BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL HEARINGS PANEL

UNDER	the Resource Management Act 1991
IN THE MATTER	of the review of parts of the Queenstown Lakes District Council's District Plan under the First Schedule of the Act
AND	
IN THE MATTER	of submissions and further submissions by **REMARKABLES PARK LIMITED** and **QUEENSTOWN PARK LIMITED**

SUMMARY OF SUBMISSIONS OF COUNSEL FOR REMARKABLES PARK LIMITED AND QUEENSTOWN PARK LIMITED

HEARING STREAM 13 – QUEENSTOWN MAPPING

9 June 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 Remarkables Park Limited (**RPL**) and Queenstown Park Limited (**QPL**) have made submissions and further submissions on the Queenstown Lakes Proposed District Plan (**PDP**).

1.2 The focus of the evidence and submissions for the Stream 13 Hearings is the proposed Queenstown Park Special Zone (**QPSZ**). The QPSZ is proposed for land located on the true right bank of the Kawarau River. The location and physical attributes of the land make it a prime site for tourism, recreation and rural-residential development.[1]

1.3 The landscape values of the locality have been carefully considered by highly experienced experts. Avoiding inappropriate development and impacts on landscape values was a key driver in the general development of the QPSZ and the identification of specific development "pods".

1.4 The QPSZ seeks to enable a tourism and recreation hub, and carefully located residential development. The range of activities proposed benefit from the rural character of the site and its location near urban areas.

1.5 A catalyst for the development of the QPSZ was providing a gondola link from the urban area at Frankton[2] to the Remarkables Ski Area. The myriad benefits of the gondola are significant from both an environmental and economic perspective. The gondola is a potential game changer from a tourism perspective.

1.6 Putting the gondola to one side, the other recreation and tourism activities also deliver stand alone benefits in terms of economic growth and opening up private land for public recreation. The QPSZ will considerably enhance the existing trail network and provide access to a high country experience in close proximity to the urban area of Queenstown. Opportunities for eco-tourism arise in relation to identified SNAs which could be accessed by foot (or viewed from the gondola).

1.7 Farming will continue on the land, but will be managed in a manner that delivers environmental benefits in relation to, for example, SNAs and water quality. The continuation of farming activity provides further tourism opportunities.

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[1] Noting the proposed objective and policy recommended by Mr Paetz for the Strategic Direction chapter, as follows:

> 3.2.1.4 Objective – Recognise and provide for the significant socioeconomic benefits of tourism activities across the District.
>
> 3.2.1.4.1 Enable the use and development of natural and physical resources for tourism activity where adverse effects are avoided, remedied or mitigated.

[2] The gondola will have a terminal at Remarkables Park.

1.8 The scale and location of built development is an important consideration. Development is confined to specific areas; building coverage is limited.[3] Buildings are proposed to be of a size that is appropriate for a rural setting. It is acknowledged, however, that the QPSZ contains urban elements (such as the village area). In the wider context of the zone, these elements are considered to be appropriate.

1.9 In the context of a District with an economy built on tourism, the QPSZ provides a sustainable and exceptional opportunity to expand and refine Queenstown's tourism offering. Given the land is currently held by one owner, it can be developed in an integrated and comprehensive manner (an opportunity that could be lost if the landholding is fragmented under the Rural Zone subdivision provisions).

1.10 It is noted that these submissions briefly touch on some of the evidence to be adduced for QPL and RPL. However, a more detailed review of the evidence will be provided at the hearing scheduled for 4 September 2017 once all the evidence has been exchanged and filed.

1.11 The following high level refinements to the QPSZ are noted at the outset:

(a) The QPSZ is no longer sought for Lots 1 and 2 DP 349682. These parcels of land wrap around the base of the northern face of The Remarkables and previously included two development pods (RV1 and RR1). They were considered to be part of the more iconic western face of The Remarkables were more visible than the other development pods. While the landscape was modified in this location and there were many factors that supported development of these lots, QPL has elected to focus on the land beneath of the northern face of The Remarkables. QPL still controls Lots 1 and 2 DP 349682;

(b) RV2 and RR7 are no longer pursued. While both development pods were supportable, they presented challenges from a landscape and access perspective;

(c) The development of RV3 is expressly linked to the establishment of the gondola. If the gondola is not established, RV3 can be developed as an "RR" pod provided the overall 90 rural–residential lot cap across the site is observed; and

[3] 30% and 20% in RV3 and RV4, and 15% elsewhere (RRs).

(d) The QPSZ provisions have been further refined through ongoing input from QPL's team of experts (and to reflect the above). The revised provisions are attached to the evidence of David Serjeant.

2. BACKGROUND AND PREVIOUS SUBMISSIONS

2.1 The submission points to be addressed in the Stream 13 Hearings are:

(a) QPL – Submission No's 806.1, 2, 5, 7, 95, 147, 150[4] and 206; and

(b) RPL – Further Submission No 1371.

2.2 It is useful to briefly record the evidence and legal submissions already presented by QPL and RPL because there are consistent themes that are relevant to the Panel's evaluation of the QPSZ. QPL and RPL have previously presented evidence and legal submissions in the following hearing streams that are relevant to the Hearing Stream 13 submissions seeking the inclusion of the QPSZ:

(a) Hearing Stream 01B - Strategic Direction, Urban Development and Landscape - Chapters 3, 4 and 6. Of potential relevance to the QPSZ, RPL and QPL sought that there be limited exceptions to the proposed urban growth boundary and considered the defintion of urban development was problematic. The Council responded to the concerns regarding the definition of urban development by expressly excluding Millbrook and Waterfall Park;

(b) Hearing Stream 02 - Rural, Rural Residential and Rural Lifestyle, and Indigenous Vegetation and Biodiversity - Chapters 21, 22, and 33. A key theme pursued in relation to those chapters included the view that a pre-occupation with farming is not sustainable and did not provide for ecological enhancement, and that tourism activities were essential to Queenstown's economy;

(c) Hearing Stream 04 – Subdivision. The only matter relevant to the QPSZ was the deferrement of consideration of the appropriate subdivsion regime for the QPSZ land to the mapping hearings; and

(d) Hearing Stream 05 – District – Chapters 30, 35 and 36. QPL's principal interest was in provision for public transport as a means of reducing energy use.

[4] This submission point relates to the Building Restriction that captures part of the QPL land.

3. LEGAL FRAMEWORK

General

3.1 Counsel for the Council summarised the broad legal framework against which the Panel must evaluate the district plan review and submissions on it.[5] Those general submissions are accepted, in particular the reference to the **Colonial Vineyard Ltd v Marlborough District Council**[6] decision and the summary of the legal requirements set out at paragraph [17] therein.

3.2 In **A & A King Family Trust v Hamilton City Council**[7] a pithy summary of those requirements was set out as follows:

> [9] The legal framework for plan reviews is set out in sections 31, 32 and 72-76 of the RMA. The matters that need to be addressed were comprehensively set out by the Court in ***Colonial Vineyard Ltd v Marlborough DC*** and ***Reiher v Tauranga City Council*** as follows:
>
> > [10] In examining a provision under the Act, including Section 32, we must consider:
> >
> > (a) Whether it assists the territorial authority to carry out its functions in order to achieve the purpose of the Act;
> >
> > (b) Whether it is in accordance with Part 2 of the Act;
> >
> > (c) If a rule, whether it achieves the objectives and implements the policies of the plan; and
> >
> > (d) Whether having regard to efficiency and effectiveness, the provisions are the most appropriate way to achieve the objectives of the proposed plan, having regard to the benefits, the costs and the risks of not acting.
> >
> > [11] In doing so the Court must take into account the actual and potential effects that are being addressed to consider the most appropriate provisions, if any, to respond to this.
>
> [10] As well, s 74 of the RMA requires a territorial authority to prepare and change its district plan in accordance with its functions under s 31 (among other things). These functions include the establishment, implementation, and review of objectives, policies and methods to achieve integrated management of the effects of the use, development.

3.3 The Court in **A & A King Family Trust** also commented in relation to section 32 of the Act:

> [12] The test under s 32 has been considered in many decisions of the Environment Court, including *Gisborne District Council v Eldamos Investments Limited, Long Bay-Okura Great Park Society Incorporated v North Shore City Council, Colonial Vineyard Limited v Reiher* referred to above to name a few. As well, the High Court considered it in *Shotover Park Limited and Remarkables Park Limited v Queenstown Lakes District Council.* In *Shotover Park Limited,* the term *most appropriate* was applied as follows:
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> > [57] The RMA objective is "the most appropriate way" to achieve the purposes of this Act. See above, ss 32(2)(a) and (b). The phrase "the most appropriate"

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5 Dated 4 March 2016 in relation to Hearing Streams 1A and 1B.
6 [2014] NZEnvC 55.
7 [2016] NZEnvC 229.

> acknowledges that there can be more than one appropriate way to achieve the purpose of the Act. The task of the territorial authority is to select the most appropriate way, the one it considers to be the best.

The test under section 32 has also been described as determining which zone is "better".

Section 5

3.4 Section 5 of the Act sets out its sustainable management purpose. In my submission, it is not helpful to seek to isolate particular aspects of the definition of sustainable management. Rather, the definition should be read as a whole. Having said that, counsel takes no particular issue with the focus on the "management" function by counsel for the Council.[8] Land management is a feature of the QPSZ, particularly in relation to the management of stock.[9]

3.5 It is submitted that an "overall broad judgement" approach remains valid unless there is a higher order document that is determinative of a particular environmental matter. That is not the case here. All Part 2 matters need to considered, weighed and evaluated.

Section 6

3.6 In my submission, the salient section 6 matters are 6(a), 6(b), 6(c), and 6(d).

3.7 Sections 6(a) and (b) require the river margins and ONLs be protected from inappropriate subdivision, use and development.

3.8 The word "margin" for the purposes of section 6(a) has been held to be the "upper most limit of wave action".[10] On that definition, no development is proposed within the river margins.

3.9 What is "inappropriate" should be assessed by what is sought to be protected and will be heavily influenced by context.[11] In terms of context, the Kawarau River is used for numerous recreational activities and has trails along its banks. Urban development (established and zoned) adjoins parts of its true left bank.

3.10 Section 6(b) is relevant to the ONL classification of the land. Stephen Brown has undertaken a detailed assessment of the QPSZ and concludes that any impact on the ONL is minor. He notes that the ONL has both cultural and natural elements,

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8 See submissions dated 4 March 2016 in relation to Hearing Streams 1A and 1B, at paragraph 4.4.

9 In particular, see the evidence of Simon Beale and Alison Dewes.

10 **Upper Clutha Environmental Society Inc v Queenstown Lakes DC** EnvC C012/98. It is noted that obiter comments in **High Country Rosehip Orchards Limited v MacKenzie DC** [2011] NZEnvC 387 question aspects of this approach but no conclusive guidance is given.

11 **Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd** [2014] NZSC 38.

and that the gondola has a surprisingly light footprint. In the spectrum of naturalness, the landscape is far from pristine and the existence of cultured elements is relevant to the potential effects of the QPSZ.

3.11 Furthermore, Mr Brown concludes that the proposed development pods have low visibility. He describes them as "extremely contained" and "introverted".

3.12 Section 6(c) is relevant to the identified SNAs. On the evidence, it is considered that the QPSZ better protects the SNAs because it relieves the pressure to develop a viable farming operation which would necessitate more intensive high country grazing. Stock management and light grazing of SNAs for weed management purposes are "better" than the Rural Zone regime. Intensive farming will have potentially significant adverse effects on water quality.

3.13 In terms of section 6(d), the QPSZ will enable public access to the Kawarau River. It will also enable access to the Rastus Burn and Owens Creek.

Section 7

3.14 It is submitted that sections (7)(b), 7(c), 7(f), 7(h), and 7(i) are relevant to varying degrees.

3.15 Section 7(b) concerns efficiency. While the term is broader than simply economic efficiency (and can embrace, for example, whether a proposal is efficient in implementing relevant objectives and policies)[12], it is submitted that in this case economic considerations are important because the District Plan review is not limited to or solely focused on "protection". Use and development of natural and physical resources is also very important. The gondola will provide all season access to The Remarkables and, in particular, improve access to the existing ski area (an existing natural and physical resource). It will improve the efficiency of the existing use of the resource. John Ballingall's (Economist) economic assessment and evaluation of costs and benefits is also relevant to section 7(b) (and section 32 which is addressed below). His modelling indicates significant benefits, particularly to an industry associated with tourism.

3.16 Evidence will also be adduced regarding the potential inefficiency of traditional farming uses and potential adverse effects.

3.17 Section 7(c) is, in my submission, of limited relevance given the ONL status of the land. However, given the existing land uses on the site and the nearby urban land, the broader visual amenity of the locality is still a relevant consideration.

12 **RJ Davidson Family Trust v Marlborough DC** [2016] NZEnvC 81.

3.18 Like section 7(c), section 7(f) considerations are largely subsumed into the section 6(b) aspect of the Panel's Part 2 evaluation. Having said that, the "qualities" of the environment are, in my submission, relevant to the overall evaluation of sustainable management. In that regard, Mr Brown's evaluation of the wider landscape context is again relevant.

3.19 The Kawarau River is a trout habitat (section 7(h)).[13] The evidence for QPL will disclose that the QPSZ will deliver water quality benefits that, in turn, must be positive in respect of protecting trout habitat.

3.20 Section 7(i) concerns climate change. This is relevant because the QPSZ enables a transport system (the gondola) that is not powered by petroleum. It will reduce reliance on cars and buses for those wishing to access The Remarkables for skiing or mountain biking (among other things), or the QPSZ generally. Furthermore, the gondola provides an alternative form of transport between the RPZ and nearby urban areas such as Lake Hayes.

Section 32

3.21 The opening submissions of counsel for the Council succinctly capture the substance and pith of section 32:[14]

> 4.7 Under section 32, an evaluation report on a proposed plan must examine whether proposed objectives are the most appropriate way to achieve the purpose of the RMA, and whether the provisions are the most appropriate way of achieving the objectives. To do that, the Council is to identify reasonably practicable options and is to assess the efficiency and effectiveness of the provisions through identifying the benefits and costs of the environmental, economic, social and cultural effects, including opportunities for economic growth and employment.

Section 32 is also addressed at paragraph 3.3 above.

3.22 It is submitted that opportunities for economic growth and employment are particularly relevant to the Panel's evaluation of the QPSZ and determining whether it is "better" than the proposed Rural Zone.

3.23 Simon Milne provides evidence on the ski industry and the challenges it faces. The gondola would significantly improve the international perception of skiing in Queenstown (and go some way to alleviating the infamous reputation of the existing ski field road).[15] John Ballingall has undertaken an assessment of the economic impact of the gondola. He finds that additional tourism spending created over 35

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13 See evidence of Robert Greenaway.

14 See submissions dated 4 March 2016 in relation to Hearing Streams 1A and 1B, at paragraph 4.7.

15 http://www.dangerousroads.org/australia-and-oceania/new-zealand/892-the-remarkables-new-zealand.html

years would be in the order of $1.43 billion. Further economic benefits accrue from other components of the QPSZ such as visitor accommodation. It is noted that the gondola requires significant capital investment[16] which will be generated, in part, by the development opportunities enabled by the QPSZ. While the Council has recommended the passenger lift systems be a restricted discretionary activity in the Rural Zone, the reality is that a gondola of the distance proposed within the QPSZ is simply not viable under the Rural Zone provisions.

3.24 In short, the Rural Zone cannot deliver anything like the economic growth opportunities that the QPSZ presents.

Sections 74 to 75

3.25 Sections 74 and 75 set out matters to be considered by a territorial authority and the contents of district plans.

3.26 Section 74(1) reinforces the importance of Part 2 and sections 31[17] and 32.

3.27 Section 74(2)(a)(i) provides that when preparing a district plan, a territorial authority "shall have regard to" any proposed Regional Policy Statement (**pRPS**). Additionally, section 75(3)(c) provides that a district plan "must give effect to" any Regional Policy Statement (**RPS**).[18]

3.28 At the time of writing these submissions there is an operative and proposed RPS. The QPSZ is assessed against relevant provisions of both in evidence. The operative RPS seeks "To protect Otago's outstanding natural features and landscapes from inappropriate subdivision, use and development".[19] As noted above, what is "inappropriate" should be assessed by what is sort to be protected and will be heavily influenced by context.[20] The use if the word "inappropriate" in the objective suggests that there will be appropriate developments.

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16 In the order of $85 million.

17 It is noted, for completeness, that section 31 requires avoidance or mitigation of natural hazards. The engineering evidence for QPL is that any hazards are avoided or can be mitigated.

18 Section 43AA of the RMA defines "proposed policy statement" and "regional policy statement" as follows:

> **43AA Interpretation**
> In this Act, unless the context requires another meaning,—
> **proposed policy statement** means a proposed policy statement that has been notified under clause 5 of Schedule 1 **[[**, or given limited notification under clause 5A of that schedule,**]]** but has not become operative in terms of **[[**clause 20 of that schedule**]]**
> **regional policy statement**—
> (a) means an operative regional policy statement approved by a regional council under Schedule 1; and
> (b) includes all operative changes to the policy statement (whether arising from a review or otherwise)

19 Objective 5.4.3.

20 **Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd** [2014] NZSC 38.

3.29 It is noted that Mr Barr, in the Council's Reply, has recommended that the first landscape objective read:[21]

> Landscapes are managed and protected from the adverse effects of subdivision, use and development

Proposed Policy 6.3.2.1 that follows acknowedges that subdivision and development is not inappropriate in all ONL locations.

Section 74(2)(a)(i)

3.30 The Environment Court considered the meaning of "shall have regard to" in **Winstone Aggregates Limited v Auckland Regional Council**:[22]

> [41] The meaning of ("have regard to") has been considered in a number of decisions, notably in the context of section 104(1) of the Act. "To have regard to" a matter means that it is of material consideration, but that does not mean such rules or policies necessarily must be followed; ***R V Westminster City***. As was found in R V CD, these words are not synonymous with "shall take into account". The decision-maker does not have to strictly apply the policies or rules; they are required only to "have regard to.

3.31 The Courts have held that regard should be had to the most up to date version of a pRPS. In **Becmead Investments Limited v Christchurch City Council**,[23] when concluding that regard should be had to the decisions version rather than the notified version of the pRPS, the Environment Court held (at 378):

> … we adhere to the view that regard should be had to the most up-to-date state of the Statement in considering the change, so that the latest and presumably best informed planning position from a regional perspective may be weighed.

3.32 In terms of the weight to be given to a pRPS, the Environment Court in **Clevedon Cares Inc v Manukau City Council**[24] observed that how much regard should be had "depends in part on the stage it has reached through the participatory process".[25] In that case, a decision had been issued in relation to the proposed change to the RPS, but the provisions were subject to appeal, and therefore still subject to uncertainty. In considering the weight to be given to the proposed change to the RPS, the Court stated:

> [111] Change 6 is the result of a statutory directive. However, its provisions are currently subject to considerable uncertainty. Accordingly, the ARPS continues to be a relevant document until the appeals are determined. Because the outcome of the appeals is uncertain, the weight we should give to it should reflect that. In our view, very little weight should be given to Change 6. We also bear in mind that we are only required to have regard to the Change but must give effect to the operative document no matter what stage Change 6 is at.

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21 Objective 6.3.1.
22 Environment Court, Auckland, A96/98, 14 August 1998.
23 (1996) 2 ELRNZ 368.
24 [2010] NZEnvC 211.
25 Ibid, at para [109].

3.33 Finally, if a proposed change becomes operative prior to the plan review or change being finalised, then the Panel should ensure that it gives effect to the now operative provisions of the RPS. For example, in **Black v Waimakariri District Council,**[26] a change to the RPS became operative after an appeal hearing on a proposed plan change but before the decision was issued. The Court invited the parties to make further submissions on the now operative provisions of the RPS and declined the appeal on the basis that the proposed plan change was contrary to the now operative provisions of the RPS. The Court did however note that the result may have been the same even if the provisions had not become operative, given that they would have had regard to those provisions pursuant to section 74(2)(a)(1) in any event.

Section 75(3)(a) – Give effect to any national policy statement

3.34 The evidence for QPL will address water quality. It is submitted that the QPSZ gives effect to the National Policy Statement for Freshwater Management. While freshwater management is also addressed in regional documents, the QPSZ's direct consideration of this issue is commendable.

3.35 The section 42A report refers to the proposed National Policy Statement on Indigenous Biodiversity. Mr Serjeant also refers to it. This is not yet technically a national policy statement for the purposes of section 75(3)(a) as it has not been "issued" under section 52. However, that does not prevent the Panel from considering it. You are just not bound to "guve effect" to it.

Section 75(3)(c) – Give effect to any RPS

3.36 In **Environmental Defence Society v New Zealand King Salmon Company**[27] the Supreme Court held at para [77]:

> [77] … Give effect to" simply means "implement". On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*:
>
> > [51] The phrase "give effect to" is a strong direction. This is understandably so for two reasons:
> > [a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and
> > [b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.
>
> […]
>
> [80] We have said that the "give effect to" requirement is a strong directive, particularly when viewed against the background that it replaces the previous "not inconsistent with" requirement. There is a caveat, however. The implementation of such a directive will be

[26] [2014] NZEnvC 119.
[27] [2014] NZSC 38.

> affected by what it relates to, that is, what must be given effect to. A requirement to give effect to a policy which is framed in a specific and unqualified way may, in a practical sense, be more prescriptive that a requirement to give effect to a policy which is worded at a higher level of abstraction.

3.37 Currently, by virtue of the definition of RPS in section 43AA, it is the operative RPS that must be given effect to in the District Plan, rather than a proposed RPS. However, in circumstances where the proposed RPS has progressed to the point that its wording is finalised, the Environment Court has held that it would be appropriate for the Council to give effect to the proposed RPS in the context of a district plan review. In **Riverside Oak Estate Ltd v Hamilton City Council,**[28] the proposed Waikato RPS had not been declared operative, but the final consent order in respect of the proposed RPS had been issued by the Court. The Environment Court, in considering an appeal against the proposed District Plan, noted at para [5] that:

> For practical purposes the Council rightly, in our view, approached this aspect of the appeal by accepting that the PDP should "give effect" to the provisions of the proposed RPS.

3.38 The parties to the pRPS appeals are acutely aware of the implications of the **King Salmon** decision and are working constructively to develop ONL policies that do not place a dead hand on large tracts of land across the region (particularly in the Queenstown district). The decisions version is unlikely to survive and is subject to multiple appeals. Given the state of play, counsel proposes to further update the Panel as to progress with the appeals in the week of 4 September 2017.

3.39 The language of the operative RPS has been mentioned above. It is not, in my submission, a prohibition in the sense of the interpretation applied the NZCPS in the **King Salmon** decision. Importantly, the word "avoid" is not used and the requirement to "protect" is qualified by the phrase "from inappropriate subdivision, use and development". There is scope for appropriate development and a "broad overall judgement" is required. The Landscape objective and policy referred to above and recommended by Mr Barr have a similar flavour (see paragraph 3.29).

Section 75(4)(b)

3.40 A district plan must not be inconsistent with a regional plan.

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28 [2016] NZEnvC 49.

3.41 The Regional Plan: Water seeks to maintain water quality[29] in the region. The evidence for QPL will establish that the land management regime proposed under the QPSZ is better than the Rural Zone from a water quality perspective.

4. SCOPE

4.1 The section 42A report indicates that the Council may take issue with aspects of the further submissions lodged in respect of the QPSZ. A review of the general principles relating to scope is useful because it is inevitable that proposed "tweaks" and refinements will arise in relation to a comprehensive zoning such as the QPSZ.

General Principles

4.2 The starting point is **Countdown Properties (Northlands) Ltd v Dunedin Council**[30] where it was held that an amendment to a plan should not go beyond what was reasonably and fairly raised in submissions in relation to a plan as follows:

> The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

4.3 This approach was accepted and applied in **Royal Forest and Bird Protection Society Inc v Southland District Council**:[31]

> … it is important that the assessment of whether any amendment was reasonably and fairly raised in the course of the submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

4.4 **Re an application by Vivid Holdings Ltd**[32] referred to and applied **Countdown** and **Royal Forest and Bird** and held that the same approach applied to the assessment of scope of references and whether they raise sufficient matters under the First schedule of the Act to establish jurisdiction.[33]

4.5 In **Shaw v Selwyn District Council**,[34] the Council introduced plan changes to replace transitional plan rules concerning subdivision. The Shaw's lodged a submission seeking to reduce the minimum allotment size, which was rejected by the Council. The Council modified the plan change by adding a new policy that provided for subdivision as a non-complying activity. The Council's decision was appealed

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29 Objective 7.A.1.

30 [1994] NZRMA 145 (HC) at page 41. This concerned a plan change but the approach is applied in the most recent High Court decision on scope with respect to a district plan review addressed at paragraph 5 of this memorandum.

31 [1997] NZRMA 408 (HC) at page 10.

32 (1999) 5 ELRNZ 264.

33 (1999) 5 ELRNZ 264 at 20.

34 [2001] 2 NZLR 277.

and the Court held that it had no jurisdiction to grant relief sought by Shaw's because they proposed new rules which could not be justified on the basis of objectives and policies of the transitional plan and the original submissions proposed no new objectives and policies. On appeal to the High Court, Chrisholm J held that:[35]

> …Although it is true that no new objectives and policies were actually formulated in either referrers' submission, there can be little doubt that both submissions signaled that the relief package was intended to include such modification to the objectives and policies as might be necessary to support the proposed rules. In my opinion, the "*workable*" approach discussed by Panckhurst J required the Environment Court to take into account the *whole* relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.

4.6 **General Distributors Ltd v Waipa District Council**[36] followed the approach that any amendments to a plan would be procedurally fair if it can be said to be reasonably contemplated in the primary submissions:

> [55] One of the underlying purposes of the notifications/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form, which could not reasonably have been anticipated resulting in potential unfairness.
>
> [56] There is of course a practical difficulty. As was noted in *Countdown Properties* at p 170, p 165, councils customarily face multiple submissions, often conflicting, and often prepared by persons without professional help. Both councils, and the Environment Court on appeal, need scope to deal with the realities of the situation. To take a legalistic view and hold that a council, or the Environment Court on appeal, can only accept or reject the relief sought in any given submission would be unreal.
>
> [57] The [RMA] recognises this. Clause 14(2) requires only that the provision or matter has been referred to in the submission.

4.7 Finally, the most recent and leading authority on the issue of scope with respect to a district plan review is **Albany North Landowners v Auckland Council**.[37] The Court accepted the approach in the **Countdown**, **Royal Forest and Bird** and **Shaw** decisions and stated:

> [115] A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached with realistic and workable fashion rather than from the perspective of legal nicety. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

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35 Ibid, at para [35].
36 (2008) ELRNZ 49 (HC).
37 [2017] NZHC 38.

4.8 In summary, Whata J held that:

> [135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a reasonably foreseen logical consequence test which accords with the longstanding Countdown "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in Clearwater and Kós J in Motor Machinists.

4.9 The Council's scope issue appears to relate to the extent of the gondola corridor proposed under RPL's further submission (plan attached and marked **Annexure** "**A**"). In that regard, it is acknowledge that a further submission is limited to opposing or supporting a proposal and cannot add additional matters. However:

(a) A plan showing the gondola corridor was publicly notified on 24 November 2016. The plan clearly showed the corridor over land near Lake Hayes on the true left bank of the Kawarau River (plan attached and marked **Annexure** "**B**");

(b) The only aspect of RPL's further submission that could truly be considered new was the relatively minor increases in the width of the corridor near Lake Hayes and within QPL's land;

(c) While those additions may be beyond the scope of a further submission, they are within the scope of decisions available to the Panel because:

(i) The original submission made it clear that a gondola was proposed in the general vicinity of the Kawarua River (although largely along or near the true right bank). No submissions in opposition were received from any party except the Queenstown Airport Corporation;

(ii) The renotified plan made it clear that the gondola corridor extended to land on or near the true left bank of the Kawarau River. No submissions in opposition were received from any party except the Queenstown Airport Corporation; and

(iii) The modifications proposed in the RPL's further submission do not significantly alter the corridor from that which was shown on the renotified plan. In fact, the overall extent of the corridor is reduced, particularly on the true left bank side of the Kawarua River.

4.10 In my submission, the modifications proposed in RPL's further submission are within the Panel's general scope. Clearly a gondola corridor was proposed and the general public was put on notice of such. Natural justice issues do not arise. The "tweaks" to the gondola corridor can be described as reasonably foreseeable consequences of the RPL submission.

5. COMPREHENSIVE DEVELOPMENT PLANS

5.1 The QPSZ provisions propose the use of Comprehensive Development Plans (**CDP**) in manner that is similar to that proposed for the Jacks Point Zone.[38]

5.2 As currently proposed, an application for CDP resource consent would be a restricted discretionary activity and would enable the basic structuring elements of the of a development area to be established (such as earthworks, landscaping, building areas and roading). Subsequent applications for buildings would be a controlled activity provided they were consistent with the CDP resource consent.

5.3 The *vires* of a CDP type mechanism has been considered by the Environment Court. In **Queenstown Airport Corporation Ltd & Ors v Queenstown-Lakes District Council,**[39] the Court held that an outline development plan was invalid because it did not authorise a land use activity. The CDP proposed under the QPSZ will enable land use to establish key structural elements (such as roads, landscaping, earthworks and building locations).

5.4 In the context of Framework Plans proposed under the Auckland Unitary Plan, declarations were sought in the Environment Court as to the validity of the mechanism. The Independent Hearings Panel (**IHP**) summarised the process this way:[40]

> The application for declarations was ultimately lodged with the Environment Court in October 2015 and heard on 12 February 2016 with further materials and submissions being lodged up to 8 March 2016. The Court delivered an interim decision on 24 March 2016 (*Re an application by Auckland Council)* affording the Council a further opportunity to revise its proposed framework plan/consent provisions. The Court's final decision was delivered on 15 April 2016 (*Re an application by Auckland Council*). Reference should be made to both decisions to understand the full extent of the issues raised, the arguments presented and the Court's findings and reasons.
>
> In brief summary, the decisions resulted in a declaration that the Unitary Plan may lawfully include a provision enabling an application for a bundle of land use consents which authorise the key enabling works necessary for development associated with the first stage of urbanisation and/or redevelopment of brownfield and greenfield land within precincts in the form set out in attachments to the final decision. The Court refused to make a declaration that in assessing and determining a resource consent application for an activity in a precinct, the consistency of that activity with a framework plan for that precinct is a matter to which regard

38 As proposed in the Reply of Vicki Jones in respect of the Jacks Point Zone.
39 [2014] NZEnvC 93.
40 IHP Overview Report – Framework Plans.

> must be had by the consent authority. The Court also refused to make a declaration endorsing the template provisions submitted by the Council as it did not have evidence of the actual application of such provisions, nor evidence addressing the effects on the environment of the activities that would be subject to them. The Court noted that the merits of such provisions could be a matter to be recommended on by the Panel.
>
> Consequent on these decisions, the Council lodged further revised framework consent provisions with the Panel on 3 June 2016 in relation to Topic 081 – Rezoning and Precincts. The Panel has taken these into account when making its recommendations.

5.5 The IHP ultimately recommended that the Framework Plans be deleted. However, as noted by the IHP, in **Auckland Council**[41] a Full Court made the declaration that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development of land is *intra vires* the Act. The Court stated:

> [14] Provided that the consent expressly allows the consent holder to use land in a manner that contravenes a district rule (s 9(3)), the rule is *intra vires* the Act even though other resource consents will be required to authorise further development of the land.
>
> [15] A district council's ability to make rules is constrained by ss 77A and 87A. If the consent does not authorise the consent holder to use land in a manner that contravenes a district rule, but instead purports to authorise a plan about the future use of land, such a rule would be *ultra vires* the Act.

5.6 The CDP resource consent under the QPSZ enables a bundle of land use activities. It is therefore consistent with the decisions referred to above.

5.7 I do note that no declarations were made in relation to the *vires* of activity status being altered by the existence of a Framework Plan resource consent. However, the QPSZ provisions provide for a CDP as a restricted discretionary activity and subsequent buildings and activities are also restricted discretionary activities. As such, a reader of the plan can determine activity status on the face of the plan.

6. URBAN DEVELOPMENT

6.1 The QPSZ is a special zone. It is predominantly rural, but will have urban elements (such as the Village Station). Rebecca Skidmore considers that the QPSZ development does not meet the definition of "urban development" in the PDP. The vast majority of the site is open space and rural. Mr Brown acknowledges that there will "peri urban and urban" elements within RV3, but any landscape change is within the bounds of the wider landscape setting.

6.2 Notwithstanding, it is submitted that the Panel could expressly exclude the QPSZ from the definition of "urban development" in the same manner as proposed for

[41] [2016] NZEnvC 65, Newhook J, Dwyer J and Borthwick J.

Waterfall Park and Millbrook. QPL and RPL raised concerns with the definition (see 2.2(a) above).

7. BUILDING RESTRICTION

7.1 Planning Map 31 includes a Building Restriction overlay that touches a small part of the QPSZ land. As for as QPL can see, the Building Restriction serves no useful purpose and the extent of it seems to be an error.

7.2 It is QPL's understanding that the Operative District Planning Maps (31a) included a building restriction area that extended across the Kawarau River on to what is no QPL's land. However, there was no corresponding rule relating to the building restriction.

7.3 The PDP replicated the building restriction area shown in the ODP. In addition, a rule was added to the Rural Chapter Rule 21.4.26 requiring a non-complying consent for buildings within the restriction area.

7.4 QPL is not aware if any resource management issue related to, or any explanation for, the building restriction. In the absence of any resource management rationale, it seeks that it be deleted from its land.

8. CONSERVATION LAND

8.1 The gondola corridor passes over land administered by the Department of Conservation as Recreation and Conservation Reserve. This does not provide any impediment to providing a gondola corridor overlay over this land.

8.2 However, a concession will be required for the establishment of the gondola when resource consent is sought. Initial preliminary discussions with the Department of Conservation have occurred. There are opportunities for potential land exchanges, amongst other mutually beneficial arrangements.

9. CONCLUSION

9.1 It is submitted that the QPSZ is better than the Rural Zone. The QPSZ is a bespoke zoning tailored to the unique features of the site.

9.2 The gondola corridor presents a significant tourism opportunity. The economic benefits are substantial. However, it bears emphasis that the recreation, visitor accommodation, glamping and village development opportunities also contribute to enhancing Queenstown's tourism offering. It both consolidates and enhances existing and highly valued recreation activities (such as the trail network).

9.3 In addition to tourism benefits, the gondola is important transport infrastructure. The proposal is supported by NZSki and QPL's traffic experts for the contribution it will make to reducing car use and road network pressure.

9.4 The ONL within which the QPSZ will be located already contains cultured elements. The QPSZ enables sensitive development in specific locations that protects the values of the ONL.

9.5 The QPSZ offers superior ecological and water quality outcomes than the Rural Zone. Farming activities could result in ecological degradation given the presence of SNAs. Water quality considerations arise due to the location of the land near the Kawarau River.

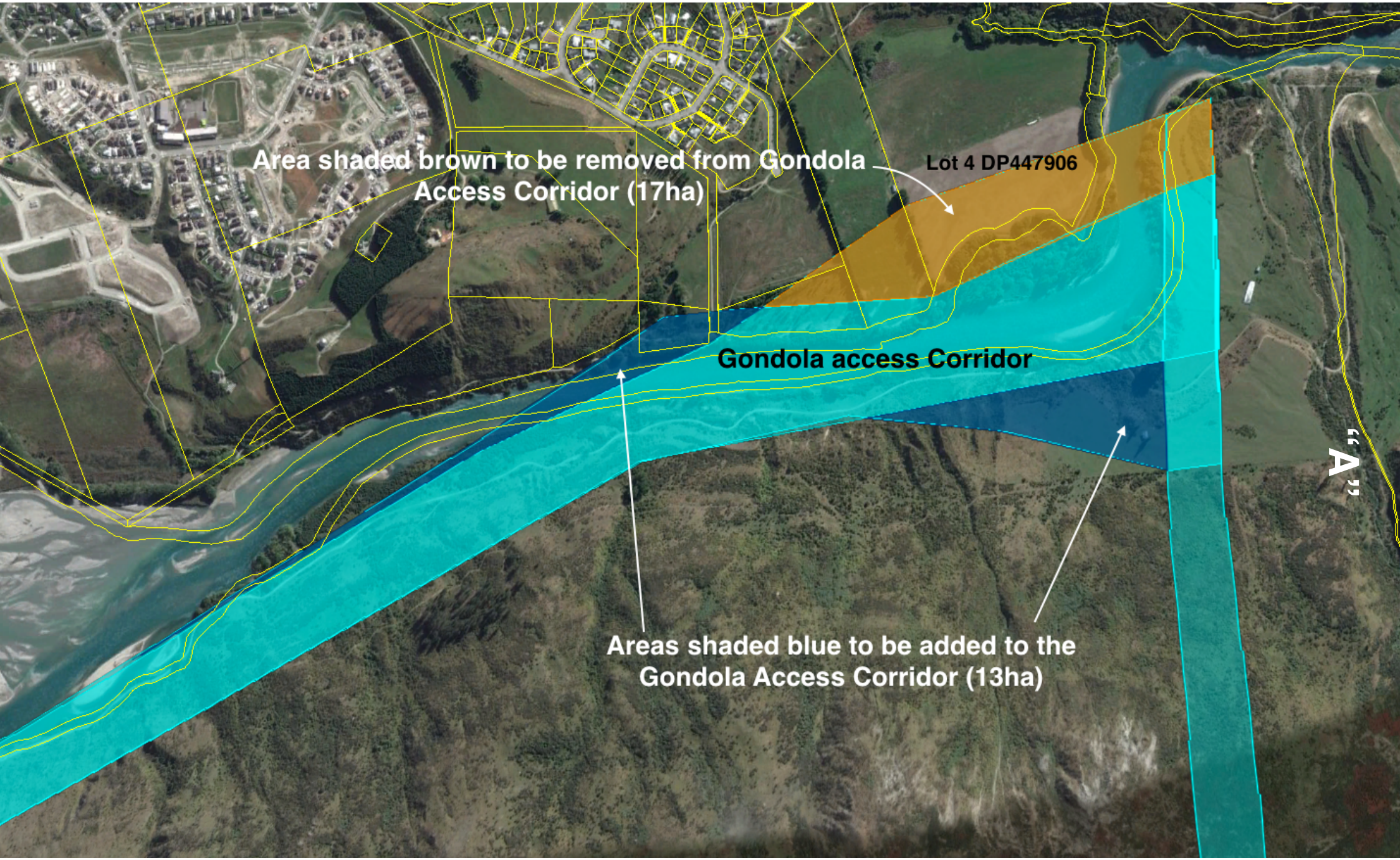
9.6 The QPSZ provisions have been further refined to ensure the desired and intended environmental outcomes are delivered.

Dated the 9th day of June 2017

J D Young

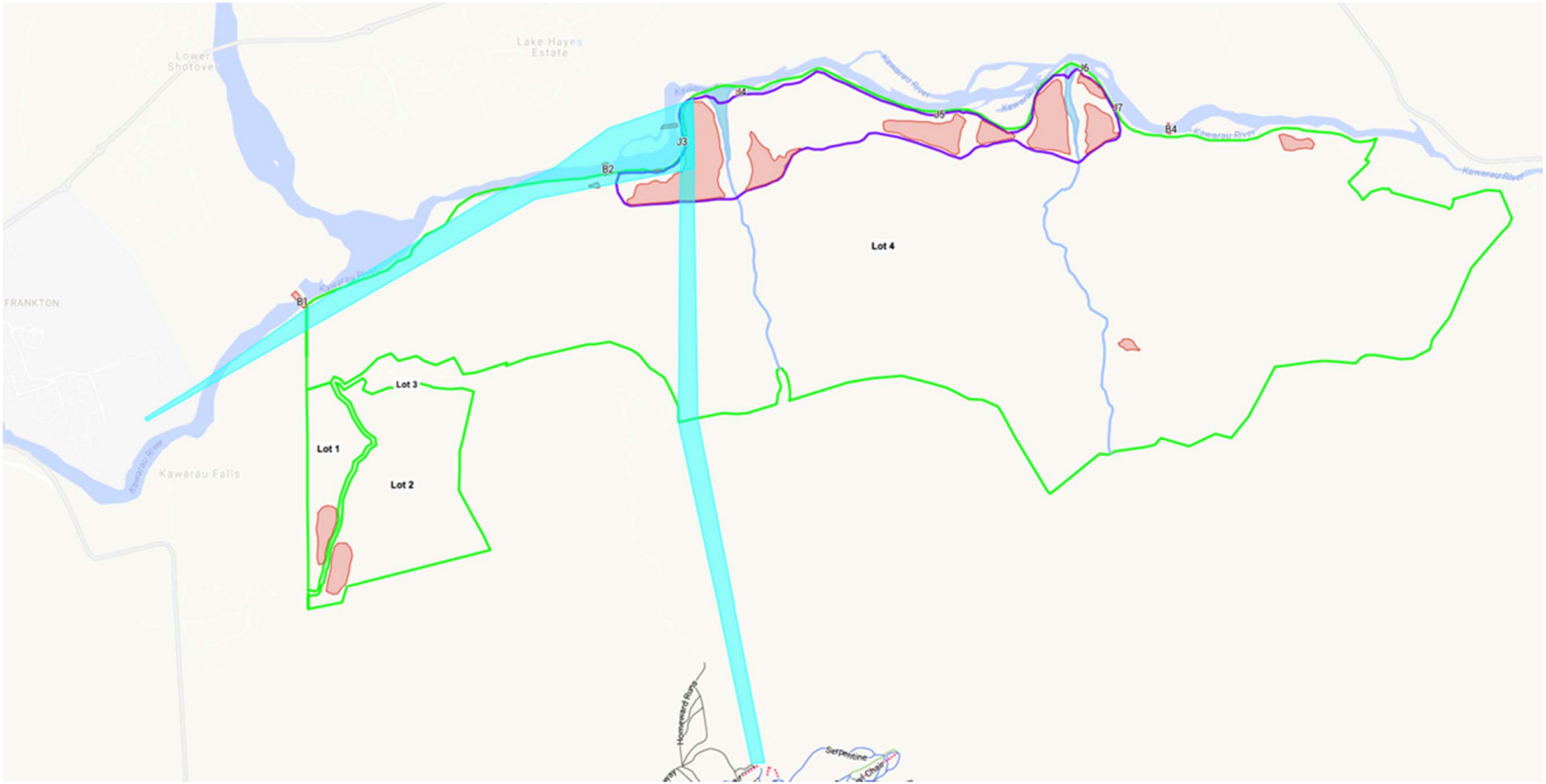
Counsel for Remarkables Park Limited and Queenstown Park Limited

ANNEXURE A: PLAN FROM RPL'S FURTHER SUBMISSION


Area shaded brown to be removed from Gondola Access Corridor (17ha)
Lot 4 DP447906
Gondola access Corridor
Areas shaded blue to be added to the Gondola Access Corridor (13ha)
"A"

ANNEXURE B: PLAN SHOWING GONDOLA CORRIDOR PUBLICLY NOTIFIED ON 24 NOVEMBER 2016

Queenstown Park Limited- Additional Map Provided



"B"