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Submission on Queenstown Lakes Proposed District Plan Stage 3
Under Clause 6 of the First Schedule, Resource Management Act 1991
To: Queenstown Lakes District Council
Submitters: Nicola and Mark Vryenhoek and Dynamic Guest House Limited

1. This is a submission on the Queenstown Lakes District Proposed District Plan – Stage 3 (Proposed Plan).

2. Nicola & Mark Vryenhoek and Dynamic Guest House Limited (DGH) could not gain a trade competition advantage through this submission (clause 6(4) of Part 1 of Schedule 1 of the Resource Management Act 1991).

3. The specific provisions that this submission relates to are: *Chapter 39 Wahi Tupuna (New), Chapter 25 Earthworks, Chapter 26 Historic Heritage, Chapter 27 Subdivision, Chapter 29 Transport, Chapter 30 Energy and Utilities, Chapter 31 Signs, Chapter 32 Protected Trees, Chapter 33 Indigenous Vegetation & Biodiversity, Chapter 34 Wilding Exotic Trees, Chapter 35 Temporary Activities and Relocated Buildings, Chapter 36 Noise, Chapter 37 Designations, Chapter 38 Open Space and recreation Zone, Chapter 3 (Strategic Direction), Chapter 4 (Urban Development), Chapter 5 (Tangata Whenua), Chapter 6 (Landscapes) and associated Maps.*

4. This submission is made in addition to the submitters (DGH's) submission (#2175) on Stage 2 of the QLDC Proposed District Plan (PDP).

5. The relief sought in this submission should be considered in conjunction with relief sought in the Stage 2 submission. The relief sought should not be separated from the reasons provided in the entire submission that follows.

Reasons for the Submission

Site 33 - Wakatipu-Wai-Maori

6. The submitters have two properties that have been identified as *Wahi Tupuna*. The land is adjacent to site 33 Wakatipu-Wai-Maori. Values attributable to site 33 for the umbrella *wahi Tupuna* site categorization of Wakatipu-Wai-Maori are advised as: *wahi taoka, mahika kai,* and *ara tawhito*. The majority of our land is located 30 – 50 metres above the highest flood level of Lake Wakatipu (referencing the 1-150-year flood event experienced in 1999). The *wahi Tupuna* mapped boundary is approximately 20 metres above the 1-150-year flood level on a sloping hill that historically would have been relatively inaccessible from the lake or canoe if covered in native vegetation as was likely. The subsoil of our land indicated as *wahi Tupuna* (site 33 with *wahi taoka, mahika kai* and *ara tawhito* values) contains the QLDC sewer infrastructure, storm water and other services infrastructure from State Highway 6 and other properties, as well as access steps onto the Frankton Walkway located on QLDC lake side reserve land. The Frankton Walkway and retaining wall beneath our site is of modern construction and elevates walkers one - two metres above the usual lake level.

7. The submitters' land is zoned High Density Residential, Chapter 9 introduced in Stage 2 of the PDP and forms part of a broader modified and highly intensified urban built landscape. The extent of modification of the urban cultural landscape removes the possibility of any broader cultural heritage protection based on the significance of the natural values, unlike unmodified natural heritage areas within Tangata Whenua's *rohe* that are available for World Heritage Protection, such as cultural landscapes of the Sub-Antarctic Islands. The High Density Residential Zone includes substantial visitor accommodation and small businesses like our own and looks towards the ONL/ONF of Cecil Peak. The gradient of the submitters' land makes it highly unlikely that portion of land was ever used as *ara tawhito*. No supporting probative evidence is provided in support of this unlikely claim. No evidence of settlement or

other occupation was found in recent developments off the limited access road signposted as 'Morries Lane'. Whether Maori walked over the submitters' land on one or two occasions (if that was ever possible given the batter of the slope, indigenous cover of south facing slopes, and faster flowing water of the narrows) does not support a site of significance claim over the submitters' land.

8. *Wahi Tupuna* is not defined in the Resource Management Act 1991 (the RMA) or Chapter 2 Definitions of the QLDC PDP although *waahi tapu and other taonga* are specifically protected as a matter of national importance under section 6(e) of the RMA. *Wahi Tupuna* is defined in the Heritage New Zealand Pouhere Taonga Act 2014. The central role of that more specific Act (formerly the Historic Places Act) is to provide authoritative recognition to places of heritage value supported by a fair and reasonable process. *Wahi Tupuna* is a site important to Maori for its ancestral significance and associated cultural and traditional values.[1] It is therefore logical that any reference to *wahi tupuna* in the heirarchy of plans prepared by iwi, district, regional or central government authorities is a reference to *wahi tupuna* categorised and protected by the HNZPT Act 2014. It should be noted that the revised HNZPT Act provides various mechanisms and authority for identifying archeological and cultural heritage sites and expediting processes brought into effect by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 with the intended approach to reduce costs and ensure that sufficient weight be given to archeological investigation and other specialist heritage needs.[2] The two pieces of legislation are intertwined and it is not surprising that confusion persists today.

9. Recognizing and making provision for *wahi tupuna* in the resource management regime does not replace the legislative process providing for that specific purpose. It duplicates a forum for claims to be heard should protection be lacking through district plan processes, including designations and covenants. While heritage list protection could also be duplicated in the RMA forum that is only appropriate on privately owned land where protection is also obtained through the proper statutory channels. The RMA does not manifest intention to ignore due process, despite the replication of public lists and overlapping statutes.[3] Further, the large areas involved in the *wahi tupuna* overlay are too extensive to qualify as a 'significant site' in the absence of individual claims and evidence relevant to each discreet site owned by the submitters (with reference to the property owner on each individual certificate of title).[4]

10. It is submitted that *Wakatipu-Wai-Maori* (site 33) should as a result of this submission and relief requested, be reclassified (with appropriate boundary) as a statutory acknowledgement area (SAA) within Chapter 39 to be renamed Chapter 39 *Tapuwae Whaiora* to reflect the Maori Heritage of the district grounded in kaitiakitanga, Maori aspirations, and informed by New Zealand's colonial past, present, and future together with the legal and political context of the Treaty of Waitangi in the constitution of New Zealand.[5] *Tapuwae* means sacred footprint and refers to the footprint of iwi and hapu life and culture since the arrival of the first diasopa in Aotearoa some 800 years ago.[6] *Whaiora* means growing together. Put together, *Tapuwae Whaiora* signifies a nation and region growing well

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[1] Paragraph 1.1 and 2.2 of the QLDC Section 32 Evaluation Stage 3 Components September 2019 for Wāhi tūpuna 'Site of Significance to Māori' advises that Chapter 39 is to provide for identification and protection of *Wahi Tupuna* as a result of the directions given in Chapter 5 Tangata Whenua introduced in Stage 1 of the PDP which as a result of no appeals makes that chapter 'beyond challenge'.

[2] See Westlaw Commentary 25.18.5.5(d) Review and reform.

[3] *Barker v Edger* (1998) NZPCC 422; see also *Royal Forest and Bird Protection Society of New Zealand Inc v Rangatira Devvelopments Limited* [2018] NZCA 445.

[4] Maungaharuru-Tanitu Trust v Tasman District Council [2018] NZEnvC 79

[5] Pursuant to section 206 and schedule of the Ngāi Tahu Claims Settlement Act 1998, the Crown acknowledges Te Rūnanga o Ngāi Tahu's statement of Ngāi Tahu's cultural, spiritual, historic, and traditional association to Whakatipu-Wai-Māori.

[6] Tapuwae - Te Korero a teKaunihera Māorio te Pouhere Taonga, The Māori Heritage Council Statement on Māori Heritage, Heritage New Zealand (2017).

together. It articulates the vision of a nation whose cultural heritage is changing form due to racial intermarriage and centuries of immigration, and is grounded in the partnership agreement articulated in both Maori and English language versions of the Treaty of Waitangi introduced into New Zealand law through common law and by enactment. A revised Chapter 39 would apply to the entire QLDC district (footprint) with rules for the protection of SAA and discrete *urupa, wahi tapu, and wahi tupuna* to be identified in accordance with the consultative processes provided for by HNZPT (albeit at some time in the future) consistent with objective and policies contained in the following documents:

- National Policy Statement and Environmental Standards for Freshwater Management;
- National Policy Statement on Urban Development Capacity;
- Otago Regional Policy Statements;
- QLDC Proposed District Plan (with specific reference to higher order Chapter 3 Strategic Direction and intermediate Chapter 5 Tangata Whenua);
- Iwi Management Plans:
  (i) Kai Kahu Ki Otago Natural Resources Management Plan (2005);
  (ii) The Cry of the People - Te Tangi a Tauira (2008);
  (iii) New Zealand Historic Places Trust Pouhere Taonga Sustainable Management of Historic Heritage Guidance Series Iwi Management Plans – A guide for Maori working in resource management and planning (1 October 2012);
  (including all and any relevant proposed national or regional policy statements, environmental standards and partially operative plans).

Wahi Tupuna - Definitions

11. More specific terms for places that are *taonga* include *wahi tupuna* and *wahi taonga* and have been described as "localities upon which certain activities took place" many of which might be correctly referred to as *wahi tapu* (examples being historic pa sites, rock art sites, urupa or significant mountain ranges) and "tribally treasured areas" whose significance can also be classified as having scientific archaeological values.[7] A Maori discussion paper referred to by the Parliamentary Commissioner for the Environment in 1996 (Helen Hughes) is said to draw distinction between everyday things such as *pa, quarries, mahinga kai* and *wahi tapu* that is considered as sacred and often significant at a national level. That view reflects the political and legal context of radical change that occurred in New Zealand in the 1980's and 90's and is discussed in the Land's case – a significant departure from mainstream Crown and judicial thought that the treaty was a nullity.[8]

12. Developed in response to the desire to dispose of land owned by the Crown or crown owned companies, the 'sites of significance' policy was developed in response to problems with the memorial system in use for State-Owned Enterprises. The sites of significance policy was used as a framework to land bank crown land and formed the basis for Crown settlements with iwi whose claims before the Waitang Tribunal were recognized in statute, such as the Ngāi Tahu Claims Settlement Act 1998.[9] To the extent that early settlements have not addressed ongoing costs attributable to ongoing historical research and costs attributable to RMA purposes, the burden of those costs should not be imposed on individual property owners who would become burdened with an overlap of administrative costs

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[7] "Historic and Cultural Heritage Management in New Zealand" Office of the Commissioner for the Environment, Te Kiatiaki Taiao a Te Whare Paremata, June 1996, Appendix 1 and see p.37

[8] See *New Zealand Māori Council v Attorney-General* [1987]1 NZLR 641; *Wi Parata v Bishop of Wellington* (1987) 3 NZ Jur (NS) 72, 78 discussed "In Good Faith" Symposium proceedings marking the 20th anniversary of the Land's case, Edited by Jacinta Ruru and Published by the New Zealand Law Foundation.

[9] The author of this submission was part of 'the B team' in the Tainui settlement and a member of the Inter-departmental Steering Committee of the Protection Mechanism (1992-1996); See Sites of Significance Process, A step by step guide to protecting sites of cultural, spiritual and historical significance to Māori, 1996 (released under the OIA) referred to in the Heritage NZ Iwi Management Plans Guide, dated 1 October 2012.

through local and regional rates and unnecessary resource consents for otherwise permitted activities in appropriate zones. Funding of iwi involvement in the RMA process is a matter to be considered in a broader RMA national policy framework.

13. Recent judicial decisions in the Environmental Court and beyond support our submission that (i) planning overlays of large extensive areas are inappropriate, and (ii) probative evidence to support *wahi tapu* or *wahi tupuna* claims over private land is essential.[10] Given the inclusion of accidental discovery protocol in the current earthworks chapter, the risks of destroying Maori values on urban high-density zoned land where no early Maori settlement occurred should be considered de minimis and no additional rules should be required to protect values already protected by part 2 of the RMA.[11] Objectives, policies and associated rules (39.2) contradict the higher order chapters (leaving to one side chapter 5)

14. The term *heritage* is not defined in the RMA although the protection of *historic heritage* from inappropriate subdivision, use, and development is a mater is a matter of national importance under s6(f). The RMA does define the purpose of heritage orders (s187) and provide for the appointment of heritage protection authorities (s189) in protecting any place of special interest or significance to Tangata Whenua for spiritual, cultural or historical reasons. Part 8 of the RMA provides a process of consultation with private property owners whose land has been identified as having heritage value with a process involving requests for information (including probative evidence of heritage values).

15. *Wahi Tupuna* is defined in the Heritage New Zealand Pouhere Taonga Act 2014 (the HNZPT Act). The purpose and function of the HNZPT Act (formerly known as The Historic Places Act 1993) is to promote the identification, protection, preservation, and conservation of the historical and cultural heritage of New Zealand (specifically to identify *wahi tupuna, wahi tapu* and *wahi tapu* areas). As *wahi tupuna* is not sacred or *tapu, tikanga Maori* values regarding 'protection' of *wahi tupuna* sites vary according to the value and may well be less than 'preservation'. The spirit of the RMA being to promote the sustainable management of natural and physical resources can be said to embody *tikanga Maori* values including the values of protect or/and preserve.[12] The HNZPT Act has a narrower purpose than the broad purpose of the RMA grounded in sustainable management.[13] Common to both pieces of legislation is the unalterable past and recognition of some historic heritage as a matter of national importance. The RMA recognizes the protection of matters of national importance in section 6(f) in the protection of historic heritage from inappropriate subdivision, use and development and section 6(b) provides for the protection of 'outstanding natural features and landscapes' from inappropriate subdivision, use and development while the more specific HNZPT Act provides for a heritage list of places of 'outstanding national heritage value'. A further shared feature of both enactments is the requirement for due process and consultation by a public authority. The timing of the mapping of the *wahi tupuna* was too late. Chapter 39 should have been notified at the same time as the higher order strategic and intermediate Chapters 3-6 of the PDP.

Iwi Management Plans

16. QLDC advise that there are just two relevant Iwi Management Plans to consider in the PDP. Ngāi Tahu ki Murihiku Natural Resource and Environmental Iwi Management Plan 2008 (KTKO) "The Cry of the People" and the Kai Tahu Ki Otago Natural Management Plan 2015 (KTKO NRMP 2005) referenced at para 4.23 of the section 32 evaluation report. The Cry of

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[10] See *King v Heritage New Zealand Pouhere Taonga* [2018] NZEnvC 214; *Self Family Trust v Auckland Council* [2018] NZEnvC 49; *Campaign for a Better City v New Zealand Historic Places Trust* [2004] NZRMA 493 (HC); *Gavin H Wallace Ltd v Auckland Council* [2012] NZEnvC120; and *Verstraete v Far North District Council* [2013] NZEnvC 108 at [14] and [17].

[11] See *Kapiti High Voltage Coalition Incorporated v Kapiti Coast District Council* [2012] NZHC 2058, paras [97]-[100]; Winstone Aggregates Ltd v Franklin District Council (2002) RM Decision 02/80.

[12] Section 5 Resource Management Act 1991 (RMA).

[13] Section 3 Heritage New Zealand Pouhere Taonga Act 2014 (HNZPT Act)

the People (Te Tangi a Tauira) representing four Rūnanga developed by Ngāi Tahu ki Murihika sets out the legal context with a brief summary of relevant settlement and environmental legislation. Both reports prepared 2005 and 2008 were prepared prior to legislative changes simplifying and streamlining the RMA with the more specific heritage legislation.

17. It is our submission that the guidelines prepared by Heritage New Zealand together with the Maori Heritage Council Statement on Maori Heritage are relevant policy documents that should inform QLDC in the context of integrated management of cultural heritage planning and planning for urban growth.[14]

Further Submissions and Relief Sought

18. The submitters oppose the PDP Chapter 39 introduced in Stage 3 of the PDP and further submit that:

(i) There is no distinct or cohesive reason to identify the submitters' land as a 'sacred place' or 'site of significance' sufficient to warrant the overlay of onerous and restrictive rules introduced in Chapter 39 of the PDP;

(ii) The submitters' land is a mix of urban developed and undeveloped land in the High Density Zone (HDZ), with no distinct archeological significance;

(iii) No probative evidence has been provided either to the QLDC or to property owners as reason for the inclusion of the submitters' land in the *Wakatipu-Wai-Maori* Site 33 mapping overlay;

(iv) Chapter 39 of the PDP is inconsistent with the policy directions of the Otago Regional Policy Statement and the objectives and policies of Strategic Chapter 3 of the PDP including other intermediate chapters;

(v) Discrete *Wahi Tupuna* sites are more appropriately identified consistent with sections 66 – 68 of the HNZPT Act 2014;

(vi) *Wahi Tupuna* mapped boundaries on private land make assessment against relevant HDZ Rules difficult and needlessly complex. It is not certain how the rules shall be applied to the submitters given contradictory statements made to landowners as part of the public consultation process and subsequent correspondence;

(vii) the process and timing of notification to land owners that land is mapped as *wahi tupuna* is unfair, biased, and unreasonable. Verified *wahi tupuna* sites should have been mapped and notified at the same time as the higher order Strategic Chapter and intermediate Chapters 3-6 of the PDP, notified in Stage 1 of the PDP;

(viii) the proposed Chapter 39 and associated maps purporting to identify land as *wahi tupuna* is unlawful;

(ix) the Chapter 39 evaluation report prepared by QLDC for the purpose of section 32 of the RMA is inadequate;

(x) the submitters oppose the suggested variation to Chapter 25 – Earthworks, Rule 25.4.2 and its application to: (1) areas currently indicated as falling within *Wakatipu-Wai-Maori* site 33 and/or on properties whose title fall within and outside of the current mapped site 33 overlay and (2) properties adjacent to lake (edge) reserve and any SAA.

19. Chapter 39 as notified does not reflect the current and historical development that has occurred in the Wakatipu Basin arising out of the Ngāi Tahu Settlement Act 1998 and seven generations (or approximately 150 years) of settlor activity in New Zealand and the Queenstown Lakes District. Nor does it contribute positively to the strategic objectives and policies of the PDP, or rules regulating commercial activities or the subdivision, use and development of land intended to achieve the purpose and principles of the RMA strongly guided by sections 6, 7 and 8. For the sake of repetition, the balance that the PDP seeks to establish through those rules include: adopting and incorporating matters of national importance and recognizing the administrative structure of local government through issuing

[14] Section 61 RMA.

permits and consents, and introducing mitigation measures and monitoring. Anchoring development to the past will surely drown the hopes and aspirations of future generations in the rising tide.

Relief Sought

20. The submitters seek the relief as follows:

(i) Re-notification of a revised Chapter 39 as well as re-notification of the high policy and mid-level policy chapters (3-6) of the PDP;

(ii) That Chapter 39, objectives and policies 39.2 be deleted and/or is not carried through into the revised Chapter 39;

(iii) That Chapter 39, Rules 39.5.1 be deleted;

(iv) The revised re-notified Chapter 39 make provision for discrete *wahi tupuna* sites after appropriate consultation has been had with Heritage New Zealand in conjunction with QLDC and any affected property owners in accordance with the HNZPT Act, with appropriate agreements being sought on discreet sites for inclusion on a *wahi tupuna* heritage list for places of outstanding national heritage value; and

(v) All parties affected by *Wakatipu-Wai-Maori* site 33 and/or SAA (including moorings and jettys) must be notified.

I do wish to be heard in support of my submission.

18 November 2019
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