BEFORE THE HEARINGS PANEL FOR THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Queenstown Lakes Proposed District Plan

BY **JOHN MAY**

Further Submitter No. 1094

SUBMISSIONS OF COUNSEL FOR JOHN MAY

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The Parties Positions

1. Mr Darby for Glendhu Bay Trustees Limited (GBTL) gave extensive oral evidence to the effect that he wants to no more than what the Environment Court granted.

2. Mr May's position is that Mr Darby should have no more development opportunities than what the Environment Court granted, and must be subject to all of the controls and obligations that the Environment Court imposed.

3. The parties' positions ought to be perfectly aligned.

4. It seems that the divergence lies in Mr Darby's general complaint that more flexibility is required. But he did not offer any detail about what it is about the conditions of the resource consent granted that are problematic, or what the nature of the problem is. This explains why GBTL's submission is so poorly focussed and the evidence is a moving feast of generalised allegations that each edition in the sequence of the proposed provisions is somehow better passes section 32 than the last one.

5. It must be remembered that the resource consent conditions that Mr Darby is critical of were not drafted by the Court. The conditions were produced by Mr Goldsmith (then of Anderson Lloyd) after a detailed and extensive hearing process, during which iterative changes were made to the proposal until the proposal finally tipped the balance in favour of consent being granted.

6. It would not be plausible for GBTL to say now that over a 4 year application process that involved a steady stream of refinements and whittling away, Mr Darby did not know what he was doing when he lodged the consent conditions for the Court's approval following the Court's first two decisions. Mr Darby is an experienced golf resort developer. He knew exactly what he was doing.

7. Mr Darby says that the development cost of golf courses have gone up since 2012. No doubt they have. So has the market value of residential property in the Upper Clutha over that time, which is of course the means by which this development is to be funded.

8. What we need from GBTL is an honest, consistent, and specific statement of what the problem is. In the absence of that, Mr May's position is driven by the fear that GBTL's submission is a Trojan horse for a sequence of future applications to extend the proposed development well beyond what the Court granted. Clues pointing to that position include:

   (a) The Lodge Site overlooking Mr May's land that was not pursued before the Court now forms part of the GBTL submission.

   (b) GBTL seeks 50 residences instead of the granted 42.

   (c) The golf course is now to be extended into the Fern Burn.

   (d) Activity areas are proposed to the east, including an extraordinarily loosely drafted "Camping" activity area that would authorise hotel buildings as controlled activities!

   (e) GBTL seeks a policy framework that does not mention the ONL at all, much less explain how the ONL is going to be protected from the effects of inappropriate development. A myriad of things are "enabled", but nothing is avoided.

   (f) GBTL steadfastly refused to confine the scope of its submission despite Mr Darby's own evidence that he wanted nothing more than what the Court granted.

9. If we take Mr Darby at his word, GBTL's proposed zone provisions enable more extensive development than what he is seeking. Either Mr Darby does not understand his own proposal, or when he answered questions from the Panel on 8 June he was not telling the truth.

Existing Environment.

10. Counsel for GBT sought to explain the appropriateness of the GSZ by reference to the existing environment.[1] Despite Mr Darby's apparent reluctance to rely on the resource consents, the resource consents are relied upon for providing the comparison point against which the GSZ provisions fall to be assessed. In response it is submitted:

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[1] Counsel for GBT, part two, paras 15-19.

(a) If GBT say they have implemented the resource consent and will continue to do so (as they must to bring themselves within *Hawthorn*), then their complaint that the resource consent lacks sufficient flexibility to be economically viable lacks credibility.

(b) GBT cannot have their cake and eat it too. If the adverse effects authorised by the resource consent form part of the environment, then so must the positive effects. GBT cannot rely again on the enhancements proposed in the resource consent to justify the zone provisions.

Outstanding Natural Landscape: A bottom line? The post-*King Salmon* world.

11. The experts agree that the site is within an ONL.

12. The Court of Appeal has recently addressed the classification process and whether that has been affected by *King Salmon*. In *Man O'War Station Ltd v Auckland Council* [2017] NZRMA 121 the Court of Appeal warned of the dangers of confusing the classification process with the consequences of ONL classification. It is a "top down" approach in which the environmental facts are established first and the consequences of those facts then flow from those findings. at [67] the Court of Appeal said:

> *"However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development) clearly intends that such landscapes be protected."*

13. By relying upon the delivery of "positive effects" to justify the zone[2], GBT's case has the distinctive flavour of the old "overall broad judgement approach" in which competing considerations can be

[2] See Counsel for GBTs submissions, Part two, para 10-14.

balanced off against each other. That approach has now been rejected. Section 6(b) is a bottom line. The Court of Appeal in *MOW* said:

> *[33] MOWS's principal argument is that proposed change 8 was prepared prior to the Supreme Court's decision in King Salmon, and that both the policies it contains and the maps showing land identified as ONLs reflected the law as it was understood at that time. This involved a common understanding that the protection to be afforded to an ONL was one factor in the overall judgment called for by s 5 of the Act. Under that approach, consent might be granted for uses and developments in an ONL, including those adversely affecting the landscape, if considered appropriate by reference to other considerations based on achieving the Act's purpose of sustainable management. Since such an approach is no longer possible after the Supreme Court's judgment in King Salmon, Mr Casey submitted that the proper approach to identifying an ONL should be to apply the concept only to landscapes that are exceptional on a national scale or short of that, only to landscapes that are clearly outstanding, and not just "notable", "representative" or even "magnificent".*

14. The Court of Appeal soundly rejected MOW's appeal. Positive effects are all well and good, but cannot be used as an "offset" to justify what is otherwise a failure to follow the direction in section 6(b).

Do the GSZ provisions comply with the Council's obligation to protect the ONL?

15. Higher order provisions in the Proposed Plan provide direction on how Council will apply section 6(b). In particular:

(a) Chapters 3: *3.2.5 Goal - Our distinctive landscapes are protected from inappropriate development.*

> *Objective 3.2.5.1 Protect the natural character of Outstanding Natural Landscapes and Outstanding Natural Features from subdivision, use and development.*
>
> > *Policy 3.2.5.1.1 Identify the district's Outstanding Natural Landscapes and Outstanding Natural Features on the District Plan maps, and protect them from the adverse effects of subdivision and development.*[3]

(b) Chapter 6. *6.3.1 Objective - The District contains and values Outstanding Natural Features, Outstanding Natural Landscapes, and Rural Landscapes that require protection from inappropriate subdivision and development.*

> *Policy 6.3.1.3 That subdivision and development proposals located within the Outstanding Natural Landscape, or an Outstanding Natural Feature, be assessed against the assessment matters in provisions 21.7.1 and 21.7.3 because subdivision and development is inappropriate in almost all locations, meaning successful applications will be exceptional cases.*

16. The language of these provisions is strong and directive. Plainly the notified plan anticipated that all ONLs would be within the rural zone, because that is where the implementation methods are to be found. The ONL assessment matters at 21.7.1 relate logically back to Chapters 3 and 6 provisions, but are wildly inconsistent with the GSZ provisions, the

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[3] Note that in the objective and policy the reference to "inappropriate" has dropped out. The policy requires protection from the adverse effects of all subdivision and development.

policies of which do not even mention the ONL. There is a fundamental disconnection between the higher order provisions and how resource consents under the GSZ policy framework would fall to be assessed. This is made apparent by comparing how a proposal within the same ONL would fall to be assessed under Chapter 21 as compared to the GSZ. Mr Taylor will explain that in his oral summary.

17. It is submitted that Chapter 21 and the GSZ provisions cannot both implement the Chapter 3 and 6 provisions and so comply with Parliament's direction to Council under section 6(b).

The importance of the conditions to the Court's decision.

18. The Environment Court placed significant protection on the future development of the land. The Court's decision is predicated on the idea that the full suite of conditions would ensure that section 6(b) would be achieved.[4]

19. There is no warrant for any inference to be drawn (as Mr Darby did) that some of the conditions are less important than others. The narrative part of the Court's third (final) decision runs to three paragraphs. Paragraph 1 records that consent is granted conditionally on certain matters being attended to; and paragraph 3 records that the Court has been through the conditions appended to the decision and that those conditions are appropriate to deal with the Court's concerns. None of the conditions have the Orwellian quality of being more equal than the others.

20. The Environment Court decision required covenants to be placed over the land:

    (i) Condition 41.a.i: The Bull Paddock area was to be covenanted against further development for 10 years.

    (ii) Condition 41.a.ii: Area marked B (residential area) shall be covenanted in perpetuity against future development but not prohibiting subdivision of the golf course and the 42 sites, and the subdivision and development of eight visitor accommodation/residential units.

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[4] [2012] NZEnvC 43 dated 1 March 2012, paragraphs 66 and 67. Given that this is a pre-*King Salmon* decision, there is still a "balancing" flavour in those findings.

Advice note: any future development beyond 42 units requires a variation to the resource consent and a rigorous assessment of the measures proposed to sufficiently mitigate the visibility/domestic affects. [5]

(iii) Condition 41.a.iii: The C1 Farm Area was to be covenanted against any future development of the site for 10 years, outside usual farming activities.

(iv) Condition 41.a.iv: Area C2 shall be covenanted against further development for a period of 20 years, except for camping activities.

(v) Condition 41.a.v & vi: Area E shall be covenanted in perpetuity against further development, with the exceptions of; boundary adjustment, alteration of existing dwellings, temporary structures (marquees), sheds for farming purposes, the construction of a chapel

(vi) Condition 41.a.vii: Area F shall be covenanted for 35 years against further development, except for; subdivision for farming purposes, boundary adjustment, the construction of two further residential dwellings.[6]

(vii) Condition 41.a.viii: Area G shall be covenanted against development in perpetuity, except for; development associated with farming activity or regeneration of native forest or other vegetation.

21. One can have no confidence that the Court would have expressed the covenants in these terms had it known that future proposals might not fall to be assessed under the Rural zone provisions.

22. The conditions contain explicit staging requirements. The reason for that staging is apparent from the second decision, and the Court's recording of the evidence of Mr Darby:

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[5] Emphasis added. Plainly the Court was anticipating that such a rigorous assessment would occur under the objective, Policy, and Rule framework as they relate to ONLs in the Rural General zone. None of that rigour is to be found replicated in the GSZ provisions promoted by GBT.

[6] As above

> *Mr Darby also reminded us that the staging of the development is deliberately related to the visibility of dwellings and kanuka growth rates.*[7]

23. And then at para 76 (overall evaluation):

> *"What they have done is to stop treating the golf course and residential development in isolation but retro-fitted them into their embedding environment"*

24. When one studies the list of things required to be achieved in stage 1 (first 24 months), it is apparent that there is a heavy emphasis in getting the Revegetation Strategy for the whole consented area prepared and approved and the stage 1 planting and golf course completed in full before the first houses get built. GBT had to eat their greens before getting their meat. There is not the same emphasis in the GSZ provisions. This is presumably the "flexibility" that Mr Darby is now hinting at, which is contrary to his own sworn evidence accepted and relied on by the Court.

The Rule framework

25. One key weakness is the controlled activity regime. That regime makes the activity areas within the zone largely meaningless. "Buildings" (controlled activity) and residential activity (largely discretionary) will facilitate a staged approach to development that will allow an "environment" to be created such that the status of residential activities is meaningless in an assessment of adverse effects on landscape values. It is after all buildings that change the natural character of landscapes, not what people do inside them. Result: a carefully orchestrated proliferation of buildings through the zone, the conversion of which to residential activities and visitor accommodation is inevitable.

26. Mr May is convinced that this regime will result in the re-emergence of the Lodge site proposal (which is why GBT has refused to withdraw it[8]) with an inadequate policy framework to protect the ONL. That is why

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[7] [2012] NZEnvC 43, para 29, last sentence.
[8] Note, there is no covenant shown over that area on the maps, and there is a strange provision for 8m buildings whereas farm buildings are required to meet a 4m standard.

this zone is viewed by Mr May as a Trojan horse for future expansion and why Mr Darby's oral evidence that he only wants what the Court has granted is not to be trusted.

27. The proposed provisions (in all 3 forms so far) show the hallmarks of "bottom up" drafting. Start with the rules you want and grow policies and objectives above them to justify them. The trouble is, at that point GBT bumps into chapter, 6, chapter 3, section 6(b), and the agreed expert opinion that the site is part of an ONL. It is not surprising therefore, that in answers to questions on 8 June Ms Pfluger's evidence was that once developed, the zone would nolonger have the characteristic natural character of an ONL. That is why, in a post *King Salmon* world, the GBT submission must be rejected. GBT were very fortunate to obtain their resource consent when they did, and should be grateful for that.

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