

**BEFORE THE HEARINGS PANEL
FOR THE QUEENSTOWN LAKES PROPOSED DISTRICT PLAN**

UNDER THE Resource Management Act 1991 (“**Act**”)
IN THE MATTER OF Stage 3b Proposed District Plan – Wāhi tūpuna
BETWEEN **GIBBSTON VALLEY STATION** (Submitter
#31037)
AND BETWEEN **MALAGHANS INVESTMENTS LIMITED**
(Submitter #31022)
AND **QUEENSTOWN LAKES DISTRICT COUNCIL**
Planning Authority

**SUPPLEMENTRY LEGAL SUBMISSIONS: RESPONSE TO MR NOLAN QC’S
JURISDICTIONAL ISSUE ON BEHALF OF SCOPE RESOURCES LTD**

21 AUGUST 2020

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MAY IT PLEASE THE COURT:

Introduction

1. These further supplementary submissions are made, as with the earlier submissions, on behalf of the following submitters (“**Submitters**”):
 - (a) Gibbston Valley Station (Submitter #31037) (“**GVS**”); and
 - (b) Malaghans Investments Limited (#31022) (“**MIL**”).
2. These submissions follow the invitation of the Panel to respond to the “jurisdictional” submissions made by Mr Nolan QC on behalf of Scope Resources Limited – at the invitation of the Panel through its Minute 32.

The jurisdictional issue

3. The thrust of Mr Nolan QC’s argument appears to be, if land has been rezoned through an earlier stage of the PDP, then that same land cannot be rezoned to a different zone through a submission on a later PDP stage (applying to different land).
4. Mr Nolan QC says that such an outcome could only be achieved through “notification of a plan change or variation (or a new review)”.

Submissions on behalf of the Submitters

Context

5. To some extent, the issue has only arisen because the staged nature of QLDC’s “PDP” process. It is another example of the difficulties arising from the process chosen by QLDC to affect its “plan review”. Despite the name (ie the “PDP”), it is understood, despite being termed a PDP, that the process is actually a series of plan changes.
6. The Submitters’ land has been rezoned through an earlier PDP stage (ie earlier plan changes) to rural (MIL) and rural and Gibbston Character Zone (GVS).
7. It is questionable whether, through those earlier stages, either MIL or GVS could have reasonably sought a Rural Visitor Zone for their sites. The Rural Visitor Zone was not, at that point, part of the “PDP” process. While

it is permissible to seek an alternative zone for a site to that notified under a plan change, a submitter cannot reasonably foresee a future zoning yet to be notified and seek to apply that to its site through a submission.

General approach

8. It is generally permissible, in the context of a plan change applying a new zone to one or more discrete areas, to seek the application of that new zone to another discrete area (as distinct to an adjoining one).
9. On that basis, it must be open to a submitter, to seek, through a submission on one stage of the PDP (ie that particular plan change), to apply the zoning and provisions under that stage to other land – even if that land has already been through its own (earlier) stage of the PDP.
10. If Mr Nolan QC's approach were right, then, because of the fragmented approach to its review undertaken by QLDC, a landowner might never be able to seek the most appropriate zoning for its site if its site adopted as one particular zone under one stage, and the more appropriate zone were later notified (for different land) under a later stage. Any such jurisdictional barrier to achieving the most appropriate zoning would be further compounded as a landowner cannot themselves seek a variation to the PDP as it applies to their site, and could be refused a private plan change seeking a site specific rezoning for up to 2 years after the PDP plan change for their zone becoming operative. Note, that the date of any PDP plan change becoming operative is the date as publicly notified under clause 20 of the First Schedule – note the date that rules in any PDP plan change are to be treated as operative under s86B.
11. The practical consequences of Mr Nolan QC's interpretation itself weighs heavily against the approach being correct – at least in the context of a PDP plan change, which is one of a series of plan changes promoted in a staged manner so as to achieve what is effectively an entire review of the ODP. That context is quite different to an isolated plan change advanced to address issues arising in a focused location, being extended to another location.

Application of Motor Machinists

12. Mr Nolan QC relies heavily on the High Court's decision in *Motor Machinists*.
13. As with any authority, context is critical. It is insufficient, and improper, to cite a test developed in one set of circumstances (eg *Motor Machinists*) and seek to apply it to all other circumstances as "binding precedent" – as Mr Nolan QC is appearing to urge the Panel to do.
14. The Panel will be well aware that the doctrine of (binding) precedent, requires identification of the "*ratio*" of the decision.¹ To determine the ratio of a decision, ie that part of the decision which is to be binding in future cases, it is crucial to identify:
 - (a) the issue before the court; and
 - (b) the material facts of the case, ie those facts which are essential to the making of the decision.
15. The ratio is confined within the issue before that court, in the context of the material facts. Of course, other observations and findings² can still be of some relevance, if not highly persuasive, depending on how similar the issues and facts are.
16. *Motor Machinists* was decided in the context of a plan change that was geographically limited. In particular the rezoning proposed under the plan change was land along inner city ring road (from residential to outer business zone). The plan change also revised the provisions of the inner and outer business zones. In that context, the submission at issue sought additional land in the vicinity also be rezoned to outer business. The context was important to the High Court's finding that the submission was not "on" the plan change.

Application of principles

17. In the current proceedings, Stage 3 included notification of the Rural Visitor Zone as a zone for use in the "PDP", and the application of that zone to a

¹ Shorthand for "*ratio decidendi*", meaning "the reason for the decision".

² Known as "*obiter dicta*" (or simply "*obiter*").

number of sites. It is understood that seven geographically distinct sites were notified for Rural Visitor Zoning under the Stage 3 PDP plan change.

18. The section 32 report explained the purpose of the Rural Visitor Zone, as follows:

The RVZ is intended to provide for and manage visitor industry activities within the rural environment of the District, specifically the Outstanding Natural Landscapes (ONL). The RVZ is designed to provide for visitor industry facilities on sites that are too small to likely be appropriate for resort zoning (i.e. a stand alone special zone), and the principal activity is visitor accommodation and smaller scale commercial recreation activities, rather than a separate resort or special zone that is centred around substantial recreation activities (i.e. Millbrook Chapter 43 and the establishment and ongoing use of golf courses).

19. The intent of the Rural Visitor Zone was never expressed as to apply only the areas that were notified for such zoning. The Stage 3 PDP plan change essentially proposed a “new” zone for the PDP (in the sense that the Rural Visitor Zone had not previously been proposed as part of any earlier PDP plan change stage), and then its application to a number of areas (seven).
20. In that context, it would seem obvious that a submitter seeking the application of the Rural Visitor Zone to their land must be “on” the PDP plan change. It would be unduly onerous to require a submitter – particularly in the context of a process promoted as a “proposed district plan” – if they wished to have the Rural Visitor Zone applied to their site to have to convince the Council to notify a further PDP plan change or variation to achieve this.
21. In respect of the opportunity for affected parties to participate, the context of the Council’s staged PDP plan change process is also relevant. It is well known throughout the district that landowners need to be vigilant as to the potential impacts of each stage, and submissions on each stage, on their interests.
22. As a “litmus test”, if the PDP process had been advanced by a full review and fully notified proposed plan, which was progressed in stages (rather than notified in stages), then there would be no question as to jurisdiction. Fairness to submitters suggests that they should not be denied the opportunity to seek a new zone on their land, simply because the Council has adopted a piecemeal approach to its PDP plan change notification process.

23. Finally, if the Panel was persuaded by Mr Nolan QC's submission, then the Submitters request that the Panel still consider the substance of their rezoning requests, and indicate what recommendation the Panel would have made had it considered that it had the jurisdiction to do so. This would assist in the context of any appeal. With that in mind, even if the Environment Court had concerns about jurisdiction, and notice to potentially affected parties, that can be remedied at the Environment Court stage through the use of section 293 of the Act.

DATED 21 August 2020



J D K Gardner-Hopkins
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