

**Before Councillors and Independent Commissioners appointed by
the Gore District Council**

In the Matter of

the Resource Management Act 1991
(Act)

And

In the Matter of

submissions and further submissions
on the Proposed Gore District Plan

And

Hearing Stream 8: McNab
Management Limited

**Memorandum of Counsel on behalf of
McNab Management Limited
accompanying updated provisions**

Dated: 24 February 2024

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INTRODUCTION

1. This memorandum is filed on behalf of McNab Management Limited (**McNab**). McNab's submission on the Proposed Gore District Plan (**PDP**) was heard before the Panel on 5 December 2024. McNab seeks to amend the zoning at 10 McKinnon Road, Gore (**Site**) to enable light industrial activities servicing the rural area, rural lifestyle activities and the relocation O Te Ika Rama Marae.
2. The hearing was adjourned to allow McNab to undertake further work to respond to points raised at the hearing. The Panel also directed further legal response to matters arising at the hearing.
3. This memorandum will address the following:
 - (a) Legal matters arising from the hearing;
 - (b) McNab Development Area approach and consequential drafting amendments;
 - (c) Response to Council feedback;
 - (d) Section 32AA assessment; and
 - (e) Conclusion.

LEGAL MATTERS ARISING FROM THE HEARING

Effect of Precincts on Zoning Status

4. As traversed in opening legal submissions and at the hearing, the Site is identified as a future urban area in the Ready for Tomorrow Gore Spatial Plan (**Spatial Plan**) and is therefore currently exempt from the NPS-HPL. However, a key concern of McNab, and an important driver for the bespoke light industrial zoning sought, is that there is no obligation for the Council to carry over the identification of the Site as a 'future urban area' into the next version of the Spatial Plan. Exemption from the NPS-HPL therefore relies on the PDP decision.
5. If in the future the Site remains a rural zone and is no longer identified for future industrial use in the Spatial Plan, the Site would be subject to the NPS-HPL. This would restrict the types of activities that can be undertaken on the Site and there is a real risk that the Site cannot be used for the purpose intended by McNab.
6. At the hearing, the Panel stepped through some questions on the realities of this perceived risk. The Panel queried whether, if it were minded to accept that a General

Rural zoning is most appropriate for the Site, the inclusion of the McNab Rural Industry Precinct Overlay would identify the Site as a “future urban area” and therefore exempt the Site from the NPS-HPL. While a precinct approach is no longer being sought for the McNab site, we address the Panel’s query below should the Panel be minded to consider this option for the Site.

7. At the hearing the Panel was referred to the Environment Court’s decision in *Wakatipu Equities Limited v Queenstown Lakes District Council* [2023] NZEnvC 188. In this case, the Environment Court determined whether the Wakatipu Basin Lifestyle Precinct is separate to the underlying Wakatipu Basin Rural Amenity Zone for the purposes of the NPS-HPL. The Environment Court noted that the National Planning Standards 2019 signals that a precinct would tend to sit within the zone that it serves¹ and held that a precinct is not a separate zone for the purposes of the NPS-HPL.²
8. The same outcome was reached in *Drinnan v Selwyn District Council* [2023] NZEnvC 180. In that case, the Environment Court was tasked with determining whether the Rural Zone and the relevant planning layers under the Selwyn District Plan was a ‘Rural Lifestyle Zone’ for the purposes of the NPS-HPL.³ The Environment Court found that the provisions of the Selwyn District Plan envisioned that the Rural Zone would be a single zone, with an overlay being an “area of specific control” under the rural zoning.⁴
9. Accordingly, we submit in reliance on that judicial authority that the introduction of a McNab Rural Industry Precinct with an underlying General Rural zoning will not amount to the Site being “identified for future urban development” for the purposes of the NPS-HPL. The definition of “identified for future urban development” in the NPS-HPL specifically requires the land to be identified for urban growth in a future development strategy or in a strategic planning document.⁵ Without one of these strategic planning documents, the carve out for land identified for future urban development in the NPS-HPL would not apply.
10. On that basis, and given that all parties agree that it is appropriate to establish light industrial activities that service the primary production sector on the Site, we submit that a light industrial zoning is the most appropriate zoning in a section 32 sense to give effect to the agreed and uncontested outcomes sought. Without an underlying light industrial zoning, there is insufficient certainty that the McNab site can be

¹ *Wakatipu Equities Limited v Queenstown Lakes District Council* [2023] NZEnvC 188 at [26].

² *Wakatipu Equities Limited v Queenstown Lakes District Council* [2023] NZEnvC 188 at [30].

³ The Selwyn District Council had not yet adopted the Zone Framework Standard under the National Planning Standards 2019. There is no ‘Rural Zone’ in the National Planning Standards so the Environment Court had to determine the next equivalent zone.

⁴ *Drinnan v Selwyn District Council* [2023] NZEnvC 180 at [98].

⁵ Clause 1.3, National Policy Statement for Highly Productive Land 2022.

developed in a manner considered appropriate by all parties, and McNab's investment in developing the land to meet the needs of the district will be compromised. To have a situation where development costs are incurred but potentially the resource consenting of activities is not possible is untenable to McNab.

Validity of a Rule

11. In relation to the earlier version of proposed LIZ-S11(3)-(4) which intended to provide triggers for intersection upgrades depending on the level of development occurring, the Panel raised some queries regarding the enforceability of a provision that provides discretion to a third party not being the Council. The Panel also noted this may be an issue because LIZ-S11(3)-(4) was tied to a permitted activity rule, which results in the permitted activity status being dependent on a third party's assessment.
12. The starting point is that in order to be valid in law a rule must conform to common law principles requiring district plan rules to be drafted in a way that is certain.
13. In *Maclean v Thames Coromandel District Council* A046/03, the Planning Tribunal held that a rule that conferred discretion on third parties was invalid. The relevant rule in that case permitted garages to be built up to a common boundary if specified conditions or standards were met, and if the approval of the neighbour and "other affected parties" was obtained. The Planning Tribunal found the rule to be invalid due to the permitted activity status being dependent on third party approval. The meaning of "other affected parties" had an element of subjectivity in terms of who would be considered adversely affected, which the Planning Tribunal considered to confer too much discretion so as to render the rule uncertain and therefore invalid in law.
14. In order to address the Panel's concerns regarding LIZ-S11(3)-(4) and provide further certainty to the wording of the provisions, Ms McMillan has now proposed a controlled activity status for activities linked to this standard. Under the revised provisions, DEV3-R3 now makes light industrial activities within the proposed McNab Development Area a controlled activity subject to certain standards. Standard DEV3-S2(6) is a refined version of what was previously LIZ-S11(3)-(4) in terms of requiring a traffic assessment to be undertaken at certain stages of development:

6. Once the vehicle movements calculated under DEV3S2(5) exceed 3500 vehicles per day⁶ a traffic impact assessment must be prepared by a suitably qualified and experienced person to assess the effects of traffic on the intersection of McKinnon Road and State Highway 1 including the potential for conflict with vehicles turning into or out of Talbot Street.

15. In our submission, the proposed amended provisions are valid in law as they are sufficiently certain and no longer leave discretion to a third party in relation to the management of transportation effects. This approach is also supported by New Zealand Transport Agency (NZTA)

PROPOSED MCNAB DEVELOPMENT AREA

16. At the hearing, the Panel tested whether there would be merit in introducing a Development Area approach to masterplan the proposed McNab Rural Industry Precinct. The Panel then directed McNab to consider such an approach in its Minute 29.
17. Ms McMillan and the McNab team have considered this approach and agree there would be merit in including the proposed McNab development in the Development Areas chapter of the PDP. Accordingly, Ms McMillan has prepared a recommended set of draft provisions for the McNab Development Area, which are attached to Ms McMillan's supplementary statement of evidence dated 24 February. McNab has engaged with the section 42A Reporting Officers and NZTA, who are largely supportive of the utilisation of this approach. While Ms Woodbridge remains of the view that the scale of the Light Industrial zone sought is out of scope, her recommendations regarding drafting have largely been accepted and the remaining points of disagreement are identified later in these submissions.
18. We rely on our opening legal submissions dated 28 November 2024 that a rezoning of part of the Site to Māori Purpose Zone, Rural Lifestyle Zone and Light Industrial Zone is appropriate for the Site and we do not repeat those submissions here. Instead, we address the key changes to the relief sought below and respond to the feedback provided by the section 42A Reporting Officers on the amended relief.

Summary of Key Changes

19. In our submission, the revised provisions largely reflect the outcomes sought by McNab in their original submission and in evidence, with some key changes to

1. As requested by the Panel, Mr Bartlett has converted the traffic assessment requirements to vehicles per day (from percentage land area) and this is reflected in the revised provisions.

respond to the Panel's questions and to reconstruct the relief to fit within the framework of the Development Area chapter.

20. An Outline Development Plan is proposed for the Site indicating the underlying zoning outcomes sought, which are the same zoning outcomes that were sought in Ms McMillan's rebuttal evidence.
21. In relation to the bespoke Light Industrial Zone in the McNab Development Area, the key outcome sought is to enable light industrial activities that are limited to those that service the primary production sector and those that relate to logistics and storage.⁷ All other light industrial activities will be subject to a discretionary activity consent, and general industrial activities will be a non-complying activity.
22. The key changes to the relief sought following the hearing are set out in the evidence of Ms McMillan dated 24 February and can be summarised as follows:
 - (a) An additional Development Area is included in the Development Area chapter of the PDP, called the McNab Development Area;
 - (b) An underlying zoning of Light Industrial, Māori Purpose and Rural Lifestyle is still being sought for the site, as well as a Mahinga Kai Area;
 - (c) The relief sought seeks to enable light industrial activity that is limited only to those that service the primary production sector and those that relate to logistics and storage. These light industrial activities are now proposed to be a controlled activity rather than a permitted activity to manage servicing and transport matters; and
 - (d) In response to concerns raised in the section 42A Report and at the hearing, a Rural Industry Precinct is no longer being sought and McNab relies on the definition of Light Industrial Activity in the PDP for the activities anticipated on the Site. However, although the PDP definition of light industry is used, this is limited to activities that service the primary production sector and that relate to logistics and storage. To clarify, we agree with the Panel's assessment at the hearing that the definition of rural industry activity under the National Planning Standards (which is the definition used in the earlier relief sought) can also fall under the definition of light industrial activity under the PDP.
23. In our submission, and relying on the section 32AA assessment prepared by Ms McMillan, the Development Area approach should be preferred over the precinct approach put forward by McNab in evidence as it provides greater certainty in terms

⁷ Noting that we are deleting "construction" from the logistics limb.

of what development can be anticipated for the Site and how that development is to take place.

Scale of Light Industrial Activities enabled in the McNab Development Area

24. The amended provisions in Ms McMillan's evidence set out that Light Industrial activities are a controlled activity in the McNab Development Area. However, it is not proposed that the full range of Light Industrial activities are enabled within the McNab Development Area. Rather, Light Industrial activities are limited to those activities which support primary production, logistics, and the storage and distribution of materials.⁸ All other Light Industrial activities would require consent for a discretionary activity, and General Industrial activities would be a non-complying activity.
25. In our submission, the objectives, policies and standards proposed for the McNab Development Area are aligned with this framework. Proposed DEV3-O1(3) seeks to provide for *targeted* light industrial activities which support the surrounding primary production sector. SUB-S1 introduces a minimum lot size of 1 ha in the McNab Light Industrial zone to manage the scale of light industry activities on the Site.
26. Accordingly, we submit that the amended provisions provide sufficient clarity that light industrial activities are intended to be limited in its scope within the McNab Development Area, and are limited to those activities that support the primary production sector. We therefore disagree with Ms Woodbridge's comments in relation to the scale of the light industrial zone proposed for the McNab site and consider that the rules, activities and minimum lot size proposed will limit the scale of light industrial activities on the Site and ensure that plan users are clear as to why the scale is being managed.

Removal of Rural Industry Activities

27. Following concerns raised by the Panel and Ms Woodbridge at the hearing, McNab is no longer seeking to provide for Rural Industry activities in the McNab Development Area. This change is made in response to Ms Woodbridge's concern that Rural Industry activities, by their definition in the National Planning Standards, can only be undertaken in a "rural environment" and not a Light Industrial zone.
28. At the hearing the Panel queried whether the activities anticipated for the McNab site could be captured within the definition of Light Industrial activity instead.
29. The PDP defines light industrial activity as any:⁹

⁸ DEV3-R3(2) Christine McMillan Proposed Provisions.

⁹ Gore Proposed District Plan, Interpretation Chapter.

Manufacturing, processing, storage, logistics, repair or distribution activity that does not generate objectionable odour, dust or noise or elevated risk to people's health and safety. Light industrial activities include, but are not limited to, warehouse storage, automotive repairs, minor engineering and light manufacturing activities, product assembly.

30. In our submission, the type of activities anticipated for the McNab site can comfortably fit within the PDP definition of light industrial activity, with some additional provisions to clarify that the type of light industrial activities anticipated on the McNab site are those that support primary production, storage and logistics.
31. Accordingly, to better align the PDP with the National Planning Standards, rural industry activities are no longer being sought in the proposed Light Industrial Zone provisions. Instead, the definition of Light Industrial activity is relied on, with the addition of objectives and policies directing light industrial activity in the McNab Development Area to be supportive of primary production.
32. For completeness, we note that the removal of rural industry activities from the Light Industrial zone provisions is not a signal that McNab is seeking to introduce larger scale industrial activity on the McNab site. The removal of rural industry activities is purely made to address Council's concerns regarding consistency with the National Planning Standards. The intent remains to enable light industrial activities that are limited to those that service the primary production sector and those that relate to logistics and storage, and we submit that this is captured in the proposed provisions.

Landscape Plan

33. DEV3-S4(4) provides for the requirement for a landscape plan to be provided with any resource consent application for light industrial activities in the McNab Development Area which adjoin a Rural Lifestyle Zone, Māori Purpose Zone or General Rural Zone boundary.
34. The requirement for a landscape plan has not been replicated in the subdivision chapter of the PDP as was done in the Gore South Development Area¹⁰ to avoid duplication.

RESPONSE TO NZTA AND COUNCIL FEEDBACK

35. As directed by the Panel, McNab circulated the draft amended provisions to NZTA and the section 42A Reporting Officers for comment and feedback.

¹⁰ SUB-S4 Proposed District Plan.

36. Counsel and Ms McMillan have worked with Ms Dempster on behalf of NZTA, who is supportive of the amended provisions.
37. Counsel and Ms McMillan have engaged with Ms Woodbridge for the Council who has provided several rounds of input into the drafting of the proposed provisions. Ms McMillan has agreed to most of the feedback provided by Ms Woodbridge. In particular, Ms McMillan has amended the provisions to:
- (a) Include a landscape buffer to cover external site boundaries.¹¹ This is to ensure that the effects on landowners adjoining the proposed McNab Light Industrial zone (both General Rural and Rural Lifestyle) are mitigated;
 - (b) Inclusion of additional matters of control for controlled activities;
 - (c) Replace the Mahinga Kai Overlay with a Mahinga Kai Area;
 - (d) Amend the subdivision chapter to include the minimum lot size proposed for the McNab Light Industrial Zone and include matters of discretion for subdivision in McNab Development Area;
 - (e) Relocate future site access on McKinnon Road such that it is not on the boundary with adjacent land;
 - (f) Only enable primary production in the McNab Development Area while the area is undeveloped; and
 - (g) Relocate the light industrial activity rules in the Development Areas chapter to the Light Industrial Zone chapter of the PDP.
38. There are still some areas of disagreement with the Section 42A Officers, which we address further below. In summary, Ms Woodbridge's residual points of disagreement relate to:
- (a) Traffic assessment requirement;
 - (b) Scale of the McNab Light Industrial Zone; and
 - (c) Scope.

Traffic

39. Ms Woodbridge remains of the opinion that the traffic assessment triggers proposed in DEV3-S2(6) are not appropriate on the basis that the cost of undertaking the traffic assessment (and presumably any traffic upgrades arising from that assessment)

¹¹ DEV3-S4(1) Christine McMillan Provisions.

would be borne by a single developer. Ms Woodbridge also has concerns that the provision does not require any traffic upgrades to be undertaken if a traffic assessment determines that upgrades are required.

40. In our submission the issue of costs is a matter for the developer/future owners to address, not the PDP. The provisions proposed by Ms McMillan, in particular the matters of control that will be triggered by in LIZ-R1 for all relevant activities, provide certainty that the required works will be undertaken at the appropriate time and will therefore achieve the objectives and policies of the McNab Development Area and the PDP as a whole.

Scale of McNab Light Industrial Zone

41. Ms Woodbridge is not supportive of the scale of the Light Industrial zone proposed for the McNab Development Area, particularly in relation to the smaller zone at the junction of McKinnon Road and State Highway 1.
42. As discussed above, we submit that the rules and standards proposed by Ms McMillan, in particular the introduction of a 1 ha minimum lot size and the restriction of light industrial activities to those that service the primary production sector, logistics and storage, will appropriately refine the scale of the McNab Light Industrial Zone such that it is commensurate with the surrounding environment.

Scope

43. Ms Woodbridge considers that the amended relief sought by McNab is out of scope as *“the proposal seems to have moved further away from the rural industry outcomes which were sought through the submissions and previous evidence”*.¹² Ms Woodbridge remains of the opinion as set out in her section 42A Report that the scale of the light industrial zone proposed for the McNab site is out of scope of the submission.
44. We have addressed the law on scope in our opening legal submissions, which we rely on and adopt for the present purposes.¹³ However, we reiterate that whether an amendment is within scope should be approached in a “realistic and workable fashion” rather than from the perspective of legal nicety.¹⁴
45. In our submission, the amended relief proposed by Ms McMillan has not moved further away from rural industry outcomes. Rather, the provisions have been amended to be better aligned with the National Planning Standards.

¹² Email from Victoria Woodbridge to Joshua Leckie dated Friday 14 February 2025.

¹³ Opening legal submissions at paragraphs [22] – [28].

¹⁴ *Gertrude’s Saddlery Limited v Queenstown Lakes District Council* [2020] NZHC 3387 at [74].

46. Despite the removal of rural industry activities from the provisions, the proposed amendments do not increase the scale of light industrial activity proposed for the Site. As discussed at paragraphs [24]-[26] above, the scale of light industrial activity proposed for the McNab Development Area is still limited to logistics and the storage and distribution of materials, which was what was provided for under the McNab Rural Industry Precinct provisions.
47. However, an additional requirement has been added to limit light industrial activities in the McNab Development Area to those which support primary production. This is to better align the types of light industrial activities in the McNab Development Area to those that service the primary production sector. Further, a 1 ha minimum lot size has been proposed to be in keeping with the surrounding lower density environment.
48. Accordingly, our submission is that the scale of activities enabled under the light industrial zone in the McNab Development Area is consistent with the scale sought for the McNab Rural Industry Precinct in submissions and in the evidence of Ms McMillan and is therefore squarely within scope.

SECTION 32AA

49. A section 32AA assessment of all amendments to the PDP is set out in the supplementary statement of evidence of Ms McMillan.
50. In summary, Ms McMillan concludes that the amended suite of provisions provides Council with greater control over the activities that can establish within the McNab Light Industrial Zone, ensuring a focus on light industrial activities that either serve the primary production sector or that relate to storage and logistics. Ms McMillan considers that the McNab Development Area approach and amended provisions is the most appropriate way to achieve the objectives of the PDP.¹⁵

CONCLUSION

51. In our submission, the relief sought by McNab will deliver on the strategic vision of the Spatial Plan and provide for the relocation of O Te Ika Rama Marae and targeted light industrial and rural lifestyle activities for which there is high demand in the Gore District.
52. The supplementary evidence filed by Ms McMillan restructures the earlier relief sought to align with the framework of the Development Area chapter of the PDP and responds to matters arising from the Panel at the hearing. The Development Area

¹⁵ Statement of Supplementary Evidence of Christine McMillan dated 24 February 2025, at paras [17]-[19].

approach will ensure Council has appropriate detail at the future subdivision and development stage to manage effects in a targeted and certain way.

53. The supplementary evidence filed by Ms McMillan also demonstrates that the amended relief sought is the most appropriate outcome in a section 32AA sense.

54. Accordingly, we submit that the amended relief sought by McNab is granted.

DATED 14 February 2024

A handwritten signature in blue ink, appearing to read 'JMG Leckie' or similar, written over a horizontal line.

JMG Leckie / L Rolph
Counsel for McNab Management Limited