

**Before the Panel of Hearing Commissioners
For the Queenstown Lakes Proposed District Plan**

In the Matter of

the Resource Management Act
1991

And

In the Matter of

the Queenstown Lakes Proposed
District Plan – Stage 2

And

In the Matter of

Hearing Stream 14 – Wakatipu
Basin

**Legal Submissions on behalf of
Boundary Trust and Spruce Grove Trust**

Dated: 13 July 2018

Introduction

1. These opening legal submissions are presented on behalf of the trustees of the Boundary Trust and Spruce Grove Trust.
2. The Spary Family have lived in the Wakatipu Basin for several decades and the Boundary Trust and Spruce Grove Trust are two trusts providing for the benefit of various family interests (**Spary Trusts**).
3. They are a long standing neighbour of Millbrook Country Club.

Spary Trusts' Land

4. The two locations subject to the submissions are both parts of “missing teeth” within the Millbrook Resort Zone (**MRZ**). They are currently a “spot zone” of rural within the MRZ. Ms Gilbert for the Council describes these sites as two “cut outs” to the MRZ.
5. The Spary Trusts seek inclusion of both blocks of land within the MRZ.
6. Ms Gilbert has shown the two structure plans sought by the Spary Trusts inserted into the Millbrook Structure Plan graphic and Master Plan in her rebuttal evidence (see Appendices D and E).
 - (a) Malaghans Road:
 - (i) The Malaghans Road site is entire owned by the trustees of the Spruce Grove Trust and is entirely surrounded by land zoned MRZ. This land includes four building platforms granted by the Environment Court.
 - (b) Arrowtown Lake-Hayes Road:
 - (i) The Boundary Trust and Spruce Grove trustees own two legal lots within this block of land. The remaining lots making up the block are owned by 3 different parties.
7. Both blocks of land are within the Millbrook Landscape Character Unit (**LCU**). Despite that, and being surrounded on three sides by the MRZ, both the land blocks are proposed to be zoned Amenity Zone.

8. Ms Gilbert for the Council no longer opposes the two blocks of land being included in the MRZ as long as built development is not visible from Malaghans Road and any future development is consistent with “the MCC aesthetic”.¹
9. The Spary Trusts’ case is therefore not about “if”, but “how”. The remaining point of contention between Council and witnesses on behalf of the Spary Trusts’ relates to how to control final built form, density and character enabled by the proposed zoning to MRZ.
10. This is complicated by the fact that Millbrook Country Club (**MCC**) does not own, and to their apparent dislike, legally control, the land own by the Spary Trusts.

Relief Sought

Millbrook Resort Zone

11. Ms Leith and Ms Smetham have proposed a tailored MRZ approach that will achieve an outcome consistent with the character adjoining the relevant land. This has been refined in response to feedback by Council experts since the original submissions were lodged.
12. Ms Leith summarises the relief sought in the Spary Trusts’ submissions in her evidence in chief.² It includes (in summary form):
 - (a) two Structure Plans showing residential activity areas;
 - (b) road setbacks;
 - (c) a Golf Course and Open Space activity area on all of the land outside of the proposed residential activity areas;
 - (d) controls on built form including appearance of buildings, effects on visual and landscape amenity of the area including coherence with surrounding buildings;
 - (e) a set back requirement of 7m from activity area boundaries;

¹ Ms Gilbert, summary statement of evidence dated 5 July

² EIC, paragraph 30-32(h)

- (f) a maximum average building density of one residential unit per 500m²;
 - (g) a 50% maximum site coverage for the residential areas; and
 - (h) (importantly), a rule ensuring no part of any building is visible from Malaghans Road.
13. In response to feedback provided by Ms Gilbert and Mr Langham for the Council in rebuttal evidence Ms Leith has made some amendments to the relief sought by the Spary Trusts to better enable a “Millbrook Character” for any development enabled on the Spary Land. This includes:
- (a) incorporation of the Millbrook Design Guidelines to the rule framework;
 - (b) an additional rule requiring submission of Neighbourhood Design Plans for each activity area prior to subdivision and development to align with the Design Guidelines; and
 - (c) additional advisory notes which could be added to the chapter to advise that Council are to assess compliance with the Millbrook Design Guidelines for the Spary Trust land rather than the Millbrook Design Review Board and to clarify that where there are any discrepancies between the Design Guidelines and the rules within Chapter 43 that the rules take precedence.
14. The relief sought by the Spary Trust therefore does not solely rely on the relatively blunt instrument of a Structure Plan alone. Instead it includes a rule framework wider to ensure appropriate outcomes.
15. A key difference between the relief sought by the Spary Trusts and the MRZ is the use of site specific density controls, rather than the 5% maximum site coverage rule applying over land owned by MCC. The evidence for the Spary Trusts demonstrates such a blunt instrument is not an effective mechanism to manage effects in relation to the characteristics of this land (in a visual effects sense) and also the legal ownership complications.

Law

16. When preparing or changing a district plan the Council must have regard to the matters listed in section 74 which include any proposed regional policy statement, a proposed regional plan and management plans and strategies prepared under other Acts.
17. Importantly it must not have regard to trade competition or the effects of trade competition. Under section 75, the plan must give effect to any national policy statement, any New Zealand coastal policy statement and any regional policy statement and must give effect to a water conservation order or a regional plan (for any matter specified in subsection 30(1)).
18. Under section 75(1), district plan policies must implement objectives, while any rules must implement the policies. Section 76 requires rules to achieve the objectives and policies of a plan.

Section 32

19. Ms Leith has completed a thorough section 32AA analysis of the relief sought which is contained in her evidence in chief. This draws on the landscape evidence of Ms Smetham and infrastructure evidence of Mr McCartney.
20. Although critical of the relief sought by the Spary Trusts, witnesses for Council or Millbrook have not completed a thorough section 32 analysis detailing the costs and benefits of the relief sought and the notified zoning of the Amenity Zone for the land covered by the Spary Trusts' submissions.
21. In my submission, an anticipated 80 ha minimum lot size on land surrounded by resort zoning that is supported at a concept level for intensification by landscape witnesses for both Council and Spary cannot be preferred in a section 32 sense.
22. As a decision maker your analysis should not start with any particular presumption as to the appropriate zone, rule, policy or objective.³

³ *Eldamos Investments Limited v Gisborne District Council* W47/05, affirmed by the High Court in *Gisborne District Council v Eldamos Investments Ltd*, CIV-2005-548-1241, Harrison J, High Court, Gisborne, 26/10/2005. See also *Sloan and Ors v Christchurch City Council* C3/2008; *Briggs v Christchurch City Council* C45/08, and *Land Equity Group v Napier City Council* W25/08.

23. Instead, your task is to seek to obtain the optimum planning solution within the scope of the matters before it based on an evaluation of the totality of the evidence given at the hearing, without imposing a burden of proof on any party.⁴
24. The section 32 analysis of the relief sought needs to be carried out primarily in relation to the land subject of the submission. Any flow on effects on surrounding land owned by Millbrook Country Club should only then be tested, rather than the other way around.
25. Put another way, to suggest, as MCC have, that the most appropriate zoning for the blocks of land is for it to remain as open space to retain the character on their land is a flawed approach. It places inappropriate weight on effects on land owned by MCC over the positive and enabling outcomes that the relief sought by the Spary Trusts would generate.
26. Of course, effects on the remainder of the land within the MRZ is a relevant part of your assessment, but it shouldn't be the starting point, or your sole consideration.

Millbrook Resort Zone (MRZ)

27. No one owns or controls the MRZ or the rules within it.
28. The Resort Zone Purpose⁵ includes providing for residential activities⁶ and includes Residential Activity Areas, the purpose of those being "to provide for residential activities". Golf and Open Space Activities Areas are also provided for.
29. The Spary Trusts are seeking all those activities in accordance with that Resort Zone Purpose.
30. Like every other zone used in planning documents throughout New Zealand, the MRZ includes district rules (as defined in section 43AAB of the RMA) that the Council uses pursuant to section 76 to carry out *its* functions under the Act and achieve the objectives and policies of the plan.
31. Those functions are the functions of Council, not of MCC.

⁴ *Eldamos* paragraph [129];

⁵ 43.1

⁶ 43.1.1

32. All landscape experts agree that this land has the capacity to absorb change.
33. The rules supported by Ms Leith are the most appropriate way to achieve the purpose of the MRZ on the Spary Trusts' land, which includes "...residential activates developed in an integrated manner...".
34. The land falls within the same Landscape Character Unit (the Millbrook Landscape Character Unit) as the land owned by MCC. As such, as notified there is a disconnect between the identification of the land in the Millbrook Landscape Character Unit that has an ability to absorb change, and the subsequent zoning recommendation of Amenity Zone.
35. Ms Gilbert for the Council (landscape) agrees with this land being included in the MRZ subject to a qualifier relating to development on the knoll in the centre of the property.⁷
36. In relation to the Malaghans Road Site Mr Langham now considers that subject to density controls the proposed Structure Plan could retain the visual amenity conveyed by the northern face of the knoll and residential activity in a manner that can be absorbed by the adjoining Millbrook residential "enclave" and golf course setting.⁸ He does not support rezoning of the Arrowtown - Lake Hayes Road Location.
37. The relief package described above, as updated following receipt of Council's rebuttal evidence responds to this evidence.
38. In my submission there is no valid RMA effects justification for the inclusion of the land within the Amenity Zone as notified. To borrow the words of the Environment Court, the "noe" cannot be justified in this instance. It is the 'noes' in the plan which must be justified, not the 'ayes'.⁹ Section 32 is there primarily to ensure that any restrictions on the complete freedom to develop are justified rather than the converse.

Density

39. There remains disagreement between the relevant experts on the approaches to dwelling density on the land. MCC applies a 5% density

⁷ EIC, paragraph 18.4

⁸ Rebuttal, paragraph 27.14

⁹ *Hodge v CCC C1A/96*, at page 22.

over the whole site where as the Spary Trusts propose more bespoke density provisions.

40. When assessing density, in my submission it is important to look to the outcome enabled by the proposed relief, rather than simply the blunt tool of the density control itself. The 5% density control over the land owned by MCC will not work practically when applied to “non MCC” land which has very different site specific attributes.
41. Densities in parts of Millbrook near the Spary Trusts’ land are greater than elsewhere. For example, the density of Foxes Rush within Millbrook is much less than 500 m² per dwelling and the density of Malaghans Ridge is approximately 800 m² per dwelling.
42. In my submission, what is important to your assessment is the environmental effect of the proposed control on the site, rather than comparing zone wide density provisions.
43. The Spary Trusts seek a density control of 500 m² per dwelling. However, in calculating this, the size of the residential activity area is applied, not the whole site. Given that much of the site is open space, the overall density is much lower than this which seems to have been overlooked in evidence for Council and Millbrook.
44. In addition to that, internal road and layout constraints within the proposed activity areas as shown on the Structure Plans will mean that the number of dwellings will be even lower and cannot be calculated by divided the lot area by the density figure as witnesses for MCC have done.
45. Applying the various density constraints as a package equates to a density of approximately 1 lot per 1716 m² on Arrowtown Lake-Hayes Road¹⁰ and 1 lot per 1,508 m² on Malaghans Road¹¹. Other controls such as the restriction on visibility from Malaghans Road may further reduce that density.

¹⁰ Being a total land area of 10.64ha, Residential Activity Area of 4.78 ha, less 35% for non residential land such as roading, resulting in approximately 62 lots

¹¹ Being a total land area of 9.2 ha, Residential Activity Area of 4.73ha ha, less 35% for non residential land such as roading, resulting in approximately 61 lots

46. The evidence of Ms Smetham demonstrates that a similar MRZ aesthetic can be achieved through the provisions proposed rather than a blunt 5% control or a maximum yield as Mr Langham has done.
47. In my submission a site specific assessment is the only way to genuinely assess whether the provisions proposed are the most appropriate way to achieve the objectives and ultimately the purpose of the Act. As Mr Craig for MCC notes, each “neighbourhood” within the MRZ incorporates unique characteristics or factors that dictate dwelling unit numbers.¹²
48. The site specific controls proposed, as they apply to the relevant land will achieve a consistent outcome and reflect the landscape values associated with Millbrook.¹³
49. The inclusion of the Millbrook Design Guidelines will also ensure an integrated built form outcome, much greater than the existing buildings consented building platforms in both locations that are not restricted by any guidelines.

Knoll landscape

50. Ms Gilbert for the Council has raised concerns regarding residential development on the knoll landform at the Malaghans Road site.
51. The relief sought by the Spary Trusts provides for an Open Space Protection Area and for no part of any building to be visible from Malaghans Road. Given the practical implications of complying with this rule, appropriate protection of the knoll will be ensured.
52. In addition to that control, matters of discretion¹⁴ for any buildings in this area will add further robustness to the protection of the knoll including:
 - (a) Associated landscaping controls; and
 - (b) Effects on visual and landscape amenity values of the area including coherence with the surrounding buildings and heritage values.

¹² Mr Craig, Rebuttal Evidence, paragraph 15

¹³ Ms Smetham, EIC, paragraph 90

¹⁴ Proposed Rule 43.4.11(ii) and (iii)

MCC Privacy

53. Ms Gilbert raises concerns with impacts of privacy of adjoining owners of development of the Malaghans Road land.
54. In my submission any privacy impact on those owners will be no different to the impact they already experience of being part of the MCC community which includes having houses immediately adjoining them. Such an impact is an inevitable consequence of the existing MRZ zoning and is not an appropriately justification to impose the Amenity Zone on the land.
55. In addition, the already consented 4 building platforms on Malaghan's Road mean that in a existing environment sense there is already a loss of privacy.

Other effects

56. Mr McCartney has filed evidence on behalf of the Spary Trusts confirming that it will be feasible to implement the necessary access, water supply, wastewater disposal and stormwater control for the land subject to the submissions.
57. Ms Jarvis for the Council agrees.

Amenity Zone

58. As discussed above, there is a disconnect between the identification of the land in the Millbrook Landscape Character Unit that has an ability to absorb change, and the subsequent zoning recommendation of Rural Amenity Zone.¹⁵
59. There does not appear to be any section 32 analysis by experts on behalf of either the Council or MCC as to the costs and benefits of rural zoning in a LCU that has the capacity to absorb change.
60. Such an approach, and subsequent notified zoning has significant costs in a section 32 sense, is not enabling, is unjustified in terms of landscape values (as agreed by all experts) and ultimately does not represent sustainable management.

¹⁵ This disconnect is detailed further in Ms Smetham's EIC at paragraph 34

Regional Policy Statement

61. Ms Leith has completed an assessment of the relief sought by the Spary Trusts against the relevant regional planning documents in her section 32AA Evaluation Report.¹⁶
62. No planning experts consider that the RPS directs the Spary Land to remain rural zoned.

PDP Strategic Directions

63. As Mr Langham for the Council notes, Ms Leith's evidence is largely concurred with in terms of Strategic Objections 3.2.1.8 and 3.2.5.2.
64. Mr Langham for the Council agrees that the relief sought would not result in cumulative effects altering the MRZ.
65. The relief sought is therefore consistent with those Objectives, although as they are under appeal the usual weighting considerations apply.

Council's Regulatory Functions

66. It is the job of Council, through zoning and the resource consent processes to avoid, remedy and mitigate effects on the Environment.
67. As such, the amendments to the relief sought by the Spary Trusts introduce the Millbrook Design Guidelines to the PDP rule framework.
68. This will enable Council to have appropriate tools in the toolbox to ensure the integration and character outcomes sought by The Spary Trusts, MCC and experts for the Council. This is the job of Council as regulatory authority not MCC.
69. To have MCC sitting as the final decision maker is the equivalent of directing that Foodstuffs sign off on the design controls of a Woolworths supermarket on the basis that Foodstuffs consider they should control any impact on their amenity. That is clearly not appropriate.
70. In my submission the focus of the Panel needs to be on environmental effects, including the amenity of the existing MRZ. For the reasons outlined below that is different to any effects on MCC as a business.

¹⁶ Ms Leith, Annexure 3

Millbrook Country Club Position

Trade Competitor

71. Millbrook seek that the land be left open space.¹⁷
72. In my submission as a residential property developer MCC is a trade competitor of the Spary Trusts. The Panel must not have regard to trade competition or the effects of trade competition.¹⁸ MCC could gain an advantage in trade competition through their submission.¹⁹
73. As such, Millbrook can only make a submission if directly affected by an effect that effects the environment and does not relate to trade competition or the effects of trade competition.
74. In my submission parts of Millbrook's submission and evidence doesn't entirely withstand the codified scrutiny of the trade competition provisions.

The Law

75. Given the statutory bar of Section 74(3) adverse trade effects raised by a trade competitor can be only be considered by a decision-maker if they go beyond the effects ordinarily associated with trade competition.
76. The purpose of the trade competition provisions is to prevent trade competitors frustrating legitimate activities purely for the purpose of preventing commercial competition. The purpose is not to prevent competition for use and enjoyment of resources between resource use competitors, or the avoidance of mitigation of adverse effects on the environment; it is the narrow concept of economic market impairment arising for trade competition that the Court cannot consider.²⁰
77. A relatively recent case on a private plan change request (**PC84**) to the Kapiti Coast District Plan, *Kapiti Coast Airport Holdings Ltd v Alpha Corporation Limited*²¹ (**Kapiti Airport**) the Environment Court dealt with the

¹⁷ EIC, Mr Craig, paragraph 100

¹⁸ Section 74(3)

¹⁹ Schedule 1, clause 6(4)

²⁰ *Kuku Maru Partnership (Beatrix Bay) v Marlborough DC* EnvC W050/02

²¹ [2016] NZEnvC 137

issue of trade competition as between landowners and interpreted the High Court's earlier decision in *Queenstown Central Limited v Queenstown Lakes District Council*²².

78. In *Kapiti Airport* declarations were sought that: the respondents were either trade competitors or surrogates of trade competitors submitters; and that the Council was required under section 41C(7) of the RMA to strike out the submissions.
79. The Court considered relevant case authorities and considered that what was of importance was, *"that there be a competitive activity having a commercial element."*²³ On this basis, it found that there was unquestionable a competitive activity having a commercial element in the case before it in so far as some of the Respondents were concerned.²⁴ The Court found²⁵:

"the Applicant, Coastlands, Sheffield and Ngahina are all in the business of commercial landowners, developers and lessors. They compete for lessees to rent their premises in Paraparaumu. At first blush that makes them trade competitors."

80. Counsel in *Kapiti Airport* was at pains to remind the Court that it was bound by the High Court decision in *Queenstown Central Limited*, so the Court determined exactly what was the decision made by the High Court in *Queenstown Central*. It found that it was clear from the comments in that decision that *"the competition under consideration...was for use of a resource (the limited resource of flat land in Queenstown urban environment). His Honour in the High Court found that such competition was not trade competition."*
81. To the contrary, the Environment Court in *Kapiti Airport* held the respondents were seeking to *restrict* the commercial activities which the Applicant may apply to undertake on its land. This was not competition for a resource but trade competition related directly to the competing uses

²² [2013] NZRMA 239 (HC)

²³ Citing Baragwanath J in *Montessori Pre-school Charitable Trust v Waikato District Council* [2007] NZRMA 56 (HC)

²⁴ *Kapiti Airport* at [14]

²⁵ *Kapiti Airport* at [14]

which they undertake on their respective areas of land at the Airport and town centre.²⁶

82. On this basis, we consider that MCC is a trade competitor of The Spary Trusts as it owns and wishes to develop the neighbouring land for the same purpose as The Spary Trust, who in the is instance is acting as a developer. Consequently, it would be in MCC's interests to prevent the relief sought by the Spary Trusts from being approved as it introduces further residential sections to the market.

The evidence

83. MCC has a legitimate and justified RMA basis to participate in the Spary Trust submission where they are affected by an effect on the environment that doesn't relate to trade competition.
84. However, in reviewing evidence prepared by and on behalf of MCC I consider in focusing on the business activity of MCC the following statements come close to, or go over, that bar:
- (a) Mr O'Malley "submits" that there is no justification for any expansion of MRZ unless (amongst other things) there is an opportunity to enhance golf tourism or the Millbrook *brand*.²⁷
 - (b) Millbrook is concerned that no landowner agreements have been reached in relation to amenities on the Spary Trusts' parcels of land.²⁸
 - (c) Mr Edmonds considers that any future residences of the land would "[be] an unrelated neighbour trying to masquerade as part of a world class resort".²⁹
85. Those evidential statements go beyond environmental effects and relate to the business of the MCC as a "world class resort" that makes money from developing and selling real estate and managing private infrastructure. In my submission, emphasising their trade competition motives.

²⁶ *Kapiti Airport* at [22]

²⁷ EIC, para 22

²⁸ Mr Edmonds EIC, para 21


²⁹ EIC, para 102

86. To the contrary, Mr Craig (giving landscape evidence on behalf of MCC) agrees with Ms Smetham that there are no significant landscape characteristics potentially impeding inclusion into the MRZ of both sites.
87. The relief package supported by Ms Leith, and added to following the receipt of rebuttal evidence to include integration of the Millbrook Design Guidelines as requested by Mr Craig, will ensure that environmental effects on Millbrook relating to cohesion, integration and amenity will be appropriately controlled to ensure that the MRZ's objective is met.
88. That needs to be the focus of this hearing, environmental effects from rezoning, not the strength of the MCC brand and business or who MCC have entered into agreements with.

Part 2

89. All three landscape witnesses (on behalf of Spary Trusts, Council and MCC) who have assessed the Spary Trusts' submission support the inclusion of the Spary Land within the MRZ.
90. Through evidence Council raised concerns regarding ensuring consistency with the MRZ aesthetic.
91. As a result Ms Leith has proposed relief, supported by a thorough section 32AA analysis that will ensure that any development enabled by the MRZ is appropriately integrated with the rest of the MRZ without having adverse effects on the receiving environment.
92. The relief sought therefore represents sustainable management as required by Part 2 of the Act.

93. As the purpose of the Act and the objectives of the Plan can be met by the less restrictive regime (in this case MRZ), then MRZ should be adopted. This approach reflects the requirement to examine the efficiency of the provisions and also promotes the Act by enabling people to provide for their wellbeing.³⁰



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³⁰ *Royal Forest and Bird Protection Society of New Zealand Incorporated v Whakatane District Council* [2017] ZNEnvC 51 at [59]