

Before Queenstown Lakes District Council

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In the matter of                    the Resource Management Act 1991

And                                    The Queenstown Lakes District proposed District Plan –  
Rezoning Hearing Topic 12 – Upper Clutha mapping

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**LEGAL SUBMISSIONS FOR**

Seven Albert Town Property Owners (#1038)

Dated 31 May 2017

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## **MAY IT PLEASE THE PANEL**

### **Introduction**

- 1 These legal submissions are presented on behalf of Seven Albert Town Property Owners (Further Submitter 1038) ("**Submitters**") in respect of Upper Clutha Mapping Hearing Stream 12 of the Queenstown Lakes Proposed District Plan ("**PDP**").
- 2 The Submitters are property owners adjacent to Wicklow Terrace, Albert Town. The subject of these submissions is the identification of landscape classification lines over a portion of the Clutha River ONF at Albert Town, indicated on Map 24b, and situated directly in front of the Submitters' properties. This portion of the ONF in question is herein referred to as the "**Wicklow Tce ONF**".

### **Overview**

- 3 These submissions address the following matters:
  - (a) An outline of the process of council's identification of the Wicklow Tce ONF in the PDP;
  - (b) Assessment of the Council's landscape and planning evidence dated 17 March 2017;
  - (c) Assessment of the Council's rebuttal evidence;
  - (d) Justification for the notified boundary classification in the PDP;

### **Council's Identification of the Wicklow Tce ONF**

- 4 The process of the evolution of the Wicklow Tce through the PDP can be summarised as follows:
  - (a) Planning Map 24b as notified in the PDP indicated the boundary of the Wicklow Tce ONF to align with the Clutha River and exclude the unformed legal road of Wicklow Terrace.
  - (b) The boundary as notified roughly follows the landscape boundaries as indicated in Dr Read's landscape boundaries report dated 2014 and Ms Steven's peer review of that report.
  - (c) Mr Alan Cutler (submitter 110) requested that the Wicklow Tce ONF be amended so as to include the adjacent river bank as part of the 'outstanding natural river corridor'.

- (d) Ms Hellen Mellsop's evidence lodged in respect of Hearing Stream 12 accepts the submission from Mr Cutler and recommends the boundary of the Wicklow Tce ONF be amended to follow the landward legal boundary of Wicklow Tce.
- (e) Mr Craig Barr's section 42a report accepts Ms Mellsop's recommendation in his summary report but does not further analyze the amendment within the body of that report.
- (f) Ms Mellsop's rebuttal evidence lodged re-examines the ONF boundary and acknowledges her evidence in chief boundary does not accurately follow the top of the river escarpment and therefore amends the boundary further north, towards the notified boundary location. Mr Barr's rebuttal evidence relies on Ms Mellsop's refined boundary.

### **The Council's Landscape Evidence**

- 5 Ms Mellsop's evidence in chief at paras 8.116- 8.119 considers Mr Cutler's requested amended ONF boundary. The critical issue with the analysis in these paragraphs is that this is not in accordance with her stated methodology (with the exception of (a) referring to ODP rather than PDP):

*[4.5] The methodology of Dr Read's landscape boundaries study involved several processes:*

*(a) application of the characteristics of ONL and visual amenity landscapes, as described in Section 4 of the Operative District Plan (ODP);*

*(b) use of the UK Landscape Institute's Guidelines for Landscape and Visual Assessment<sup>4</sup> to identify broad landscape character areas and their values;*

*(c) application of these guidelines and the 'modified Pigeon Bay criteria' set out in Section 5.4.2.1 of the ODP to assist in determining the quality, values and significance of the landscape character areas; and*

*(d) extension of landscape boundaries already determined or described in the ODP, using the landscape character areas and a process of matching like with like.*

- 6 Ms Mellsop's more detailed analysis of the Wicklow Tce ONF does however not employ this methodology, rather it focusses on the following key points:
- (a) Reference to the notified PDP maps being an error in translation from the marker pen on an aerial to a precise GIS (para 8.117).

- (b) The amended boundary is consistent with 'other areas' of the Clutha River ONF and includes the river banks and terrace faces that form an integral part of the feature (para 8.117).
- (c) The escarpment is clearly legible, and whilst (potentially partially modified) is connected to other unmodified river bank landforms to the west and east (para 8.119).
- (d) The ONF in this location will not compromise future stability works if needed but would ensure such works minimise adverse effects on the natural character of the Clutha River (para 8.119).

7 I refer to each of the above points made by Ms Mellsop below:

- (a) The purported 'error' in defining the Wicklow Tce ONF boundary on the PDP planning maps is not supported in her evidence with reference to what aerial map this error came from, or whether this is in fact the case. There is no evidential basis for this claim. Moreover, as provided in the evidence of Charles Grant, upon close inspection of Dr Read's landscape report, Figure 29 it appears as though the boundary line is drawn very precisely to follow the river and exclude most of the legal road portion of Wicklow Tce.
- (b) Dr Read also rebuts the issues raised by Mr Grant, stating that her original maps show land between the 'river and the line, and between the line and the property boundaries'. It is unfortunate that Fig 29 is of poor quality in Dr Read's initial report, however I submit that when viewed on screen, it is clear the thick line of Dr Read's report touches the edge of the river in this location. Furthermore, the explanation that 'in general' the Clutha ONF has been defined by reference to at least the lowest of the enclosing terrace features is also ambiguous. When looking at the photos produced in Mr Grant's summary, the 'lowest enclosing terrace' could easily be discerned as the terrace of the lower walkway down to the water's margin.
- (c) Ms Mellsop's reference **to consistency with 'other areas' of the Clutha River ONF** is not clear in stating what those other areas are or where. It is also not clear how the Wicklow Terraces and river bank are assumed to be integral to the Clutha River ONF when the values and characteristics of that feature are not identified by Ms Mellsop. Conversely, I submit that it is not appropriate to define one landscape classification boundary by comparing other parts of the same feature and assuming the boundary

follows the same course. This is inconsistent with the *WESI*<sup>1</sup> criteria requiring a factual assessment on the ground. It is also not explained in evidence as to how the banks and terraces are an integral part of the feature, for example by clarifying the formative processes of that feature and the surrounding landscape.

- (d) Similar to the submission above, the consideration of the escarpment being connected to other unmodified river bank forms is problematic. It is unclear where this connection is, or what other unmodified river bank forms are being referred to. As provided in the evidence of Mr Grant, the Wicklow Tce banks are subject to erosion and have been modified to a large extent over time. As above, it is also questionable the extent to which outstandingness of a part of a feature can be existing by way of association only, from another part of that feature. Ms Mellsop acknowledges in her evidence in chief at para 8.119 that the river escarpment is at least partially modified, yet in her rebuttal evidence she does not refer to modification or naturalness in refining the boundary to follow the top of the river escarpment rather than the cadastral boundaries. Conversely, it seems unusual that Dr Read's rebuttal considers the upper surface of the river terrace has been 'modified and domesticated and is strongly influenced in its character and quality by the adjacent dwellings' (para 5.3) but does not analyse the modification of the face of the terrace feature itself, nor the walkway below. I submit that the photos provided by Mr Grant more clearly show this modification and domestication.
  - (e) The consideration that ONF status will ensure future works will address potential adverse effects on the River ONF is also questionable in that it does not examine how the values of the River ONF will be protected through this process. This is also somewhat contradictory to Mr Barr's rebuttal at para 28.11, that the lack of zoning in this area means that there are no rules within the PDP (at this point) which would control development on this land. This point on the underlying zoning status is referred to further below in these submissions.
- 8 It follows from the above, that despite setting out comprehensive rezoning principles for landscape boundaries in her evidence, Ms Mellsop does not apply those in this instance. The principle reason for the amended ONF location appears to be based upon 'legibility' of the upper escarpment, and want of consistency between this area and other (undefined) areas of the Clutha River terraces.

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<sup>1</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC)

- 9 As set out in para 4.5(c) of Dr Read's methodology, the WESI factors are clearly of importance, I therefore set these out as follows:

*[14] Factors for assessing the significance of landscapes were determined by the Environment Court in Pigeon Bay Aquaculture Ltd v Canterbury Regional Council and subsequently refined in Wakatipu Environmental Society v Queenstown Lakes District Council. As the factors played a significant part in our hearing we set them out:*

*(a) the natural science factors – the geological, topographical, ecological and dynamic components of the landscape;*

*(b) its aesthetic values including memorability and naturalness;*

*(c) its expressiveness (legibility): how obviously the landscape demonstrates the formative processes leading to it;*

*(d) transient values: occasional presence of wildlife; or its values at certain times of the day or year;*

*(e) whether the values are shared and recognised;*

*(f) its value to tangata whenua; and*

*(g) its historical associations.<sup>2</sup>*

[Footnotes omitted]

- 10 It seems a fundamental omission to only focus on the legibility of the terrace escarpment, rather than methodically working through all of the WESI criteria.

### **The Council's Planning Evidence**

- 11 In respect of Council's planning evidence in chief, I submit that accepting the amended ONF boundary was either an omission in evidence or was overlooked, or otherwise the evidence is deficient in its assessment of this change.
- 12 The amendment is only referred to in the Strategic Overview report from Mr Barr, however is not analysed more closely within the specific rezoning reports. Mr Barr's rebuttal evidence does however look at the issue more closely.
- 13 Mr Barr relies on the refined boundary proffered in the rebuttal evidence from Ms Mellisop, the only planning reasoning for which is in his para 28.8 where he states that it would be 'logical and feasible to include the road within a landscape

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<sup>2</sup>As recently confirmed in the Man o War litigation - *Man O' War Station Limited v Auckland Council* [2014] NZEnvC 167 at [14].

classification, up to where it adjoins an urban zoning'. With respect, Counsel cannot follow the logic of that 'reasoning'.

- 14 Mr Barr then goes on to consider the underlying zoning of the road and its relevance to landscape categorisation. Mr Barr considers that all roads in the District are not allocated an underlying zone, therefore rules (in the PDP notified stage 1) do not apply and there are no rules which control development on roads (para 28.11). The following issues arise from that assertion:
- (a) Whilst roads and formed roads are defined in the PDP, 'unformed roads' (like Wicklow Tce) are not and therefore it is uncertain whether these fall to be considered within an adjacent zone (like in the case of Stopped Roads in Chapter 37);
  - (b) The Environment Court, in *Southland Fish & Game v Southland District Council* found that the Council's roading powers under the Local Government Act were subject to the RMA and therefore any rule in the district and regional plans, due to the permissive nature of the LGA roading powers as compared to the restrictive nature of the RMA, in particular ss 9(3), 13, and 15.<sup>3</sup> Given Wicklow Tce is an unformed road, it is not unimaginable that in the future, as in the case of *Southland Fish & Game*, consents might be sought for development to be undertaken within the road reserve, and which Council or other persons might wish to ensure the effects of such were regulated by the RMA.
- 15 I refer to the evidence of Mr Grant at paras 12-19 which considers ONF classification over zones other than those zoned rural. It is submitted that there is a discrepancy in the reasoning between Mr Barr's evidence in chief, relating to 'landscape boundaries and classifications on land other than rural' and Mr Barr's rebuttal evidence, which considers that roads without zoning may be categories within an ONL.
- 16 Mr Barr's evidence in chief clearly acknowledges that the framework of the PDP primarily provides for the ONL and ONF classifications and boundaries within the Rural Zone (Chapter 21) and that the rules and assessment matters relating to the three landscape classification overlays (ONF, ONL, RLC) are in the Rural Zone.
- 17 Although Mr Grant's evidence refers to the amended ONF boundary as now covering Township Zone rather than the legal road of Wicklow Tce, I consider this analysis to still be correct and helpful for the Commission. The reasoning from Mr Barr's section 20 (Strategic Overview) is equally applicable to legal roads as well

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<sup>3</sup> *Southland Fish & Game v Southland District Council* [2016] NZEnvC 220 at [50].

as to zones other than rural zones. There is no justification to include this portion of the legal road within the ONF boundary.

**Justification for the PDP ONF Boundary**

- 18 It submitted that the Wicklow Tce ONF boundary as notified in the PDP is the most appropriate boundary for the following reasons:
- (a) The boundary represents the lowest enclosing terrace of the River ONF as considered in Dr Read's analysis;
  - (b) The boundary following the boundary of the river margin and the legal road is a logical and defensible boundary, as discussed in Mr Grant's evidence at paras 26- 27;

Dated this 31st day of May 2017



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