

Before Queenstown Lakes District Council

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In the matter of            The Resource Management Act 1991

And                            The Queenstown Lakes District Proposed District Plan Topic 13  
Queenstown Mapping

And                            Middleton Family Trust Submission 338

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**LEGAL SUBMISSIONS FOR**

Oasis in the Basin Association (Further Submitter #1289)

Dated 27 July 2017

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## **MAY IT PLEASE THE PANEL**

### **Introduction**

- 1 These legal submissions are presented on behalf of Oasis in the Basin Association (**Oasis**) as a further submitter to the Middleton Family Trust (**Submitter**) Submission 338 (**Middleton Submission**), and in respect of the Middleton Submission request to rezone land within Topic 13 of the Proposed District Plan (**PDP**).
- 2 Counsel refers to and adopts the introductory paragraphs of Mr Goldsmith's Evidence in Chief which clarifies the areas of particular concern to Oasis in respect of the overall Middleton Submission. To further clarify, the aspects of the Middleton Submission being specifically opposed in this hearing relate to the LDR proposal over land identified Outstanding Natural Landscape (**ONL**) in the PDP planning map 31.
- 3 Oasis has no concern about development involving land not identified as ONL. The only aspect of the Oasis Submission which relates to that non-ONL land is that, should that land be zoned for development, provision should be made for development of public pedestrian/cycling access from Tucker Beach Road through that land to the public esplanade reserve adjoining Lake Johnson.
- 4 A consequence of the previous point is that the Oasis Submission does not oppose development of the majority of the land subject to the Middleton Submission which is owned by the Submitter. The Oasis Submission is primarily directed at land not owned by the Submitter.

### **Executive Summary**

- 5 These legal submissions are relatively simple in that they reflect a relatively simple case put forward by the Middleton Submission, being that one national instrument provides the ability to essentially override all other relevant statutory considerations for a rezoning request and that the evidence supports such an outcome in this case. I submit that case is fundamentally flawed for the reasons outlined further in these submissions.
- 6 I submit that, in this instance, all other relevant matters for consideration in a rezoning are not achieved so as to support the relief sought in the Middleton Submission. In particular, I refer to the unchallenged evidence that the relief requested in the Middleton Submission would be inconsistent with landscape considerations of higher order statutory documents, the higher order provisions of the PDP, and the matters of national importance within Part 2 of the Act.

## The interpretation and application of NPSUDC

- 7 The Council's position in relation to the relevance, and extent of consideration of, the recently gazetted National Policy Statement on Urban Development Capacity 2016 (**NPSUDC**)<sup>1</sup> is set out in paragraphs 2.14-2.16 of the Opening Representations/Legal Submissions for the Council dated 21 July 2017. Oasis agrees with, and adopts, the Council's position as thus summarised.
- 8 The Council's solicitors also point out, in paragraph 5.9 of those Opening Legal Submissions, that the only evidence opposing the Council's DCM evidence is that of Mr Geddes which relates directly to the Middleton Submission. Given that fact, rather than simply adopting the Council's position, I now address the interpretation and application of the NPSUDC in more detail.
- 9 The Submitter's case is predicated, almost solely, on the requirements stemming from the NPSUDC. That case involves three fundamental propositions:
- (a) That the land subject to the Middleton Submission is part of an '*urban environment*' for the purposes of the NPSUDC;
  - (b) That the evidence supports a case that the NPSUDC requirements are triggered;
  - (c) That in this case the NPSUDC should trump all other considerations, including landscape considerations.

I address those three propositions separately.

### *Urban Environment*

- 10 Policies PA1 – PA4 are now in force and apply to all local authorities. However they only apply to an '*urban environment*' as defined in the NPSUDC. Council's solicitors lodged a Supplementary Memorandum dated 19 April 2017 which addresses this issue. Counsel understands that the land subject to the Middleton Submission would not form part of the '*Queenstown urban environment*' as defined in paragraph 6.1 of that Memorandum.
- 11 That definition raises some interesting interpretation questions which Counsel assumes are likely to be debated in respect of more than just this rezoning request. Counsel leaves that issue to the Commission (primarily because of the submissions to be made below in relation to the other two propositions). If the land subject to the Middleton Submission is not part of an urban environment

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<sup>1</sup> The NPS Urban Development Capacity came into effect on 1 December 2016; all objectives of the NPS have immediate legal effect as well as policies PA1 – PA4 (outcomes for planning decisions), policies PC1 – PC4 (responsive planning) and policies PD1 – PD4 (coordinated planning evidence and decision making). The remainder of policies have staged implantation over the next two years.

then the Submitter's case is fundamentally flawed. The remainder of these submissions therefore assume that that land is part of an urban environment for the purposes of the NPSUDC.

*Evidential case*

- 12 Broadly speaking the NPSUDC is very directive. However much of the direction depends upon first establishing the facts (primarily relating to lack of development capacity) to justify a requirement to comply with the relevant directions. If there is no shortage of development capacity (to the extent required to trigger the NPSUDC) the directions do not apply. The NPSUDC requires Council to establish the underlying facts through a process intended to take place within the next 18 months culminating in a '*future development strategy*' which must be in place (in a high growth area such as Queenstown) by the end of 2018.
- 13 The Council has provided an assessment of development capacity which, at this stage, shows sufficient development capacity to meet the requirements of the NPSUDC without the need for any additional residential zoning. That initial assessment will be subject to review over the next 18 month period. That review might lead to different conclusions. Until that occurs, that initial assessment is what the Council is relying on.
- 14 That assessment has been arrived at through a reasonably detailed analytical process. Anybody might ask questions about some aspects of that analytical process, or the conclusions reached, but a substantive challenge to that assessment necessitates an equally analytical process arriving at different conclusions. I submit that Mr Geddes' evidence simply does not provide the necessary analytical process to support the challenges Mr Geddes makes to the Council's assessment.
- 15 Mr Geddes does not profess any particular expertise in carrying out the type of analytical assessment needed to challenge the Council's assessment. His evidence expresses a number of opinions which are not based on other than just his personal opinion without any underlying analysis. One example of this is his challenge to the Council assessment that a developer would expect a 20% rate of return for a development to be commercially viable. He suggests an alternative 33% rate of return but provides no expert, reasoned justification for that opinion.
- 16 Absent the application of appropriate expertise, and absent the necessary degree of analysis, I submit that Mr Geddes' evidence falls well short of providing a significant challenge to the Council assessment, let alone overturning that assessment and establishing an alternative assessment.

*NPSUDC should trump other considerations*

17 In the event that the Commission does not accept the above submission, and does accept Mr Geddes' contention that the NPSUDC is effectively triggered due to a lack of existing development capacity, it would then be necessary to address the priority to be afforded the NPSUDC as against other relevant considerations.

18 The following statement is quoted from the MFE Introductory Guide to NPSUDC 2016<sup>2</sup>:

*"Role of a National Policy Statement*

*A national policy statement provides direction to local authorities and other decision-makers under the RMA on matters of national significance relevant to achieving the purpose of the RMA. A national policy statement sets objectives from a national perspective and identifies policies to achieve those objectives. These objectives and policies must then be recognised and responded to by decision-makers, such as local authorities, in their policy statements and plans prepared under the RMA."*

19 While the above statement correctly describes the legal position, it does not provide guidance concerning the priority of the NPSUDC in relation to other statutory directives in order to provide guidance as to how the directives of the NPSUDC are to be balanced against what may be competing directives under other instruments under the RMA, or the RMA itself.

20 The relevance of this question is obvious when one considers the potential conflicting requirements under the NPSUDC to provide development capacity for urban development and the requirements of Part 2 of the Act for the protection and management of ONL's. Any proposal involving the zoning of part of an ONL for urban development purposes potentially creates significant conflicts between those competing directives.

21 As stated above I do not intend to address what is a relatively complex issue in any detail. However as an example as to the type of considerations which may come into play when considering such issues I refer to the Commission to Policies PA1-PA4 of the NPSUDC from which I highlight:

(a) *PA1: "Local authorities shall ensure that...sufficient housing and business land development capacity..."*

(b) *PA2: "Local authorities shall satisfy themselves...infrastructure..."*

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<sup>2</sup> Introductory Guide to NPSUDC 2016, page 5

- (c) PA3: "*When making planning decisions...decision-makers shall provide for....whilst having particular regard to...choices/efficient use of urban land/limiting adverse impacts of competitive operation of land....*"
- (d) PA4: "*When considering the effects of urban development, decision makers shall take into account....benefits [of] urban development...benefits and costs of urban development at a national, inter-regional, regional and district scale, as well as local effects.*"

- 22 Policies PA1 – PA4 referred to above are now operative and must be applied by all local authorities. However the same local authorities must also apply s6(b) RMA which requires "*The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.*" When one considers the legal meanings which have been applied to the phrases underlined in the previous paragraph, the scope for legal debate about whether, in any particular instance, the NPSUDC requirements should override the s6(b) requirements is obvious.
- 23 One issue which may well arise is whether the NPSUDC is deficient (in a *King Salmon* sense) in failing to adequately address other RMA policy considerations such as those arising under s6(b). The starting assumption is that an NPS has been implemented under the RMA and therefore that it should not be necessary, when applying the NPS, to refer back up to Part 2. However the absence of a reference in the NPSUDC to other considerations such as s6(b) considerations is significant. An argument as to deficiency may have substance.
- 24 However it may not be necessary to go down that route. *King Salmon* emphasizes the importance of examining policy provisions very carefully to see if they are in fact incomplete, or in conflict, before having resort to Part 2 to remedy any such deficiency or conflict. Policy PA4(b) requires decision-makers to take into account '*The benefits and costs of urban development at a national, inter-regional, regional and district scale, as well as the local effects*'. It appears that other considerations, such as s6(b) considerations, can be brought into the equation under that policy. One could envisage a debate, under that policy, about the extent to which a need for greater development capacity to be enabled should override s6(b) to the extent that part or parts of the ONL should be zoned for urban development.
- 25 Mr Geddes appears to head down this route, and in fact appears to argue that such a debate must be had at this point in time in relation to the ONL subject to the Middleton Submission. I refer to para 8.14 of Mr Geddes' rebuttal which relies on a comment from Ms Banks' evidence in chief as follows:

*"I consider that the current extent of the Queenstown UGB (and where recommended to be extended in response to submissions) is*

*appropriate to provide for social, economic, cultural and environmental wellbeing; and has been demonstrated in this evidence to meet predicted housing demand to 2048. The location of the UGB is also appropriate with regard to the quality and character of the surrounding Rural Zoned land, and Outstanding Natural Features and Landscapes. Avoiding impinging on areas that are vulnerable to degradation is inherent as part of the overall spatial application of zoning and overlays in the notified PDP. **However, I also acknowledge that in some instances the spatial extent of the Queenstown urban zones and UGB may over time need to expand into the ONL; and also that Chapter 4 (policy 4.2.2.5) does provide for the UGB to be refined over time to meet community needs.***" [emphasis added]

26 The final paragraph 8.21 of Mr Geddes' Supplementary Evidence reads:

*"I believe this is particularly relevant to submission 338 where my primary evidence outlines the needs of the community in terms of housing provision and the protection of landscape have become finely balanced."*

27 Mr Geddes seems to glean from Ms Banks' comment that this accepts there may be a requirement for consideration of urban development into ONLs.<sup>3</sup> That proposition is perhaps correct, but only in terms of a future planning decision, the timing of which is as yet uncertain. It may well be that this District is required to continually provide for increased development capacity, in which case there may come a point in time section 6(b) landscapes are required to be developed. That situation however is not relevant in this hearing; there is no conflict between the NPSUDC and Part 2 because there is sufficient development capacity outside of those landscapes.

28 On this issue it is again worth referring to the anticipated NPSUDC process culminating in a future development strategy which must be in place by the end of 2018. To achieve that requirement, the Queenstown Lakes District Council will have to embark upon a planning and public consultation process, That process may well give rise to identification of a need for additional development capacity to be zoned. That in turn could give rise to questions such as whether such additional future development capacity should be located on the valley floor in the vicinity of Malaghans Road, or on sloping ONL hillsides such as the land subject to the Middleton Submission, or elsewhere. That will be the process through which such decisions are ultimately made.

29 Based on the evidence presented I submit that this Commission can appropriately leave such decisions to that future process in a situation such as

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<sup>3</sup> Nick Geddes Rebuttal Evidence at [8.20]

this where there is such a clear conflict between the requested rezoning and the achievement of relevant objectives and policies relating to s6(b) considerations.

30 In summary of the above:

- (a) There is no evidence before the Panel which establishes that the Council's dwelling capacity modelling shows its PDP is inconsistent with the requirements of the NPSUDC;
- (b) The NPSUDC may, in the future, require this District to develop its section 6 landscapes, but that point in time has not yet been reached;
- (c) That future determination is not within the lifetime of this PDP. However may be a matter for determination in the Council's Future Development Strategy<sup>4</sup> which must establish how, where, and when urban development will occur in accordance with capacity modelling undertaken and the requirement to meet minimum targets as a result of that modelling; and
- (d) Rezoning and the formulation of the PDP are based upon a range of statutory matters for consideration not limited to the NPSUDC. These are further traversed in the following sections.

#### **Other relevant matters for consideration**

31 There is nothing within the NPSUDC which addresses adverse effects of urban development, or other matters of national importance within Part 2 of the Act. The NPSUDC does not override other nationally important matters in the context of the District Plan Review, given it is one matter within a range of other matters required to be considered / implemented (as the weighting requires).

32 Mr Geddes states in his evidence in chief that he adopts the statutory considerations set out in the section 42a Strategic Report (para 9.2) with respect to rezoning requests. Included within that list of 13 considerations is the requirement within section 75(3) that a district plan give effect to any national policy statement. That one consideration out of 13 matters does not have a primacy over other factors. This is not a situation like that before the Supreme Court in *King Salmon* where the national instrument under consideration effectively covered the round of what was before the Court.

33 In this instance, each rezoning request in a District Plan Review is subject to a wider range of relevant factors, including, inter alia:

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<sup>4</sup> A future development strategy must be prepared for District's with High Growth Areas in accordance with policies PC12 – PC14. This is required to be implemented by 31 December 2018 and is not restricted to the boundaries of an urban area within that District.

- (a) The requirement to give effect to / have regard to (as the case may be) other higher order instruments in the RMA;
- (b) The extent to which a rezoning request gives effect to the higher order provisions of the PDP; and
- (c) Whether the rezoning accords with the Council's section 31 functions and the overall sustainable management purpose within Part 2.

34 The above additional matters are a conflation [*what does this mean?*]of the statutory and assessment principles set out in para 9.2 and 15.3 of the Council's section 42a report, however are considered to be of particular importance to this case for the following reasons.

*Operative and Proposed RPS*

35 Mr Geddes concludes in his evidence in chief that the proposed rezoning is in accordance with the Operative RPS because '*the effects ... have been discussed in Part 6 where it is concluded that adverse effects relate to the landscape*'. That part 6 essentially acknowledges the fact that the required rezoning would result in significant adverse landscape effects on the section 6 ONL. I highlight the fact that the Submitter has presented no landscape evidence. Therefore the opinions of Dr Read and Mr Skelton, who reach the same conclusions, are unchallenged. It is therefore difficult to understand Mr Geddes' conclusion that this proposal is consistent with operative RPS provisions which seek to protect those landscapes and avoid, remedy, or mitigate degradation of those resources.

36 The Proposed RPS is, across the board, more stringent than the Operative RPS. This includes key provisions seeking unqualified protection of section 6 landscapes (pol 3.2.6). Counsel is however aware of a number of appeals currently live on that instrument and therefore the limited weighting that can be placed on it.

*Higher PDP provisions*

37 Para 5.32 of Mr Geddes' evidence states that the Middleton Submission is consistent with 'each' Objective and Policy within Chapter 3... and further, those particular enabling policies of Chapter 3 should be given particular emphasis.

38 Counsel submits that with respect to the first assertion, some important provisions of Chapter 3 have clearly been overlooked, particular with reference

to those provisions listed in para 3.7 of Mr Brown's evidence and Council's section 42a report at para 13.7.<sup>5</sup>

39 With respect to the second assertion, there is no authority for the proposition that certain provisions are to be accorded with a greater weighting where those are consistent with a national instrument. Conversely, there is Supreme Court authority for the interpretation that more directly worded policies should be accorded a higher weighting than policies expressed at a greater level of abstraction.<sup>6</sup> In this respect, the policy direction within policy suite 3.2.5 (relating to protection of landscapes) are clearly more specifically and directive worded than policy suite 3.2.6 (relating to provision of affordable and mixed housing opportunities). Insofar as the latter policy suite is relevant, there is also no assurance as to how this proposal will achieve affordable housing given it is arguably in some of the most prime viewing, north facing, proximate land within the Queenstown area.

#### *Section 31 and Part 2*

40 Counsel acknowledges that the draft PDP objectives and higher order RPS provisions are not the only goalposts against which to assess a rezoning proposal. Resort must also be had to Part 2 of the Act, which of course provides an enabling aspect of ensuing people and communities can provide for their social, cultural, and economic wellbeing.

41 That Part 2 assessment is however an assessment in the round, requiring weighting of positive and adverse effects, and particularised matters within sections 6 and 7.<sup>7</sup> Such an assessment ultimately requires weighing and balancing the various considerations under Part 2. There are acknowledged benefits of the ability to provide additional housing, but no evidence is provided that such housing is a necessity in accordance with the NPSUDC. Further benefits in the form of public access, and revegetation / exotic vegetation clearance are acknowledged, However there is uncontested landscape evidence that considers the rezoning will have very high or significant adverse effects on the qualities and characteristics of the ONL.

42 It is submitted that, in this instance, the scales within section 5 are not finely balanced and that the significant adverse effects on section 6 matters of national importance outweigh more general positive benefits under section 5.

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<sup>5</sup> Both briefs conclude that Goal 3.2.5 and associated policy suite in particular are of importance and that the proposed rezoning will have significant costs to landscape, contrary to those provisions.

<sup>6</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 41 at [80]

<sup>7</sup> Counsel refers to submissions lodged in T12 for submitter 502, which conclude the applicability of a broad judgement approach

## Oasis Evidence

- 43 The four briefs of evidence presented for Oasis focus specifically on the effects of the LDR rezoning requested by the Middleton Submission.

Mr Goldsmith presents evidence as a founding member of Oasis, outlining Oasis's core objectives, purpose, and standing for this hearing. Mr Goldsmith provides a first-hand account of the amenity attributes of Lake Johnson and its surrounds, and the foreseeable adverse effects on the same as a result of the proposed rezoning.<sup>8</sup> Mr Goldsmith further outlines the benefits which would be served by facilitating further public access and trail links as a result of any acceptance (in part or full) of the Middleton Submission (relating to land outside the ONL).<sup>9</sup> Mr Goldsmith's rebuttal evidence also provides an overview of likely visibility effects of development from Lake Johnson and its surrounds.

- 44 Mr Carr provides traffic evidence which considers the proposed new roading access to the rezoning would have a 'challenging gradient' for construction, and that it is unusual for new developments to be accessed through entirely newly constructed roads where existing alternative roading is already constructed.<sup>10</sup> Mr Carr further outlines the significant constraints with the Tucker Beach Road access (the existing roading access) but notes that a future upgrade would alleviate this constraint, thereby removing any need for the proposed new road through the ONL.

- 45 Mr Skelton presents landscape evidence which describes the attributes of the ONL potentially affected by the rezoning proposal, and concludes that the notified PDP ONL boundary is in the most appropriate location based upon first principles landscape assessment.<sup>11</sup> Mr Skelton concludes that the proposed development would have very high adverse effects on ONL character and quality, and moderate to high impacts on rural and visual amenity, and more distant views from within the Basin.<sup>12</sup> Mr Skelton further considers the proposed access road would have a moderate - high adverse effect on landscape quality, character, and visual amenity, as experienced from public and private view points to the south and from parts of Hansen Road and the walking track over unformed Hansen Road, and that such adverse effects would be unlikely to be capable of appropriate mitigation.<sup>13</sup>

- 46 Mr Brown presents planning evidence on behalf of Oasis. The structure of Mr Brown's evidence follows the key matters of consideration for rezoning requests

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<sup>8</sup> Evidence in Chief, Warwick Goldsmith at [10] – [16].

<sup>9</sup> Ibid, at [22]- [27]

<sup>10</sup> Evidence in Chief, Andy Carr, at [13] – [ 15]

<sup>11</sup> Evidence in Chief, Steven Skelton, at [17]

<sup>12</sup> Ibid, at [22] and [23]

<sup>13</sup> Ibid, at [29] – [30]

as set out in Council's section 42a reports relevant to rezoning requests.<sup>14</sup> In considering each of these matters in turn, Mr Brown concludes that:

- (a) It is unclear whether the proposed rezoning will be consistent with the relevant objectives of the proposed (LDR) Zone – (Assessment Principle (a))<sup>15</sup>;
- (b) The proposed rezoning is not consistent with any of the higher order provisions of the PDP (Chapters 3, 4, and 6)<sup>16</sup>;
- (c) The rezoning does not achieve the operative RPS provisions<sup>17</sup>;
- (d) Economic costs to degradation of the ONL would outweigh economic benefits of increased housing supply<sup>18</sup>;
- (e) The proposed rezoning will require significant infrastructure extensions, the efficiency of which has not been assessed by way of detailed modelling, however the costs of which are considered to have significant or very high adverse landscape effects (with respect to new roading)<sup>19</sup>;
- (f) In respect of Part 2 of the Act, the rezoning proposal is not consistent with sections 6 and 7 due to adverse effects of urbanising part of the District's prominent ONL landscapes, and this not being outweighed by positive social and cultural benefits of increasing land and housing supply in this District. The rezoning is therefore considered to overall fail the sustainable management purpose of section 5.

**Dated this 27<sup>th</sup> day of July 2017**



**Rosie Hill**

**Counsel for Oasis in the Basin Association**

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<sup>14</sup> Counsel in particular refers to para 15.3 of Council's Strategic s42a Report Topic 13, which lists 13 'assessment principles' applied to rezoning requests for determining the most appropriate provisions or zones in the PDP.

<sup>15</sup> Evidence in Chief, Jeffrey Brown at [3.3]

<sup>16</sup> Ibid, at [3.8] – [3.15]

<sup>17</sup> Ibid, at [3.18]

<sup>18</sup> Ibid, at [3.19]

<sup>19</sup> Ibid, at [3.4] and [3.24], [3.27]