BEFORE THE HEARINGS PANEL FOR THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the Queenstown Lakes Proposed District Plan
BY	**JOHN MAY**
	Further Submitter No. 1094

MEMORANDUM OF COUNSEL FOR JOHN MAY

DATED 20 JUNE 2017

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MAY IT PLEASE TH ECOMMISSIONERS

1. The Commission reserved leave to file a brief of evidence and/or submissions in reply to the supplementary material filed by Glendhu Bay Trustees Limited.

2. Counsel has received and perused the memorandum of counsel for GBT dated 14 June together with the appended table of provisions that the Commission asked Mr Ferguson to supply.

3. This memorandum serves as Mr May's response to those submissions and the table.

Legal Submissions

4. The relevance of the Supreme Court's decision in *King Salmon* and the subsequent decision of the Court of Appeal in *Man O' War Station*[1] were well traversed at the hearing on the 14th of June. Nothing said by counsel for GBT in her submissions dated 14 June alters this counsel's submissions for Mr May. It is, of course, perfectly understandable that GBT should want to preserve the overall broad judgment approach since that was the regime under which the resource consent was granted. That was the very proposition that the Supreme Court was tasked to deal with, and did so emphatically. The Court of Appeal in *Man O' War Station* held that it did not make any difference that we are not dealing with giving effect to the NZCPS, because the directive language of section 6(b) leads to the same result.[2]

5. Counsel for GBT points to provisions of the Proposed District Plan which are said to support a scheme by which positive effects might be weighed against adverse effects. It is submitted that this approach conflates two different propositions. It is not suggested for a moment that positive effects can never be relevant to a consent authority's decision in relation to an ONL, but rather that evaluating positive effects is a separate matter to evaluating whether section 6(b) values have been protected. The relevance of positive effects, or environmental compensation, falls to be evaluated only once the protection element (refer Objectives 3.2.5.1 and

[1] [2017] NZCA 24
[2] Ibid paragraph 61.

6.3.1 of the Proposed District Plan) are satisfied. A consent authority called upon to apply those provisions is still left to decide whether consent should nevertheless be granted and, if so, on what conditions. After *Man O'War* there is no case for arguing that environmental compensation is an exception to the protection objectives in the proposed Plan or section 6(b) of the Act.

6. Neither is it accepted that the use of the word "inappropriate", borrowed from section 6(b) itself, and repeated in Objectives 3.2.5.1 and 6.3.3 of the Proposed Plan introduce an evaluative element to the framework that brings in other aspects of Part 2 of the Act into consideration. As counsel for GBT notes in her paragraph 13, the Supreme Court held that the word "inappropriate" is to be assessed against the characteristics of the environment that are sought to be preserved (in this case, the ONL). Therefore, any development in the ONL that does not protect its values is inappropriate development. There is no need to go beyond the words of section 6(b) itself to understand what "inappropriate" means.

The Table

7. The witnesses for Mr May have not had the time to conduct a line by line analysis of the table and to verify its correctness (or otherwise). It is not clear who the author of the table appended to counsel's submissions is.

8. What is apparent, however, is that the third column headed "Comment/Explanation" has been utilised as an advocacy opportunity that was not called for. [3] For example, on the second page of the table the following statement appears:

> *"Specific allowance has been built in for consideration of building in Activity Area R between 4m and 6m in height above the datum, to consider visual impacts of taller buildings than was assessed at the time of consent."*

9. This paragraphed reads as though something is being offered rather than something more than what was consented is being sought. A more useful approach would have been to identify with precision what building

[3] Counsel's recollection is that the Commission's request for the table was directed to Mr Ferguson.

height the Environment Court granted with respect to each of the 42 house sites, and now what is sought by the submitter.

10. On the 6th page of the appendix table the staging issue is addressed through comments in column 3. Rather than point out that the submitter proposes to abandon the 3-stage structure imposed by the Court, it is blandly said that:

> *"key elements have been retained and integrated into the rules where necessary, e.g. requirement for the residences to link to the revegetation strategy as a means for ensuring that the key mitigation revegetation specifically required to address the effects of built form is provided".*

That comment misses the point expressly made by the Environment Court that the staging was linked to the anticipated growth rates for kanuka[4] and the need for the development to be imbedded within its environment[5]. The proposed rules 44.5.4, 44.6.5, and 44.6.7 do not contain the "plant first, build later" flavour of the Court's decision. The rules facilitate the submitter proceeding with the residential development without the mitigation planting being established in advance. The cash-flow benefits of this are not difficult to imagine but the temporary adverse effects on ONL values at least required acknowledgement and assessment. It is not easy to understand the basis on which the submitter implies that staging was not a "necessary" or "key element".

11. The discussion of rule 44.5.2(d) (permitted farm buildings in the GS activity areas) is misleading. It is said that *"Development of farm buildings in Activity Areas GS(OS/F), GS(C) and GS(FH) is aligned with the provisions for farm buildings that apply to ONL areas in the rural zone".* The word "aligned" is ambiguous. Farm buildings of the same dimensions in the chapter 21 provisions are restricted discretionary activities unless on land holdings more than 100 Hectares[6]. The portions of the GS(O/SF), GS(FH) and GS(C) activity areas next to Glendhu Bay are not on lots exceeding 100Ha.[7] The proposed rules

[4] [2012] NZEnvC 43 para 29.
[5] Ibid para 76.
[6] Rule 21.5.18.1
[7] CFR 602577 is 44.2105 Ha.

omit to carry over that site area standard and the table comments fail to mention it. Effectively that omission would shift the status of farm buildings close to the Wanaka-Mt Aspiring Road from restricted discretionary to permitted activities.

12. It is submitted that the above examples are sufficient to put the Commissioners on guard about the reliability of the comments made in column 3 of the table. Mr May maintains his view that the provisions facilitate substantial future development within the ONL that will be inadequately controlled by the provisions proposed.

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