

Before Queenstown Lakes District Council

In the matter of the Resource Management Act 1991

And

In the matter of The Queenstown Lakes District Proposed District Plan Topic 06
Residential

Legal Submissions

Dated 26 October 2016

The Estate of Norma Kreft (#0512); The Wanaka Trust (#0536)

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1 Introduction

- (a) These legal submissions are presented on behalf of The Estate of Norma Kreft (#0512) and The Wanaka Trust (#0536) ("**Submitters**") in respect of Topic 06, Chapter 8 Medium Density Residential ("**MDR**") of the Proposed District Plan ("**PDP**").
- (b) The Submitters made submissions and a further submission on the MDR chapter seeking a range of relief to the notified chapter which would better achieve integrated management of resources.
- (c) The Submitters own land at 51-53 Stratford Terrace and 26 Warren Street in Wanaka ("**Sites**"). The Sites are identified on PDP Planning Map 21 within the MDR Zone. The relief sought by the Submitters is supported by planning/ urban design evidence presented by Jane Rennie.

2 Executive Summary

- (a) The amended provisions provided by Ms Rennie are considered to be the most appropriate means of achieving sustainable management of the Sites, as well as the purpose and objectives of the MDR chapter and the notified higher order chapters in the PDP. These are therefore appropriate changes to implement District-wide.
- (b) The Sites are split zoned in the Operative District Plan ("**ODP**") as Low Density Residential and High Density Residential Sub Zone C. The PDP zoning of the Sites as MDR is supported by the Submitters and has not been opposed by any submissions.
- (c) The main aspect of the Submissions is to provide a more appropriate activity classification for breaches of standards within the MDR. The Submissions have not sought to dramatically amend the rules themselves to provide for more lenient development:
 - (i) An activity status must be justified as the 'most appropriate' in accordance with the provisions of the PDP, the purpose of the Act, the Council's section 31 functions, and the factual matter of what is sought to be protected through those standards;
 - (ii) The Restricted Discretionary ("**RD**") breach status and associated matters of discretion have been refined in the evidence of Jane Rennie, and will provide an appropriate level of certainty and protection for users of the Plan;

- (iii) A RD status for appropriate breaches of standards will achieve a design-led approach for urban integration and development of the MDR Zone.
- (d) Site specific rules in the ODP pertaining to building coverage set a 'baseline' against which the PDP provisions must be assessed. A restriction on those development rights must be carefully justified by a Council evaluation report.

3 **Non-complying activity status in standards**

- (a) The structure of the PDP provides an activity status for particular rules, and non-compliance activity status for a breach of standards associated with rules. The key aspect of the Submissions is to ensure that an appropriate status is associated with a breach of standards. The following matters were submitted on to oppose the notified non-compliance status (suggesting non-complying ("**NC**") to be replaced by RD, or Discretionary to be replaced by RD):
 - (i) Standard 8.5.1 Building Height
 - (ii) Standard 8.5.4 Building Coverage
 - (iii) Standard 8.5.5 Density
 - (iv) Standard 8.5.6 Recession Plane
 - (v) Standard 8.5.7 Landscape permeable surfaces
 - (vi) Standard 8.5.8 Minimum Boundary Setback
 - (vii) Standard 8.5.10 Window Sill Height
- (b) For each of the above activity status amendments Ms Rennie has provided refined matters of discretion for Council to be restricted to which seek to achieve design-led strategic planned outcomes. Ms Rennie also discusses in detail the particular advantage of providing a more flexible approach to breaches of prescribed standards for these matters.
- (c) The Court of Appeal in *Coromandel Watchdog of Hauraki v Chief Executive of the Ministry of Economic Development* provides that the activity status of a proposed provision in a plan must be considered in accordance with section 32 as the most appropriate way to achieve the associate objectives and policies for that provision:

The important point for present purposes is that the exercise required by s 32, when applied to the allocation of activity statuses in terms of s 77B, requires a council to focus on what is "the most appropriate" status for achieving the objectives of the district plan, which, in turn, must be the most appropriate way of achieving the purpose of sustainable management.

Section 32(3) is amplified by s 32(4) which requires that for the purposes of the examination referred to in s 32(3), an evaluation must take into account:

(a) The benefits and costs of policies, rules or other methods; and

(b) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods

...

In addition to the cost/benefit analysis required by s 32, there are a number of other requirements which must be met by a local authority in preparing its district plan. When determining which of the activity types referred to in s 77B should be applied to a particular activity, the local authority must have regard not only to the cost/benefit analysis undertaken pursuant to s 32, but also to its functions under s 31, the purpose and principles set out in Part 2 of the Act, particularly the sustainable management purpose described in s 5, the matters which it is required to consider under s 74, and, in relation to rules, the actual or potential effect on the environment of activities including, in particular, any adverse effects (s 76(3))¹

- (d) Although the above case was particularly about application of prohibited activity status to a rule, it is submitted the Court's reasoning is equally applicable to considerations of the appropriateness of NC or Discretionary status for breaches of standards. All six activity classes provided for in section 77A (previously section 77B) of the Act are valid options for consideration.
- (e) It is entirely open to a Council to determine that NC or Discretionary status is the most appropriate way to manage the effects of a particular activity and provide for sustainable management. That, however, must be a determination based upon active consideration of alternatives, and of costs and benefits.
- (f) Standards 8.5.1 (height), 8.5.5 (density), 8.5.6 (recession planes), and 8.5.7 (permeable surfaces) were all notified with an associated NC status for a breach of standards. The section 42A report prepared by Amanda Leith recommends that standards 8.5.5 (density) and 8.5.7 (permeable surfaces) be amended and replaced with a Discretionary and RD status respectively, and standards 8.5.1 (height) and 8.5.6 (recession planes) be retained as NC.
- (g) Standard 8.5.4 (coverage), 8.5.8 (setback), and 8.5.10 (windowsill height) were notified with a Discretionary status for breach of standards. The section 42A report recommends that standard 8.5.10 (windowsill height) be deleted and standards 8.5.4 (coverage) and 8.5.8 (setback) be retained as Discretionary.

¹*Coromandel Watchdog of Hauraki Inc v Chief Executive of the Ministry of Economic Development* [2007] NZCA 473, at [28] [29] and [31]

Non-Complying status justification

- (h) It is submitted that each of the above standards would be more appropriately drafted with RD non-compliance status. NC activity status is generally associated with objectives and policies in a plan, which sends a clear signal to users of the plan that a particular breach or activity is not anticipated and will not achieve the purpose of a particular zone. In the present instance, the MDR Chapter, and provisions in Chapter 3 Strategic Direction support the general purpose that MDR is to:

provide for a greater supply of diverse housing options for the District whilst still ensuring that housing forms are well designed and located to provide residential amenity...²

- (i) Other provisions in Chapter 8 which provide for a design-led approach to development, include (as amended in the section 42A report Chapter 8):

Obj. 8.2.2 Developments contribute to the environment through quality urban design solutions which positively responds to the site, neighbourhood and wider context.

Pol. 8.2.2.4 Ensure developments reduce visual dominance effects through variation in facades and materials, roof form, building separation and recessions or other techniques.

Obj 8.2.3 Development provides high quality living environments for residents and maintains the amenity of adjoining sites.

Pol. 8.2.3.1 Apply recession plane, building height, setbacks and site coverage controls as the primary means of ensuring reasonable protection of neighbours' access to sunlight, privacy and amenity values.

- (j) None of the above policies are 'avoidance' in nature in that they do not provide strong policy support that a breach of standards justifies NC status. For example, Policy 8.2.3.1 is explicitly limited to 'reasonable' protection of access to particular amenity values. The above provisions, and others in the Chapter not cited, all support a varied and integrated approach to development. Strictly 'capping' breaches of standards will not achieve such a design-led approach which is further discussed in Ms Rennie's evidence at paras 39-40.
- (k) The closest avoidance type policy is Policy 8.2.2.3, which specifically relates to garages dominating the street frontage. The associated standard 8.5.14 'Dominance of Garages' only provides Discretionary breach status. This is an example of inconsistency within the Chapter which is not justified in Council's evaluation reports.

² Section 42A Report Medium Density Residential Zone, Part 6 Background, page 13, and referring to Goal 3.2.2 and objective 3.2.2.1 referred to in evidence of Jane Rennie

- (l) It is difficult to justify NC status (in terms of section 32) as flowing from those objectives and policies which only seek to 'manage' and 'control' adverse effects rather than to avoid or preclude.

Discretionary status justification

- (m) Discretionary activity status provides open-ended discretion for Council to consider any matter it considers relevant for the purposes of determining a consent application and applying conditions of consent. It reserves a large amount of power to Council to decline applications and correspondingly creates a large amount of uncertainty to plan users.
- (n) As discussed in Ms Rennie's evidence at pages 12-13, RD status provides a 'proactive regime' for enabling appropriate and efficient development within the MDR Zone. The specific matters of assessment which Ms Rennie' has refined in Appendix 2 of her evidence provide certainty and clarity to plan users as to what matters will guide a potential breach of a standard, whilst still maintaining the ability for council to refuse consent where appropriate.
- (o) The High Court in *Rangitata Diversion Race Management Ltd v Genesis Energy Ltd*³ recently considered section 77A and any 'implied' or 'express' limitations to applying controlled activity status in a plan change. It considered that the wording of the Act had no express limitation on the section 77A discretion, so went on to consider any implied limitation through section 30 (regional council functions), extrinsic higher order planning documents, and finally Part 2 of the Act. Having considered all of those matters the Court determined in that instance there was no limitation on the section 77A ability to provide a controlled activity status for a rule where that was supported by a section 32 assessment. Relevant extracts from the case are included below:

[24] Section 77A of the RMA is, on its face, unqualified. For present purposes it relevantly provides that a "local authority may ..." categorise activities as belonging to one of the activities described in ss (2). Subsection (2) then lists the six activity statuses, including controlled activity status. There is no express prohibition on the local authority's discretion to assign activity status within the words of the section itself

...

[28] There being no express limitation on the ability to assign controlled activity status, the question becomes whether the internal context of the RMA in any way implicitly alters that initial conclusion. This inquiry is multi faceted. I address the various considerations in turn.

³ *Rangitata Diversion Race Management Ltd v Genesis Energy Ltd* [2015] NZHC 2174

[29] Before addressing these matters, it is useful to consider the function of the plan making process. In *Discount Brands Ltd v Westfield (New Zealand) Ltd*, the Supreme Court stated:

The district plan is key to the Act's purpose of enabling 'people and communities to provide for their social, economic, and cultural well being'. It is arrived at through a participatory process, including through appeal to the Environment Court. The district plan has legislative status. People and communities can order their lives under it with some assurance.

(emphasis added, footnotes omitted)

(p) In light of the above, the 'most appropriate' section 77A test requires a factual assessment of the activity (or standards) and the effects on the environment as set against the provisions of the PDP, the purpose of the Act, and any other relevant planning instruments. RD status in this instance is justified having regard to the provisions of the PDP, and the enabling section 5(2) purpose of the Act.

(q) RD status in the MDR Zone will also accord with section 31 functions of territorial authorities, which provides for:

*'review of objectives, policies and methods to achieve **integrated management** of the effects of the use, development, or protection of land and associated natural and physical resources...'*

(r) In order to provide the most appropriate balance of protection and certainty, it is submitted that the prescribed RD status and associated guidance provisions offered in the evidence of Ms Rennie be recommended by the Commissioners.

4 **Site Specific Density (Standard 8.5.4)**

(a) The Wanaka Trust Submission requested that the Operative District Plan ("ODP") Site Standard 7.5.5.1(i) (building coverage) be retained within PDP standard 8.5.4.

(b) The ODP Site Standard provides for a 50% building coverage rule specifically for the Warren Street Property (Lot 3 DP 25998). The remainder of the previous zoning of the Site (HDR sub zone C) provided a 45% maximum coverage.

(c) The site-specific rule was the result of a Consent Order reached in the Environment Court to settle appeals relating to Plan Change 10.⁴ The Court, having considered the Parties' agreement, approved the Consent

⁴ *Kreft v Queenstown Lakes District Council* (ENV-2007-CHC-317)

Order on the basis that it confirmed to the relevant requirements and objectives of the Act, including in particular Part 2.

- (d) It is submitted that although the Commissioners are not bound by the ODP provisions, the ODP is the starting position or 'baseline' for a resident's rights in respect of their land. Section 32 is discussed in the previous section of these submissions, and as you are aware requires a comprehensive assessment of alternatives. One alternative for consideration is always the 'status quo' of what is provided for as of right in an operative plan.
- (e) Therefore imposing a more restrictive standard must be justified having specifically considered the impact of that change on the receiving environment. In this instance, the section 32 report for Chapter 8 has made no specific reference to reducing this particular site-specific standard.
- (f) It is acknowledged that there may be desirability from Council to 'streamline' the Plan to remove references to site-specific provisions. This however is not a justification in terms of section 32 efficiency.

Dated this 26th day of October 2016



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