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 Stream 3 - Historic Heritage and Protected Trees chapters

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

HEARING STREAM 3 – HISTORIC HERITAGE AND PROTECTED TREES CHAPTERS

6 July 2016

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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 Historic Heritage and Protected Trees chapters and to provide the Council's position on specific issues.

1.2 They also seek to address some matters raised by submitters through their written evidence filed prior to, and presented at the hearing, including submitters legal submissions, where the Council considers that further analysis is required.

1.3 Otherwise, these submissions do not respond to every legal issue raised by submitters during the course of the hearings. The absence of a specific response in these submissions should not be regarded as acceptance of the points made by counsel for various submitters.

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

(a) Ms Jones for the Historic Heritage chapter; and
(b) Ms Law for the Protected Trees chapter.

1.5 Having considered matters raised and evidence produced during the course of the hearing, Ms Jones and Ms Law's replies and associated revised chapters represent the Council's position.

2. HISTORIC HERITAGE CHAPTER 26

Archaeological Sites

2.1 The Panel asked counsel to provide submissions on the relationship between the Heritage New Zealand Pouhere Taonga Act 2014 (**HNZPTA**) and the Resource Management Act 1991 (**RMA**), which is of particular relevance for the purposes of regulating archaeological sites. The general relationship between the two acts was outlined in the Council's synopsis of legal submissions on Hearing Stream 3.[1] Those submissions are not repeated, rather the below builds on those submissions in order to demonstrate the necessity of including the

[1] Council's Synopsis of Legal Submissions 17 June 2016, at paragraphs [7] and [8].

rules in Table 5 of the Historic Heritage chapter, which relate to archaeological sites only.

2.2 The HNZPTA sets out the responsibilities of Heritage New Zealand (**HNZ**), which include the preparation and maintenance of the New Zealand Heritage List / Rarangi Korero (**List**), previously called the Historic Places Register. The List contains historic places, historic areas, wāhi tapu, wāhi tapu areas and wāhi tupuna. The HNZPTA does not provide any regulation or mechanism for the protection of the List items. Any practical protection or regulation must come through the objectives, rules and policies of district plans, in particular through section 6(f) of the RMA, which provides for the protection of historic heritage from inappropriate subdivision, use, and development as a matter of national importance and section 74(2)(b)(iia) of the RMA, which specifically addresses the relationship between the List and plans prepared by territorial authorities under the RMA.

2.3 In contrast to the List entries, subpart 2 of Part 3 of the HNZPTA does provide a regulatory framework for the protection of archaeological sites. Archaeological sites are defined in section 6 of the HNZPTA as, those sites which:

(a) pre-date 1900; or

(b) have been declared in terms of section 43 of the HNZPTA.[2]

2.4 Through section 42 of the HNZPTA, archaeological sites are protected by making it unlawful for any person to modify or destroy, or cause to be modified or destroyed, the whole or any part of an archaeological site without the prior authority of HNZ.

2.5 The RMA also provides for the practical protection of archaeological sites through section 6(f) of the RMA. Section 74(1)(b) of the RMA requires district plans to comply with Part 2 of the RMA. Accordingly, appropriate provision must be made in the proposed PDP for the protection of historic heritage in accordance with section 6(f) of the RMA. The RMA definition of *historic heritage* comprises

[2] Sites that originate from 1900 or later may be "declared," and made subject to the provisions of the HNZPTA, in accordance with s 43 of that Act.

archaeological sites.[3] Unlike the HNZPTA, there is no definition of archaeological site contained within the RMA.

2.6 The Council submits that, although there is some duplication through the two Acts, they have very different purposes. The HNZPTA provides overarching protection of archaeological sites themselves on a national level, while the RMA provides for wider protection of specific archaeological values at a local level.

2.7 The Council submits that there are specific effects that HNZ cannot consider when determining an application for an authority under the HNZPTA, which can be addressed by way of the resource consent process under the RMA. The evidence of Dr Schmidt and Ms O'Dea for HNZ supports this position, and that the two Acts have very different purposes.[4] The RMA provides wider protection than the HNZPTA, as a broader range of effects can be considered under the RMA.[5] Further, the management of archaeological values under the RMA begins with public participation while public participation is not available under the HNZPTA.[6] The evidence of Ms Jones for the Council aligns with the views of Dr Schmidt and Ms O'Dea on this matter.[7]

2.8 The limitation on the effects that HNZ can consider when determining an application for an authority under the HNZPTA was discussed by the Environment Court in *Greymouth Petroleum Ltd v Heritage New Zealand Pouhere Taonga.*[8] In that case the Environment Court found that the sections contained within subpart 2 of part 3 of the HNZPTA are directed at the protection of archaeological sites themselves. The wider environmental effects of activities within an archaeological site cannot be considered by HNZ. The Court stated:

> *[38] We consider that it is abundantly clear from these provisions that the sections of the [HNZPTA] under consideration are directed at the protection of archaeological sites themselves and not wider areas*

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3 Resource Management Act 1991, s 2.
4 See paragraph 13.2 Jane Mary O'Dea Evidence. See also paragraphs 14 to 21 Dr Matthew Schmidt evidence.
5 Ibid.
6 See paragraph 13.2 Jane Mary O'Dea Evidence.
7 See paragraphs 12.8 and 12.9 Vicki Jones s42A Report.
8 [2016] NZRMA 105.

beyond them. It is correct that the matters identified in s59(1)(a) of the Act which might be considered when determining an application under s44 are very wide in scope but they are clearly matters which must apply to the archaeological site in respect of which an application has been made. Sections 59(1)(a)(i),(iii) and (v) specifically state that.

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[43] Having regard to all of these considerations we find that the purpose of Subpart 2 of Part 3 of the [HNZPTA] is to protect the physical integrity of archaeological sites which persons seek to modify or destroy, not to protect the wider cultural landscape. Accordingly we determine that HNZ was not correct in determining Greymouth's application on the basis of the contended effect which it might have on the wider landscape surrounding the archaeological site which Greymouth sought authority to modify…

2.9 The Court went on to find that public participation is not available under the HNZPTA in the same way as under the RMA. The Court found:

[44] That matter relates to the way in which Greymouth's application was processed by HNZ. The Act is notably brief in the provisions which it contains as to the manner in which HNZ must process applications for authorities. The Act contains no notification requirements, provisions for participation of other parties or hearings provisions such as those contained in Part 6 of the Resource Management Act for example.

2.10 The Council accepts that in order to provide for efficiency and effectiveness in the PDP, it is imperative that the protection offered to archaeological sites is streamlined and any conflict or unnecessary overlap between the Historic Heritage chapter and subpart 2 of Part 3 of the HNZPTA is avoided. It is the position of the Council that the rules contained within table 5 of the revised chapter effectively provide for the regulation of effects beyond what can be considered under the HNZTPA, while at the same time avoiding conflict or unnecessary overlap.

Definition of Archaeological Site

2.11 During the hearing, the Panel queried whether decision makers under the RMA were bound by the definition of "archaeological site" contained within the HNZPTA or whether the Historic Heritage Chapter could provide protection to post-1900 features. It is the position of the Council that, unless the HNZPTA definition is included in the PDP, Council is not strictly bound by that definition when considering the rules that relate to those sites (although it would be the logical definition to consider). The Council could include a different definition if it could justify it as appropriate. In any event, the Council supports the inclusion of the HNZTA definition of archaeological site in the PDP, and this is included in the Heritage chapter, in clause 26.6.x.

Use of the Term "Inappropriate" in Policies

2.12 The evidence of Ms Jones at paragraph 19.8 of her s 42A report is that she does not consider it necessary to include the word 'inappropriate' before the words 'landuse, subdivision, and development' in Policy 26.4.1.2.

2.13 The Panel has asked the Council to consider its position in light of the Supreme Court's decision in *Environmental Defence Society Incorporated v NZ King Salmon.*[9] It is noted that the Council has addressed a similar issue in its Legal Reply for the Strategic chapters, in Section 6. In *King Salmon,* the Court found that the term "inappropriate" contained within section 6(f) of the RMA should be interpreted against the backdrop of what is sought to be protected or preserved[10] and that in the absence of a higher order policy statement, a protection against 'inappropriate' development is not necessarily a protection against any development.[11]

2.14 The Court went on to find that section 6 of the RMA does not give primacy to preservation or protection over the other concepts

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9 *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (***EDS v NZKS***).

10 Ibid, at [105].

11 Ibid, at [29(b)].

contained within part 2 the RMA. However, the Court found that, in that case, the policies contained within the New Zealand Coastal Policy Statement (**NZCPS**) did give primacy to preservation and protection and, in the absence of any uncertainty, the Board of Inquiry was required to give effect to those policies.[12] The Board of Inquiry was not entitled to rely on the 'overall judgment' approach to give greater weight to the other concepts contained within Part 2 of the RMA than what was provided for by the NZCPS.[13]

2.15 The Council submits that, by requiring the adverse effects of such activities to be managed in a manner that ensures that historic heritage is 'protected' to the extent warranted by its significance, policy 26.4.1.2 effectively provides for protection against 'inappropriate' development in accordance with section 6(f) of the RMA.

2.16 The Council further submits that by focusing on the proportionality of the effects of activities in relation to the significance of protected features, Policy 26.4.1.2 gives effect to Part 2 of the RMA on a wider basis. In this manner, the policy provides for the protection of historic heritage from inappropriate subdivision, use, and development while at the same time making provision for social and economic wellbeing as reflected within section 5(2) of the RMA. In light of the Supreme Court's findings on the 'overall judgment' approach, the Council submits that the balance between protection and development must be provided for on the face of the PDP.

2.17 If the policies contained within the Historic Heritage chapter do not sufficiently provide for the prospect of development, there would be very little scope for a consent authority to give weight to the provision for social and economic wellbeing contained in section 5(2) of the RMA when considering the rules of the Historic Heritage Chapter.[14]

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12 Ibid, at [149].

13 Ibid, at [151]- [153].

14 For these reasons, it is the Council's position that Policy 26.4.1.2 provides for a different range of values than that of Objective 3.2.5.1 in the Strategic Direction chapter.

Kingston Flyer

2.18 A number of submitters have requested the inclusion of the Kingston Flyer in the inventory of protected features (**Inventory**) contained within the Historic Heritage Chapter. In a similar vein to the Earnslaw, the Council considers the Kingston Flyer does not fall within the meaning of *historic heritage* contained within the RMA.

2.19 As outlined in the Council's opening submissions on Hearing Stream 3, the RMA does not comfortably accommodate the regulation of mobile heritage. Section 2 of the RMA defines *historic heritage* as *natural and physical resources that contribute to an understanding and appreciation of New Zealand's history and cultures,* which then encompasses the term *historic structures*. To be a *structure* in accordance with the RMA definition, an item must be fixed to land.

2.20 In the Council's submission, whether a moving item can be considered as fixed to land is a matter of degree. The Kingston Flyer can be contrasted with the Antrim Slipway Cradle (**Cradle**). While the Cradle's movement is restricted to a confined area (and is considered to be *historic heritage)*, the Kingston Flyer is able to travel over kilometres. The Council submits that, on account of its extensive mobility, the Kinston Flyer cannot be considered to be fixed to land and does not fit within the meaning of *historic heritage*.

Scope Issues

2.21 The evidence of a number of submitters on the Historic Heritage Chapter has brought about the need to address issues of scope. The legal principles relating to scope have been addressed in depth in the Councils various submissions on Hearing Streams 1A and 1B[15] Hearing Stream 2[16] and these submissions are not repeated here. The relevant principles are however summarised below for the convenience of the Panel.

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[15] Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7; Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2.

[16] Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

2.22 The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:

(a) a submission must first, be *on* the proposed plan;[17] and

(b) a decision maker is limited to making changes within the scope *of the submissions* made *on the* proposed plan.[18]

2.23 The two limb approach endorsed in the case of *Palmerston North City Council v Motor Machinists Ltd,*[19] subject to some limitations, is relevant to the Panel's consideration of whether a submission is *on* the plan change.[20] The two limbs to be considered are:

(a) whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and

(b) whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

2.24 The principles that pertain to whether certain relief is within the scope of a submitter's submission can be summarised as follows:

(a) the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;[21]

(b) another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence"

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17 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7.

18 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

19 [2014] NZRMA 519.

20 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at paragraph 7.3-7.12.

21 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.

of the relief sought in a submission; the scope to change a plan is not limited by the words of the submission;[22]

(c) ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter;[23] and

(d) scope is an issue to be considered by the Panel both individually and collectively. There is no doubt that the Panel is able to rely on "collective scope". As to whether submitters are also able to avail themselves of the concept is less clear. To the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief, it is submitted that the submitter could not advance relief.[24]

Submitter 604 (Jackie Gillies)

2.25 Ms Gillies requests specific relief in respect of a number of inventory items and rules by way of evidence. The Council submits the following matters advanced by Ms Gillies are not within the ambit of what is fairly and reasonably raised in her submission:

(a) Ms Gillies requests that Skippers Road (Item 5) be upgraded to Category 1.[25] Ms Gillies did not make a submission on the Skippers Road listing and accordingly upgrading the Category of the road is beyond the relief that the Panel is able to recommend;

(b) Ms Gillies' evidence is that she supports the Council's position that Arrowtown Masonic Lodge (Item 330) be recorded as a Category 1 item, and she provides significant technical evidence in respect of the historic value of this item. [26] The Council accepts that the evidence of Ms Gillies supports the Council's position and that there does not

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22 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.
23 Ibid, at 574.
24 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.
25 See paragraph 12.1 Jacqueline Sarah Hilda Gillies Evidence.
26 Ibid, paragraphs 12.6 and 18.

appear to be any legal constraint against Ms Gillies presenting this evidence. However, the fact that she did not seek specific relief in relation to this matter can be considered when determining the weight to be given to her evidence on this matter;

(c) the evidence of Ms Gillies is that the description of item 33 "Boatshed, Slipway and original Old Ticket Office, Frankton Marina Recreation Reserve" should be amended to read "Boatshed, Slipway, NZR Ticket Office."[27] Ms Gillies did not make any submission on this listing. However, it is the Council's position that the amendment is not of substance and is simply a minor correction;

(d) the evidence of Ms Gillies is that Glenarm Cottage (Item 68) should be upgraded to a Category 1 feature.[28] This was addressed in the Council's synopsis of legal submissions at paragraph 3. The cottage sits within the geographic area covered by Plan Change 50 that the Council resolved to withdraw from Stage 1 on 29 October 2015. It is the Council's position that all submissions relating to this area, including on any heritage listings, are now out of scope of Stage 1 of the PDP, as there are no provisions remaining in the PDP for those submissions to be "on"; and

(e) Ms Gillies' evidence is that she does not support the Permitted Activity status of internal alterations to a Category 3 listed feature contained within Rule 26.6.13.[29] Ms Gillies did not submit on Rule 26.6.13 nor did she raise any general concerns regarding this issue and accordingly any amendment to this activity status is submitted to be beyond the relief that the Panel is able to recommend.

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[27] Ibid, paragraph 12.2.
[28] Ibid, paragraphs 12.7 and 17.
[29] Ibid, paragraph 9.4.

New Zealand Tungsten Mining Limited (Submitter 519)

2.26 The evidence of Ms Jones, contained within the section 42A report of the Council, is that there was a drafting error in that activity standard 26.6.28 refers to any heritage feature referred to in the *statement of significance* and makes no mention of those listed under the separate sections entitled *key features to be protected*. This error was not amended in the revised chapter provided along with the section 42A report of Ms Jones, as Ms Jones had concerns regarding the scope to correct the error. The evidence of Mr Vivian on behalf of New Zealand Tungsten Mining Limited (**NZTML**) is that the submission of NZTML provides scope for this correction, at least so far as activity standard 26.6.28 relates to the Glenorchy Heritage Landscape (**GHL**).[30]

2.27 Reflecting on Mr Vivian's evidence and the NZTML submission, it is the Council's position that the submission of NZTML does provide scope for the error to be amended. Although NZTML did not specifically request the error to be amended, linking the rule back to the key features to be protected is considered to be fairly and reasonably within the ambit of the NZTML's submission, which states that the "*standard is submitted to be amended as it is too broad, unspecific and not effects based.*"

2.28 In the s 42A report, Ms Jones referred to the fact that a number of submitters considered that the assessment matter was in fact already linked to the *key features to be protected*.[31] In this context, the correction of the error is also submitted to be a foreseeable consequence of NZTML's submission, as the assessment matter was suggested to be too *unspecific*. Accordingly, it is submitted that no issue of procedural fairness arises from recommending the correction as within scope of NZTML's submission. The Council further submits that the submission of NZTML is not limited to the GHL in any manner. Accordingly, the correction of the rule as a whole is within scope.

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30 See paragraph 4.77 Mr Carey Vivian Evidence.
31 See paragraph 16.15 of Ms Vicki Jones s 42A report.

Mill House Trust (Submitter F1113)

2.29 The evidence of Mr Hadley for Mill House Trust is that the listing of the Mill House (Item 76) should be removed from the Inventory on account of the incorrect reference in the ODP to the item being on the HNZ List. The Council accepts that reference to the HNZ List was an error. However, it does not accept that this necessarily leads to the conclusion that the Mill House itself was listed in error. The prime consideration for the listing of an Inventory Item is whether the values of the item align with the one of the heritage categories listed in the revised proposed chapter. The existence of an item on the HNZ list is not the sole indicator of its heritage value. Further, as there was no submission on the Historic Heritage Chapter requesting the removal of the Mill House from the Inventory, the Council submits that there is no scope for the Panel to recommend the removal of the listing as part of Stage 1 of the PDP.[32]

Real Journeys Limited (Submitter 621)

2.30 The evidence for Mr Farrell on behalf of Real Journeys Limited is that the PDP should be amended to *permit* the continued use, operation, maintenance, repair and *upgrading* of the Antrim Engine Slipway (**Slipway**) for any purposes associated with the TSS Earnslaw.[33] It appears this portion of Mr Farrell's evidence is in fact requesting that the rules relating to the upgrading of the Slipway be amended to provide for such activities to be carried out on a permitted basis. However, if this is the case, it is the position of the Council that, as Real Journeys' submission was limited to the appropriate *category* attributed to the Slipway and the activity status of the relocation of the Antrim Engine Boiler only, any amendment to the rules to provide for the upgrade of the Slipway on a permitted basis is beyond the scope of the relief that the Panel is able to recommend.

2.31 The Council further refers to paragraphs 2(a)-(b) of Mr Farrell's evidence summary. The reference to a disagreement in 2015 between a Council staff member and Real Journeys in respect of the

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[32] Mr Hadley and HNZ's submissions were only on the appropriate category to be attributed to it.

[33] See paragraph 8 evidence summary of Mr Ben Farrell.

need for resource consent to carry out works on the Slipway is not accepted. Further, the ODP definition 13.2.2 'General Maintenance' states "the replacement should be of the *original* or *similar* material, colour, texture, form and design as the original it replaces". Accordingly, and although not of any direct relevance to this hearing, it is the position of the Council, that the replacement of hardwood beams with steel beams was beyond the concept of maintenance and required resource consent.

Relaxation of the rules in other chapters of the PDP

2.32 The possibility of relaxing the rules in other chapters of the PDP in order to provide protection for heritage features was raised during the hearing on the Historic Heritage Chapter. The position of the Council is that, as there was no submission on the Historic Heritage Chapter requesting relief in reference to any other chapter of the PDP (except subdivision), there is no scope to relax the rules of the other chapters of the PDP in the manner raised. This is also addressed below under 'other matters'.

3. PROTECTED TREES CHAPTER

"Reasonably Necessary"

3.1 Matter of discretion 32.5.1.2 in the revised s42A chapter states:

> *Whether the works [significant trimming, removal, destruction or damage] are **reasonably necessary** to enable the efficient use of land and resources, including to improve situations where there is inadequate natural relight or to ensure vegetation is not adversely impacting on buildings [**emphasis ours**].*

3.2 The Panel asked Ms Law what the words "reasonably necessary" meant in the context of the matter of discretion. Counsel has not identified any direct case law on the interpretation of those words in a matter of discretion. Although not of direct relevance to the interpretation of a plan provision, there is a body of case law on the meaning of the phrase through the same language being included in

section 171 of the RMA, where a public work and designation must be *reasonably necessary* for achieving the objectives of the requiring authority for which the designation is sought.[34] The Environment Court in *Gavin Wallace v Auckland Council*[35] held that "reasonably necessary" is an objective standard that falls between the subjective test of expediency or desirability at one end and absolute necessity at the other. The epithet "reasonably" qualifies some tolerance.[36] In *Queenstown Airport Corporation Limited v Remarkables Park Limited*[37] the High Court held, also in the context of section 171 of the RMA, that "reasonably necessary" meant something less than "best."

Permitted Activity Rules Reserving Discretion of the Council

3.3 The Panel queried whether the notified permitted activity rules 32.4.5 and 32.4.20 were unlawful on account of reserving undue discretion to the Council to decide whether it is appropriate for a tree to be removed, given the permitted activity status.

3.4 Section 87A(1) of the RMA states,

> *(1) If an activity is described in this Act, regulations (including any national environmental standard), a plan, or a proposed plan as a **permitted activity**, a resource consent is not required for the activity **if it complies with the requirements, conditions, and permissions**, if any, specified in the Act, regulations, plan, or proposed plan **[emphasis ours].***

3.5 Although the RMA allows permitted activity rules to be subject to conditions and permissions contained within the RMA, such a condition will be unlawful if it delegates or reserves discretion to the Council to finally approve a permitted activity.[38] The Council accepts that notified rules 32.4.5 and 32.4.20 do reserve undue discretion to the Council. Accordingly, the rules have been amended in the revised chapter attached to Ms Law's right of reply.

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34 Section 171 of the RMA provides for territorial authorities to make recommendations on Notices of Requirement.
35 *Gavin Wallace v Auckland Council* [2012] NZEnvC 120.
36 *Gavin Wallace v Auckland Council* [2012] NZEnvC 120 at [183].
37 *Queenstown Airport Corporation Limited v Remarkables Park Limited* [2013] NZHC 2347 [96].
38 *Boanas v Oliver* C072/94 (PT).

3.6 The permitted activity standards now provide that persons must notify the Council of their intention to remove a tree prior to removal and must provide the Council with an arborist report specifying the reasons for the removal after it is completed. This essentially gives the Council notice of the works, but the component of the rule where the Council would have confirmed permitted activity status has been removed. The Council submits that the revised conditions fall within what can lawfully be required in relation to a permitted activity.[39]

Liability for damage from trees

3.7 Submitter 39 (Mr Ritchie) has requested the Council to respond to his submission in terms of liability for damage caused by protected trees. Landowners may be liable for damage caused to third parties by a Protected or Character Tree on their property. This is a common law issue which ultimately falls outside of scope of the RMA and therefore what is relevant to the Panel in making its recommendations. The Council accepts however that matters of economic wellbeing and safety are central to the concept of sustainable development contained within Part 2 of the RMA.[40]

3.8 The landowners with Protected and Character Trees on their land can mitigate liability and safety risks associated with Protected and Character Trees by carrying out regular tree maintenance programmes. The ability for landowners to carry out such a programme is provided for by the rules of the Protected Tees Chapter, which allow minor trimming as a permitted activity and significant trimming as a discretionary or restricted discretionary activity. Further, the rules of the Protected Tees Chapter permit the felling of a Protected or Character Tree in the circumstances that it is dangerous.

3.9 The Council submits that the economic burden that is placed on landowners by requiring them to maintain Protected or Character Trees on their land in a safe condition is appropriate in relation to the environmental, heritage and cultural values that these trees bring to

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39 See *Bryant Holdings Ltd v Marlborough DC* [2008] NZRMA 485 at [48]-[49] (HC).

40 Resource Management Act 1991, s 5(2).

the District. Accordingly, it is the submission of the Council that the rules contained within the Protected Tees Chapter give effect to the concept of sustainable development contained within Part 2 of the RMA.

Issues of Scope

3.10 The evidence of a number of submitters on the Protected Trees Chapter has also brought about the need to address issues of scope. The legal principles relating to scope are discussed at paragraphs 2.21 – 2.24 above and are not repeated.

Standard Tree Evaluation Method (STEM) Methodology

3.11 In her written summary presented at the hearing on 29 June 2016 submitter 329 (Ms Hapuku) stated that the methodology for the inclusion of Protected Trees should be included in the PDP. As Ms Hapuku's submission did not submit on nor request relief in relation to this issue, the inclusion of the STEM methodology in the Protected Trees Chapter is beyond the scope of the relief that the Panel is able to recommend for the submitter.

32.4.14 Significant trimming or removal of trees in public spaces

3.12 The Panel queried whether the activity status for the significant trimming or removal of a tree in public spaces in the needed to be fully discretionary. Council confirms that no submissions were made on this rule nor on its activity status. Accordingly, there is no scope for the Panel to recommend a change to the activity status of this rule.

4. OTHER MATTERS

4.1 The Panel questioned during the course of the hearing the relevance of the earthworks (Plan Change 49) and signage (Plan Change 48) chapters in the ODP, as well as the Queenstown Town Centre (Plan Change 50). A suggestion was made by the Panel that those

provisions (as they now form part of the ODP)[41] would need to be notified in Stage 2 for submission.

4.2 This matter was addressed in the Council's legal reply for the Strategic Directions hearing at paragraphs 10.7 to 10.12. For convenience, those paragraphs are repeated in **Appendix 1**. At this point in time the Council has no intention of notifying these provisions (ie plan changes) in Stage 2 of the PDP, although it is acknowledged that, as a matter of law, that is possible.

4.3 Any non-reviewed ODP provisions will simply stay in the ODP. There are three other options for resolving any integration issues between the PDP provisions as any appeal process moves on (if there is one) and associated provisions move back into the ODP by "joining" the non-reviewed provisions excluded from Stage 1 of the Review. Which one will be most appropriate will depend on the extent of the integration issue. The options are:

(a) amendment of proposed plan under clause 16(2) of Schedule 1 of the RMA, to alter any information where such an alteration is of minor effect, or to correct any minor errors;

(b) variation of proposed plan, prior to the approval of the PDP, under clause 16A of Schedule 1 of the RMA; and

(c) correction of the ODP to correct any minor errors under clause 20A of Schedule 1 of the RMA.

41 Plan Changes 49 and 50 recently became operative on 30 June 2016.

4.4 There is no scope for the Panel to amend the ODP provisions, through the hearings on Stage 1 of the PDP, as suggested by Ms O'Dea in her evidence summary at paragraph 6.

DATED this 6th day of July 2016

S J Scott/ K L Hockly
Counsel for Queenstown Lakes
District Council

Appendix 1

Extract from Legal Submissions on behalf of Queenstown Lakes District Council as part of Council's Right of Reply dated 7 April 2016 for Strategic Direction hearing

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.[42] 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:

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

42 *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.*

the ODP, by effectively replacing the previous corresponding rules and associated provisions of the ODP that were subject to Stage 1 of the Review.[43]

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.[44]

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.

43 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.

44 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.