BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL HEARING PANEL

IN THE MATTER	of the Resource Management Act 1991
AND	the renotification of two submissions on Stage 1 of the Queenstown Lakes Proposed District Plan concerning the zoning of land at Arthur's Point by Gertrude's Saddlery Limited and Larchmont Developments Limited

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SYNOPSIS OF LEGAL SUBMISSIONS ON BEHALF OF ARTHURS POINT OUTSTANDING NATURAL LANDSCAPE SOCIETY INCORPORATED (FURTHER SUBMITTER 48)

Dated 26 January 2023

Counsel Acting: Alanya Limmer
Bridgeside Chambers
P O Box 3180
Christchurch 8140

Email: alanya@bridgeside.co.nz
Telephone: 64 21 812 811

MAY IT PLEASE THE COMMISSIONERS

1. This synopsis of legal submissions is filed on behalf of the Arthurs Point Outstanding Natural Landscape Society Incorporated (**Society**). The Society is scheduled to appear at next week's hearing after:

   (a) The Officers for Queenstown Lakes District Council (**Council**);

   (b) The original submitters, Gertrude's Saddlery Limited (**GSL**) and Larchmont Enterprises Limited (**LEL**) – collectively, the **Submitters**; and

   (c) Numerous other **Further Submitters**.

2. The legal submissions presented by the Society at the hearing will therefore constitute both a summary of these written submissions and a response (as far as practicable) to representations made and material presented, prior to the Society's attendance.

3. In accordance with the Panel's procedural directions, these written submissions *commence with a summary statement of the content of the document which is no more than two (2) pages long.*

4. For the sake of simplicity (and in view of the fact several parties will precede the Society's appearance) the following abbreviations are used in these legal submissions:

   (a) **Site** refers to the combined area of land affected by the GSL and LEL submissions;

   (b) **ONL** and **ONF** are Outstanding Natural Landscape and Outstanding Natural Feature respectively, as those terms are used in sections 6(a) and (b) of the Resource Management Act 1991 (**Act**).

Summary Statement

5. Attending this hearing and having opportunity to speak to the Panel about the values of the landscape affected by the GSL and LEL Submissions and the potential effects of the rezoning(s) sought, is momentous for the Society.

6. The case for the Society is straight-forward and supported by a compendium of caselaw that has gone before. In short, it is the Society's position (supported by expert landscape and planning evidence):

   (a) The Site is properly considered as ONL and/or ONF, in terms of s6(b) of the Act; and

   (b) The Site contributes to the natural character of the Kimiākau River and its margins, in terms of s6(a) of the Act; and, as such

   (c) In order to achieve the statutory imperatives of "preservation" of "natural character" and "protection" from "inappropriate subdivision, use and development", the most appropriate zoning outcome is retention of Rural Zoning.

7. This is not a consent application. The Panel's first and essential enquiry into whether this area is ONL or ONF must be uncluttered by and independent of any consideration of alleged benefits arising from development (which the Society disputes) and/or how effects on the ONLs or ONFs can be reduced. It is an essentially factual assessment based upon the inherent qualities of the landscape itself.

8. The land must also be "sufficiently natural" to qualify as a section 6(b) landscape or feature. This is not equivalent to being pristine or remote. There is no particular threshold of "naturalness" required. This aspect of your determination calls for the exercise of well-informed judgment.

9. On the evidence, the Society's case is that this Site is most certainly part of the wider ONL (as notified in the Proposed District Plan) and/or the Kimiākau ONF. This is so despite the presence of wilding conifers and the ongoing clearance of those trees at the present time. This is also so despite the small area of residential zoning within Arthurs Point and adjacent to part of the Site, which has not yet been developed. The Society's witnesses take into account both of these factors.

10. Once relevant ONLs, ONFs and River margins have been identified, the Panel must consider how the Plan can achieve the directives in ss6(a) and (b). The classified land and/or the surrounding areas of ONL and ONF must be protected from inappropriate subdivision, use and development. What equates to "inappropriate" will depend on the values of any ONL and ONF areas and the effects of the proposed rezoning(s) on those values.

11. The Society's witnesses confirm that even the reduced rezoning proposal imperils the critical landscape values of the Site and its surrounds. This is not avoided by the proposed bespoke and complex rules that attempt to mitigate the adverse effects - rules which the Society says are not adequate to secure all of the outcomes assumed by the Submitters' witnesses anyway.

12. The Society further submits:

    (a) Even if the rules were improved to guarantee the outcomes relied upon by the Submitters' witnesses, the adverse effects brought about would breach the s6(a) and (b) directives; and

    (b) Even if the proposed regulatory package were added to and potential development constrained even further, it could never be adequate to ensure protection of the relevant ONLs and ONFs from inappropriate activities; and

    (c) The inappropriateness of development enabled by the zoning and rules package proposed is also not avoided or reduced by removal of the wilding conifers – if anything, the Society's evidence is that the clearance activities lay bare the landscape thereby increasing its exposure, rendering many of its natural and science values more legible and making it more vulnerable to adverse effects from development.

13. Therefore, the Society says any form of additional residential zoning is incongruent with the directives in s6 of the Act and the Regional and District policies that have followed. The answer, then, must be rejection of the Submissions.

Context

14. From the Society's first formal memorandum in this hearing process, the Panel will be aware of its involvement in the rezoning request to-date. The Society has, out of its own resources and for no prospect of a pecuniary windfall at the end, participated in a large number of Court cases. Its end goal over these

years and right through to the Court of Appeal, has been to secure the right to be heard on whether this Site should be rezoned for residential development.

15. Being in attendance at this hearing is therefore of great significance to the Society and a welcome opportunity. The plan-making process established by the Act deliberately accommodates and encourages participation of those most affected by its regulation. That the Society and its members have finally made their way to this hearing is, in my submission, precisely how the Act intends it to be. Their interest in and passion for this area is to be respected, not derided or dismissed as a campaign of misinformation or hysteria. They are here because they care.

Is the Site an ONL and/or ONF?

Does it have to be one or the other?

16. As proposed, the Site is part of an ONL. The Landscape Schedules Variation (**Variation**) denotes the Site as an ONF. The Variation is less advanced that the Proposed Plan – although not by much. The difference is that further submissions on the proposed planning provisions have closed whereas only original submissions have closed on the Variation.

17. In any event, the Society submits it is not a matter that needs to trouble the Panel for the following reasons:

    (a) *The RMA, in s6(b), treats them both in the same way. As the case law makes clear, the important thing is that they must be identified: This requires definition of the land (whether it is a feature of landscape) and of its attributes.*[1]

    (b) The level of protection afforded by relevant provisions of the Regional and District Plans (at a policy and regulatory level) is also the same for ONLs and ONFs.

    (c) Case law demonstrates that it, more often than not, will not matter:

> **[82] Approaching the text of s 6(b) with the RMA's purpose and the guidance of the High Court and the Supreme Court in mind, we note that features and landscapes are not the same thing. In broad terms and in the context of the RMA we think one may generally speak of a feature as a single element of natural and physical resources while a landscape is usually a collection of such elements. The Environment Court has previously held, relying on a dictionary definition, that a**

[1] *Western Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (*Matakana Case)* at [139]

> **feature is a distinctive or characteristic part of a landscape and therefore that an outstanding natural feature is a distinctive part of a larger landscape which is an outstanding natural landscape. But with respect, that cannot be a fixed relationship: the scale of elements is necessarily relative and a feature may be so large, as in the case of a mountain or an island, that it can encompass one or more landscapes while retaining its overall integrity as a feature. A feature may also be relatively small, such as a particular geological formation, whereas one would ordinarily not characterise a similarly small area as being a landscape. In some cases, an outstanding natural feature may exist in splendid isolation without an outstanding natural landscape around it, while in others it may be outstanding because of its relationship to other features or the landscape, whether those other things are outstanding or not. It follows that we think that the text of s 6(b) should be considered in terms of principles rather than rules or definitions.**
>
> **[83] There was some debate before us about the structure of the RCEP which addresses features and landscapes together in its policies, rules and schedules. Some parties suggested that this approach was less desirable than that of other councils which differentiate between features and landscapes in their plans. We doubt that there is much to be gained in attempting to resolve that issue in this case, particularly as the sand barrier of Matakana Island could reasonably be described as either or both a feature (given its special geological attributes) or a landscape.**
>
> **(Footnotes omitted)**

18. On the facts of this case, it is submitted that whether the Site is ONL or ONF or a combination of both, does not matter.

<u>Relevance of the Landscape Schedules Variation</u>

19. As noted above, the Variation is at an early stage of its planning evolution. However, so are these rezoning requests. Again, it is submitted the Panel does not need to devote any particular thought or energy to the question of weight to be afforded to the values listed in the Variation. This includes because the landscape witnesses do not rely on the Variation as being determinative of where boundaries are nor what the values of specified ONLs and ONFs are.

20. In this respect I submit the Variation corroborates Mr Brown's conclusions as to boundaries and values. Further – and given the high degree of alignment between Mr Brown and Ms Mellsop's evidence – the Schedules largely corroborate Ms Mellsop's evidence too. Importantly though, neither witness relies upon the Schedules as definitive statements of either boundaries or values.

21. Mr Espie expressly refers to the Schedules at paragraph 61 of his evidence. It therefore appears most (if not all) landscape witnesses have at least considered them and their application to the Site.

Approach to the assessment

22. The leading authority on how an ONL or ONF is to be ascertained is the Court of Appeal decision in *Man O'War Station*[2]. The principles of this case have been referred to in numerous other cases, including Decision 2.1 of the Environment Court in respect of the Plan's ONL and ONF Maps[3]. Another useful authority – because of the case law history it traverses and the factual presence of a commercial forestry plantation – is the *Matakana Case* (which is cited earlier in these submissions).

23. To fall within the protection of s6(b) an ONL or ONF must be both "outstanding" and "natural". Relevant principles include:

    (a) The starting point is a reliable factual assessment as to the qualities inherent in the landscape or feature*;*

    (b) The planning consequences of identifying an area as part of an ONL or ONF are irrelevant to the exercise;

    (c) Evaluation must be at the appropriate geographic scale treating the landscape or feature as a whole;[4]

    (d) It is not appropriate to focus on just one parcel of land when determining ONL or ONF boundaries for the purposes of plan provisions;[5]

    (e) A landscape has to be "sufficiently natural" but there is no threshold required to be met. Rather, it is a judgment call for the decision-maker, taking into account information from experts and non-experts:

> **[62] We also accept QLDC's submission, supported by the Landscape Methodology JWS and Ms Mellsop, that the primary enquiry should be as to whether the area of land in question belongs within the landform that properly defines the boundaries of the ONF or ONL. Once that is determined, attention turns to the degree of naturalness of the land in question. Contextual evaluation then guides the judgment. The judgment called for is as to whether the area of land in issue is too modified or inappropriately developed such that including it in the ONF or ONL would detract from, or**

[2] *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24
[3] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1)
[4] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [80]
[5] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [124] and [125], [136], [157]

> **undermine, the values of the ONL or ONF when considered as a whole.[6]**

And:

> **[158] In our consideration of all of the evidence, for the reasons set out in the sections of this decision discussing ONFL issues and assessing the sand barrier we have come to the conclusion that lower aesthetic value ratings for the whole of the sand barrier in respect of coherence, vividness and naturalness based on the presence of the forest plantation and associated forestry activity are not fully justified. Those lower ratings effectively elevate one consideration above a number of others. In the context of the wider landscape, the result is to diminish the significance of the sand barrier in relation to the neighbouring areas of the harbour, Mauao, Bowentown Heads and Rangiwaea, all of which are scheduled as ONFLs. In our judgment the sand barrier is at least the equal of those features and landscapes both when taken individually and when considered in the context of the regional coastal environment in and around Te Awanui I Tauranga Harbour. We also consider that the associational elements of the landscape are very high, especially for Māori values. These elements support the overall assessment.[7]**

(f) An overriding consideration must be to ensure the overall legibility of the ONL or ONF is maintained – that again being a question for properly informed judgment;[8]

(g) Many ONL within the Queenstown Lakes District *contain smaller areas within their boundaries that are neither highly natural nor outstanding of themselves (e.g. parts of the floor of the Cardrona Valley)[9];*

(h) The presence of wilding conifers does not necessarily make a landscape less natural or less beautiful[10];

(i) Neither does the presence of plantation forestry necessarily disqualify an otherwise outstanding landscape[11];

(j) There is unlikely to ever be a single viewpoint or viewing time:

> **[137] The admonition to stand back begs the question of the most appropriate point of view. This is an issue not only of a viewpoint in space but also in time or over a period of time, given the four-dimensional existence of a landscape. Just as a viewer can see a landscape from close up, or in the fore- or middle ground or from a long distance, so the time dimension**

[6] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1)
[7] *Western Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 147
[8] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [63]
[9] *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [136]
[10] *Western Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (*Matakana Case)* at [105]
[11] *Western Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (*Matakana Case)* at [144] and [145]

> **may be fleeting, or last for few years, or the life of the relevant plan, or for a generation, or over a much longer term: the process elements of a landscape or feature may be appropriately considered over geological epochs. It seems unlikely that there will ever be a single viewpoint or viewing time: that would simply be to adopt a snapshot approach which we understand is not supported by expert opinion (although it seems to be integral to the analysis of preferences using the Q-Sort methodology). So one must stand back conceptually and bring together in one's mind the full range of views, along with whatever one may know of relevant processes and associations which can inform one's understanding of those views.[12]**

24. It is submitted Mr Brown has undertaken an assessment that accords fully with the principles and law developed in respect of s6(b) – law that has been developed in both the national and local context.

25. The difference between Mr Brown and Ms Mellsop is relatively small and relates only to whether – and to what extent – the existing Low Density Residential Zone should be extended. Ms Mellsop supports a small extension but Mr Brown cannot support any extension. Mr Brown will address the Panel on this confined difference in opinion.

26. As to the removal of wilding conifers, Mr Brown's assessment takes into account both their continued existence but also, ultimate clearance of all such trees[13]. He concludes:

    (a) The landscape is Outstanding either way; but

    (b) A cleared landscape is even more vulnerable to adverse effects from development.

27. In any case, it is submitted the present situation is a "moment in time". Any "mess" made by clearance activities should not advantage the rezoning proponents. It is appropriate for you to take a longer term view, as discussed in the *Matakana Case* (cited above). I submit this is especially so given this area has never been developed in all these years (including before wilding conifers took up residence) and the effects of development pursuant to a rezoning, would be irreversible.

28. Mr Brown's evidence notes[14]:

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[12] *Western Bay of Plenty Regional Council v Bay of Plenty Regional Council* [2017] NZEnvC 147 (*Matakana Case)*
[13] It is noted the Society is concerned as to the lawfulness of such extensive clearance as a permitted activity and has raised this with Council. The Society is also concerned with removal of some vegetation within 163 Atley Road (where such vegetation was required to be retained pursuant to resource consent RM980348) and the recent painting of water tanks on the Site. These concerns have been raised with Council.
[14] At paragraph 6(c)

c) Thirdly, the on-going removal of exotic trees will reshape the Shotover Loop: it will inevitably appear less natural, coherent and aesthetically appealing than it has until very recently. Yet, this is also the case in relation to the slopes below and either side of Coronet Peak, but no-one has suggested that those slopes should lose their ONL status. This is only a temporary state and eventually, a natural equilibrium will be restored. The historic descriptions and photographs I have seen confirm for me the Site has significant value whether the conifers remain or not, and over time, if left subject to rural zoning, the Loop landscape will heal and revegetate – hopefully, in a more natural fashion. However, this is most unlikely to happen if the crest of the Loop and its more elevated and prominent, side slopes are covered in residential development.

What is "inappropriate" subdivision, use or development?

29. Once ONL or ONF status has been confirmed, the Act requires protection from inappropriate activities. In this context, the relevant Regional and District policies require the same.

30. Relevant legal principles as to the setting of rules include:

    (a) Whether an activity is "inappropriate" relates back to the natural characteristics and qualities that contribute to the values of the ONL that are "existing in or caused by nature";[15]

    (b) Some types of activity will be inappropriate in every ONL, regardless of surrounding context[16]. These types of activities must be prohibited;[17]

    (c) Conversely, if a council is satisfied, in respect of a particular activity, the activity cannot give rise to adverse effects upon the natural characteristics and qualities of the ONL/ONF, the activity may be granted permitted status;[18]

    (d) In all other instances, the effects of the proposed activity must be considered on a case-by-case basis to determine whether the activity will give rise to adverse effects on the ONL/ONF values.[19]

31. Taking these principles into account, the planning response you decide on must only permit activities that you know, for certain, will not affect the value of any ONLs or ONFs overlaying and/or surrounding the site. With particular recourse to the planning evidence before you, I submit a residential zoning of

[15] *Man O'War Station Ltd v Auckland Council* [2017] NZHC 3217 at [93] and [95]
[16] *Man O'War Station Ltd v Auckland Council* [2017] NZHC 3217 at [93]
[17] *Man O'War Station Ltd v Auckland Council* [2017] NZHC 3217 at [98]
[18] *Man O'War Station Ltd v Auckland Council* [2017] NZHC 3217 at [98]
[19] *Man O'War Station Ltd v Auckland Council* [2017] NZHC 3217 at [99]

either form sought would inevitably permit activities that, at the least, *could* adversely affect critical values. It is therefore appropriate that the framework either deny such activities from the outset or is cautious in dealing with them.

32. In addition, to enable the case-by-case assessment discussed by the High Court in *Man O'War* (referenced above), the framework would need to facilitate and assist in evaluating effects on the ONL/ONF values. As noted by Mr Giddens, in this Plan it is *only the Rural Zone that pays sufficient reference to any ONL/ONF values present.* Put another way, the Plan does not expect an area to be rezoned for residential after it has been determined as ONL/ONF.[20] The Plan framework is generally hostile to residential development within ONL/ONF areas. This is unsurprising when s6(b) areas are involved.

33. Retaining the Rural Zone allows for a consent application to be made. The policies of the Rural Zone direct decision-makers to consideration of adverse effects on landscape values. The appropriate "recipe" for fulfilling Council's duties under the Act (and particularly s6(b)) is provided by a rural zoning of the Site and application of the Rural Zone provisions to future activities on the Site.

Reasonable use of land

34. The evidence of Mr Fairfax suggests there is some kind of "reasonable use" case to be considered. With respect, the Society submits there is no such matter of relevance. The Site was proposed to be Rural and ONL when the Proposed Plan was notified and when Mr Fairfax concluded his purchase of it. As far as the Society is aware, it has never been identified as providing opportunity for further residential growth.

35. Section 85 of the Act provides opportunity for people to raise "reasonable use" issues if a plan or proposed plan looks to severely curtail what could have otherwise been done. This is not the factual matrix applying here. Even then, s85 is used only sparingly and the threshold for proving that land is rendered incapable of reasonable use, is a high one.

36. Counsel has not found any authority for the proposition that a landowner can properly claim they have no reasonable use for their recently purchased land, unless their rezoning request is granted.

[20] For completeness, I note this is different from where an existing residential zone is later determined to be part of an ONL/ONF despite that existing zoning.

National Policy Statement for Highly Productive Land

37. Initially, Ms Evans identified the National Policy Statement for Highly Productive Land (NPS-HPL) as an independent impediment to the rezoning request. In her rebuttal, Ms Evans advises satisfaction that the restrictive policies of the NPS-HPL do not apply in light of the evidence from Dr Hill.

38. Mr Giddens raises concern with whether the desktop assessment and opinion offered by Dr Hill satisfy the requirements of the NPS-HPL's definition of **LUC 1, 2 and 3**:

> **LUC 1, 2 or 3 land means land identified as Land Use Capability Class 1, 2 or 3, as mapped by the New Zealand Land Resource Inventory <u>or by any more detailed mapping that uses the Land Use Capability classification.</u>**
>
> Emphasis added.

39. On or around 16 December 2022, the Ministry for the Environment released a "Guide to Implementation" of the NPS-HPL. In respect of the definition of LUC 1, 2 and 3 it says[21]:

> **LUC class 1, 2 or 3 land is defined in Clause 1.3(1) as "land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory3 or by any more detailed mapping that uses the Land Use Capability classification." This means that if a region or district has more detailed LUC mapping than the original New Zealand Land Resource Inventory, then that can be used by the relevant local authority to identify HPL under the transitional definition of HPL and for subsequent mapping of HPL.**
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> **More detailed mapping could be tools such as S-Map, however it is not intended to include site-specific soil assessments prepared by landowners. If a local authority intends to use more detailed mapping information, it must be based on the LUC classification parameters (completing the assessment according to the methodology in the Land Use Capability Survey Handbook (2009)), and not consider other factors such as water availability. Part 2 of the guide will provide further guidance on best practice for undertaking more detailed assessment of LUC.**
>
> **Until HPL has been mapped in a regional policy statement and those maps have become operative, the transitional definition of HPL will apply to all land zoned general rural and rural production that is identified as LUC class 1, 2 or 3, regardless of its shape or size. This means many land parcels may only be partially identified as HPL under the transitional definition of HPL where part of the land parcel is LUC class 1, 2 or 3 and part is not.**

40. The approach taken in the NPS-HPL can be contrasted to the National Environmental Standards for Contaminated Land[22]. There, Regulation 9

[21] At pages 14 and 15

[22] Formally entitled: Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011

makes clear that default classifications can be displaced upon a detailed site investigation being undertaken. The NPS-HPL provides no such equivalent. It is submitted that if it was intended that individual landowners could avoid the effect of the NPS-HPL by getting a different opinion on the status of their particular site, the NPS-HPL could have easily and expressly provided for this. It does not.

Evidence

41. The Society is calling two expert witnesses – Mr Brown and Mr Giddens. Their evidence was pre-circulated in accordance with directions.

42. The Society is also calling Tom Dery.

43. In addition, some Society members have made individual submissions and will speak to those submissions on their own account.

Dated this 26th day of January 2023

Alanya Limmer
Counsel for Arthurs Point Outstanding Natural Landscape Society Inc