and fill and slope.

b. Engineering requirements for residential building platforms and retaining walls.

c. Environmental protection measures, including sediment and erosion control, dust control and revegetation.

d. Potential adverse effects of activities close to water bodies or which will affect aquifers.

e. Potential effects on cultural heritage and archaeological sites.

f. Construction noise.

g. Potential effects on transmission lines.

9.3 Taking into account all of the above the Submitter asks:

a. What does the volume control achieve, in terms of a consent trigger, that is not already achieved by the Site Standards summarised above?

b. If all of the potential effects which arise under the Site Standards detailed above are addressed, what difference does it make (in respect of any particular site) whether the volume of earthworks excavated or deposited is 100m3, 200m3, 300m3, 400m3, 500m3, 1,000m3, 2,000m3 or 50,000m3?

c. What assessment matters come into play upon breach of the volume control which do not come into play upon breach of any of the other Site Standards summarised above?

d. What condition can be imposed as a consequence of the volume trigger control that cannot be imposed as a consequence of breach of the Site Standards summarised above?

e. What condition can be imposed as a consequence of the volume trigger control that is necessary to address any concern if there is no breach of the Site Standards summarised above?

f. How many resource consents potentially will have to be applied for, processed, and paid for, in respect of earthworks activities which breach the volume control but which do not breach any of the other Site Standards [particularly given that a purported objective of PC49 to reduce consenting costs]?

9.4 One issue which may need to be addressed if the volume trigger control were to be deleted may be the issue of hours of operation within residential areas. If that is the case however, requiring a large number of resource consents to be applied for in order to be able to impose a control on hours of operation is an inefficient method of addressing this concern. A more efficient method would be to insert a Site Standard imposing limits on hours of operation (in relation to earthworks activities) within specified zones (or possibly all zones other than Rural General zone). Appropriate hours of operation could be 8am to 6pm on Monday to Saturday of each week, or something similar. If that method were adopted, consent would only be required if someone wanted to carry out earthworks activities outside those hours.

*Relief Requested*

9.5 That all PC49 provisions which impose a earthworks volume trigger level for consent purposes, or which relate to an earthworks volume trigger control rule or requirement, be deleted.

9.6 Possibly insert a new Site Standard specifying permissible hours of operation for earthworks activities in specified zones, or within all zones other than the Rural General Zone.

10. **Legal issue – ONL/ONF Consent Status Trigger**

10.1 Rule 22.3.3.i is a site standard which imposes resource consent 'trigger' controls relating to maximum total volumes of earthworks as detailed in Table 22.1 referenced in that Rule. Table 22.1 contains a 200m3 Tier 2 consent trigger in relation to ONL's and ONF's which is different from a 1,000m3 Tier 6 trigger rule applicable to the Rural General zone excluding ONL's and ONF's. The Submitter contends that this provision is *ultra vires.*

10.2 This issue arises from the combination of the following factors:

a. The District Plan does not formally determine the extent and boundaries of ONL's and ONF's. ONL's and ONF's are identified on the Landscape Category Maps which, effectively, record ONL's and ONF's as determined through a sequence of Environment Court decisions, many of which are resource consent decisions and are not District Plan plan change decisions. The Landscape Category Maps can be, and are, amended from time to time as a result of Environment Court consent decisions which do not arise from any review of the District Plan.

b. The issue of the status of the landscape category lines on the Landscape Category Maps has been a matter of some debate. The current position of the Council appears to be that the solid black lines can only be amended by the Environment Court (whether through resource consent appeal or plan change appeal is unclear) whereas the dotted lines can be amended by the Council at resource consent stage.

c. An Interim Decision issued in respect of PC19 (EnvC93 (2014)) has determined that the status of an activity must be specified in the District Plan, and cannot be determined through a resource consent process.

d. It appears to follow from the above that, as the landscape categories lines are boundaries which have or will be determined thorough a resource consent process, and as the proposed 200m3 resource consent trigger control is based upon whether or not the relevant land is within an ONL or an ONF, that proposed trigger control is *ultra vires.*

10.3 The Submitter notes that this problem does not arise under the current (pre-PC49) District Plan because the differentiation between the three landscape categories generally only arises in respect of policies and assessment matters. There are few, if any, instances where consent status depends upon an ONL/ONF determination (and it is noted that, if there are any such instances, it would appear that those are also *ultra vires* as a consequence of the PC19 Interim Decision).

*Relief Requested*

10.4 Amend or delete any rules which purport to determine consent activity status as a consequence of the relevant earthworks activity being located within an ONL or an ONF.

10.5 In the alternative, if this is legally valid, defer the operative date of any such rules until a review of the District Plan identifies the ONL/ONF boundaries as part of the District Plan.

## 11. Bulk Earthworks

11.1 Rule 22.3.2.4 introduces a new consent requirement requiring fully discretionary activity consent for earthworks with a total volume of over 50,000 cubic metres within one consecutive 12 month period. The Submitter contends that this new consent provision is unnecessary, and inappropriate, for the following reasons:

a. There is no identifiable difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same issues arise. The same kinds of conditions can be imposed. The trigger level of 50,000m3 is meaningless.

b. If a volume 'trigger' control is retained, then the difference between restricted discretionary and fully discretionary has little meaning. The same considerations apply under both consent categories. The same conditions can be imposed. Consent can be refused if considered appropriate. The addition of a trigger level of 50,000m3, and the change in status from restricted discretionary to fully discretionary, is unjustified.

c. If Submission Point 9 above is accepted and any volume control is deleted, there is still no difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same Site Standards are relevant. Breach of any Site Standard will require consent. If none of the Site Standards are breached, there is no need for resource consent control because there will be no need to impose consent conditions.

11.2 Part of the rationale for introducing a new Bulk Earthworks consent status appears to relate to the issue of bonds. However a bond can be imposed in respect of any earthworks consent. It is difficult to see why consideration of the possibility of requiring a bond should be triggered by an arbitrary volume figure rather than being considered in respect of the extent of the actual extent of earthworks being carried out and the actual environmental effects arising which might need to be remedied (as has been the practice in the past).

*Relief Requested*

11.3 Delete Rule 22.3.2.4(b) Bulk Earthworks and all other plan provisions relating to that consent category.

## 12. Notification

12.1 The Submitter contends that Rule 22.3.2.6 Non-notification of Applications is far too restrictive. A primary objective of PC49 is to reduce consent compliance costs. There is no need to notify the vast majority of earthworks applications because the issues concerned can be adequately dealt with between the consent applicant and the Council without needing to involve anybody else. Rule 22.3.2.6 should be amended to provide for a default starting position that all applications for earthworks consent under Part 22 are dealt with in a non-notified basis (noting that of course the "*special circumstances*" provisions of the RMA are always applicable).

12.2 The point made in the previous paragraph is supported by the Monitoring Report appended to the s32A Report which records only seven earthworks applications being notified within a two year period, all of which related to quarrying activities.

12.3 The primary exception to the previous point should be a breach of Rule 22.3.3.(ii) [height of cut and fill slope] where the breach relates to a distance of a cut or fill from the site boundary, in which case the starting presumption should be limited notification to the relevant adjoining landowner.

12.4 In addition to the above points, the Submitter notes that existing Rule 22.3.2.6 is badly drafted and is difficult to understand.

*Relief Requested*

12.5 Amend Rule 22.3.2.6 to address the concerns detailed above, to simplify the rule, and to provide for a default position that applications for consent for earthworks activities do not need to be notified (possibly subject to exceptions).

13. **Minor Drafting Amendments**

13.1 Submission Points 5 - 12 above set out the Submitter's primary concerns. In addition the Submitter expresses the following concerns about the drafting of PC49. The primary purpose of identifying the following Submission Points is to draw these drafting issues to the Council's attention and to establish jurisdiction for the Council to address these issues, so that PC49 ends up with improved clarity, internal coherence, drafting accuracy and legal robustness. In respect of some or all of the following submission points the Submitter, rather than requesting specific relief, requests that the issues be considered and that appropriate amendments be made to address the concerns raised.

13.2 In Section 22.2, Objective 1 Policy 1.2, there is a list of six bullet points in respect of which the following concerns are expressed:

a. Four of the six identify a technique or method without stating a desired outcome whereas two of the six identify a technique or method and state a desired outcome. The drafting is inconsistent. The desired outcomes are or should be obvious. In the second and sixth bullet points, the second part commencing "*... to avoid... etc*" should be deleted.

b. The fourth and fifth bullet points refer to "*construction*" which is unnecessary, and potentially inappropriate, when referring to earthworks activities. That word should be deleted from the fourth bullet point and should be replaced by the words "*earthworks activities*".

c. In the fifth bullet point the words "*... taking into account the receiving environment.*" should be deleted because consideration of every consent should take into account the receiving environment.

13.3 In Section 22.2, Objective 3, Policy 3.2 the reference to "*... avoid de-watering*" is inappropriate. De-watering is frequently an inevitable consequence of development. Not all de-watering has adverse effects, and some de-watering may have positive effects. In addition the reference to avoidance is inappropriate for reasons canvassed in Submission Point 7 above. That wording should be amended to read "*... avoid or mitigate any adverse effects caused by de-watering*".

13.4 In respect of Section 22.2, Objective 3, Policy 3.3, the following points are made:

a. Much of the land zoned for development in the Queenstown area is located on steeply sloping sites. It is impossible to avoid earthworks on steeply sloping sites, and many earthworks activities on steeply sloping sites will not necessary have adverse effects.

b. There is an illogicality between the first sentence which requires avoidance and the second sentence which anticipates non-avoidance.

c. The above two points could be addressed by rewording Policy 3.3 as follows:

"*3.3 To avoid the adverse effects of earthworks on steeply sloping sites, where land is prone to erosion or instability, where practicable. Where these effects cannot be avoided, to ensure techniques are adopted that minimise the potential to decrease land stability*".

13.5 In Part 22.2, Objective 4, the reference in the heading to "*Rural Areas*" is ambiguous, because the term "*Rural Areas*" includes Rural Lifestyle and Rural Residential zones. As all Policies 4.1 – 4.4 appear to be applicable only to the Rural General zone, the heading should be reworded "*Earthworks in the Rural General Zone*". The reference to Ski Area Subzones is unnecessary because those sub-zones are located within the Rural General Zone.

13.6 In Section 22.2, Objective 4, Policy 4.4, the reference to "*skifields*" is inappropriately and unnecessarily restrictive. There is existing and future potential for other recreational activities within Ski Area Sub-Zones. The reference to "*...skifields...*" should be amended to read "*...recreational activities...*".

13.7 In Section 22.2, Objective 5, Policy 5.2, the following points are noted:

a. There is no need to avoid earthworks in close proximity to water bodies if no adverse effects will arise. The second sentence is unnecessary because that sentence merely repeats Policy 5.1. If the only concern about locating earthworks within close proximity to water bodies is sediment runoff, then Policy 5.1 fully addresses the issue. Policy 5.2 should be deleted.

b. In respect of Policy 5.3, the four main aquifers have already been noted in the final paragraph of Section 22.1. There is no need to repeat them here. The reference to "*... including ... etc*" can be deleted.

13.8 In Part 22.2, Objective 6, Policies 6.4 and 6.5 (and elsewhere within PC49) references to "*NZ Historic Places Trust*" should be corrected to read "*Heritage New Zealand Pouhere Taonga*" and references to "*Historic Places Act 1993*" should be corrected to read "*Heritage New Zealand Pouhere Taonga Act 2014*".

13.9 The heading to Rule 22.3.1 reads "*General Provisions/Cross-Referencing*". This heading is confusing because the term "*General Provisions*" suggests general provisions which apply as rules. The heading would be better worded to read "*Cross-Referencing/Other Legislation*".

13.10 In respect of Rule 22.3.ii(a) the following points are noted:

a. Subclause (i) appears to be intended to apply to subdivisions going forward which are consented under proposed new Rule 15.2.20. That is considered appropriate, but the wording is awkward. The following alternative wording is suggested:

"*(i) That are approved as part of a subdivision consented under Rule 15.2.20; or*"

b. Subclause (ii) appears to be intended to apply to consents which precede PC49 and are therefore not consented under proposed new Rule 15.2.20. Assuming that is the case, the following points are noted:

i. The existing (pre-PC49) District Plan is known to be ambiguous on the issue of whether earthworks which form part of a subdivision activity are dealt with and consented under Part 15 as part of the subdivision consent or require separate land use consent under the relevant zone provisions. Because of that ambiguity, many subdivision consents (which inevitably include earthworks) have been dealt with only under Part 15, whereas other subdivision consents have been required to obtain separate land use consent under the relevant zone provisions. There are numerous subdivision consents in existence where it would be difficult to determine whether the relevant earthworks "*... have been explicitly included...*".

ii. The applicable 'changeover' date should not be the date of notification of PC49 because PC49 did not take effect upon notification. The 'changeover' date should be the date PC49 takes legal effect, being the date Council issues decisions on submissions to PC49 [regardless of any appeals].

iii. The above two points could be addressed by rewording subparagraph (ii) as follows:

"*(ii) That are approved as part of a subdivision consented prior to* ***[date of release of Council decisions on submissions to PC49]***".

13.11 Rule 22.3.1.ii(a) does not include an exemption for earthworks relating to the construction of a dwelling within an approved residential building platform. The current exemption has not been carried forward. Once a residential building platform has been approved, that must anticipate earthworks required to build a house, whether or not earthworks have been specifically consented. In many cases the extent of earthworks which will be required is unknown because the house has not been designed when the residential building platform is consented. Rule 22.3.1.ii(a) should include a specific exemption for earthworks associated with the construction of a house within an approved residential building platform.

13.12 Rule 22.3.1.(iii) Noise reads as if it is a rule, whereas in fact the relevant (restricted discretionary activity) rule is repeated later (in the correct location) as Rule 22.3.3.vii. There is no need for a cross-reference here because the later rule is located in this Part 22. This reference should be deleted.

13.13 In respect of Rule 22.3.1.iv Archaeological Sites the following points are noted:

a. Because there is no definition of "*archaeological sites*", either in the District Plan or in the RMA, the first sentence of subparagraph a is unclear and potentially inaccurate. Only pre-1900 archaeological sites are protected under the Heritage New Zealand Pouhere Taonga Act 2014. This sentence is unnecessary and should be deleted.

b. Archaeological sites are not defined within "*Historic Heritage*" in Section 2 of the RMA. They are not defined at all in the RMA. The second sentence adds nothing and should be deleted.

c. If the first two sentences are deleted from subparagraph (a), the remaining two sentences achieve the required cross-referencing (with a question mark over why the words "*... (a consent)...*" are included).

d. Subparagraph (b) appears to purport to be a definition, in which case it is in the wrong place. It is also unnecessary [refer point (e) below]. Subparagraph (b) should be deleted.

e. Subparagraph (c) is inappropriate, and should be deleted, for the following reasons:

i. The statement is incorrect. Archaeological sites are not subject to the Rules in Section 13 of the Plan.

ii. There is already a cross-reference to Part 13 in Rule 22.3.1.i.(a)(i).

iii. Point c above adequately deals with this issue.

13.14 In Rule 22.3.2.1(b)(i), in the proviso at the end, the word "*exposed*" should be replaced by the word "*the*" for the following reasons:

a. The word "*exposed*" implies the removal of vegetative cover. That is a temporary effect, which ceases when revegetation occurs. In addition there is a Site Standard requiring revegetation of exposed surfaces. Many earthworks activities will be caught by this reference which should not be caught because the "*exposure*" will be remedied.

b. This proviso is presumably aimed at incremental increases in earthworks areas, such as the width of access tracks. The proviso should target the permanent outcome, not a temporary effect.

13.15 In Rule 22.3.2.2(c) it is unclear why the words in subparagraphs (ii) and (vii) are capitalised. The same point applies to Rule 22.3.2.3(b) subparagraphs (ii) and (vii).

13.16 In Rule 22.3.3.(i), Table 22.1, Tiers 2, 3, 4, and 5, referring to the final bullet point in each Tier relating to Special Zone Activity Areas, the following points are noted (assuming that, despite Submission Point 9 above, the volume 'trigger' control rule is retained, and this complicated approach of a number of separate Tiers is retained):

a. It is necessary that a District Plan provides certainty when it comes to consent status. Any person reading the District Plan should be able to identify, without any ambiguity, the consent status of any particular activity.

b. The four bullet points refer to different specific zones which do not necessarily apply within all of the Special Zones. For example, Tier 4, bullet point 6, refers to "*Rural Residential and Rural Lifestyle Activities*" when none of the Special Zones contain Rural Residential or Rural Lifestyle zoning.

c. It is therefore left to a consent applicant to try and work out which 'equivalent' zoning would apply to the density applicable within that particular part of the relevant Special Zone.

d. That degree of ambiguity is unnecessary and inappropriate, in both a legal and a planning sense.

13.17 In Rule 22.3.3.i, Table 22.1, Tier 6, why does the first bullet point refer to Section [which should be Rule] 5.3.5.1(v) instead of referring directly to Appendix 5?

13.18 In Rule 22.4.(ii)(e) [compared to the current pre-PC49 equivalent Environmental Protection Measures], the words "*The effects on traffic generated and...*" have been added. The justification for that addition is unclear. Noise is covered by a separate Site Standard. Hours of operation are dealt with by the preceding subclause (d). Deposition of sediment, particularly in residential areas, is dealt with in the rest of this subclause and also by a separate Site Standard. The purpose of roads is to accommodate traffic. Those words should be deleted.

13.19 Rule 22.4.(ii)(f) introduces a new assessment matter based upon the track record of the applicant/operator. In respect of this new assessment matter the following points are made:

a. When most applications for resource consent involving earthworks are made, the choice of earthworks contractor has yet to be made. If this new rule intends to impose a requirement that such choice be made when the consent application is made, then the requirement is unreasonable. If that is not the intention, then the new rule is pointless.

b. Compliance with resource consent conditions is an enforcement/compliance matter. It is inappropriate to include such a consideration in a consent assessment matter of this nature.

13.20 Rule 22.4.vii(c) is an assessment matter in relation to impacts on sites of cultural heritage value which reads:

> "*Whether the subject land contains a recorded archaeological site, and if so the extent to which the proposal would affect any such site and whether any necessary archaeological authority has been obtained from the NZ Historic Places Trust*".

The following comments are made:

a. While it is accepted that archaeological sites fall within the definition of "*historic heritage*" in the RMA, that does not necessarily mean that archaeological sites have to be protected through District Plan provisions. The Council should consider whether there is any other statutory regime in place which will ensure that any required policy direction is implemented.

b. Pre-1900 archaeological sites are subject to separate procedures under the Heritage New Zealand Pouhere Taonga Act 2014, which requires an Archaeological Authority to be issued before any such archaeological site can be disturbed.

c. The common practice in the past has been to apply for the required Archaeological Authority concurrently with the processing of the relevant resource consent application, or after the consent has been obtained. The wording of this new rule implies that the Archaeological Authority should be obtained first. That will potentially add months of delay to the consenting process without any justification.

d. The rule also implies that, if an Archaeological Authority has not been obtained, the Council may impose conditions on the relevant earthworks consent in respect of any archaeological site. That raises the possibility that consent conditions imposed by the Council may be inconsistent with conditions imposed under the required Archaeological Authority. That is both inefficient and inappropriate.

e. This issue can easily be addressed by the Council including a standard condition in every earthworks consent requiring the consentholder not to carry out any earthworks which would damage a pre-1900 archaeological site without first obtaining the required Archaeological Authority from Heritage New Zealand Pouhere Taonga.

f. Accordingly Rule 22.4.vii(c) should be deleted.

13.21 PC49 adds new definitions of "*Bed*" and "*River*". The following comments are made:

a. The two definitions are copied from the RMA. As those definitions are already in the RMA, the Submitter queries why they need to be included in the District Plan. There are many other terms which are not defined in the District Plan because they are defined in the RMA.

b. Because the definitions are quoted in full, that wording becomes enshrined in the RMA. If either of those definitions is subsequently amended in the RMA, the District Plan will have to be amended to maintain consistency. That is undesirable. If it is considered necessary to insert these definitions into the District Plan, they should not be quoted in full. Instead they should be directly cross-referenced, as is the case with the definition of Building (which cross-references to the Building Act 1991) and the definition of "Road" (which cross-references to the Local Government Act 1974).

**Alternative or Consequential Relief**

14. The Submitter requests such alternative, additional or consequential amendments to the PC49 Plan Provisions as may be considered necessary or appropriate in order to address the issues raised in this submission.

**Request to be Heard**

15. The Submitter wishes to be heard in support of this submission.

Date: 30 July 2014

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49/4

**Submission on Publicly Notified Plan Change**

*Clause 6 of the First Schedule of the Resource Management Act 1991*

To: Queenstown Lakes District Council
Private Bag 50072
Queenstown 9348

1. Name of submitter: Glencoe Station Limited ("**Submitter**")

2. This is a submission on the following public plan change:

Plan Change 49: Earthworks – to the Queenstown Lakes District Plan ("**PC49**").

3. The Submitter could not gain an advantage in trade competition through this submission.

4.1 The Submitter is a landowner potentially affected by PC49. This submission requests amendments to the provisions proposed to be inserted into the Queenstown Lakes District Plan by PC49.

4.2 For ease of reference and consideration by the consent authority, the issues raised in this submission are set out below under separate headings. Each section of the submission contains the submission point relevant to that heading, the reasons for the submission point, and the relief requested.

5. **Positive v Negative – Change in Emphasis**

5.1 Earthworks are essential to the prosperity and wellbeing of the District. In accordance with the general approach of the RMA, the focus should be on enabling appropriate earthworks while ensuring that adverse effects are avoided, remedied or mitigated. Part 4.11 Earthworks of the District Plan (proposed to be deleted under PC49) reflects the correct approach of enabling subject to environmental protection.

5.2 The Section 22.1 introduction to new Part 22 Earthworks (proposed through PC49) reverses that focus by placing primary emphasis on adverse effects before addressing the important enabling aspect. This is then inconsistent with Section 22.2 which reverts to the original focus first on enabling and then on environmental protection. The reversal in Section 22.1 is inappropriate and creates inconsistency.

*Relief Requested*

5.3 That the first two paragraphs in Section 22.1 be reversed, in order to reinstate the original order of focus and to achieve consistency with the order of objectives and policies in Section 22.2.

6. **Major Change in Policy**

6.1 Under the (pre-PC49) District Plan, Part 4 addresses District Wide issues and contains the primary District Wide Objectives and Policies. Each separate Section in Part 4 addresses a different issue and specifies a different set of Objectives and Policies. It is necessary to read the relevant Sections as a whole in order to understand the balance between the way different issues are addressed, and to arrive at overall decisions relating to sustainable management. For example, and relevantly for the purpose of this Submission Point, Part 4.2 deals with landscape and visual amenity issues and Part 4.11 deals with earthworks. This is an appropriate approach because specific issues arise in respect of earthworks which do not arise in respect of landscape and visual amenity effects. Importantly Part 4.11 achieves consistency with Part 4.2 by only touching upon visual amenity issues in passing (because they have already been dealt with under Part 4.2) and by using general language to ensure

that Part 4.2 retains priority on the subject of landscape and visual amenity issues and is not contradicted by Part 4.11.

6.2 The PC49 s32 Report does not recognise the existing District Plan structure (this being one of the dangers of isolating a subject such as Earthworks and dealing with it separately, rather than as part of an overall District Plan Review). The PC49 s32 Report gives the impression that the Earthworks section of the District Plan must also deal with landscape and visual amenity issues relating to earthworks. The s32 Report does not recognise or assess the significance of the Part 4.2 Objectives and Policies.

6.3 As a consequence of the matters detailed in the previous two paragraphs, PC49 includes a major change in policy in respect of landscape and visual amenity values. The new policy direction contained in Objective 2 of PC49 simply requires avoidance of a range of outcomes. Not only is that obviously impossible to achieve, it is fundamentally different from the policy direction contained in Part 4.2. As a consequence PC49 creates a major inconsistency within the District Plan.

6.4 The concerns detailed above are compounded by the introductory words to Objective 4 which read "*Subject to Objective 2, to enable earthworks...*". The underlined introductory words give Objective 2 priority over Objective 4. This drafting will operate to significantly prevent the positive outcomes anticipated by Objective 4, because many of the activities detailed in Policies 4.1 – 4.4 cannot be carried out in compliance with the higher priority Policy 2.1 and/or Policy 2.2.

6.5 This problem is further compounded by the fact that there has been extensive litigation, and a number of Environment Court judgements, which provide guidance and interpretation on the implementation of Part 4.2. That includes, for example, interpretation of the "*reasonably difficult to see*" concept. PC49 effectively throws all that case law out the window. If PC49 were to be confirmed in its current form, the District Plan would contain one policy approach relating to buildings in sensitive landscapes and a different policy approach relating to earthworks in sensitive landscapes. This is obviously inappropriate, because many developments comprise both buildings and earthworks.

6.6 This problem is further compounded by the fact that PC49 largely retains the current (pre-PC49) assessment matters, and does not amend the assessment matters to be consistent with the new policy approach. By way of example, the new PC49 Objective 2 "*avoidance of adverse effects*" policy approach is inconsistent with the relevant assessment matters which adopt a "*Whether and to what extent...*" policy approach. The latter is consistent with the Part 4.2 Landscape and Visual Amenity Objectives and Policies but is inconsistent with the new PC49 Objective 2 policy approach.

6.7 This basic flaw in PC49 is further compounded by the second major change inherent in PC49 which is to remove earthworks plan provisions from each different part of the District Plan and consolidate them into a new Part 22. Under the pre-PC49 plan provisions, assessment matters relevant to consents for earthworks were considered in the context of the objectives and policies relevant to the activity being undertaken. By way of example, an application for consent for earthworks in the Rural General zone is (pre-PC49) considered against the Part 5 objectives and policies of the Rural General Zone as informed by the relevant Part 4 objectives and policies, whereas an application for consent for earthworks in relation to a residential development within a zoned residential area is considered in the context of the Part 7 Residential objectives and policies which are in turn informed by the Part 4 objectives and policies relevant to residentially zoned areas.

6.8 PC49 fundamentally changes this approach. PC49 appears to be attempting to address earthworks in a global manner with very little, if any, reference to development context in terms of the zone within which the proposed activity is taking place. As a result, for example, new Policy 2.2 which requires avoidance of adverse visual effects of earthworks on visually prominent slopes, natural landforms and ridgelines applies to all earthworks, regardless of

whether the particular '*prominent slope*" is located on a Rural General VAL hillside or within the residentially zoned area of Queenstown Hill.

6.9 One intended objective of PC49, being the removal of numerous duplicated District Plan provisions, is understood and accepted. However this still involves a major change to the structure of the District Plan. The current PC49 approach actually involves a step backwards rather than a step forwards because, although it minimises duplication of plan provisions (which merely reduces the number of 'pages' in a largely online document), it increases consent complexity (and will inevitably increase consenting costs) because it duplicates plan provisions relating to landscape and visual amenity values in a manner which creates fundamental inconsistencies.

*Relief Requested*

6.10 That the following amendments be made:

a. Delete Objective 2 and Policies 2.1 – 2.4 (and, if considered necessary for the purposes of clarity, cross-reference the Part 4.2 District Wide Objectives and Policies relevant to landscape and visual amenity values).

b. Amend Objective 4 by deleting the words "*Subject to Objective 2...*".

c. Retain Rule 22.4.iv [Landscape and Visual Amenity Assessment Matters] generally in their current form (as they are virtually the same as contained in the District Plan pre-PC49) but add a specific assessment matter which requires consideration to be given to the zone within which the earthworks are being carried out and the relevant objectives and policies of that zone.

## 7. "*Avoiding*" v "*Avoiding, remedying or mitigating*"

7.1 Objective 1 addresses the enabling aspect of earthworks, and does so by recognising that earthworks are essential to subdivision, development and access. However Objective 1 then requires those enabling earthworks to be undertaken in a manner which "*avoids adverse effects*". It is plainly impossible to carry out earthworks in a manner which avoids all adverse effects. It is inappropriate for an Objective to seek an outcome which is impossible to achieve.

7.2 That Objective 1 is implemented by Policy 1.2 and Policy 1.5 which again require avoidance. The same point applies. A policy should not seek to achieve the impossible.

7.3 The submitter acknowledges that policies should be directive to the extent reasonably possible, and that it is generally undesirable to parrot the "*avoid, remedy or mitigate*" mantra of the RMA. However that is the reality when it comes to earthworks. Some effects are avoided, many effects are mitigated, and sometimes effects are remedied. There is nothing inappropriate about using the phrase "*avoid, remedy or mitigate*" when it is directly applicable and is appropriate.

7.4 This submission point also raises, in a wider context, Submission Point 6 above. If one considers earthworks for a particular activity in the context of the objectives and policies of the relevant zone, informed by Part 4 Objectives and Policies where relevant, then the inevitable outcome is an "*avoid, remedy or mitigate*" outcome. It is inappropriate for a separate Earthworks Part 22 of the District Plan to seek more stringent outcomes than are anticipated by other relevant objectives and policies in the District Plan. That creates inconsistencies within the District Plan which will cause interpretation problems.

*Relief Requested*

7.5 In Objective 1, Policy 1.2 and Policy 1.5 amend "... *avoids adverse effects...*" to read "... *avoids, remedies or mitigates adverse effects*".

8. **Ski Area Sub-Zones**

8.1 Ski Area Sub-Zones are specifically identified on the Planning Maps. Those identified areas anticipate and provide for the kinds of activities traditionally carried out within skifields. Those activities, of necessity, include 'terraforming' the landscape involving extensive earthworks. Such earthworks are an integral and essential aspect of the construction, operation and maintenance of skifields.

8.2 Given that a District Plan should be forward thinking, it is also appropriate to take into account climate change, together with current and likely future attitudes towards recreational activities. Mountain biking and hiking are obvious examples. Skifields have the benefit of readymade access which can enable extensive recreational activities within Ski Areas at times when the skifield cannot operate. Such activities may also involve earthworks, such as the creation of trails for mountain bikes. Such earthworks, while being essential for such activities, are generally of relatively minor scale compared to the extent of earthworks for a skifield.

8.3 The inevitable outcome of providing for skifields is that those identified Ski Areas undergo major change through earthworks, resulting in major effects on natural landforms, prominent ridgelines, and the like. These areas of major effect are limited in scope, and in area, when considered in the context of the Queenstown Lakes District. When one considers the recreational opportunities which are enabled by such earthworks, it is arguable that those effects are not adverse. However that is a debatable point, and it is essential that the District Plan resolve that debate by enabling and providing for such earthworks on the basis that they are not adverse.

8.4 One advantage of skifields is that they are generally not visible (from outside the Ski Area) except from below and from a considerable distance, which minimises the impact of earthworks associated with activities such as roading. However they are visible from the air, with Cardrona Skifield being a prime example. It is impossible to disguise or hide the effect of earthworks on Cardrona Skifield when viewed from the many planes which fly overhead and relatively close to that particular skifield.

8.5 The current (pre-PC49) District Plan recognises all of the above by exempting earthworks within the Ski Area Sub-Zones from any form of direct control. That regime has been in place since at least 1995 (and possibly considerably longer). That is an appropriate approach for this activity.

8.6 PC49 radically changes this policy approach. While PC49 exempts earthworks within Ski Area Sub-Zones from the new proposed controls relating to volume of earthworks, that exemption does not extend to 'Bulk Earthworks', and PC49 imposes restricted discretionary activity status on earthworks within Ski Area Sub-Zones if any cut exceeds 1m. That new control is then compounded (in effect) by Submission Point 7 above relating to "*avoidance*" and Submission Point 6 above relating to compliance with new and very stringent objectives and policies relating to landscape and visual amenity effects.

8.7 The reality is that it is virtually impossible to carry out meaningful upgrades of existing skifield runs and/or provide access trails to different parts of a skifield and/or extend a skifield into new territory (within the Ski Area Sub-Zone) without carrying out earthworks which create cuts over 1m in height and/or exceed 50,000m3 in volume. The new policy approach then makes it virtually impossible to obtain consent, despite the restricted discretionary activity status of the activity. This amended approach to Ski Area Sub-Zones is fundamentally inappropriate.

8.8 In addition, there is no apparent justification for this new proposed approach. Neither the Monitoring Report dated May 2012 (refer to the s32 Report for PC49) or the s32A Report itself identifies any difficulties or concerns with the regime, which has operated for at least 20 odd years, which would justify this amended approach.

8.9 PC49 does contain a provision exempting all earthworks within a Ski Area Sub-Zone if carried out in accordance with a Conservation Management Plan or Concession approved by the

Department of Conservation. The assumptions underlying that provision appear to be firstly that all skifields are located on Crown land and secondly that the criteria applied by the Department of Conservation will adequately address all relevant effects. This approach is inappropriate, for the following reasons:

a. It is doubtful whether the exemption actually works as intended. The terms "*Conservation Management Plan*" and "*Concession*" are technical terms which do not include all of the various different forms of tenure from the Crown that Ski Areas could (and do) operate under.

b. Any assumption that all existing Ski Areas are located on land owned by the Crown is incorrect (specifically in relation to Cardrona). Whatever controls are imposed by the Crown under whatever tenure is in place, and whatever the potential outcome of those controls (neither of which is known), it is inappropriate that different Ski Areas be subject to different earthworks control regimes.

c. It is possible that a single Ski Area could partially be located on Crown land and partially on private land, in which case PC49 would result in two different earthworks regimes applicable within the same Ski Area.

d. The Council has no control over what land may or may not be privatised by the Crown in future. The PC49 exemption might actually become a disincentive to private ownership, because private ownership would result in loss of the exemption, when private ownership might otherwise be an effective and efficient outcome in terms of management of the Ski Area land resource.

e. In summary on this point, all Ski Area Sub-Zones should be subject to the same (if any) control. However the Submitter contends that no such control is necessary, for the reasons expressed above.

*Relief Requested*

8.10 Amend Rule 22.3.2.1(b) as follows:

a. Amend subclause (i) by deleting subclause (e) relating to trails and operational areas within Ski Area Sub-Zones.

b. Delete Rule 22.3.2.1(c)(i) relating to approvals by the Department of Conservation.

c. Amend Rule 22.3.2.1(c)(ii) by exempting earthworks within Ski Area Sub-Zones from Rule 22.3.3 and Rule 22.3.2.4(b).

d. Make any other amendments that are required to ensure that all earthworks within a Ski Area Sub-Zone are a permitted activity.

## 9. Volume Control

9.1 The Submitter questions the justification for any form of volume control relating to earthworks. In making this Submission Point the Submitter acknowledges, and emphasises, the importance of the height and slope trigger control. In sensitive landscapes it is the height of a cut above the level of earthworks activities and/or the height and extent of the fill batter below the level of earthworks activities which primarily gives rise to adverse effects. Within areas zoned for development it is the height of a cut and/or fill which potentially creates stability issues and/or creates other residential adverse effects in respect of neighbouring properties. The Submitter questions what the volume trigger control achieves which is not achieved by the height and slope trigger control.

9.2 In making this Submission Point, and in putting the questions detailed in the following paragraph, the Submitter notes that the following potential effects are addressed separately by Site Standards which trigger restricted discretionary activity consent control if breached:

a. Height of cut and fill and slope.

b. Engineering requirements for residential building platforms and retaining walls.

c. Environmental protection measures, including sediment and erosion control, dust control and revegetation.

d. Potential adverse effects of activities close to water bodies or which will affect aquifers.

e. Potential effects on cultural heritage and archaeological sites.

f. Construction noise.

g. Potential effects on transmission lines.

9.3 Taking into account all of the above the Submitter asks:

a. What does the volume control achieve, in terms of a consent trigger, that is not already achieved by the Site Standards summarised above?

b. If all of the potential effects which arise under the Site Standards detailed above are addressed, what difference does it make (in respect of any particular site) whether the volume of earthworks excavated or deposited is 100m3, 200m3, 300m3, 400m3, 500m3, 1,000m3, 2,000m3 or 50,000m3?

c. What assessment matters come into play upon breach of the volume control which do not come into play upon breach of any of the other Site Standards summarised above?

d. What condition can be imposed as a consequence of the volume trigger control that cannot be imposed as a consequence of breach of the Site Standards summarised above?

e. What condition can be imposed as a consequence of the volume trigger control that is necessary to address any concern if there is no breach of the Site Standards summarised above?

f. How many resource consents potentially will have to be applied for, processed, and paid for, in respect of earthworks activities which breach the volume control but which do not breach any of the other Site Standards [particularly given that a purported objective of PC49 to reduce consenting costs]?

9.4 One issue which may need to be addressed if the volume trigger control were to be deleted may be the issue of hours of operation within residential areas. If that is the case however, requiring a large number of resource consents to be applied for in order to be able to impose a control on hours of operation is an inefficient method of addressing this concern. A more efficient method would be to insert a Site Standard imposing limits on hours of operation (in relation to earthworks activities) within specified zones (or possibly all zones other than Rural General zone). Appropriate hours of operation could be 8am to 6pm on Monday to Saturday of each week, or something similar. If that method were adopted, consent would only be required if someone wanted to carry out earthworks activities outside those hours.

*Relief Requested*

9.5 That all PC49 provisions which impose a earthworks volume trigger level for consent purposes, or which relate to an earthworks volume trigger control rule or requirement, be deleted.

9.6 Possibly insert a new Site Standard specifying permissible hours of operation for earthworks activities in specified zones, or within all zones other than the Rural General Zone.

10. **Legal issue – ONL/ONF Consent Status Trigger**

10.1 Rule 22.3.3.i is a site standard which imposes resource consent 'trigger' controls relating to maximum total volumes of earthworks as detailed in Table 22.1 referenced in that Rule. Table 22.1 contains a 200m3 Tier 2 consent trigger in relation to ONL's and ONF's which is different from a 1,000m3 Tier 6 trigger rule applicable to the Rural General zone excluding ONL's and ONF's. The Submitter contends that this provision is *ultra vires.*

10.2 This issue arises from the combination of the following factors:

a. The District Plan does not formally determine the extent and boundaries of ONL's and ONF's. ONL's and ONF's are identified on the Landscape Category Maps which, effectively, record ONL's and ONF's as determined through a sequence of Environment Court decisions, many of which are resource consent decisions and are not District Plan plan change decisions. The Landscape Category Maps can be, and are, amended from time to time as a result of Environment Court consent decisions which do not arise from any review of the District Plan.

b. The issue of the status of the landscape category lines on the Landscape Category Maps has been a matter of some debate. The current position of the Council appears to be that the solid black lines can only be amended by the Environment Court (whether through resource consent appeal or plan change appeal is unclear) whereas the dotted lines can be amended by the Council at resource consent stage.

c. An Interim Decision issued in respect of PC19 (EnvC93 (2014)) has determined that the status of an activity must be specified in the District Plan, and cannot be determined through a resource consent process.

d. It appears to follow from the above that, as the landscape categories lines are boundaries which have or will be determined thorough a resource consent process, and as the proposed 200m3 resource consent trigger control is based upon whether or not the relevant land is within an ONL or an ONF, that proposed trigger control is *ultra vires*.

10.3 The Submitter notes that this problem does not arise under the current (pre-PC49) District Plan because the differentiation between the three landscape categories generally only arises in respect of policies and assessment matters. There are few, if any, instances where consent status depends upon an ONL/ONF determination (and it is noted that, if there are any such instances, it would appear that those are also *ultra vires* as a consequence of the PC19 Interim Decision).

*Relief Requested*

10.4 Amend or delete any rules which purport to determine consent activity status as a consequence of the relevant earthworks activity being located within an ONL or an ONF.

10.5 In the alternative, if this is legally valid, defer the operative date of any such rules until a review of the District Plan identifies the ONL/ONF boundaries as part of the District Plan.

## 11. Bulk Earthworks

11.1 Rule 22.3.2.4 introduces a new consent requirement requiring fully discretionary activity consent for earthworks with a total volume of over 50,000 cubic metres within one consecutive 12 month period. The Submitter contends that this new consent provision is unnecessary, and inappropriate, for the following reasons:

a. There is no identifiable difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same issues arise. The same kinds of conditions can be imposed. The trigger level of 50,000m3 is meaningless.

b. If a volume 'trigger' control is retained, then the difference between restricted discretionary and fully discretionary has little meaning. The same considerations apply under both consent categories. The same conditions can be imposed. Consent can be refused if considered appropriate. The addition of a trigger level of 50,000m3, and the change in status from restricted discretionary to fully discretionary, is unjustified.

c. If Submission Point 9 above is accepted and any volume control is deleted, there is still no difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same Site Standards are relevant. Breach of any Site Standard will require consent. If none of the Site Standards are breached, there is no need for resource consent control because there will be no need to impose consent conditions.

11.2 Part of the rationale for introducing a new Bulk Earthworks consent status appears to relate to the issue of bonds. However a bond can be imposed in respect of any earthworks consent. It is difficult to see why consideration of the possibility of requiring a bond should be triggered by an arbitrary volume figure rather than being considered in respect of the extent of the actual extent of earthworks being carried out and the actual environmental effects arising which might need to be remedied (as has been the practice in the past).

*Relief Requested*

11.3 Delete Rule 22.3.2.4(b) Bulk Earthworks and all other plan provisions relating to that consent category.

## 12. Notification

12.1 The Submitter contends that Rule 22.3.2.6 Non-notification of Applications is far too restrictive. A primary objective of PC49 is to reduce consent compliance costs. There is no need to notify the vast majority of earthworks applications because the issues concerned can be adequately dealt with between the consent applicant and the Council without needing to involve anybody else. Rule 22.3.2.6 should be amended to provide for a default starting position that all applications for earthworks consent under Part 22 are dealt with in a non-notified basis (noting that of course the "*special circumstances*" provisions of the RMA are always applicable).

12.2 The point made in the previous paragraph is supported by the Monitoring Report appended to the s32A Report which records only seven earthworks applications being notified within a two year period, all of which related to quarrying activities.

12.3 The primary exception to the previous point should be a breach of Rule 22.3.3.(ii) [height of cut and fill slope] where the breach relates to a distance of a cut or fill from the site boundary, in which case the starting presumption should be limited notification to the relevant adjoining landowner.

12.4 In addition to the above points, the Submitter notes that existing Rule 22.3.2.6 is badly drafted and is difficult to understand.

*Relief Requested*

12.5 Amend Rule 22.3.2.6 to address the concerns detailed above, to simplify the rule, and to provide for a default position that applications for consent for earthworks activities do not need to be notified (possibly subject to exceptions).

13. **Minor Drafting Amendments**

13.1 Submission Points 5 - 12 above set out the Submitter's primary concerns. In addition the Submitter expresses the following concerns about the drafting of PC49. The primary purpose of identifying the following Submission Points is to draw these drafting issues to the Council's attention and to establish jurisdiction for the Council to address these issues, so that PC49 ends up with improved clarity, internal coherence, drafting accuracy and legal robustness. In respect of some or all of the following submission points the Submitter, rather than requesting specific relief, requests that the issues be considered and that appropriate amendments be made to address the concerns raised.

13.2 In Section 22.2, Objective 1 Policy 1.2, there is a list of six bullet points in respect of which the following concerns are expressed:

a. Four of the six identify a technique or method without stating a desired outcome whereas two of the six identify a technique or method and state a desired outcome. The drafting is inconsistent. The desired outcomes are or should be obvious. In the second and sixth bullet points, the second part commencing "*... to avoid... etc*" should be deleted.

b. The fourth and fifth bullet points refer to "*construction*" which is unnecessary, and potentially inappropriate, when referring to earthworks activities. That word should be deleted from the fourth bullet point and should be replaced by the words "*earthworks activities*".

c. In the fifth bullet point the words "*... taking into account the receiving environment.*" should be deleted because consideration of every consent should take into account the receiving environment.

13.3 In Section 22.2, Objective 3, Policy 3.2 the reference to "*... avoid de-watering*" is inappropriate. De-watering is frequently an inevitable consequence of development. Not all de-watering has adverse effects, and some de-watering may have positive effects. In addition the reference to avoidance is inappropriate for reasons canvassed in Submission Point 7 above. That wording should be amended to read "*... avoid or mitigate any adverse effects caused by de-watering*".

13.4 In respect of Section 22.2, Objective 3, Policy 3.3, the following points are made:

a. Much of the land zoned for development in the Queenstown area is located on steeply sloping sites. It is impossible to avoid earthworks on steeply sloping sites, and many earthworks activities on steeply sloping sites will not necessary have adverse effects.

b. There is an illogicality between the first sentence which requires avoidance and the second sentence which anticipates non-avoidance.

c. The above two points could be addressed by rewording Policy 3.3 as follows:

"*3.3 To avoid the adverse effects of earthworks on steeply sloping sites, where land is prone to erosion or instability, where practicable. Where these effects cannot be avoided, to ensure techniques are adopted that minimise the potential to decrease land stability*".

13.5 In Part 22.2, Objective 4, the reference in the heading to "*Rural Areas*" is ambiguous, because the term "*Rural Areas*" includes Rural Lifestyle and Rural Residential zones. As all Policies 4.1 – 4.4 appear to be applicable only to the Rural General zone, the heading should be reworded "*Earthworks in the Rural General Zone*". The reference to Ski Area Subzones is unnecessary because those sub-zones are located within the Rural General Zone.

13.6 In Section 22.2, Objective 4, Policy 4.4, the reference to "*skifields*" is inappropriately and unnecessarily restrictive. There is existing and future potential for other recreational activities within Ski Area Sub-Zones. The reference to "*...skifields...*" should be amended to read "*...recreational activities...*".

13.7 In Section 22.2, Objective 5, Policy 5.2, the following points are noted:

a. There is no need to avoid earthworks in close proximity to water bodies if no adverse effects will arise. The second sentence is unnecessary because that sentence merely repeats Policy 5.1. If the only concern about locating earthworks within close proximity to water bodies is sediment runoff, then Policy 5.1 fully addresses the issue. Policy 5.2 should be deleted.

b. In respect of Policy 5.3, the four main aquifers have already been noted in the final paragraph of Section 22.1. There is no need to repeat them here. The reference to "*... including ... etc*" can be deleted.

13.8 In Part 22.2, Objective 6, Policies 6.4 and 6.5 (and elsewhere within PC49) references to "*NZ Historic Places Trust*" should be corrected to read "*Heritage New Zealand Pouhere Taonga*" and references to "*Historic Places Act 1993*" should be corrected to read "*Heritage New Zealand Pouhere Taonga Act 2014*".

13.9 The heading to Rule 22.3.1 reads "*General Provisions/Cross-Referencing*". This heading is confusing because the term "*General Provisions*" suggests general provisions which apply as rules. The heading would be better worded to read "*Cross-Referencing/Other Legislation*".

13.10 In respect of Rule 22.3.ii(a) the following points are noted:

a. Subclause (i) appears to be intended to apply to subdivisions going forward which are consented under proposed new Rule 15.2.20. That is considered appropriate, but the wording is awkward. The following alternative wording is suggested:

"*(i) That are approved as part of a subdivision consented under Rule 15.2.20; or*"

b. Subclause (ii) appears to be intended to apply to consents which precede PC49 and are therefore not consented under proposed new Rule 15.2.20. Assuming that is the case, the following points are noted:

i. The existing (pre-PC49) District Plan is known to be ambiguous on the issue of whether earthworks which form part of a subdivision activity are dealt with and consented under Part 15 as part of the subdivision consent or require separate land use consent under the relevant zone provisions. Because of that ambiguity, many subdivision consents (which inevitably include earthworks) have been dealt with only under Part 15, whereas other subdivision consents have been required to obtain separate land use consent under the relevant zone provisions. There are numerous subdivision consents in existence where it would be difficult to determine whether the relevant earthworks "*... have been explicitly included...*".

ii. The applicable 'changeover' date should not be the date of notification of PC49 because PC49 did not take effect upon notification. The 'changeover' date should be the date PC49 takes legal effect, being the date Council issues decisions on submissions to PC49 [regardless of any appeals].

iii. The above two points could be addressed by rewording subparagraph (ii) as follows:

"*(ii) That are approved as part of a subdivision consented prior to* ***[date of release of Council decisions on submissions to PC49]***".

13.11 Rule 22.3.1.ii(a) does not include an exemption for earthworks relating to the construction of a dwelling within an approved residential building platform. The current exemption has not been carried forward. Once a residential building platform has been approved, that must anticipate earthworks required to build a house, whether or not earthworks have been specifically consented. In many cases the extent of earthworks which will be required is unknown because the house has not been designed when the residential building platform is consented. Rule 22.3.1.ii(a) should include a specific exemption for earthworks associated with the construction of a house within an approved residential building platform.

13.12 Rule 22.3.1.(iii) Noise reads as if it is a rule, whereas in fact the relevant (restricted discretionary activity) rule is repeated later (in the correct location) as Rule 22.3.3.vii. There is no need for a cross-reference here because the later rule is located in this Part 22. This reference should be deleted.

13.13 In respect of Rule 22.3.1.iv Archaeological Sites the following points are noted:

a. Because there is no definition of "*archaeological sites*", either in the District Plan or in the RMA, the first sentence of subparagraph a is unclear and potentially inaccurate. Only pre-1900 archaeological sites are protected under the Heritage New Zealand Pouhere Taonga Act 2014. This sentence is unnecessary and should be deleted.

b. Archaeological sites are not defined within "*Historic Heritage*" in Section 2 of the RMA. They are not defined at all in the RMA. The second sentence adds nothing and should be deleted.

c. If the first two sentences are deleted from subparagraph (a), the remaining two sentences achieve the required cross-referencing (with a question mark over why the words "... *(a consent)*..." are included).

d. Subparagraph (b) appears to purport to be a definition, in which case it is in the wrong place. It is also unnecessary [refer point (e) below]. Subparagraph (b) should be deleted.

e. Subparagraph (c) is inappropriate, and should be deleted, for the following reasons:

i. The statement is incorrect. Archaeological sites are not subject to the Rules in Section 13 of the Plan.

ii. There is already a cross-reference to Part 13 in Rule 22.3.1.i.(a)(i).

iii. Point c above adequately deals with this issue.

13.14 In Rule 22.3.2.1(b)(i), in the proviso at the end, the word "*exposed*" should be replaced by the word "*the*" for the following reasons:

a. The word "*exposed*" implies the removal of vegetative cover. That is a temporary effect, which ceases when revegetation occurs. In addition there is a Site Standard requiring revegetation of exposed surfaces. Many earthworks activities will be caught by this reference which should not be caught because the "*exposure*" will be remedied.

b. This proviso is presumably aimed at incremental increases in earthworks areas, such as the width of access tracks. The proviso should target the permanent outcome, not a temporary effect.

13.15 In Rule 22.3.2.2(c) it is unclear why the words in subparagraphs (ii) and (vii) are capitalised. The same point applies to Rule 22.3.2.3(b) subparagraphs (ii) and (vii).

13.16 In Rule 22.3.3.(i), Table 22.1, Tiers 2, 3, 4, and 5, referring to the final bullet point in each Tier relating to Special Zone Activity Areas, the following points are noted (assuming that, despite Submission Point 9 above, the volume 'trigger' control rule is retained, and this complicated approach of a number of separate Tiers is retained):

a. It is necessary that a District Plan provides certainty when it comes to consent status. Any person reading the District Plan should be able to identify, without any ambiguity, the consent status of any particular activity.

b. The four bullet points refer to different specific zones which do not necessarily apply within all of the Special Zones. For example, Tier 4, bullet point 6, refers to "*Rural Residential and Rural Lifestyle Activities*" when none of the Special Zones contain Rural Residential or Rural Lifestyle zoning.

c. It is therefore left to a consent applicant to try and work out which 'equivalent' zoning would apply to the density applicable within that particular part of the relevant Special Zone.

d. That degree of ambiguity is unnecessary and inappropriate, in both a legal and a planning sense.

13.17 In Rule 22.3.3.i, Table 22.1, Tier 6, why does the first bullet point refer to Section [which should be Rule] 5.3.5.1(v) instead of referring directly to Appendix 5?

13.18 In Rule 22.4.(ii)(e) [compared to the current pre-PC49 equivalent Environmental Protection Measures], the words "*The effects on traffic generated and...*" have been added. The justification for that addition is unclear. Noise is covered by a separate Site Standard. Hours of operation are dealt with by the preceding subclause (d). Deposition of sediment, particularly in residential areas, is dealt with in the rest of this subclause and also by a separate Site Standard. The purpose of roads is to accommodate traffic. Those words should be deleted.

13.19 Rule 22.4.(ii)(f) introduces a new assessment matter based upon the track record of the applicant/operator. In respect of this new assessment matter the following points are made:

a. When most applications for resource consent involving earthworks are made, the choice of earthworks contractor has yet to be made. If this new rule intends to impose a requirement that such choice be made when the consent application is made, then the requirement is unreasonable. If that is not the intention, then the new rule is pointless.

b. Compliance with resource consent conditions is an enforcement/compliance matter. It is inappropriate to include such a consideration in a consent assessment matter of this nature.

13.20 Rule 22.4.vii(c) is an assessment matter in relation to impacts on sites of cultural heritage value which reads:

> "*Whether the subject land contains a recorded archaeological site, and if so the extent to which the proposal would affect any such site and whether any necessary archaeological authority has been obtained from the NZ Historic Places Trust*".

The following comments are made:

a. While it is accepted that archaeological sites fall within the definition of "*historic heritage*" in the RMA, that does not necessarily mean that archaeological sites have to be protected through District Plan provisions. The Council should consider whether there is any other statutory regime in place which will ensure that any required policy direction is implemented.

b. Pre-1900 archaeological sites are subject to separate procedures under the Heritage New Zealand Pouhere Taonga Act 2014, which requires an Archaeological Authority to be issued before any such archaeological site can be disturbed.

c. The common practice in the past has been to apply for the required Archaeological Authority concurrently with the processing of the relevant resource consent application, or after the consent has been obtained. The wording of this new rule implies that the Archaeological Authority should be obtained first. That will potentially add months of delay to the consenting process without any justification.

d. The rule also implies that, if an Archaeological Authority has not been obtained, the Council may impose conditions on the relevant earthworks consent in respect of any archaeological site. That raises the possibility that consent conditions imposed by the Council may be inconsistent with conditions imposed under the required Archaeological Authority. That is both inefficient and inappropriate.

e. This issue can easily be addressed by the Council including a standard condition in every earthworks consent requiring the consentholder not to carry out any earthworks which would damage a pre-1900 archaeological site without first obtaining the required Archaeological Authority from Heritage New Zealand Pouhere Taonga.

f. Accordingly Rule 22.4.vii(c) should be deleted.

13.21 PC49 adds new definitions of "*Bed*" and "*River*". The following comments are made:

a. The two definitions are copied from the RMA. As those definitions are already in the RMA, the Submitter queries why they need to be included in the District Plan. There are many other terms which are not defined in the District Plan because they are defined in the RMA.

b. Because the definitions are quoted in full, that wording becomes enshrined in the RMA. If either of those definitions is subsequently amended in the RMA, the District Plan will have to be amended to maintain consistency. That is undesirable. If it is considered necessary to insert these definitions into the District Plan, they should not be quoted in full. Instead they should be directly cross-referenced, as is the case with the definition of Building (which cross-references to the Building Act 1991) and the definition of "Road" (which cross-references to the Local Government Act 1974).

**Alternative or Consequential Relief**

14. The Submitter requests such alternative, additional or consequential amendments to the PC49 Plan Provisions as may be considered necessary or appropriate in order to address the issues raised in this submission.

**Request to be Heard**

15. The Submitter wishes to be heard in support of this submission.

Date: 30 July 2014

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49/5

**Submission on Publicly Notified Plan Change**

*Clause 6 of the First Schedule of the Resource Management Act 1991*

To: Queenstown Lakes District Council
Private Bag 50072
Queenstown 9348

1. Name of submitter: Jacks Point Residents & Owners Association Incorporated ("**Submitter**")

2. This is a submission on the following public plan change:

Plan Change 49: Earthworks – to the Queenstown Lakes District Plan ("**PC49**").

3. The Submitter could not gain an advantage in trade competition through this submission.

4.1 The Submitter is a landowner potentially affected by PC49. This submission requests amendments to the provisions proposed to be inserted into the Queenstown Lakes District Plan by PC49.

4.2 For ease of reference and consideration by the consent authority, the issues raised in this submission are set out below under separate headings. Each section of the submission contains the submission point relevant to that heading, the reasons for the submission point, and the relief requested.

5. **Positive v Negative – Change in Emphasis**

5.1 Earthworks are essential to the prosperity and wellbeing of the District. In accordance with the general approach of the RMA, the focus should be on enabling appropriate earthworks while ensuring that adverse effects are avoided, remedied or mitigated. Part 4.11 Earthworks of the District Plan (proposed to be deleted under PC49) reflects the correct approach of enabling subject to environmental protection.

5.2 The Section 22.1 introduction to new Part 22 Earthworks (proposed through PC49) reverses that focus by placing primary emphasis on adverse effects before addressing the important enabling aspect. This is then inconsistent with Section 22.2 which reverts to the original focus first on enabling and then on environmental protection. The reversal in Section 22.1 is inappropriate and creates inconsistency.

*Relief Requested*

5.3 That the first two paragraphs in Section 22.1 be reversed, in order to reinstate the original order of focus and to achieve consistency with the order of objectives and policies in Section 22.2.

6. **Major Change in Policy**

6.1 Under the (pre-PC49) District Plan, Part 4 addresses District Wide issues and contains the primary District Wide Objectives and Policies. Each separate Section in Part 4 addresses a different issue and specifies a different set of Objectives and Policies. It is necessary to read the relevant Sections as a whole in order to understand the balance between the way different issues are addressed, and to arrive at overall decisions relating to sustainable management. For example, and relevantly for the purpose of this Submission Point, Part 4.2 deals with landscape and visual amenity issues and Part 4.11 deals with earthworks. This is an appropriate approach because specific issues arise in respect of earthworks which do not arise in respect of landscape and visual amenity effects. Importantly Part 4.11 achieves consistency with Part 4.2 by only touching upon visual amenity issues in passing (because they have already been dealt with under Part 4.2) and by using general language to ensure

that Part 4.2 retains priority on the subject of landscape and visual amenity issues and is not contradicted by Part 4.11.

6.2 The PC49 s32 Report does not recognise the existing District Plan structure (this being one of the dangers of isolating a subject such as Earthworks and dealing with it separately, rather than as part of an overall District Plan Review). The PC49 s32 Report gives the impression that the Earthworks section of the District Plan must also deal with landscape and visual amenity issues relating to earthworks. The s32 Report does not recognise or assess the significance of the Part 4.2 Objectives and Policies.

6.3 As a consequence of the matters detailed in the previous two paragraphs, PC49 includes a major change in policy in respect of landscape and visual amenity values. The new policy direction contained in Objective 2 of PC49 simply requires avoidance of a range of outcomes. Not only is that obviously impossible to achieve, it is fundamentally different from the policy direction contained in Part 4.2. As a consequence PC49 creates a major inconsistency within the District Plan.

6.4 The concerns detailed above are compounded by the introductory words to Objective 4 which read "*Subject to Objective 2, to enable earthworks...*". The underlined introductory words give Objective 2 priority over Objective 4. This drafting will operate to significantly prevent the positive outcomes anticipated by Objective 4, because many of the activities detailed in Policies 4.1 – 4.4 cannot be carried out in compliance with the higher priority Policy 2.1 and/or Policy 2.2.

6.5 This problem is further compounded by the fact that there has been extensive litigation, and a number of Environment Court judgements, which provide guidance and interpretation on the implementation of Part 4.2. That includes, for example, interpretation of the "*reasonably difficult to see*" concept. PC49 effectively throws all that case law out the window. If PC49 were to be confirmed in its current form, the District Plan would contain one policy approach relating to buildings in sensitive landscapes and a different policy approach relating to earthworks in sensitive landscapes. This is obviously inappropriate, because many developments comprise both buildings and earthworks.

6.6 This problem is further compounded by the fact that PC49 largely retains the current (pre-PC49) assessment matters, and does not amend the assessment matters to be consistent with the new policy approach. By way of example, the new PC49 Objective 2 "*avoidance of adverse effects*" policy approach is inconsistent with the relevant assessment matters which adopt a "*Whether and to what extent...*" policy approach. The latter is consistent with the Part 4.2 Landscape and Visual Amenity Objectives and Policies but is inconsistent with the new PC49 Objective 2 policy approach.

6.7 This basic flaw in PC49 is further compounded by the second major change inherent in PC49 which is to remove earthworks plan provisions from each different part of the District Plan and consolidate them into a new Part 22. Under the pre-PC49 plan provisions, assessment matters relevant to consents for earthworks were considered in the context of the objectives and policies relevant to the activity being undertaken. By way of example, an application for consent for earthworks in the Rural General zone is (pre-PC49) considered against the Part 5 objectives and policies of the Rural General Zone as informed by the relevant Part 4 objectives and policies, whereas an application for consent for earthworks in relation to a residential development within a zoned residential area is considered in the context of the Part 7 Residential objectives and policies which are in turn informed by the Part 4 objectives and policies relevant to residentially zoned areas.

6.8 PC49 fundamentally changes this approach. PC49 appears to be attempting to address earthworks in a global manner with very little, if any, reference to development context in terms of the zone within which the proposed activity is taking place. As a result, for example, new Policy 2.2 which requires avoidance of adverse visual effects of earthworks on visually prominent slopes, natural landforms and ridgelines applies to all earthworks, regardless of

whether the particular '*prominent slope*" is located on a Rural General VAL hillside or within the residentially zoned area of Queenstown Hill.

6.9 One intended objective of PC49, being the removal of numerous duplicated District Plan provisions, is understood and accepted. However this still involves a major change to the structure of the District Plan. The current PC49 approach actually involves a step backwards rather than a step forwards because, although it minimises duplication of plan provisions (which merely reduces the number of 'pages' in a largely online document), it increases consent complexity (and will inevitably increase consenting costs) because it duplicates plan provisions relating to landscape and visual amenity values in a manner which creates fundamental inconsistencies.

*Relief Requested*

6.10 That the following amendments be made:

a. Delete Objective 2 and Policies 2.1 – 2.4 (and, if considered necessary for the purposes of clarity, cross-reference the Part 4.2 District Wide Objectives and Policies relevant to landscape and visual amenity values).

b. Amend Objective 4 by deleting the words "*Subject to Objective 2...*".

c. Retain Rule 22.4.iv [Landscape and Visual Amenity Assessment Matters] generally in their current form (as they are virtually the same as contained in the District Plan pre-PC49) but add a specific assessment matter which requires consideration to be given to the zone within which the earthworks are being carried out and the relevant objectives and policies of that zone.

## 7. "*Avoiding*" v "*Avoiding, remedying or mitigating*"

7.1 Objective 1 addresses the enabling aspect of earthworks, and does so by recognising that earthworks are essential to subdivision, development and access. However Objective 1 then requires those enabling earthworks to be undertaken in a manner which "*avoids adverse effects*". It is plainly impossible to carry out earthworks in a manner which avoids all adverse effects. It is inappropriate for an Objective to seek an outcome which is impossible to achieve.

7.2 That Objective 1 is implemented by Policy 1.2 and Policy 1.5 which again require avoidance. The same point applies. A policy should not seek to achieve the impossible.

7.3 The submitter acknowledges that policies should be directive to the extent reasonably possible, and that it is generally undesirable to parrot the "*avoid, remedy or mitigate*" mantra of the RMA. However that is the reality when it comes to earthworks. Some effects are avoided, many effects are mitigated, and sometimes effects are remedied. There is nothing inappropriate about using the phrase "*avoid, remedy or mitigate*" when it is directly applicable and is appropriate.

7.4 This submission point also raises, in a wider context, Submission Point 6 above. If one considers earthworks for a particular activity in the context of the objectives and policies of the relevant zone, informed by Part 4 Objectives and Policies where relevant, then the inevitable outcome is an "*avoid, remedy or mitigate*" outcome. It is inappropriate for a separate Earthworks Part 22 of the District Plan to seek more stringent outcomes than are anticipated by other relevant objectives and policies in the District Plan. That creates inconsistencies within the District Plan which will cause interpretation problems.

*Relief Requested*

7.5 In Objective 1, Policy 1.2 and Policy 1.5 amend "*... avoids adverse effects...*" to read "*... avoids, remedies or mitigates adverse effects*".

Not in Stewart

8. **Specific Provisions Carried Forward**

8.1 PC49 effectively carries forward, by retaining and reinstating, certain provisions applicable to specific zones. This is considered to be an appropriate approach because those provisions have previously been subject to specific consideration in the context of earlier plan changes, have been found to be appropriate, and no reason or concern has arisen to justify amending those provisions. However if the provisions are to be carried forward, they should be carried forward accurately, and in full, and consequential amendments should be made if appropriate in the context of PC49.

*Jacks Point Zone*

8.2 Rule 22.3.2.1(b)(iii).a carries forward an exemption in the Remarkables Park Zone relating to earthworks approved as part of any building granted resource consent. The Jacks Point Zone also contains (in current Rule 12.2.5.1.vi) an exemption from the site standards for earthworks associated with a subdivision, the construction, addition or alteration of any building, and golfcourse development. The exemption for earthworks relating to subdivision is effectively carried forward by a new PC49 Part 15 Rule. The exemption for earthworks in relation to the construction, addition or alteration of any building, and in relation to golfcourse development, should also be carried forward.

8.3 Rule 22.3.2.2(b) carries forward a specific rule relating to golfcourse development within the Jacks Point Zone. That rule includes an area limitation of 2,500m2. As PC49 does not generally carry forward controls based on area relating to earthworks, this specific area control should be deleted as a consequential amendment.

8.4 The justification for carrying forward Rule 22.3.2.4(c) is questioned. There does not seem to be any logical basis for applying fully discretionary activity status to earthworks within the Jacks Point Zone which breach the earthworks Sites Standards, rather than the restricted discretionary activity status which applies in every other zone.

8.5 In Rule 22.3.3.(i), Table 22.1, Tier 7 should include an exemption for earthworks associated with golfcourse development exceeding 1,000m3 in volume.

*Relief Requested.*

8.6 a. Amend Rule 22.3.2.1(b) by adding a new subclause (iv) as follows:

"*(iv) In the **Jacks Point Zone**, earthworks in relation to the construction, addition or alteration of any building and earthworks in relation to golfcourse development.*"

b. Amend Rule 22.3.2.2(b) by deleting the words "*...and/or 2,500m2 of exposed topsoil...*".

c. Delete Rule 22.3.2.4(c).

d. In Rule 22.3.3.(i), Table 22.1, amend Tier 7 (middle column) to read as follows:

"• *Any zone or Special Zone Activity Area not listed above in Tier 1 to 6 provided that this does not apply to Ski Area Sub-Zones or to earthworks within the Jacks Point Zone associated with golfcourse development exceeding 1,000m3 in volume.*"

9. **Volume Control**

9.1 The Submitter questions the justification for any form of volume control relating to earthworks. In making this Submission Point the Submitter acknowledges, and emphasises, the importance of the height and slope trigger control. In sensitive landscapes it is the height of a

cut above the level of earthworks activities and/or the height and extent of the fill batter below the level of earthworks activities which primarily gives rise to adverse effects. Within areas zoned for development it is the height of a cut and/or fill which potentially creates stability issues and/or creates other residential adverse effects in respect of neighbouring properties. The Submitter questions what the volume trigger control achieves which is not achieved by the height and slope trigger control.

9.2 In making this Submission Point, and in putting the questions detailed in the following paragraph, the Submitter notes that the following potential effects are addressed separately by Site Standards which trigger restricted discretionary activity consent control if breached:

a. Height of cut and fill and slope.

b. Engineering requirements for residential building platforms and retaining walls.

c. Environmental protection measures, including sediment and erosion control, dust control and revegetation.

d. Potential adverse effects of activities close to water bodies or which will affect aquifers.

e. Potential effects on cultural heritage and archaeological sites.

f. Construction noise.

g. Potential effects on transmission lines.

9.3 Taking into account all of the above the Submitter asks:

a. What does the volume control achieve, in terms of a consent trigger, that is not already achieved by the Site Standards summarised above?

b. If all of the potential effects which arise under the Site Standards detailed above are addressed, what difference does it make (in respect of any particular site) whether the volume of earthworks excavated or deposited is 100m3, 200m3, 300m3, 400m3, 500m3, 1,000m3, 2,000m3 or 50,000m3?

c. What assessment matters come into play upon breach of the volume control which do not come into play upon breach of any of the other Site Standards summarised above?

d. What condition can be imposed as a consequence of the volume trigger control that cannot be imposed as a consequence of breach of the Site Standards summarised above?

e. What condition can be imposed as a consequence of the volume trigger control that is necessary to address any concern if there is no breach of the Site Standards summarised above?

f. How many resource consents potentially will have to be applied for, processed, and paid for, in respect of earthworks activities which breach the volume control but which do not breach any of the other Site Standards [particularly given that a purported objective of PC49 to reduce consenting costs]?

9.4 One issue which may need to be addressed if the volume trigger control were to be deleted may be the issue of hours of operation within residential areas. If that is the case however, requiring a large number of resource consents to be applied for in order to be able to impose a control on hours of operation is an inefficient method of addressing this concern. A more efficient method would be to insert a Site Standard imposing limits on hours of operation (in

relation to earthworks activities) within specified zones (or possibly all zones other than Rural General zone). Appropriate hours of operation could be 8am to 6pm on Monday to Saturday of each week, or something similar. If that method were adopted, consent would only be required if someone wanted to carry out earthworks activities outside those hours.

*Relief Requested*

9.5 That all PC49 provisions which impose a earthworks volume trigger level for consent purposes, or which relate to an earthworks volume trigger control rule or requirement, be deleted.

9.6 Possibly insert a new Site Standard specifying permissible hours of operation for earthworks activities in specified zones, or within all zones other than the Rural General Zone.

10. **Legal issue – ONL/ONF Consent Status Trigger**

10.1 Rule 22.3.3.i is a site standard which imposes resource consent 'trigger' controls relating to maximum total volumes of earthworks as detailed in Table 22.1 referenced in that Rule. Table 22.1 contains a 200m3 Tier 2 consent trigger in relation to ONL's and ONF's which is different from a 1,000m3 Tier 6 trigger rule applicable to the Rural General zone excluding ONL's and ONF's. The Submitter contends that this provision is *ultra vires.*

10.2 This issue arises from the combination of the following factors:

a. The District Plan does not formally determine the extent and boundaries of ONL's and ONF's. ONL's and ONF's are identified on the Landscape Category Maps which, effectively, record ONL's and ONF's as determined through a sequence of Environment Court decisions, many of which are resource consent decisions and are not District Plan plan change decisions. The Landscape Category Maps can be, and are, amended from time to time as a result of Environment Court consent decisions which do not arise from any review of the District Plan.

b. The issue of the status of the landscape category lines on the Landscape Category Maps has been a matter of some debate. The current position of the Council appears to be that the solid black lines can only be amended by the Environment Court (whether through resource consent appeal or plan change appeal is unclear) whereas the dotted lines can be amended by the Council at resource consent stage.

c. An Interim Decision issued in respect of PC19 (EnvC93 (2014)) has determined that the status of an activity must be specified in the District Plan, and cannot be determined through a resource consent process.

d. It appears to follow from the above that, as the landscape categories lines are boundaries which have or will be determined thorough a resource consent process, and as the proposed 200m3 resource consent trigger control is based upon whether or not the relevant land is within an ONL or an ONF, that proposed trigger control is *ultra vires.*

10.3 The Submitter notes that this problem does not arise under the current (pre-PC49) District Plan because the differentiation between the three landscape categories generally only arises in respect of policies and assessment matters. There are few, if any, instances where consent status depends upon an ONL/ONF determination (and it is noted that, if there are any such instances, it would appear that those are also *ultra vires* as a consequence of the PC19 Interim Decision).

*Relief Requested*

10.4 Amend or delete any rules which purport to determine consent activity status as a consequence of the relevant earthworks activity being located within an ONL or an ONF.

10.5 In the alternative, if this is legally valid, defer the operative date of any such rules until a review of the District Plan identifies the ONL/ONF boundaries as part of the District Plan.

## 11. Bulk Earthworks

11.1 Rule 22.3.2.4 introduces a new consent requirement requiring fully discretionary activity consent for earthworks with a total volume of over 50,000 cubic metres within one consecutive 12 month period. The Submitter contends that this new consent provision is unnecessary, and inappropriate, for the following reasons:

a. There is no identifiable difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same issues arise. The same kinds of conditions can be imposed. The trigger level of 50,000m3 is meaningless.

b. If a volume 'trigger' control is retained, then the difference between restricted discretionary and fully discretionary has little meaning. The same considerations apply under both consent categories. The same conditions can be imposed. Consent can be refused if considered appropriate. The addition of a trigger level of 50,000m3, and the change in status from restricted discretionary to fully discretionary, is unjustified.

c. If Submission Point 9 above is accepted and any volume control is deleted, there is still no difference between an earthworks activity involving 40,000m3 and an earthworks activity involving 60,000m3. The same Site Standards are relevant. Breach of any Site Standard will require consent. If none of the Site Standards are breached, there is no need for resource consent control because there will be no need to impose consent conditions.

11.2 Part of the rationale for introducing a new Bulk Earthworks consent status appears to relate to the issue of bonds. However a bond can be imposed in respect of any earthworks consent. It is difficult to see why consideration of the possibility of requiring a bond should be triggered by an arbitrary volume figure rather than being considered in respect of the extent of the actual extent of earthworks being carried out and the actual environmental effects arising which might need to be remedied (as has been the practice in the past).

*Relief Requested*

11.3 Delete Rule 22.3.2.4(b) Bulk Earthworks and all other plan provisions relating to that consent category.

## 12. Notification

12.1 The Submitter contends that Rule 22.3.2.6 Non-notification of Applications is far too restrictive. A primary objective of PC49 is to reduce consent compliance costs. There is no need to notify the vast majority of earthworks applications because the issues concerned can be adequately dealt with between the consent applicant and the Council without needing to involve anybody else. Rule 22.3.2.6 should be amended to provide for a default starting position that all applications for earthworks consent under Part 22 are dealt with in a non-notified basis (noting that of course the "*special circumstances*" provisions of the RMA are always applicable).

12.2 The point made in the previous paragraph is supported by the Monitoring Report appended to the s32A Report which records only seven earthworks applications being notified within a two year period, all of which related to quarrying activities.

12.3 The primary exception to the previous point should be a breach of Rule 22.3.3.(ii) [height of cut and fill slope] where the breach relates to a distance of a cut or fill from the site boundary, in which case the starting presumption should be limited notification to the relevant adjoining landowner.

12.4 In addition to the above points, the Submitter notes that existing Rule 22.3.2.6 is badly drafted and is difficult to understand.

*Relief Requested*

12.5 Amend Rule 22.3.2.6 to address the concerns detailed above, to simplify the rule, and to provide for a default position that applications for consent for earthworks activities do not need to be notified (possibly subject to exceptions).

13. **Minor Drafting Amendments**

13.1 Submission Points 5 - 12 above set out the Submitter's primary concerns. In addition the Submitter expresses the following concerns about the drafting of PC49. The primary purpose of identifying the following Submission Points is to draw these drafting issues to the Council's attention and to establish jurisdiction for the Council to address these issues, so that PC49 ends up with improved clarity, internal coherence, drafting accuracy and legal robustness. In respect of some or all of the following submission points the Submitter, rather than requesting specific relief, requests that the issues be considered and that appropriate amendments be made to address the concerns raised.

13.2 In Section 22.2, Objective 1 Policy 1.2, there is a list of six bullet points in respect of which the following concerns are expressed:

a. Four of the six identify a technique or method without stating a desired outcome whereas two of the six identify a technique or method and state a desired outcome. The drafting is inconsistent. The desired outcomes are or should be obvious. In the second and sixth bullet points, the second part commencing "*... to avoid... etc*" should be deleted.

b. The fourth and fifth bullet points refer to "*construction*" which is unnecessary, and potentially inappropriate, when referring to earthworks activities. That word should be deleted from the fourth bullet point and should be replaced by the words "*earthworks activities*".

c. In the fifth bullet point the words "*... taking into account the receiving environment.*" should be deleted because consideration of every consent should take into account the receiving environment.

13.3 In Section 22.2, Objective 3, Policy 3.2 the reference to "*... avoid de-watering*" is inappropriate. De-watering is frequently an inevitable consequence of development. Not all de-watering has adverse effects, and some de-watering may have positive effects. In addition the reference to avoidance is inappropriate for reasons canvassed in Submission Point 7 above. That wording should be amended to read "*... avoid or mitigate any adverse effects caused by de-watering*".

13.4 In respect of Section 22.2, Objective 3, Policy 3.3, the following points are made:

a. Much of the land zoned for development in the Queenstown area is located on steeply sloping sites. It is impossible to avoid earthworks on steeply sloping sites, and many earthworks activities on steeply sloping sites will not necessary have adverse effects.

b. There is an illogicality between the first sentence which requires avoidance and the second sentence which anticipates non-avoidance.

c. The above two points could be addressed by rewording Policy 3.3 as follows:

"*3.3 To avoid the adverse effects of earthworks on steeply sloping sites, where land is prone to erosion or instability, where practicable. Where these effects*

*cannot be avoided, to ensure techniques are adopted that minimise the potential to decrease land stability*".

13.5 In Part 22.2, Objective 4, the reference in the heading to "*Rural Areas*" is ambiguous, because the term "*Rural Areas*" includes Rural Lifestyle and Rural Residential zones. As all Policies 4.1 – 4.4 appear to be applicable only to the Rural General zone, the heading should be reworded "*Earthworks in the Rural General Zone*". The reference to Ski Area Subzones is unnecessary because those sub-zones are located within the Rural General Zone.

13.6 In Section 22.2, Objective 4, Policy 4.4, the reference to "*skifields*" is inappropriately and unnecessarily restrictive. There is existing and future potential for other recreational activities within Ski Area Sub-Zones. The reference to "*...skifields...*" should be amended to read "*...recreational activities...*".

13.7 In Section 22.2, Objective 5, Policy 5.2, the following points are noted:

a. There is no need to avoid earthworks in close proximity to water bodies if no adverse effects will arise. The second sentence is unnecessary because that sentence merely repeats Policy 5.1. If the only concern about locating earthworks within close proximity to water bodies is sediment runoff, then Policy 5.1 fully addresses the issue. Policy 5.2 should be deleted.

b. In respect of Policy 5.3, the four main aquifers have already been noted in the final paragraph of Section 22.1. There is no need to repeat them here. The reference to "*... including ... etc*" can be deleted.

13.8 In Part 22.2, Objective 6, Policies 6.4 and 6.5 (and elsewhere within PC49) references to "*NZ Historic Places Trust*" should be corrected to read "*Heritage New Zealand Pouhere Taonga*" and references to "*Historic Places Act 1993*" should be corrected to read "*Heritage New Zealand Pouhere Taonga Act 2014*".

13.9 The heading to Rule 22.3.1 reads "*General Provisions/Cross-Referencing*". This heading is confusing because the term "*General Provisions*" suggests general provisions which apply as rules. The heading would be better worded to read "*Cross-Referencing/Other Legislation*".

13.10 In respect of Rule 22.3.ii(a) the following points are noted:

a. Subclause (i) appears to be intended to apply to subdivisions going forward which are consented under proposed new Rule 15.2.20. That is considered appropriate, but the wording is awkward. The following alternative wording is suggested:

"*(i) That are approved as part of a subdivision consented under Rule 15.2.20; or*"

b. Subclause (ii) appears to be intended to apply to consents which precede PC49 and are therefore not consented under proposed new Rule 15.2.20. Assuming that is the case, the following points are noted:

i. The existing (pre-PC49) District Plan is known to be ambiguous on the issue of whether earthworks which form part of a subdivision activity are dealt with and consented under Part 15 as part of the subdivision consent or require separate land use consent under the relevant zone provisions. Because of that ambiguity, many subdivision consents (which inevitably include earthworks) have been dealt with only under Part 15, whereas other subdivision consents have been required to obtain separate land use consent under the relevant zone provisions. There are numerous subdivision consents in existence where it would be difficult to determine whether the relevant earthworks "*... have been explicitly included...*".

ii. The applicable 'changeover' date should not be the date of notification of PC49 because PC49 did not take effect upon notification. The 'changeover' date should be the date PC49 takes legal effect, being the date Council issues decisions on submissions to PC49 [regardless of any appeals].

iii. The above two points could be addressed by rewording subparagraph (ii) as follows:

"*(ii) That are approved as part of a subdivision consented prior to* ***[date of release of Council decisions on submissions to PC49]***".

13.11 Rule 22.3.1.ii(a) does not include an exemption for earthworks relating to the construction of a dwelling within an approved residential building platform. The current exemption has not been carried forward. Once a residential building platform has been approved, that must anticipate earthworks required to build a house, whether or not earthworks have been specifically consented. In many cases the extent of earthworks which will be required is unknown because the house has not been designed when the residential building platform is consented. Rule 22.3.1.ii(a) should include a specific exemption for earthworks associated with the construction of a house within an approved residential building platform.

13.12 Rule 22.3.1.(iii) Noise reads as if it is a rule, whereas in fact the relevant (restricted discretionary activity) rule is repeated later (in the correct location) as Rule 22.3.3.vii. There is no need for a cross-reference here because the later rule is located in this Part 22. This reference should be deleted.

13.13 In respect of Rule 22.3.1.iv Archaeological Sites the following points are noted:

a. Because there is no definition of "*archaeological sites*", either in the District Plan or in the RMA, the first sentence of subparagraph a is unclear and potentially inaccurate. Only pre-1900 archaeological sites are protected under the Heritage New Zealand Pouhere Taonga Act 2014. This sentence is unnecessary and should be deleted.

b. Archaeological sites are not defined within "*Historic Heritage*" in Section 2 of the RMA. They are not defined at all in the RMA. The second sentence adds nothing and should be deleted.

c. If the first two sentences are deleted from subparagraph (a), the remaining two sentences achieve the required cross-referencing (with a question mark over why the words "*... (a consent)...*" are included).

d. Subparagraph (b) appears to purport to be a definition, in which case it is in the wrong place. It is also unnecessary [refer point (e) below]. Subparagraph (b) should be deleted.

e. Subparagraph (c) is inappropriate, and should be deleted, for the following reasons:

i. The statement is incorrect. Archaeological sites are not subject to the Rules in Section 13 of the Plan.

ii. There is already a cross-reference to Part 13 in Rule 22.3.1.i.(a)(i).

iii. Point c above adequately deals with this issue.

13.14 In Rule 22.3.2.1(b)(i), in the proviso at the end, the word "*exposed*" should be replaced by the word "*the*" for the following reasons:

a. The word "*exposed*" implies the removal of vegetative cover. That is a temporary effect, which ceases when revegetation occurs. In addition there is a Site Standard requiring revegetation of exposed surfaces. Many earthworks activities will be caught

by this reference which should not be caught because the "*exposure*" will be remedied.

b. This proviso is presumably aimed at incremental increases in earthworks areas, such as the width of access tracks. The proviso should target the permanent outcome, not a temporary effect.

13.15 In Rule 22.3.2.2(c) it is unclear why the words in subparagraphs (ii) and (vii) are capitalised. The same point applies to Rule 22.3.2.3(b) subparagraphs (ii) and (vii).

13.16 In Rule 22.3.3.(i), Table 22.1, Tiers 2, 3, 4, and 5, referring to the final bullet point in each Tier relating to Special Zone Activity Areas, the following points are noted (assuming that, despite Submission Point 9 above, the volume 'trigger' control rule is retained, and this complicated approach of a number of separate Tiers is retained):

a. It is necessary that a District Plan provides certainty when it comes to consent status. Any person reading the District Plan should be able to identify, without any ambiguity, the consent status of any particular activity.

b. The four bullet points refer to different specific zones which do not necessarily apply within all of the Special Zones. For example, Tier 4, bullet point 6, refers to "*Rural Residential and Rural Lifestyle Activities*" when none of the Special Zones contain Rural Residential or Rural Lifestyle zoning.

c. It is therefore left to a consent applicant to try and work out which 'equivalent' zoning would apply to the density applicable within that particular part of the relevant Special Zone.

d. That degree of ambiguity is unnecessary and inappropriate, in both a legal and a planning sense.

13.17 In Rule 22.3.3.i, Table 22.1, Tier 6, why does the first bullet point refer to Section [which should be Rule] 5.3.5.1(v) instead of referring directly to Appendix 5?

13.18 In Rule 22.4.(ii)(e) [compared to the current pre-PC49 equivalent Environmental Protection Measures], the words "*The effects on traffic generated and...*" have been added. The justification for that addition is unclear. Noise is covered by a separate Site Standard. Hours of operation are dealt with by the preceding subclause (d). Deposition of sediment, particularly in residential areas, is dealt with in the rest of this subclause and also by a separate Site Standard. The purpose of roads is to accommodate traffic. Those words should be deleted.

13.19 Rule 22.4.(ii)(f) introduces a new assessment matter based upon the track record of the applicant/operator. In respect of this new assessment matter the following points are made:

a. When most applications for resource consent involving earthworks are made, the choice of earthworks contractor has yet to be made. If this new rule intends to impose a requirement that such choice be made when the consent application is made, then the requirement is unreasonable. If that is not the intention, then the new rule is pointless.

b. Compliance with resource consent conditions is an enforcement/compliance matter. It is inappropriate to include such a consideration in a consent assessment matter of this nature.

13.20 Rule 22.4.vii(c) is an assessment matter in relation to impacts on sites of cultural heritage value which reads:

"*Whether the subject land contains a recorded archaeological site, and if so the extent to which the proposal would affect any such site and whether any necessary archaeological authority has been obtained from the NZ Historic Places Trust*".

The following comments are made:

a. While it is accepted that archaeological sites fall within the definition of "*historic heritage*" in the RMA, that does not necessarily mean that archaeological sites have to be protected through District Plan provisions. The Council should consider whether there is any other statutory regime in place which will ensure that any required policy direction is implemented.

b. Pre-1900 archaeological sites are subject to separate procedures under the Heritage New Zealand Pouhere Taonga Act 2014, which requires an Archaeological Authority to be issued before any such archaeological site can be disturbed.

c. The common practice in the past has been to apply for the required Archaeological Authority concurrently with the processing of the relevant resource consent application, or after the consent has been obtained. The wording of this new rule implies that the Archaeological Authority should be obtained first. That will potentially add months of delay to the consenting process without any justification.

d. The rule also implies that, if an Archaeological Authority has not been obtained, the Council may impose conditions on the relevant earthworks consent in respect of any archaeological site. That raises the possibility that consent conditions imposed by the Council may be inconsistent with conditions imposed under the required Archaeological Authority. That is both inefficient and inappropriate.

e. This issue can easily be addressed by the Council including a standard condition in every earthworks consent requiring the consentholder not to carry out any earthworks which would damage a pre-1900 archaeological site without first obtaining the required Archaeological Authority from Heritage New Zealand Pouhere Taonga.

f. Accordingly Rule 22.4.vii(c) should be deleted.

13.21 PC49 adds new definitions of "*Bed*" and "*River*". The following comments are made:

a. The two definitions are copied from the RMA. As those definitions are already in the RMA, the Submitter queries why they need to be included in the District Plan. There are many other terms which are not defined in the District Plan because they are defined in the RMA.

b. Because the definitions are quoted in full, that wording becomes enshrined in the RMA. If either of those definitions is subsequently amended in the RMA, the District Plan will have to be amended to maintain consistency. That is undesirable. If it is considered necessary to insert these definitions into the District Plan, they should not be quoted in full. Instead they should be directly cross-referenced, as is the case with the definition of Building (which cross-references to the Building Act 1991) and the definition of "Road" (which cross-references to the Local Government Act 1974).

**Alternative or Consequential Relief**

14. The Submitter requests such alternative, additional or consequential amendments to the PC49 Plan Provisions as may be considered necessary or appropriate in order to address the issues raised in this submission.

**Request to be Heard**

15. The Submitter wishes to be heard in support of this submission.

Date: 30 July 2014

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