BEFORE AN INDEPENDENT HEARING PANEL
APPOINTED BY QUEENSTOWN LAKES DISTRICT COUNCIL

UNDER	Resource Management Act 1991
IN THE MATTER	of a Variation to the proposed Queenstown Lakes District Plan (Te Pūtahi Ladies Mile) in accordance with Part 5 of Schedule 1 to the Resource Management Act 1991

MEMORANDUM OF COUNSEL FOR KOKO RIDGE LIMITED

Dated: **2 February 2024 (Corrected Version)**

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1. Introduction

1.1. This memorandum is filed on behalf of Koko Ridge Limited with respect to the Council's legal submissions and expert reports in reply and filed on 29 and 30 January 2024.

2. Background

2.1. Koko Ridge Limited records its concern that it has been prejudiced by the conduct of the Council's case.

2.2. The statutory process does not provide for a right of appeal; therefore the principles of procedural fairness and natural justice take on particular importance for a hearing of this nature.

2.3. The particular conduct of concern to the Council is the proposal which has emerged in the reply from Council to propose that in relation to the H2 zone, development is to be deferred until a third party has invested in traffic infrastructure.

2.4. The relevant rule is new rule 49.5.10 which now requires that a bus lane, bus stops and the implementation of a NZUP package West of Shotover Bridge are implemented before development may occur (Development Suppression Provision). "Development" for the purpose of this rule is defined as:

> "*For the purposes of this rule, "development" means a building for which a Code Compliance Certificate has been issued by the Council. Any application under Rules 49.4.4, 49.4.18, and any other application involving a building shall include a condition requiring that a Code Compliance Certificate under s92 of the Building Act 2004 shall not be applied for in respect of that building before the corresponding transport infrastructural works for the Sub-Area are completed.*"

2.5. Koko Ridge is also concerned that the Council appears to have been in error in weighing the evidence presented at the hearing, with Corona Trust evidence being preferred despite the errors highlighted by Koko Ridge, providing reliable evidence that withstood testing in the hearing. Notably the experts for the Corona Trust did not attend the hearing and their evidence was untested, but it appears to have been preferred by the Council's expert in setting a large setback on the boundary of the land.

2.6. That error has led to the Council proposing a highly restrictive set back on the boundary between the Corona Trust Land and Koko Ridge Land despite the assessment of visual effects being less than minor. This matter is addressed in the annexed statement of Tim Allan for Koko Ridge and is not addressed further in this memorandum.

3. Prejudice Caused to Koko Ridge

3.1. Koko Ridge was unaware that such a provision was contemplated by Council as appropriate and it was not on notice that this remained a live issue, following the agreement at the expert planning conference that highway infrastructure was not an issue.

3.2. Consequently, Koko Ridge did not call evidence or make legal submissions on the vires of a plan provision of this nature.

3.3. The proposed Development Suppression Provision is not appropriate for the Sub Area-H2 land for the reasons set out in the annexed statement of Tim Allan.

3.3.1. Procedural Unfairness - Failure of Council to Advise Koko Ridge Limited That a Development Suppression Provision Was Proposed

3.3.1.1. Koko Ridge has submitted[1] against the implementation of a development suppression aspect to rule 49.4.5 (as notified) stating that it is inappropriate for the H2 zone to have development deferred until investment has been made by a third party in transport infrastructure.

3.3.1.2. That submission point was resolved at a pre-hearing meeting of the planning experts whereby the Council agreed that the development suppression provisions were not required as Koko Ridge Limited supplied an active travel link per a route on the structure plan.

3.3.1.3. Council did not advise Koko Ridge or engage in any other way that a Development Suppression Provision would be introduced to apply to the H2 land.

3.3.1.4. Council did not engage in post-hearing liaison, despite the Panel requesting that the parties confer to narrow issues further post-hearing, and Koko Ridge Limited requesting to meet with Mr Brown – that has resulted in a change to the structure plan which Koko Ridge has not had an opportunity to respond to and which it considers is not feasible to construct for technical reasons.

3.3.2. Failure to Observe Natural Justice - Legal Submissions of QLDC do not Address the Vires of the Proposed Development Suppression Provision

3.3.2.1. While the Council has provided advice on whether the Development Suppression Provision is "within scope", the Council has not provided any advice in its legal submission as to the vires of the proposed Development Suppression Provision.

3.3.2.2. The Council has the burden of proof to demonstrate to the Panel that such provisions are appropriate and are lawfully available.

3.3.2.3. Koko Ridge Limited considers that such a provision is unworkable for H2 land (as set out in the statement of Tim Allan) and is ultra vires because:

a) The provision proposes that the Council cannot issue a code compliance certificate under the Building Act 2004. The provision is proposing the use of building legislation for a collateral purpose of controlling development and density which is ultra vires;
b) The inclusion of a condition on a resource consent to restrict the application for a code of compliance is ultra vires as it purports to require a person to avoid a requirement of the Building Act 2004 for a collateral purpose;
c) Withholding the benefit of a resource consent for a collateral purpose is a breach of the New Zealand Bill of Rights Act 1990, as the consent applicant is prevented from obtaining a regulatory approval in circumstances unless they agree not to exercise their rights under the Building Act 2004.
d) If occupied without a code of compliance certificate, the buildings will not be insurable which causes a problem for financing construction.

3.4. For the reasons set out above, Koko Ridge Limited considers that the Development Suppression Provision is proposed in a form which is unreasonable in a Wednesbury[2] sense and that the Panel may not introduce that provision as part of the Plan Change as it applies to area H2;

[1] OS80.13 and OS 80.19

[2] Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948) 1 KB 223

3.5. To achieve natural justice and procedural fairness, the Council should address those matters listed above and submitters should be given the opportunity to provide a contrary view to ensure that natural justice is adhered to.

4. Amended Relief Sought

4.1. Koko Ridge Limited sets out the issues above with more particularity in the statement of Tim Allan annexed to this memorandum, which includes a full list of the relief sought.

4.2. However, for the purpose of clarification the most important elements of the relief sought by Koko Ridge are for the Panel to:

a) Decline the proposed 20m setback in new rule new rule 49.5.6.5, as the most reliable evidence (and therefore the evidence on which the greatest weight is to be given) was presented by David Compton-Moen who considered any visual effects were less than minor. Therefore, no evidential basis exists for the imposition of the 20m set back.

b) Removal of the Development Suppression Provisions proposed by QLDC in rule 49.5.10. If that relief is not to be granted by the Panel, and the panel is satisfied that the inclusion of such a provision is legally available, the Council's position that there is simply a choice to include or exclude a development suppression rule should be rejected.

c) Koko Ridge Limited says that the plan rules should provide for <u>both</u> provisions to work alongside each other and it amends its relief sought to include the following <u>alternative</u> relief:

i. No Development Suppression Provision for allotments up to and inclusive of 108 allotments (in accordance with the expert witness statement); <u>and</u>

ii. Development Suppression Provisions to apply only to allotment numbers above 109 allotments.

4.3. This will allow the Council to revert to the position that no transport infrastructure investment is required for development of up to 108 homes but gives the Council discretion to consider a greater number in the future, by which time the additional transport infrastructure should be in place.

DATED 2 February 2024

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K L Rusher

Annexure – Statement of Tim Allan on Behalf of Koko Ridge Limited

Reply of Koko Ridge Limited to Council's Section 42A Hearing Report dated 30 January 2024

Introduction

1. While the Council claims to agree with the principles and rules put forward by Mr Devlin at the request of the Hearing Panel and described as the LDR+ rules, it has modified the rules to make them excessively constraining for the increase in density anticipated and has introduced at least two "poison pills" that will render the rules ineffective in achieving additional housing intensification on Sub-area H2 (the Koko Ridge land).

2. The reasoning set out in the Council's s42A report in reply makes it clear that this approach to provide for intensification, but constrain it is intentional. Therefore the Council is providing advice to the Panel that expresses support for the LDR+ objectives but has written rules that will stop the desired outcome being achieved.

3. The counterfactual is that Council can get some quick wins in respect of more housing on Sub-Area H2, but has not provided advice to the Panel to achieve that outcome.

Background

4. Everyone involved is well aware that by the time the Hearing Panel makes its decision that Sub-Area H2 will be sub-divided into 37 sections, with at least 15 different owners. The Council continues to ignore this fact.

5. As Mr Brown and the Panel are aware, every vacant lot which is developed under the existing Large Lot Residential A zoning is exponentially harder to effectively sub-divide further to achieve more housing in the area. This is because the initial development will be a large expansive home centrally located on the site to meet the Large Lot Residential A building setback rules of 10m from road frontages and 4m from other boundaries. That will mean that there is limited land available from which to make a subdividable allotment.

6. For these reasons Koko Ridge requested, and the Council agreed at the pre-hearing meeting, that the conditions precedents (rule 49.5.10) in respect of upgrading the public transport network would not apply to Sub-Area H2 and it would be treated the same as the adjacent Sub-Area H1.

7. Furthermore, in the pre-hearing meeting the Council clarified to Koko Ridge exactly what was meant by an "Active travel link to State Highway 6 bus stops". Mr Brown explained it as "a path/route suitable for pedestrians and cyclists to the bus stop. Not a footpath, something less." Below is an extract from page 21 of the minutes issued by the Council of the pre-hearing meeting.

Rule 49.5.10 The removal of the obligation to wait until public infrastructure on the northern side of State Highway 6 is built before development on H2 could commence is accepted.

Clarification: What in practical terms is envisaged by an 'Active Travel link' to SH6 bus stops that do not exist?

Jeff advised this was a path/route suitable for pedestrians and cyclists to the bus stop. Not a footpath, something less

8. For this reason we continued to propose the clarification of rule 49.5.10 to read "Link to active travel link to State highway 6 bus stops" to recognise what was agreed in the pre-hearing meeting and the fact that the bus stops and the paths to them will not exist until the development on the north side of SH6 commences and that this will be years away.

9. In addition, Mr Brown has amended the General Structure Plan and Plan Change rules to require a re-routed Active Travel Link that now passes through Koko Ridge land at a location that is now not feasible both practicably and technically. We were not consulted on that proposal, and we are unaware of the origin of that proposal. We consider that it should have been provided as a concept as notified or alternatively it should have been advised at the hearing or post hearing when Koko Ridge had responded to the Panel's request for a proposed for LDR+ rules.

Poison Pill

10. Mr Devlin suggested Mr Brown had made a copy and paste error in rule 49.5.10 to require that Council works are required to be completed prior to any development. Mr Brown response (paras 18.17 - 18.20) makes it clear that this is not a mistake. We consider he has changed his position and is therefore reneging on his previous undertakings set out in the pre-hearing meeting. We also consider, that had the Council considered that a restriction on the rate of development was necessary for an increase in density above 108 allotments, then that should have been a matter raised at the hearing.

11. The change to the Structure Plan is effectively buried and is not expressly mentioned in Mr Brown's Section 42A Hearing Report. We consider that the Panel cannot be satisfied with the evidence to support this change to the active travel link, as it has not been tested at the hearing. It raises real problems of feasibility because it is not technically possible. We are disappointed that this was not presented to us at an earlier time and consider the Council does not have scope to make this structure plan change, as there is no submission seeking this change.

12. The outcome of these proposed rules will be that the maximum number of houses in Sub-Area H2 will never be achieved.

Additional Pills

13. In addition, Mr Brown has raised further barriers to intensification by proposing in rule 49.5.10 that the following is now also required to be completed before development can commence. Rule 49.5.10 now requires the completion of the following as a condition precedent:

H2	Dedicated westbound bus lane on SH6 (Howards Drive to Shotover Bridge (part of NZUP package)) Bus stops on SH6, west of Stalker Road intersection (one on each side of SH6) Stalker Road bus priority NZUP package west of Shotover Bridge

14. It would appear that Mr Brown has used his support to the Panel directed increase in the maximum number of residential units to 140 from 108 to include another choke on the development of additional housing on Sub-Area H2. As pointed out above, this will effectively mean that development in the H2 zone is contingent on the development of the North Side of the Ladies Mile area because the transport investment will not be made until that occurs, and that will be a number of years away. In the meantime, the H2 sections will be sold and built on with no certainty that subdivision can occur – the sections will be developed before the opportunity to subdivide is realised. Therefore, the opportunity for intensification is lost in practical terms. For intensification to occur in any material quantum it is essential for subdivision not to be constrained at that outset or for there to be a development constraint that applies until a third-party investment in infrastructure occurs.

15. The inevitable outcome of less housing is against the objective of the Plan Change and any increase housing under the TPLM will be delayed by many years and it will not achieve the maximum density. The existing lots will most likely be developed in the interim which will severely constrain the potential yield of future housing. Mr Browns proposed amendments in effect guarantee that significantly less than the low-density yield of 108 will be achieved. My estimate is that a total of only 60 homes (23 additional) will be developed.

16. The solution here is simple, if the traffic network is so constrained that an additional 32 homes cannot be handled, even with the initial improvements proposed, then the maximum number of units should remain at 108 units on the basis 108 is nearly three times as good as the initially proposed 38 even if it is far below the potential of the site. Additional houses beyond this can be at the Councils discretion through subdivision. The relief we are seeking (OS80.13 and OS80.19) is that there is no constraint on development due to third party investment. Therefore the most appropriate form of rule is to set the maximum density at 108, with provision to grant consent for further subdivision over 108 allotments at a different activity status.

Other Important Procedural Matters

17. As demonstrated above, at the panel's invitation, our proposed LDR+ rules to increase housing numbers has been used against Koko Ridge Limited. The proposed LDR+ rules were comprehensive and also nuanced in a number of ways.

18. We note that as the hearing finished early we offered, the day before, to meet on Friday 15 December 2023 and go through the proposed LDR+ rules with the Council before submitting them. Mr Brown declined this offer for himself and his legal counsel. It was left that Mr Brown would contact me if he felt it necessary. Mr Brown has not contacted me, despite the Panel's direction that liaison was desirable.

19. The Council 'amendments' proposed to the LDR+ rules put forward by Mr Devlin are material changes on which Koko Ridge Limited was not advised or consulted. The 'amendments' will not achieve the increase housing the Hearing Panel is anticipating. For example:

    Rule 49.5.6.5 – additional intensification permitted except on and near the top of the southern escarpment.

20. Koko Ridge proposed a new rule 49.5.6.5 to limit intensification along the southern escarpment edge which is the governing feature with respect to effects on shading, privacy and visual prominence. This was achieved by a 6m exclusion from the top edge of the southern escarpment edge. It applied both up/over and down the escarpment and also captured any boundary not just adjacent ones.

21. While the Council's Urban Design expert Mr Lowe, professed concern about the loss of developable land, the Council have proposed replacing this targeted 6m restriction from the governing feature with a gross 20m setback from the cadastral boundary.

22. As is self-evident the cadastral boundary has no direct relationship with the top of the escarpment and the setback will have effects well beyond the 20m setback in terms of being able to meet all the other plan rules. Therefore this rule as drafted is inefficient and places inappropriate limitations on 16,680m² of developable land.

23. It is also incorrect to claim the 'top of the escarpment that runs along or near the southern boundary of Sub-Area H2' is poorly defined as it has not been surveyed like a cadastral boundary. It can easily be placed on the Structure Plan and/ or surveyed (and in respect of the vicinity of Corona Trust boundary it already has been formally surveyed). The shallowness of the Council's definitional arguments can be found in their own proposed rules 49.2.7.8A, 49.4.38C and 49.5.6 c which reference the escarpment(s).

    a. New Rule 49.2.7.8A which requires '…maintaining amenity values of properties south of the **southern escarpment edge'**.
    b. New Rule 49.4.38C which prohibits "any built development on the **southern escarpment** of Sub-Area H2".
    c. Rule 49.5.6 c. is designed to exclude unsightly objects "within 4m of a boundary adjacent to the **top of an escarpment**…".

24. For the avoidance of doubt we have no issue with these specific rules. They are listed here to show the inconsistency in the Council's plan drafting and its refusal to correctly reference the setback to the landscape feature that most influences the effects.

25. In our view the approach taken by Mr Devlin is preferred as it follows the correct principles. We note further that on a visual effects assessment, the expert evidence was that any potential effects were less than minor – therefore the rules proposed by Mr Devlin better address the development of this area.

<u>Unreasonable positions</u>

26. While we naturally prefer our drafting to the amendments made by the Council, many are semantic. The most egregious differences to the LDR+ version are:

    a. In our view, the evidence does not support rule 49.5.6.5A, an exceptional building setback of 4m from the southern cadastral boundary (as opposed to the standard 2m setback that was supported by Mr David Compton-Moen, the only expert witness to physically visit the Corona Trust, accurately assess the visual impact and presented on this issue at the hearing). This set back dimension unnecessarily removes up to 1,740m² of developable land.

    b. In our view, the evidence does not require an exception be made to rule 49.5.2 lowering the height limit of 5.5m (as opposed to the existing 8.0m limit) within 20m of the Corona Trust boundary as it is unnecessary.

    c. <u>We consider the Council has also failed to make necessary changes proposed by Mr Devlin to achieve appropriate intensification such as:</u>

    d. <u>Rule 49.5.1</u> Residential Density:

        'Maximum residential density on one residential unit per 300m² <u>except where Rule 49.5.6.5 applies then the maximum residential density is one residential unit per 200m².</u>' as proposed by Mr Devlin.

    e. <u>Rule 49.5.3</u> Building coverage:

        'A maximum of 40% <u>except where rule 49.5.14C applies.</u>' as proposed by Mr Devlin.

    f. <u>Rule 49.5.5 except that:</u>

Recession Plane:

'Recession planes will not apply to buildings sharing a common or party wall <u>or the 0m boundaries of Zero lots</u>.' as a refinement.

g. <u>Rule 49.5.6 except that:</u>

Minimum Building setbacks:

'Setbacks do not apply to site boundaries where a common or party wall proposed between two buildings on adjacent site ~~provided this does not apply~~ where rule 49.5.6.5 applies.'

This should be retained as proposed by Mr Devlin.

Conclusion

27. To put this in perspective, if the Councils rules are approved:

    a. Indefinite (i.e. permanent) or multi-year delays will be suffered by the community as land that could be immediately developed for additional housing is not. In some cases these delays will result in permanent losses – we consider this is inappropriate and does not provide for relieving the acute housing shortage in the District as soon as practicable.
    b. 18[3] of the 37 existing lots representing (half the developable land within Sub-Area H2) will be partly "<u>downzoned</u>" from the current Large Lot Residential A zone by the rules as proposed by the Council.

28. This would result in a failure for the core Plan Change objective to increase residential housing in Queenstown.

Recommended Actions – Relief Requested:

29. While we acknowledge that the decision is now with the Hearing Panel, some changes to what has been proposed by the Council in its 42A report are necessary to make the Plan Change functional for Sub-Area H2:
    a. Reject the change in route of the Active Travel link on the Structure Plan.
    b. Remove the requirement for the travel link to be completed before development and add "Link to" to row 1 of rule 49.5.10.
    c. Delete row 3 of rule 49.5.10.
    d. In rule 49.5.11 set the maximum number of homes at 108 as a permitted activity. Set additional homes up to a maximum 140 as a discretionary activity. This will allow the Council to revert to the position that no transport upgrades are required for development to proceed up to 108 homes, but give the Council discretion to consider a greater number in the future, by which time the additional transport infrastructure should be in place.
    e. Delete rule 49.5.6.5A.
    f. For the reasons outlined above, consider adopting Mr Devlin's proposed rule 49.5.6.5 with a 6m exclusion from the top of the southern escarpment or reduce the Council's proposed 20m setback from entire 870m length of the southern cadastral boundary.
    g. Consider deleting the exception to rule 49.5.2 limiting the maximum height to 5.5m as it is unnecessary.
    h. Make the corrections to rules 49.5.1, 49.5.3, 49.5.5 and 49.5.6 listed in paras 30 – 33 above.

Tim Allan
Director

[3] Lots 1, 9 – 16, 19, 20,23, 24, 26 - 30

Koko Ridge Limited
2 February 2024