BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Hearing Streams 1A and 1B – Introduction, Strategic Direction, Urban Development, Tangata Whenua and Landscape chapters

---

LEGAL SUBMISSIONS ON BEHALF OF QUEENSTOWN LAKES DISTRICT COUNCIL AS PART OF COUNCIL'S RIGHT OF REPLY

HEARING STREAMS 1A AND 1B – STRATEGIC CHAPTERS IN PART B OF THE PROPOSED DISTRICT PLAN

7 APRIL 2016

Simpson Grierson
Barristers & Solicitors

J G A Winchester / S J Scott
Telephone: +64-3-968 4018
Facsimile: +64-3-379 5023
Email: sarah.scott@simpsongrierson.com
PO Box 874
SOLICITORS
CHRISTCHURCH 8140

TABLE OF CONTENTS

Schedule 1 - Mr Anthony Pickard for the Introduction and Tangata Whenua chapters;

Schedule 2 - Mr Matthew Paetz for the Strategic Direction and Urban Development chapters; and

Schedule 3 - Mr Craig Barr for the Landscape chapter.

1. INTRODUCTION

1.1 The purpose of these legal submissions is to assist the Panel regarding legal issues that have arisen during the course of the hearing on the Introduction, Strategic Direction, Urban Development, Landscape and Tangata Whenua chapters. In particular they address:

General:

(a) Issue of Collective Scope;

(b) Air Noise Boundary - scope issues;

(c) QAC matters;

  (i) Incorporation of PC35 - section 32 issues;

  (ii) Council position on conferencing with QAC;

  (iii) Council's position on QAC relief;

Introduction Chapter

(d) Legal status of building outline (profile) poles note;

Strategic Direction Chapter

(e) Preference for farming in rural areas;

(f) Objective 3.2.5.1 / *EDS v NZKS;*

(g) Openness;

Urban Development Chapter

(h) Rational for Urban Growth Boundaries;

(i) Definition of 'urban development';

Tangata Whenua Chapter

(j) Scope to make changes suggested by Panel;

(k) Withdrawal of QPL and RPL's submissions;

(l) Incorporation by reference of IMPs;

Landscape Chapter

(m) Policy direction for Rural Landscape Classification;

(n) Open Character;

(o) Scope - Policy 6.3.1.8;

Other matters

(p) Section 32 requirements;

(q) QLDC submission on Urban Design;

(r) Council resolutions;

(s) Plan Change 50;

(t) Integration between Stages 1 and 2, and excluded chapters; and

(u) Update on Panel's memorandum regarding scope and minor errors.

1.2 Filed alongside this right of reply, are the planning replies of:

(a) Mr Anthony Pickard for the Introduction and Tangata Whenua chapters (**Schedule 1**);

(b) Mr Matthew Paetz for the Strategic Direction and Urban Development chapters (**Schedule 2**); and

(c) Mr Craig Barr for the Landscape chapter (**Schedule 3**).

2. ISSUE OF "COLLECTIVE SCOPE"

2.1 The Hearings Panel has requested legal submissions in response to submissions made on behalf of a number of submitters which address the concept that has been labelled as "collective scope".

2.2 For example, counsel for NZ Tungsten Mining (submitter #519 and #1287) has addressed this in a memorandum of Counsel dated 30 March 2016.[1] It is understood that various other counsel have urged the Hearings Panel to adopt this approach.

2.3 The essence of the approach is understood to be that, irrespective of the relief sought in an individual submission, a submitter on a topic is entitled to adopt relief sought by other submitters on the same topic and has standing to address the Panel on matters not identified in their submission. This position is stated to be made in reliance upon the High Court decision in *Simons Hill Station Limited v Royal Forest & Bird Protection Society of New Zealand Inc.*[2]

2.4 To be clear, it is not suggested that there is a legal constraint on submitters presenting evidence or commenting on matters raised by other submitters, although the weight that could be attributed to such evidence would be questionable if it did not relate to the relief specified in their submission or a matter addressed in a further submission. The focus of this issue and this part of the submissions in reply is understood to be on the question of standing, in terms of rights to appeal based on the concept of "collective scope".

2.5 To the extent that the submissions made on behalf of NZ Tungsten Mining Ltd reflect the legal position on scope advanced by other submitters on this

1 See paras 2.1 – 2.3.
2 [2014] NZHC 1362.

issue, it is respectfully submitted that it is an incorrect statement of the law and is untenable.

2.6 It is important to recognise that the *Simons Hill* case dealt with the question of scope in terms of resource consent appeals. The ratio in that decision cannot and does not translate to submissions and relief on proposed plans under Schedule 1 to the RMA. It is submitted that Schedule 1 is a code in terms of how submitters achieve standing to pursue relief, and it is an improper extension of the reasoning in *Simons Hill* to suggest that submitters can pick and choose all or any part of the relief set out in other submissions on the same subject matter and present a case on matters not addressed in their own submission.

2.7 The only way that such standing can be achieved is through the statutory mechanism of lodging a further submission pursuant to clause 8 of Schedule 1 (provided a submitter has standing to do so in terms of the thresholds/circumstances identified in clause 8(1)). If the submissions suggesting that "collective scope" exists is correct, that would render meaningless the need to make a further submission. That cannot have been Parliament's intention, particularly in light of the fact that the scope to make a further submission was narrowed by 2009 RMA amendments.

2.8 It would also render meaningless the limitations on appeal rights set out in clause 14(1) and (2), where a submitter may only appeal to the Environment Court on a provision or a matter in the person's submission on the proposed plan. The "collective scope" submission is therefore also inconsistent with findings in other cases, such as *Te Whanau a Te Ngarara v Kapiti Coast District Council*,[3] where the Environment Court held that clause 14(2) of Schedule 1 prevented *relief* being expanded upon through an appeal, rather than *grounds of appeal* in support of the same relief. In that respect, it is the *relief* set out in a submission rather than the grounds or reasoning which provide scope for an appeal and to present a case.

2.9 There is nothing in *Simons Hill* (nor the *Church of Jesus Christ of Latter Day Saints Trust Board*[4] case referred to by counsel for NZ Tungsten Mining) that extends the generally accepted approach to scope identified in *Re Vivid Holdings Limited,*[5] which is:

---

3 EnvC, W78/2008.
4 [2015] NZEnvC 160.
5 [1999] NZRMA 467.

(a) *Did the appellant make a submission?*

(b) *Does the appeal relate to a:*

(i) *Provision included in the proposed plan;*

(ii) *Provision the local authority's decision proposes to include;*

(iii) *Matter excluded from the proposed plan; or*

(iv) *Provision which the local authority's decision proposes to exclude?*

(c) *If the answer to any of those is yes, then* ***did the appellant refer to that provision or matter in their submission*** *(bearing in mind that this can be a primary submission* ***or a cross-submission****)?*

2.10 There is no dispute that the concept of "collective scope" applies to the Hearings Panel in terms of defining the boundaries of relief that it might recommend. There is however no authority for the proposition that an individual submitter can avail itself of that concept at their discretion to provide legal standing, irrespective of what relief they might have specified in their original submission or whether or not they have made a further submission.

2.11 To hold that this was the law would be directly contrary to longstanding and widely accepted authority such as *Offenberger v Masterton District Council*,[6] which has confirmed that further submissions may only be made in support of, or opposition to, submissions already made, and cannot extend the scope of the original submission and can only seek allowance or disallowance in whole or part of the original submission. In summary, in order to obtain standing as a matter of law, it is not lawful for a submitter to adopt relief specified in other submission except by way of a further submission.

3. AIR NOISE BOUNDARY - SCOPE ISSUES

3.1 The Hearings Panel identified on 31 March 2016 that there may be an issue as to whether the Panel has scope to consider the location of and justification for the proposed Airport Air Noise Boundaries[7] which were identified in the submission for Queenstown Airport Corporation (**QAC**) (to be relocated), given that they were identified in the 'Legend and User Information' page of the Planning Maps as an 'Operative Plan' matter and

6 W053/96 (PT).

therefore excluded from the scope of Stage 1 or indeed the PDP in its entirety.

3.2 There is an inconsistency between the Legend information of the PDP and what has been included in the planning maps and provisions, in that Airport Air Noise Boundaries have been included along with associated provisions. That raises the question of whether one matter should prevail over the other or whether there is an error.

3.3 The Council's position is that the Legend information in the Planning Maps is incorrect, and was incorrectly not deleted despite the late decision to include PC35 provisions prior to notification of the PDP. As such, it is submitted that this error can be rectified, either through a clause 16(2) correction or a withdrawal of the incorrect notation on the Legend under clause 8D of Schedule 1.

3.4 In terms of the implication for the Panel's scope, it is submitted that whether or how the error is rectified does not impact on the Panel's scope to address the Air Noise Boundary lines and associated submissions/issues. The substance of these matters was included elsewhere in the PDP and has been submitted on. It is also submitted that no submitters are likely to be prejudiced by the Panel considering such matters, in that submitters would have had the opportunity to consider the relief sought by QAC (for example) in its submission and make a further submission if they considered that necessary.

3.5 In that respect, we agree with the essence of the approach set out in paragraphs 40 to 46 of QAC's supplementary legal submissions dated 1 April 2016.

4. QAC MATTERS

Incorporation of PC35 - section 32 issues

4.1 In a supplementary memorandum of counsel[8] and statement of evidence,[9] Darby Planning LP (submitter #608) raised the question of whether it was appropriate for restrictions on activities within the proposed Outer Control

7 Queenstown Airport Air Noise Boundary (Ldn65) and Queenstown Airport Outer Control Boundary (Ldn65). The Wanaka Airport Outer Control Boundary is not listed as an 'Operative Plan' matter.
8 Dated 30 March 2016
9 Supplementary evidence of Chris Ferguson dated 24 March 2016

Boundary to be more stringent than the controls in the relevant New Zealand Standard.

4.2 The Panel has queried whether it is permissible to rely on the Environment Court's decision in the relatively recent PC35 appeal in terms of section 32 of the RMA.

4.3 In general terms, we submit that it would be permissible for the Panel to place some reliance on the Environment Court's consideration of very similar issues as part of the PC35 appeals process. It is submitted however that this could not act as a substitute for applying section 32 to the present facts and circumstances.

4.4 An Environment Court decision is not binding – only a High Court decision is authoritative on the Council in terms of the correct application of the law. However, factors which would make it reasonable to have regard to and place some weight on the Court's PC35 analysis in this instance include:

(a) the relatively recent consideration by the Court of very similar issues;
(b) the very high level of scrutiny by the Environment Court over the PC35 provisions and alternatives; and
(c) the Council's intention to effectively integrate the PC35 approach into the structure and style of the PDP with as little substantive change as possible.

4.5 Some caution should however be exercised for the following reasons:

(a) there may be a materially different planning approach being proposed to areas of land which are likely to be subject to the effects of airport noise, and that change would need to be accounted for and appropriately analysed for the purposes of section 32;
(b) there may be materially different facts and circumstances at the present time compared to those which applied when the Environment Court reached its conclusions on the merits of PC35;
(c) we understand that the Environment Court was applying the previous version of section 32 when it determined PC35, whereas the Panel will need to apply the latest (post-2013) version; and

(d) there still needs to be an analysis of the proposed PDP approach which meets the requirements of section 32AA.

Council position on conferencing with QAC

4.6 As a preliminary matter, it is noted that Mr Paetz in his right of reply statement for Chapters 3 and 4 has, in some instances, reconsidered and revised his position from what was recorded in the Expert Witness Conferencing Statement dated 22 March 2016 (following conferencing with planning experts for QAC and the Hansen Family Partnership).

4.7 That is submitted to be entirely appropriate, in so far as it is consistent with Mr Paetz' duty under the Code of Conduct to consider all material provided to the Hearings Panel on the chapters for which he has responsibility, as author of the section 42A report.

4.8 In that respect, Mr Paetz is not "bound" by the Expert Conferencing Statement and the views that he expressed in that statement. We also note that, at the re-convened hearing on 31 March 2016, the planning witnesses for QAC were tested by the Hearings Panel on various matters outlined in the Conferencing Statement and appeared to revise their views or make concessions as to the appropriateness of some of the changes that they suggested.

Supplementary evidence for QLDC

4.9 In terms of the supplementary legal submissions for QAC dated 1 April 2016, some criticism is made of the Council filing a supplementary statement from Mr Barr in response to the conferencing statement. While it is accepted that this is not a typical practice, the criticisms are not accepted by the Council for the following reasons:

(a) Mr Barr did not "choose"[10] not to be involved in the conferencing because it was understood that the purpose would be a technical drafting exercise to ensure that PC35 was appropriately integrated into chapters 3 and 4. As it happened, the conferencing went well beyond that and resulted in broader suggested changes to the chapters that were not anticipated by the Council;

10 See paras 22 and 24 of QAC supplementary submissions.

(b) the Council is not as a matter of law "bound" to accept the view of one of its experts and is entitled to produce evidence which outlines an alternative view;

(c) the Hearing Panel's minute did not constrain the Council or any other submitter from making comment on the Expert Conferencing Statement. While the Council could have outlined its views by way of legal submissions or in its right of reply, it was considered of more assistance for the Panel that expert evidence was produced to enable alternative views to be tested;

(d) the value of Mr Barr's evidence is a matter for the Panel,[11] but it is submitted that QAC's submissions overstate his lack of familiarity with PC35. Quite apart from that, it was evident that, from a strategic and drafting perspective, the issues identified by Mr Barr in his supplementary statement were valid and deserving of careful consideration, and the changes that were included in the conferencing statement impacted directly on the Landscape Chapter, for which he prepared the s42A report; and

(e) there is no basis for QAC suggesting[12] that the Council is resistant to including PC35 provision in the PDP and, indeed, it is clear that the position is quite the opposite. What the Council is resistant to is the undue focus on Queenstown Airport matters at the expense of other infrastructure or natural and physical resources, and more fundamental structural and strategic policy changes to Chapters 3 and 4 which go beyond simply translating PC35 into the PDP format.

Council's position on QAC relief

4.10 Since the re-convened hearing on 31 March 2016, further discussions between QAC and the Council have occurred in an effort to reach agreement on the appropriate content of Chapter 4. While the Council is largely content with the suggested changes to Chapter 4 which have largely been adopted in Mr Paetz' evidence in reply, it continues to have reservations about the position advanced by QAC in respect of Chapter 3,

11 Responding to QAC's submissions at para 25.
12 Paragraph 29 of QAC supplementary submissions.

which it considers goes too far in recognising and providing for the needs of QAC in that chapter, and does not reflect an appropriate balance with other relevant considerations.

4.11 The Council's position on Chapter 3 is largely reflected by the supplementary evidence presented by Mr Barr. Mr Paetz has also reconsidered the conferencing statement position for Chapter 3 in light of Mr Barr's evidence, and has suggested some material changes consistent with Mr Barr's supplementary evidence, as well as a range of other matters which arose through questioning from the Panel and evidence produced by other submitters. Overall, the Council is content with the revised version of Chapter 3 attached to Mr Paetz' statement in reply.

5. INTRODUCTION CHAPTER

Legal status of building outline poles

5.1 Concerns were raised by the Panel as to whether clause 1.7.6 of the Introduction chapter is a trigger for resource consent. The Council's position is that 1.7.6 is not a trigger for resource consent, but for the avoidance of doubt Mr Pickard has suggested a minor clarification to the wording to make this clearer.

5.2 The Introduction chapter is not of a regulatory nature – it does not contain objectives, policies or rules. In any event, 'building profile poles' are specifically excluded from the definition of *Building* in section 2 of the PDP. They are also not structures, given the incorporation of the definition of *building* into *structure*, and therefore do not trigger rules relating to buildings and/or structures within the zone chapters.

6. STRATEGIC DIRECTION CHAPTER

Preference for farming in rural areas

6.1 A number of submitters raised concerns about the 'preference' for farming and agricultural activities in rural areas, as outlined in chapter 3. In the version of chapter 3 provided with the section 42A report, this related to:

(a) Goal 3.2.5;

(b) Objective 3.2.5.5; and

(c) Policies 3.2.5.5.1 and 3.2.5.5.2.

6.2 Having considered the evidence and issues raised by submitters, the Council accepts that the wording of these provisions should be adjusted in a way that will better reflect the intention of the provisions. In particular, it is accepted that the s42A report version of the objective and policies could be interpreted as relating to the economic value or viability of farming activities, and giving undue preference to those activities at the expense of other activities that may occur or seek to locate in rural areas.

6.3 From the Council's perspective, the key issue is about the influence of past and future farming activities and associated rural land management as being a central ingredient in defining the character of rural landscapes. This was explained by Dr Read in her evidence to the Panel.

6.4 It is accepted that a focus on preserving the viability of farming is not appropriate, but rather the focus should be on enabling farming and associated land management practices because of the strong influence those activities have on the District's landscapes. Indeed, it was Dr Read's evidence that there may be relatively few areas of the District where farming is truly viable in terms of the value of the land. But it is submitted to be inescapable that, even when farming activities are not being undertaken as a means of deriving a return on investment, it is the prevalent way in which rural land is managed. For those reasons, it is submitted to be important to recognise this activity, and its ability to evolve over time, because of the way that it has and will continue to shape the character of rural landscapes.

Objective 3.2.5.1 / *EDS v NZKS*

6.5 Objective 3.2.5.1, as recommended through the Council's Reply, is:

> ***Objective –*** *Protect*ion of *the* ~~*natural character quality of the*~~ *Outstanding Natural* Features and *Landscapes* ~~*and Outstanding Natural Features*~~ *from* inappropriate *subdivision, use and development.*

6.6 The Panel has asked the Council to consider the appropriateness of the protect policy, in light of the Supreme Court's *EDS v NZ King Salmon*

decision.[13] Through his Reply, Mr Paetz has accepted the inclusion of the word *inappropriate* into this Objective, and Mr Barr has endorsed the same change. The appropriateness of the inclusion of this word is accepted given section 6 does not give primacy to preservation or protection[14] (although as counsel for QAC rightly accepts, giving primacy or protection of such landscapes *may* be appropriate in some particular circumstances).[15] This change is also based on the rationale of the Supreme Court's decision, which is addressed by Mr Gardner-Hopkins in paragraphs 4.7-4.17 of his Legal Submissions on behalf of the Matukituki Trust.[16] Importantly, a protection against 'inappropriate' development is not necessarily a protection against any development. Rather it allows for the possibility that there may be some forms of appropriate development within these landscapes, and this allows a case to be made. This is also submitted to be appropriate in light of the fact that 96.7% of the District is located within an ONL or ONF.[17]

6.7 What QAC is pursuing is a slightly different matter, in that they are seeking something further down the spectrum and their position is submitted to be far too permissive and too enabling of *new* infrastructure in ONLs. This can be compared to activities such as repair and maintenance of *existing* infrastructure in ONLs, which may well require different treatment. We refer to our response above regarding QAC's submission. Mr Paetz has sought to address this issue through his updated Chapter 3 attached to his Reply Evidence.

7. URBAN DEVELOPMENT CHAPTER

Rationale for Urban Growth Boundaries

7.1 It is understood that the question has been raised as to what purpose the proposed Urban Growth Boundaries (**UGBs**) serve. This was addressed in opening during the presentation of the section 42A reports and associated evidence, but is appropriate to clarify again.

---

13 *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (***EDS v NZKS***).
14 *EDS v NZKS*, paragraph [149].
15 QAC Supplementary Submissions, dated 1 April 2016, paragraph [38].
16 Dated 22 March 2016.
17 Memorandum of Counsel on behalf of QLDC providing requested further information, dated 18 March, Schedule 3.

7.2 At the outset, it is noted that there were very few submissions which suggested that the UGBs were inappropriate as a method.[18] Rather the focus of submissions was about the location of the line, which is submitted to be a matter to be considered at later hearings.

7.3 The evidence in reply of Mr Paetz will address the purpose of and rationale for UGBs as a method. In doing so, it is submitted that the Panel should consider the analysis that Mr Paetz provides in terms of the Council's dwelling capacity model, which very conservatively indicates that substantial capacity for urban activities (including new households in particular) exists within the UGBs. As such, it is submitted that concerns that may have been put before the Panel about the potential for a distortionary effect that UGBs can have on the housing market and inflationary effects on house prices can effectively be disregarded.

7.4 Otherwise, the evidence for the Council is clear that there are a range of sound resource management reasons for using UGBs as a method, and outlining the benefits of their use. Importantly, the evidence of both Mr Paetz and Mr Glasner referred to the certainty that UGBs provide to the Council, developers, and the community, and the benefits that flow from that certainty. Mr Glasner's evidence identified the strong linkages with other Council functions and processes, particularly relating to financial and infrastructure planning and the wider community benefits that can be achieved by the strong integration that UGBs enable.

7.5 Mr Bird's evidence identified sound urban design reasons for the use of UGBs and the range of benefits that can be realised by their implementation. He identified why, in the context of this District, the use of UGBs is appropriate and is likely to produce superior environmental outcomes for urban areas than other policy approaches.

7.6 Therefore, the rationale for UGBs is not solely for landscape protection, or indeed for any overriding single purpose. They serve a range of valid resource management purposes, and also have a range of significant benefits. It is submitted that the Council's evidence demonstrates that they are the most appropriate method for this district and the complex growth and natural environment challenges that it faces.

---

18 Support has been offered by Warwick Goldsmith's clients if they are in the right place. The DPR hearings (to follow) are the appropriate hearings to consider where the right place is. Support for UGBs was also offered by the Queenstown Lakes Community Housing Trust.

Definition of Urban Development

7.7 It is accepted by the Council that the notified definition of Urban Development, notwithstanding that it had been confirmed relatively recently by the Environment Court, was neither clear nor particularly helpful.

7.8 Council officers have therefore considered other definitions form other districts/processes around the country. As explained in the right of reply statement of Mr Paetz, he considers that the definition used in the Proposed Auckland Unitary Plan is much clearer and, with only minor modification to reflect some of the issues with discrete special zones in the Proposed Plan, would be an appropriate definition for the district. That definition is as follows:

> *Urban Development*
> *Means development that by its scale, intensity, visual character, trip generation and/or design and appearance of structures, is of an urban character typically associated with urban areas. Development in particular Special Zones (namely Millbrook and Waterfall Park) is excluded from the definition.*

7.9 The exclusion of the Millbrook and Waterfall Park zones is submitted to appropriately address the issue that those areas might otherwise be regarded as urban development, when in fact they are a discrete and particular form of development located in rural areas. The absence of a specific threshold in terms of minimum lot sizes and/or average dwellings per hectare (for example) is a consequence of there being no minimum lot size in rural areas. As Mr Paetz explains in section 4 of his Reply, by including a potentially arbitrary figure in the definition of Urban Development, this might inadvertently and inappropriately provide a "threshold" where it might be argued that a particular density of development is considered appropriate in rural areas.

7.10 So, while there may still be a degree of subjectivity in the definition that is proposed, it is submitted that this is not a significant issue for the purpose of applying and interpreting the Goals, Objectives and Policies in the strategic chapters.

8. TANGATA WHENUA CHAPTER

Scope to make changes suggested by Panel

8.1 The Panel suggested to Mr Pickard during the hearing that numerous changes to Chapter 5 required consideration. In short, following the withdrawal of Queenstown Park Limited (**QPL**) and Remarkables Park Limited (**RPL**) submission on this chapter (as addressed in more detail below), it is submitted to be doubtful that there is scope to make a number of changes suggested. It is also submitted to be telling that Tangata Whenua (Te Ao Marama Incorporated[19] and KTKO[20]), who were key parties in preparing the notified chapter, both through their submission and through their presentations on Day 2 of the hearing, were strongly in support of the Council's position.

Withdrawal of QPL and RPL's submission

8.2 QPL and RPL formally withdrew those parts of their submissions relating to the Tangata Whenua chapter in their entirety.[21] These submissions were wide-ranging in nature, seeking alternative relief that included the deletion of Chapter 5 in its entirety and, if the proposed deletion was not accepted, that the provisions were amended as outlined in their submissions. The withdrawal of QPL and RPL's primary submissions raise the question of the status of Real Journeys' further submissions, supporting the primary submissions.

8.3 Clause 8(2) of Schedule 1 confirms that "A further submission must be limited to a matter in support of or in opposition to the relevant submission made under clause 6". It cannot seek relief of its own. The underlying purpose of a further submission is to enable a person to have standing to have their views considered on an original submission that may affect that person in some way, either beneficially or negatively.

8.4 Where a further submission *opposes* the relief sought in an original submission and the original submission is withdrawn, the further submission simply falls away because there is no longer anything to oppose.

---

19 #817.
20 #810 - Te Runanga o Moeraki, Kati Huirapa Runaka ki Puketeraki, Te Runanga o Otakou and Hokonui Runanga.
21 By way of Memorandum of Counsel dated 4 March 2016.

8.5 The position is arguably more complex where a further submission supports the relief in an original submission and the original submission is withdrawn. On one view, the position should simply be the same as noted above, i.e. the further submission falls away because there is no longer anything to support. The alternative view is that it would be contrary to the public participatory nature of the RMA for a further submission supporting an original submission to have no standing once the original submission is withdrawn where the subject matter directly affects the further submitter. However, the answer to that is that the further submitter would have had the opportunity to lodge an original submission, and if they did not, then that was at their own risk.

8.6 On balance therefore, it is submitted that Real Journeys' further submissions have no status given the withdrawal of the original submissions. We are not aware of Real Journeys submitting that they still have standing to be heard through Chapter 5, and in fact the company did not appear at the Introduction hearing in support of their further submission (nor provide any evidence in support of their further submission).

Incorporation by reference of IMP

8.7 As discussed in Mr Pickard's Reply, clarification was sought as to the number and specificity of Iwi Management Plans[22] (**IMPs**) referenced in Chapter 5. The public notice (for notification of Stage 1) lists the IMPs as documents that are incorporated into the PDP under Clause 34(2)(c) of the First Schedule of the RMA.[23]

8.8 Clause 30 of Schedule 1 provides that standards, requirements, or recommended practices (of international or national organisations, or as prescribed in any country of jurisdiction), or any other written material that deals with technical matters and is too large or impractical to include in, or print as part of the PDP may be incorporated by reference either in whole or in part. Material incorporated by reference in the PDP has legal effect as part of the PDP.

---

22 Kāi Tahu ki Otago Natural Resource Management Plans 1995 and 2005.
Te Tangi a Tauira: The Cry of the People, the Ngāi Tahu ki Murihiku Iwi Management Plan for Natural Resources 2008.

23 http://www.qldc.govt.nz/assets/Uploads/Planning/District-Plan/Incorporation-of-Documents-by-Reference/Public-Notice-consultation-to-incorporate-material-by-reference-3.pdf
http://www.qldc.govt.nz/planning/district-plan/proposed-district-plan/incorporation-of-materials-by-reference/

8.9 Although the IMPs arguably could sit within clause 30(1)(c), putting to one side whether IMPs sit neatly within any of the categories listed in clause 30(1) of Schedule 1, the IMPs are of course already matters that the Council must have regard to under section 74(2) of the RMA in preparing the PDP. It is submitted that the reference to the IMPs in Policy 5.4.1.3 as matters to have regard to when making resource management decisions is appropriate, as Mr Pickard has endorsed through his Reply. In terms of this Policy reference however, it is not considered appropriate for them to be 'incorporated by reference' in terms of having legal effect. Having legal effect is a matter for rules, rather than policies.

9. LANDSCAPE CHAPTER

9.1 A number of submitters express support for the Council's policy approach that landscape lines should be mapped, provided they are in the right place (for example Mr Ben Farrell for Glentui and other submitters). Some submitters, such as the Upper Clutha Environmental Society Inc, suggest however that the *status quo* under the ODP is appropriate. The location of the lines is of course a matter for a later hearing, but the Panel's consideration of Chapter 6 includes policy direction on the mapping of ONLs and ONFs on the PDP planning maps.

9.2 It is the Council's position that compelling evidence in support of an explicit mapping approach has been presented by Dr Read and Mr Barr, which clearly outlines the merits and benefits of this policy approach (both generally and in comparison to the status quo under the Operative Plan). By contrast, it is submitted that there has been no countervailing expert evidence which seriously challenges the merits of mapping of ONL and ONF boundaries.[24]

Policy direction for Rural Landscape Classification

9.3 There has been some resistance from submitters as to the approach taken in the PDP, where there is one set of policies/landscape assessment matters for the Rural Landscape Classification (**RLC**) within the Wakatipu and Clutha Basins. These submitters prefer the dual policy approach in the ODP, where non-ONL Wakatipu Basin rural land is instead categorised as

24 UCES do seek to retain a case by case approach, but it was conceded at the hearing that lines would be supported, if they were in the right place.

Visual Amenity Landscape, and the remainder falls within the Other Rural Landscapes category (ie. largely the Clutha Basin). Mr Goldsmith places substantial weight on the fact that there was a Environment Court two week hearing, some 17 years ago in 1999 which considered and determined this position.

9.4 The Council accepts that regard should be had to the Environment Court's 1999 decision, but submits that equally if not more important in determining whether this position should continue in the PDP, is the Council's and community's experience with the interpretation and implementation of the 1999 policy approach over the last 15 years or so, particularly with respect to the environmental outcomes that it has resulted in.

9.5 After considering the evidence filed by submitters and presented at the hearing, there is no change in the Council's position, which remains that the PDP objectives and policies can be applied across the District for non-mapped rural land. Falling back on the *status quo* simply because people are familiar with it, is not considered to be a particularly compelling resource management reason for its retention. The Council's evidence has set out the reasons why a different approach has been taken through the PDP. Dr Read in particular outlined her concerns with the ODP's dual approach, and the inefficiencies she has experienced when operating under the ODP framework in section 5 of her evidence. The Council's evidence indicates that, notwithstanding differences in character between the Wakatipu and Upper Clutha basins, the proposed objective and policy framework enables such differences to be appropriately considered. This is also addressed in Mr Barr's right of reply.

9.6 For these reasons, it is submitted that it is not necessary to have a split policy approach for different parts of the District. Furthermore, submitters who oppose the Council's proposed policy approach have not produced expert evidence which has materially addressed the inefficiencies in the ODP as to the need to determine the landscape classification of the site and its vicinity, every time an application is made within the Rural General Zone. The costs, inefficiencies, and uncertainties of this approach, coupled with the absence of specific benefits, are submitted to be evident and count strongly against its retention in terms of section 32 of the RMA.

9.7 In terms of submitters' concerns and a question from the Panel that previous litigation may be a 'sunk cost', it is submitted that this factor should be accorded little, if any, weight. Quite apart from the fact that it is doubtful that the costs of previous litigation are strictly relevant in terms of section 32, Environment Court decisions on consent applications have been taken into account in terms of the location of mapped ONLs, and the process behind the boundary locations will be addressed in evidence presented to the Rural Hearing. As such, the outcome of previous litigation has been considered and applied by the Council – but that does not of itself justify a different policy position.

Open character

9.8 The Hearings Panel has requested legal submissions in response to submissions made by Mr Goldsmith as to what is meant by "rural character".[25] His concern relates to the Council's alleged desire to protect or maintain the "open character" of RLC land, in light of the Environment Court's statement in 1999 that "*We consider that the protection of open character of landscapes should be limited to areas of outstanding natural landscape and features (and rural scenic roads)*".

9.9 We repeat our earlier submissions that what the Environment Court concluded in terms of a policy position or factual conclusion in 1999 should not and does not bind the Council to adopt the same position many years later. With respect, the Court's statement is a value judgment, in the same way that the Council's position which is advanced today represents something of a value judgment based on its experience of implementation of the ODP and its assessment of the rural environment as it stands today.

9.10 The background to and basis for the Council's policy position on management of rural landscapes has been outlined in the evidence of Dr Read and Mr Barr (and addressed again in Mr Barr's right of reply). Their expert evidence and assessment is that, as a matter of fact, rural landscapes generally exhibit openness and a lack of domestic elements, which in turn contribute strongly to the factors which define rural character.

25 Paragraphs 7.9-7.10, in Legal Submissions for RLC Issues, undated.

9.11 In summarising the evidence presented by the Council on this issue, the following key conclusions can be drawn:

(a) the open character of productive farmland is a key element of the landscape character which can be vulnerable to degradation from subdivision, development and non-farming activities;

(b) the prevalence of large farms and landholdings contributes to the open space and rural working character of the landscape; and

(c) the predominance of open space over housing and related domestic elements is a strong determinant of the character of the District's rural landscapes.

9.12 Mr Goldsmith's submissions are not of course evidence. Furthermore, we are not aware of any expert evidence before the Panel which seriously contradicted that of Dr Read or Mr Barr on this issue.[26] In the circumstances, it is submitted that it is both reasonable and permissible for the Council to seek to recognise openness in its rural landscape policies.

Scope - Policy 6.3.1.8

9.13 Concerns were raised by QAC as to the scope for Mr Barr to recommend a change to Policy 6.3.1.8 (notified numbering) – in the section 42A report the change was linked to the submission of Real Journeys Limited. Mr Barr has identified two submissions that directly raise issues of light and impacts on the night sky, that the recommended change can be linked to, being the submissions G Bissett (340) and D & R Hughes (581). It is therefore submitted that no issues of scope exist for the recommended change to Policy 6.3.1.8

10. OTHER MATTERS

Section 32 requirements

10.1 It was subjected by Ms Wolt for Trojan Helmet Limited that submitters do not need to provide section 32AA analysis to demonstrate that their position is more appropriate than that of the Council's. With respect it is submitted that this is incorrect, as is her specific submission that "*No onus lies with a*

26 Including the evidence of Mr Baxter, which was focused on Wakatipu Basin.

submitter to establish that the subject provisions of a proposed plan are correct or appropriate".[27]

10.2 It is accepted by the Council that the law is that there is no presumption in favour of the Council's notified or recommended provisions. To suggest however that there is no onus on submitters to provide probative evidence or analysis to demonstrate that their suggested relief is more appropriate than the Council's position or indeed any other parties relief would render the Schedule 1 process unworkable. If the Panel is to accept submitters' positions, they need to be satisfied that the submitters' case is 'more appropriate' based on the evidence before it and also under the further evaluation that must be made under section 32AA, if further changes are to made by the Panel.

QLDC submission on Urban Design

10.3 The Panel asked for an update on the part of QLDC's corporate submission that states that a "*workstream will be pursued to develop a Design Guide, with community and design professional involvement*". This is combined with a statement in the submission that "*whilst the PDP contains a number of provisions promoting good design, it is considered that a Residential Design Guide, which is ultimately incorporated by reference in the PDP, would help reinforce design expectations*".

10.4 This submission is not on any part of the notified Stage 1 chapters, and instead is a statement about a work stream within Council. For any new design guide to be incorporated by reference, it would need to be incorporated by reference at notification of either a variation to the PDP, or in Stage 2. It is submitted that this statement in QLDC's corporate submission is not a matter for the Panel.

Council resolutions

10.5 During the Council's opening, the Panel asked the Council to advise whether it has made any further resolutions, following the original resolution made on 17 April 2014 to formally commence the review. The Council's resolution made on 30 July 2015, where the Council approved the Proposed

27 Legal submissions for Trojan Helmet Limited (Submitter 443, 452 and 1157) dated 7 March 2016, at paragraph 39.

District Plan 2015 (Stage 1) for notification pursuant to section 73 and clause 5 of Schedule 1 of the RMA, is directly relevant to the matter of scope of the (partial) District Plan Review. Although not an express resolution as to scope, it does in effect confirm the revised scope of Stage 1 of the Review, through the approval to notify the various chapters attached to the report, which clearly reflects that the review is being undertaken through stages.

Plan Change 50

10.6 The Panel asked the Council to advise whether PC50 would be notified through Stage 2 of the Review. In short, there is no intention that it will be, and assuming the Environment Court appeals are resolved and the plan change approved, it will follow the course of Schedule 1 of the RMA and become operative.

Integration between Stages 1 and 2, and excluded chapters

10.7 The Panel asked the Council to provide some further information in its reply, on the intended integration between Stage 1 and Stage 2 chapters, and chapters/topics excluded from the Review.

10.8 As decisions are made on submissions on Stage 1 PDP provisions under clause 10 of Schedule 1, the deeming effect of section 86F of the RMA will come into play.[28] While section 86F is a deeming provision, it will have the effect of treating PDP rules as operative. Indeed, if there are no submissions in opposition to PDP rules, section 86F(a) provides that those rules are already to be treated as operative. Otherwise, if there are no appeals on rules after decisions on submissions are released, those rules will also be treated as operative by virtue of section 86F(b). Finally, rules that have been appealed will not be treated as operative until appeals are withdrawn or determined.

10.9 The deeming effect of that is illustrated below, noting that all rules will have legal effect once decisions on submissions are made:

---

28 *Section* 87F states that: *A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—*
(a) no submissions in opposition have been made or appeals have been lodged; or
(b) all submissions in opposition and appeals have been determined; or
(c) *all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.*

PDP rules where no submissions in opposition	PDP rules not appealed	PDP rules appealed
Deemed operative under section 86F(a)	Deemed operative after closing date of appeals under section 86F(b)	In legal effect, but not operative until appeals withdrawn or determined

10.10 For rules and associated provisions in the first two categories of the table above, what will in effect occur is that those PDP provisions will become part of the ODP, by effectively replacing the previous corresponding rules and associated provisions of the ODP that were subject to Stage 1 of the Review.[29]

10.11 Section 86F of course expressly applies only to *rules*, rather than other plan provisions such as objectives and policies. Therefore as a matter of law, the unchallenged PDP provisions which are associated with deemed operative rules will not also be deemed to be operative by section 86F. However, to the extent that those provisions are not subject to appeal, they would have overriding weight compared to the corresponding provisions of the ODP, which would be operative and in legal effect only on a nominal basis.[30]

10.12 Therefore, over time as the appeal process moves on, the "size" of the PDP will progressively shrink as rules and associated provisions move back into the ODP by "joining" the non-reviewed provisions that were excluded from Stage 1 of the Review. The same process will apply to Stage 2 of the Review. Those provisions that are excluded from the Review will simply stay in the ODP.

29 In order to formally ensure that the reviewed provisions of the PDP replace the corresponding (Category B) provisions of the operative plan, final approval of the PDP provisions under clause 17 of Schedule 1 of the RMA is required.

30 It is only at the point when the PDP or discrete parts of the PDP are formally made operative under clause 17 of Schedule 1 that corresponding ODP provisions would be extinguished as a matter of law.

Update on panel's memorandum regarding scope and minor errors

10.13 In **Schedule 4**, an update as to the Panel's memorandum regarding scope and minor errors is provided.

DATED this 7th day of April 2016

J G A Winchester / S J Scott
Counsel for Queenstown Lakes District Council

Schedule 1

Reply by Mr Anthony Pickard for the Introduction and Tangata Whenua chapters

[Provided as separate PDF]

Schedule 2

Reply by Mr Matthew Paetz for the Strategic Direction and Urban Development chapters

[Provided as separate PDF]

Schedule 3

Reply by Mr Craig Barr for the Landscape chapter

[Provided as separate PDF]

SCHEDULE 4

RESPONSE TO PANEL'S MEMORANDUM TO COUNCIL DATED 16 FEBRUARY 2016 – UPDATE (through blue text)

Para	Extract from Panel's Memorandum	Proposed Action (updated through Reply)	Explanation
7	On Map 13 the identification of the Resort – Jacks Point Special Zone also has the notation "PC 44". It is unclear whether this area is within Stage 1 or not.	Further analysis is underway to determine how to address the inconsistency between the 'Legend and User Information' for the planning maps and the introduction of objectives, policies, rules and a structure plan that relate to the PC44 area.	The advice note on the Map Legend on the first page of the Planning Maps says: "*2 Plan Changes. Land that is subject to a current Plan Change is not part of the District Plan Review and has been included for information purposes only. The zonings of the Operative District Plan apply to these areas, and Operative zones are shown in the legend where relevant*". This advice note applies to the area covered by PC 44 – Hanley Downs. An Independent Commissioner recently released recommendations on PC 44 and this decision was adopted by Full Council on 24 February and is being advertised on 9/10 March 2016. The notified Jacks Point Special Zone is acknowledged to include provisions that apply specifically to the area covered by PC 44, and submissions have been received on these provisions. The Council is continuing to evaluate the options available to it and intends taking a paper to a Full Council meeting in May, where a decision will be made.

Para	Extract from Panel's Memorandum	Proposed Action (updated through Reply)	Explanation
16	We also note that the Visitor Accommodation Subzone has been applied throughout the maps with the same notation on proposed zones and operative zones. It is unclear what this notation relates to in the PDP.	Use Clause 16(2) of Schedule 1 to clarify that the Visitor Accommodation subzones shown over operative zones, are operative (and shown for information purposes) by including the word "(Operative") after the notations on the planning map legends. Use Clause 16(2) of Schedule 1 to remove the Visitor Accommodation subzones from the planning maps where they are located over	To avoid any confusion, specific provisions relating to Visitor Accommodation were withdraw under clause 8D of Schedule 1 of the RMA, by public notice, in November 2015 (see **Schedule 2**).[31] The clause 8D notice withdrew the provisions from the following chapters of the PDP: • Chapter 7 – Low Density Residential • Chapter 8 – Medium Density Residential • Chapter 9 – High Density Residential • Chapter 10 – Arrowtown Residential Historic Management Zone • Chapter 11 – Large Lot Residential The definition of "Visitor Accommodation" and the Visitor Accommodation provisions that are included within the following rural zones were not withdrawn, and these sub-zones are correctly shown on the planning maps: • Chapter 21 – Rural • Chapter 22 – Rural Residential and Rural Lifestyle Visitor Accommodation subzones are also included on the planning maps over operative zones (eg Township). These subzones on the PDP planning maps are identical to the equivalent zones on the ODP planning maps, and were shown on the PDP planning maps for information purposes only. It needs to be made clear that these are "operative" subzones.

31 Of opening legal submissions for QLDC.

Para	Extract from Panel's Memorandum	Proposed Action (updated through Reply)	Explanation
		one of the residential zones, and remove from the map legends where appropriate.	Visitor Accommodation subzones are also shown over proposed residential zones on the PDP planning maps. These were also shown for information purposes. There are no rules in the PDP that trigger their use (and they are not related to the withdrawn visitor accommodation provisions referred to above). They are in essence, orphan overlays on the PDP planning maps, and therefore can be withdrawn without prejudice to any party.
18	Chapter 2 - Definitions This contains a number of definitions that only apply to zones that are not within Part 1 of the Review. This appears to be inconsistent with the statement that those zones are not part of this stage. We are also unsure of the relevance of showing some definitions with strike-out	Use clause 16(2) to remove the underlined text so that a clean chapter remains. No changes will be made to the Definitions chapter at this stage, in relation to superfluous definitions.	The definitions chapter should not have been notified with strikeout and underlined text. What this shows is the difference between ODP and PDP definitions. A clean version of the chapter should have been notified. New definitions necessary for Stage 2 will be introduced at the time of Stage 2. Any superfluous definitions that have been notified as part of stage 1, but which do not appear in Stage 1 chapters, will be reconsidered later in the Stage 1 hearings process.

Para	Extract from Panel's Memorandum	Proposed Action (updated through Reply)	Explanation
	and/or underlining, notwithstanding the explanation at the commencement of the Chapter.		
19	Chapter 27 – Subdivision Rule 27.5.1 sets minimum site sizes for zones which are not included in Stage 1. Similarly Rule 27.5.4 applies rules to zones that are not in Stage 1. Section 27.7.1 also refers extensively to the Open Space Zone provisions, although that is not part of Stage 1.	This matter is being considered further and the Council's position will be confirmed at the Subdivision hearing.	

Para	Extract from Panel's Memorandum	Proposed Action (updated through Reply)	Explanation
20	Chapter 36 – Noise The rules in this chapter appear to apply to zones which are not included in the PDP to date. In addition to the apparent inconsistency, it is not clear whether the rules apply to operative zones with the same name as zones in the PDP.	This matter is being considered further and the Council's position will be confirmed at the District-Wide hearing (where the noise chapter will be considered).	