

**BEFORE THE COMMISSIONERS APPOINTED BY THE CENTRAL OTAGO
DISTRICT COUNCIL**

UNDER the Resource Management Act 1991

IN THE MATTER of RC230179 an application for a 33-lot
subdivision at Rocky Point on Tarras-
Cromwell Road (SH8)

BETWEEN **TKO PROPERTIES LIMITED**

Applicant

AND **CENTRAL OTAGO DISTRICT
COUNCIL**

**MEMORANDUM OF COUNSEL REGARDING SCOPE FOR REVISED
PROPOSAL**

Dated: 02 September 2024

MAY IT PLEASE THE COMMISSION

Introduction

[1] This Memorandum of Counsel responds to Minute 1 from the Hearings Panel, regarding 'scope' for the Applicant's revised proposal, as submitted on 29 July 2024 (**Initial Revised Proposal**). Including a response to the following issues of scope raised in para 7 of Minute 1:

[7] whether the amended application is within scope of the application as lodged... in particular on the effect of additional land now being included in the application, any additional effects including matters identified by Mr Vincent, and also whether it may affect any parties outside of those who have already lodged submissions on the application as notified.

[2] We note that Mr Vincent considers the changes proposed are within the scope of the application as notified, though acknowledges:

The subdivision layout now includes transferring a small area (Approximately 3,500m²) of Lot 2 DP 523873 into the subdivision which was not included in the application as notified.

Updated comments / approvals from Bendigo Station Developments Ltd ought to be provided, given they would stand to lose land as part of the development if it is approved.

The addition of a fourth lot along Bendigo Loop Road is probably the biggest change to the subdivision layout in terms of potential to increase landscape effects (and the change I'm least certain would be within scope, given the ONL notation).

[3] In response to the issues raised, and as a result of other intentions to design the project, the Applicant has submitted a further scheme plan and assessment for consideration and to replace the Initial Revised Proposal along with this Memorandum. This is now called the **Revised Proposal** herein. An explanation of the changes between the Application as lodged, the Initial Revised Proposal, and the Revised Proposal, is set out in the attached memo from Baxter Design.

[4] For the reasons set out below, we consider the Revised Proposal to be within the scope of the Application as notified, and overall it presents a

reduction of environmental effects. In summary, the Revised Proposal has resulted in removal of the portion of development showed on the Bendigo Station Developments Ltd Site, and therefore the remaining key issue to address in terms of scope is the four lots along Bendigo Loop Road (along with removal of lots in upper portions of the Site).

- [5] Applying the leading authorities on determining scope and jurisdiction, the two key essential tests are, the envelope of effects not having materially increased, and considering potential prejudice to parties and the public. The Revised Proposal satisfies both elements.

Authorities on scope

- [6] A helpful summary on higher authority cases relating to jurisdiction to amend proposals for resource consent is set out in *H.I.L Ltd v Queenstown Lakes District Council*¹. Including an essential summary of the tests as:

[42] ...

(a) a change to a notified application is within the jurisdiction of the court if its ambit is fairly and reasonably within the scope of the original notified application: *Shell New Zealand Limited v Porirua City Council*;

(b) particular factors to be considered include (see *Atkins v Napier City Council*)

- the scale, intensity and character of the altered activity;
- the altered scale, intensity and character of the effects or impacts of the proposal;
- potential prejudice to both parties and the public.

- [7] The H.I.L case sought to increase a 4 lot subdivision to a 5 lot subdivision on appeal to the Environment Court, which was opposed by Council on jurisdictional reasons due to concerns over the different scale of landscape and visual effects. Although that case was in the context of scope to amend a consent application on appeal to the Environment

¹ *H.I.L Ltd v QLDC* [2014] NZEnvC 45

Court, as compared to a Council decision, it is submitted the principles from the case, and authorities cited, can be applied to the present scenario.

[8] Summarising the tests:

- (a) An amendment is likely to be within scope if it is fairly and reasonably within the ambit of the original consent application and does not result in what is, in substance, a different application; it does not result in a significant difference to the scale, intensity and character of a proposed activity; or the effects of the proposed activity; and it does not prejudice any person.²

[9] Applying these principles to the Revised Proposal it is submitted that:

- (a) Proposed changes to the additional lot 27 in the vicinity of the Bendigo Loop Road (and the redesign of these four lots) will not increase effects of the project on the environment, or on any person. Mr Baxter concludes that, despite the additional lot 27 in this location, there is an overall reduction in landscape effects due to reduction in built form, additional design controls and landscaping. This is essentially similar to the H.I.L End case, where there may be a different layout of subdivision and built form with different effects, however that does not necessarily take a proposal outside of the scale, intensity, and ambit of effects as notified. Different from that case, the Revised Proposal overall lowers the proposed built form and total number of development allotments.
- (b) An extension of land at Lot 2 DP 523873 is no longer included.

² Atkins v Napier City Council [2009] NZRMA 429 (HC) at [20]-[21], Car Distribution Group Ltd v Christchurch City Council [2018] NZEnvC 235 at [23], Waitakere City Council v Estate Homes Ltd [2006] NZSC 112, [2007] 2 NZLR 149 at [29], HILL td v Queenstown Lakes District Council [2014] NZEnvC 45, (2014) 18 ELRNZ 29 at [42], Shell New Zealand Ltd v Porima City Council CA 57 /05, 19 May 2005 at [7]. See also Re Horowhenua District Council [2014] NZEnvC 184 at [13]. Shell New Zealand Ltd v Porima City Council CA 57 /05, 19 May 2005 at [7]. See also Re Horowhenua District Council [2014] NZEnvC 184 at [13].

- (c) The notified proposal overall is a comprehensive development. Scope of the proposal should therefore be assessed in a workable rather than a legalistic fashion. Similarly, given the proposal has been publicly notified and attracted public submissions, it is submitted that a 'higher bar' exists in terms of finding that a minor addition of land area would tip the balance in terms of either scale and intensity of the proposal, or potential prejudice to non-submitters.
- (d) None of the public submissions received on the proposal specifically raise issues in relation to buildings in proximity to Bendigo-Loop Road. However, some submissions do raise generic issues as to landscape and visual amenity effects of the proposal overall, and as such those matters (including in relation to Lot 27 and Lot 30 can continue to be pursued). Attachment K9 to Mr Baxter's landscape assessment shows the visibility for structures on Lots 30, 29, 28, and 27 within a cluster. The addition of Lot 27 in this location is therefore within an area already identified for clustered building development and would not tip the balance to create a 'significantly different scale, character, and intensity of development' in this location.
- (e) No person who did not submit, would have submitted due to the placement of lot 27 in the vicinity of Bendigo Loop Road, would be prejudiced by this change, given it does not increase the scale or intensify of effects of the proposal. The scenario is similar to the *Shell*³ case, where extensions of development footprint were considered within scope in the circumstances of further approval being given, and on evidence as to effects.

[10] The description of the proposal included in the CODC template submission documents provided for:

Subdivision consent for subdivision creating 33 lots with building platforms and one balance allotment at Rocky Point

³ *Shell New Zealand Ltd v Porima City Council* CA 57 /05

- [11] A reconfiguring of development allotments and an overall reduction of built form is entirely within the ambit and effects envelope of the proposal as described.
- [12] The nature and extent of the proposal was clearly notified in a manner that could have been expected to attract the attention of any person who might be interested in a comprehensive subdivision proposal along and in the vicinity of 'Lakefront Terrace, Bendigo'.
- [13] Overall, the Revised Proposal enables a more effective layout of development which reduces landscape and ecological effects, and does not prejudice or affect any person who has (or might have) submitted. It is the overall built form footprint and the substance of the application, which is important for scope and effects, rather than the legal definitions of land areas – as expressed in the legal tests above.

Summary of proposal changes

- [14] We note that the Revised Proposal included a summary document of the changes to the application since notification, prepared by Brown and Co. Overall, these changes are an attempt to respond to, and reduce ecological and landscape (and other) environmental effects as raised in submissions and in Council's original s42A report.
- [15] Collectively, the revisions result in a planning conclusion in the revised AEE, that overall the proposal has reduced environmental effects and confirmation that both s104D non-complying gateway tests are 'passed'.
- [16] The Applicant has proposed extensive additional ecological compensation and positive ecological effects associated with the proposal, including offset and enrichment planting, formal protection of the balance land (91% of land area), and ecological enhancement and monitoring plans proposed.
- [17] In order to further respond to Minute 1, the Applicant's landscape architect, Mr Baxter, has prepared a memorandum summarising the landscape changes in the Revised Proposal, and corresponding effects. Mr Baxter concludes that adverse effects arising from the amended

application in regard to development adjacent to Bendigo Loop Road
have been reduced.

Dated 2nd day of September 2024

A handwritten signature in black ink, appearing to be 'R E Hill'.

.....
R E Hill / B B Gresson / G M Todd
Counsel for the Applicant