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 the Rezoning Hearing Stream 13 – (Queenstown mapping)

SUPPLEMENTARY LEGAL SUBMISSIONS FOR QUEENSTOWN LAKES DISTRICT COUNCIL AS PART OF RIGHT OF REPLY

Hearing Stream 13 – Queenstown Mapping

11 October 2017

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MAY IT PLEASE THE PANEL:

1. INTRODUCTION

1.1 These supplementary legal submissions are filed in relation to the submissions of Queenstown Park Limited (806), Skyline Enterprises Limited (556), Grant Hylton Hensman et al (361) and Gibbston Valley Station Ltd (827). The Panel granted leave for the planning and legal replies for these four submissions to be filed on 11 October 2017.

2. 1A: QUEENSTOWN URBAN – BUSINESS AND INDUSTRIAL

Skyline Enterprises Limited (Skyline) (574) and ZJV (NZ) Limited (Ziptrek) (FS1370)

Variation to land affected by Skyline's submission

2.1 The Council intends to notify Stage 2 of the PDP in the final quarter of 2017, and council officers are in the process of seeking full Council decisions to proceed with notification of the provisions. Attached to Ms K Banks' Reply Evidence at Appendix 5 and referred to in Ms Evans' Reply Evidence, is a memorandum from the Council's Parks and Recreation team. That memorandum explains the approach and provisions for the Stage 2 Open Space and Recreation Zones that Council has confirmed for notification in November 2017.

2.2 The draft Open Space and Recreation Zones chapter includes a Ben Lomond Sub Zone. This Ben Lomond Sub Zone will cover the majority of the land covered by Skyline's rezoning submission, with the exception of a small area at the northernmost extent of the proposed Commercial Tourism and Recreation Sub Zone (**CTRSZ**) (this land is owned by DoC). Therefore at the same time as notifying the Stage 2 Open Space and Recreation Zones chapter, the Council will be notifying a variation to the Stage 1 Rural zone at the Ben Lomond Reserve, through the notification of the Ben Lomond Sub Zone on the planning maps. It is foreshadowed that there will be further variations to the Stage 1 planning maps, that are not relevant to this Right of Reply nor the Skyline submission.

2.3 The consequence of the pending variation is that decision making on the Skyline and Ziptrek/Peter Fleming and others[1] submissions on the Rural zoning at Bobs Peak will not be made alongside other Stage 1 submissions. Clause 16B(1) of Schedule 1 of the RMA provides that where a variation includes a provision (ie. the Ben Lomond Sub Zone) to be substituted for a provision (ie. the Rural Zone) in the PDP against which submissions (ie. those lodged by Skyline and Ziptrek) have been lodged, those submissions shall be deemed to be submissions against the variation. Decision making on the appropriate zone type will be deferred until the variation reaches the same procedural stage (ie. Stage 2 hearings).[2] This enables a Council decision that addresses all relevant submissions made in Stage 1 and also those that may be made on the pending variation. In other words, the Skyline and Ziptrek/Peter Fleming Stage 1 submissions seeking (and opposing) the proposed CTRSZ will remain 'live' and recommendations and decisions on those submissions will be made at the same time as any submissions on the appropriateness of the Ben Lomond Sub Zone. In addition, from the date of notification of the variation, the Ben Lomond Sub Zone shall have effect in the PDP.[3]

2.4 When the Council has approved all of Stage 2 (and any consequential Stage 1 variations such as this one) for notification, it is intended that a memorandum of counsel will be filed with the Panel that will explain the scope of what will be notified in Stage 2 of the plan review, and consequential variations to Stage 1, as well as any consequences for the Panel's Stage 1 recommendations on submissions.

2.5 There are likely to be other Stage 1 submissions that will be 'on' provisions that are to be varied, and therefore no recommendations/decisions will be required on those submissions alongside the rest of Stage 1, but until final decisions as to notification have been made by full Council, it is premature for this information to be provided.

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1 FS1063.
2 At this stage, it is anticipated that the Variations to Stage 1 will generally be heard at the same time as Stage 2, although there may be some exceptions to this approach and the hearings process has not yet been planned.
3 RMA, clause 16B(2) of Schedule 1.

Reserve Management Plan

2.6 The Panel queried whether the Council's Ben Lomond and Queenstown Hill Reserve Management Plan 2005 (**RMP**), prepared under the Reserves Act 1977, should be the lead document for the area. This was the position put forward in Mr Brown's evidence for Ziptrek, in opposition to Skyline's proposed CTRSZ.

2.7 The correct legal position is set out in Ziptrek's legal submissions at paragraphs 5.1-5.3. The starting point for considering the relationship between the RMP and the PDP is s 74(2)(b) under which the council shall have regard to the RMP, to the extent that its content has a bearing on resource management issues of the district. The Environment Court has confirmed that "shall have regard to" means that a matter must be given material consideration, but the rules or policies that are in the specified document need not necessarily be followed.[4]

2.8 The site specific nature of the RMP is accepted and therefore the document has a bearing on the Panel's recommendations. The Council is therefore required to give material consideration to the RMP, but in the Council's submission the Panel is not required to determine whether any proposed zone type would be consistent with it.[5] Ziptrek's submissions as to the benefits of a zone type being consistent with the RMP, are submitted to go to the s 32 evaluation as to efficiency, rather than being a mandatory requirement.

2.9 It is also noted that the Council intends to review the RMP in the 2018/2019 financial year, as indicated by Ms Galavazi's memorandum at Appendix 5 to Ms K Banks' reply evidence, but that it is the RMP that stands at present, that must be given material consideration.

Council's final recommendation

2.10 As the variation at Bobs Peak has not yet been notified, Ms Evan's final recommendation on Skyline's submission seeking a proposed

4 *Winstone Aggregates Ltd v Papakura District Council* EnvC A096/98.
5 At [8.2].

CTRSZ is that it be rejected. As set out in Ms Evans' Supplementary Reply evidence, the reasons for this recommendation are that while the final version of the provisions as attached to Mr Dent's evidence addresses many of her earlier concerns, there is still an issue around the permissiveness of the rules around commercial and commercial recreation activities. There is also a lack of assessment in relation to traffic and transport effects, which continues to present a problem in terms of support for the rezoning and allowing a sufficient evaluation of the effects or potential effects of Skyline's proposed CTRSZ, in terms of section 32 of the RMA.

3. GROUP 2: RURAL

Queenstown Park Limited (806)

3.1 Mr Buxton's reply recommendation continues to be that the submission seeking the Queenstown Parks Special Zone (**QPSZ**) be rejected, for the reasons set out in his Evidence in Chief, Rebuttal and Reply including his reliance on Ms Mellsop's evidence that this s 6(b) outstanding natural landscape is not able to absorb development of the scale and nature enabled by the proposed QPSZ. In addition, the following specific matters that were discussed during the course of the hearing are responded to here.

Vires *of Comprehensive Development Plan and Trail Plan provisions*

3.2 Council reserved its position on the *vires* of a number of rules included in the proposed QPSZ, which were subsequently supported through legal submissions by Mr Young for QPL. QPL's legal submissions rely on *Re an application by Auckland Council*[6] and *Queenstown Airport Corp Ltd v Queenstown Lakes District Council*.[7]

3.3 One of the key issues in the *Queenstown Airport* case was whether activity status and/or consent were determined by whether something complied with an approved resource consent or a plan approved by a consent. The decision supports the proposition that the status of an activity derives from the Act and from subsidiary planning

6 [2016] NZEnvC 65
7 [2014] NZEnvC 93

instruments, not from a resource consent. In that respect, a proposed rule that required consent to be sought for an outline development plan, the approval of which then made subsequent activities identified in that outline development plan permitted, was held to be *ultra vires* the Act. The Court held that the classification or status of an activity should not arise from the consent authority's exercise of a discretionary power through a prior grant of consent. Proposed rules that require compliance with a resource consent do not involve a standard, term or condition, and are therefore invalid.

3.4 The *Auckland Council* declaration is of direct relevance to QPL's proposed QPSZ. However, the Environment Court in that declaration only went as far as confirming that a rule enabling consent to be applied for a bundle of land use activities that would authorise the key enabling works necessary for the integrated development of land is *intra vires* the Act. This is essentially QPL's proposed Rule 44.4.8.

3.5 We then turn to other provisions in the proposed QPSZ, where it is submitted that Mr Young's concession at paragraph 5.7 of his submissions is central to the *vires* of some of the provisions which are advanced. Mr Young concedes that "*no declarations were made* [in the Auckland Council declaration] *as to the* vires *of activity status being altered by the existence of a Framework Plan resource consent*". When this is read in conjunction with the *Queenstown Airport* case, what QPL propose in some rules is submitted to offend what was said in *Queenstown Airport* and are therefore submitted to be *ultra vires* the Act.

3.6 We return to the specific rules shortly, but mention first that as overall Mr Buxton is recommending rejection of the proposed QPSZ, the *vires* of these provisions is not considered to be material to the Council's position. If the Panel was to recommend accepting the QPL submission and supporting the inclusion of a QPSZ into the PDP, Council respectfully requests that the Panel grant the ability for QPL and QLDC to work together to agree on a set of Comprehensive Development Plan provisions that are *intra vires* the Act, before releasing final recommendations. It may be of value to the parties if the Panel includes a set of guiding 'drafting' principles in any minute of this nature, that is issued. It is understood from Mr Young's

submissions at the hearing, that QPL would support such an approach. Council wishes to be clear that it supports the use of Comprehensive Development Plans or Outline Development Plans as a tool and it is acknowledged that they can have clear advantages over incremental decision making through individual consents (or even bundled consents). Overall however and for other reasons, the request for the QPSZ is rejected.

3.7 Council accepts that the QPSZ provisions attempt to rectify the "what is the activity status issue" as submitted in the QPL legal submissions, but Council's concerns go further than that in terms of the earlier resource consent obtained (for example) under Rule 44.4.8 being the determinate/rule, rather than the rule in the QPSZ, itself. Council's concerns can be summarised as follows:

(a) 44.4.8A – Mr Buxton in his evidence summary confirmed that he did not see the need for this rule and recommended changes to the scope of Rule 44.4.8 to cure this (this is not a *vires* concern, but noted for completeness);

(b) 44.4.9.2, 44.4.9.3 and 44.4.9.4 – these rules make activity status dependent upon whether something is in accordance with a CDP consent granted under 44.4.8 or a Trail Plan under 44.4.9.2, which is submitted to offend against the *Queenstown Airport* case law. Either the activities are specified in the consent under 44.4.8, or not – a plan cannot set activity status by reference to the consent as it effectively makes the CDP consent akin to a rule or planning instrument;

(c) 44.4.10.3 – for the same reasons as directly above. As drafted, activity status is determined by whether a resource consent has been granted under 44.4.8, which makes the resource consent the determinant/rule, rather than the QPSZ itself;

(d) 44.4.10.4 and 44.4.10.5 – for the same reasons as above;

(e) Standard 44.5.4 (which says building coverage for RVAA4 is 30% or <u>as defined in a resource consent under Rule 44.4.8)</u>. Applying the same *Queenstown Airport* principle to this standard, it is submitted that a resource consent cannot

rewrite a standard in a plan. The standard needs to be clear from the words in the PDP itself; and

(f) for the same reasons, the *vires* of Standard 44.5.5.3 and Standard 44.5.5.5 (it says building height for RVAA3 discretion is limited to "the extent to which the buildings which will accommodate this height have been considered as part of Rule 44.4.9.2 ..") are not accepted.

3.8 On reflection, it is noted that similar *vires* issues may need to be worked through, in relation to similar Outline Development Plan provisions in the Jacks Point Zone. Council supports a similar approach, where the Panel and interested parties are directed by the Panel to work together to agree on a set of Outline Development Plan provisions that are *intra vires* the Act, before releasing final recommendations.

River margins

3.9 Mr Young states in his legal submissions at paragraph 3.10 that no development is proposed within the river margins based on the term "margin" being the "upper most limit of wave action". Mr Young also notes in his footnote that there is no conclusive guidance of what constitutes the "margin". The Council does not agree with Mr Young's definition of "margin", and refers to its reply legal submissions dated 6 October 2017 at paragraphs 11.1 to 11.6, where the case law of what are the "margins" is set out in more detail, including consideration of a recent Environment Court decision that has considered the meaning of "margins", *Save Wanaka Lakefront Reserve Incorporated v Queenstown Lakes District Council.*[8] Applying the *Save Wanaka* findings to the Kawarau River, it is submitted that "margins" may extend at least 20-50 metres from the river, and possibly more depending on topography.

3.10 Council notes that in the expert conferencing statement between Council and QPL the landscape experts agreed on the geographic extent of the Kawarau River margins in the vicinity of the proposed

8 [2017] NZEnvC 88

QPSZ, but disagreed on the magnitude of potential cumulative adverse effects on the natural character of those margins.[9]

Water Conservation Order

3.11 The Panel asked whether, in light of the approach taken in *Southland Fish and Game v Southland Regional Council*,[10] it could look at the reasons why the Water Conservation (Kawarau) Order (**WCO**) was applied over the Kawarau River (as included in the Tribunal's report), in addition to the final terms of the WCO itself. The relevance of this question is that through s 75(4)(a) of the RMA, a district plan must not be inconsistent with a water conservation order.

3.12 The Environment Court in *Southland Fish and Game* referred on several occasions[11] to the report by the Tribunal that considered the WCO over the Oreti River, as a more detailed indication of the values being protected.

3.13 The Council's view is that it is the WCO over the Kawarau River itself, that is the legislative instrument referred to in s 75(4)(a) and the RMA itself does not require the Council nor the Panel to go beyond the words of the WCO. It is acknowledged that the Court in *Southland Fish and Game* made references to the Tribunal Report itself in paragraphs 145 and 146, but Council submits that:

(a) in this case, the WCO clearly sets out the outstanding amenity and intrinsic values of the Kawarau River (see below), and therefore there is no need to go beyond the WCO itself as to whether the PDP is inconsistent with the WCO; and

(b) in any event, an Environment Court decision is not binding on the Council.

3.14 The WCO declares the outstanding amenity and intrinsic values of the Kawarau River (at s 3) to be:

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9 See the Record of Conferencing dated 24 August 2017 at paragraph 4.4 and 5.6 (attached to the Memorandum of Counsel for Queenstown Park Limited, Remarkables Park Limited and Queenstown Lakes District Council dated 30 August 2017).

10 [2016] NZEnvC 220.

11 See for example [145]-[146].

(a) natural and physical qualities and characteristics that contribute to:

(i) people's appreciation of pleasantness of waters;

(ii) aesthetic coherence;

(iii) cultural and recreational attributes;

(b) biological and genetic diversity of ecosystems; and

(c) essential characteristics that determine the ecosystem's integrity, form, functioning and resilience.

3.15 Due to these values, the river was declared to be outstanding in its natural state.

3.16 Mr Buxton's view[12] is that the submitter has glossed over the values of the Kawarau River, and that the effects of a gondola, access road, jetties and bridges on the character of the river have not been fully considered. Mr Buxton noted that the proposed matters of control for a gondola within the gondola corridor did not provide for consideration of effects on all the characteristics of the WCO.

3.17 Mr Young's closing submissions address a different question, namely whether the Environment Court in *Southland Fish and Game* was correct to refer to the WCO in its decision, given that the resource consent at issue did not seek to establish structure(s) or activities within the Oreti River, and that WCOs do not protect land. Mr Young concludes that the Court was able to refer to the WCO because the cycle trail would have a direct impact on activities within the Oreti River (angling) and the amenity associated with those activities, which the WCO sought to protect. The Council agrees with that point. However, for the reasons set out in paragraph 3.16 above, the Council does not agree with Mr Young's assertion in his paragraph 5.7 that the proposed gondola will not have any impact on recreational users of the Kawarau River.

Kawarau River – ONF

3.18 QPL's legal submissions of 29 August 2017 state that Mr Buxton relies on the WCO to assert that the Kawarau River is an ONF. This assertion is submitted to be incorrect. Mr Buxton, in his

12 Supplementary rebuttal evidence of Robert Buxton dated 11 July 2017 at [3.17].

supplementary rebuttal evidence, is simply highlighting that two other legal instruments (the WCO, and the Otago Regional Plan – Water) have identified its value and sought to protect it. While in comparison, QPL have not addressed the effect of a gondola, access road, jetties and bridges on the character of the river.

3.19 Policy 5.4.5 of the Otago Regional Plan – Water is to recognise the WCO, including by protecting the "*outstanding characteristics*" of waters set out in Schedule 2 of the WCO. Schedule 1 of the Otago Regional Plan – Water then identifies "*natural and human use values*" of Otago's lakes and rivers, and states at page 20-4 that "*The outstanding features and landscapes relate to those in Part II of the Act or those identified in the Water Conservation (Kawarau) Order, which this Plan recognises*".

3.20 In Schedule 1A of the Otago Regional Plan – Water at page 20-15, under a column headed "Outstanding natural feature or landscape", it is then stated that the Kawarau River between Lake Dunstan and Lake Wakatipu is outstanding for its wild scenic characteristics, its natural characteristics, for scientific values, and for recreational purposes. That column ends with the description: "*Spectacular and rugged river gorge, schistose landscape, fast flowing white water and rapids, old gold sluicing landscape, from confluence with Arrow River to Lake Dunstan*." In summary, the provisions of the Otago Regional Plan – Water clearly treat this stretch of the Kawarau River as "outstanding", even though Schedule 1A does not distinguish which characteristics are relevant to ONF and which to ONL.

Building Restriction Area

3.21 Mr Buxton's updated summary of evidence noted that further investigation was required into the purpose of the Building Restriction Area (**BRA**). QPL has requested in its submission that this be removed,[13] relief which is opposed through the further submission of QAC (FS1340).

13 Mr Buxton's updated summary of evidence states that this request did not appear to be included in the original submission. However, the Council accepts that it was included, as stated in Mr Young's closing submissions for QPL at paragraph 3.1.

3.22 Through further investigations it is understood that the resource management purpose of the BRA relates to Designation 46, specially to condition 16 of that designation. Appreciating that the terminology differs slightly between BRA and buffer zone, the original decision on the designation, RM970647, confirmed a 'buffer zone' from the oxidation ponds was required and included the following condition:

> *The buffer zone shall apply to the areas as shown on the approved plan…Residential activities are prohibited within the Buffer Zone boundaries.*

3.23 It follows that the Council accepts that the BRA can be removed from PDP map 31, as it is not required on the planning maps to enable to Designation condition to be given effect to, which restricts any residential activity in that buffer zone. The condition itself refers to the approved plan, which is the plan approved as part of the designation. There is no need for the BRA to also be shown on Planning Map 31 (noting that they also do not appear to align in terms of their boundaries).

3.24 In addition, removing the BRA would not be likely to create the potential for inappropriate development because the remaining zoning and restrictions do not provide any development rights. The land affected is zoned Rural (surface of water and land), or identified as road. In addition, much of the area is affected by the Queenstown Airport Outer Control Boundary, with a smaller portion subject to the Queenstown Airport Inner Control Boundary. Any buildings would require resource consent as a Discretionary activity and this would enable the Council as regulatory authority to consider the effects on established infrastructure such as the Wastewater Treatment Plant and associated composting facility, Queenstown Airport, and natural hazards flood risk from the Shotover and Kawarau Rivers. It is unlikely therefore that sensitive activities such as residential activity would be consented without the matter of reverse sensitivity being addressed.

3.25 It is noted that in stream 2, Mr Craig Barr recommended that the BRA should be retained, and stated that QPL had not provided any

evidence to justify its removal.[14] That recommendation is now superseded. The Council's position is that QPL's submission regarding the BRA should be accepted, and QAC's further submission regarding the BRA should be rejected.

Gibbston Valley Station Limited (GVS) (827)

3.26 In opening submissions, Council reserved its position as to whether it accepted that the 2008 consent RM080864 formed part of the *Hawthorn* existing environment, given suggestions in GVS's legal submissions that GVS does not intend to fully implement all stages of the consent. This is relevant in that the Council is required, in making a district plan, to have regard to the actual or potential effect on the *environment* of activities including, in particular, any adverse effect. The Council accepts that the effects associated with a consent may form part of the existing environment in a plan change/review context, however, that consent must be likely to be implemented before the *Hawthorn* 'existing environment' concept should even be applied.

3.27 GVS makes it clear in their opening submissions that it is the 2008 consent, plus another 'significant consent for a lodge and cottages adjacent to the Gibbston Winery' (ie. RM110747), that is sought to be enhanced in planning terms through the review. However, the legal submissions also state (at paragraph 12):

> *The change in circumstances brought about by the Global Financial Crisis from 2008 onwards as well as the impact of continued and growing interest in GVS and its very well positioned vineyard products has* ***stimulated a review of the 2008 consent proposal*** *by GVS in line with the process being conducted by QLDC and this Panel. Essentially, GVS has posed the question to itself as to* ***what is suitable for implementation now under the 2008 consent*** *and how that can be accommodated within the parameters of the proposed District Plan and the Resource Management Act's requirements.*

14 Section 42A Report of Mr Craig Barr for Chapter 21 - Rural dated 7 April 2016 at paragraph 20.18.

3.28 The 2008 consent includes stages, as confirmed in GVS' opening submissions at paragraph 10. Council does not accept that any part, or stage of the 2008 concept that GVS has no intention of implementing, can form part of the *Hawthorn* existing environment, in terms of considering potential effects of the proposed Gibbston Valley Sub Zone. Council therefore urges caution in accepting that the 2008 consent in a fully implemented form, should be a black and white 'comparison point'. The 2008 consent approved a staged, 'piece by piece approach'.

3.29 In addition, the visitor accommodation/lodge/cottage consent RM110747 was granted in February 2012 and therefore unless it has been given effect to, lapsed in February 2017. The consent does not specify any other date for lapsing. Mr Giddens' evidence for GVS confirms that an amendment to consent RM110747 has been lodged with the Council, but gives no further detail. The application is dated 20 December 2016, no evidence was given by GVS as to its progress, and it has not been granted at this point in time. Given the uncertainty presented by this evidence, which indicates that GVS no longer holds a consent for RM110747, Council's position is that it also cannot form part of the *Hawthorn* existing environment.

3.30 Council continues to hold reservations that GVS intend to move away from that approach and does not have intentions of completing all stages as approved by Council.

3.31 Counsel for GVS also refers to a consent for a car park that has been applied for. That consent cannot be considered as part of the existing environment, given it has not been granted at this point in time, and it is submitted that Dr Read is entitled to give her expert view as to the likely visual effects of that part of the Sub Zone's rules.

Grant Hylton Hensman et al (#361)

3.32 Following Hensman's appearance at the hearing Mr Buxton and Ms Hutton (for the submitter) participated in expert conferencing. Following that conferencing, Mr Buxton continues to recommend that submission, which seeks a standalone Industrial zone, be rejected as

he considers Hensman has not provided sufficient information or assessment on the following matters:

(a) an up to date report on the natural hazards, both on and above the site; and

(b) the effect of the proposed height control, including a visual impression of the development that could be expected to be achieved under the height control provisions.

3.33 The Council respectfully submits that the submitter has not provided sufficient information on its proposed Industrial zoning to support the relief it seeks, which means that the examination of the effects or potential effects of the rezoning, cannot be satisfied.[15] The submitter has not demonstrated under s 32 that their preferred industrial zone is an appropriate method for the PDP, which consequentially means that the Panel will not be able to fulfil its duty under s 32AA of the RMA.

DATED this 11th day of October 2017

S J Scott / H L Baillie
Counsel for the Queenstown Lakes
District Council

15 QLDC opening legal submissions, at Section 2.