

IN THE MATTER of the Resource Management Act 1991 ("**RMA**")

AND

IN THE MATTER of hearings of submissions by **the Queenstown Lakes District Council** on the Proposed Queenstown Lakes District Plan ("**Proposed Plan**").

**LEGAL SUBMISSIONS ON BEHALF OF
THE MATUKITUKI TRUST ("TRUST")**

1. KEY FOCUS / OUTCOME SOUGHT

- 1.1 The Trust requires a planning framework that enables development of its site in a manner consistent with resource consent RM080876 approved by the Environment Court in *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council*.¹ The Court found that the proposed development did represent sustainable management, and therefore appropriate development in an ONFL.
- 1.2 There is nothing in any amendments to the RMA or in the authorities decided since consent RM080876 that renders the proposed development, or something like it, inappropriate.

2. THE MATUKITUKI TRUST

The Matukituki Trust

- 2.1 The Trust owns 108.4742 ha of land at the eastern tip of Roy's Peninsula, off West Wanaka Road ("**Site**"). The Site is a rough glaciated landform dominated by two hills which are around 280m above the surface of Lake Wanaka. Roy's Peninsula is an outstanding natural feature within an outstanding natural landscape.²

¹ *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* C113/09. [Interim decision] and: *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2010] C113/09NZEnvC 138 [Final decision].

² *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* C113/09 at [11 - 15].

- 2.2 The Trust acquired the Site in 1999. It did so with the intention of building a family home on the property and undertaking an extensive ecological restoration programme. The goal was to produce lasting benefits for both the wider environment and community, as well as the beneficiaries of the Trust, for many generations.³
- 2.3 The Trust stopped grazing livestock on the site, and left it to regenerate naturally. Native vegetation, like matagouri, and some Kanuka, now dominates the site. The Trust remains committed to returning the Site to a natural state, similar to the regenerating islands of Mao Tapu and Mao Waho in Lake Wanaka.
- 2.4 To secure its consent, the Trust was put through a number of lengthy, well documented, processes and proceedings, at significant cost to it.
- 2.5 The initial application was made in October 2003. It was declined by the Council, including on appeal to the Environment Court In 2006.⁴
- 2.6 However, the Environment Court (if not the Council) erred in law (as confirmed by the High Court on appeal).⁵
- 2.7 Notwithstanding the error, the Trust took on board some of the concerns and engaged landscape architect Steven Brown to refine its proposal. The result was a shift of the dwelling to the saddle of the peninsula.⁶
- 2.8 The proposal continued to be opposed by the Upper Clutha Environmental Society ("**UCES**"),⁷ and the Trust lodged a fresh application with the Council which was granted in 2008.⁸ Despite the

³ Statement of Evidence of Mr Gregory Blair Marler, 22 May 2009, para 4 - 7, proceeding ENV-2008-CHC-000293.

⁴ Decision W10/2006. In 2005, the Trust applied for land use consent to establish, use and maintain two farm implement and vehicles storage sheds on the site. During this application the Trust became aware of, and successfully challenged, the Council's non-notified plan change 9 which sought to change to the activity status of farm buildings on the Site from controlled to discretionary. In 2007, the Trust was subsequently granted consent for the farm buildings, for a controlled activity, in decision RM050512.

⁵ *Matukituki Trust v Queenstown Lakes District Council* CIV-2006-412-000733, 19 December 2006.

⁶ *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council C113/09 [7] - [10]*. During this review, Mr Brown assessed a number of sites in regards to its visibility from public vantage points, mitigation requirements, landscape and natural character effects, and the ability to integrate the proposed dwelling into the site.

⁷ *Ibid.* At [7] - [10]. The discussions concerned the implications of the High Court decision, what was the most appropriate site for a dwelling on the Trust's land and the issues that needed to be addressed in a further Environment Court proceeding.

⁸ Decision RM080876. The Commissioners were Hon Peter Salmon QC and Ms Jane Taylor.

continued opposition by UCES, the grant of consent was ultimately confirmed in the Environment Court by the Judge McElrea in November 2009.⁹

2.9 Judge McElrea found that the effects of the development were clearly positive and the proposal was supported by the objectives and policies of the Plan. In respect of Part 2 matters, the Court found that the proposal:¹⁰

- (a) promoted sustainable management of natural and physical resources within the meaning of section 5;
- (b) met the requirements of section 6 by protecting an outstanding feature from inappropriate subdivision, use and development; and
- (c) complied with the matters of section 7 by displaying an "ethic of stewardship" unusual in such circumstances.

2.10 In making these findings the Court clearly recognised that there can be sustainable development of ONFs in this part of the Queenstown Lakes District.

3. CURRENT ACTIVITIES OF THE TRUST AND IMPLEMENTATION OF THE CONSENT

3.1 The conditions approved by the Environment Court require a staged implementation of the consent, and prescribe a long lead-in time before the physical development and construction works for the dwelling can commence. In particular, the conditions require restrictive covenants be registered over the title of the property, various pest and vegetation management plans to be developed and submitted to the Council, and that the first triennial ecological restoration work plan to have been completed, before a building consent for the dwelling can be issued.¹¹

3.2 Significantly, the consent required the leases to telecommunications providers Telecom and Vodafone to be terminated at the end of their

⁹ *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* C113/09 and *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2010] NZEnvC 138.

¹⁰ *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* at [177] and [178.]

¹¹ *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2010] NZEnvC 138. Conditions 39-45, 6-7 of consent RM080876.

current period, which has only recently occurred (in September last year). This opens the opportunity to now develop the site.

- 3.3 The Trust has also been constrained in its ability to develop by the significant costs of obtaining consent (which could have instead been used for mitigation planting and other ecological restoration), as well as the consequences of the global financial crisis. The Trust intends to take further steps towards implementing its consent. It has been in discussions with contractors and its other professional advisors, some of whom are meeting with the Council planning team to discuss the Trusts' proposed approach and implementation of the consent.
- 3.4 There is no "bright line" point provided in the consent by which it can be clearly considered to have been implemented. Given the long lead in time required for some aspects, such as planting requirements, the Trust wishes to protect against the scenario where the implementation (or exercise) of the consent might be challenged. There could also be the potential for further, unforeseen, delays.
- 3.5 Accordingly, it is essential for the Trust to ensure that the planning environment will not foreclose its ability to seek an extension to the lapse date, or a replacement or updated consent in the future, should that be necessary.

4. PROPOSED PLAN PROVISIONS - LEGAL MATTERS

- 4.1 The provisions which the Trust supports, and the changes it seeks, are summarised in the planning evidence of Ms Louise Taylor on behalf of the Trust. A section 32 evaluation of the changes sought has also been prepared on behalf of the Trust and filed with the Hearings Panel.
- 4.2 These submissions will focus on the key legal issues.

Relief sought

- 4.3 The principal amendments sought by the Trust that are relevant to this hearing,¹² are, in essence:

- (a) To qualify Objective 3.2.5.1, in relation to the protection of ONFLs, so that it refers to protection from *inappropriate*

¹² The Trust also seeks a number of amendments to Chapter 21 - Rural Zone, but those will be addressed in a later hearing.

subdivision, use and development - and corresponding amendments to the related policies.¹³

- (b) To delete wording in policies to the effect that subdivision and development is "inappropriate in almost all locations",¹⁴ and to remove other provisions which take an absolutist approach to the protection of ONFLs and avoidance of subdivision and development.¹⁵

4.4 As a more minor amendment, the Trust also seeks to include the word "use" in a number of provisions referring to subdivision and development, to ensure consistency with section 6(b) of the RMA.

Legal principles

4.5 Plan provisions are required to be developed and changed "in accordance with", relevantly:¹⁶

- (a) "the provisions of Part 2"; and
- (b) "its obligation to prepare an evaluation report in accordance with section 32".

4.6 In considering the provisions of Part 2 relative to the relief sought by the Trust, a legal question arises as to what is required by section 6(b), and also in terms of the proper relationship between section 6(b) and section 5 of the RMA.

Relationship with section 5 - overall judgment

4.7 In *NZ Rail* the High Court held that:¹⁷

The recognition and provision for the preservation of the natural character of the coastal environment in the words of s 6 (a) is to achieve the purpose of the Act, that is to say to promote the sustainable management of natural and physical resources. That means that the preservation of natural character is subordinate to the primary purpose of the promotion of sustainable management. **It is not an end or an objective on its own but is accessory to the principal purpose.**

¹³ Being policies 3.2.5.1.1, 6.3.1.12.

¹⁴ Policies 6.3.1.3., 6.3.1.4.

¹⁵ Objective 6.3.3, Policies 6.3.3.1, 6.3.3.2, and 6.3.4.3.

¹⁶ Section 74(1) RMA.

¹⁷ *NZ Rail Ltd v Marlborough DC* [1994] NZRMA 70 (HC), at 19.

4.8 That general approach was equally applicable to ONFLs under section 6(b) of the RMA. However, it now needs to be read in light of the decision of the Supreme Court in the *NZ King Salmon* case.¹⁸

4.9 The Supreme Court did not find that the passage quoted above was incorrect, but did note that it "may be interpreted in a way that does not accurately reflect the proper relationship between s 6, in particular ss 6(a) and (b), and s 5".¹⁹

4.10 The Supreme Court went on to observe:²⁰

Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances.

4.11 And later:²¹

environmental protection by way of avoiding the adverse effects of use or development falls within the concept of sustainable management and is a response legitimately available to those performing functions under the RMA in terms of pt 2.

4.12 As such, the Trust accepts that a protective approach to ONFLs is, at least in terms of Part 2 of the Act, one that is legitimately open to the Council. However, it is not the only approach available; the Council is not constrained here by a need to "give effect to" a higher order document such as the NZCPS, with directive "avoid" policies such as that instrument contains.

4.13 Further, any provisions the Council decides to adopt must also be demonstrably the "most appropriate" in terms of section 32 of the Act. (It should be noted that section 32 assumed much lesser prominence in the *NZ King Salmon* case, because that case centred around the requirement to "give effect to" the NZCPS).

¹⁸ *Environmental Defence Society v The New Zealand King Salmon Company Limited* [2014] NZSC 38 (*EDS v NZKS*).

¹⁹ *EDS v NZKS*, at [147].

²⁰ *EDS v NZKS*, at [149].

²¹ *EDS v NZKS*, at [150].

Section 6(b) - "inappropriate"

- 4.14 It also needs to be acknowledged that the Supreme Court decision placed a gloss on the meaning of the term "inappropriate", including in the context of section 6 of the RMA.
- 4.15 The Court found that "inappropriate" should be interpreted in s 6(a), (b) and (f) against the backdrop of what is sought to be protected or preserved.²²
- 4.16 However, equally, it also acknowledged that:²³
- ... a protection against "inappropriate" development is not necessarily a protection against any development. Rather, it allows for the possibility that there may be some forms of "appropriate" development.
- 4.17 Therefore, and in the absence of any need to give effect to a higher order policy instrument (such as the NZCPS) mandating a more absolute approach, it is appropriate for the District Plan provisions to recognise that some development can occur and will not be "inappropriate".

Section 32 evaluation

- 4.18 The Trust adopts the section 32 evaluation prepared by Ms Louise Taylor. In particular:

Amendments regarding "inappropriate" development

- (a) The Trust's preferred wording of Objective 3.2.5.1 (adding the qualifier "inappropriate") is the most appropriate way to achieve the purpose of the RMA, bearing in mind that (as acknowledged by the Supreme Court) section 6 does not give primacy to preservation or protection.
- (b) If that is accepted, then the equivalent changes to supporting policies are self-evidently the most appropriate way to achieve that objective (having regard to their efficiency and effectiveness).
- (c) This approach allows proposed subdivision, use and development (recognising the wide range of activities covered by those terms) to be assessed on its merits and with regard to

²²

EDS v NZKS, at [105].

²³

EDS v NZKS, at [29](b); see also comments to similar effect at [98].

its effects relative to the ONFL values which are sought to be protected.

- (d) In terms of its costs and benefits this approach is considered to still provide appropriate protection for ONFLs, while not foreclosing opportunities for development which may have social and economic benefits (and/or contribute to economic growth and employment, in terms of section 32(2)(a)).

Other amendments - Chapter 6

- (e) The other deletions and amendments that the Trust seeks (outlined above at paragraph 4.3(b)) are required because the policies (requiring protection from all development or stating that subdivision/development is inappropriate in almost all locations) take an outright protection approach, that is inconsistent with, and therefore not the most appropriate way to achieve, Objective 6.3.1 (which, rightly, only requires protection from *inappropriate* subdivision/development²⁴).
- (f) In terms of their costs and benefits, and consistent with the comments above, the policies as amended in accordance with the Trust's submission would still provide appropriate protection for ONFLs, but would also allow proposals to be considered on their merits and for mitigation measures to be taken into account. That in turn will better enable appropriate development to proceed which may have social and economic benefits (and/or contribute to economic growth and employment, in terms of section 32(2)(a)).

- 4.19 The Trust seeks further complimentary changes to Chapter 21 - Rural Zone, to be addressed in a later hearing.

Dated: 22 March 2016

J D K Gardner-Hopkins
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²⁴ The Trust supports this Objective, seeking only that the word "use" be added to "subdivision and development".