

**BEFORE THE QUEENSTOWN LAKES  
DISTRICT COUNCIL**

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

**AND**

**IN THE MATTER** of the Queenstown Lakes District Proposed District Plan

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**MEMORANDUM OF COUNSEL**

17 June 2016

Real Journeys Limited #621/ #1341

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## 1. Introduction

- 1.1 This Memorandum is lodged on behalf of Real Journeys Limited in respect of its submissions made to the Proposed District Plan ("PDP") Chapter 26 (Heritage).
- 1.2 This Memorandum considers whether there is jurisdiction under the Resource Management Act 1991 ("RMA") to regulate the TSS Earnslaw<sup>1</sup> as a heritage feature in the PDP.

## 2. Executive Summary

- 2.1 The definition of historic heritage provides for the management of natural and physical resources, which by definition we consider excludes the Earnslaw, as it is not a 'structure'.
- 2.2 The PDP cannot protect the Earnslaw on the basis of historic heritage within Chapter 26. The rules pertaining to such protection are *ultra vires*.

## 3. Structure of PDP and effect of heritage listed features

- 3.1 The Historic Heritage chapter (26) in the DPR states that:

*"The purpose of this chapter is to 'promote the sustainable management of the District's historic<sup>1</sup> heritage features*

<sup>1</sup> Sec 2A RMA"

- 3.2 The footnote above refers to section 2A RMA, which may be an error as that section of the Act deals with successors. It is assumed that the reference should be to the interpretation section 2.
- 3.3 Chapter 26 seems to be predicated on the definition of Historic Heritage under the RMA (although in error reference). The PDP refers to historic heritage **features**<sup>2</sup>, which is not a precise term to use as Historic Heritage under the Act provides for the management of *"natural and physical resources... including historic sites, structures, places, and areas ... and surroundings associated with natural and physical resources"*.

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<sup>1</sup> Heritage listing #37, Map 36, TSS Earnslaw, whose berthing is located at Steamer Wharf, Beach Street

<sup>2</sup> 26.1 Purpose, Chapter 26

- 3.4 'Feature' is not defined under the RMA, therefore it must be considered whether the Earnslaw could fall within the ambit of natural and physical resources, including sites, or associated surroundings.
- 3.5 The Earnslaw and its 'berthing' are listed in the Heritage Schedule of the Operative District Plan. It is unclear whether this listing refers to the berth or the vessel. That intent appears to have been clarified in the section 42A report for Historic Heritage, and is to identify the vessel itself. There is no reference to the Earnslaw in the Heritage Section 32 report for the PDP.

#### 4. **Jurisdiction to manage natural and physical resources**

- 4.1 All persons exercising functions and powers under the RMA are required to "*recognise and provide for*" matters of national importance in policy statements and plans and in the assessment of resource consent applications.<sup>3</sup> The protection of historic heritage from inappropriate subdivision, use, and development is listed as a matter of national importance in section 6 of the RMA. Councils are also required to have regard to any relevant entry on the New Zealand Heritage List when preparing or changing a regional policy statement, regional plan or district plan<sup>4</sup> and rules that protect historic heritage in proposed plans take immediate legal effect.<sup>5</sup>
- 4.2 The purpose of the RMA is to sustainably manage natural and physical resources. *Natural and physical resources* are defined in section 2 as:

*"includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures"*

- 4.3 'Structure' is defined as:

*"any building, equipment, device, or other facility made by people and **which is fixed to land; and includes any raft**"*

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<sup>3</sup> Sections 74(1)(b), 66(1)(b), s61(1)(b) and 104 RMA

<sup>4</sup> Sections 61(2), 66(2) and 74(2) RMA

<sup>5</sup> Section 86B(3)(d) RMA

- 4.4 There is no definition of 'building' in the RMA, however the Building Act 2004 specifically excludes a ship from the definition of building.<sup>6</sup> The Earnslaw is also not a 'Raft', relevantly defined under the RMA as:

*"any moored floating platform which is not self-propelled..."*

- 4.5 Historic Heritage is broadly defined as:

*"(a) means **those natural and physical resources** that contribute to an understanding and appreciation of New Zealand's history and cultures, deriving from any of the following qualities:*

- (i) archaeological;*
- (ii) architectural;*
- (iii) cultural;*
- (iv) historic;*
- (v) scientific;*
- (vi) technological; and*

*(b) includes—*

- (i) **historic sites, structures, places, and areas; and***
- (ii) archaeological sites; and*
- (iii) sites of significance to Māori, including wāhi tapu; and*
- (iv) **surroundings associated with the natural and physical resources."***

- 4.6 The ordering of the above definitions means that historic sites, structures, places, and areas must be narrower than natural and physical resources and fit within that latter defined category. For the avoidance of doubt, 'historic site' is not defined in the PDP or RMA, but 'site' is defined in the PDP and relates to parcels of land.

## 5. **Is the Earnslaw fixed to the land and therefore a 'Structure'?**

- 5.1 The Environment Court in *Hauraki District Council v Moulton* provided an analysis on whether a vessel was a structure under the RMA:

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<sup>6</sup> Section 9 Building Act

*"The answer is that all vessels do not require a resource consent (or a permissive rule in a plan) unless they are fixed to the land and thus meet that part of the definition of "structure". To borrow a rather ugly phrase from land law, the factor which determines whether a vessel is fixed to the land is the "degree of annexation". In the case of a vessel the degree of annexation would involve two, possibly three, aspects:*

- *the method of mooring; and*
- *the duration of the mooring; and*
- *(possibly) whether the vessel can move under its own steam or by sail."*

...

*"...if boats are temporarily moored or tied up they are not "fixed to the land", but there may come a time when the duration of mooring indicates that the vessel is fixed (depending on the circumstances in each case). Similarly the method of mooring (e.g. bolting to a jetty) might show a vessel is fixed."<sup>7</sup>*

- 5.2 *Moulton* was later applied in the Environment Court in *Tasman District Council v Way* where Judge Dwyer considered the vessel (a houseboat) in question was a structure due to the permanency of the anchors used for mooring, the times of mooring (up to six months at a time), and the limited self-propulsion of the vessel; notwithstanding the occasional departure of the vessel to sea.<sup>8</sup>
- 5.3 The *Earnslaw* has less of a sense of permanency than the above case. It travels to and from its berthing a number of times a day and has substantial means of self-propulsion. Although its reach is not geographically large, being confined to Lake Wakatipu, it does not have the same sense of lastingness as a vessel moored for days or months on end in one spot.
- 5.4 From the above interpretation of the relevant definitions, Historic Heritage in the RMA would not include the *Earnslaw*, as the factual

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<sup>7</sup> *Hauraki District Council v Moulton* (Environment Court, C38/987, 15 May 1997) at page 10

<sup>8</sup> *Tasman District Council v Way* 2010 NZEnvC 349 at [52]

context means it is not within the definition of a natural and physical resource.

## 6. **Other regulatory options for the Earnslaw**

- 6.1 The following are potential *vires* methods of regulating the historic heritage characteristics of the Earnslaw (should they be found to exist).
- (a) The PDP could provide non-regulatory guidance on the heritage features of the Earnslaw through policies or objectives.
  - (b) The Earnslaw could potentially be regulated through the Heritage New Zealand Pouhere Taonga Act 2014 by way of a heritage covenant. This would depend on the classification of the Earnslaw as a 'thing' or 'in land' (covered by water). This Memorandum has not covered that possibility further.
  - (c) The Ship Registration Act 1992 requires vessels to be marked and registered to meet minimum requirements. Alterations to such markings and appearance may be required to be approved through notice or re-registration. Although this may not provide for protection of the Earnslaw per se, it is a form of regulating its key features.



**17 June 2016**

**M A Baker-Galloway/ R E Hill**