

BEFORE THE MCKENZIE DISTRICT COUNCIL

UNDER Resource Management Act

IN THE MATTER of Plan Change 13 to the
McKenzie District Plan

**OUTLINE OF SUBMISSIONS ON BEHALF
OF THE RHOBOROUGH GROUP**

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INTRODUCTON

1. I appear on behalf of Robert Preston, Roberta Preston, Sarah Preston and Rhoborough Downs Limited, collectively referred to as "the Rhoborough Group".
2. The Rhoborough Group have lodged submissions and further Submissions in respect of Plan Change 13 to the McKenzie District Plan ("Plan Change 13").
3. As is often the case, the original submissions were expressed in the following manner:
 - a. That Plan Change 13 be withdrawn in its entirety; or
 - b. In the alternative (but without prejudice to the primary relief sought), that site specific relief be granted for land owned by the Rhoborough Group.

Rhoborough Downs

4. The land owned by the Rhoborough Group – Rhoborough Downs- is located to the west of Lake Pukaki at the junction of State Highways 8 & 80. All told, it encompasses some 12,500 acres.
5. The land is, however, not in one single contiguous unit, rather there are two discrete areas separate from the main Rhoborough Downs station. These are:
 - a. The Lake Pukaki Block, located between State Highway 80 and Lake Pukaki; and
 - b. An area referred to as Lake Wardell, some 61 hectares to the north of the junction between State Highway 8 and State Highway 80.

WITNESSES

6. The witnesses appearing on behalf of the Rhoborough Group are:
 - a. Roberta Preston, the owner of the original homestead at Rhoborough Downs;
 - b. Robert Preston, the owner of Rhoborough Downs;
 - c. Dr Michael Steven, a landscape planner; and
 - d. Carey Vivian, a resource management planner.

7. In evidence, our clients will set out in brief the history of their ownership and association with Rhoborough Downs Station. Theirs is a rather familiar tale to tell, referring as it does to the various trials and tribulations associated with the ownership and management of a high country station.

8. These trials and tribulations include ongoing, but ultimately futile, attempts to control wilding pine on Rhoborough Downs. In addition, they will refer to the Tenure Review processes undertaken by them in order to freehold some of the land managed by the Preston family for some 90 years.

9. In this regard, it is important to note that the end result of the Tenure Review process (which took some 12 years) is that those areas identified on Rhoborough Downs as being of "significant inherent value" were returned to full Crown ownership and management.

10. What constitutes "significant inherent values" is defined in section 2 of the Crown Pastoral Land Act 1998 (CPLA) as:

"Significant inherent value, in relation to any land, means inherent value of such importance, nature, quality, or rarity that the land

deserves the protection of management under the Reserves Act 1977 or the Conservation Act 1987."

11. Tenure review of Rhoborough Downs was subject to much external analysis, including a report by the Department of Conservation which concluded:

"The significant high inherent values on Rhoboro Downs are the tall tussock grasslands, shrublands, cushionfields and wetland (Red Tussock) areas along with the broad nationally significant landscape of the Ben Ohau Range, and the recreational opportunities.

12. As a result of the Tenure Review, some 40% of Rhoborough Downs was returned to public ownership, the majority of which lay within the Ben Ohau Range area specifically referred to by DoC.
13. In my preliminary submission, what constitutes areas of significant inherent value under the CPLA should be very influential in determining outstanding landscapes under section 6(b) of the Act.
14. Put simply, the areas of our clients' property returned to public ownership were the "crème de la crème" of Rhoborough Downs in terms of their landscape, natural, ecological and recreational values. Dr Steven's evidence will concur with the result attained under Tenure Review, his view being that the freehold balance of Rhoborough Downs is far from qualifying as an outstanding landscape.
15. Understandably, therefore, our clients have been surprised at the findings of Mr Densem's landscape report which effectively ignores the fact that the outstanding areas have been locked up in perpetuity as a result of Tenure Review. It puts to one side the degree of scrutiny Rhoborough Downs endured over 12 years.
16. Our clients will also refer to the economic consequences of the arduous Tenure Review process, a process that, in combination with other factors such as diminishing market returns, leaves them in a

position whereby they need to diversify their operation simply to ensure the long term survival of Rhoborough Downs for future generations of the Preston family.

STATUTORY CONTEXT

17. Plan Change 13 has to meet the sustainable management purpose of the Act in s 5.
18. While this particular section is often referred to, it is rare that one comes across any analysis whatsoever of what it actually means in any given circumstance.
19. Rather, expressions such as "*the reasonably foreseeable needs of future generations*" and "*social and economic wellbeing*" are usually put to one side when a plan change touches on matters of national importance under section 6, or indeed more vague concepts such as amenity values under section 7.
20. As will be clear from the evidence of Mr Vivian provided to the panel last week and also the submissions of Federated Farmers, Plan Change 13 is a classic example of the failure to fully appreciate the meaning and requirements of section 5.
21. Rather, Plan Change 13 has an exclusive focus on "protecting" the landscapes in the McKenzie Basin, while failing to provide any meaningful analysis in terms of the counterbalancing factors under section 5. To illustrate, the Explanation and Reasons to Objective 3A states (2nd bullet point , p5):
 - It is appropriate that development, particularly in the high country and MacKenzie Basin, has **an overriding regard** to the wider visual and landscape consideration that are important to the well-being of the District, its residents and visitors.

22. The Environment Court has consistently held that "protection" in the context of section 6 of the RMA does not mean absolute protection, but is qualified by the purpose of sustainable management. This means, for example, that the ability for people in communities to provide for their own wellbeing must also be taken into account. Put another way, it is well established that section 6 matters are subordinate to the purpose of the Act: *New Zealand Rail Limited v Marlborough District Council* [NZRMA 70 (High Court) at [85].
23. It is therefore necessary to weigh all relevant matters in order to achieve the RMA's purpose: *Ministry of Conservation v Western Bay of Plenty District Council 71/01* (following the decision of the Court of Appeal in the *Environmental Defence Society v Mangonui County Council* [1989] 2NZLR257).
24. It is respectfully submitted that the purpose of the RMA includes providing for the economic and social wellbeing of the McKenzie farming community and their reasonably foreseeable needs, which plainly include the need to diversify. This will no doubt be an often repeated message to the Panel.
25. Provisions in a district plan which fall short of this requirement simply cannot be the most appropriate means of achieving the purpose of the Act.

APPROACH TO PLAN CHANGE 13

26. Relying on decisions such as *Eldamos*, your approach to evaluating Plan Change 13 involves, in brief summary, a consideration of whether the various objectives, policies and methods:

- a. Are the most appropriate (*better or best*) means of achieving the purpose of the Act, having regard to matters such as efficiency and effectiveness, benefits and costs under s 32;
 - b. Assists the Council to carry out its functions of managing the adverse effects; and
 - c. Are in accordance with the provisions of Part 2
27. Further, the end result **must** represent the "*optimal planning solution*".
28. In respect of any rules to be adopted, the activity status (permitted, controlled, discretionary or non-complying) should not be set higher than is necessary for the Council to perform its functions. In simple terms, I submit that excessive regulation is inherently inefficient and ineffective and therefore not the most appropriate means of achieving the purpose of the Act.
29. To illustrate, non-complying status is appropriate **only** if there is a genuine prospect that both the section 104D threshold tests would be failed (*Cornerstone Group Ltd v North Shore City Council. A042/2007*) This is particularly relevant where, as in Plan Change 13, the development of all non-farm buildings outside identified or approved nodes attract non-complying activity status.
30. Within the very broad canvas that is the Mackenzie Basin, I submit there are numerous opportunities to provide for development which has miniscule effects, in which case the first threshold test (i.e effects are no more than minor) will be automatically passed.

PLAN CHANGE 13 – UNSOUND FOUNDATIONS

Landscape assessment

31. A key complaint regarding Plan Change 13 is the lack of a sufficiently rigorous landscape assessment. Such a complaint is hardly surprising in circumstances where the Council seeks to severely constrain development within the Rural Zone, solely on landscape grounds.
32. Put into context, Plan Change 13 effectively provides that no non-farm buildings are permitted as of right within an area of some 205,000ha. As minimum lot sizes go, this is a quite extraordinary degree of regulation.
33. Understandably therefore, there is a community expectation that such a degree of regulation should at the very least be based on a sound investigation of the facts, not the cobbling together of previous broad brush landscape assessments.
34. As noted by Mr Murray for Federated Farmers, the recently operative District Plan has already been through the process of identifying and protecting landscapes the **community** considered to be worthy of protection by means of regulation i.e. areas above 900m amsl and areas adjacent to the various lakes in the Basin. Additionally, as the Panel will be aware, there are substantial areas in the McKenzie Basin protected under other legislation because of their landscape values, including of course 40% of the land previously held by Rhoborough Downs.
35. Identification of landscapes worthy of protection in the Operative Plan was based on the studies referred to in the Densem Report. The question arises as to why (or how), using exactly the same information, a conclusion can possibly be reached at a district level

that the **entire** Basin qualifies for protection under s 6? Such a fundamentally different interpretation of past studies is difficult to understand.

Lack of a Proper Section 32 Analysis

36. Again this is a common complaint of submitters, and rightly so. This matter has been dealt with in Mr Vivian's Part A evidence and there is little need to repeat this in detail.
37. Plan Change 13 has an overriding focus on preventing rural-residential development. While there are potential effects associated with such development, it is submitted that this narrow focus means that the end result is a failure to properly consider other forms of development that can contribute to the social and economic wellbeing of the McKenzie Basin community, in particular the landowners most affected by Plan Change 13.
38. Furthermore, it is evident that no consideration has been given to the economic consequences of Plan Change 13 on these landowners, or for that matter what are the current economic drivers for high country farmers. These are important issues which should not have been put to one side simply because it was too hard.

Key Features of Plan Change 13

39. Perhaps the most important feature of Plan Change 13 is the "encouragement" of nodal development within those areas of the Rural Zone identified as having the capacity to absorb development. Generally speaking, feedback on this concept appears more positive than negative.

40. The starting point is that it appears to be an attempt to provide for an "appropriate" form of development within the Basin, and as such the authors of Plan Change 13 deserve some considerable credit.
41. Curiously, Environment Canterbury, while supporting the concept of nodal development has sought in its submission that applications for Approved Building Nodes be classified as a non-complying activity. The problem of course is that non-complying status imports a presumption **against** a particular activity. In other words, Ecan wants a presumption against something it supports! Fortunately the Reporting Officer (Ms Harte) is alive to this issue and has, quite properly, recommended that Ecan's submission seeking non-complying status for Approved Building Nodes be declined.
42. The devil of course is in the detail, starting with the identification of areas with the capacity to absorb development (Landscape Sub-areas). In addition, careful analysis is required as to how the policy and regulatory framework surrounding nodal development will be administered in practice. Regrettably, not all signs are encouraging.
43. For example, it is apparent from the evidence of Dr. Steven that the delineation of "Pink areas" and nodes in Appendix R to Plan Change 13 is inaccurate, sometimes wildly so.
44. Therefore, unless the mapping is done properly, the Council will be faced with endless challenges via resource consents and subsequent appeals as to the reliability of the analysis. That is not a criticism of Mr Densem's professional ability, rather it is an observation of the limited time in which he had to undertake his assessment.
45. A second aspect of Plan Change 13 which deserves acknowledgement is the attempt to address up front the "carrying capacity" of landscape sub-areas, so as to avoid the need for endless debate about cumulative effects. This is laudable; however, once again, I submit that the limits of this "carrying capacity" must be supported by an appropriate detailed property by property landscape analysis.

46. It follows that Plan Change 13 is on equally shaky ground when it claims (explanation to Policy 3F) that development beyond the identified nodes **will** have cumulative effects. Again, that is a matter which can only really be determined from an appropriate level of analysis.
47. It is also apparent that the "Pink" Areas straddle property boundaries, raising the clear prospect of individual landowners missing out entirely on any development opportunities.
48. Ms Harte brushes this to one side in her s 42A Report, where it is stated:

"...With regard to the associated issue of people missing out because others have established nodes and thereby taken up the permitted capacity for the landscape area, there is no real answer to this. It is the same situation that applies to a number of resources managed under the Resource Management Act 1991, in particular the taking of water and the emitting of polluted air. "
49. The issue of "priority" alluded to by Ms Harte is indeed a vexed one, with the "first, come, first served" approach subject to ongoing criticism and very expensive litigation. The Supreme Court will shortly have its say on the application of this approach to the allocation of water rights in the (hopefully) final chapter of the protracted dispute between *Ngai Tahu* and Central Plains.
50. The allocation of water and/or air relates of course to public resources – they are not private resources as is the case here. Therefore, one cannot simply state that what works (or not as the argument currently stands) for public resources should apply equally to private property.
51. What is clear is that failure to resolve this issue at this stage is grossly inefficient and ineffective in terms of s 32 of the Act. Furthermore, the uncertainty it creates will inevitably have further litigation costs, a factor also not considered under s 32. Such tangible costs aside, the

proposed "rationing" of nodes will inevitably pit neighbour against neighbour and is likely to result in an unacceptable degree of social divisiveness.

52. Respectfully, I submit there is an answer to this issue, one already recommended by Mr Densem in response to a submission by Lone Star Farm Limited.

60 Lone Star Farm Limited

121. This submission **60/2** concerns Godley Peaks Station. The part considered in this section seeks "should ... an analysis deem a set number of nodes to be an appropriate land management method, then map 8 be amended to show the maximum number of new nodes **per station** rather than per landscape sub-areas

122. I support this submission as it would give a clearer definition of options for each property

123. I recommend that this part of Submission 60 be accepted.

53. In other words, the allocation of nodes should be done on a property by property basis.

Status of Approved Building Nodes

54. As noted above, it is the apparent intention of Plan Change 13 to encourage development within Landscape Sub-areas in Approved Building Nodes and to "avoid" development elsewhere within the Rural Zone.
55. If that is the case, I submit that fully discretionary activity status is not in the least encouraging. A more appropriate status would be either controlled, or at worst restricted discretionary activity status, subject to meeting appropriate performance standards.

56. Simply put, if, following a more robust landscape assessment the Council determines that development within these landscape sub-areas is appropriate, fully discretionary activity status would represent an excessive degree of regulation.
57. As noted above, the degree of regulation required in a district plan should be commensurate to the Council's ability to carry out its functions under the Act. If that can be done by means of a less restrictive activity status, it should be.
58. In addition, Mr Vivian will discuss the lack of encouragement Policy 3G provides for development within Landscape Sub-areas. As an alternative, he has suggested that this Policy can be recast in a more positive (as opposed to negative) light.

Miscellaneous Matters - Uncertainty of Rules

59. Mr Vivian will refer to the high degree of uncertainty around the definition of a "remote farm building" and the implications for assessing whether such buildings are controlled or non-complying.
60. In a similar vein, I submit Rule 15.2.1 is flawed: This provides:
- Any Approved Building Node or extension to an Identified Building Node which does not meet the standards in 15.1.1. and 15.1.2 respectively, shall be a Non- Complying Activity.
61. The "standards" referred to include the second bullet point in 15.1.1:
- All nodes shall have substantial perimeter planting unless they are sufficiently hidden so as to achieve significant screening from outside the node.
62. In deciding whether or not a particular application for either an Approved Building Node or an extension to an Identified Building Node, it will be the task of a Council officer to determine either:

- a. what is substantial perimeter planting?; or
 - b. Whether the node is "sufficiently hidden so as to achieve significant screening from outside the node?
63. Rule 15.2 is therefore uncertain and leaves it to the Council to make a judgement as to whether an application is discretionary or non-complying. Such uncertainty is unacceptable.

Nodes on Rhoborough Downs

64. An abiding impression from a visit to Rhoborough Downs is that the sheer size of the property is such that there are untold areas which could absorb development without in any way detracting from the amenity or landscape values of the surrounding rural environment.
65. As noted above, Dr Steven is of the opinion that the freehold part of Rhoborough Downs does not qualify as an Outstanding Natural Landscape. That general opinion aside, Dr Steven has confined his evidence to a select group of potential nodes on Rhoborough Downs, being:
- a. The Lake Pukaki Block;
 - b. Lake Wardell;
 - c. Loch Logan;
 - d. The existing Homestead (an Identified Building Node)
66. Having taken the time to consider these nodes in detail, Dr Steven is of the opinion they can comfortably absorb levels of development greater than anticipated by Mr Densem. Respectfully, Dr Steven's opinion will be readily understood by the panel undertaking a similar site visit to Rhoborough Downs.
67. In respect of Lake Wardell, this area has been identified as including an X i.e. an area where no new nodes are suitable. This is

notwithstanding Mr Densem's view that Lake Wardell is heavily modified and can absorb development, an opinion also shared by Dr. Steven.

68. Mr Densem however states that a decision on whether or not to allow a node at Lake Wardell depends on other planning factors as well as solely landscape ones. That is a rather odd statement in the context of a plan change which is focused solely on identifying and managing landscape effects. It is not a statement supported by any proper analysis.
69. Mr Densem concludes in respect of Lake Wardell:
44. I consider it would be appropriate given the strategic importance of this area for the Council to develop a "Structure Plan" for a sustainable and coordinated pattern of development, reserves, rural and conservation uses in the Pukaki outlet area. This should provide for the area "Pukaki Downs to Hayman Road (east Pukaki) intersection generally.
70. While there **may** be some merit in that approach, some caution is required. In particular, I submit that reliance on a planning exercise that may never happen is not particularly effective. Nor is it at all reassuring for the landowner.
71. If therefore the panel is attracted to Mr Densem's recommendation, I submit the Plan should place a sunset clause on the time by which such a structure plan exercise is to be completed.
72. In addition, the Panel should remove the "x" from Lake Wardell in the interim. This would mean that any future debate via a structure plan on the ability of Lake Wardell to absorb development focuses on the **type** of development rather than whether the area can absorb any development per se.

Conclusions

73. The case for withdrawing Plan Change 13 in its entirety is forceful.
74. Simply put, the Council cannot expect a plan change based solely on landscape issues to survive intact absent a robust and defensible landscape assessment. Similarly, the lack of a sufficiently broad s 32 analysis significantly undermines the legitimacy of Plan Change 13.
75. If withdrawal is not the path chosen by the Council, the alternative option of substantial modification, again supported by a proper landscape analysis, is irresistible.
76. Broadly speaking, landowners within the McKenzie Basin support an appropriate degree of control over non farming related development within the Basin. Further, there is a high degree of (albeit qualified) support for nodal development. This can only benefit from a more detailed landscape assessment and a higher degree of community input.
77. Overall I submit that the most appropriate course of action for the Council to take is to introduce a variation to Plan Change 13. This can build on some of the good aspects of Plan Change 13, while at the same time correcting the bad and the ugly.

GJ Cleary

Counsel for the Rhoborough Group

9 September 2008