

**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 Hearing Stream 10 –  
Natural Hazards,  
Definitions and Whole  
of Plan

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**OPENING REPRESENTATIONS / LEGAL SUBMISSIONS FOR  
QUEENSTOWN LAKES DISTRICT COUNCIL**

**Hearing Stream 10 – Natural Hazards, Definitions and Whole of Plan**

**13 March 2017**

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**MAY IT PLEASE THE PANEL:**

**1. INTRODUCTION**

**1.1** These legal submissions are made on behalf of Queenstown Lakes District Council (**Council**) in respect of Hearing Stream 10 of the Proposed District Plan (**PDP**). The following matters are being considered in this hearing stream:

- (a) Chapter 28 – Natural Hazards (**Natural Hazards chapter**);
- (b) Chapter 2 – Definitions (**Definitions chapter**); and
- (c) submissions categorised as 'whole of plan'.

**1.2** Recommendations on the majority of submissions made on the Definitions chapter have already been made through previous hearings on the PDP, where s42A authors considered the submissions on definitions at the same time as they were considering the substantive and related provisions on a certain topic. Submissions points were allocated, and submitters invited to, the respective hearings. From a definitions perspective, the purpose of this hearing is to collate the Council's recommendations on definition related submissions from those previous hearing streams, and to address a small number of submissions on the Definitions chapter that have not been addressed in previous hearing streams.

**1.3** The purpose of the 'whole of plan' portion of this hearing is to assess submission points that have been lodged against the entire PDP or summarised as general comments on the PDP, rather than against individual chapters, specific PDP provisions, maps or properties. These submissions were generally so broad in nature, that they could not be attributed to a specific chapter or provisions.

**1.4** These opening submissions address the following matters:

- (a) scope principles/ issues;
- (b) Natural Hazards chapter:
  - (i) strategic overview of Natural Hazards;
  - (ii) risk based approach and tolerability;
  - (iii) mapping of natural hazards;

- (iv) Proposed Otago Regional Policy Statement (**PRPS**);
- (v) precautionary approach;
- (vi) submissions on the Natural Hazards chapter;
- (c) Definitions chapter;
  - (i) strategic overview of definitions;
  - (ii) applicability of definitions to the Designations chapter;
  - (iii) specific submissions on definitions;
- (d) whole of plan submissions; and
- (e) order of witnesses.

**1.5** These submissions address key matters in dispute, but are not a comprehensive response to all evidence that has been filed, which will be covered through expert's summaries of evidence, during the course of the hearing, and in the Council's right of reply if necessary.

**1.6** There are a number of issues raised in evidence for submitters that are accepted, and also a number of issues raised that are contested and not accepted by the Council. In order to assist the Hearing Panel (**Panel**) the summaries of the Council's evidence have responded, at a very general level, to some of the key issues raised in submitters' evidence. This will be expanded on in the Council's reply, if necessary.

**1.7** The Council refers to and adopts the opening legal submissions presented at the Strategic Direction hearing, in terms of Council's functions and statutory obligations (section 3) and relevant legal considerations (section 4).<sup>1</sup> Those submissions are not repeated here, but in summary, the Environment Court gave a comprehensive analysis of the mandatory requirements in *Long Bay-Okura Great Park Society v North Shore City Council*.<sup>2</sup> Subsequent cases have updated the *Long Bay* summary following amendments to the RMA in 2005, the most recent and comprehensive of which was provided by

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1 Opening Representation / Legal Submissions for Queenstown Lakes District Council, Hearing Streams 1A and 1B - Strategic Chapters in Part B of the Proposed District Plan, dated 4 March 2016, at parts 4 and 5.  
 2 *Long Bay-Okura Great Park Society v North Shore City Council* Auckland A078/08, 16 July 2008 at [34].

the Environment Court in *Colonial Vineyard Limited v Marlborough District Council*.<sup>3</sup>

## 2. SCOPE PRINCIPLES/ ISSUES

2.1 The Panel's powers to recommend (and subsequently the Council's power to decide) are limited in that:

- (a) a submission must first, be *on* the proposed plan;<sup>4</sup> and
- (b) a decision maker is limited to making changes within the *scope of the submissions made on the proposed plan*.<sup>5</sup>

2.2 The legal principles addressing these two limbs were addressed in depth in the Council's submissions on Hearing Streams 1A and 1B<sup>6</sup> and in Hearing Stream 2.<sup>7</sup> Those principles are not repeated here but a summary for the benefit of any Panel members who did not sit during those hearings, is provided at **Appendix 1** of these submissions.

2.3 In some instances Ms Leith has identified definitions that she consider, on the merits, would benefit from improvement.<sup>8</sup> However, even when taking a generous view, it appears that there may not be scope to address these issues within the scope of the submissions received on the PDP. In these instances Ms Leith has provided her view on the merits of certain changes but has noted that there is unlikely to be scope to make them, and therefore the changes are not included in the **Appendix 1** recommended chapter.

2.4 Further, Mr Hanley has provided expert evidence on the Natural Hazards chapter on behalf of Otago Regional Council (**ORC**). Mr Hanley seeks that Policy 28.3.2.4 be amended to create a clearer more measurable test for allowing hard protection structures. Ms

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3 *Colonial Vineyard Limited v Marlborough District Council* [2014] NZEnvC 55.

4 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at parts 5 and 7.

5 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

6 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2.

7 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

8 See paragraphs 16.6, 19.7, 24.4, 29.6, 30.4, 31.2, 34.2 of the section 42A report on Chapter 2 Definitions. These recommendations relate to the definitions of sleep-out, site, archaeological site, bed, bulk earthworks, cleanfill facility, earthworks, mining activity, river, waster management facility, next to or adjoining something else, erection of a building, factory farming, hard surfacing, in addition to something else, but not as important, adjoining land, amenity or amenity values, building, development, garage, lake, liquor, noise, private way, river, sound, subdivision, waterbody, and wetland.

Bowbyes will advise the Panel, though her evidence summary, that she considers that, on the merits, such a change would improve the policy. However, at the time of filing these written submissions no clear scope within ORC's submission or any other submission on the Natural Hazards chapter has been identified.

### 3. NATURAL HAZARDS CHAPTER 28

#### Strategic overview of Natural Hazards

3.1 Section 31(1)(b)(i) of the Resource Management Act (**RMA**) provides that it is a territorial authority function to *control the effects of the use, development, or protection of land including for the purpose of the avoidance or mitigation of natural hazards.*

3.2 While Natural Hazards do not relate to any matters of national importance in section 6, section 7 matters are of relevance.<sup>9</sup> The Resource Legislation Amendment Bill proposes to add "*the management of significant risks from natural hazards*" into section 6 of the RMA. However, that is currently not part of the legislative framework at this point in time, and therefore is not relevant to the Panel's recommendations.

3.3 The Strategic Direction chapter of the PDP promotes the management of development in areas affected by natural hazards in a manner that balances the enablement of higher density development within the Queenstown Lakes District's (**District**) scarce urban land resource, with addressing the risks posed by natural hazards.<sup>10</sup>

3.4 The purpose of the Natural Hazards Chapter is then to provide a policy framework for the management of natural hazard risk throughout the District. The chapter's purpose recognises that the District is subject to multiple hazards.<sup>11</sup>

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9 The efficient use and development of natural and physical resources, maintenance and enhancement of the quality of the environment, any finite characteristics of natural and physical resources, and the effects of climate change.

10 Reply Objective 3.2.2.2 and Policy 3.2.2.1.

11 Chapter 28 Natural Hazards, 28. flooding and inundation, erosion and deposition (including landslip and rockfall), land instability, earthquakes and liquefaction, avalanche, alluvion, avulsion and subsidence, tsunami / seiche, and fire.

## **Risk based approach and tolerability**

- 3.5** The position being advanced by Council is a risk based approach to natural hazards. Broadly speaking, the risk based approach seeks to ensure that the response to any particular hazard is commensurate to the level of risk posed, and therefore is to be considered on a case by case basis.
- 3.6** The objectives and policies of the Natural Hazards chapter provide for the mitigation and avoidance of significant risk in the District to 'tolerable' levels. The concept of 'tolerability' is derived from the Otago Regional Policy Statement (**RPS**),<sup>12</sup> which the Council must give effect to, and enables the community's tolerance to natural hazards risk to be considered when decisions on consent applications are made. It is the Council's position that the concept of tolerability is an important addition to the PDP,<sup>13</sup> and for completeness it is noted that the same concept is now in the PRPS decisions version, which the district plan must have regard to.<sup>14</sup>

## **Mapping of natural hazards**

- 3.7** The mapping of natural hazards is an integral part of how the Council achieves its function under section 31(1)(b)(i) of the RMA. The majority of natural hazards in the District are not recorded on the PDP maps (the only exemption is three flood hazard areas). Rather they are mapped using the Council's hazard database, which exists as an external tool and has not been incorporated into the District Plan by reference.
- 3.8** This means that the information held within the database will not be used as the basis for an activity status and, therefore, will not trigger any requirement for a resource consent. Rather the effect of Policy 28.3.2.3 and the information requirements in 28.5 is that all persons applying for resource consent to subdivide or develop land that is

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12 Policy 11.5.6 of the Otago Regional Policy Statement.

13 Section 42A report on Chapter 28 Natural Hazards, at paragraph 6.7.

14 Policies 4.1.5(c), 4.1.5(d) and 4.1.10(a) of the Otago Regional Council Proposed Regional Policy Statement (appeals marked against provisions (14 February 2017).

subject to natural hazards risk are required to provide detailed hazard assessments along with their applications for consent.<sup>15</sup>

- 3.9** An outcome of the proposed approach will be that the Schedule 1 process will not be required to include hazard information in the Council's hazard database. Ms Bowbyes has identified and accepted that this approach does not afford potentially affected parties with the ability to challenge the robustness of the hazard information through the Schedule 1 process. However, it is the Council's position that the dynamic nature of hazard information and the challenges of keeping abreast of new information through plan changes make a non-statutory approach the most appropriate.<sup>16</sup>

### **Proposed Otago Regional Policy Statement**

#### *Requirement to "have regard to" the PRPS Decisions Version*

- 3.10** Section 74(2)(a)(i) of the RMA provides that when preparing a district plan a territorial authority shall 'have regard to' any proposed regional policy statement. The legal principles relating to the need for the Panel to 'have regard to' the PRPS when making recommendations on the PDP were addressed in the Council's memorandum / legal submissions filed on 3 March 2017 (see **Appendix 2** for a copy).
- 3.11** All of the Decisions Version of the PRPS remains proposed at this point in time. This is because the ORC has decided not to notify the parts of the PRPS that are not subject to appeal and therefore the relevant legal test for all of the PRPS Decisions Version, under the RMA, is still 'have regard to' in section 74(2)(a).<sup>17</sup> Accordingly, the Panel has an obligation to give the PRPS Decisions Version material consideration when making its recommendations on submissions on the Natural Hazards chapter. However, the Panel is not under any obligation to ensure that the various provisions of the chapter give

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15 See recommended revised Policy 28.3.2.3 at Appendix 1 of the section 42A report on Chapter 28 Natural Hazards. A controlled or restricted discretionary activity would need Natural Hazards as a matter of control or discretion (respectively).

16 Section 42A report on Chapter 28 Natural Hazards, at paragraph 10.16.

17 See paragraphs 8 and 9 of the submissions in **Appendix 2**. Mr Hanley's evidence for ORC incorrectly states in two places, that the legal test is "give effect to".

effect to (or implement)<sup>18</sup> the PRPS under section 75(3)(c) of the RMA.

- 3.12** The Environment Court in the *Winstone Aggregates* case, specifically noted that, despite being mindful of the desirability of striking a balance between obligations and functions in the present and the future:<sup>19</sup>

*the Act does not require that a proposed district plan be consistent with a proposed regional policy statement. Should a district plan be found to be lacking in consistency at some future time, mechanism exist within the Act for initiating changes, where appropriate ..*

- 3.13** The Council submits that the relationship between the Natural Hazards chapter and the PRPS will need to be assessed again at the time that the final version of the PRPS is available. If there are any inconsistencies between the provisions of the two documents at this stage then a plan change or variation to the Natural Hazards chapter may be required. However, as the final outcome of the PRPS remains uncertain this is not a matter that can be practically addressed in this hearing stream.

#### *PRPS decisions version*

- 3.14** The PRPS was notified for public submissions on 23 May 2015. The Council made a submission on the natural hazards related objectives and policies of the PRPS. The matters raised in the Council's submission are listed at paragraph 5.24 of Ms Bowbyes' s42A Report. In summary the matters raised include the definition of 'significant risk', the impact of the avoidance policies on infill and existing development, the need for clarity in respect of the concept of tolerance and the need for flexibility to enable consideration of hazards by a means appropriate for the particular local context. The Council has joined the PRPS appeal process as a section 274 party in relation to matters raised in that submission.<sup>20</sup>

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18 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 167, [2014] 1 NZLR 593 at [77].

19 EnvC A096/98, 14 August 1998, at [41].

20 Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.25.



**3.15** Decisions on submissions were notified on 1 October 2017. The PRPS does not map hazards. Appeals have now been filed against a number of PRPS objectives and policies that relate to natural hazards.<sup>21</sup> Those appeals remain unresolved.<sup>22</sup> In particular, Dunedin City Council's appeal seeks that:

- (a) the focus of policy 4.1.6 be changed from 'avoid' to 'manage;'
- (b) that the emphasis on *encouraging design* of activities that *facilitate recovery, relocation and mitigation* in policy 4.1.6 be reinstated as notified; and
- (c) provision for design that *mitigates* risk be included in policy 4.1.7.

**3.16** Accordingly, the s42A report on the Natural Hazards Chapter was prepared in the absence of certainty as to the final form of the PRPS, and that remains the current state of play.

**3.17** It is Ms Bowbyes' view that the Natural Hazards chapter is consistent with the decisions version of the PRPS<sup>23</sup> in so far as it introduces a policy framework that takes a risk based approach to natural hazards.<sup>24</sup>

**3.18** Further, Ms Bowbyes notes that the s32 analysis prepared by ORC for the PRPS acknowledges that the level of natural hazard risk that is tolerable to communities should not be predetermined. Rather, the PRPS approach provides flexibility for the varying levels of tolerance within the communities of the Otago Region to be determined at a territorial authority level by way of consultation with those communities. Ms Bowbyes notes that, in this respect, the approach taken in the notified version of the Natural Hazards chapter is consistent with the PRPS (as is submitted to be the case with her recommended chapter).<sup>25</sup>

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21 The Otago Regional Council has issued a copy of the PRPS dated 14 February 2017 that sets out which provisions of the PRPS have been appealed.

22 Mediation was taking place at the time of filing these submissions.

23 Otago Regional Council Proposed Regional Policy Statement for Otago, Appeals marked against provisions (14 February 2017).

24 Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.19.

25 Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.22.

**3.19** The relevant legal test at this point in time is to "have regard to" the PRPS. Ms Bowbyes has acknowledged that the decisions version of the PRPS advocates a more definitive and cautious approach with regard to natural hazard risk than that proposed by the provisions of the Natural Hazards chapter. In particular, Ms Bowbyes acknowledges that the PRPS seeks *avoidance* of development in locations affected by *significant hazards*, while the Natural Hazards chapter only requires *avoidance* where risks are *intolerable*. However, Ms Bowbyes notes that the PRPS decisions document released on 1 October 2016 provides the following reasoning:<sup>26</sup>

*While the PRPS provisions require the avoidance of certain effects, it does not automatically follow that an activity is prohibited. What is prohibited are adverse effects on particular values. If the adverse effects from that activity on those values can be avoided, then the activity can be undertaken.*

**3.20** In Ms Bowbyes' view, this reasoning creates some uncertainty as to how the word 'avoid' is to be interpreted in the context of the PRPS objectives and policies.<sup>27</sup> The appeal process on the PRPS has the potential to assist with providing certainty in this regard.

**3.21** As part of Ms Bowbyes having regard to the PRPS, she has considered whether the relief sought by submissions on the Natural Hazards chapter provides an opportunity to increase consistency with the decisions version of the PRPS.<sup>28</sup>

### **Precautionary approach**

**3.22** ORC submitted on the PDP requesting that the Natural Hazards chapter provide for the precautionary approach reflected in the PRPS.<sup>29</sup> The decisions version<sup>30</sup> of the PRPS contains Policy 4.1.8 which states (emphasis added):

**Policy 4.1.8 3.2.8 Precautionary Applying a precautionary approach to natural hazard risk**

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<sup>26</sup> Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.20.

<sup>27</sup> Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.21.

<sup>28</sup> Section 42A report on Chapter 28 Natural Hazards, at paragraph 5.19.

<sup>29</sup> Section 42A report on Chapter 28 Natural Hazards, at paragraph 9.2 – 9.11.

<sup>30</sup> Proposed Regional Policy Statement for Otago: Incorporating Council Decisions and Appeals 14 February 2017. Note that proposed Policy 4.1.8 is subject to appeals from Wise Response Incorporated and Real Journeys Limited.

*Where natural hazard risk to people and communities is uncertain or unknown, but potentially significant or irreversible, apply a precautionary approach to identifying, assessing and managing that risk.*

- 3.23** The PRPS does not define the term 'precautionary approach' used in Policy 4.1.8. However, the concept has been addressed in detail through case law under the RMA.
- 3.24** The precautionary approach, as developed in New Zealand case law, essentially provides that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions, or activities), decision makers should be cautious while also recognising that the RMA is not a "no-risk regime".<sup>31</sup>
- 3.25** The weight to be given to the precautionary principle/approach depends on the circumstances, including the extent of present scientific knowledge, the impact on otherwise permitted activities, and the gravity of the effects if, despite uncertainty, they do occur.<sup>32</sup> There needs to be a plausible basis, not just suspicion or innuendo, for adopting the precautionary approach.<sup>33</sup>
- 3.26** The risk must be capable of scientific measurement or being objectively identified. This is to prevent situations where it is argued that the precautionary approach should be applied based on unfounded speculation expressed to suit a party's position, or where there is a lack of research information about the effects of an activity.<sup>34</sup>
- 3.27** It is the view of Ms Bowbyes that the emphasis on the precautionary approach in the PRPS Policy 4.1.8 is adequately reflected through recommended redraft Policies 28.2.2.2 and 28.3.2.3.<sup>35</sup> Redraft Policy 28.2.2.2 provides for the enablement of subdivision and development of land where such activities would not accelerate or worsen natural hazard risk to an unacceptable level. Redraft Policy 28.3.2.3

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31 *Friends of Nelson Haven and Tasman Bay Incorporated v Marlborough District Council* [2016] NZEnvC 151 at [22]; *Aquamarine Limited v Southland Regional Council* C126/97, 15 December 1997 at 145.

32 *McIntyre v Christchurch City Council* [1996] NZRMA 289 at 305.

33 *Aquamarine Limited v Southland Regional Council* C126/97, 15 December 1997 at 146.

34 *Sea-Tow v Auckland Regional Council* A066/06 at [462].

35 Section 42A report on Chapter 28 Natural Hazards, at paragraph 9.6 to 9.9.

provides an onus on a resource consent applicant to provide an assessment to demonstrate the level of natural hazard risk related to a particular proposal. Further, Mr Hanley's evidence, provided for ORC, has raised no further issue in respect of the precautionary approach. Accordingly, it appears that Ms Bowbyes and Mr Hanley have reached agreement on this issue.

### **Submissions on the Natural Hazards chapter**

**3.28** The key outstanding issues identified in the s42A report on the Natural Hazards chapter related to matters raised in ORC's submission.<sup>36</sup> However, there has been some movement in that position. ORC's original submission sought general changes at a high level whereas Mr Hanley's evidence provides a fine-grained response on each of the individual provisions within the redrafted chapter. Ms Bowbyes will advise the Panel through her evidence summary, that she largely agrees with the discrete changes now sought by Mr Hanley.<sup>37</sup> It therefore appears from the evidence before the Panel, that the Council and ORC have now reached agreement on the majority of issues.

**3.29** Ms Bowbyes has made a note of what are understood to be the remaining outstanding issues in her summary of evidence. These remaining issues fall into two categories:

- (a) changes proposed by Mr Hanley to reflect the wording of the PRPS that Ms Bowbyes considers to be inappropriate on account of the continuing uncertainty around the final wording of the PRPS (the relevance of the PRPS has been addressed above); and
- (b) other changes proposed by My Hanley in relation to which Ms Bowbyes wishes to hear Mr Hanley's oral evidence prior to forming a view.

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<sup>36</sup> Section 42A report on Chapter 28 Natural Hazards, at Part 9.

<sup>37</sup> Evidence of Warren Hanley for Otago Regional Council, 6 March 2017.

## 4. DEFINITIONS CHAPTER 2

### Strategic overview of definitions

- 4.1 The Definitions Chapter is included in the PDP to aid plan users in the interpretation of the substantive chapters. The PDP has been drafted with the intent that the defined terms in Chapter 2 apply throughout the PDP, that is whenever the defined term is used, with the exception of the Designations chapter.<sup>38</sup> There is no need for the PDP to underline words where they are being used in their defined way (rather than the ordinary dictionary meaning of a word or phrase).
- 4.2 In addition, definitions are also provided within notified Chapter 5: Tangata Whenua in a glossary, and also within Ms Vicki Jones' right of reply for Chapter 26: Historic Heritage.<sup>39</sup> The Chapter 5 terms are intended to apply throughout the PDP, while the Chapter 26 terms only apply to that chapter.<sup>40</sup> It is appropriate that the definitions currently included in Chapter 26 and specific to that chapter, should (for consistency reasons), be moved into Chapter 2, with a qualifier that it only applies to the Historic Heritage chapter. This is consistent with the new note that Ms Leith has recommended be added into the start of the Definitions chapter, clarifying that the application of a definition can be limited to a specific zone or scenario.

### Applicability of definitions to the Designations chapter

- 4.3 Ms O'Sullivan's evidence (on behalf of Queenstown Airport Corporation (**QAC**)) is that the definition of "Airport Operator" should remain in the PDP, because it is used in the Wanaka Airport Aerodrome Purposes Designation (Designation 64). The term isn't used elsewhere in the PDP, and therefore consistent with other terms not used in Stage 1 chapters, Ms Leith has recommended its deletion. The Council's approach is that designations do not trigger

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38 Section 42A Report for Chapter 2 Definitions, at paragraph 7.2.

39 Section 42A Report for Chapter 2 Definitions, at paragraph 7.8.

40 Section 42A Report for Chapter 2 Definitions, at paragraph 7.8.

the definitions within Chapter 2<sup>41</sup> and therefore "Airport Operator" should be deleted from Chapter 2.

**4.4** Although a designation is included in a district plan as *if it were a rule*, section 176(2) then provides that the provisions of a district plan or proposed district plan (which includes a definition), shall apply in relation to that land that is subject to the designation, *only* to the extent that the land is being used for a purpose other than the designated purpose. Therefore, the definitions are only relevant when the underlying zone is being relied upon, rather than the designation itself. A designation authorises the requiring authority's work and activities without the need to comply with the zone rules or obtain a land use consent.<sup>42</sup> It is therefore respectfully submitted that the conditions of designations should be specific enough without referring to the Definitions chapter unless necessary. The Airport has had an opportunity to submit on the Designation, in that respect.

**4.5** In addition, in Section 37.1 of the s42A Designations chapter it states that:

*Conditions of the designation set parameters for which the activity can occur in accordance with the purpose of that designation.*

**4.6** The conditions set the bounds of each designation and only one of the designations<sup>43</sup> includes a condition that specifically states a definition in the District Plan applies. This contrasts with the approach in the rest of the PDP where the Chapter 2 definitions apply whenever the term is used.

**4.7** This approach was recently confirmed as appropriate in the Christchurch Replacement District Plan, and the partially operative Auckland Unitary Plan. The ordinary dictionary meaning of "airport operator" can be used in the context of Designation 64.

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41 Section 42A Report for Chapter 2 Definitions, at paragraph 26.6.

42 Section 42A Report on Chapter 37 Designations at paragraph 1.1.

43 #570 Aurora – Electricity Substation and Ancillary Purposes.

**4.8** It is also noted that in the s42A Report Ms Leith confirmed that, if one were necessary, she would support a note being added to Chapter 2 to confirm that Designations do not trigger definitions.<sup>44</sup> In her summary, she updates that position by stating that she now considers one is necessary and that the note should confirm that Designations do not trigger definitions unless specifically stated.

#### **'Antenna' and 'mast'**

**4.9** Ms O'Sullivan has sought changes to the definitions of 'antenna' and 'mast' to ensure that the rules in 30.4.41 to 30.4.50 are not limited to telecommunication activities.<sup>45</sup> These rules were relocated through the course of the Utilities hearing, but their content remains as notified.

**4.10** Although the merits of what is being suggested by Ms O'Sullivan is accepted, and it was not the intention of the rules to be limited to telecommunication activities, this is an inadvertent consequence of the notified rules and definitions, and has not been submitted on. Consequently amendments to the definitions of "antenna" and "mast" to ensure 'radio communication, navigation or meteorological communication activities' are also included in the definitions, is a matter that may need to be rectified through Stage 2.<sup>46</sup>

#### **'Site'**

**4.11** The definition of 'site' has been discussed by the Panel and various Council witnesses throughout the substantive hearings. In Hearing Stream 4 – Subdivision, the Panel requested that Mr Nigel Bryce review the definition and in particular clauses b) and c), which Mr Bryce deferred until this hearing.<sup>47</sup> In Hearing Stream 6 – Residential, Ms Kim Banks addressed the definition in her reply evidence in response to questioning from the Panel, regarding developments occurring across more than one lot and the intended

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44 Section 42A Report for Chapter 2 Definitions, at paragraph 26.6.

45 Statement of Evidence of Kirsty O'Sullivan dated 2 March 2017, at paragraph 2.24.

46 Vodafone New Zealand (179), Spark New Zealand Trading Limited (191), Chorus New Zealand Limited (781).

47 Section 42A Report on Chapter 2 Definitions at paragraph 19.1-19.2.

application of the definition to cross leases, company leases, unit titles and strata titles.<sup>48</sup>

**4.12** In considering both of these issues, Ms Leith considers that the definition of 'site' as included in the Operative (in part) Auckland Unitary Plan (**AUP**) should be used instead of the PDP definition.<sup>49</sup> Although she notes that while the AUP definition addresses the Panel's questions to Ms Banks, it does not address the questions put to Mr Bryce.

**4.13** The Panel's questions to Mr Bryce concerned zone and district boundaries and whether those boundaries should necessitate a site being considered as two (or more) sites. Ms Leith considers that there is no need for a change in zone or boundary at a site to require it to be considered as two (or more) sites.<sup>50</sup> Consequently, she recommended that b) and c) in the 'site' definition be deleted. However, there is no scope within submissions to either replace the PDP definition with the AUP definition or to delete b) and c).<sup>51</sup>

### **'Small Cells'**

**4.14** Subsequent to the Council agreeing with Spark New Zealand Trading Limited (191) and Chorus New Zealand Limited (781) that a definition of "small cells" is required in the PDP (in the hearing on the Utilities and Energy chapter), the National Environmental Standard for Telecommunications 2016 has come into force.<sup>52</sup> The Council agrees that the updated definition from the NES of 'small cells' should be included in the PDP, and therefore updates its recommendation to the version now used in the National Standard.

### **'Support Structure'**

**4.15** Mr McCallum-Clark seeks that this definition be broadened to include telecommunication lines.<sup>53</sup>

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48 S42A Report for Chapter 2 Definitions, at paragraph 19.3.

49 S42A Report for Chapter 2 Definitions, at paragraph 19.4.

50 S42A Report for Chapter 2 Definitions, at paragraph 19.6.

51 Only one submission on 'site' was received, Patterson Pitts Group (370) who sought amendments to reflect "replacement Acts", or "Unit Titles Act 2010".

52 On 1 January 2017.

53 Evidence of Mr McCallum-Clark dated 3 March 2017 at paragraph 2.



- 4.16** In Mr Barr's s42A report for Chapter 30, he recommended the inclusion of "Support Structure" in Chapter 2, however as at that time there was also a definition of "Telecommunication Facility", which included *associated equipment and support structures*. Therefore there was no need for telecommunication facilities to be added to the definition of "Support Structures".<sup>54</sup> However, through his reply evidence on Chapter 30, Mr Barr recommended that the definition of "Telecommunication Facility" be deleted (for other reasons).<sup>55</sup>
- 4.17** Consequently, Ms Leith agrees with Mr McCallum-Clark's evidence and recommends through her summary that the definition of "Support Structure" should be broadened to include telecommunication lines.

### **Replacement Acts**

- 4.18** Patterson Pitts Group (370) sought amendments to 'site' to reflect "replacement Acts", or "Unit Titles Act 2010". It is respectfully submitted that references in district plans to future legislation is *ultra vires* due to uncertainty. However, section 22 of the Interpretation Act 1999 provides that references to a repealed enactment (Act) is a reference to an enactment that, with or without modification, replaces, or corresponds to, the enactment repealed. Therefore, if the Act is repealed and replaced by a new Act, then the references to the old Act should be read as references to the new Act.
- 4.19** This principle of interpretation resolves the issue of referring to 'and replacement Acts' in the definition.
- 4.20** In addition and for the same reasons, the reference to the 2008 regulations in the definition of *Regionally Significant Infrastructure* should be updated to 2016.

### **'Retail activity'**

- 4.21** The evidence for Bunnings Limited (746) confirms that the Bunnings and the Council are in agreement about the definitions of Trade

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54 Section 42A on Chapter 30 Energy and Utilities at paragraph 9.27.

55 Reply Evidence of Mr Craig Barr for Chapter 30 Energy and Utilities at paragraph 14.1.

Supplier and Building Supplier, but as set out in Ms Kay Knight's evidence Bunnings seeks to exclude 'Trade Suppliers' from the definition of 'retail activity'.<sup>56</sup> This submission is a point of difference between the Council and Bunnings and will be addressed in more detail in the Council's reply.

### **'Visitor Accommodation'**

**4.22** While the residential Visitor Accommodation provisions have been withdrawn and are intended to be part of Stage 2 of the PDP review,<sup>57</sup> there are still rules related to visitor accommodation in the Stage 1 Rural, Town Centres and Special zones, and the definition is also included in Stage 1. The Council respectfully notes that amendments to the definition will have an effect on the Stage 2 process and draws this to the Panel's attention for their information. Ms Leith has addressed the submissions on the definition that do not impact upon the number of nights. This is addressed in more detail in Ms Leith's evidence summary.

## **5. WHOLE OF PLAN SUBMISSIONS**

### **Evidence of Mr Haworth for Upper Clutha Environmental Society (145)**

**5.1** I briefly raise some concerns with Mr Haworth's evidence. First, Mr Haworth has attempted to remedy deficiencies in what has been categorised as a 'whole of plan' submission, by providing detail now as to what should have been provided in the original submission. The provision of that information at this point in the process, does not get around the procedural fairness and natural justice issues raised in Mr Barr's s42A report.<sup>58</sup> The scope of a submission cannot be widened through providing subsequent evidence as there is no way for further submitters to have reasonably known, at the time the submission was lodged, what the submission was seeking and whether they should seek to join the debate through lodging a further submission.

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56 Statement of Evidence of Kay Panther Knight on behalf of Bunnings Limited dated 6 March 2017 at paragraph 34.

57 S42A Report for Chapter 2 Definitions, at paragraph 22.6.

58 Section 42A on Whole of Plan submissions at paragraph 6.4.

**5.2** In addition, Haworth is seeking to re-litigate some matters that have already been covered in the earlier hearing streams. The content/merit of the chapters mentioned in his evidence have already been heard, and it is respectfully submitted that the content/merit of these chapters is not a matter for this hearings panel. While it is respectfully noted that the structure of the entire plan may be a matter for this hearings panel (i.e., chapter order etc), the existence, and merits of a chapter was required to be brought through the relevant hearing stream. Any submitter seeking a change through those chapter specific hearing streams would also have needed scope in order to seek changes to the chapter.

**6. WITNESSES**

**6.1** The Council will be calling the follow evidence:

- (a) Ms Amy Bowbyes, Senior Planner, who is the author of the section 42A report on the Natural Hazards Chapter 28;
- (b) Ms Amanda Leith, Consultant Planner, who is the author of the section 42A report on the Definitions Chapter 2; and
- (c) Mr Craig Bar, Senior Planner, who is the author of the section 42A report on the 'whole of plan.'

**DATED** this 13<sup>th</sup> day of March 2017



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S J Scott  
Counsel for the Queenstown Lakes  
District Council

**APPENDIX 1 –  
LEGAL PRINCIPLES ON SCOPE**

1. The legal principles regarding scope and the Panel's powers to recommend (and subsequently the Council's power to decide) are:
  - 1.1 a submission must first, be *on* the proposed plan;<sup>59</sup> and
  - 1.2 a decision maker is limited to making changes within the scope of the *submissions made on the proposed plan*.<sup>60</sup>
  
2. The two limb approach endorsed in the case of *Palmerston North City Council v Motor Machinists Ltd*,<sup>61</sup> subject to some limitations, is relevant to the Panel's consideration of whether a submission is *on* the plan change.<sup>62</sup> The two limbs to be considered are:
  - 2.1 whether the submission addresses the change to the pre-existing status quo advanced by the proposed plan; and
  - 2.2 whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.
  
3. The principles that pertain to whether certain relief is within the scope of a submitter's submission can be summarised as follows:
  - 3.1 the paramount test is whether or not amendments are ones which are raised by and within the ambit of what is fairly and reasonably raised in submissions on the PDP. This will usually be a question of degree to be judged by the terms of the PDP and the content of submissions;<sup>63</sup>
  - 3.2 another way of considering the issue is whether the amendment can be said to be a "foreseeable consequence" of the relief sought in a

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59 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at Parts 5 and 7.

60 Council's Legal Reply on Hearing Streams 1A and 1B dated 7 April 2016 at part 2; Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

61 [2014] NZRMA 519.

62 Council's Opening Legal Submissions on Hearing Streams 1A and 1B dated 4 March 2016 at paragraph 7.3-7.12.

63 *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145, at 166.

submission; the scope to change a plan is not limited by the words of the submission,<sup>64</sup>

**3.3** ultimately, it is a question of procedural fairness, and procedural fairness extends to the public as well as to the submitter,<sup>65</sup> and

**3.4** scope is an issue to be considered by the Panel both individually and collectively. There is no doubt that the Panel is able to rely on "collective scope". As to whether submitters are also able to avail themselves of the concept is less clear. To the extent that a submitter has not sought relief in their submission and/or has not made a further submission on specific relief, it is submitted that the submitter could not advance relief.<sup>66</sup>

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64 *Westfield (NZ) Limited v Hamilton City Council* [2004] NZRMA 556, and 574-575.

65 *Ibid*, at 574.

66 Council's Legal Reply on Hearing Stream 2 dated 3 June 2016 at part 2.

**APPENDIX 2**

**COPY OF MEMORANDUM OF COUNSEL / SUBMISSIONS FOR QUEENSTOWN  
LAKES DISTRICT COUNCIL REGARDING PROPOSED REGIONAL POLICY  
STATEMENT 3 MARCH 2017**

**COPY  
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 Proposed District Plan

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**MEMORANDUM OF COUNSEL / SUBMISSIONS FOR QUEENSTOWN LAKES  
DISTRICT COUNCIL REGARDING PROPOSED REGIONAL POLICY STATEMENT**

**3 March 2017**

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**MAY IT PLEASE THE PANEL:**

1. This memorandum relates to the Otago Proposed Regional Policy Statement (**PRPS**).
2. The Hearing Panel (**Panel**) in its First Minute concerning the PRPS<sup>67</sup> provided guidance as to how it expected to deal with decisions on the PRPS. The Panel confirmed that from the date of the First Minute, it expected the Council and submitters to refer to the Decisions Version of the PRPS in giving both evidence and legal submissions. It confirmed also that for those hearing streams that had already been heard before 7 October 2016, that the Panel would provide the Queenstown Lakes District Council (**Council**) and submitters the opportunity to address the implications of the PRPS Decisions Version on the submissions and evidence heard, taking account of the appeals lodged.
3. In its Second Minute<sup>68</sup> the Panel directed the Council to provide written submissions on whether the Decisions Version of the PRPS changes any of the Council's recommendations already made to the Panel. The Panel in its Second Minute clarifies that it is only requesting submissions on how the changes from the Notified version to the Decisions version of the PRPS, and any change in the status of those provisions (taking account of the appeals lodged), affect the submissions and evidence presented at the hearings to the extent that they are relevant to the case previously presented, not new or additional evidence or submissions on the PRPS more generally.<sup>69</sup>

**Background**

4. The PRPS was notified for public submissions on 23 May 2015. Decisions on submissions were notified on 1 October 2017.
5. Council's recommendations on Hearing Streams 1 to 5 were therefore made before the Decisions Version was released. Recommendations on Hearing Stream 6 were also made before the Decisions Version was released, and at the time of filing the Council's reply, the appeal period had not closed and

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67 Dated 7 October 2016.

68 Dated 8 February 2017.

69 At paragraph 4.



Council was not in a position to give evidence on the Decisions Version of the PRPS.

6. Except for the following, recommendations on Hearing Streams 07 to 10 have considered the implications of the PRPS Decisions Version:

- 6.1 Designations;
- 6.2 Waterfall Park Zone;<sup>70</sup> and
- 6.3 Whole of Plan.

7. A number of appeals have now been filed against various PRPS Decisions Version objectives and policies. The Otago Regional Council has issued a copy of the PRPS dated 14 February 2017 that sets out which provisions of the PRPS have been appealed. The majority (but not all) of PRPS provisions are under appeal.

#### **Requirement to "have regard to" the PRPS Decisions Version**

8. Section 74(2)(a)(i) of the RMA provides that when preparing a district plan a territorial authority shall 'have regard to' any proposed regional policy statement.
9. All of the Decisions Version of the RPS remains proposed, as under Schedule 1 of the RMA a proposed policy statement remains 'proposed' up until the point in time that it becomes operative in terms of clause 20.<sup>71</sup> Through clause 20 of Schedule 1, an approved RPS becomes an operative policy statement on a date which is to be publicly notified. It is understood that the Regional Council has decided not to notify the parts of the PRPS that are not subject to appeal, and therefore the relevant legal test for all of the PRPS Decisions Version, is still 'have regard to' in s74(2)(a).

#### **What does "have regard to" mean for the Panel?**

10. In *Winstone Aggregates Limited v Papakura District Council*<sup>72</sup> the Environment Court considered that 'to have regard to' a proposed regional policy statement,

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<sup>70</sup> At section 2, page 2, the s42A notes that the RPS is currently under review but does not say that the Decisions Version has been considered.

<sup>71</sup> Section 86F of the RMA does not apply, as there are no rules in a policy statement.

<sup>72</sup> EnvC A096/98.

in the context of section 72(2)(a)(i) of the RMA, means to give that document material consideration. However, the provisions of the document need not necessarily be followed.<sup>73</sup> In the context of resource consent appeals, the Court has defined the legal test as meaning "give genuine attention and thought to the matter".<sup>74</sup>

11. In that case, a proposed regional policy statement was beyond challenge (all appeals were resolved), but not yet operative. The Court took the proposed regional policy statement into consideration but did not require the proposed district plan in question to be consistent with it.
12. The Panel therefore has an obligation to give the PRPS Decisions Version material consideration when making its recommendations on submissions on the Natural Hazards chapter. However, the Panel is not under any obligation to ensure that the various chapters give effect to (or implement)<sup>75</sup> the PRPS under section 75(3)(c) of the RMA.
13. In the *Winstone Aggregates* case the Environment Court noted that, despite being mindful of the desirability of striking a balance between obligations and functions in the present and the future:<sup>76</sup>

*[41]... the Act does not require that a proposed district plan be consistent with a proposed regional policy statement. Should a district plan be found to be lacking in consistency at some future time, mechanisms exist within the Act for initiating changes, where appropriate...*

14. The Council submits that, in accordance with the reasoning in the *Winstone Aggregates* case, the relationship between the PDP and the PRPS will need to be assessed in detail at the time that appeals on the PRPS are resolved or subject to Environment Court decisions, and more particularly when the RPS is made operative by the Regional Council, whether in whole or in part. If there are any inconsistencies between the provisions in the two documents at this stage then a plan change or variation to the PDP may be required. However, as the final outcome of the RPS remains uncertain this is not a matter that can be practically addressed at this point in time.

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73 EnvC A096/98, 14 August 1998 at [41].

74 Environment Court decision in *Marlborough Ridge Ltd v Marlborough District Council* (1997) 3 ELRNZ 483 and *Unison Networks Ltd v Hasting District Council* [2011] NZRMA 394, at [70].

75 *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited*, [2014] 1 NZLR 593 at [77]

76 EnvC A096/98, 14 August 1998 at [41]

## **Designations – have "particular regard to"**

15. The relevant legal test for the designations chapter, is to consider the effects on the environment of allowing the requirement, having particular regard to the PRPS.
16. In the context of a resource consent decision,<sup>77</sup> have particular regard to has been held to give genuine attention and thought to the matter, on a footing that the legislation has specified it as something important to the particular decision and therefore to be considered and carefully weighed in coming to a conclusion.

## **Implications of PRPS Decisions Version to Council recommendations in Hearing Streams 01 - 05**

17. These submissions now turn to address the implications of any changes made to the PRPS in the Decisions Version, to recommendations made in Hearing Streams 01 to 06, and to the three chapters in subsequent hearings where the PRPS Decisions Version has not been considered.
18. Council has carried out a review of the changes from the notified version to the Decisions Version of the PRPS that are relevant to these recommendations and submissions and asked relevant authors to confirm:
  - 18.1 whether Council's recommendations and submissions (including section 32 assessments) should be amended in response to the regional council's decisions on the PRPS, taking into account the extent of the subsequent appeals; and
  - 18.2 what (if any) amendments to the recommendations and submissions, that make up the Council's position on these matters are needed to address the changes.

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*Marlborough District Council v Southern Ocean Seafoods Ltd* [1995] NZRMA 220, noting this is a resource consent decision.

- 19.** The results of this review are summarised in **Appendix 1** and show that no amendments to the recommendations and submissions are supported at this time, because one or more of the following applies:
- 19.1** the decisions on the PRPS retained the intent and direction of the notified provisions in the main; and/or
  - 19.2** the decisions in several cases strengthens the support from the RPS for the Council's recommendations and submissions on the PDP; and/or
  - 19.3** the relevant provisions of the PRPS are subject to appeals that could result in substantive changes to the PRPS such that they can only be given limited weight at this time.

**DATED** this 3<sup>rd</sup> day of March 2017



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S J Scott  
Counsel for Queenstown Lakes District Council