BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

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LEGAL SUBMISSIONS FOR:

Darby Planning LP (#608),
Soho Ski Area Limited (#610),
Treble Cone Investments (#613)
Lake Hayes Ltd (#763)
Lake Hayes Cellar Ltd (#767)
Mount Christina Limited (#764)

Hearing Stream 02 - Rural, Rural Residential and Rural Lifestyle, Gibbston Character Zone, Indigenous Vegetation and Wilding Exotic Trees - Chapters 21, 22, 23, 33 and 34

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1. Introduction

1.1 These legal submissions are presented on behalf of the submitters listed below in respect of the Proposed District Plan Stage 1 ("**PDP**") and complements the relief sought within the submissions lodged by the submitters under clauses 6 and 8 of Schedule 1 Resource Management Act 1991 ("**RMA**").

(a) Darby Planning LP (#608),

(b) Soho Ski Area (#610)

(c) Treble Cone Investments (#613)

(d) Lake Hayes Ltd (#763)

(e) Lake Hayes Cellar Ltd (#767)

(f) Mount Christina Limited (#764)

1.2 The submission of Darby Planning Limited ("**DPL**") is an umbrella submission seeking combined relief in respect of Hearing Stream 02 for the above (and additional other) entities as listed on page 8 of Christopher Ferguson's evidence dated 21 April 2016.

1.3 Each of the entities identified above have site specific interests which are fully detailed in the original submissions to Council. The relief sought by the Submitters is however aligned and the legal issues are common to each entity.

1.4 The interests represented by these submissions are wide ranging from ski fields, through to rural living, through to boutique commercial development in a rural setting. However the underlying principle for each of these entities' interests in the PDP is the same; this District's rural areas have significant potential to be used for a wide range of activities, while still retaining their very important landscape, character and amenity values. Lake Hayes Cellar (Amisfield) Treble Cone ("**TC"**) and Soho (Cardrona SAZS) represent existing nodes of development within the rural zone. It is efficient and very beneficial in terms of positive effects for the District to ensure that use of these existing nodes of development can be further diversified, developed and optimised.

1.5 While heading in the right direction, the PDP still requires further amendments to ensure that development is contemplated, enabled and encouraged in an appropriate manner.

1.6 The legal submissions and evidence of the above entities presented in respect of Hearing Stream 01B are fully adopted and relied upon in these submissions.[1] Where particularly relevant to the issues raised in these submissions, the Commissioners are referred back to Topic 01B submissions and evidence. As discussed further below under 'Procedural Matters', this repetition is required due to the allocation of different Commissioners across interrelated topics.

2. Rural Chapter 21

Existing and future environments

2.1 The general theme progressed by the submitters in respect of the rural zone is to recognise and provide for the value of rural land as a resource which enables a broader range of activities than farming and includes conservation, recreation activities, tourism, employment, and rural living.

2.2 Within this zone exists a wide variety of land types and associated activities, as discussed by Mr Ferguson at page 9 of his Hearing Stream 02 evidence.

2.3 It is the duty of the Hearings Panel to recognise and provide for those variations in land use and activity in planning for the future generations of the District, in order to give effect to sustainable management under the RMA.

2.4 DPL is not opposed to farming being a recognised and permitted activity within the rural zone. However the way in which farming is given a preference over other activities which are rural-based within the higher order objectives of Chapter 21 may have unintended consequences on other desirable activities to be carried out in rural zones in the future.

2.5 The starting point for consideration by decision makers under the RMA is the existing environment to which future provisions of the PDP are going to apply. The "environment' as interpreted under the RMA is not only the current description of its components, as identified in section 2;

> ***"environment** includes—*
>
> *(a) ecosystems and their constituent parts, including people and communities; and*
>
> *(b) all natural and physical resources; and*

[1] Submissions of Ms Baker Galloway dated 18 March 2016 on behalf of Darby Planning Limited and others

(c) amenity values; and

(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters".[2]

2.6 The 'environment' also includes the past environment "*as described in the relevant district plan and the reasonably foreseeable environment*".[3] The future component of the environment is well established in the leading Court of Appeal case; *Queenstown Lakes District Council v Hawthorn Estate Limited* where, in the context of a decision on a resource consent the Court analysed the scheme and purpose of the RMA and concluded;

> *"In summary all of the provisions of the Act to which we have referred lead to the conclusion that when considering the actual and potential effects on the environment of allowing an activity, it is permissible, and will often be desirable or even necessary, for the consent authority to consider the future state of the environment, on which such effects will occur".*[4]

2.7 More recently, in *Far North District Council v Te Runanga A Iwi o Ngati Kahu*, the Court of Appeal confirmed that;

> *"In its plain meaning and in its context, we are satisfied that 'the environment' necessarily imports a degree of futurity."*[5]

2.8 Although the above authority was in the context of resource consent applications, the concept of futurity in the existing environment has also been considered in plan change applications (and partial plan reviews).

2.9 The High Court in *Shotover Park v Queenstown District Council*[6]. In *Shotover Park*, Justice Fogarty confirmed that where some of the land the subject of a plan change is already the subject of resource consents likely to be implemented, the planning authority has to write a plan which accommodates the presence of that activity.

> *"The purpose of a territorial authority's plan is to "establish and implement objectives, policies and methods to achieve integrated management... of the land and associated natural and physical resources of the district. Where some of that land is already the subject of resource consents likely to be implemented, and the plan has not yet been made for that locality, it is natural*

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[2] Section 2 RMA
[3] *R J Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [20]
[4] *Queenstown Lakes District Council v Hawthorne Estate Limited* [2006] NZRMA at [57]
[5] *Far North District Council v Te Runanga A Iwi o Ngati Kahu* [2013] NZCA 221 at [80]
[6] *Shotover Park Limited v Queenstown lakes District Council* [2013] NZHC 1712

enough that the territorial authority has to write a plan which accommodates the presence of that activity."[7] (emphasis added)

2.10 It follows that unless there is substantive evidence establishing that the existing use of the Rural Zone is predominantly agricultural, and justifying that the future use of the Rural Zone should similarly be restricted to being predominantly agricultural production, then planning provisions providing for that outcome are inconsistent with the purpose of the Act and authoritative case law interpreting that purpose.

2.11 A current description of the District's (non ONL) rural zones in the Operative Plan is as follows;

> *"Visual Amenity Landscapes (VAL) are the landscapes to which particular regard is to be had under section 7 of the Act. They are landscapes which wear a cloak of human activity much more obviously — pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses, and tend to be on the District's downlands, flats and terraces. The extra quality that these landscapes possess which bring them into the category of VAL is their prominence because they are:*
>
> *- adjacent to ONFs or ONLs;*
>
> *- landscapes which include ridges, hills, downlands or terraces; or*
>
> *- a combination of the above"*
>
> *…*
>
> *"Other Rural Landscapes (ORL) are those landscapes with lesser landscape values (but not necessarily insignificant ones) which do not qualify as ONLs or VALs".*

2.12 The landscape evidence of Dr Read for Hearing Stream 02 does not assess the landscape character of the District's rural zones as being characterised by farming.

2.13 Similarly, the planning evidence of Council states the following;

> *"Farming is the predominant and longstanding land use in the Rural Zone, and because of the social and economic wellbeing derived from the utilisation of the soil resource. Also, because from a landscape perspective, the rural character of large landholdings is an important element and historical influence of the District's landscapes both in terms of the ONF/L and RL landscapes."*[8]

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[7] Ibid at para [112]
[8] Para 8.11 s42A report Rural Chapter

2.14 The above statement does not appear to be supported by landscape evidence, or by other expert evidence. Even if evidence were produced on the historical practices of farming in the District, that is not the current planning situation in the ODP, and is not necessarily the future environment.[9]

2.15 The planning framework plays an important role in determining the appropriateness of an activity and the significance of an activity's effects in the future. The planning context and the environmental context are both important considerations and therefore it is important to get it right at this stage of the review by applying provisions which reflect the 'environment' in the context of sustainable management.

2.16 In order to give effect to the existing and future environment, the amendments to Chapter 21 proposed by Mr Ferguson should be adopted.

3. Ski Area subzones

3.1 The overall approach to SASZs is to ensure the PDP provides for the maintenance and enhancement of the natural environment, landscape and amenity values, while recognising and providing for the significant positive benefits to be derived from the use and development of those natural resources for commercial recreation and ancillary activities. The ski areas aim to continue to increase their significant economic contributions to the district by continuing to develop and diversify services offered on mountain, not only during winter but year round. Such improvements also contemplate improvement in access to the mountain, and visitor accommodation and other commercial services on the mountain.

3.2 Many of the changes in the latest version of Council's amended chapter reflect the relief sought by the submitters.[10] Those amendments are supported by the submitters and would be assisted by further amendments to provide for:

(a) a more accurate definition of SASZ activities to provide certainty; and

(b) transportation connections and passenger lift systems, in order to ensure the SASZs are efficiently integrated with the district roading network;

(c) the inclusion of visitor accommodation provisions .

[9] Referring in support to cases relied upon in legal submissions of Ms Baker Galloway for Darby Planning Limited and others, dated 18 march 2016 which establish the considerations of future generations in plan making

[10] Refer paras 86-88 evidence of Chris Ferguson dated 21 April 2016

SAZS Activities

3.3 To provide certainty, a detailed list of SASZ activities is sought. Given the breadth of activities that could take place as an essential part of the SASZ development, it is considered important that these are spelt out, so that in the future there is no doubt they are appropriate.

Transportation connection and passenger lift systems

3.4 TC and Soho are seeking a regime that will ensure any subsequent proposal to link the SASZ with the local roading network, is enabled. There are significant efficiencies, benefits and commercial advantages to be gained from enhancing access to the SASZ district wide. This can be achieved either by the amendments to the rules proposed by Mr Ferguson at his pages 24 and 25 (for where the activity is outside of the SASZ), or alternatively, through the expansion of the SASZ so that it connects to the roading network.

Visitor accommodation

3.5 The proposal in respect of accommodation on the mountains has been further refined since the submission was lodged. The primary purposes for accommodation buildings will be visitor accommodation, and worker accommodation. Given the length of the ski season in particular, the duration of stay of workers in particular, could be 6 months, and therefore an exemption to the standard rule for visitor accommodation in terms of length of stay is suggested to provide a set of provisions that enables buildings for visitor and worker accommodation to be assessed as restricted discretionary activities.

3.6 The submitters are committed to ensure that such developments come hand in hand with positive landscape and ecological effects on site, and in this regard additions have been suggested by Mr Ferguson to the RD rule 21.5.32 as proposed by the 42A report writer.(page 32).

3.7 As noted in the transportation section above, TC and Soho sought expansion of the zone. This will be addressed in that hearing stream. The primary reason for the zone expansion is to ensure the SAZS transportation network is linked and integrated with the local roading network. The zone expansion is not intended to enable visitor accommodation below, and disconnected from, the traditional ski area (i.e., the snow line). Therefore additional Standards are proposed in Mr Ferguson's evidence at page 33, restricting Visitor Accommodation to above an altitude of 1100m.

Landscape categories

3.8 Council's most recent track change version of the higher order provisions of Chapters 3 and 6 do not include amendments sought by the submitters in Hearing Stream 01 to ensure that SASZs are generally excluded from the landscape categories rather than just the landscape assessment matters.[11]

3.9 Mr Barr's recommendations still retain that SASZs are excluded only from the ONFL assessment matters (not the whole category including objectives and policies).

> ***6.4.1.3*** *The landscape assessment matters apply only to the Rural Zone, and are not applicable to the following:*
>
> *Ski Area Activities within the Ski Area Sub Zones.*

3.10 This amendment is not assessed in the s 32AA report appended to Mr Barr's report

3.11 The exclusion of the SASZs from the landscape categories generally was discussed in the further submission from Counsel dated 30 March 2016. Those submissions are adopted in full and are summarised as follows;

(a) Landscape provisions in Chapters 3 and 6 do not provide for individual recognition of the characteristics of ONFLs within the District. What has occurred is a 'blanket' regime which is restrictive towards all development, in all ONFLs to the same level, regardless of their individual attributes;

(b) If the Supreme Court's reasoning in *King Salmon* in the determination of what is '*inappropriate*' is considered within the context of what is sought to be protected, then clearly those characteristics, features, and values must be more explicitly identified in the Plan if such identification is to be of meaningful assistance to decision makers;

(c) If the key characteristics and values of each individual ONFL were identified in the Plan that would include (in some instances) the observance of non-natural aspects, such as ski field buildings, ski lifts, and access roads, which are all important parts of the landscape. Any future development should be assessed for appropriateness against those particular attributes;

(d) The significant elements of human modification to SASZs must detract from the 'naturalness' of the adjacent landscapes and raise questions as to whether the SASZs could actually form part of a separate landscape. Moreover, even if the SASZs are considered to form part of the adjacent ONFL despite their

[11] Rule 6.4.1.3

significant modification, those particular and unique characteristics of the SASZs should be explicitly recognised in the Plan, by way of reference to the particular ONFL (for example, ski lifts, access roads, and lighting.

3.12 The above matters must be taken into account when assessing the attributes and the 'naturalness' of each SASZ and when describing those values within the Zone purpose and when considering provisions proposed to provide for effective and efficient transportation networks.

3.13 Mr Osborne's economic evidence considers the importance of tourism as a significant contributor to the economy of the District and that that industry relies heavily on the ONFLS of the District.

> *"The competitive advantage exhibited by the Queenstown market is based on its outstanding natural landscape and to a lesser degree the agglomeration of visitor related activities. This natural asset contributes hundreds of millions of dollars to the District's GDP every year. The relative value of this nationally significant asset cannot be underestimated in terms of its value to the local community. It is fundamental, therefore, that the relative value associated with it is safeguarded from potentially inappropriate and conflicting activities".*[12]

3.14 Mr Osborne's evidence however is not based upon landscape evidence which identifies more clearly those 'inappropriate and conflicting activities'. Moreover that evidence appears in support primarily for the Rural Zone provisions which are not relevant for the preservation of the ONFLS of the District. Mr Osborne's evidence also fails to make an assessment as to the actual effects of tourism on ONFLs.

3.15 Amendment of the SASZ provisions consistent with the comments above, and in accordance with the evidence of Mr Ferguson, will adequately provide for the appropriate protection of ONFLs. That approach will also provide for an effects-based and case by case assessment, as is envisaged under the RMA. Any future developments can therefore provide for economic benefits and contribute to economic growth and employment, in terms of section 32(2)(a)).

4. *Chapter 33 Indigenous vegetation*

4.1 The submissions by Soho and TC also seek inclusion of an exception to Rule 33.3.4 for indigenous vegetation clearance on land managed under the Conservation Act in accordance with a Conservation Management Strategy or Concession; under the

[12] Page 3, summary of Philip Osborne evidence Topic 02

Land Act, in accordance with a Recreation Permit; or the Reserve Act in accordance with a Reserve Management Strategy. The Soho Ski Area is located within Crown Pastoral Lease and is subject to a Recreation Permit under the Land Act. Where land is subject to the framework of such legislation, Soho submitted that it is a duplication of process and therefore inefficient for the District Plan to subject this land to further rules and potential consent processes when such matters have already been considered. Soho seeks to exempt indigenous vegetation clearance on its land for these reasons and it is submitted that this is appropriate.

4.2 In addressing these submissions, the s.42A report recommends this relief be rejected because it would not result in the Council fulfilling its function under s.31 of the Act. However, the author may have overlooked s.74(2)(b) of the Act, which states:

> *(2) In addition to the requirements of section 75(3) and (4), when preparing or changing a district plan, a territorial authority shall have regard to—*
>
> *…*
>
> *(b) any—*
>
> *(i) management plans and strategies prepared under other Acts; and*
>
> *…*
>
> *to the extent that their content has a bearing on resource management issues of the district; and*

4.3 In addition, s.32(1) requires an evaluation report to examine whether the provisions in the proposal are the most appropriate way to achieve the objectives by –

> *(i) identifying other reasonably practicable options for achieving the objectives;*

4.4 A consideration of options is not limited to just RMA regulation and understanding and incorporating broader context is essential[13] and desirable to inform this evaluative process.

4.5 The nature of the relief sought by Soho and TC falls within the realm of both a management plan and strategy prepared under other Acts and which has a bearing on the resource management issues relating to indigenous vegetation clearance; and another reasonably practicable option for achieving the relevant objectives of the PDP.

[13] Page 11, A Guide to section 32 of the Resource Management Act 1991, MfE (December 2014)

4.6 A similar approach is in place in the Mackenzie District for example, which provides exemptions for various types of indigenous vegetation clearance where clearance is provided for in specified mechanisms under the Reserves Act and the Conservation Act.

5. Rural Residential and Rural Lifestyle Chapter 22 – Lake Hayes Ltd and Mt Christina

5.1 Changes are sought to Chapter 22 to remove unnecessary and unjustified restrictions on development, and to allow for the most efficient use of rural living areas such as Lake Hayes Ltd's site (Rural Lifestyle), and the Mt Christina site (Rural Residential). For example, visitor accommodation is sought to be restricted discretionary not non complying. Density of one residential unit per 1ha is proposed for the Rural Lifestyle areas. Neither of these changes would put at risk rural character or visual amenity values in the rural living areas.

5.2 The Mt Christina site also needs the boundary of the rural residential zone expanded to better reflect the topography of the site and this will be addressed in the rezoning hearing stream.

6. Rural Residential and Rural Lifestyle Chapter 22 – Lake Hayes Cellar ("LHC") (Amisfield site)

6.1 LHC will be seeking in the rezoning hearing stream that the site be rezoned Rural Residential with a Commercial Overlay. The introduction of a commercial overlay will necessitate changes to objectives, policies and rules, so that there is a logical connection between the overlay and rest of the zone that needs to be considered in this Hearing Stream also, but that will be, out of necessity, addressed in the rezoning Hearing Stream again.

6.2 The overlay and associated new objective and policies are proposed to allow for a more optimised and efficient use of the existing development on site, so as to allow for conferences and events, weddings and functions, exhibitions and retail sales of food and wine.

6.3 This is a prime example of the wide range of high value activities that can be located in the rural zone. Such activities can provide significant benefits, and can be done in such a way as to protect the character and attractiveness on the district.

7. Procedural Matters

'Scope' and 'standing'

7.1 At paragraph 1.2 – 1.7 of our legal submissions on Hearing Stream 01, the issue of scope was addressed. Council's Right of Reply in respect of Hearing Stream 01 addressed the issue of scope in respect of the PDP and stated:

> *"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."*
>
> *…*
>
> *"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."*[14]

7.2 The above submissions are contradictory and confuse the two separate legal concepts of *'scope'* and *'standing'*.

7.3 'Standing' is about the right to submit, appeal, appear or be heard. It is different and separate to principles relating to what evidence is admissible, and what is within scope of relief. Standing is not at issue here given that all submitters and further submitters being represented have made valid submissions or further submissions in respect of Stage 1 of the PDP and in particular in respect of topics covered in Hearing Stream 02 of the PDP.

7.4 Council's legal submissions state that the High Court case of *Simons Hill Station Limited*[15] on collective scope is not applicable to the Schedule 1 plan making process as that case was on a resource consent, and because Schedule 1 is a code in terms of standing.[16] I respectfully disagree. The reasoning and principles set out in the *Simons Hill Station* apply and are of assistance.

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[14] Paras 2.4 and 2.10, right of reply legal submissions for QLDC dated 07 April 2016
[15] *Simons Hill Station Limited v Royal Forest and Bird protection Society of New Zealand Inc* [2014] NZHC 1362
[16] Para 2.6, legal submissions for QLDC dated 07 April 2016

7.5 Whilst the point of law on appeal in *Simons Hill Station* was in the context of a resource consent appeal under s 120, the High Court's findings on the interpretation of s 120 necessarily looked at the scope of the originating submission put before the local authority;

> *"What is important is that the applicant is put on notice, by the submissions **in their entirety**, of the issues sought to be raised, so that they can be confronted by that consenting authority."*[17]
>
> (emphasis added)

7.6 In coming to that conclusion, the High Court relied explicitly on Environment Court's determinations of scope in the context of plan changes, namely the *Environmental Defence Society* case which was also relied upon by Counsel in Hearings Steam 01;

> *"Similarly, in a more recent case dealing with a similar issue, Environmental Defence Society Incorporated v Otorohanga District Council it was stated:*
>
> *[12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions".*[18]

7.7 It cannot be said that Schedule 1 provides a code for scope (assuming that Counsel for Council intended to refer to this as scope rather than 'standing'). Clause 8 provides a process for submitters to become involved in the plan change proceedings (therefore to establish standing). Schedule 1 does not provide any guidance or restrictions on the determination of admissible evidence, or the weight to be given to that evidence.

7.8 The principles of admissible evidence are that it must be probative, and relevant.[19] Evidence that meets both the relevance test and has probative value in the context of the case will be admitted. Evidence presented in the course of hearings on the PDP which supports any submission put to the Panel is clearly relevant and probative to the Panel's duty to enquire and make recommendations on the provisions. The reality of the Council's legal submissions would for example mean that a well-resourced submitter could not present expert evidence in respect of a

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[17] Ibid, at Para [30]
[18] Ibid, at para 28, referring to *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70 para [12]
[19] Ss 7 and 8 Evidence Act 2006

matter contained in another person's submission which might be highly relevant and of assistance to the Panel. That cannot be the outcome envisaged by Parliament, and is not the outcome supported by case law.

7.9 I therefore disagree with the contention for Council (quoted in paragraph 7.1 above) that the weight to be attributed to any evidence depends upon whether that evidence relates to relief specified in a particular submission. Evidence is either relevant and probative or it is not, it is either admissible or it is not. Provided evidence is relevant and admissible, the weight to be given that evidence does not relate to some theoretical extent to which the evidence directly or indirectly relates to a specific relief specified in a submission.

7.10 Finally, a contextual reading of the whole of Schedule 1 makes clear the distinction between a hearing to be held on submissions on a planning instrument under clause 8B and appeals to be brought under clause 14. Clause 8B provides that a local authority must hold a hearing into submissions; it does not specify which submitters may be heard or upon what matters. By contrast, clause 14 expressly provides that a person may only bring an appeal where they referred to the provision being appealed in their submission on the plan.

7.11 Accordingly it is submitted that the submissions and evidence presented for the submitters are within scope if they (or any part of them) meet any of the following tests:

(a) The relevant relief is specifically requested in a submission or further submission; or

(b) The relevant relief is a consequential or alternative relief which is appropriate to address matters raised in a submission (where the submission includes a request for consequential or alternative relief, which is generally the case in the submissions lodged for the submitters listed in paragraph 1.1);

(c) The relevant relief is within the scope of all submissions lodged to or in respect of the relevant DPR provisions.

Hearing Topics and Commissioner Delegation

7.12 The PDP is a partial Plan Review under section 79(1) of the RMA. It is being reviewed through the Schedule 1 process which is a code within the RMA for the preparation and change of panning instruments. The Queenstown Lakes District Council ("**Council**") has elected to delegate its hearing and deliberating responsibilities

under Schedule 1 to an Independent Hearings Panel, resulting in recommendations to the Council for final decision.[20]

7.13 Council has elected to split the hearing on the PDP into sub topics (Hearings Streams) and to appoint sub-committees of the entre hearings panel to hear those different topics. Other than the delegation instrument of December 2015 and the procedural minutes issued by the Panel, there appears to be no further formal documentation such as hearings manual or reference manual to record the hearings panel process.

7.14 This process appears to be inconsistent with the general process requirements of Schedule 1 of the Act, and also with how other territorial authorities have interpreted the requirements under Schedule 1.

7.15 The key concerns are:

(a) it is unclear who of the entire panel will be making final recommendations on the PDP to the Council,

(b) the potential prejudice to submitters to ensure a fair hearing is given,

(c) and the potential unnecessary additional costs to be incurred by the public through this process.

7.16 At para 12 of the delegation report dated December 2015 the following is noted;

> *"The Hearings Panel will have the power to hear, deliberate and make recommendations on submissions and further submissions on the Proposed District Plan. As the Hearings Panel will vary for each hearing stream or topic, the Hearings Panel will issue multiple recommendations in the names of those Commissioners and Councillors on each particular Hearings Panel".*

7.17 It is unclear from the above, whether each Panel member will issue a separate recommendation to Council based upon the hearings which they were present for, or whether the sub-committee of the Panel which heard a particular Hearing Stream will make a collective recommendation on that Stream, or whether the entirety of the Hearing Panel (consisting of all 17 Commissioners) will make a combined recommendation on the PDP to Council.

7.18 It is submitted that the latter approach would be most appropriate for the following reasons;

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[20] Section 34 RMA Delegation of function etc., by local authorities; and QLDC Report for Agenda Item: 5 dated 17 December 2015

(a) The High Court has ruled that officials' decisions can be made on matters to which they were not present so long as the relevant materials have been sufficiently understood[21];

(b) The PDP has a legal weighting under the RMA and should be treated as one document rather than its constituent parts so as to give effect to its purpose;

(c) Hearing Streams which are overlapping in content should not be heard by different sub-groups of the Hearings Panel to provide a fair hearing to submitters;

7.19 Hearings Streams 01B and 02 are directly overlapping in issues and content, as is shown in the expert evidence lodged in respect of Hearing Stream 02 which in many places refers to matters such as landscapes, which sat within Hearing Stream 01.[22] Those topics will also be directly relevant to the hearing of the subdivision chapter, and future re-zoning submissions, to be heard in early 2017 and this will have a direct impact on the submitters.

7.20 Taking the above example further, counsel questions how (at least) four separate sub-groups of the Hearings Panel could make sufficiently informed and effective decisions on the topics they have heard in isolation from other topics of the PDP.

7.21 With respect to ONFL issues this is of particular concern as Council has confirmed it will go back and do a more thorough assessment of the location of ONL/ RLC lines in evidence in re-zoning hearings. This is directly relevant to rural zoning hearings and to the Landscapes and Rural Chapter hearings which will have already been heard (by different Commissioners) by that stage. It is questionable whether the above approach will give effect to case law on ONFLs which requires the identification of nationally important matters to be protected before provisions are implemented to provide for that protection.[23]

7.22 Counsel submits that to remedy the above concerns, the following matters should be taken into account by the Hearings Panel:

(a) Whether the process for the PDP hearings taken to date is in accordance with the delegation instrument of December 2015;

(b) Whether the process for the PDP hearings is in accordance with the purpose and intent of Schedule 1, and section 79(1) of the RMA;

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[21] *Whakatane District Council v Bay of Plenty Regional Council* [2009] 3 NZLR 799 at paras [141] - [143]
[22] Evidence in Chief of Mr Osborne for QLDC dated 06 April and Evidence of Marion Read dated 06 April both primarily consider ONFL matters within evidence on the rural and rural lifestyles zones.
[23] *Man O War Station Ltd v Auckland Regional Council* [2015] NZHC 767, at [59]

(c) Whether the process for the PDP establishes a fair and efficient hearing process for all submitters; and

(d) Whether the process would be assisted by clearer terms of reference for Panel decision making and an assurance to submitters as to how recommendations on overlapping Hearing Streams will eventually be put to Council.

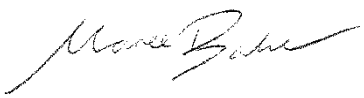
7.23 Effectively the divergence (between what was proposed for the submitters during Hearing Steam 01 and what has been accepted by the Council in considering Hearing Stream 02) results in two separate sets of provisions heading down different paths.

7.24 Accordingly the Panel is referred to the prior legal submissions lodged on behalf of the submitters represented in Hearing Stream 01. Those submissions, and the transcript recording questions and answers relating to those submissions, are fully adopted and are relied upon in these submissions due to the significant overlap in the content of Hearings Streams 01 and 02.

7.25 The Panel is referred to the detailed amendments to Chapters 1, 3 and 6 proposed on behalf of the submitters, and supported by evidence presented for the submitters, during Hearing Stream 01. While that Hearing Stream 01 presentation has resulted in some amendments to Council's proposed Chapters 21 and 22, many of the significant amendments proposed during Hearing Stream 01 have not been accepted, which results in Council's proposed Chapters 21 and 22 being significantly different to what is proposed for the submitters.

7.26 For the avoidance of doubt therefore, these submissions are made in reliance on the higher order provisions as suggested by Mr Ferguson in his evidence presented during Hearing Stream 01 as opposed to Council's latest version of higher order chapters. That of course does not necessarily mean that the Hearing Stream 02 amendments proposed for the submitters, or a variant thereof, might not also give effect to the Council's Hearing Stream 01 provisions (or a variant thereof). This point emphasises the extent to which Hearing Streams 01 and 02 are interrelated.

Dated this 24th day of May 2016



Maree Baker-Galloway, Counsel