

BEFORE THE MACKENZIE DISTRICT COUNCIL

IN THE MATTER of Proposed Plan Change 13 to the Mackenzie District Plan

AND

IN THE MATTER of Submissions and Further Submissions by Simons Hill Station Limited, Simons Pass Station Limited and Pukaki Irrigation Company Limited

**LEGAL SUBMISSIONS ON BEHALF OF SIMONS HILL STATION LTD,
SIMONS PASS STATION LTD AND PUKAKI IRRIGATION COMPANY LTD**

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Introduction

- 1 I appear today for the following Submitters and Further Submitters on Proposed Plan Change 13 (PC 13) to the Mackenzie District Plan (Plan):
 - (a) Simons Hill Station Limited
 - (b) Simons Pass Station Limited
 - (c) Pukaki Irrigation Company Limited.
- 2 Put simply, the Submitters are opposed to PC 13 in its entirety and in particular:
 - (a) Its identification of the Mackenzie Basin as an outstanding natural landscape;
 - (b) The effective removal of any permitted building rights;
 - (c) The unduly restrictive and complicated nature of the Plan Change;
 - (d) The unsubstantiated, and negative references peppered throughout to “greening” of the Basin and adverse effects land use intensification.
- 3 In essence, my clients seek two very reasonable outcomes – that is, flexibility and certainty – so that they may continue to adapt and manage their substantial farming operations appropriately and sustainably into the future.
- 4 In support of their submissions, I will be calling evidence from:
 - (a) Denis Fastier – the owner and manager of Simons Hill Station Limited. Mr Fastier will provide you with a description of both Simons Hill and Simons Pass Stations and an assessment of the sustainability of current land use practices on those stations. He will outline the adverse implications of PC 13 for adaptation of those unsustainable practices.
 - (b) Chris Glasson will provide landscape evidence addressing the appropriateness of identifying the Mackenzie Basin as an outstanding natural landscape and the potential for development within the Basin.
 - (c) Mike Garland will provide an overall assessment of the proposed Plan Change against the provisions of the Resource Management Act and with regard to the objectives and policies of the relevant planning instruments.

Statutory Framework

- 5 Section 75 of the Act sets out the general requirements for the contents of a district plan. Such plan must be prepared in accordance with the local authority's functions under Section 31; the provisions of Part 2 of the Act; Section 32 and any regulations, and must have regard to various statutory instruments.
- 6 The only statutory instrument of relevance is the Canterbury Regional Policy Statement, which is of limited assistance to the issues you need to decide. As confirmed in the recent decision on Banks Peninsula,¹ the recognition of an area as an outstanding landscape at a regional level is not determinative of its status at a district level.
- 7 To be an appropriate exercise of the Council's powers, duties and functions the Plan Change must:
- (a) Achieve integrated management of the effects of the use, development or protection of the land and implement the settled objectives and policies of the Plan;
 - (b) Satisfy the Section 32 requirements including appropriateness, efficiency and effectiveness; and
 - (c) Satisfy the ultimate test as to whether on balance, implementing the proposal would more fully serve the statutory purpose than would cancelling it.²
- 8 There is no presumption in favour of the Council's Plan Change provisions³. In advancing a Plan Change, the Council must satisfy you that it is the *optimum planning solution*.⁴
- 9 You are not charged with achieving the protection of outstanding natural landscapes at all costs and, where landscapes are not in fact qualified under 6(b) of the Act, you are not charged with "protecting" them in a section 6 sense at all.
- 10 In my submission, it is fundamental to your consideration that the permissive nature of the Act is taken into account. The Environment Court (Judge Sheppard) has determined:

¹ *Briggs v Christchurch City Council* C45/2008

² *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 179

³ *Eldamos Investments Limited v Gisborne District Council* W047/05 at [124]

⁴ *Ibid* at [129]; Upheld by the High Court in *Gisborne District Council v Eldamos Investments Ltd* CIV-2005-485-001241 at [35]

As I read the Resource Management Act the emphasis for District Plans is upon enabling activities and the use of resources subject to responsible management of the environment and the integrated management of effects of activities. Taking account of the purpose of rules set out in Section 76, I am of the opinion that rules should be devised to intervene or restrict activities and the use of private land only to the extent that it is necessary for the Council to perform its functions under Section 31 of the Act .⁵

11 In assessing the appropriate level of intervention, the Court found:

When it comes to classifying activities in the range of control through to prohibited, I consider that it should be borne in mind that this represents a sliding scale of difficulty for an intending applicant for resource consent. Care should be taken not to set the classification so low that the Council will be limited in the performance of its functions under the Act. Equally, however, the bar should not be set higher than necessary for a Council to perform its function.⁶

12 The Court in *Wakatipu* noted that achieving integrated management

is particularly important in respect of such an uncertain and complex concept as landscape.⁷

13 The Court recognised that

...there are dangers in managing subjective matters rather than letting the market determine how the landscape should be developed and altered⁸

while also observing that:

...very often the best managers of landscape are landowners. It is difficult to manage landscape by committee - and most positive, imaginative landscaping comes from individuals left to work in their ways and with their own landscape architects.⁹

14 Finally, the Court held that these factors can be

...outweighed when the appropriate management is the status quo and there is statutory sanction for the protection of the outstanding natural landscape from inappropriate subdivision and developments.¹⁰

⁵ *Cornerstone Group Limited v North Shore City Council* A042/07 at [80]

⁶ *Ibid*

⁷ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C180/99 at [126]

⁸ *Ibid* at [137]

⁹ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C189/99 at [95]

¹⁰ *Ibid* at [137]

- 15 This requires two judgements – is there statutory sanction (ie, is it a section 6(b) landscape) and, if so, is the appropriate management status quo having regard to the purpose of the Act?
- 16 In my submission there is no s6(b) sanction in respect of the Mackenzie Basin as a whole and the appropriate management status is not status quo.

Identification of Outstanding Natural Landscapes – is there a statutory sanction?

- 17 What is outstanding can only be assessed – in relation to a district plan – on a district-wide basis because the sum of the district's landscapes are the only immediate comparison that the territorial authority has.¹¹
- 18 You have already received expert evidence challenging the identification of the entire Basin as an outstanding natural landscape in accordance with Section 6(b) of the Act. Mr Glasson also provides an opinion that such identification has not been arrived at in a robust and accepted way and is therefore not defensible.
- 19 In my submission, this is a fatal and decisive failing of the Plan Change. The Court in *Wakatipu* held:

Broadly speaking, there are three substantive stages (ignoring procedural steps in getting to, and at, a hearing) in deciding the contents of the District Plan in accordance with the [statutory requirements]. They are:

- 1 identification of the facts, the significant issues for the District arising out of those facts and then sequentially, the other contents of the District Plan;
- 2 the Section 32 analysis of the policies and rules generated by (1); and
- 3 the 'broader and ultimate issue' as to whether "*on balance, we are satisfied that implementing the proposal[s] would more fully serve the statutory purpose than would cancelling [them] ...*"

- 20 The Court was very clear that only when the facts have been ascertained to the point where issues can be formulated should the Council turn to the next sub-stages in the process: considering the appropriate objectives, policies and methods of implementation.¹²

¹¹ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C180/99 at [85]

¹² *Ibid* at [55] and [56]

21 The Planning Officers' contention that:

...the large-scale landform(s) of the Mackenzie Basin do not lend themselves to easy identification and separation into discrete landscapes. Even if this were done, the areas covered would be so substantial as to be little different than determining that the Basin is an outstanding landscape in its own right as well as containing outstanding landscapes within it.¹³

is unsupported by Mr Densem's landscape report and strongly refuted in the evidence of three recognised and experienced experts in the field - Dr Steven, Mr Kruger and Mr Glasson.

22 In fact, there is a high level of agreement between these three witnesses that the relevant matters have not been properly assessed. It is submitted that on the weight of the evidence you cannot be satisfied that the Basin is in fact an outstanding natural landscape. Consequently, the Plan Change is misconceived.

Confusion of Issues

23 In addition to a flawed factual basis, the Plan Change suffers from a confusion of purpose.

24 The section 32 report explains that *Plan Change 13 has been prepared in response to development pressure within the Mackenzie Basin, and in particular pressure for residential development and sub-division.*

25 It then proceeds to impose controls on this basis throughout the entire Basin.

26 However, by its own concession, the Council acknowledges that in fact the residential development within the Mackenzie Basin has been very clearly limited to particular areas:

The area of choice to date have (sic) been around Twizel both on the immediate boundary of the town or further afield ... more recently, pressure around the major lakes has arisen with more land being released from pastoral lease to freehold.

27 The problem the Plan Change is primarily trying to address is not in the high country stations.

28 This is confirmed in the evidence of Mr Fastier and Mr Garland. Their evidence corroborates the findings of the report attached to earlier evidence presented by Mr Vivian which concludes that, unlike the areas surrounding Lakes Dunstan,

¹³ Section 42A Report, page 3-4

Hawea, Te Anau and Wakatipu, the Mackenzie High Country has retained the same small communities that have existed traditionally and population growth has been concentrated in and around Twizel and Tekapo.¹⁴

29 The Plan Change has tried to do too much too quickly. There appears to be a need to manage growth around Twizel and the Plan Change proposes a means of doing that. In my submission, that is where the Plan Change should have stopped until the factual basis for any further issue identification was properly established.

30 As it stands, the Plan Change is reacting to one type of development but capturing much more. It fails to distinguish between growth and building development for residential and/or lifestyle purposes around existing towns as compared with building development for realisation of the productive potential of high country land.

31 The facts associated with these two types of development are not the same:

Farm buildings are generally not a significant issue in the sense that residential development is because farm buildings are not something from which profit can be made and so they are only built when they are needed.¹⁵

32 In my submission, the same must be true for dwellings that house farm workers. A Plan Change that severely constrains development opportunities throughout the high country stations is an inappropriate and excessive reaction to a much more confined and different problem. In this regard it is also misconceived.

Inadequate Analysis

33 The Council itself describes the policies and rules of PC 13 as "severely" limiting where buildings can be established. In my submission, severe is an entirely accurate word to encapsulate the tenor of the Plan Change and is at the very heart of my clients' opposition.

34 Mr Fastier's evidence sets out the need for change. Such change will only be facilitated by provisions that are flexible enough to provide for a range of possibilities and certain enough for landowners to be confident in making investment decisions and future plans.

35 Section 9 of the Act and its underlying policy direction that landowners are free to use land as they wish unless the District Plan imposes controls, is important. The

¹⁴ *The Socio Economic Status of the South Island High Country* Glen Greer May 2008 (Research Report No 306), pages 22 and 27

¹⁵ Section 32 Report, page 14

evidence is clear that this Plan Change will cost landowners in a regulatory sense (they need consent for virtually everything) and in disabling them from being able to plan for the future with certainty.

- 36 In the circumstances of the Mackenzie District with farming being such an important issue, the absence of an adequate cost benefit analysis in this regard is a significant factor going against your ability to approve or even amend the Plan Change appropriately. As with Banks Peninsula, the issues in Mackenzie of the costs and benefits of the various provisions, and their effectiveness and efficiency are tied up with achieving appropriate flexibility of operation for the farming environment.¹⁶
- 37 This has not been achieved because the issues surrounding buildings for residential purposes and buildings for farming purposes have been conflated.
- 38 The Plan Change regime effectively takes away any form of permitted development (save for farm buildings within existing nodes). Mr Garland disputes that this *is the same situation in almost all rural areas throughout New Zealand, whether within an identified landscape area or not.*¹⁷
- 39 In response to my clients' submissions on the economic impact of PC 13 on farming the s42A report states:

The Council are (sic) aware of these pressures and do not wish to create an additional financial burden on farmers in the Basin.¹⁸

- 40 It proceeds to assert:

The status [discretionary] is not onerous in itself and the assessment matters that need to be considered provide guidance for all parties as to what is involved.¹⁹

- 41 I refer to a comparison of attributes of various activity status recently set out by the Environment Court, which confirms the *sliding scale of difficulty* I mentioned earlier²⁰:

- (a) **Classification as a controlled activity would preclude the consent authority from refusing consent; the authority would only be able to impose conditions; and the likelihood of public participation would be relatively low.**

¹⁶ *Briggs v Christchurch City Council* C45/2008 at paragraph 203

¹⁷ Page 4, Section 42A Report

¹⁸ *Ibid*

¹⁹ *Ibid*

²⁰ *Comerstone Group Ltd v North Shore CC* A042/07 at [551]

- (b) **Classification as a restricted (limited) discretionary activity would involve an assessment of a proposal being limited to stated criteria; consent could be refused; if granted, conditions could be imposed; and public notification is somewhat more likely.**
 - (c) **Classification as a discretionary activity would involve assessment by stated criteria, other environmental effects, objectives and policies of the plan, other applicable planning instruments and the purposes and principles of the Act; consent could be refused; if granted, conditions could be imposed; and public notification is more likely.**
 - (d) **Classification as a non-complying activity would restrict the consent authority's power to consent by the conditions in section 104D; any proposal that is not precluded by those conditions would be assessed by environmental effects, objectives and policies of the plan, other applicable planning instruments and the purposes and principles of the Act; consent could be refused; if granted, conditions could be imposed; and public notification is even more likely.**
- 42 The regime proposed by the Council effectively means that before any building can take place, discretionary consent must be obtained. Even then, dwellings require further assessment and through all this there is the potential for public notification and the consequences that brings in the way of potential hearings, delays and attendant costs.
- 43 My clients are ^{well} all aware of the costs that can be involved. They have fought many other Resource Management Act battles to obtain access to and the right to use the water resource that is so integral to their ability to adapt. As Mr Fastier deposes, after some eight years of considerable effort and expense, they now have an allocation and are close to being heard on the permissions they seek to use this water. There is still much cost to be incurred and PC 13 raises the potential for even more again.
- 44 The Policy guidance and assessment criteria do not provide a high level of certainty. They provide a complicated list of assessment matters that require expert input. An applicant will need to fund that input and quite probably, the Council's expert input also.
- 45 There is even less certainty in establishing a node outside of the identified areas regardless of the benefits that would accrue from its location for example, in terms of efficient farming operations.
- 46 There are costs and uncertainty at every stage and the s32 analysis fails to accurately identify or analyse those costs.

- 47 In discussing remote farm buildings, the Section 42A Report states that while the consent process can be *bothersome* it will *usually results[s] in buildings which are visually less obvious and which are a better fit in the landscape.*
- 48 It also says that *in most cases the application will not be notified.* [my emphasis]
- 49 This fails to recognise the essential concern of the Submitters which is not that the process is *bothersome* but rather that it imposes costs which are unnecessary and fails to have regard to the reality that farm buildings are located and designed in a manner that fits their function and purpose. Consent conditions affecting either of these matters could very significantly affect the efficiency and effectiveness of such building.
- 50 There is added uncertainty because of the nebulous definition of "remote farm buildings", which requires someone to be satisfied that there is a "need" for the building to locate outside of a node. In my submission, this reserves too much discretion to the Council and is too uncertain to be lawful. It is a definition that is determinative of activity status and therefore must be clear. Costs may well be incurred in arguing about its applicability in any given case.
- 51 Failure to meet this definition results in a farm building become non-complying. In a rural zone where rural activity is such a vital part of the economy, this is entirely inappropriate.
- 52 In response to submissions pointing out that the Basin is in fact a "working" landscape and that this is given insufficient regard, the section 42A report (page 4) states:
- The Plan Change however, makes numerous references to pastoral use of the Basin being an important factor and influence on the Basin's landscape, identity and economy. The Council in particular set out at the beginning of the Plan Change as Policy 3B - Economy, Environment and Community which states:**
- To encourage a healthy productive economy, environment, and community within and maintain the identity of, the Mackenzie country.*
- Clearly then, the Council has no intention of adversely affecting the farming operations within the Basin which are its lifeblood and which is a key factor in the identity of the Mackenzie Basin.**
- 53 The difficulty with the above statement of Council intent is that it is locked in the present and fails to pay heed to the unsustainable nature of existing farming operations within the Basin. It is irrelevant whether the Council intends to affect

existing operations - planning is for the future and it is PC13's effect on future operations that concerns my clients.

- 54 The discussion on page 5 of the Section 42A Report, under the heading "Fairness" illustrates the lack of regard to the cost of this Plan Change for farmers. It acknowledges that stations within the Basin are not provided with equitable opportunity for nodal development but essentially concludes that no better approach could be adopted because of the over-riding concern to protect the values of the outstanding natural landscapes of the Basin. This very significantly diminishes the importance of rural activities in the Basin and makes them subservient to landscape values. This is not a robust cost/benefit analysis.

Greening and intensification

- 55 At page 7 of the Section 42A Report, it is stated:

In my opinion, greening is an issue and it is appropriate to acknowledge this in the discussion of landscape values and impact.

- 56 Section 75 of the Act provides states that a District Plan may identify the significant resource management issues facing a district. In my submission, the Council has no evidence upon which to include this statement in its Plan and, in fact, this is acknowledged in the next sentence:

The Council, however, after consideration of this issue has chosen not to develop a policy or regulation on this matter for a variety of reasons, including the difficulties in determining the form and extent of this issue.

- 57 Until the Council is satisfied that this is a significant resource management issue in the District it cannot justify including such a comment in the Plan. It is not supported by evidence and it is not pursued in policy or regulation. It is a flippant addition to the issue that has the potential to cause confusion and concern for landowners.

Part 2

- 58 In summary, it is Mr Garland's opinion that the Plan Change does not achieve the purpose of the Act and in fact that the Operative Plan provisions better achieve the purpose of the Act.
- 59 Mr Glasson concludes that the entire Basin cannot be deemed as outstanding natural landscape and that there is capacity for some level of permitted and controlled activity development within the Basin subject to controls.

- 60 The purpose of the Act is to promote the sustainable management of the resources not the environment. The role of council's under the Act in relation to social, economic and cultural activities, is essentially a passive one. It is to enable people and communities to provide for their well-being, not to direct how that is to be achieved.²¹
- 61 In my submission, essential to the inability of the Plan Change to achieve the purpose of the Act is that it does not seek to manage or control the effects of activities, but rather directs a particular outcome – that being, preservation of the status quo.
- 62 The Council contends that PC 13 is not about preserving the Basin as a *museum piece*. However, this is not borne out in application of its provisions. The Plan Change seeks to provide for “change” only if that change looks like change that has gone before which, in my submission, does not in fact provide for change at all. This does not enable people or communities but rather ties them to a moment in time that, on the evidence, is not sustainable.
- 63 Section 7(g) of the Act requires you to have particular regard to *any finite characteristics of natural and physical resources*.
- 64 Productive land is a finite resource and Mr Fastier's evidence explains that substantial areas of Simons Hill and Simons Pass Stations that are presently unutilised have been determined to be entirely suitable for productive purposes. Mr Fastier explains that the Plan Change has the very real potential to curtail the efficient use and development of this finite resource. That is highly relevant to your assessment of the appropriateness of this Plan Change.
- 65 As explained in the evidence of Mr Fastier, the landscapes of Mackenzie Basin are subject to numerous environmental pressures and these are expressly confirmed in the Issues of the operative Plan:

All of the issues of the rural area ... have relevance to the high country e.g. sustaining the soil resource, plant and animal pests, rural amenity, protection of indigenous vegetation and riparian areas, and landscape and ecological values.²²

...

A pressing issue that confronts many rural communities in the high country areas in the South Island is the apparent degradation of the unimproved tussock grasslands such that the land may not sustain a range

²¹ Ibid at [181]

²² Mackenzie District Plan page 7-3

of land uses into the future. The worst land degradation appears to depend on the terrain, rainfall and management practices, natural soil fertility, and levels of rabbit and heiracium.²³

- 66 In accord with Mr Fastier's evidence, the operative Plan also confirms that a change from the status quo is necessary to ensure sustainability and the potential of the soil resource to meet the reasonably foreseeable needs of future generations²⁴.
- 67 Despite statements in the Section 32 and Section 42A Report to the contrary, it is Mr Fastier's clear evidence that PC 13 will impact on their ability to adapt land use practices. In particular, adaptation will require the strategic placement of workers dwellings and farm buildings on the Stations in a manner that best suits whatever the final form of farming operations will be.

Rejection of the Plan Change

- 68 As I alluded to at the beginning of these submissions, my clients want two key things: an appropriate degree of flexibility and an appropriate degree of certainty so that they may adapt their farming practices and provide for their wellbeing (with consequential benefits to the District) without undue constraint. They consider the Plan Change fails dismally on both counts.
- 69 I note that some submitters have urged you to move to a "fully discretionary" regime for all development within the Basin. In my submission this goes no way toward addressing my clients concerns and suffers from almost the same deficiencies as the Plan Change itself. While it may have some attraction (in a drafting sense) due to its simplicity and convenience, it would still fail to satisfy the purpose of the Act and would not provide an appropriate balance between the competing considerations. The Mackenzie Basin is not the same as the Wakatipu Basin.
- 70 Unlike the Wakatipu Basin, the evidence does not establish that the High Country stations of the Mackenzie Basin require a plan controlling subdivision and residential development as a *matter of urgency*.²⁵
- 71 Whereas a *huge part* of the Queenstown Lakes' economy depends on the quality of its scenery²⁶, farming is the backbone of the Mackenzie District.

²³ Ibid at page 7-4

²⁴ See paragraphs 1 and 3 of Issue 2, page 7-4

²⁵ *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C189/99 at [99]

²⁶ Ibid at [57]

- 72 The submissions filed by my clients seek rejection of the Plan Change in its entirety. This would effect a return to the operative regime. This creates a wide continuum of relief. In the course of preparation for this hearing, the Submitters and, at the Submitters' request, their experts have considered how they might formulate an alternative planning regime somewhere along that continuum that would satisfy their concerns and represent a more appropriate outcome under the Act. Despite the efforts put into this exercise the conclusion is, however, that the Plan Change is so fundamentally flawed that it does not lend itself to amendment, site-specific relief or tweaking around the edges.
- 73 A conclusion that the Plan Change requires significant re-formulation and in particular appropriate analysis and investigation undertaken on an integrated footing throughout the high country of the Mackenzie Basin, is consistent with much of the evidence and submissions you have received in this hearing – no matter which side of the fence the submitter sits.
- 74 Submitters to the Plan Change and the experts assisting them have identified an inability to fix up the Plan Change and instead strongly suggest that a comprehensive review is required. In my submission, you as a Panel will similarly find it difficult to embark upon a re-write of the Plan Change – not the least because it proceeds from a flawed basis.
- 75 Accordingly, the Council needs to start again in respect of controls over the high country stations and, very importantly, it needs to proceed from a robust and defensible landscape assessment. Such a task is well beyond the means of any one or even several Submitters and is more properly the role of the Council. In my submission, it is a matter of such significance and degree that it warrants attention by the "at source" authority.²⁷
- 76 The issues are clearly different for growth around Twizel and, due to the separation of issues, it is quite possible that you can reach a conclusion on that aspect of the Plan Change while rejecting the parts of it that affect the wider Basin. This would be a perfectly respectable outcome. It is, after all, growth around Twizel that has provided the impetus for a change to the planning regime in the first place.
- 77 By our best estimates, we suggest that some two-thirds to three-quarters of landowners within the Basin (excluding around Twizel) have submitted in opposition to the Plan Change. In Banks Peninsula, the level of opposition proportional to population was much less when the Council wisely recognised that it needed to undertake a wholesale review of its landscape proposal.

²⁷ *Kaitiaki Tarawera Inc v Rotorua District Council A7/98* at page 8

- 78 Unlike the Banks Peninsula situation, the Council has not prepared a variation in response to overwhelming opposition in submissions although the writing may have been on the wall from that time. In any event, it would be a significant unfairness to landowners to leave PC 13 extant while a variation was promulgated. Whilst it might have very little weight, it would provide the regulatory framework by which activity status is determined. For the period of time that any variation was "catching up" with the Plan Change, landowners would be subject to the extremely onerous consenting requirements of it.
- 79 Instead, PC 13 has proceeded to a hearing and you are now required to make a decision on it within the framework of the Act taking into account all of the evidence you have heard. In my submission, on the weight of the evidence the Plan Change fails the test of acceptability indicated by the Act and to that extent must be rejected. As His Honour Judge Bollard has observed²⁸:

Inadequately analysed and conceived forms of management after all run counter to the very concept of sustainability underpinning the RMA.

A C Limmer
11 September 2008

²⁸ Ibid at page 7