IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2018-425-000098
[2019] NZHC 3227

BETWEEN	LEONARD JOHN KNOWLES and SUSAN RAYMONDE FELS KNOWLES First Applicant
AND	ANGELA JOAN WAGHORN Second Applicant
AND	DAVID BRUCE CROW Third Applicant
AND	BRUCE CHARLES MATHESON and FRANCES MARY MATHESON Fourth Applicant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Respondent
AND	CSF TRUSTEES LIMITED Second Respondent

Hearing:	3 July 2019
Appearances:	PJ Page, JJYR Pierce, SR Peirce for the Applicants KL Hockly for the First Respondent RB Enright for the Second Respondent
Judgment:	9 December 2019

JUDGMENT OF NATION J

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[1] By way of judicial review, the applicants challenge the decision of the Queenstown Lakes District Council (QLDC) to grant consent to the second respondent

(CSF) on a non-notified basis to construct a multi-unit development at 1 York Street, Queenstown.

Background

[2] Attached as a schedule to this judgment is a map setting out relevant sites. The applicants own residential properties at 9A, 9C, 9D and 11 York Street, Queenstown. They are on Queenstown Hill, overlooking the Queenstown township. They have panoramic views to Queenstown Bay, Lake Wakatipu, Kelvin Peninsula, Queenstown Gardens, Cecil Peak, Walter Peak and Ben Lomond.

[3] CSF owns properties at 9 to 13 Hallenstein Street, the subject site (1 York Street, the area outlined outlined in blue on the map), and an area described as Lot 2 DP399178, shaded in orange on the attached map.

Figure 1: Diagram showing subject site and adjacent sites

[4] 1 York Street, the other properties owned by CSF and the residential properties owned by the applicants are all zoned high density residential (HDR) zone (sub-zone B), under QLDC's Operative District Plan (ODP). Subject to a number of specific relevant rules and standards, multi-unit development was permitted within the HDR zone. One of the rules specified that, on sloping sites, the maximum permitted height of buildings within the area would be seven metres.

[5] In 2011, Mr and Mrs Knowles the first applicants as the owners of 11 York Street, Mr Crow the third applicant as the owner of 9C York Street, Mr Watanabe and Mr Lloyd as the owners of 9B York Street (not parties to these proceedings), and the fourth applicant Mr and Mrs Matheson as the owners of 9A York Street purchased the area shown as 3 York Street. This is a vacant site. There is no dispute that 3 York Street was purchased by its current owners as vacant space to protect their views over the Queenstown township into the distance.

[6] In August 2015, QLDC notified its Proposed District Plan (Stage 1) (PDP). In the PDP, 1 York Street and the applicants' properties were to remain HDR zone.

[7] Various parties, including the applicants Mrs Knowles and Ms Waghorn, lodged submissions seeking low density suburban residential (LDSR) zoning for an area including 1 York Street and their properties. No submissions were lodged within the required period by any party seeking to retain HDR zoning in the PDP for the properties for which the submitters sought LDSR zoning.

[8] On 30 November 2017, CSF applied under s 88 Resource Management Act 1991 (RMA) for land use consent to construct on 1 York Street 24 residential units to undertake associated earthworks and to establish visitor accommodation for up to 365 days per year for each unit, and for subdivision consent to undertake a unit title subdivision of the proposed units. The proposal exceeded maximum height limits under both the ODP and the PDP.

[9] In April 2018, Commissioners appointed by QLDC recommended that 1, 3, 9 and 11 York Street should be rezoned from HDR zoning to LDSR zoning. QLDC gave

effect to that recommendation in a decisions version of the PDP, publicly notified on 5 May 2018 (the rezoning decision).

[10] Resource consents were required for CSF's proposed development in terms of the ODP. A controlled activity resource consent was required because the development was for visitor accommodation. Restricted discretionary resource consents were required because the development was for a combination of more than three units and because the proposed building footprint exceeded the maximum of 400 m^2 on the site permitted in the HDR zone and because the proposed development breached rules as to building coverage, the required setback from road, setback from neighbours, maximum unbroken length of any building, the site minimum requirement for open space, fence heights, and the maximum height for buildings of seven metres. Further consents were also required.

[11] In a decision of 8 October 2018, QLDC decided, pursuant to ss 95A-F RMA, the application would be processed on a non-notified basis. Pursuant to ss 104 and 104B RMA, consent was granted subject to conditions. The decision was made by QLDC's delegated decision-maker Mr Woodford, consistent with the associated report of QLDC's consultant planner Ms Giborees. I refer to both the report and the decision collectively as "the QLDC decision".

[12] CSF lodged a notice of appeal to the Environment Court against the rezoning decision on 19 June 2018. There was the potential for that notice of appeal to be struck out because CSF had not been a submitter as to the matter on which it had lodged the appeal.

[13] The applicants submit QLDC made errors in the QLDC decision in:

(a) placing improper weight on CSF's appeal of the Council's decision to zone the Subject Site as Low Density Suburban Residential Zone in the Proposed District Plan (PDP);

(b) failing to apply the Operative District Plan (ODP) correctly;

(c) defining an erroneous permitted baseline of adverse effects that could lawfully be disregarded under ss 95E(2)(a) and 104(2) of the RMA;

(d) Applying the permitted baseline discount over the wrong property by discounting the effects of development on 3 York Street instead of 1 York Street;

(e) failing to identify the owners of 3 York Street as affected persons;

(f) failing to correctly identify the extent of the adverse effects of the proposed activities; and

(g) failing to identify that compliance with consent condition 21(a) affects the interests of the applicants and requires the consent of the applicants to implement.

Legislation and principles applicable to a notification decision

[14] In the circumstances of this case, public notification of CSF's resource consent application was required if QLDC decided, in accordance with ss 95A(8)(b) and 95D RMA, that the application would "have or is likely to have adverse effects on the environment that are more than minor".[1]

[15] If QLDC determined that public notification was not required because the likely adverse effects on the environment would be minor or less than minor, QLDC had to determine whether there should be limited notification of the application in accordance with the steps set out in s 95B RMA. In the circumstances of this case, this required QLDC to determine whether there were persons on whom the proposed activity's adverse effects would be minor or more than minor (but not less than minor). If QLDC found there were such affected persons in terms of s 95E, QLDC was required to notify each such affected person.[2]

[16] In determining issues as to whether there should be notification of an application, s 95D states:

> **95D Consent authority decides if adverse effects likely to be more than minor**
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> A consent authority that is deciding, for the purpose of section 95A(8)(b), whether an activity will have or is likely to have adverse effects on the environment that are more than minor—
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> …

1 Resource Management Act 1991, s 95A(8)(b).
2 Resource Management Act, s 95B(9).

(b) may disregard an adverse effect of the activity if a rule or national environmental standard permits an activity with that effect; …

[17] Section 95E provides:

> **95E Consent authority decides if person is affected person**
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> (1) For the purpose of giving limited notification of an application for a resource consent for an activity to a person under section 95B(4) and (9) (as applicable), a person is an **affected person** if the consent authority decides that the activity's adverse effects on the person are minor or more than minor (but are not less than minor).
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> (2) The consent authority, in assessing an activity's adverse effects on a person for the purpose of this section,—
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> (a) may disregard an adverse effect of the activity on the person if a rule or a national environmental standard permits an activity with that effect; and
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> (b) must, if the activity is a controlled activity or a restricted discretionary activity, disregard an adverse effect of the activity on the person if the effect does not relate to a matter for which a rule or a national environmental standard reserves control or restricts discretion; and
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> (c) must have regard to every relevant statutory acknowledgement made in accordance with an Act specified in Schedule 11.
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> (3) A person is not an affected person in relation to an application for a resource consent for an activity if—
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> (a) the person has given, and not withdrawn, approval for the proposed activity in a written notice received by the consent authority before the authority has decided whether there are any affected persons; or
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> (b) the consent authority is satisfied that it is unreasonable in the circumstances for the applicant to seek the person's written approval.
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> (4) Subsection (3) prevails over subsection (1).

[18] For a person not to be an "affected person", QLDC thus has to decide that the activity's adverse effects on a person potentially affected would be less than minor. If the adverse effects on a person potentially affected are minor or more than minor there is a mandatory obligation to give limited notification under s 95B(2).

[19] In *Auckland Council v Wendco (NZ) Ltd*, the courts were concerned with whether Auckland Council had taken into account the possibility of on-site adverse

effects in deciding whether there were affected persons who had to be notified of the application.[3] William Young J, for the majority of the Supreme Court, stated:

> [45] … The associated question that then arises is whether there was an adequate evidential basis for its conclusion that such effects would be less than minor and thus that non-notification was appropriate.
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> [46] On the basis of *Discount Brands v Westfield (New Zealand) Ltd*, the validity of the non-notification decision does not depend on this Court agreeing with the view taken by the Council that the adverse effects of the activity on Wendy's would be less than minor.[4] On the other hand, the Court must review the adequacy of the information before the Council when making the non-notification decision. This assessment must reflect the reality that in making the decision not to notify the application, the Council was precluding any opportunity for Wendy's to have input into the decision.

[20] Courts have continued to follow the decision of the Supreme Court in *Discount Brands Ltd v Westfield (New Zealand) Ltd* and, in particular, the judgment of Blanchard J as to the information requirements for a decisionmaker determining whether or not to notify a resource consent application.[5]

[21] Here, the applicants do not complain that QLDC had inadequate information before it when it made its notification decision or that notification would have elicited information that could have altered its assessment as to whether the effects of the proposed activity would be less than minor. The complaint is that QLDC was in error in the way it reached its decision on all the information which was available to it.

[22] In *Tasti Products Ltd v Auckland Council*, Wylie J agreed with commentators that a broad or liberal approach should be taken to the interpretation of words relevant to the determination as to whether there is an affected person, given the principle that affected persons should be able to participate in matters that affect them if they wish to do so.[6]

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3 *Auckland Council v Wendco (NZ) Ltd* [2017] NZSC 113, [2017] 1 NZLR 1008.

4 *Discount Brands v Westfield (New Zealand) Ltd* [2005] NZSC 17, [2005] 2 NZLR 597. "Wendy's" is the potentially affected neighbour.

5 See for example *Auckland Council v Wendco (NZ) Ltd*, above n 3; *Coro Mainstreet (Inc) v Thames-Coromandel District Council* [2013] NZHC 1163, [2013] NZRMA 442; *Ferrymead Retail Ltd v Christchurch City Council* [2012] NZHC 358.

6 *Tasti Products Ltd v Auckland Council* [2016] NZHC 1673, [2017] NZRMA 22 at [80].

[23] I note however that the Court of Appeal in *Coro Mainstreet (Inc) v Thames-Coromandel District Council* and the Supreme Court in *Auckland Council v Wendco (NZ) Ltd* both considered it arguable that amendments to the RMA since *Discount Brands Ltd v Westfield (New Zealand) Ltd*, and in particular 2009 amendments, might require courts to reduce the intensity of review to be applied to non-notification decisions from that mandated in *Discount Brands* so as to give effect to the apparent intention of Parliament to give consent authorities greater scope to decide not to notify resource consent applications.[7]

[24] As was helpfully explained by counsel for QLDC:

> 6.1 Section 9(3) of the RMA provides that no person may use land in a manner that contravenes a district rule unless the use is expressly allowed by a resource consent. In the general course a resource consent is required under the current operative district plan. However, at times consent may be required under both an operative plan and a proposed plan. This situation comes about where rules in a proposed plan have taken legal effect but have not yet become operative.
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> 6.2 Rules in a proposed district plan take legal effect at a number of different points in time as set out in section 86B of the RMA. The most common is at the time that a territorial authority makes its decisions on submissions on the proposed rules.
>
> 6.3 Rules become operative after the period that a proposed plan is notified if there are no submissions, or at the time that all submissions or appeals on the rules are resolved.[8]
>
> 6.4 The result is that there is commonly a period of time between when proposed rules have legal effect and when they become operative. In this time period resource consent is required under both the proposed and operative plans.[9]
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> 6.5 If the outcome of a consent application would be the same under both an operative and proposed plan, the existence of two plans makes little difference. However, if the outcome would be different under the two different plans, the consent authority is required to carry out a weighting exercise prior to making a decision on the substantive consent.

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7 *Coro Mainstreet Inc v Thames-Coromandel District Council* [2013] NZCA 665, [2013] NZRMA 73; *Auckland Council v Wendco (NZ) Ltd*, above n 3, at [47]; *Discount Brands Ltd v Westfield (New Zealand) Ltd*, above n 4.

8 Resource Management Act, s 86F.

9 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 580-581.

6.6 There is no statutory guidance on how a weighting exercise is to be carried out. As such, the relevant principles are established in case law. The leading case is *Keystone Ridge Limited v Auckland City Council*.[10] In *Keystone* the High Court accepted the summary of the principles relating to weighting set out by the Environment Court in that case, being:[11]

- The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

- The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:

  (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making;

  (ii) circumstances of injustice;

  (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.

- In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.

6.7 As emphasised in *Keystone* the extent to which weight is to be given to a proposed plan depends on context and is to be assessed by the consent authority on a case by case basis. The context that may be relevant to a weighting exercise includes the extent to which the proposed plan has been through the objective process, potential for injustice, the existence of any shift in Council policy, and whether any new measure might implement a coherent pattern of objectives and policies in a plan.

[25] In *Queenstown Central Ltd v Queenstown Lakes District Council*, Fogarty J said:[12]

> [9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans.

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10 *Keystone Ridge Ltd v Auckland City Council* HC Auckland AP24/01, 3 April 2001.

11 At [16] and [36].

12 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, [2013] NZRMA 239.

[26] Wylie J also observed in *Tasti Products*:[13]

> [81] Consideration of the context in which the notification decision needed to be made is informative. A decision whether or not to notify an application either publicly or on a limited basis, must logically precede the decision on the application itself. When considering an application for a resource consent under s 104(1), the consent authority is required to have regard to various specific matters, including any relevant provisions of a plan or proposed plan. Similarly, under s 104D(1), a consent authority may grant a resource consent for a non notifying activity, only if it is satisfied in regard to various specified threshold matters. Where there is a relevant operative plan and a relevant proposed plan, it has to be satisfied that the application is for an activity that will not be contrary to the objectives and policies of both plans.
>
> [82] If the policies and objectives contained in a proposed plan are required to be taken into account in making the substantive decision on the resource consent application, then, in my judgment, it is axiomatic that they must be relevant in determining whether a person is affected by the application, so as to require that the consent authority find the person to be effected [sic] under s 95E(1), and then give limited notification of the application to that person pursuant to s 95B(2).

[27] Here, I am concerned with the process by which QLDC decided the adverse effects on the applicants would be "less than minor". As to that, I respectfully adopt Dunningham J's approach to the required assessment as stated in *Speargrass Holdings Ltd v Queenstown Lakes District Council*:[14]

> [139] As Speargrass submits, no "absolute yardstick" exists for determining when an effect is "minor", "less than minor" or "more than minor" and those are matters of fact and degree to be informed by context. I accept that a useful explanation of what constitutes "less than minor" was given in *Gabler v Queenstown Lakes District Council*, where Davidson J said it is "that which is insignificant in its effect, in the overall context, that which is so limited that it is objectively acceptable and reasonable in the receiving environment and to potentially affected persons".

[28] All parties accepted the principles of judicial review in respect of notification decisions were as articulated by the High Court in *Coro Mainstreet (Inc) v Thames-Coromandel District Council*:[15]

> [40] It is not the function of the Court on an application for review to substitute its own decision for that of the consent authority. Nor, will the court assess the merits of the resource consent application or the decision on

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13 *Tasti Products Ltd v Auckland Council*, above n 6.

14 *Speargrass Holdings Ltd v Queenstown Lakes District Council* [2018] NZHC 1009, (2018) 20 ELRNZ 845, citing *Gabler v Queenstown Lakes District Council* [2017] NZHC 2086, (2017) 20 ELRNA 76 at [94].

15 *Coro Mainstreet (Inc) v Thames-Coromandel District Council*, above n 5.

> notification. The inquiry the Court undertakes on an application for review is confined to whether or not the consent authority exceeded its limited jurisdiction conferred by the Act. In practice the Court generally restricts its review to whether the Council as decision maker followed proper procedures, whether all relevant and no irrelevant considerations were taken into account, and whether the decision was manifestly reasonable. The Court has a discretion whether or not to grant relief even if it is persuaded that there is a reviewable error.

Failure to place proper weight on LDSR zoning in PDP

[29] For the applicants, Mr Page submitted there was a fundamental injustice in QLDC's non-notification decision and substantive s 104 decision in that it effectively denied the applicants the benefits they had obtained through the rezoning decision, and the LDSR zoning of 1 York Street and their properties in the PDP. Mr Page argued QLDC did that on the basis the rezoning was subject to an appeal when QLDC staff were aware that the appeal by CSF was invalid because CSF had no right to lodge an appeal and the Environment Court had no jurisdiction to hear it.

[30] The applicants argue there was no valid appeal relating to the Commissioners' decision to rezone 1 York Street. The rules in the PDP as to the site should have been treated as operative because they were beyond challenge. The applicants argue that, in failing to give proper weight to the operative provisions in Chapter 7 LDSR zone of the PDP, QLDC failed to consider a relevant matter it was required to take into account when making its decision.

[31] In submissions for QLDC, Ms Hockly accepted that rules in a proposed plan become operative after the period that a proposed plan is notified if there are no submissions or at the time that all submissions or appeals on the rules are resolved. She acknowledged there can be a period of time between when proposed rules have legal effect and when they become operative. In that time period, resource consent applications have to be considered under both the proposed and operative plans.

[32] For the QLDC, Ms Hockly submitted that:

(a) s 86F is prescriptive and relevantly all appeals had to have been determined before a rule in a proposed plan could be treated as operative;

(b) here, PDP rules relevant to the resource consent application that QLDC was considering were not settled because rules were subject to appeals at the time of the QLDC decision;

(c) s 86F(1) is clear in its terms and without qualification. A rule in a proposed plan has to be treated as operative only if no appeals have been lodged or all appeals have been determined, withdrawn or dismissed. QLDC could not lawfully have decided that CSF's appeal was a nullity;

(d) regardless of the jurisdictional basis for CSF's appeal, rules relating to the zoning of the 1 York Street site were the subject of valid appeals. Rule 7.5.5, as to building coverage, was subject to an appeal by Willowridge Developments Ltd. Rule 7.5.11, as to density, was subject to an appeal by the Queenstown Airport Corporation Ltd; and

(e) because relevant rules in the PDP were subject to appeal, they could not be treated as operative. Previous rules in the ODP could not be treated as inoperative. In those circumstances, QLDC had to consider both the ODP and PDP and decide what weighting should properly be given to relevant provisions in both the ODP and PDP. QLDC argues there was no error in the way it did that.

[33] In its decision, QLDC first considered whether the effects of the proposed activity on the environment would be minor. Having decided they would be, QLDC then considered whether the adverse effects on persons potentially affected would be less than minor. In carrying out those assessments, QLDC recognised they it to consider relevant rules in both the ODP and the PDP. There were a number of references to this in its decision.

[34] In its decision, QLDC proceeded on the basis overall the application was for a non-complying activity under the ODP and a non-complying activity under the PDP (Stage 1 Appeals Version 2018).

[35] In its decision, QLDC said Stage 2 of the PDP had been notified on 23 November 2017 but there were no rules within the Stage 2 Notified Version 2017 that had immediate legal effect and which required resource consent.

[36] In considering whether public notification was required because the proposed activity would have or be likely to have adverse effects on the environment that were more than minor, QLDC noted it may disregard an adverse effect if a rule permits an activity with that effect. It noted that it was a permitted activity to erect residential buildings on the site which complied with "all site and zone standards of the ODP and PDP".

[37] In making an assessment as to effects on the environment, QLDC identified the relevant assessment matters under the ODP and said they had been considered in its assessment. QLDC said relevant assessment matters in the PDP had also been considered. QLDC concluded on the basis of its assessment of effects the application was not likely to have adverse effects on the environment that were more than minor. As a result, public notification was not required by step 3, s 95A(7)(b).

[38] QLDC then went through the required steps to determine whether to give limited notification of the application for resource consent. It began by noting that limited notification was not precluded under step 2 as the proposal was not subject to a rule in either the ODP or PDP Stage 1 Appeals Version 2018 that precluded notification.

[39] QLDC went on to identify persons who might be adversely affected by the proposed activity, again by reference to the matters that required consideration in both the ODP and PDP. In doing so, it identified the concerns that had been raised by nearby residents, including the applicants in these proceedings.

[40] Those concerns included effects of shading from the development, that the development would set a precedent for future development, pressures on the right of way and a roll-on effect up Queenstown Hill to an established residential area, the intensity of units in what they considered to be a residential area, social impact on what they considered to be "a presently quiet residential area" and noise due to high

density living. The focus of their concerns addressed at the hearing before me related to the loss of views.

[41] QLDC considered the way proposed activity could result in loss of views and outlook experienced from neighbouring properties, including 9A to 9D and 11 York Street. In doing so, it appears to have given little weight to LDSR zoning of 1 York Street in the PDP.

[42] As to the way the applicants' views and outlook from their properties would be affected by the proposal, the QLDC noted:

> *Views and outlook*
>
> The proposed development breaches the maximum height limit to varying degrees at various locations across the site, the worst case of which is at the centre of the site. This is due to the variable topography of the site.
>
> The proposed development has the potential to result in loss of views and outlook experienced from neighbouring properties; those views being towards Lake Wakatipu, Kelvin Peninsula, Queenstown Gardens, Cecil Peak, Walter Peak, Ben Lomond, Bob's Peak, Queenstown Hill, and the Remarkables mountain range.
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> …
>
> Views from Nos. 9A-9D [York Street] would be most potentially affected by the proposed development, given their boundary spans parallel with a large portion of the north-eastern site boundary.

As a result of a site visit undertaken on 26 May 2018, it was determined that:

> … if a building were to be built at the level of the common boundary, to a permitted height of 7 metres, much of the views [from properties at 9A and 9D York Street] of Lake Wakatipu would be impeded. Views of Kelvin Peninsula and Queenstown Gardens would be blocked almost in their entirety.

Through a site visit to properties at 9A and 9D York Street on 30 July 2018, it was determined:

> The proposed development would hinder some views of the base of the natural landscape features of Cecil Peak, Walter Peak, Ben Lomond, and Bob's Peak, however the loss of these views would have a low magnitude of effect in respect of Nos. 9A-9D York Street when compared to a complying development which could include a 7m high building located 2m from the north-eastern site boundary. More importantly, views of the main form of these mountains and peaks would be retained as a result of the proposed

> development. The gap in the built form will provide a further mitigating factor, to ensure some lake views are also retained (which a permitted development may not).
>
> Overall, given the permitted level of development that could occur under the ODP high density zoning, the proposed development would result in less than minor adverse effects on people in respect of views and outlook experienced from Units 9A-9D York Street.

[43] As to loss of view, the assessment acknowledged that neighbouring landowners would be affected but, in that regard, noted that development on the application site could be constructed to a height of seven metres as a permitted activity. QLDC concluded that much of the views afforded to neighbouring properties would be largely blocked by a permitted development, particularly with regard to views of Lake Wakatipu. QLDC concluded:

> The extent of effects on owners/occupiers of neighbouring properties has been assessed when compared with a complying development in Section 4.3.3 above, and this has been found to be less than minor, particularly when views of the main forms of mountain ranges would be preserved.

[44] QLDC noted:

> The Operative and Proposed District Plans do not specifically protect private views, rather it seeks to protect public views. Notwithstanding this, whilst some views would not be preserved, the above assessment demonstrates that views towards Lake Wakatipu, Kelvin Peninsula, Queenstown Gardens, Cecil Peak, Walter Peak, Ben Lomond, Bob's Peak, Queenstown Hill, and the Remarkables mountain range would be largely preserved as a result of the proposed development. This assessment is particularly relevant when comparing a complying development to that proposed, where views may be further impeded.

[45] QLDC then considered the application in terms of s 104 RMA which required it to consider relevant provisions of a plan or proposed plan.

[46] Relevantly, s 104 states:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; and

(ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and

(b) any relevant provisions of—

(i) a national environmental standard:

(ii) other regulations:

(iii) a national policy statement:

(iv) a New Zealand coastal policy statement:

(v) a regional policy statement or proposed regional policy statement:

(vi) a plan or proposed plan; and

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) 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.

[47] QLDC concluded the proposal was not contrary to the objectives and policies of the ODP.

[48] QLDC then considered the application in terms of the objectives and policies of the PDP. QLDC referred to various objectives and associated policies in certain chapters of the PDP and ways in which it considered the proposed development was consistent with those objectives and policies.

[49] It is thus apparent from the above that, in reaching its decision as to notification and its substantive s 104 RMA decision to grant the consent, QLDC had regard to the ODP and, to a certain extent, also the PDP.

[50] QLDC however acknowledged the proposal was not consistent with the relevant objectives and policies of the Stage 1 Decisions Version 2018. QLDC also acknowledged that the Council had notified Stage 2 of the PDP on 23 November 2017 with immediate legal effect pursuant to s 86A(2) RMA, so that QLDC had to consider those objectives and policies in dealing with the application. QLDC noted that, for

the LDSR zone, the location, scale and intensity of visitor accommodation, residential visitor accommodation and homestays had to be managed to maintain the residential character of the zone.

[51] The policies for visitor accommodation in locations within the LDSR Visitor Accommodation Subzone sought to ensure that the zone maintained a residential character and the supply of residential housing, and that relevant policies sought to maintain residential activities in locations of the LDSR zone that are not in the Visitor Accommodation Subzone. QLDC acknowledged that the proposal did not maintain residential activity as the predominant use of the subject site given the proposal sought to allow up to 24 of the proposed units to be used for visitor accommodation activities.

[52] QLDC thus concluded "the proposal does not align with the relevant objectives and policies" of the PDP (Stage 2 Notified Version 2018).

[53] QLDC said in the QLDC decision the earlier rezoning decision to rezone land as LDSR was subject to an appeal and so the status of the appeal and zone were uncertain. It acknowledged that a number of rules applying to the LDSR zoning had been identified as having legal effect and as being relevant to the application but, pursuant to s 86F, were not to be treated as operative because appeals had been lodged in respect of those rules by two other parties.

[54] QLDC noted that, because of the appeal, a weighting exercise was required. QLDC concluded:

> In this report, the application has been assessed primarily in relation to the rules and provisions of the ODP. The proposal has also been assessed in relation to the Objectives and Policies of the PDP. The assessment above demonstrates that the proposal is consistent with the relevant objectives and policies of the ODP. However the proposal is not consistent with all relevant objectives and policies of the PDP.
>
> An appeal has been lodged by the applicant in respect of the rezoning of the application site from High Density Residential to Lower Density Suburban Residential. The relief sought by the appellant is to reinstate the High Density Residential Zone for the application site (and the adjacent property known as the York Street section, Lot 2 DP 399178).

> As discussed previously in this report, the Commissioner decision on the request to rezone the application site sets out that the determinative factor in considering the submissions is the capacity of the Right of Way to accommodate any increase in traffic arising from further intensification. The Commissioner decision found that the more intensive use of the Right of Way would have adverse effects on the existing dwellings and residents due to the increased inconvenience and loss of amenity values associated with additional traffic on the driveway. The proposed development does not obtain vehicular access from the Right of Way, and in addition the applicant proposes to relinquish their rights over the vehicular portion of the Right of Way, such that there would be no legal rights to the proposed development along this part of the Right of Way.
>
> As the PDP is presently under appeal, and specifically the rezoning of the application site has been appealed, minimal weight can be afforded to the provisions of the PDP.
>
> Therefore it is considered that the proposal has been appropriately assessed in relation to the legal weight of the ODP and PDP provisions.

[55] In the context of carrying out that weighting exercise, QLDC again said that, because the PDP was presently under appeal, and specifically so with regard to the rezoning of the subject site, "minimal weight" could be afforded to the provisions of the PDP.

[56] The applicants thus could, at least potentially, have benefited from the objectives and policies of the LDSR zoning of 1 York Street and their properties in ways that were given minimal weight by QLDC in deciding whether the proposed activity on them would exceed "less than minor".

[57] The applicants say however that, in the circumstances, QLDC should not have attached weight to a number of the rules as to the HDR zoning for the subject site in the way it did. The applicants argued the only valid appeals before the Council were as to two specific rules applying to the LDSR zone. CSF's appeal as to the whole of the LDSR zoning was invalid. Thus, except to the extent specific rules in the LDSR zone were at the time subject to valid appeals, the rules of the HDR zone should no longer have been treated as operative.

[58] I accept the submission made for QLDC that it had no option but to make its decision as to notification in the context of there then being an appeal as to the LDSR zoning which had not been resolved.

[59] Section 86F RMA sets out:

> **86F When rules in proposed plans must be treated as operative**
>
> (1) A rule in a proposed plan must be treated as operative (and any previous rule as inoperative) if the time for making submissions or lodging appeals on the rule has expired and, in relation to the rule,—
>
> (a) no submissions in opposition have been made or appeals have been lodged; or
>
> (b) all submissions in opposition and appeals have been determined; or
>
> (c) all submissions in opposition have been withdrawn and all appeals withdrawn or dismissed.
>
> (2) However, until the decisions have been given under clause 10(4) of Schedule 1 on all submissions, subsection (1) does not apply to the rules in a proposed plan that was given limited notification.

[60] In reply submissions, counsel for the applicants referred to the judgment of the High Court in *Martin v Ryan* and in *Murray v Whakatane District Council* as requiring me to regard the CSF appeal as being invalid from the time it was filed.[16]

[61] I do not consider this is what those authorities require me to do.

[62] In *Martin v Ryan*, the High Court was concerned with the effect of setting aside a Court order. The High Court was considering whether it should retrospectively set aside the decision of the District Court, where that would have the effect of invalidating agreements entered into pursuant to that decision. In that context, the High Court stated:[17]

> The demise of the absolute theory of invalidity … is at least for New Zealand purposes now complete … The current approach is that "Except perhaps in comparatively rare cases of flagrant invalidity, the decision in question is recognised as operative unless set aside." …
>
> At least in the majority of cases the vitiating features of an impugned decision create no more than a latent invalidity which will be of no legal consequence unless and until it is rendered operative by the decision of a court of competent jurisdiction. The occasion for the latter decision might never arise.

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16 *Martin v Ryan* [1990] 2 NZLR 209 (HC); *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC).

17 *Martin v Ryan*, above n 16, at 62 and 65.

[63] In *Murray v Whakatane District Council*, the High Court was concerned with a council's decision to deal with a consent application on a non-notified basis. The Court found the errors were fundamental and set aside the decision from the beginning. The Court said:[18]

> It is settled law that every unlawful administrative act, except perhaps in extreme cases of clear usurpation of power, is operative until set aside by a court. Even where a decision is challenged by a plaintiff entitled to do so in appropriate legal proceedings, the court is not compelled to set aside the decision … The validity of a decision is therefore a concept which is "relative, depending upon the court's willingness to grant relief in any particular situation".

[64] The lodging of the CSF appeal to the Environment Court against the LDSR zoning was not an administrative act of the Council. It is consistent with the authorities just referred to that the lodging of the appeal was valid until it was struck out by the Environment Court. Although it was struck out for want of the Court's jurisdiction to hear that appeal, it was nevertheless an appeal which was before the Environment Court at the time QLDC made its decision of 8 October 2018.

[65] I do not consider there was an error in QLDC making its decisions of 8 October 2018 on the basis the rezoning decision was the subject of an appeal. This does not mean there was no error.

[66] With QLDC having to consider the provisions of both the ODP and the PDP, as was acknowledged, it was required to carry out a weighting exercise.

[67] As was submitted for QLDC, the weight to be attached to the PDP depended on the extent to which it had proceeded through the objection and appeal process. In assessing the weight to be accorded to the PDP, this case had to be considered on its own merits and its particular facts. QLDC had to consider potential circumstances of injustice.

[68] On the evidence before me by way of documents and affidavits, I am satisfied:

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18 *Murray v Whakatane District Council*, above n 16, at 60.

(a) CSF was not a submitter as to the rezoning of the relevant properties in the PDP from HDR to LDSR zoning.

(b) Just prior to the close of the period for appeals against the rezoning decision, Mr Bayliss, a planning policy manager with QLDC, told Mr Francis of CSF that, because Mr Francis had not submitted on the PDP in relation to York Street, he thought there was no clear standing for him to appeal QLDC's decision, that he was uncertain as to how the Environment Court might respond to an attempt to appeal QLDC's decision in these circumstances, that it might be possible for the Court to allow an appeal and he strongly encouraged Mr Francis to seek legal advice on how he might pursue an appeal.

(c) The only appeal lodged as to the rezoning of 1 York Street and neighbouring properties was CSF's. That appeal was lodged with the Environment Court on 19 June 2018.

(d) On 10 August 2018, solicitors for the applicant Mrs Knowles advised QLDC that they considered QLDC should file an application for strikeout on the basis CSF had not made a submission on the relevant matter.

(e) On 8 October 2018, QLDC made the QLDC decision not to notify the applicants and to grant the consents sought by CSF.

(f) On 2 November 2018, Mrs Knowles applied to the Environment Court to strike out the CSF appeal.

(g) On 2 November 2018, counsel for QLDC filed a memorandum with the Environment Court supporting the strikeout application on the grounds that CSF had not made a submission as to the relevant matter and was not a successor to any submitter in a way that provided it with standing.

(h) On 19 December 2018, there was a hearing in the Environment Court as to the strikeout application.

(i) On 15 February 2019, Environment Court Judge Jackson held that CSF did not have standing to seek the relief sought in the notice of appeal and struck out the appeal for lack of jurisdiction.

[69] The QLDC decision was made on 8 October 2018. At that time, the QLDC decision on the PDP as to the rezoning of the relevant properties was subject to appeal. As was suspected to be the case by QLDC staff at the time and as ultimately confirmed by the Environment Court, the Environment Court had no jurisdiction to hear that appeal.

[70] In considering what weight should have been given to the PDP and, in particular, the rezoning of the subject site to LDSR, the particular potential considerations as to the justice of the whole situation and the particular facts of this case required QLDC to give considerable weight to the LDSR zoning of the subject site in the PDP. That was required because there had already been a full hearing as to the submissions which had been made for a rezoning of that area. The Commissioners had heard detailed submissions from QLDC planners in opposition to the submissions which had been made to them. The Commissioners' recommendations were then implemented through QLDC's rezoning decision and notification of that decision.

[71] Although QLDC could not, of itself, determine CSF's appeal to be invalid, it could make an assessment as to the likelihood of CSF being able to pursue an appeal against the LDSR zone. QLDC could and should have determined that the prospects of CSF being able to continue with the appeal were low and there was thus every likelihood that the LDSR zoning of the subject site would be operative. QLDC must have made that assessment when, on 2 November 2018, its counsel filed a memorandum with the Environment Court supporting Mrs Knowles' strikeout application.

[72] QLDC proceeded with its 8 October 2018 decision as to notification and its substantive decision without taking into account a relevant consideration, the likelihood that CSF's appeal would not succeed and the LDSR zoning for the subject site in the PDP would remain in place and become operative. In failing to do that, QLDC failed to have regard to a matter which was relevant to the assessments it had

to make, both in deciding whether there should be notification and as to the application itself.

[73] On that basis, the applicants are entitled to a declaration that QLDC's decision not to notify the application to the persons who it had identified as potentially affected, was invalid.

Failure to apply the ODP rules correctly, wrongful application of permitted baseline principle to 3 York Street

[74] The applicants' arguments as to this drew heavily on the expert evidence by affidavit of an experienced planner, Mr Vivian.

[75] I note and respectfully agree with the observation made by Wylie J in *Tasti Products Ltd v Auckland Council*:[19]

> [75] It is the decision itself which is the subject of the review application, and not what Council officers, with the benefit of hindsight, say they did or did not do in their affidavits.[20] Nor is it helpful for parties to applications like this to file voluminous affidavits by planners seeking to criticise or support the Council's decision. It stands to be considered in its terms and no amount of ex post facto criticism or justification can change it.

[76] In his evidence, Mr Vivian argued that QLDC's planners had taken a too simplistic approach by reaching their ultimate determinations on the basis it was a permitted activity under the ODP to erect a residential building on the 1 York Street site that complied with all site and zone standards and, in doing so, they failed to apply rules which were intended to protect the visual amenity of the applicants' properties.

[77] I accept the submission made for the respondents that, in the QLDC decision, QLDC did consider all relevant rules in the ODP in reaching its determination as to notification and substantively when considering matters under s 104. Having reached a determination in relation to relevant matters and relevant rules separately, QLDC did make overall assessments as to how the particular matters in respect of which they required consent would affect the amenities of the applicants' properties.

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19 *Tasti Products Ltd v Auckland Council*, above n 6.

20 *Hanna v Whanganui District Council* [2013] NZHC 1360, (2013) 17 ELRNZ 314, at [14]-[15].

[78] The applicants also argued that QLDC was in error in the way it had decided it would be a permitted activity under the ODP to build an eight metre tall accessory building on the vacant site at 3 York Street and treated that as relevant to the QLDC decision, both as to notification and substantively.

[79] The applicants argued that the erection of a building of any size on 3 York Street was an unrealistic or fanciful possibility, even if allowed by the relevant plan. They say the erection of any building would have to be as accessory to the use of 9A-9C York Street for residential purposes. They submitted that, because the owners of 3 York Street acquired it as a vacant space with the intention of keeping it vacant to protect their views, it was fanciful to suggest that the owners would erect a building on that site eight metres high.

[80] QLDC submitted it was not unreasonable for it to conclude that the owners of 3 York Street might decide to construct a building at some time in the foreseeable future on a valuable piece of flat land, in close proximity to the town centre and surrounded by high density development. It noted there was nothing in the resource consent decision by which title to 3 York Street was amalgamated with those for 9A-9C York Street or the title instrument for 3 York Street that would prevent buildings being erected on 3 York Street.

[81] On review, it is not for the Court to assess the merits of the consenting authority's determination unless, as QLDC acknowledged, the Court can find there was no reasonable basis for that determination.

[82] In the context of this case, one issue seemed to be whether QLDC could reasonably take into account the way 3 York Street might be developed by potential owners of 9A-9C York Street when the present owners had no intention of developing 3 York Street in that way.

[83] At a more general level, did consideration of what was permitted under a district plan in assessing what constituted the receiving environment have to be limited with due regard to the intentions of those currently owning the land under consideration?

[84] As was explained in submissions for both the applicants and the respondents, the issues in this regard engaged with the concepts of the permitted baseline and receiving environment.

[85] The "permitted baseline" is a judge-made concept that is used to assist in the assessment of effects of any applications for consent. In short, it enables a consent authority, in assessing the effects of an application on the environment or on persons who might be affected by the proposed activity, to disregard any effects that would also result from activities permitted on the site.

[86] In *Bayley v Manukau City Council*, the Court of Appeal observed:[21]

> Before s 94 authorises the processing of an application for a resource consent on a non-notified basis the consent authority must satisfy itself first, that the activity for which consent is sought will not have any adverse effect on the environment which is more than a minor effect. The appropriate comparison of the activity for which the consent is sought is with what either is being lawfully done on the land or could be done there as of right.

[87] In *Smith Chilcott Ltd v Auckland City Council*, the Court of Appeal held that the permitted baseline approach could be applied to substantive decisions, as well as non-notification decisions.[22] The Court also commented on what effects might appropriately be disregarded when assessing what could be done as a permitted activity. The Court concluded that:[23]

> In accordance with the purpose of the legislation anything that is permitted but fanciful does not provide a realistic indication of what is permitted and a proper point of comparison. There must be a practical fact specific assessment. The test is perhaps best captured in a single expression as the discussion at the hearing indicated. Of the various phrases used in *Barrett* and elsewhere, "not fanciful" appears to us to set the standard appropriately. It follows that any permissible use qualifies under the permitted baseline test unless in all circumstances it is a fanciful use.

[88] The permitted baseline concept was recognised in legislation in 2003 under what is now s 95E(2)(a). This says a consent authority "may disregard an adverse effect of the activity … if a rule or a national environmental standard permits an activity with that effect".

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21 *Bayley v Manukau City Council* [1999] 1 NZLR 568 (CA) at 576.
22 *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473 (CA).
23 At [26], citing *Barrett v Wellington City Council* [2000] NZRMA 481 (HC).

[89] Counsel for QLDC referred to the way a similar type of baseline concept has also come to be applied in deciding what constituted the "environment", against which the effects of the proposed activity were to be assessed. Such an assessment is required when considering whether there has to be notification under s 95A(8)(b) and also when considering an application for resource consent substantively.

[90] Section 104(1)(a) mandates that the consent authority must have regard to actual and potential effects on the environment of the proposed activity.

[91] In *Queenstown-Lakes District Council v Hawthorn Estate Ltd*, the Court of Appeal said that, in considering the meaning of the words used in s 104(1)(a):[24]

> … the word "environment" embraces the future state of the environment as it might be modified by the utilisation of rights to carry out permitted activity under a district plan. It also includes the environment as it might be modified by the implementation of resource consents which have been granted at the time a particular application is considered, where it appears likely that those resource consents will be implemented.

[92] In *Arrigato Investments Ltd v Auckland Regional Council*, the Court of Appeal stated:[25]

> What is permitted as of right by a plan is deemed to be part of the relevant environment. But, beyond that, assessments of the relevant environment and relevant effects are essentially factual matters not to be overlaid by refinements or rules of law.

[93] And:[26]

> Thus the permitted baseline in terms of *Bayley*, as supplemented by *Smith Chilcott Ltd*, is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan.

[94] In *Nash v Queenstown Lakes District Council*, Clifford J said:[27]

> … the assessment of the relevant environment and relevant effects are essentially factual matters, not to be overlaid by refinements or rules of law. That factual assessment, as acknowledged in the *Far North Council* case, is one that is required as a matter of law to be undertaken taking account of the future state of the environment, including as affected by other resource

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24 *Queenstown-Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA) t [84].
25 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA) at [38].
26 At [29].
27 *Nash v Queenstown Lakes District Council* [2015] NZHC 1041 at [64].

> consents that the consent authority is satisfied are likely to be put into effect.[28] That assessment is, of course, to be undertaken applying the effects-based approach fundamental to the RMA.

[95] As was submitted for QLDC, in terms of the receiving environment, the recent decision of the High Court, *Speargrass Holdings Limited v Queenstown Lakes District Council*, built on the *Hawthorn* principle, stating that the assessment of what constitutes the "environment" calls for a "real world" approach, not an artificial approach, to what the future environment will be.[29] A consent authority must not minimise the effects of a proposed activity, either by comparing it with an unrealistic possibility allowed by the relevant plan, or by ignoring its effects on what is, or undoubtedly will be, part of the environment in which the activity will take place.

[96] With due regard to all those authorities and s 95E(2)(a) RMA, the assessment as to what is permitted under a district plan should be the same whether that assessment is being made for the purpose of establishing the baseline against which the effects of a proposed activity on the site are determined or when the consent authority has to decide what constitutes the receiving environment which is going to be affected by the proposed activity.

[97] I accept the submission for QLDC that, in its decision, it did not apply the permitted baseline discount to the wrong property. It considered what might have been permitted on 3 York Street in deciding what constituted the environment which could be affected by the proposed development on 1 York Street.

[98] In the QLDC decision, QLDC did refer to the possibility of an eight metre high accessory building being constructed on 3 York Street and how that would fundamentally affect views from 9A-9D York Street to a greater extent than the proposed development. It stated:

> A development of this nature would fundamentally block any views from the units at Nos. 9A-9D towards Cecil Peak, Walter Peak, Ben Lomond, and Bob's Peak to a greater extent than the proposed development. As such, it is not unreasonable to conclude that, whilst the proposed development affects some views from Nos. 9A-9D, the effect would be indiscernible if a building

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28 *Far North District Council v Te Runanga-a-iwi o Ngāti Kahu* [2013] NZCA 221 at [94].
29 *Speargrass Holdings Ltd v Queenstown Lakes District Council*, above n 14, at [64].

> were constructed on No. 3 York Street, particularly given the application site is at a lower elevation than No. 3.

[99] The respondents argued that, in its decision, QLDC said that under the ODP an accessory residential building could be built to a maximum height of eight metres. They submitted that QLDC had acknowledged the owners' reasons for amalgamating 3 York Street with 9A-9C York Street and that QLDC had recorded that no additional saleable lot was created when QLDC consented to the amalgamation of 3 York Street with 9A-9C York Street. They submitted that this showed QLDC had considered whether an eight metre building could be built on 3 York Street. QLDC argued that its decision as to the potential for such a building of eight metres on 3 York Street was not open to question in the context of judicial review as it is not for this Court to consider the merits of QLDC's decision.

[100] QLDC nevertheless had to consider whether the erection of an eight metre high accessory building on 3 York Street was a fanciful possibility. In her submissions for QLDC, counsel acknowledged that QLDC's decision in this regard could be the basis for review if it was unreasonable. Counsel acknowledged that QLDC's reasoning might appear somewhat incongruous given the purpose for which 3 York Street was created. She nevertheless submitted that, on the information before QLDC, the Court could not decide that QLDC's decision as to this had been unreasonable. Planning maps show that 3 York Street is close to the town centre, is surrounded by developable land in the HDR zone that would be attractive for development. There was nothing in QLDC's earlier decision consenting to the amalgamation of the title to 3 York Street with those for 9A-9C York Street or in the title itself to prevent buildings being erected on 3 York Street. There was no covenant over 3 York Street that would prevent the owners of 3 York Street, at some time in the future, deciding to construct a building on a valuable piece of flat land in close proximity to the town centre and surrounded by high density development.

[101] QLDC acknowledged that title to 3 York Street had been amalgamated with those for 9A-9C York Street so that it would be kept vacant and not developed in any way that would detrimentally affect the views from its owners' properties.

[102] QLDC considered how the proposed development on 1 York Street could detrimentally affect neighbouring properties through shading. In that part of its decision, QLDC said the most potentially affected neighbour's property would be 3 York Street. It then said this was a vacant site held in joint ownership with Nos. 9A-9C, intended to be kept as an open space to preserve views. It concluded:

> The land at No. 3 is a communal area which is not utilised for any apparent outdoor living purposes. As such, effects on persons in relation to Units 9A-9C and the jointly owned vacant No. 3 York Street property would be less than minor.

[103] Having acknowledged the way 3 York Street would remain vacant, it was unreasonable for QLDC to have any regard to the potential for an accessory building eight metres high to be built on 3 York Street in the way it referred to in its decision.

[104] I find QLDC made an error in this regard but it was not a reviewable decision because it was not material to the determinations it reached either as to notification or on its substantive s 104 consideration.

[105] Under the heading "Receiving Environment", QLDC referred to there being a mixture of single residential units and multi-unit developments in the immediately surrounding area, and there being a number of HDR zone sites that were currently developed to a low density that did not necessarily fulfil the level of development anticipated by the HDR zoning of those sites. There was then a lengthy section in its decision under the heading "Assessment: Effects On The Environment" for the purpose of determining whether those effects would be minor or more than minor. In that part of the decision, there was no reference to the potential for a building to be erected on 3 York Street.

[106] In a later section, QLDC considered whether limited notification was required as to persons adversely affected by the proposed activity. In that section of the report, QLDC noted "the consent authority **may** disregard an adverse effect of the activity on a person if a rule or national environmental standard permits an activity with that effect. In this case, the permitted baseline is found within section 3.3.2" of the report. In that section of the report there was no mention of the sort of building that could be built on 3 York Street.

[107] In considering effects on views, QLDC considered in detail how the proposed development would affect the views of those neighbours who it had decided could potentially be adversely affected. There was a detailed assessment of the effect of views from 9A-9D York Street. The conclusion reached in that report, after such consideration, was:

> Overall, given the permitted level of development that could occur under the ODP high density zoning, the proposed development would result in less than minor adverse effects on people in respect of views and outlook experienced from Units 9A-9D York Street.

[108] It also concluded:

> No. 11 York Street has similar views to Units 9A-9D, however the only significant view that is likely to be affected in the direction of the proposed development would be of Ben Lomond. Given the elevation of No. 11 York Street above the application site, the loss of view would be minimal, with the main form of the mountain range still being in view. A permitted 7m high building would have a similar effect. Effects on the owners/occupiers at No. 11 in respect of views and outlook are considered to be less than minor.

[109] Between those two conclusions, QLDC did refer to the possibility of a seven to eight metre high accessory building being constructed on 3 York Street and the effect that would have on the views of 9A-9D and 11 York Street, as referred to earlier.

[110] There was then the further assessment of how the proposed development on the subject site would affect the views from other neighbouring properties, as referred to above at [44].

[111] QLDC thus made a determination as to how the views from 9A-9D and 11 York Street would be affected by the development proposed for 1 York Street. In doing that, its decision as to how the views would be affected was thus based on what was planned for 1 York Street, not what QLDC considered was permitted and what might be constructed on 3 York Street, although there was some reference to the latter.

[112] As counsel for QLDC noted in her submissions, QLDC in its decision then went on to discuss other types of adverse effects of the proposal on persons potentially affected. It concluded that those effects would be less than minor. In doing so, it did

not bring into its analysis the effects of a possible eight metre high building on 3 York Street.

[113] I thus accept the submission for QLDC that the conclusion which QLDC came to as to the way the proposed activity would have a less than minor effect on the view from the applicants' properties was reached independently of its observation as to the building the ODP permitted on 3 York Street. In that way, its reference to what would be permitted on 3 York Street was not material to the QLDC decision. I thus conclude that, although QLDC's reference to such a permitted development on 3 York Street was in error, it was not material and would not have impacted QLDC's conclusions as to the effects of the proposal on the applicants and thus would not have justified relief.

Failure to correctly identify the extent of the adverse effects of the proposed activity

[114] The applicants also argued that QLDC erred in assessing that an accessory building could be erected to a maximum height of eight metres. For that submission, they relied on evidence that had been provided by Mr Vivian that recession planes had to be measured from the boundaries of the small land area at 3 York Street. QLDC submitted there was no error in the way it determined the height to which an accessory building could be developed on 3 York Street. It relied on evidence in an affidavit from QLDC's planner Ms Giborees, that the "site", for the purpose of applying recession planes under the ODP, required 3 York Street to be combined with Lot 8 DP17970 (the title underlying units 9A-9D York Street). This was necessary because, from a planning perspective, 3 York Street cannot be sold or dealt with separately from the unit titles that it is amalgamated with.

[115] I consider the challenge the applicants have made to QLDC's decision in this regard is a challenge as to the merits of its decision. On the evidence before me, I have not been persuaded there was no reasonable basis for the determination QLDC came to in this regard. In any event, for reasons which I have already discussed, I do not consider QLDC's reference to the possibility of a building eight metres high being erected on 3 York Street was material to its decisions and thus amenable to review.

Failure to consider effects on 3 York Street

[116] Associated with criticisms of the way QLDC had considered matters as to 3 York Street, it was submitted for the applicants that the owners of 3 York Street were entitled to protection under the ODP and PDP rules. It was suggested no s 95E assessment had been carried out to identify whether the owners of 3 York Street were affected persons. It was submitted QLDC had, in this way, erred by failing to consider a matter that it was required to consider.

[117] I reject that criticism. In its decision, QLDC identified the owners/occupiers of neighbouring properties as being the only neighbours considered potentially affected by the proposed development. Those owners included the owners of 9A-9D York Street. In its decision, QLDC noted that 3 York Street was vacant but how it was owned. As illustrated by its consideration of shading issues, it considered how the activity would impact on 3 York Street and on the owners of 3 York Street.

Failure to consider that compliance with an essential condition for the development would require the consent of the applicants or to consider that compliance with the condition would not manage anticipated traffic effects.

[118] In the QLDC decision, QLDC noted that, in its submissions seeking a rezoning of various properties including 1 York Street in the PDP, neighbours had been concerned that the right of way on Lot 2 DP399178 did not have the capacity to handle additional and more intensive development adjacent to that right of way on 1 York Street. It noted the Commissioners in the rezoning decision had found that the more intensive use of the right of way would have adverse effects on the existing dwelling and residents due to the increased inconvenience and loss of amenity values associated with additional traffic on the driveway. It noted these concerns had been included in correspondence received from neighbours in connection with CSF's application for a resource consent for the proposed development on 1 York Street.

[119] In its assessment of effects, QLDC decided that noise, vibration and lighting from vehicles entering and leaving the site would be comparable with levels acceptable in a high density residential environment, particularly so given the site's proximity to the town centre and public transport routes. It considered there would be an increase in pedestrian activity using the pedestrian right of way but, because of

where stairs would be reached and how they would be screened, QLDC considered this would not adversely affect owners or occupiers of neighbouring properties to be potentially affected by the development.

[120] Significantly, QLDC noted that no vehicular access to the development was proposed from the right of way off York Street. CSF proposed to relinquish its rights to the vehicular portion of the right of way, such that the vehicular portion of the right of way would not be used by any occupants/tenants of the proposed development at 1 York Street. CSF had agreed that it would be a condition of consent that the vehicular portion of the right of way would be cancelled.

[121] The substantive decision is subject to condition 21(a) consistent with those aspects of the decision. The applicants say that compliance with that condition requires the proprietors of 9A-9D York Street, as grantors of the right of way, to complete a surrender of the easement. The applicants argue they are entitled to withhold their consent to execute and certify the surrender instrument. They argue that their refusal to provide this consent does not have to be reasonable. The applicants acknowledge that, on its face, the required surrender does appear to benefit the applicants as it purports to prevent access by occupants of 1 York Street over the private right of way. It was submitted the surrender of the easement would not benefit the applicants in this way because it would enable CSF to proceed with the development on 1 York Street in ways that would detrimentally affect the applicants.

[122] The applicants also had a concern that, even if there is no right for vehicular access to the right of way, the proposed development on 1 York Street could lead to vehicles still entering the vehicular portion of the right of way to drop off residents or visitors to 1 York Street, to the detriment of those applicants living in the townhouses adjacent to the right of way.

[123] QLDC considered this particular issue. It noted that the behaviour of people cannot be controlled as part of the proposal but, with the cancellation of the vehicular portion of the right of way, there would be no such legal access to the proposed units along the right of way. It also noted that the entrance points into the development

would encourage tenants and visitors to use pedestrian accesses into the development directly from York Street, rather than from the right of way.

[124] But for the argument that surrender of the right for vehicular use of the right of way requires the cooperation of the applicants, there was no suggestion from any party that the condition as to this in QLDC's decision was unlawful when the appropriateness of the condition had been accepted by CSF. The condition was not in breach of s 108AA RMA or what counsel referred to as Newbury Principles.[30]

[125] Both QLDC and CSF acknowledge that CSF will be responsible for complying with this condition and for doing whatever is necessary to do that in accordance with the Land Transfer Act 2017 (LTA) and/or the Property Law Act 2007. Counsel for both respondents suggested there would be ways CSF would be able to extinguish the right of way as required. QLDC referred to the jurisdiction a Court has under s 317 Property Law Act to extinguish an easement because of a change in the character of the neighbourhood or any other circumstances the Court considered relevant. CSF referred to the way, as owner of 1 York Street, it holds the benefit of easement areas on the right of way and also the burden of the easement over part of the right of way through being the owner of another area. CSF submits it could apply under s 113(1) LTA for the extinguishment of an easement through merger of its ownership and possession of fee simple estates in both benefited and burdened land.

[126] I need not make a final determination as to how CSF would be able to comply with this condition. I do not consider there was any reviewable error in QLDC imposing the condition. The validity of the condition is being challenged essentially on the basis that the applicants will not cooperate or consent to the steps required for CSF to comply with the condition.

[127] The applicants' concern is essentially that compliance with the condition will not go far enough to meet the particular concerns they have as to the way use of the right of way might detrimentally affect the amenities of their properties if the development proceeds. The inference to be drawn from the applicants' submissions

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[30] With reference to *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL).

as to this condition is that they would not cooperate with what could reasonably be expected of them and with what would be in their interests, as a means of obstructing the proposed development as a whole.

[128] That is not a stance which would weigh in their favour in my deciding whether they are entitled to the relief they seek by way of judicial review.

Conclusions

[129] I have accordingly found there was a material reviewable error in QLDC's notification and substantive decisions in that QLDC had inadequate regard to a relevant circumstance, namely that the subject site had been rezoned LDSR in the PDP.

[130] In a case where a reviewable error has been found, the starting point is that a Court will grant relief.[31]

[131] Counsel for CSF referred to the prejudice in a general sense CSF would suffer if there is a direction that QLDC reconsider its decisions through the way this will result in delay and holding costs. CSF nevertheless accepts it has not provided evidence to demonstrate specific or special prejudice arising from a decision to notify and CSF acknowledged the applicants had not unreasonably delayed in filing the proceedings.

[132] There will be practical benefits in QLDC having to reconsider both its notification and substantive decisions in that the reconsideration will occur with a certainty as to the current planning status of the subject site on York Street and immediately adjacent properties. CSF's appeal against the rezoning of that land as LDSR has been struck out. This Court was also informed that the two other appeals which had been made against aspects of the LDSR zoning in the PDP have been withdrawn.

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[31] *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112]; *Auckland Council v Wendco (NZ) Ltd*, above n 3, at [96]; *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]-[61].

[133] In carrying out the weighting exercise required of it, QLDC decided minimal weight should be afforded to provisions of the PDP because the rezoning of the subject site was the subject of an appeal. The planners, in their decision, also had earlier referred to the Commissioners' acknowledgement in their rezoning decision that theoretically HDR zoning was more appropriate for the subject site because of proximity of the land to the town centre and public transport. They had also referred to immediately adjoining properties to the south, west and east of the subject site as being zoned HDR under both the ODP and PDP. They noted that the determinative factor for the Commissioners in rezoning the subject site was the capacity of the right of way on Lot 2 DP 399178 to accommodate any increase in traffic arising from further intensification. They noted, with it being a condition of the proposed activity that there would be no vehicular access to the development, increased use would not be a consequence of the development. Those matters, apart from the appeal, may still be relevant to QLDC in the decisions it again has to make.

[134] It will be for QLDC to reconsider both its notification decision and substantive decision in light of all relevant circumstances as they now are.

[135] Accordingly, the Court makes declarations that the notification decision and substantive decision are both invalid. An order is made setting aside those decisions. CSF's application, which was the subject of those decisions, is remitted back to QLDC for reconsideration.

[136] The applicants are entitled to costs on these proceedings. If it has not been possible to reach agreement, a memorandum for the applicants is to be filed by 30 January 2020. Memoranda for the respondents are to be filed by 21 February 2020. Any memorandum in reply for the applicants is to be filed by 6 March 2020. The memoranda are to be no longer than five pages.

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