**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

**AND**

**IN THE MATTER** of Chapter 27 Subdivision and Development

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# LEGAL SUBMISSIONS FOR:

G W Stalker Family Trust Mike Henry Mark Tylden Wayne French Dave Finlin Sam Strain – 535/534

Ashford Trust – 1256

Bill & Jan walker Family Trust - 532/1259/ 1267

Byron Ballan – 530

Crosshill Farms Limited – 531

Robert and Elvena Heywood - 523/ 1273

Roger and Carol Wilkinson – 1292

Slopehill Joint Venture - 537/ 1295

Wakatipu Equities - 515/1298

Ayrburn Farm Estate Limited - 430

F S Mee Developments Limited - 525

**[Dated 22 July 2016]**

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## 1. Introduction

1.1 These submissions are presented on behalf of the Submitters listed on the front cover page. These submissions relate to Chapter 27 Subdivision and Development of the Proposed District Plan ("**PDP**").

1.2 These submissions rely, in part, on the Briefs of Evidence of Douglas Reid (for all the Submitters), Jeffrey Brown (for some of the Submitters) and Ben Farrell (for some of the Submitters).

1.3 These submissions address one major issue and one minor issue:

(a) The major issue, which the majority of these submissions address, is whether the 'default' consent status for subdivision, within zones where a minimum lot size is prescribed by a zone standard, should be a controlled activity ("**CA**") or restricted discretionary activity ("**RDA**"). The zones of particular concern are the standard Residential zones and the standard Rural Residential ("**RR**") and Rural Lifestyle ("**RL**") zones. These submissions, and the evidence to be presented, do not address zonings where no minimum lot size is prescribed (such as urban zones) or special zones where a zone specific regime applies (such as in the Millbrook and Jacks Point zones) although they may be applicable also to other zones.

(b) The minor issue relates to minimum lot size within the RL zone. Counsel understands that the RL density issue (one residential unit per 2ha or one residential unit per 1ha) has been addressed during the earlier Stage 2 hearing and/or has been deferred (in respect of the Wakatipu Basin) pending completion by Council of a separate study of the Wakatipu Basin. These submissions, and the evidence of Ben Farrell, only address the issue of whether, if RL density is reduced to one residential unit per 1ha, the Chapter 27 subdivision rule which implements that density should be a minimum 1ha requirement or a minimum average 1ha requirement. As the s42A Report does not address this issue at all, it is unclear whether the Council understands this to be a live issue for this hearing. These submissions and the related evidence of Ben Farrell assume that it is a live issue for this hearing. This issue is addressed at the end of these submissions.

## 2. Subdivision Activity Status - Summary

2.1 To further refine the scope and direction of these submissions, it is submitted that:

(a) The current Operative District Plan ("**ODP**") CA regime has worked well for approximately 15 years. No evidence has been presented by Council which challenges that proposition. The Council's justification for a change from CA to (now) RDA is not justified by any specific reason(s), or by the s32 analysis which is significantly flawed.

(b) The ODP CA regime should be reinstated into the PDP, possibly with some adjustment to the provisions which guide the decision maker when making the requisite CA decisions. This submission point relates to the substance of the ODP CA regime ("**Substance**"), and not the format or structure of the Subdivision Chapter ("**Format**").

(c) The central 'kernel' of the concerns being expressed about the proposed RDA regime is the proposal that the Council should have discretionary control over lot size (in addition to imposition of a minimum lot size zone standard). If the Council's discretionary control over lot size were to be removed from the rules recommended in the s42A Report, that would largely address the concerns being expressed. However that would leave an even greater question about the justification for a change from CA to RDA, given the nature of the remaining matters of discretion.

2.2 The statements detailed in the remainder of these submissions are made either on the basis that they are self-evident from proper analysis and consideration of the relevant documentation or in reliance on evidence presented to this hearing by the range of witnesses presenting evidence, particularly Douglas Reid, Jeffrey Brown and Ben Farrell.

## 3. ODP CA Regime

3.1 Jeffrey Brown, Ben Farrell and Chris Ferguson express firm opinions that the ODP CA regime is not complex and works well.[1] It is accepted

[1] Paras 2.1 and 2.9 EiC of Jeffrey Brown; Para 8.b. EiC of Ben Farrell; Paras 59, 80-84 EiC of Mr Ferguson for Darby Planning LP ($608)

that the Format can be improved, but it is submitted that the Substance works well. Those two aspects are differentiated as follows:

(a) Format refers to the structure of the existing ODP Chapter 15 which follows the 'sieve' structure of the rest of the ODP. The 'sieve' structure is the approach which does not detail activity status in the likes of a Table, but requires activity status to be determined by reviewing a considerable number of plan provisions to see which layer of the multi-layered 'sieve' (each layer containing different sized holes) catches the activity in question. That is a somewhat complex and counter-intuitive approach. It is acknowledged that the alternative PDP approach, classifying activities by reference to Tables, is clearer, more easily understood, and preferable. That is not challenged. However that issue has no relevance to the Substance.

(b) By Substance these submissions refer to the objectives, policies, site/zone standards and assessment matters which determine consent status and then guide the decisionmaker. These submissions contend that the Substance of the ODP CA regime is clear and easy to apply.

3.2 In order to properly understood this submission point it is necessary to refer to the ODP Chapter 15. Putting the Format to one side, and addressing Substance, the following points are made:

(a) Chapter 15 contains clear policy direction in the general Objectives 1-6 (the remaining objectives being zone specific) and the policies which relate to those objectives;

(b) The Rules contain separate sections 15.2.6 – 15.2.18, each of which deals with an aspect of subdivision and each of which contains specific assessment matters to provide guidance in implementing the relevant objectives and policies.

(c) For anyone with even a modicum of experience in the subdivision process, Chapter 15 provides clear guidance which is easy to follow and implement.

3.3 The combination of CA status and the rule regime described above means that:

(a) Any CA subdivision application which properly addresses the relevant assessment matters can easily be processed. There is virtually no need to go beyond the assessment matters to the relevant objectives and policies because any application which properly addresses the assessment matters will achieve the objectives and policies;

(b) If there are specific assessment matters which are not fully addressed or about which there is some debate, it is easy to find and apply the relevant Chapter 15 objectives and policies. It is rarely necessary to have recourse outside Chapter 15 to the land use Residential, RR and RL zones;

(c) The inclusion of Site Standards where necessary means that a breach of the Site Standard triggers an RDA consent where the assessment focuses on the RDA consent required. Rule 15.2.11 relating to water supply is an example.

## 4. s32 Evaluation Report

4.1 It is then necessary to consider the Council critique of ODP Chapter 15 which has resulted in the wholesale change in approach found in the PDP Chapter 27. The s42A Report summarises the s32 Evaluation Report but does not re-examine the conclusions of the s32 Evaluation Report. The various planning witnesses have commented on that s42A Report summary and to some extent they delve into the background s32 Evaluation report issues. These submissions now provide further focus on the s32 Evaluation Report because that is the foundation of the Council case for the now proposed RDA regime.

4.2 Paragraphs 4 – 6 on page 9 of the s32 Evaluation Report provide a good summary of the conclusions reached in that Report. Those three paragraphs read:

> "*The management framework results in significant complexities in terms of confirming the class of activity an application falls into and the multiple elements both the applicant and Council officers are required to consider for controlled activities.*
>
> *There are also many bespoke provisions for specific zones/locations that contain generic design-related provisions, rather than provisions relating to site constraints or unique features of the sites. This*

*indicates that the district wide objectives and policies could have been considered to be inadequate by the proponents of these provisions, or perhaps, overlooked in favour of advocating for the change in zoning to urban land that was at the time zoned Rural General.*

*The subdivision chapter is arranged based on the class of activity, much like the majority of the Operative District Plan. The result is that a reader needs to trawl through nearly every page of the chapter to determine the status and framework for a particular activity. It is considered the chapter can be arranged so that bespoke, or location-specific provisions, are detailed separately from the 'district wide' provisions. This will improve accessibility and ensure that the critical goals provided in the objectives and policies are not lost.*"

4.3 The following points are made in relation to the three paragraphs quoted above:

(a) The first part of the first sentence is correct, but that is the Format issue which does not relate to Substance.

(b) The second half of the first sentence merely reflects that any subdivision consent application involves the appraisal of multiple elements (whether under a CA or an RDA regime).

(c) The reference in the second paragraph to specific plan changes which have resulted in zone specific subdivision provisions (such as in the Millbrook and Jacks Point zones) is not a valid criticism of the CA regime. The CA regime applies district wide. If it is possible to draft zone specific provisions for a particular area which reflect the characteristics of that particular area, that is obviously preferable. However that will not be achieved under the proposed RDA regime.

(d) The third paragraph merely repeats the point made in the first sentence. This is an issue of Format not Substance.

(e) Nothing in those three paragraphs justifies a change from CA to RDA.

4.4 Paragraph 3 on page 10 reads:

"*The Operative District Plan includes objectives and policies that address design (Objective 5 and Policy 5.3). Despite this, the Operative District Plan subdivision chapter is considered to fall short of encouraging good subdivision design, particularly in the context of creating good neighbourhoods for residents and taking opportunities to integrate with existing neighbourhoods and facilities.*"

4.5 The following comments are made about the paragraph quoted above:

(a) It is a fundamental misrepresentation to suggest that only Policy 5.3 addresses subdivision design. This point can be confirmed by reading Objectives 1 – 6 and all related policies.

(b) There is no evidential factual analysis to support the contention that the ODP Chapter 15 falls short in encouraging good design.

(c) Even if ODP Chapter 15 does fall short in encouraging good design, there is no analytical comparison of addressing that alleged shortcoming through improved CA provisions compared to an RDA regime.

4.6 The Table on pages 13 – 14 analyse three Options (retention of Chapter 15, minor amendment of Chapter 15 or significant changes). The third column headed "Option 3" addresses the significant changes being advocated by Council which has resulted in the PDP Chapter 27. It is informative to consider the points made in that third column which are set below with comments following each:

- "*The removal of the controlled activity status has potential for uncertainty for developers/subdividers.*

*Comment*: The reference to "*potential for uncertainty*" significantly understates the issue. There can be no doubt that the outcome is significantly greater uncertainty.

- "*Has potential for a perceived loss in development rights by removing controlled activity status. However the development rights are facilitated through the respective zone provisions and expectation for land use and minimum allotment sizes.*"

*Comment*: The first sentence is correct, except that the word "*perceived*" is misleading because it implies that there is no

actual loss whereas the RDA regime creates a real loss. The second sentence contains no explanation of how removal of certainty of development facilitates development rights. This statement is self-evidently incorrect.

- "*Perception for a loss of direction or guidance of resource consent processing by the removal of specific matters of control.*"

*Comment*: Once again the use of the word "*perception*" suggests that the identified outcome will not occur, whereas in fact the removal of the detailed assessment matters obviously results in a loss of direction and guidance.

- "*Costs to the Council to formulate new provisions.*"

*Comment*: Obvious, and unnecessary.

- "*Benefit to the users of the District Plan and wider community from simplified provisions.*"

*Comment*: This is an extraordinary statement. While the improved Format simplifies matters for someone who has never used the plan before, it is of limited benefit to any regular users of the plan. The benefit to the "*wider community*" is unidentified and unable to be ascertained. The removal of certainty by changing to an RDA regime significantly outweighs any alleged benefit under this heading.

- "*Provides focus on the merits of applications and promoting sustainable management (Section 5(1) RMA).*"

*Comment*: There is no evidential analytical basis for this statement.

- "*Potential opportunity for developer-led innovation where this accords with the policy framework. The status quo may have resulted in these types of proposals not being a controlled activity and the loss of this status could be regarded as a disincentive and possibility that the application could be notified.*"

*Comment*: There is no evidential analytical basis for the claim that "*developer-led innovation*" is discouraged by the ODP CA regime. The minimum lot size (being retained) allows full scope for innovation above a prescribed minimum. Removal

of those minima might achieve this outcome, but that removal is not proposed.

- "*Enables consideration of the important matters at issue, rather than a focus on the perceived least path of resistance associated with the class of resource consents.*"

*Comment*: There is no explanation of how an RDA regime will enable consideration of important matters of issue compared to a CA regime. Some tweaking of the relevant guidance might be necessary (such as in relation to urban design) but that is unrelated to consent status.

- "*Despite the change in activity status, a stronger non-notification clause for most discretionary activities removes the risk to council and developer with applications being subject to notification assessments.*"

*Comment*: The PDP creates the identified risk by changing status from CA to RDA and then removes that risk by providing for RDA to be non-notified. Not only does that not improve the "risk" situation, it increases it because there is always the possibility of "*special circumstances*" notification which, under the proposed RDA regime, may lead to loss of development rights.

- "*Can still retain provisions relating to servicing and allotment sizes as anticipated by the respective zones.*"

*Comment*: This merely supports the evidence of Mr Glasner and Mr Wallace for the Council that controlled activity status is adequate to deal with all infrastructure issues[2] (with the possible exception of road widths which is commented on below).

4.7 The third paragraph on page 10 reads:

"*The facilitation of subdivision is a key driver of the District's economy, while subdivision outcomes will influence the wellbeing, health and safety of people and communities, both existing and*

[2] Refer Ulrich Glasner's evidence, paragraph 5.1, and David Wallace's evidence, (identical) paragraph 5.1.

*future residents. The removal of the perceived development rights coupled to the controlled activity status class of resource consent has the potential for a reduction in investment certainty, whether perceived or real. The appropriateness of the objectives in terms of meeting the purpose of the RMA, and the environmental, economic, social and cultural costs and benefits has been considered throughout the evaluation report.*"

4.8 The following comments are made in respect of the paragraph quoted above:

(a) This single paragraph identifies the essence of the primary concern being addressed in these submissions.

(b) However, once again, use of the word "*perceived*" (twice) reinforces the impression given by the s32 Evaluation Report that there is no acceptance that this adverse outcome may actually occur, let alone that it will certainly occur. The only inference that can be taken from use of that wording is that the author does not accept that that outcome will occur.

(c) There is no attempt to analyse, consider, or give appropriate weight to this outcome (regardless of whether it is only potential or is certain).

4.9 Pages 29 – 35 contain (part of) a Table which purports to identify economic, social and cultural costs and benefits of the notified fully discretionary activity regime. Those pages should be read carefully and considered carefully. They could be critiqued at length. However to minimise the length of these submissions, this critique will be limited to highlighting a few points below.

**Note**: This critique relies upon a submission point to be made below that the proposed change from fully discretionary to RDA is relatively insignificant because of the breadth of the discretion being retained.

4.10 There is a reliance on statistics. Paragraph 6 on page 30 refers to a period 2009 – 2015 during which 31% of applications were processed on a CA basis and 69% were processed on a basis which enabled Council to decline consent. That is followed by some statistical comment

relating to boundary adjustments. This statistical analysis is misleading. In particular:

(a) The analysis is not differentiated by zone. Eg: the analysis does not differentiate the number of consents (probably significant) relating to the Rural General zone where almost all applications (except boundary adjustments) are discretionary.

(b) The analysis does not identify the number of applications where non-CA status is triggered by one minor issue. The obvious example here is earthworks. A change in Council's approach to interpretation of the ODP some years ago led to a decision that any subdivision which breached land use earthworks standards would also require a land use consent. That one change in interpretation has resulted in many subdivision applications, which would otherwise be CA, having to be treated on an RDA basis.

(c) The inclusion of boundary adjustment applications, which comprise a significant number and which are not relevant to this issue, potentially confuses the picture.

(d) This issue is (potentially) limited to Residential, RR and RL zones. The statistical analysis just of subdivision applications within those zones, which also identified the reasons for a change in status from CA, would likely paint a very different picture.

4.11 The last sentence of paragraph 2 on page 33 reads:

"*… By making subdivision discretionary, coupled with non-notification provisions liberates applications from the burden of the Operative District Plan framework*".

*Comment*: No explanation is given for this very strong statement. Given that the proposed change is from a CA regime guided by detailed and specific assessment matters, where consent cannot be declined, to an RDA regime with far wider discretion and more general policy guidance, where consent can be declined, this statement is self-evidently incorrect.

4.12 Paragraph 6 on page 33, first sentence, reads:

"*Thirdly, a discretionary regime helps focus the importance of good quality subdivision design, over a focus on ensuring a proposal*

*conforms with the perceived lowest class of resource consent as a path of least resistance …*"

*Comment*: There is no evidential analytical analysis of how a discretionary regime will achieve this outcome compared to a CA regime when, at the end of the day, the same issues have to be addressed with the benefit of the same guidance under whatever regime applies.

4.13 The top part of the right hand column at the bottom of page 33 reads:

"*The ability to decline a consent based on subdivision design or servicing aspects will encourage a subdivider to undertake considered design, when it was not previously contemplated …*"

*Comment*: There is no explanation of how this '*threat*' will achieve an outcome which cannot be achieved through consultation between the Council and applicants or through imposition of appropriate consent conditions under a CA regime.

4.14 Page 34, middle column, paragraph 4 reads:

"*The removal of many of the matters of control/assessment matters focuses the assessment of the matters at issue provided in the policies, and specific policies, QLDC Land Development and Subdivision Code of Practice and QLDC Subdivision Design Guidelines.*"

*Comment*: How the removal of specific assessment matters, drafted to address specific subdivision issues, and their replacement by more generic and more wide ranging objectives and policies (assuming that the Code of Practice and Subdivision Design Guidelines will be relevant documents in either case) focuses assessment on matters at issue, in a manner which cannot be achieved under a CA regime, is not explained.

4.15 Similar comments can be made about a number of the statements in the following pages 35 – 40 but they would be largely repetitive.

4.16 In summary, it is submitted that the s32 Evaluation Report singularly fails to justify the proposed change from CA (excluding control over lot size) to discretionary (including control over lot size).

## 5. s42A Report

5.1 The s42A Report recommends a change from the notified fully discretionary regime to an RDA regime. The fundamental deficiencies in the notified fully discretionary regime are self-evident, particularly the complete lack of any evidential or analytical basis for the contention that a generic fully discretionary regime would somehow be less complex, more efficient, and provide more certainty, than the targeted ODP CA regime. As there does not appear to be any evidence supporting a fully discretionary regime, these submissions address that issue no further.

5.2 However any suggestion that an RDA regime is significantly different from a fully discretionary regime, in the circumstances of this hearing, are challenged. This is particularly and primarily because the proposed RDA regime retains Council discretion over lot size, which is the significant difference from the ODP CA regime which does not retain Council discretion over lot size.

5.3 There is a fundamental difference between these two different approaches when it comes to discretionary control over lot size:

(a) Under the ODP CA regime a minimum lot size is imposed by zone standard, and beyond that the Council has no discretion over lot size. This means that someone can purchase land and/or value land and/or design a subdivision with the certainty of knowing what the lot size rules are and therefore being able to, with certainty, ascertain development potential.

(b) The proposed RDA regime retains discretionary Council control over lot size. That means that, as well as requiring compliance with the prescribed minimum lot size, the Council has full discretion, through reference to all relevant objectives and policies, to decide what size any or all lots in a proposed subdivision should be, and to effectively impose that discretionary decision on the subdivider.

5.4 This is the real and primary significance of the "*threat*" of Council being able to decline consent – a threat which Council openly acknowledges. It is that "*threat*" which completely undermines any certainty for landowners or developers.

5.5 If Council retains discretionary control over lot size under an RDA regime, it is questionable what the change from fully discretionary to RDA actually achieves. Admittedly the list of matters for discretion is limited, which potentially removes some considerations (such as bird strike, of concern to the Queenstown Airport Corporation). However if control over lot size is retained, along with all of the other matters of discretion, and the decision is guided by reference to an extensive suite of objectives and policies, there must be a real question as to whether the change to RDA makes any discernible difference when it comes to Council discretion, landowner certainty, and cost effective decision-making.

5.6 If discretionary control over lot size is removed, the question which then becomes even more significant (than it already is) is whether there is any justification for RDA instead of CA. That is because all of the matters of discretion (other than lot size) can easily be dealt with by appropriate guidance (whether that be assessment matters and/or objectives and policies and/or documents sitting outside the district plan), including documents such as the Council's Code of Practice and the Subdivision Design Guidelines.

5.7 The s42A Report (and related evidence for Council) focuses on two primary justifications for the proposed RDA regime:

(a) Ability to refuse consent due to substandard infrastructure, with specific reference to road widths;

(b) Ability to achieve good quality subdivision design outcomes.

5.8 The first of those two justifications relies on the evidence of Mr Glasner adopted by Mr Wallace. Significantly both witnesses acknowledge that infrastructure can generally be addressed through a CA regime. The only identified area of concern is the possibility of the Council being required to accept substandard roading infrastructure, particularly relating to road widths. This issue is fully addressed in the evidence of the planning witnesses.

5.9 In summary, it is submitted that this justification for RDA does not withstand examination for (at least) the following reasons:

(a) s106(1)(c) allows a consent authority to refuse to grant a subdivision consent, or to grant a subdivision consent subject to

conditions, if it considers that "*…sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision*". That power is a complete answer to Council's concern on this issue.

(b) Neither Mr Glasner nor Mr Wallace have identified a single example of this undesirable outcome having in fact arisen under the ODP CA regime.

(c) The reality, as confirmed by Mr Ferguson in his evidence[3], is that Council controls the standard of roading, including road widths, through its Code of Practice. Every subdivision consent issued by this Council (possibly excluding boundary adjustment consents not involving roading or services) includes a condition requiring compliance with the Code of Practice (unless specified otherwise in the specific consent). This is probably why the Council has not been able to identify a single instance of this alleged concern actually arising under the ODP CA regime.

5.10 To elaborate on subparagraph (a) of the previous paragraph, the Environment Court has interpreted the powers under s106 fairly broadly, and not subject to an overall broad judgment to achieve sustainable management. What is 'sufficient' is a broadly based enquiry into both legal and physical access.

5.11 The Environment Court upheld the Council's decision to decline subdivision consent under s106(1)(c) in *Haines v Tasman District Council*[4] for a proposal which otherwise would have had 'no more than a minor effect on the environment'. The Court ultimately determined that the private access road and access by boat over lake were not 'sufficient' particularly as the former was dependent upon the ongoing goodwill of third parties. The Court stated:

> *"Section 106(1)(c) enables a consent authority to decline a subdivision consent which it might otherwise have to grant (e.g. a controlled activity subdivision) if it considers that* ***sufficient provision*** *has not been made for both legal and physical access to allotments to be created by the proposed subdivision"*[5]

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[3] Paras 83 and 94 EiC of Chris Ferguson for Darby Planning LP (#608)
[4] *Haines v Tasman District Council* (2009) 15 ELRNZ 182, Environment Court 11 March 2009
[5] Ibid at [24]

*Inherent in s106(1)(c) is a certain flexibility or discretion in the way in which*

*"a consent authority deals with access issues. The consent authority has discretion as to whether or not to grant consent (may refuse to grant) and discretion as to whether or not to grant consent subject to conditions (may grant . . . subject to conditions)"[6].*

*"We consider that the purpose of use of the word sufficient in s106(1)(c) is to enable consent authorities to undertake a broadly based enquiry into the adequacy of both legal and physical access provisions for allotments to be created by a proposed subdivision.[7]*

*"What constitutes sufficient access in any given instance will be determined by the particular circumstances of the parcel of land to be subdivided and the likely access requirements of those who might use it."[8]*

5.12 The second justification for the RDA regime is the allegation that the ODP CA regime has resulted in substandard subdivision design outcomes. That allegation is challengeable on both substantive and process grounds.

5.13 The substantive issue is whether or not the Boffa Miskell Report dated May 2011 which Mr Falconer relies on, is actually valid. It appears from the Boffa Miskell Report that the critique was based upon driving through the likes of Lake Hayes Estate, on one winter's day, taking some photographs, and forming some opinions – all done at a time when Lake Hayes Estate was only partially complete. The conclusions of that Report have never been tested in any way, particularly through public consultation. It might be interesting to know whether the residents of Lake Hayes Estate hold the same view. However no evidence has been led on this issue, other than by referring to a Report in respect of which the authors are not available for their opinions to be tested in this hearing, so this issue probable cannot be taken any further.

5.14 The more important process issue, which is addressed in the evidence of the planning witnesses, leads to the following conclusions (by reference to the Lake Hayes Estate assessment which is the most

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[6] Ibid At [25]
[7] Ibid At [28]
[8] Ibid At [56]

critical of all of the assessments in the Boffa Miskell Report and which has been commented on by the planning witnesses):

(a) The primary criticism of Lake Hayes Estate, being its location and lack of attachment to an urban area, is not a consequence of Chapter 15 subdivision design;

(b) The criticised road widths are the result of compliance with the Council's Code of Practice;

(c) The criticised 'lack of enclosure' along streets, arising because of low buildings adjoining wide streets, arises due to landowner preference when choosing to build single storey houses rather than double storey houses;

(d) With the possible exception of a boundary fence issue (which could be addressed through a CA regime) not a single criticism of Lake Hayes Estate, as contained in the Boffa Miskell Report, could be addressed (in terms of resulting in a different outcome) under the proposed PDP RDA regime compared to the ODP CA regime.

5.15 In conclusion on this issue, it is submitted that the s42A Report does not provide any justification, let alone an adequate s32 justification, for:

(a) A change from CA to RDA subdivision in general; or

(b) Council discretionary control over lot size (whether under a CA regime or an RDA regime).

## 6. Reference to Council's Code of Practice

6.1 Paragraphs 18.10 – 18.21 recommend that the PDP does not include any reference to the Council's Subdivision Code of Practice. It is important to know that that document is a very lengthy and detailed document which contains a wide range of design standards and guidelines including, for example, Council standards on road widths in subdivisions (width generally relating to potential traffic volumes). This recommendation is based upon Mr Glasner's evidence. Mr Glasner's primary concern is that reference in a district plan to a specific Code of Practice means that that standard gets 'locked in' and cannot be amended other than through a plan change.

6.2 As confirmed in Jeffrey Brown's evidence, the current ODP Chapter 15 contains a number of references to the Council's Code of Practice[9]. Why there are various references in different parts of Chapter 15, rather than perhaps one reference applicable to the whole of Chapter 15, is unclear and is a simple drafting matter which could be tidied up. However the references are there and the Code of Practice is implemented and rigorously applied by Council.

6.3 What is significant to this point is that the references to the Code of Practice in the ODP are not references to a specific version of the Code of Practice. The Code of Practice is updated from time to time (as evidenced by Mr Glasner and Mr Wallace). All subdivision consents are issued subject to a condition requiring compliance with the Council's Code of Practice. The version to be complied with is always the version in force as at the date of the consent decision (occasionally the Council tries to enforce later and newer requirements in implementation of older consents, but there is never any difficulty pushing back on that point when it arises).[10]

6.4 Neither Mr Glasner nor Mr Wallace have explained why the current ODP practice, which has worked very well for the last 15 years without any legal or practical concern, cannot continue. It is submitted that reference to the Council's Code of Practice (undated) should be retained, either through policy(ies) or assessment matter(s) (not in a Site or Zone Standard) so that the Council's current Code of Practice from time to time can always be applied, in a manner determined by the Council, as part of the planning process for considering and issuing subdivision consents.

6.5 The evidence for the Council does not suggest that there is any legal problem with the approach advocated above which has been the approach Council has adopted over the past 15 years. Even if there were a legal issue arising from reference to the Council's Code of Practice in a policy or assessment matter (resulting in a specific version becoming 'locked in') then removing any such reference from the District Plan will not make any difference to subdivision consent outcomes.

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[9] Para 2.7 EiC of Jeff Brown, referring to Rules 15.2.11.4(iii), 15.2.12.3(iv), and 15.2.13.2(iii) – also Rule 15.2.14.2(iv)

[10] Comment made from personal experience as Counsel advising clients – should be able to be confirmed by reference to Council staff if necessary.

Provided the relevant policies or assessment matters are worded appropriately, the Council will always have the ability to refer to its current Code of Practice and will inevitably apply its current Code of Practice through consent conditions. The only effect of removing reference to the Code of Practice from the District Plan would be that some readers of the District Plan may not become aware that there is a large and very detailed document sitting outside the District Plan which has a very significant influence on the subdivision design consent process.

6.6 Another option would be to include an RDA Site Standard requiring roading design to comply with a specific version of the Council's Subdivision Code of Practice, with assessment limited to the adequacy of roading design for its intended purpose (or wording to that effect, as acceptable to the Council). That would only 'lock in' one aspect of the Code of Practice, and the RDA discretion would adequately deal with the situation if the Code of Practice were to be subsequently amended in respect of roading design. ie: Breach of the Site Standard would give the Council discretion to apply any updated roading design standards. Counsel submits that this option is not necessary, but it is available.

## 7. RL Zone – Minimum or Minimum Average Lot Size

7.1 The issue of the appropriate density within RL zones within the Wakatipu Basin, and specifically whether the relevant density should be one residential unit per 2ha or one residential unit per 1ha, was addressed at length through submissions and evidence during the Stage 2 Hearing relating to RL zones. Although the issue is addressed again in the s42A Report for this hearing, Counsel understands that any further consideration of this issue (at least in respect of the Wakatipu Basin) has been deferred pending the outcome of the proposed study of the Wakatipu Basin by the Council. Accordingly that issue is not addressed any further.

7.2 However there is the related issue of whether, if the ultimate decision is in favour of one residential unit per 1ha in some or all of the RL zones, the Chapter 27 subdivision standard which implements the Chapter 22 zoning density should be a 1ha minimum (as proposed by the Council) or a 1ha minimum average (as requested by some of the Submitters). The s42A Report does not address this issue. It is not clear when

Council thinks it will be addressed. To avoid the issue being overlooked, it is addressed in these submissions and in the evidence of Ben Farrell.

7.3 This is a relatively minor issue in the bigger scheme of things, but it is an important issue when it comes to subdivision design within the RL zone. In essence the issue is whether to impose:

(a) a 1ha minimum lot size, which limits flexibility and is likely to result in grid like 1ha subdivision; or

(b) a minimum average 1ha standard, which allows the subdivider greater flexibility to design to the landscape, and to create lots of varying sizes, without any increase in density.

7.4 This issue can be explained by reference to Plan A, **attached** in Schedule A, which has been presented to the Panel in evidence previously and which is the original approved *Hawthorn* subdivision plan. This subdivision plan was consented when the land was zoned Rural General (fully discretionary regime) so it is not an example of what has been achieved in the RL zone. However the Hawthorn 'Triangle' is recommended for rezoning to RL with an allowable density of one residential unit per 2ha (Council recommendation) or one residential unit per 1ha (Dr Marion Read's recommendation, supported by submissions). Plan A therefore provides a good hypothetical case study of a potential outcome if this land had been rezoned RL, with allowable density of one residential unit per 1ha, prior to development.

7.5 Annotated on Plan A are the facts that the land originally contained 33.9158ha, that 32 lots were consented, and that slightly over 2.5ha were allocated to public walkways, parks and a carpark.

7.6 The point being made is that the subdivision outcome shown on Plan A would be achievable under a minimum average 1ha standard, provided the rule is appropriately drafted. The allowable density of up to 33 dwellings on 33 lots is achievable (actually only 32 were created on Plan A). A minimum average 1ha rule allows the variation of lot size shown on Plan A, and also allows 2.5ha to be allocated to walkways of a generous width plus two small parks plus a carpark without any loss of development rights.

7.7 Under the minimum 1ha regime proposed by the Council, the Plan A result would not be achievable (other than as a non-complying activity).

The minimum 1 ha per lot requirement would have resulted in a far more grid like pattern of development with almost no variation of any lot size. There is no incentive under that regime for the developer to provide a generous public walkway when that would result in loss of development yield.

7.8 The simple question being put in these submissions is: Why should Plan A be a non-complying activity? It is submitted that a regime with a minimum average 1ha lot size will achieve the density anticipated by Chapter 22, in a more imaginative way, while allowing provision of public amenities.

7.9 In discussing this issue with Ben Farrell, he expressed a concern that a CA minimum average 1ha regime could provide a strange outcome of a number of very small lots with one much larger lot, which might not achieve the objectives and policies of the RL zone. The obvious response to that concern relates to market value. If a landowner owned the land shown on Plan A located in a RL zone, and could create 32 RL lots of roughly equal size and relatively high value, it is difficult to see why any such landowner would, for example, create 32 4,000m² lots plus a balance lot of about 20ha. The smaller residential lots would almost certainly have a lower value compared to larger lots.

7.10 However if this is a genuine concern it can be addressed by providing for a CA minimum 1ha lot standard together with an RDA minimum average 1ha standard, with discretion limited to subdivision designed to achieve the objectives and policies of the RL zone. This is the alternative recommended by Ben Farrell.

7.11 The suggested wording of a rule which would achieve this is as follows:

> "*In all Rural Lifestyle Zones (except the Makarora Rural Lifestyle Zone) the total residential lots to be created by subdivision (including balance of the site within the zone) shall not have an average less than 1ha. For the purpose of this rule, the area of non-residential lots such as access lots or amenity lots (such as walkway lots) shall be included in order to calculate the average but those lots shall be deemed not to be separate lots.*"

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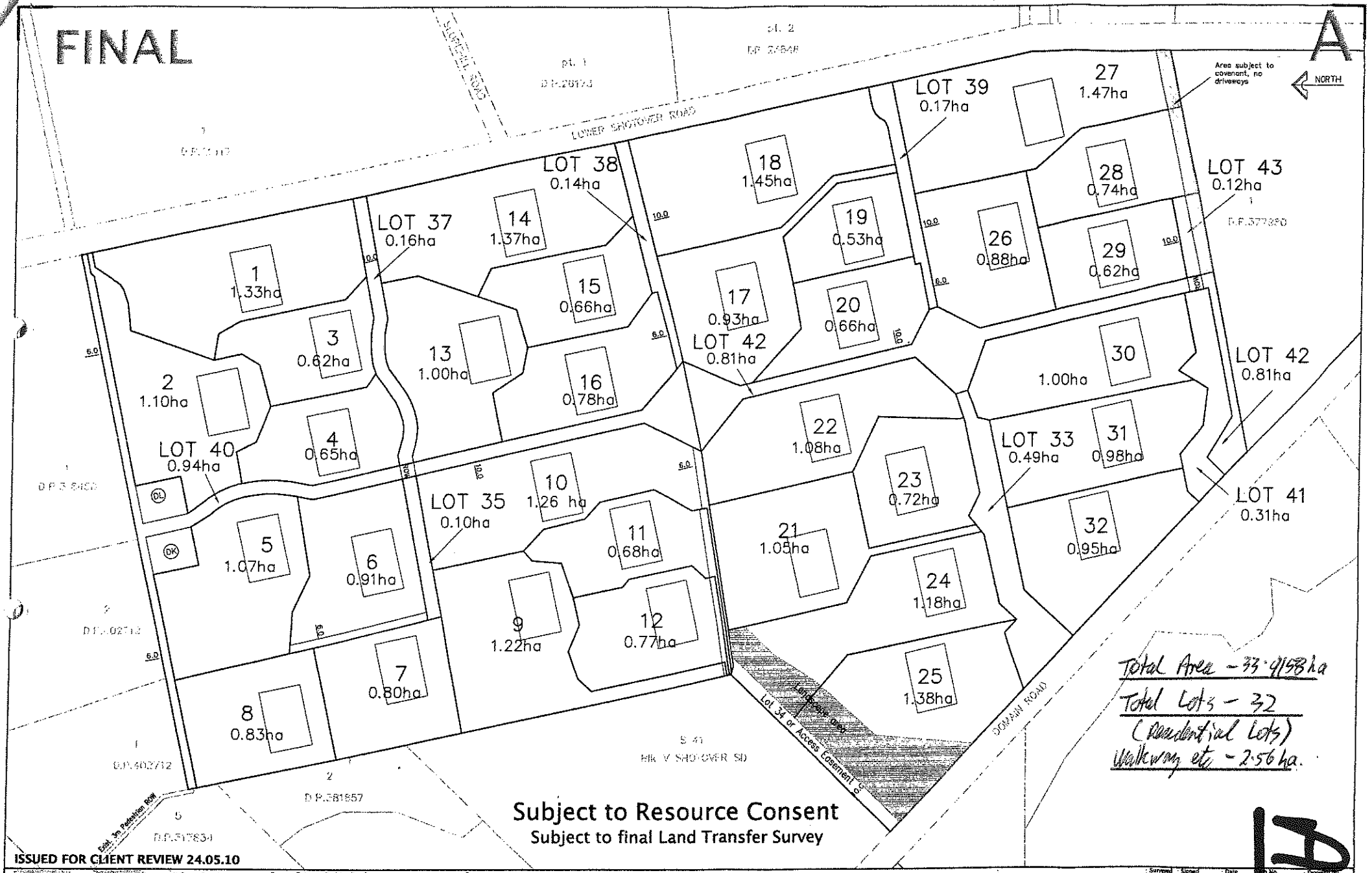
Warwick Goldsmith
Counsel for the Submitters

## SCHEDULE A

## PLAN A – Hawthorn Subdivision Plan

FINAL

A




ISSUED FOR CLIENT REVIEW 24.05.10

18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| Rev. | Date | Revision Details | By |
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**LOTS 1 - 35, 37 - 43 BEING A PROPOSED SUBDIVISION OF LOTS 2 - 9 D.P.341569 & LOTS 2 & 3 D.P.377980**

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