

**BEFORE THE COMISSIONERS ON BEHALF OF
THE QUEENSTOWN LAKES DISTRICT COUNCIL**

Under The Resource Management Act 1991 (**'The Act'**)

In the matter of Private Plan Change 54 (**'PC54'**)

**STRIKE OUT APPLICATION PURSUANT TO SECTION 41D OF
THE RESOURCE MANAGEMENT ACT 1991 ON BEHALF OF
PEAK VIEW RIDGE LOT OWNERS**

Duncan Cotterill

Solicitor acting: Derek McLachlan
PO Box 827, Nelson 7040

Phone +64 3 546 6223
Fax +64 3 546 6033
derek.mclachlan@duncancotterill.com

MAY IT PLEASE THE PANEL:

INTRODUCTION

- 1 Peak View Ridge Lot Owners ('PVRLO') are an unincorporated group of landowners who reside on Peak View Ridge, Wanaka ('PVR'). The Further Submission filed by Mr Scott Edgar (Edgar Planning) on Plan Change 54 ('PC54') provides the details of PVRLO members (Submission no.35).¹ We act for Robert Daultrey, a member and spokesperson of PVRLO.

- 2 This application is filed in relation to a submission filed by WFH Properties Limited (Submission no.21) which seeks amendments to the Northlake Structure Plan as follows:

*“Amend the Northlake Structure Plan to identify an ‘Indicative Required Road Link’ and ‘Indicative Primary Entry’ from the Northlake Special Zone to Aubrey Road, with this to be located in the general vicinity of Peak View Ridge , as identified in **Annexure [A]**; and*

any and all consequential relief required to give effect to the matters raised in this submission, including alternative, further or consequential amendments to any relevant provisions of the Northlake Special Zone that address the matters raised by the submission.”

- 3 It is submitted that this relief falls outside the scope of PC54 and is an attempt, by way of stealth, to introduce significant transportation issues that relate more broadly to the Northlake Special Zone ('NSZ'). The submission immediately raises broad issues concerning transportation, landscape, and amenity that have not been assessed within the PC54 application documentation.

- 4 We note that Northlake Investments Limited ('NIL' or 'The Applicant') have also filed a further submission identifying that they also consider WFH Properties' submission to be out of scope.

Relief Sought

- 5 PVRLO seeks the following relief:
 - 5.1 The submission of WFH Properties (Submitter no.21) is struck out in its entirety; and

¹ PVRLO further submission (no.35), at [2.1]

- 5.2 To prevent unnecessary costs to the submitters (and Applicant)
PVRLO respectfully request that a decision is made in advance of
any evidence exchange timeline or hearing.

BACKGROUND

- 6 PVRLO's further submission outlines some background detail to historical applications seeking to utilise PVR as an access to NSZ. For completeness, we provide the following additional context.

Historical Applications

- 7 Members of PVRLO submitted on PC45. PC45 did not include PVR as an access and was to be determined by a separate resource consent process. There remains a legal question as to the vires of the identification of PVR as a 'secondary access' within the Northlake Structure Plan, as it was not sought within the notified application, nor is it within the boundaries of the Northlake Structure Plan area. Further, the appropriateness of PVR was not assessed by PC45, as noted by the Decision of the Commissioners:

"The Commission also acknowledges that there are other matters that cannot be resolved through a decision on PC 45 and that require further consultation between the parties. This includes the issue of whether Peak View Ridge should be used to provide access to the NSZ on the PC 45 land." (page 45, para. 5); and

"The Commission acknowledges that whether Peak View Ridge is used for access is a matter that is likely to be addressed through the resource consent/ODP approval process." (page 68, para. 6)"

- 8 Therefore, the identification of PVR as a secondary access within the Northlake Special Zone is subject to significant qualifications. While PVR was discussed during PC45, no determination or findings were made on the merits.
- 9 In 2016, a separate application was made for an Outline Development Plan which included PVR as an access (RM160919). Traffic calming measures were proposed within activity area B1 and along Peak View Ridge to minimise traffic effects. In July 2017 the Applicant provided PVRLO a Carriageway Consultant report.
- 10 The Applicant (Allenby Farms Ltd) stressed the fact that while vehicle access would be 'secondary' the associated road design and traffic volume projection did not correlate with these representations. The proposal was for Peak View Ridge to provide vehicle access to 358 residential lots with peak traffic flow of 322 movements per hour. The transportations assessments also identified that

approximately 150 additional houses (not within area B1) would likely utilise the access as the most direct access to their dwellings. While the application was never notified, PVRLO registered their opposition to this proposal.

11 Application RM160919 was later withdrawn, and at the same time RM171015 was lodged. It became clear that RM171015 was part of a 'three prong' process. The Applicant had separated RM160919 into three applications as follows:

11.1 Application 1 (being RM171015): to determine whether Peak View Ridge can physically accommodate the desired road link, considering all physical and road design parameters, including, in particular maintaining appropriate access to the existing properties along Peak View Ridge, and whether or not Council will accept vesting of Peak View Ridge as a road;

11.2 Application 2 (which has subsequently been progressed as RM180502, granted 28 November 2018): Application for Outline Development Plan that will cover the subdivision layout of the Northlake zones area, excluding any road connection to Peak View Ridge;

11.3 Application 3: Would be a variation to the Outline Development Plan Road layout to provide a road connection from Peak View Ridge into Northlake. This application would only have been required if the previous application(s) were granted.

12 The purpose of RM171015 was defined by the Applicant at the time as:

*The current application therefore only seeks to assess the physical capacity of the proposed roading link for Aubrey Road along Peak View Ridge, including matters such as traffic safety, access into the existing Peak View Ridge properties and landscaping along the proposed road. It does not address the appropriateness of vehicle access to Northlake, which will be addressed in the subsequent application.*²

13 While RM171015 was granted by the Commissioner, the use of the road and its connection to the NSZ were not approved (as that did not form part of the application) and it was acknowledged by the Applicant and the Commissioner that the future use of the road and its suitability and appropriateness to connect

² Evidence of Mr White, dated 1 June 2018, at [18]; also see Decision on RM171015 at [24] for a 'four step' process description. This includes an extra step of obtain approval of Council to vest the road.

through to the NSZ would be the subject of a future resource consent application.

- 14 PVRLO appealed the decision on RM171015, and a settlement was reached at mediation whereby the subdivision component of the proposal was approved by Consent Order, while the land use component to construct the road, earthworks and associated retaining was surrendered. By withdrawing the land use component from the application, the Environment Court could make Orders without having to consider the merits of utilising Peak View Ridge as an access. RM171015 was effectively reduced to a boundary adjustment application. The Consent Order is attached as **Appendix A**.
- 15 Therefore, despite a swath of application(s) being filed since PC45 was introduced, none have progressed (to finality) the issue of whether PVR is an appropriate access, or what construction standards would be required, or if it is possible. If the Submission filed by WFH Properties is accepted on PC54, then all the matters previously traversed within the applications above become live issues for the upcoming hearing.

GROUND FOR STRIKE OUT

- 16 An authority conducting a hearing may direct that a submission, or part of a submission, be struck out if the following applies to the submission:
- (1) *An authority conducting a hearing on a matter described in section 39(1) may direct that a submission or part of a submission be struck out if the authority is satisfied that at least 1 of the following applies to the submission or the part:*
- (a) *it is frivolous or vexatious:*
 - (b) *it discloses no reasonable or relevant case:*
 - (c) *it would be an abuse of the hearing process to allow the submission or the part to be taken further:*
 - (d) *it is supported only by evidence that, though purporting to be independent expert evidence, has been prepared by a person who is not independent or who does not have sufficient specialised knowledge or skill to give expert evidence on the matter:...*
- (2) *An authority*
- (a) *may make a direction under this section before, at, or after the hearing; and*
 - (b) *must record its reasons for any direction made.*

17 Section 41D applies to a private plan change.³ An Authority may utilise this discretion before, at, or after the hearing.

18 The grounds for strike out are that the submission:

18.1 discloses no reasonable or relevant case; and

18.2 would be an abuse of the hearing process to allow the submission or the part to be taken further.

It discloses no reasonable or relevant case

19 To disclose a reasonable or relevant case a submission must be within scope of the original application. We discuss the components of PC54 that define the scope of the application below:

Scope of Application

20 The Public Notice and Factsheet identify that the purpose of the plan change is limited to providing legal access to Sticky Forest. It does not address broader roading connections:

The purpose of the Plan Change is to:

- *Amend the Structure Plan, policies and rules of the Northlake Special Zone (Section 12) **to enable and provide for legal access** (for transportation and infrastructure purposes) **to the adjoining land to the west** legally described as Section 2 of 5 BLK XIV Lower Wanaka SD and **known as Sticky Forest**;*
- *Amend the Structure Plan, policies and rules of the Northlake Special Zone to **provide for a new residential Activity Area (B6) in the northwest part of the zone**, with consequential amendments to the existing configuration of Activity Areas B2, C1 and E1; and*
- *A consequential amendment to the Subdivision and Development chapter (Section 15) in relation to the proposed legal access to Sticky Forest.*

The land directly affected by the plan change is located in the northwestern part of the Northlake Special Zone, immediately east of Sticky Forest and west of Lammermoor Street, and including identification on the Structure Plan of Riverslea Road as a “required road link”. The land is owned by Northlake Investments Limited.

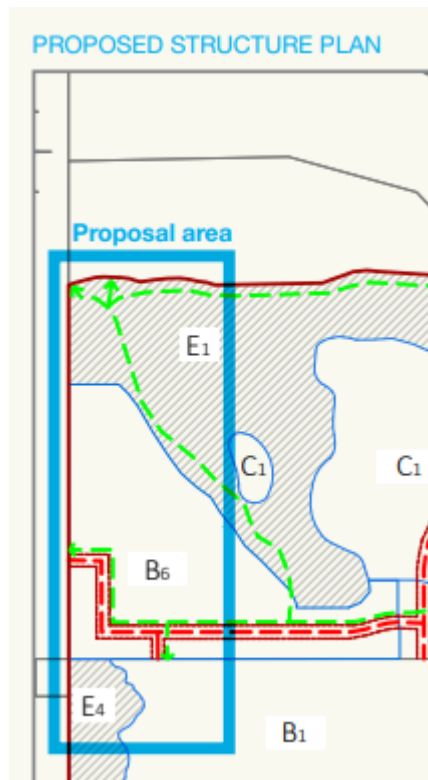
21 The public factsheet identifies two ‘main elements’ to the plan change:

³ Resource Management Act, Section 39)(1)(a)

- To provide a roading and infrastructure corridor from the Northlake Special Zone to the adjacent site known as Sticky Forest.
- To provide land for residential development in the north-western edge of the Northlake Special Zone. This could result in up to 63 net additional dwellings.

22 The public factsheet then states that “Both elements are to be achieved by reconfiguring existing Activity Areas B2, C1 and E1 in the Northlake Special Zone Structure Plan”. The public factsheet makes no mention of reconfiguring access from Aubrey Road to Area B1.

23 The public factsheet also identifies the spatial limitations of the plan change as identified below:



24 The Section 32 Assessment identifies NIL’s overall objectives as:⁴

- To enable road access and a servicing corridor to Sticky Forest; and
- To expand the land area available for urban residential development in the northwest part of the NSZ, in the vicinity of the proposed road access to Sticky Forest

⁴ Section 32 Assessment, section 2.2

25 We note that the Section 32 Report prepared by the NIL does not consider use of PVR under the potential ‘options’ within the ‘*evaluation of the costs and benefits of other options*’ within Section 4 or Section 5 of that Report. The omission to include any consideration of the use of PVR is fundamental to the scope of the plan change. Any submission seeking identification of PVR (or an alternative access in the vicinity) therefore requires significant update to the existing section 32 assessment.

26 When assessing the effects of the plan change on Allenby Land (now owned by WFH Properties), the proposal is limited to the following:

The Change will not affect any of the Allenby land as:

- *the additional urban residential development will be consistent with that density in Activity Area B1;*
- *Most of the land within the Change area immediately adjacent to the Allenby Farms land is already within Activity Area B2.*

In addition, 2 new Required Road Links to provide access to the land will be created, thereby improving connectivity to the Allenby land.

27 PC54 was received by Council on 3 February 2022. The Council then issued a Request for Further Information (‘RFI’) dated 10 March 2022. This RFI included a request for additional information on transportation and identified Council’s intention to commission a peer review of the transportation assessment. Mr Goldsmith’s Memoranda dated 1 June 2022 provides direct clarification on the scope of alternative accessways to be assessed as part of PC54:

“Alternative potential access routes to Sticky Forest are located on land outside NIL’s control and outside the scope of PC54”.

28 We do not undertake a line-by-line analysis of the Application documents themselves, rather support the summations made by Council through public notification of the plan change. We consider the notification documents (Public Notice and Public Factsheet) accurately identify and define the scope of PC54, which limits consideration of matters to the utilisation of Areas E1, B2, C1 of the NSZ. The scope of PC54 does not extend to alternative access routes to the NSZ.

Case Law – is a submission ‘on’ a plan change.

29 Whether a submission is ‘on’ a plan change will depend on the factual context. The scope of PC54 is defined within the provisions/descriptions identified

above – these form the central focus of the legal test of whether the submission filed by WFH Properties in ‘on’ the plan change.

30 The leading case on whether a submission is ‘on’ a plan change is *Clearwater Resort*⁵ where the Court held that:⁶

(1) *A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.*

(2) *But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly “on” the variation.*

31 The Court in *Clearwater* also observed:

It is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope for public participation.

32 The High Court in *Motor* considered that a very careful approach needs to be taken to the extent to which a submission may be said to satisfy both limbs of the *Clearwater* test. Kos J Observed that: ⁷

Permitting the public to enlarge significantly the subject matter and resources to be addressed through the schedule one plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes.

33 In relation to whether a submission addresses the proposed plan change itself, Kos J noted that:⁸

*“.. the first limb in *Clearwater* serves as a filter, based on a direct connection between the submission and the degree of notified change proposed ...”*

⁵ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003

⁶ *Ibid* at [66]

⁷ [2013] NZHC 1290 at [79]

⁸ *Ibid* at [80]

34 This was described as the “dominant consideration” and was expanded upon as follows:⁹

“In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing this is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource ... is altered by the plan change. If it is not, then the submissions seeking a new management regime for that resource is unlikely to be ‘on’ the plan change. ... Incidental or consequent extensions of zoning changes proposed in the plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected person of the comparative merits of that change.”

35 It is our submission that PC54 was deliberately refined in scope. The potential use of PVR (or alternative access to NSZ) was not raised within any of the application documents, and the Memoranda of Mr Goldsmith dated 1 June 2022 specifically confirms that alternative accessways to Sticky Forest was outside scope of PC54.

36 In this case, the introduction of broader issues (such as the use of PVR or alternative access to NSZ) necessitates the production of substantial evidence and updates to the section 32 analysis. Because this information was not produced through the application/notification process, there is currently no way to assess the merits of alternative access options to NSZ against the status quo.

37 We also note that the only reason that PVRLO identified the submission made by WFH Properties was because they reviewed all the submissions filed on PC54. This exercise was undertaken out of an abundance of caution, due to the extensive history associated with PVR, and to avoid further ‘stealth’ applications being progressed. Members of the public may not have undertaken this detailed exercise and will therefore remain unaware that the scope of PC54 has been extended.

38 Applying the guidance within *Motor Machinists*, it is submitted that WFH Properties’ submission must fail the *Clearwater test*, and the panel must assess the submission as being out of scope of PC54. In our submission, WFH

⁹ Ibid at [81]

Properties have failed to disclose a reasonable or relevant case, and the submission should be struck out.

Abuse of Process

39 Allowing the WFH Properties submission to progress to the hearing phase would amount to an abuse of process and put PVRLO to unnecessary expense. If the submission is not struck out, then PVRLO will need to immediately commence the preparation of planning, landscape, and transportation evidence to protect their position. There are no costs recovery mechanisms for PVRLO if the submission is subsequently found to be out of scope at Council hearing phase. At this point evidence would have already been prepared and cost incurred.

40 Councillors voted to accept PC54 at Planning and Strategy Committee on 18 August 2022. Councillors only voted to accept PC54 after a thorough RFI process. As identified above, the RFI process confirmed that the consideration of alternative access routes to Sticky Forest was outside the scope of PC54. If Councillors understood that PC54 could extend to broader transportation matters, the assessments provided would likely have been sufficient for public notification. By filing a 'submission' seeking alternative access routes to NSZ, WFH Properties have effectively subverted the RFI and Councillor approval process.

41 PVRLO are now prejudiced by this process as:

41.1 The publicly notified documents gave no cause for concern that PVR (or other alternatives access options) was within scope of the application. If it was understood the PVR was within scope of the application, an original submission in opposition would have been filed. PVRLO have now lost this opportunity.

41.2 WFH Properties have now introduced the use of PVR (or other alternatives access options) as an alternative access. Technical assessments have not been provided by WFH Properties, so PVRLO cannot peer review any documents. All evidence must be prepared from a point of 'no- information'. This is an expensive process for a submitter to undertake.

41.3 If PVR (or other alternatives access options) was within scope of PC54, then the Council had various options available to them at the time to ensure sufficient information was available to submitters to review. Council had the following mechanisms available:

41.3.1 Utilise RFI process to ensure assessment of alternative access locations were comprehensively assessed prior to public notification;¹⁰

41.3.2 Reject the application on the ground that the scope of PC54 was 'frivolous and vexatious' and was not prepared in accordance with sound resource management practice. ¹¹

42 If the scope of PC54 has been extended, then the general public have also been prejudiced, as they lost the opportunity to submit on matters beyond those specifically identified within the notification documents (being the Public Notice and Factsheet).

43 By expanding the scope of considerations after the notification of PC54, the 'checks and balances' within Schedule 1 of the Act have been subverted. If the scope of the PC54 is as broad as WFH Properties say, then the assessments filed with PC54 were clearly incomplete, and should have been rejected by Council prior to acceptance.

Relief Sought

44 On the grounds set out above, PVRLO respectfully request the following directions from the Panel:

44.1 The submission of WFH Properties (Submitter no.21) is struck out in its entirety; and

44.2 To prevent unnecessary costs to the submitters (and Applicant) we respectfully request that a decision is made in advance of any evidence exchange timeline or hearing.

Dated 5 May 2023



D A McLachlan

Solicitor for Robert Daultrey (Member of Peak View Ridge Lot Owners)

¹⁰ Resource Management Act 1991, Schedule 1, Clause 23

¹¹ Resource Management Act 1991, Schedule 1, Clause 25(4)(a) and (c)