

BEFORE AN INDEPENDENT COMMISSIONER

IN THE MATTER OF the Resource Management Act 1991
AND
IN THE MATTER OF an Application for Resource Consent by
Peninsula Holdings Trust
SUBMITTER Dr Ian Griffin

LEGAL SUBMISSIONS ON BEHALF OF DR IAN GRIFFIN

Dated: 8 March 2017

GREENWOOD ROCHE
LAWYERS
Christchurch
Solicitor: G J Thomas
(gthomas@greenwoodroche.com)

Submitter's Solicitor
Level 5
83 Victoria Street
P O Box 139
Christchurch
Phone: 03 353 0574

INTRODUCTION

- 1 These legal submissions are given on behalf of Dr Ian Griffin, in respect of his submission on the application by Peninsula Holdings Trust (*Applicant*) to subdivide a property at Cape Saunders Road and develop it for residential activity within the Otago Peninsula Coast Outstanding Natural Landscape Area (*the proposal*).
- 2 As will be clear from his submission and his evidence, Dr Griffin is an expert and passionate astronomer residing in Dunedin. He (and others) regularly utilise the area around Hoopers Inlet and Papanui Inlet for both studying the stars and for taking noteworthy astronomical photographs, many of which ultimately feature in marketing material promoting Dunedin and in scientific journals both nationally and internationally. Dr Griffin regularly uses social media and holds public talks for residents of Dunedin and Otago explaining the Southern Lights or *Aurora Australis* and the best way to observe this natural phenomenon.
- 3 Although Dr Griffin has submitted against this proposal as a layperson, it is clear from his expertise and the technical nature of his evidence that he is also an expert in this field. It is submitted that appropriate weight should therefore be afforded to his evidence.

ASSESSMENT

- 4 From a legal perspective, it is the submitters position that the proposal fails to meet either of the threshold tests under s104D of the Resource Management Act 1991 (*RMA*) and accordingly consent cannot be granted. Specifically, it is considered that the effects of the proposal (even at its reduced footprint) are more than minor and that the proposal remains contrary to the objectives and policies of the Dunedin City Plan (*operative plan*) and the Dunedin Second Generation Plan (*proposed plan*).
- 5 Moreover, it is considered that attempts to diminish the effect of the proposal by utilising a tenuous permitted baseline argument or a historic existing environment should be resisted.

Permitted Baseline

- 6 As a non-complying activity all effects of the proposal fall to be considered with only those effects that fall within any permitted baseline eligible to be disregarded by you.

- 7 As you will be familiar with, the permitted baseline is a useful tool which is available to decision makers in certain situations. In my submission it should be equally clear that this is not one of those situations. Despite the Applicants attempts to pepper the application with suggestions that some form of baseline assessment is appropriate and as such the effects are not as significant as they might otherwise appear, this is wrong in law. There is no permitted residential development available as of right to the landowner in this location.
- 8 Section 104(2) of the RMA provides:
- "When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect".*
- 9 The key word in this provision is 'permits'. For clarity, a controlled activity is not permitted nor is a restricted discretionary activity, regardless of whether it is "unlikely that [it] would not be granted"¹. Such activities do not form part of the permitted baseline² and any diminution of the effects of the proposal as a result of comparing them to an alternative 'permitted' scenario is inappropriate.
- 10 The Council Officer, Ms Darby, in her section 42A report³ (*officers report*), outlines a very limited permitted baseline that could be established that would allow eight houses to be built as permitted activities in the rural zone of operative Plan.
- 11 We respectfully disagree with that assessment. It is clear under rule 14.6.1 (a) of the operative plan, that building within the Peninsula Coast Outstanding Landscape Area requires a resource consent.
- 12 In my submission, utilising a pseudo-permitted baseline as a measure to assess and undermine the effects of the proposal is unlawful and inappropriate. Rather you must assess all effects of the proposal on the basis that no residential development in this location is the starting position. When viewed in this light, it can be seen that the effects, particularly, of development on the night sky, are significant.

¹ Brief of evidence of Mr Allan Cubitt at 23.

² *Tairua Marine Ltd v Waikato Regional Council* HC Auckland CIV-2005- 485-1490, 29 June 2006 at [45].

³ Section 42A officers report at [53] – [57]

Existing Environment

- 13 It is also submitted that there is subtle (and again unlawful) argument employed regarding the existing environment. In the application documents the applicant has referred to the site historically containing 12 dwellings. Although it is not expressly stated, it is inferred from these comments that these former dwellings should somehow be considered when assessing the effects of the new proposal.
- 14 The Court of Appeal in *Queenstown-Lakes District Council v Hawthorn Estate Limited*⁴ clearly concluded that the 'environment' includes consented activities, any activities that could be permitted as of right under the relevant plans, and any activities for which an unimplemented resource consent exists.
- 15 We endorse the comments in the officers report⁵ that historical development of the site is long gone effectively removing any argument as to existing use rights or a prior existing environment. The existing environment for this application includes only the existing quarry and the rural use of the land that is carried out as of right or pursuant to consents.

SECTION 104D – EFFECTS

- 16 Against that background, we make the following comments regarding the effects of the proposal.

Landscape

- 17 Counsel for the Applicant has submitted that when assessing the landscape effects of the proposal the Commissioner should assess these effects as though they have been mitigated because they are in effect temporary. An analogy was drawn with construction effects in this regard by Mr Cubitt. With respect, this is not a correct assessment. The effect of housing on the landscape is a permanent effect that may or may not be in part mitigated *if* screen planting proves effective.
- 18 In my submission it is clear from the definition of 'effect'⁶ in the RMA, which includes both temporary and permanent effects,⁷ that the effect of both the potentially 'temporary' situation and the end state (presuming the mitigation is effective) falls to be considered under s104D(1)(a).
- 19 In that regard, the comments made by the Council Landscape Architect, that "*landscape related adverse effects of the proposal, initially would be more than*

⁴ *Queenstown – Lakes District Council v Hawthorn Estate Limited* (2006) 12 ELRNZ 299 at [84].

⁵ Section 42A officers report at [256].

⁶ Section 3 Resource Management Act 1991

⁷ Section 3 (b) Resource Management Act 1991

*minor*⁸ are endorsed. However the submitter holds some reservations as to the extent to which the effects will in fact reduce over time. At least, with respect to the night sky, the effects will not diminish in the longer term as set out in the evidence of Dr Griffin and Mr Butler and discussed later in these submissions.

- 20 Moreover, those landscape effects that may be able to be mitigated rely in large part on the efficacy of the conditions proposed.
- 21 As articulated by Mr Knox any reduction in effects (for those effects that can be reduced over time) assumes *"complete adherence with the proposed conditions and mitigation (such as protection and enhancement of the existing valued vegetation and salt marsh areas)"*⁹.
- 22 The Officers Report identifies that the Applicant has had a number of previous compliance issues in relation to the operation of the quarry, resulting in enforcement action being taken. In addition, the Council's geotechnical consultant indicated that at present a number of remedial actions with respect to earthworks on the site remain outstanding.
- 23 It is considered that this information is highly relevant when considering the extent to which conditions may offer effective mitigation. In my submission, a cautious approach should be adopted given the compliance history which has been identified by the Council.
- 24 With particular reference to the night sky assessment it is noted that the Applicant's landscape architect, Mr Moore, has conceded that he has no specific knowledge or qualifications pertinent to this matter and that he has not visited the site at night. Despite this he concludes that *"the proposal will potentially result in a few more lights from dwellings at night but will not fundamentally alter the night time character of this rural area in my assessment"*¹⁰. Ms Darby in her officers report also concluded that the effect of the proposal on the night sky *"should not be considered fatal"* to the application.¹¹
- 25 Conversely, Mr Butler and Dr Griffin have considered in some detail the impact of this proposal on the night sky. Mr Butler in his evidence, explains that the *"introduction of artificial light to an otherwise pristine area can rapidly reduce the number of stars visible"*¹². *"Visible artificial light from even one light can diminish or ruin a viewing session."*¹³ Dr Griffin reinforces this in his evidence

⁸ Section 42A officers report at [113].

⁹ Ibid

¹⁰ Brief of evidence of Michael Moore at [56].

¹¹ Section 42A officers report at [127].

¹² Brief of evidence Stephen Butler at [29]

¹³ Ibid at [30]

confirming that any ambient light from housing will diminish the ability of the human eye to fully adjust to the darkness.

- 26 It is considered by both Dr Griffin and Mr Butler, that any additional dwellings in this location will have an **significant** adverse effect on the viewing and enjoyment of the night sky and that this loss cannot be mitigated solely by the addition of conditions (even if effective) on outdoor lighting.
- 27 With respect to that matter, it is noted that the Applicant has provided some provisions from the McKenzie District Plan which it is asserted provide some authority for the proposition that even in a UNESCO recognised dark sky environment such as the McKenzie Basin, it is not necessary that outdoor lighting obtain a consent. It should be noted however that the provisions referred to pre-date the UNESCO designation. As such, a more appropriate reference is to Plan Change 13 to the McKenzie Plan which has been traversing the process since 2007 (extracts appended to these submissions and marked 'A'). These provisions provide a much more stringent framework for constructing a non farm building within the Mackenzie Basin. Applicant's would need to obtain a non-complying resource consent. In determining this application, the decision maker would need to consider, the extent to which any exterior lighting can be mitigated, and any adverse lighting effects of the activity.

Ecological

- 28 Further to the matter of effects of additional lighting, it is noted that the evidence of Mr Butler outlines the implications of increased lighting on not only the night sky but also on the ecological functioning of the area. Neither the Wildland's Report nor the peer review undertaken by Ryder's Consulting consider this matter.
- 29 This deficiency is in addition to the inadequacies of the original Wildlands Report which, as identified by Ryder Consulting's peer review, was limited to a small part of the subject property. In my submission this deficiency has not been satisfactorily addressed in the evidence and as a result there is inadequate information to appropriately determine the ecological effects of this proposal.

Amenity

- 30 Amenity values are defined in the RMA as:

means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.

- 31 Ms Darby in her report concludes that the effect on amenity will be minor, given the change from rural use and the adverse traffic effects. This assessment does not however consider the recreational attributes that will be lost if this proposal proceeds. As Dr Griffin outlines in his evidence, there is a growing interest in Night Sky Tourism in Dunedin. Hoopers Inlet and Papanui Inlet rank as some of the best locations where *Aurora Australis* and the Milky Way can be viewed with the naked eye. As concluded by both Dr Griffin and Mr Butler, if this proposal is approved it will have a significant adverse effect on the recreational use of this area.

Reverse Sensitivity

- 32 Although not a matter of specific concern to the submitter it is also noted that only a cursory reference has been made by the applicant to the potential reverse sensitivity effects of locating a residential dwelling next to an established quarry. It is hard to comprehend that "*reverse sensitivity is not likely to arise*"¹⁴, when it is proposed that residential lots will be within 40 metres of the site boundary at Lot 2 and the access route for the quarry will pass immediately below the residential dwelling at Lot 4. It is difficult to imagine a situation in which a quarry might be authorised in such close proximity to residential development.

Summary – Effects Assessment

- 33 In summary it is considered that this proposal has landscape, amenity, and reverse sensitivity effects that are more than minor. It is unclear without further assessment whether ecological effects might also be more than minor. As such it is submitted that the proposal does not pass the s104D(1)(a) gateway.

SECTION 104D - PLANNING

- 34 Section 104D(1)(b)(iii) requires an assessment of whether the activity is contrary to the objectives and policies of both the relevant plan and the relevant proposed plan.
- 35 The Environment Court¹⁵ has made it clear in their application of s104D(b)(iii) that the issue of weighting is of no assistance when deciding whether the activity passes the second s104D gateway test. In order to pass this test, the application must not be contrary to the objectives and policies of both the operative and the proposed plan.

¹⁴ Application at 2.10

¹⁵ In *Battern v Rodney District Council A066/09* and *Affco New Zealand Limited v Napier City Council W082/2004*

- 36 We agree with Mr Cubitt's legal commentary at paragraph [57] of his evidence, that an overall consideration of the scheme of the plan is needed to determine whether the proposal is 'opposed in nature'¹⁶ to the objectives and policies of the plan and proposed plan.

Operative Plan

- 37 It is evident from Ms Darby's assessment of the relevant objectives and policies at pages 40-45 of her report, that the proposal is generally inconsistent with a significant number of provisions in the operative plan. That assessment is accepted.
- 38 Specifically, it seems clear from the evidence before you that the proposal is contrary to Objectives 14.2.1 and 14.3.1 of the operative plan which require outstanding natural features and landscapes to be protected. It is noted that this objective does not require protection from 'inappropriate development' in a section 6 sense but rather that these features are simply protected. As set out in the evidence of Dr Griffin and Mr Butler, important features of the landscape at Hoopers and Papanui Inlets are not protected as a result of this proposal.
- 39 Further, it is submitted that on the Council's own assessment the proposal is contrary to Objective 20.2.1 and Policy 20.3.4 relating to transport. These provisions require that adverse transport effects are avoided, remedied or mitigated. It clear from the officers report that the transport effects of this proposal will be more than minor. There are no methods proposed by the applicant to avoid, remedy or mitigate such effects.

Proposed Plan

- 40 Ms Darby has completed a thorough assessment of the relevant provisions of the proposed plan in pages 45 to 50 of her report. It is noted that an equivalent assessment has not been completed by the applicant.
- 41 From this assessment it appears evident that the proposal is inconsistent with the transportation and rural provisions of the proposed plan although Ms Darby finds that overall the proposal is not contrary. Ms Darby has also concluded that the proposal is generally consistent with the landscape provisions, however a number of those conclusions were due to the wetland and landscape covenants that were to be placed on the site. As set out in Mr Cubitt's evidence¹⁷ the wetland covenants are no longer part of the proposal.

¹⁶ *Monowai Properties Ltd v Rodney DC* EnvC A215/03 at[35].

¹⁷ Brief of evidence of Mr Cubitt at [16]

- 42 Consequently, although Ms Darby has confirmed that she has not undertaken a complete assessment of the revised proposal¹⁸ she finds that the proposal is not contrary to the objectives and policies overall and can therefore be granted should the Commissioner be of a mind to do so. This finding is disputed. The proposal appears inconsistent with a number of provisions on Ms Darby's own assessment. Moreover, on the evidence of Mr Butler and Dr Griffin the proposal is clearly contrary to Objective 10.2.5 which requires that Outstanding Natural Features, including the natural darkness of the night sky, are protected from inappropriate development. Further it is clear the proposal is also contrary to Policy 16.2.3.9, that requires activities to be designed and operated to ensure that adverse effect from light spill on rural character and amenity, and the ability of people to view the night sky, would be insignificant.
- 43 In my submission the evidence confirms that the proposal is opposed in nature to the objectives and policies of the plan and proposed plan and therefore does not pass the gateway test of s104D(1)(b).
- 44 Overall, it is considered that the proposal does not meet either of the s104D gateway tests and consent cannot therefore be granted.

SECTION 104 ASSESSMENT

- 45 For completeness (and on the basis that the commissioner may consider the gateway test met), we have assessed the application against the remaining considerations in s104.
- 46 The relevant considerations are:
- (a) The actual and potential effects;
 - (b) The New Zealand Coastal Policy Statement;
 - (c) The Otago Regional Policy Statement;
 - (d) The proposed Otago Regional Policy Statement;
 - (e) The operative Dunedin City District Plan;
 - (f) The proposed second generation plan; and
 - (g) Any other matter the consent authority considers relevant.

¹⁸ Evidence provided at hearing – Day 1

The Actual and Potential Effects

47 We have outlined our conclusions in relation to the effects of this proposal at paragraphs [17] – [33] above, and therefore will not repeat our comments here.

The New Zealand Coastal Policy Statement

48 The NZCPS requires consent authorities in considering an application to have regard to relevant provisions. There are two policies of specific relevance to this proposal, Policy 13 and Policy 3.

49 Policy 13 provides:

1. To preserve the natural character of the coastal environment and to protect it from inappropriate subdivision, use and development:
 - a. avoid adverse effects of activities on natural character in areas of the coastal environment with outstanding natural character.
2. Recognise that natural character is not the same as natural features and landscapes or amenity values and may include matters such as:
 - e. the natural darkness of the night sky.

50 Both the Hoopers Inlet and the Papanui Inlet are zoned within the Otago Peninsula Outstanding Natural Landscape area in the operative plan. This zoning has been repeated in the proposed plan.

51 It is clear from the wording of Policy 13, that the natural darkness of the night sky is considered a matter of 'natural character' and as such adverse effects on the dark sky are to be avoided. As the Supreme Court discussed in *Environmental Defence Society Incorporated v New Zealand King Salmon Co Ltd*¹⁹ the meaning of avoid in the NZCPS is to "not allow" or "prevent the occurrence of."²⁰

52 Both Dr Griffin and Mr Butler conclude the proposal will have a significant adverse effect on the natural darkness of the night sky and that the effect of even one residential dwelling will have a more than minor adverse effect on the natural character of Hoopers Inlet and Papanui Inlet.

¹⁹ *Environmental Defence Society Incorporated v New Zealand King Salmon Co Ltd* [2014] NZSC 38

²⁰ *Ibid* at [96].

- 53 Policy 3 requires a precautionary approach to be adopted to proposed activities where the effect on the coastal environment is uncertain, unknown or little understood.
- 54 As outlined in the evidence of Mr Butler, there is little available research on the effect of artificial light on ecosystems. However initial research has shown that artificial light could have a significant effect on estuarine environments and the migratory pattern of seabirds.
- 55 It is considered that this proposal is inconsistent with the NZCPS given the adverse effects of the proposal on the darkness of the night sky and the uncertain effects on ecology.

The Otago Regional Policy Statement and Proposed Regional Policy Statement

- 56 Little consideration is given to the Otago Regional Policy Statement (RPS) or the proposed Otago Regional Policy Statement (pRPS) in the application or in the evidence of Mr Cubitt. Further, the Officers Report concludes that the application is consistent with the RPS and the pRPS but no analysis is provided. In my submission this assessment is inadequate.
- 57 As outlined in the officers report the decisions for the pRPS were released on 1 October 2016 and the appeal period for these decisions has now closed. Many of the provisions of the pRPS have been appealed and as per the *Keystone*²¹ test the commissioner may therefore wish to consider the weight to be afforded to both policy statements. That said, in my submission the proposal is not supported by either.

Proposed RPS

- 58 The decisions version of the pRPS makes explicit mention that the natural darkness of the night sky is to be recognised.²² In my submission this policy is not met by the current proposal.
- 59 Objective 3.2 requires that '*Otago's significant and highly – valued natural resources are identified, and protected or enhanced*'. It is clear from the Otago Peninsula Outstanding Natural Landscape overlay on this site in both the operative plan and the proposed plan that this area is a highly valued natural resource.
- 60 The significant value of Hoopers Inlet and the Papanui Inlet is recognised in the report prepared by Mr Moore and others for the Otago Regional Council

²¹ *Keystone Watch Group v Auckland City Council* (NZEnvC A7/2001)

²² Policy 3.1.10 (a)(iv) and Policy 3.1.11– Proposed Regional Policy Statement

and Dunedin City Council.²³ This report classifies the Papanui Inlet and Hoopers Inlet as 'Outstanding Landscapes'.

- 61 As concluded by the Council Landscape Architect, the effect of the proposal is likely to have a 'more than minor' landscape effect on the Hoopers Inlet and Papanui Inlet. It is therefore considered that the proposal is inconsistent with this objective. As natural resources of some significance Hoopers Inlet and Papanu Inlet will not be protected or enhanced by this proposal.
- 62 Policy 3.2.4 requires the protection, enhancing and restoration of outstanding natural features, landscapes and seascapes by avoiding adverse effects on those values which contribute to the significance of the natural feature, landscapes or seascapes.
- 63 As outlined in Dr Griffin's evidence, the Hoopers Inlet and Papanui Inlet are "*amongst the best and most pristine aurora viewing locations near Dunedin, and the quality of the viewing opportunities are as good as anywhere in Southern New Zealand.*"²⁴ The natural darkness of the night sky is one of the natural features that makes the Hoopers Inlet and Papanui Inlet outstanding. It is considered that the proposal is therefore contrary to Policy 3.2.4.
- 64 Further it is considered that the proposal is contrary to Policy 5.3.1, relating to the management of activities in rural areas. This policy requires "*restricting the establishment of activities in rural areas that may lead to reverse sensitivity effects*". As I have outlined earlier in these submissions it is considered the establishment of residential dwellings adjacent to an existing quarry will likely result in reverse sensitivity effects.
- 65 This policy also requires "*minimising the subdivision of productive rural land into smaller lots that may result in rural residential activities*".²⁵ The applicant has provided no evidence to illustrate the current rural use of the site is not productive. Indeed the applicant is somewhat inconsistent on this. The application records that the farm is currently viable although Mr Clearwater's evidence suggests it is marginal. Mr Clearwater then goes on the say that the only way to create a viable farm on the Otago Peninsula is through scale, although of course this proposal reduces the scale of the farm.
- 66 In my submission this proposal will result in rural residential development that is inconsistent with Policy 5.3.1.

²³ *Coastal Environment of Otago Natural Character and Outstanding Natural Features and Landscapes Assessment – Dunedin City Section Report 28 April 2015.*

²⁴ Brief of Evidence, Dr Ian Griffin at [15].

²⁵ Policy 5.3.1(d)

Otago RPS

- 67 Objective 8.4.5 of the Otago RPS requires that areas and the values of outstanding natural features and landscapes are protected. As previously submitted it is considered that the natural darkness of the night sky can be considered as a 'natural feature' as recognised in the NZCPS. The evidence is clear that the proposal will not protect the natural darkness of the night sky and is therefore inconsistent with this objective.
- 68 Policy 8.5.4 requires recognition and preservation of the natural character of Otago's coastal environment, including protecting estuarine areas such as Hoopers Inlet and Papanui Inlet. As I have outlined previously further assessment is required to understand the ecological effects of this proposal. Without this assessment it is not clear whether the estuarine environment will be protected.

The Operative Dunedin City District Plan

- 69 As I have already addressed in these legal submissions at paragraphs [37] – [39], the proposal is inconsistent and in some cases, contrary to the relevant provisions in the operative Plan.

The Proposed Second Generation Plan

- 70 As outlined paragraphs [40] – [44], the proposal is inconsistent and in some cases contrary to the relevant provisions in the proposed Plan.
- 71 The applicant and the Ms Darby in her officers report, have placed very little weight on the proposed plan, stating that it is not far though the submission and decision making process.
- 72 As outlined in *Keystone*²⁶, the extent to which the proposed plan has been exposed to testing and independent decision making is only one of the considerations in determining how much weight should be given to a proposed provision. The other considerations include:
- (a) Circumstances of injustice;
 - (b) The extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan;
 - (c) Whether there had been a significant shift in Council policy which the new provisions implement; and

²⁶ *Keystone Watch Group v Auckland City Council* (NZEnvC A7/2001)

(d) Whether the new provisions are in accordance with Part 2 of the Resource Management Act.

- 73 The proposed plan has been updated to reflect both the NZCPS and the development of the pRPS – both of which place much greater emphasis on the protection of the night sky as a significant resource. The proposed plan also demonstrates to some extent a new direction for Dunedin, in particular with regard to Dunedin as a 'Dark Sky City'.
- 74 As Dr Griffin outlines in his evidence,²⁷ *"the increasing importance of the night sky to Dunedin can be seen in the establishment of the Dark Sky Advisory Committee and the inclusion (at least in notified form) of protections for the night sky within the Proposed District Plan."*
- 75 This direction is also reflected in the draft 'Dunedin Energy Plan',²⁸ which outlines a number of action steps for Dunedin to become a 'Night Sky City'. This plan recognises that we are *"losing our natural night sky environment to a haze of human light pollution."*
- 76 Given the clear recognition of the natural darkness of the night sky in the proposed plan, subsequent Council plans and policies, the proposed RPS and the NZCPS, it is considered that significant weight should be afforded to the provisions of the proposed plan relating to the protection of the 'natural darkness of the night sky'.

Part 2 Assessment

- 77 The recent High Court decision of *Davidson Family Trust v Marlborough District Council*,²⁹ clarifies how Part 2 should be considered in relation to resource consent applications.
- 78 *Davidson* confirms that the position outlined in *King Salmon* that the *"formulation and promulgation of a cascade of planning documents, intended, ultimately, to give effect to s5, and to Part 2 more generally"*³⁰ relates to both the plan change process and to the consideration of s104(1), as the relevant planning documents have already given substance to the principles in Part 2.
- 79 It is considered that there is a very clear direction in the NZCPS, pRPS, RPS, operative plan and proposed Plan that natural features, including the natural

²⁷ Brief of evidence of Dr Griffin at [24].

²⁸ http://www.dunedin.govt.nz/_data/assets/pdf_file/0019/518131/The-Energy-Plan-1.0-Draft.pdf

²⁹ *Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

³⁰ *Environmental Defence Society Incorporated v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [30].

darkness of the night sky, must be protected, and adverse effects avoided. The proposal does not meet this requirement.

CONCLUSION

- 80 It is concluded that this application does not pass either of the s104D gateway tests as the effects of the proposal will be more than minor and the proposal is contrary to both the operative plan and the proposed plan. As such consent cannot be granted.
- 81 In the event that you are satisfied that at least one of the threshold tests can be met, it is submitted that consideration must be given not only to the adverse effects of this proposal but also to its inconsistency with the NZCPS, the RPS, the pRPS and both the operative and proposed plans.
- 82 The proposal does not protect the natural features of the Hoopers Inlet and the Papanui Inlet, nor does it avoid adverse effects on these important resources. These matters cannot be adequately managed by conditions nor can the effects be considered temporary. In such circumstances it is submitted that consent must be declined.

EVIDENCE

- 83 The following witnesses will provide evidence:
- (a) Mr Stephen Butler;
 - (b) Dr Ian Griffin, submitter and astronomer.

DATED this 8th day of March 2017



G J Thomas
Counsel for the Submitter

'A'

**Mackenzie District Council
Plan Change 13 (Mackenzie Basin) – Mackenzie District Plan
Resource Management Act 1991
Section 293 Package**

Dated: 27 May 2016

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STATUS OF ACTIVITIES

All rules in the Rural Zone shall apply to the Mackenzie Basin Subzone unless otherwise stated.

For the avoidance of doubt, these rules do not apply to utilities, which are addressed in Section 16 — Utilities Rules.

The following Clauses 3 to 15A specify the status of activities under the District Plan i.e. Permitted, Controlled, Restricted Discretionary, Discretionary and Non-Complying Activities, for the following activities:

- 3 Buildings
- 4 Earthworks and Tracking
- 5 Factory Farming
- 6 Forestry
- 7 Recreational Activities
- 8 Visitor Accommodation
- 9 Retail Sales
- 10 Mining Activities
- 12 Vegetation Clearance
- 13 Scheduled Activities
- 14 Aviation Activities
- 15 Other Activities (Including farming, but not factory farming)-
- 15A Pastoral Intensification.

Any activity which is not provided for in these Rural Zone rules as either a Permitted, Controlled, Restricted Discretionary, Discretionary or Non-Complying Activity shall be a Discretionary Activity.

4.2 Amend Rural Zone Rule 3.1 Permitted Activities — Buildings 3.1.1 as follows:

3.1 Permitted Activities - Buildings

- 3.1.1 Any Building outside the Mackenzie Basin Subzone which is not specified as a Controlled Activity, Discretionary Activity or Non-Complying Activity and which complies with all the following standards:

4.3 Retain and amend Rural Zone Rule Permitted Activities — Buildings Standard 3.1.1.h Lakeside Protection Areas as follows:

3.1.1.h Lakeside Protection Area

No building or extensions to buildings, other than stock fencing, shall be erected in Lakeside Protection Areas identified on the Planning Maps (refer Non-Complying Activities - Rule 3.4.54).

- ~~v Riparian Areas Rule 3.1.1.f shall apply;~~
- ~~vi Airport Noise Rule 3.1.1.g shall apply;~~
- ~~vii Lakeside Protection Areas Rule 3.1.1.h shall apply;~~
- ~~viii Flood Mitigation Rule 3.1.1.i shall apply;~~
- ~~ix Flight Protection Areas Rule 3.1.1.l shall apply; and~~
- ~~x Hydro Electricity Inundation Areas Rule 3.1.2.h shall apply;~~

~~In considering any such Discretionary Activity the consent authority shall restrict the exercise of its discretion to the following matter:~~

- ~~a External appearance and location within the landscape;~~

~~Note: for the avoidance of doubt, this rule does not apply to residential buildings within the Ostler Fault Hazard Area (refer Rule 3.3.4)~~

Notification

~~Any application under clause 3.3.7 will not require the written approval of other persons and shall be non-notified.~~

~~3.3.8 Non farm buildings within defined Farm Base Areas (see Appendix R) within the Mackenzie Basin Subzone which do not meet the standards and terms listed in 3.3.7 shall be a discretionary activity;~~

~~3.3.7 Farm buildings outside Farm Base Areas (see Appendix R) within the Mackenzie Basin Subzone which do not meet the standards and terms listed in rule 3.3.3 shall be a discretionary activity except as provided for in rule 3.4.4.~~

4.10 Add the following rules under 3.4 Non-Complying Activities - Buildings as 3.4.4 and 3.4.5

~~3.4.4 Except for buildings within identified Farm Base Areas (refer Appendix R), all buildings or extensions and additions to buildings within the Lakeside Protection Area identified on the Planning Maps are a non-complying activity.~~

~~Farm Buildings and extensions of farm buildings outside a Farm Base Area (refer Appendix R) within the Mackenzie Basin Subzone within any of the following areas identified on the Planning Maps or in Appendix V (Areas of Landscape Management):~~

- Sites of Natural Significance
- Scenic Viewing Areas
- Scenic Grasslands
- Lakeside Protection Areas
- Land above 900m in altitude, other than mustering huts less than 50m² in area

3.4.5 Non-farm buildings and extensions of these buildings within the Mackenzie Basin Subzone outside of defined Farm Base Areas (refer Appendix R) including all non-farm buildings within Lakeside Protection Areas, Scenic Viewing Areas, Scenic Grasslands and land above 900m in altitude identified on the Planning Maps or in Appendix V (Areas of Landscape Management).

4.14 Add the following assessment matters, as new rules 16.2.k, 16.2l, and 16.2.n

16.2.k Farm buildings and Farm Retirement Dwellings

- i. Whether the farming building(s) ~~or farm retirement dwelling~~ would be located away from main surfaces, ridgelines and skylines of landforms. (Refer to the report "The Mackenzie Basin Landscape: character and capacity" Graeme Densem Landscape Architects November 2007, and "Intensification and Outstanding Natural Landscape: Landscape Management of the Mackenzie Basin in the Light of Court Decisions" Graham Densem Architects September–November 2015 for descriptions of areas to be avoided in terms of their vulnerability to change.)
- ii. Whether the proposed building(s) would be adjacent to a change point of the topography, such as a slope, stream course, or forest edge.
- iii. Whether the farming building(s) ~~or farm retirement dwelling~~ would be highly visible when viewed from public viewpoints such as the state highway or the surface of a lake.
- iv. The extent to which existing natural topography would be or could be used to ensure that development is located where it is not highly visible when viewed from public viewpoints.
- v. Whether the building(s) would be located so they would be highly visible in the foreground of views of the mountains surrounding the Basin or views of the lakes, from public viewpoints.
- vi. Where the siting and/or scale of proposed building(s) means they would have an adverse effect on the landscape, whether there are other sites on the application property where the building(s) could be located and serve the intended function without such adverse effect.
- vii. The extent to which any potential adverse effects on the landscape would be avoided or mitigated by appropriate design and landscaping, and/or other measures (including covenants and other restrictive instruments).
- viii. Whether the building(s) would be located where it/they would break the line and form of any skylines, ridges, hills or prominent slopes, and in particular whether buildings would appear above the skyline when viewed from any public viewpoint.
- ix. The extent to which any proposed accessways, earthworks or landscaping would follow the form and lines of the natural topography and landscape.
- x. Whether the farm building(s) ~~or farm retirement dwelling~~ would be concentrated together or in close proximity to existing buildings or other man-made structures (preferred).
- xi. Whether the colours of the roofs and walls would be recessive and of low reflectivity.

16.2.l Non-Farming Activities and Buildings

- i. The extent to which building(s) would be visible when viewed from public viewpoints such as the state highway or the surface of a lake.
- ii. Whether existing natural topography would be or could be used to ensure that activities and buildings are located where not visible when viewed from public viewpoints.
- iii. Whether building(s) would be visible in the foreground of views of the mountains surrounding the Basin or of the lakes, from public viewpoints.
- iv. Whether and the extent to which the nature, scale and overall layout of the development would compromise the character of the surrounding landscape.
- v. Where the siting and/or scale of proposed building(s) means it/they would have an adverse effect on the landscape, whether there are other sites on the application property or in the wider area where the building(s) could be located and serve the intended function without such adverse effect.
- vi. The extent to which any potential adverse effects on the landscape would be avoided

- or mitigated by appropriate design and landscaping, and/or other measures (including covenants and other restrictive instruments).
- vii. Whether building(s) would be located where they would break the line and form of any skylines, ridges, hills or prominent slopes, and in particular whether buildings would appear above the skyline when viewed from any public viewpoint.
 - viii. The extent to which any proposed accessways, earthworks or landscaping would follow the form and lines of the natural topography and landscape.
 - ix. Whether building(s) would be concentrated together or in close proximity to existing buildings or other man-made structures (preferred).
 - x. Whether the colours of the roofs and walls would be recessive and of low reflectivity.
 - xi. Whether the site is within a Lakeside Protection Area, Scenic Viewing Area or Scenic Grasslands.
 - xii. Whether the application includes proposals for ecological restoration and/or the containment and control of wilding species.
 - xiii. The extent to which any exterior lighting can be minimised to avoid adverse effects on amenity values.
 - xiv. Any adverse effects of the proposed activity in terms of:
 - Noise, vibration and lighting from the activity and from vehicles entering and leaving the site.
 - Loss of privacy for adjacent properties.
 - Levels of traffic congestion or reduction in levels of traffic safety.
 - Noise, dust and traffic from earthworks.

16.2.n Buildings and Visitor Accommodation and Retail Sales not listed as a permitted activity within Hydro-Electricity Inundation Hazard Areas in Appendix U

- i The potential for reverse sensitivity and adverse effects of new buildings/activities on the operation and management of existing power generation infrastructure, including any effect on the Potential Impact Classification, and requirements in any dam safety assurance programme;
- ii The risk of inundation associated with the uncontrolled release of water or operational discharges from existing power generation infrastructure, and the potential effects on property and life.

5 SECTION 7A — RURAL-RESIDENTIAL ZONE

Add the following Rural Residential Manuka Terrace Zone rule after the Rural Zone Rules in Section 7:

RURAL RESIDENTIAL - MANUKA TERRACE ZONE

1 ZONE STATEMENT

The Rural Residential Zone at Manuka Terrace near Lake Ohau provides an alternative low density living environment within the District's rural areas.

The Manuka Terrace Rural Residential Zone recognises the recent subdivision of land into residential sized lots, and provides for the maintenance of the scale of subdivision to provide lower density living environments that are semi-rural in nature. The minimum lot size set for the zone protects its viability in respect of the balance between providing services and maintaining amenity and the outstanding landscape values of the area. The area is close to the Ben Ohau Range and is subject to strong winds.

ATTACHMENT B – ENVIRONMENT COURT'S DIRECTED AND SUGGESTED OBJECTIVES AND POLICIES

Ninth Decision: Schedule A Objectives A and B

Objective 3A: Landscape Values

Protection of the outstanding landscape values

Objective 3A – Landscape Values

Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the District's overall character and amenity.

Objective 3B:

Objective 3B – Activities in the Mackenzie Basin's outstanding natural landscape

- (1) Subject to (2)(a), to protect and enhance the outstanding natural landscape of the Mackenzie Basin Subzone in particular the following characteristics and/or values:
 - (a) the openness and vastness of the landscape;
 - (b) the tussock grasslands;
 - (c) the lack of houses and other structures;
 - (d) residential development limited to small areas in clusters;
 - (e) the form of the mountains, hills and moraines, encircling and/or located in, the Mackenzie Basin;
 - (f) undeveloped lakesides and State Highway 8 roadside;
- (2) To maintain and develop structures and works for the Waitaki Power Scheme:
 - (a) within the existing footprints of the Tekapo-Pukaki and Ohau Canal Corridor, the Tekapo, Pukaki and Ohau Rivers, along the existing transmission lines, and in the Crown-owned land containing Lakes Tekapo, Pukaki, Ruataniwha and Ohau and subject only (in respect of landscape values) to the objectives, policies and methods of implementation within Chapter 15 (Utilities) except for management of exotic tree species in respect of which all objective (1) and all implementing policies and methods in this section apply;
 - (b) elsewhere within the Mackenzie Basin Subzone so as to achieve objective (1) above.

Ninth Decision: Schedule C
Policies 3B1 to 3B16

Policy 3B1- Recognition of the Mackenzie Basin's distinctive characteristics

(To be put forward for approval by the Mackenzie District Council after consultation)

Policy 3B2 – Adverse Impacts of Buildings and Earthworks

To avoid adverse impacts on the outstanding natural landscape and features of the Mackenzie Basin, in particular from residential buildings, domestication, structures, earthworks, tracks and roads except in particular areas under policies below, and to remedy or mitigate the adverse effects of farm buildings or fences.

Policy 3B3 – Adverse Effects of Sporadic Subdivision and Development

To control buildings and subdivision in the Mackenzie Basin Subzone (outside of approved Farm Base Areas and other than for activities provided for in [the Renewable Energy] Policy 3B9 and subject to lesser controls on buildings and subdivision in areas of lower visual vulnerability) to ensure adverse effects, including cumulative effects, on the environment of sporadic development and subdivision are avoided or mitigated as to sustain existing and likely future productive use of land.

Policy 3B4 – Limits on Subdivision and Housing

- (1) Subject to (2) below, to enable residential or rural residential subdivision and housing development in the Mackenzie basin Rural subzone only within identified Farm Base Areas;
- (2) To encourage new residential or rural residential subzones in areas of low or medium vulnerability provided:
 - (a) objectives 1, 2, 4, 7, 8 and 11 of the rural chapter are achieved; and
 - (b) the new subzones satisfy policy 3B6 below;
- (3) To strongly discourage residential units elsewhere in the Mackenzie Basin.

Policy 3B5 – Development in Farm Base Areas

- (1) Subdivision and development of Farm Base Areas which are in areas of high vulnerability to development shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:
 - (a) confining development to areas where it is screened by topography or vegetation or otherwise visually inconspicuous, particularly from public viewpoints and from views of Lakes Tekapo, Pukaki and Benmore provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Road.
 - (b) integrating built form and earthworks so that it nestles within the landform and vegetation;
 - (c) planting of local native species and/or non-wilding exotic species and management of wilding tree spread
 - (d) maintaining a sense of isolation from other development
 - (e) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing
 - (f) mitigating the adverse effects of light spill on the night sky
 - (g) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
 - (h) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access;

- (2) Subdivision and development in Farm Base Areas which are in areas of low or medium vulnerability to development shall:
- (a) restrict planting to local native species and/or non-wilding exotic species
 - (b) manage exotic wilding tree spread
 - (c) maintain a sense of isolation from other development
 - (d) mitigate the adverse effects of light spill on the night sky
 - (e) avoid adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
 - (f) install sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

3B6 – Potential Residential and Visitor Accommodation Activity subzones

- (1) To mitigate the effects of past subdivision on landscape and visual amenity values and to encourage appropriate rural residential activities in the Mackenzie Basin by identifying, where appropriate, alternative specialist zoning options (such as Rural-Residential) in areas of low or medium vulnerability to development where there are demonstrable advantages for the environment;
- (2) where such subzones are located wholly or partly in areas of medium vulnerability then any development within shall maintain or enhance the significant and outstanding natural landscape and other natural values of the Mackenzie Basin by:
 - (1) confining developments to areas where it is visually inconspicuous, particularly from public viewpoints and from views up Lakes Tekapo and Pukaki provided that there may be exceptions for development of existing farm bases at Braemar, Tasman Downs and for farm bases at the stations along Haldon Arm Road
 - (2) integrating built form and earthworks so that it nestles within the landform and vegetation
 - (3) planting of local native species and/or non-wilding exotic species and management of wilding tree spread
 - (4) maintaining a sense of isolation from other development
 - (5) built development, earthworks and access having a low key rural character in terms of location, layout and development, with particular regard to construction style, materials and detailing
 - (6) mitigating the adverse effects of light spill on the night sky
 - (7) avoiding adverse effects on the natural character and environmental values of waterbodies, groundwater and sites of natural significance
 - (8) installing sustainable systems for water supply, sewage treatment and disposal, stormwater services and access.

Policy 3B7 – Lakeside Protection Areas

- (a) To recognise the special importance of the Mackenzie Basin's lakes, their margins, and their settings in achieving Objective 3B.
 - (b) Subject to (c) to avoid adverse impacts of buildings, structures and uses on the landscape values and character of the Mackenzie Basin lakes and their margins.
 - (c) To avoid, remedy or mitigate the adverse impacts of further buildings and structures required for the Waitaki Power Scheme on the landscape values and character of the Basin's lakes and their margins.
- (Note: Policy (c) has different objectives to achieve dependent on whether Rural Objective (7)3B or Utilities objective (Section 15) 3 is being implemented.)

Policy 3B8 – Views from State Highways and Tourist Roads

(To be put forward for approval by the Mackenzie District Council after consultation)

Policy 3B9 – Renewable Energy

To recognise and provide for the use and development of renewable energy generation and transmission infrastructure and operations within the footprint of current operations or on land owned by infrastructure