

IN THE MATTER

of the Resource Management Act
1991

AND

IN THE MATTER

of hearings on Chapters 3, 4 and 6
of the Proposed Queenstown Lakes
District Plan

**OUTLINE OF LEGAL SUBMISSIONS ON BEHALF OF
PENINSULA VILLAGE LIMITED AND WANAKA BAY LIMITED
("PENINSULA BAY JOINT VENTURE")**

(Submitter 378, Further Submitter 1336)

Dated 26 February 2016

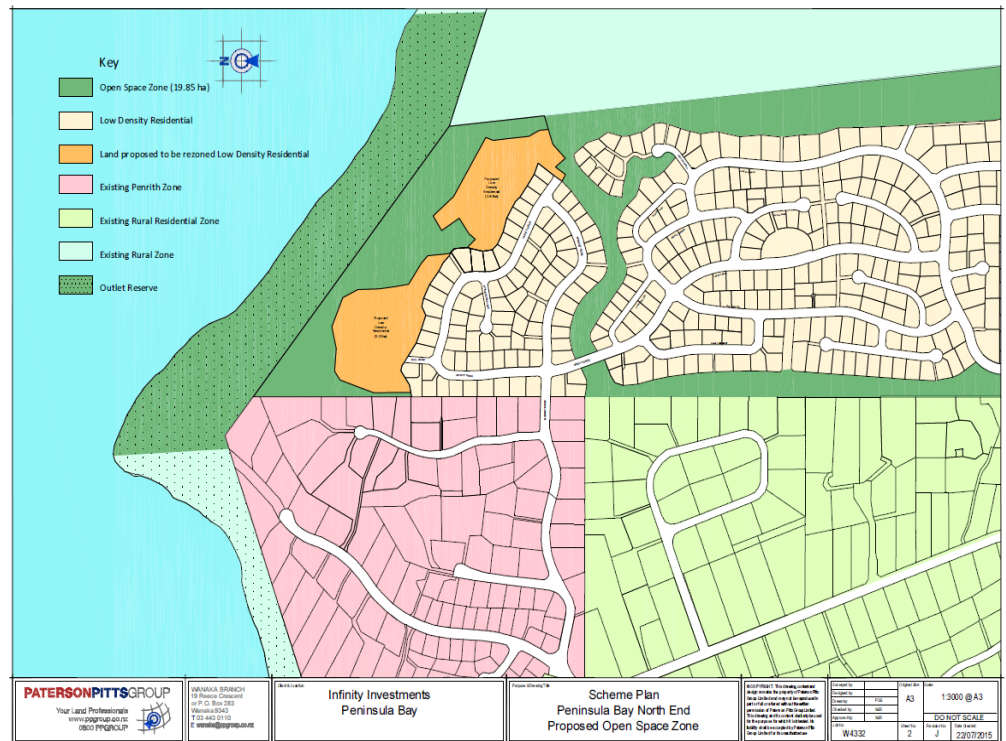
GREENWOOD ROCHE
LAWYERS
CHRISTCHURCH
Solicitor: Lauren Semple/Monique Thomas
(Monique@greenwoodroche.com)

Level 5
83 Victoria Street
P O Box 139
Christchurch
Phone: 03 353 0570

MAY IT PLEASE THE PANEL

Introduction

- 1 Peninsula Bay Joint Venture ("PBJV") owns an area of land at the northern extent of Peninsula Bay, Wanaka. That land is zoned Open Space in the operative and proposed Plans.
- 2 The PBJV land adjoins 70 hectares of land which is zoned Low Density Residential ("LDR"). The LDR land is owned by Infinity Investment Group and is almost fully developed.
- 3 In November 2015, PBJV lodged a private plan change to extend the existing LDR Zone at Peninsula Bay approximately 150m northwards of its current location, in two discrete clusters:



- 4 The area that PBJV has sought to rezone is located within the Urban Growth Boundary for Wanaka (as included in the Proposed Plan). Rezoning of the land will enable the creation of 26 low density residential lots, ranging between 1040² and 5300m² in size. It will provide ecological gains and improved passive recreation on the balance of the Open Space zoned land between Peninsula Bay and Lake Wanaka.

- 5 PBJV lodged a submission on several chapters of the Proposed Plan and Map 19. Broadly, PBJV's submission:
- (a) Seeks amendments to several of the provisions of Chapters 3, 4 and 6 to more appropriately provide for s6(b) and s6(c) matters;
 - (b) Supports certain of the provisions in Chapter 7 (Low Density Residential), Chapter 27 (Subdivision and Development) and Chapter 33 (Indigenous Vegetation and Biodiversity);
 - (c) Seeks amendment to one of the assessment matters in Chapter 21 (Rural Zone) to allow effects on landscape quality, character or visual amenity values to be avoided, remedied or mitigated; and
 - (d) Seeks the rezoning of its land from Open Space to LDR on Map 19 as shown on the plan in paragraph 3 above.
- 6 In these legal submissions, I firstly address:
- (a) The terminology used in the Proposed Plan;
 - (b) The relationship between objectives, policies and rules;
 - (c) Section 32 requirements and analysis.
- 7 I then discuss particular issues with some of the objectives and policies in each of the chapters.

Terminology

- 8 The language used in the Proposed Plan (and the fact several of the provisions stray from the wording of the relevant sections of Part 2) appears to be a common theme in submissions.
- 9 Part 2 matters are of course a mandatory relevant consideration for the preparation and review of district plans (s74(1)). While it is accepted that there is no requirement that the terminology be consistent with that used in Part 2, the implications of not using that terminology must be understood, and the wording that is used instead must be supported by s32 analysis and evidence.

- 10 There are significant risks in departing from the language used in the Act. Doing so can lead to those whose task it is to apply the Plan in the future to adopt a different value or ethic and thereby adopt a different standard than what was intended¹.
- 11 In terms of drafting, the language used must be given its plain ordinary meaning, the test being 'what would an ordinary reasonable member of the public examining the plan, have taken from the planning document'². Objectives need to be clear enough to provide targets for the policies to achieve, and policies need to be worded to provide clear direction to those making decisions on rules.

Relationship between objectives, policies and rules

- 12 Although well known, it bears repeating that the RMA provides for a hierarchical relationship between objectives, policies and rules within a plan. Section 75(1) requires that plans state "the objectives for the district", and that they contain policies to "implement the objectives" and rules "to implement the policies".
- 13 This hierarchical relationship is also reflected in ss32 and 32AA. Objectives must be evaluated as to whether they are "the most appropriate way to achieve the purpose of the Act" (s32(1)(a)) and the other provisions must be evaluated as to whether they are "the most appropriate way to achieve the objectives" (s32(1)(b)).
- 14 An objective is a statement of what is to be achieved through the resolution of a particular issue. Policies are the course of action to achieve or implement the objective. Because of the tests set out in s104D(1), the need to provide clear, strong, objectives and policies is particularly important. The policy should say what it means³.
- 15 In my submission the amendments proposed in the evidence of Ms Robertson for PBJV better meets those requirements.

¹ *Gordon v Auckland City Council* CIV-2006-404-4417 at [69]

² *Powell v Dunedin City Council* (2005) 11 ELRNZ 144 at [12]

³ *Air New Zealand Ltd v Queenstown Lakes District Council* [2012] NZEnvC 195, Table 1, p29

Section 32

16 The relevant requirements of s32 are as follows:

- (a) As previously expressed, for “objectives”, the evaluation report has to examine whether these are “the most appropriate way to achieve” the purpose of the Act (s 32(1)(a)). “Appropriate” is akin to “suitable”⁴, and implies informed discretion and value judgment.
- (b) In the case of objectives, there is no explicit requirement to undertake a comparative assessment (as there is for policies). However the word “most” suggests that such an assessment should be undertaken where other objectives could achieve the purpose of the Act.
- (c) For policies, the examination is as to whether the policies “are the most appropriate way to achieve the objectives” (s32(1)(b)). The requirements for an evaluation of policies are comparatively more prescriptive. The report is to identify other reasonably practicable options for achieving the objectives, assess the efficiency and effectiveness of the provisions in achieving the objectives, and summarise the reasons for deciding on the provisions. Informed judgment is required.
- (d) Finally, the assessment must contain a level of detail that corresponds to the scale and significance of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the proposal (s 32(1)(c)).

17 As the panel which heard submissions on Chapter 3 (Strategic Directions) of the Proposed Replacement Christchurch District Plan observed in its decision⁵, where a report demonstrates a proportionate thoroughness in how the proposal has been formulated (according to the measures prescribed in s32), that assists in fostering confidence in the quality and soundness of the work to which it relates. The converse is also true.

⁴ *Rational Transport Society Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45]

⁵ At [69]

18 In this case, neither the s32 reports nor the evidence called by the Council demonstrate that the Council has undertaken any substantive analysis of the issues and the implications for the District of the wording of the Chapters 3, 4 and 6 of Proposed Plan as promoted by the Council. In my submission, it is clear that the s32 analysis is not sufficiently thorough or rigorous in its testing of the wording of the proposed objectives and policies.

Chapter 3 Strategic Directions

19 Although PBJV's submission on Chapter 3 largely supports the provisions of Chapter 3 as notified, it opposes and seeks changes to the terminology used in several of the objectives and policies, namely:

- (a) Reference to "nature conservation values" in Objective 3.2.4.2 and associated Policy 3.2.4.2.2;
- (b) Reference to "rare, endangered or vulnerable species of indigenous plant or animal communities" in Objective 3.2.4.3 and associated Policy 3.2.4.3.1
- (c) Reference to "subdivision, use and development" (rather than "inappropriate subdivision, use and development") in Objective 3.2.5.1 and associated Policy 3.2.5.1.1

"Nature Conservation Values" - Objective 3.2.4.2 and associated Policy 3.2.4.2.2

20 Objective 3.2.4.2 and its associated policies provide:

Objective 3.2.4.2 Protect areas with Nature Conservation Values.

Policies 3.2.4.2.1 Identify areas of significant indigenous vegetation and significant habitats of indigenous fauna, referred to as Significant Natural Areas on the District Plan maps and ensure their protection.

Policy 3.2.4.2.2 Where adverse effects on nature conservation values cannot be avoided, remedied or mitigated, consider environmental compensation as an alternative.

21 PBJV's submission seeks that the objective and Policy 3.2.4.2.2 be amended to refer to the values associated with Significant Natural Areas, rather than "nature conservation values". The Council hearing officer has recommended that Policy 3.2.4.2.2 be deleted but does not address PBJV's submission on the use of the term "nature conservation values" in Objective 3.2.4.2.

22 "Nature Conservation Values" is defined in Section 2 of the PDP as meaning:

The preservation and protection of the natural resources of the District having regard to their intrinsic values, and having special regard to indigenous flora and fauna, natural ecosystems, and landscape.

23 In my submission, Objective 3.2.4.2 should be amended as sought by PBJV because:

- (a) The objective is to "protect areas with Nature Conservation Values". The definition of that term (when read in the context of the objective) does not make sense.
- (b) The definition is so broad as to apply to every natural area in the District. Moreover, "protect" means "keep safe, defend, or guard against danger or injury"⁶. It is a strong directive which is unnecessarily restrictive and is not supported by the evidence or the Council's s32 analysis.
- (c) Policy 3.2.4.2.1 (the only policy which purports to give effect to the objective) refers to "areas of significant indigenous vegetation and significant habitats of indigenous fauna". The policy therefore does not implement the objective, as required by s75(1).
- (d) "Nature conservation values" is not a term commonly referred to in other sections of the proposed plan. The s32 assessment (in assessing the appropriateness of the objective) only refers to the district having a number of areas of significant

⁶ *Longview Estuary Estate Ltd v Whangarei District Council* [2012] NZEnvC 172 at [51]

indigenous vegetation, some of which are under threat⁷. If the objective is intended to address s6(c), it should use that language.

"Rare, endangered or vulnerable species of indigenous plant or animal communities" - Objective 3.2.4.3 and associated Policy 3.2.4.3.1

24 This objective and policy provide:

Objective 3.2.4.3 *Maintaining or enhance the survival chances of rare, endangered or vulnerable species of indigenous plant or animal communities.*

Policy 3.2.4.3.1 *That development does not adversely affect the survival chances of rare, endangered or vulnerable species of indigenous plant or animal communities.*

25 PBJV seeks that reference to "rare, endangered or vulnerable species of indigenous plant or animal communities" be replaced with reference to "significant indigenous vegetation and significant habitats of indigenous fauna".

26 "Rare", "endangered" and "vulnerable" are not defined in the proposed plan. Those terms are vague (which according to the Council hearing report is "fundamentally poor policy"⁸). Again, the s32 assessment (in assessing the appropriateness of the objective) refers to the objective being intended to address s6(c).

Subdivision, Use and Development - Objective 3.2.5.1 and associated Policy 3.2.5.1.1

27 This objective and policy sit under Goal 3.2.5 – "Our distinctive landscapes are protected from inappropriate development". They provide:

Objective 3.2.5.1 *Protect the natural character of Outstanding Natural Landscapes and Outstanding Natural Features from subdivision, use and development.*

⁷ At p15

⁸ Hearing report at p16, paragraph 12.14

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, use and development.

- 28 PBJV seeks that the objective and policy be amended to refer to "inappropriate subdivision, use and development".
- 29 The Council officer accepts (in respect of this particular objective) that there are instances where it is more sound to align policy language with RMA purposes and that "this is particularly so for matters relating to Section 6 of the RMA"⁹. This is why he has recommended removal of the word 'natural character', which he considers "unduly narrow and not consistent with RMA terminology"¹⁰. Yet he states that he considers reference to "inappropriate" is unnecessary because he considers that s6(b) applies in any event and that the requirements of that section are "implicit"¹¹. With respect, that argument is flawed.
- 30 As drafted, and even though the goal refers to inappropriate development, the objective requires protection of the natural character/quality of Outstanding Natural Landscapes (ONLs) and Outstanding Natural Features (ONFs) from any subdivision, use and development. As noted in Ms Robertson's evidence, the objective focusses unduly on activities rather than adverse effects and does not contemplate the possible range of effects, from less than minor to significant. The objective effectively prohibits otherwise acceptable proposals on the basis that they involve subdivision, use and development.
- 31 This is not justified and is not supported by the evidence or the s32 analysis. The amendment sought by PBJV allows for the possibility that there may be some forms of 'appropriate' development¹².
- 32 In their current form, the objective and policy also breach s75(3)(c) of the RPS (which requires that the PDP give effect to the RPS)¹³.

⁹ Hearing report at p32, paragraph 12.103

¹⁰ Hearing report at p33, paragraph 12.103

¹¹ Hearing report at p33, paragraph 12.103

¹² *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [29(c)]

“Give effect to” means “implement”¹⁴. As the Environment Court said in *Clevedon Cares Inc v Manukau City Council*¹⁵:

[51] The phrase “give effect to” is a strong direction. This is understandably so for two reasons:

[a] The hierarchy of plans makes it important that objectives and policies at the regional level are given effect to at the district level; and

[b] The Regional Policy Statement, having passed through the [RMA] process, is deemed to give effect to Part 2 matters.

Chapter 4 Urban Development

33 As noted above, the PBJV land at Peninsula Bay is located within the Wanaka Urban Growth Boundary. Development of that land is also consistent with earlier growth management strategies for Wanaka and the wider Queenstown Lakes District.

34 PBJV considers that it is appropriate to ensure the co-ordinated and logical extension of the District’s townships occurs within the identified Urban Growth Boundaries. The Urban Growth Boundaries will encourage the sustainable and efficient use of existing physical resources by encouraging growth where there is capacity within the existing infrastructural network to accommodate such growth. The proposed Urban Growth Boundaries also provide a clear signal to the community about where the Council considers further suburban growth and development is appropriate within the District.

35 As such, PBJV’s submission on Chapter 4 largely supports the provisions of Chapter 3 as notified but takes issue with:

- (a) The use of “protect” in Objective 4.2. and associated policies;
- (b) Protection of ONLs and ONFs from encroachment - Objective 4.2.6 and associated Policies 4.2.6.1 and 4.2.6.2.

¹³ Objective 5.4.3 of the Otago RPS is “to protect Otago’s outstanding natural features and landscapes from inappropriate subdivision, use and development”.

¹⁴ *King Salmon* at [77]

¹⁵ [2010] NZEnvC 211. Approved by the Supreme Court in *King Salmon* at [77]

"Protect" - Objective 4.2.1 and associated Policies 4.2.1.1, Policy 4.2.1.2, Policy 4.2.1.4, Policy 4.2.1.5

36 PBJV sought that Objective 4.2.1 be amended as follows:

Objective 4.2.1 Objective – Urban development is co-ordinated with infrastructure and services and is undertaken in a manner that ~~protects~~ maintains or enhances the environment, rural amenity and outstanding natural landscapes and features.

37 There is very little analysis of submissions on Chapter 4 in the hearings report and no changes to the objective have been recommended.

38 The policy as drafted by the Council requires that urban development is undertaken in a manner that "protects" the environment, rural amenity and outstanding natural landscapes and features. As noted above, "protect" has been held to mean "keep safe, defend, or guard against danger or injury" while it is defined in the Oxford dictionary as "aim to preserve".

39 It is accepted that a Plan may give primacy to protection in particular circumstances¹⁶. However this must be supported by the s32 analysis, and there must be evidence that protection would better achieve the purpose of the Act. That is not the case here.

Objective 4.2.6 and associated Policies 4.2.6.1 and 4.2.6.2

40 PBJV's submission supported Objective 4.2.6 which is to be retained as notified. It sought the following amendments to the associated policies:

Policy 4.2.6.1 *Limit the spatial growth of Wanaka so that:*

- *The rural character of key entrances to the town is retained and protected, as provided by the natural boundaries of the Clutha River and Cardrona River*
- *A distinction between urban and rural areas is maintained to protect the quality and character of the environment and visual amenity*
- *Ad hoc development of rural land is avoided*

¹⁶ *King Salmon* at [149]

- The effects of urban development within Outstanding Natural Landscapes and Outstanding Natural Features are protected from encroachment by urban development. are appropriately avoided, remedied or mitigated.

Policy 4.2.6.2 Ensure that development within the Wanaka Urban Growth Boundary:

- Supports increased density through greenfield and infill development, in appropriate locations, to avoid sprawling into surrounding rural areas
- Provides a sensitive transition to rural land at the edge of the Urban Growth Boundaries through the use of: appropriate zoning and density controls; setbacks to maintain amenity and open space; and design standards that limit the visual prominence of buildings
- Facilitates a diversity of housing supply to accommodate future growth in permanent residents and visitors
- Maximises the efficiency of existing infrastructure networks and avoids expansion of networks before it is needed for urban development
- Supports the coordinated planning for transport, public open space, walkways and cycleways and community facilities
- Maintains or enhances ~~Does not diminish~~ the qualities of significant landscape features
- Rural land outside of the Urban Growth Boundary is not developed until further investigations indicate that more land is needed to meet demand.

41 I have already addressed you on the use of “protect”. In terms of Policy 4.2.6.2, “not diminish” is not a term used in the Act. It could be interpreted to mean ‘preclude’, ‘prevent’ or ‘avoid’ and according to Ms Robertson’s evidence, is not commensurate with the value of the landscape being considered.

Chapter 6 Landscape

42 PBJV’s submission seeks amendments to several of the objectives and policies in Chapter 6, as well as deletion of two of the policies.

Policy 6.3.1.3

43 PBJV seeks that the policy be amended as follows:

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.~~

44 The policy as notified suggests that the Council has pre-determined the outcome of applications for subdivision and development. There is no case law (or evidence) which suggests that subdivision and development is almost always inappropriate in ONLs or ONFs.

"Avoid" - Policy 6.3.1.7, Objective 6.3.2, Policy 6.3.2.2, Policy 6.3.4.1

45 These policies and objective all require the avoidance of certain effects. PBJV seeks the following amendments:

Policy 6.3.1.7 When locating urban growth boundaries or extending urban settlements through plan changes, avoid, remedy, or mitigate the effects of impinging on Outstanding Natural Landscapes or Outstanding Natural Features and minimise disruption to the values derived from open rural landscapes.

Objective 6.3.2 Avoid, remedy or mitigate adverse cumulative effects on landscape character and amenity values caused by incremental subdivision and development.

Policy 6.3.2.2 Allow residential subdivision and development only in locations where the District's landscape adverse character and visual amenity would not be degraded effects are appropriately avoided, remedied or mitigated.

Policy 6.3.4.1 Avoid, remedy or mitigate subdivision and development that would ~~degrade~~ result in adverse effects on the important qualities of the landscape

character and amenity, particularly where there is no or little capacity to absorb change.

- 46 Section 5(2)(c) of the Act allows (as a component of “sustainable management”) the “avoiding, remedying or mitigating of adverse effects on the environment”. To “avoid” potential adverse effects is to ensure they do not occur, to “mitigate” them is to allow them to occur but to lessen their impact, and to “remedy” them is again to allow the probability of potential adverse effects to arise and if the effect does occur, then to rectify or make good those adverse effects¹⁷.
- 47 In the context of s 5(2)(c), “avoid” has its ordinary meaning of ‘not allow’ or ‘prevent the occurrence of’¹⁸. It appears from the Council hearings report that the Council’s use of “avoid” is intentional (in the sense that certain development is not allowed/prohibited). However this does not carry through to the rules, has not been assessed in the s32 report and is not supported by evidence.
- 48 It is accepted that policies should not simply restate the provisions in the Act. However use of the word “avoids” suggests that remedying or mitigation are not options. Such a policy direction needs clear and unequivocal support throughout the Plan¹⁹ and must be supported by the s32 analysis and evidence. Here, it is not.
- 49 The Council officer states that “the merits of a development proposal could include ‘remediation or mitigation measures’ that would ultimately contribute toward avoidance of the impact identified in the objective or policy. These aspects are inherently part of decision making and the contemplation of activities under the framework of the RMA and are not considered necessary to be repeated in every circumstance through a district plan objective or provision”²⁰.
- 50 However that is not what the policy requires or allows. Plan users should not be forced to rely on something being ‘inherent’ in the Plan.

¹⁷ *Alexandra Flood Action Society Inc v Otago Regional Council* C102/05 at [145]

¹⁸ *Environmental Defence Soc Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [24(b)]

¹⁹ *The Sterling Trust v Whakatane District Council* W028/08 at [26]

²⁰ Hearings report at p11, paragraph 9.22

Objective 6.3.7 and associated Policies and 6.3.7.1 and 6.3.7.2

51 PBJV seeks that the policies be amended as follows:

Policy 6.3.7.1 Encourage subdivision and development proposals to promote indigenous biodiversity protection and regeneration where the landscape ~~and nature conservation~~ biodiversity values would be maintained or enhanced, particularly where the subdivision or development constitutes a change in the intensity in the land use or the retirement of productive farm land.

Policy 6.3.7.2 Avoid indigenous vegetation clearance where it would significantly degrade the visual character and qualities of the District's outstanding natural features and ~~distinctive~~ landscapes.

52 In terms of Policy 6.3.7.1, "nature conservation values" is addressed at paragraph 22 of these submissions. As drafted, the policy is inconsistent with and does not implement the relevant objective:

Objective 6.3.7 Recognise and protect indigenous biodiversity where it contributes to the visual quality and distinctiveness of the District's landscapes.

53 In terms of Policy 6.3.7.2, all landscapes in the District could be considered "distinctive". However in Chapter 3, the relevant goal and objective (Goal 3.2.5 and Objective 3.2.5.1) refer only to ONLs and ONFs:

Goal 3.2.5 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.

Conclusion

- 54 The wording of the Proposed Plan as promoted by the Council has not been adequately assessed in terms of the requirements of s32 and is not supported by evidence.
- 55 The amendments sought by PBJV better promote the sustainable management of natural and physical resources and will achieve the purpose of the Act.

DATED this 26th day of February 2016



Monique Thomas
Counsel for Peninsula Bay Joint Venture