QUEENSTOWN LAKES DISTRICT COUNCIL

www.qldc.govt.nz

DECISION OF QUEENSTOWN LAKES DISTRICT COUNCIL

RESOURCE MANAGEMENT ACT 1991

Applicant:	J Battson and D Manson
RM Reference:	RM190261
Location:	20C and 20D Sam John Place, Hawea
Proposal:	Subdivision consent for two-lot subdivision; Land use consent to breach density requirements; Cancellation of consent notices
Legal Description:	Lot 2 DP 328577 and 1/20th share of Lot 31 DP 306940 held in Record of Title 116725
Operative Zoning:	Large Lot Residential
Activity Status:	Non-complying Activity
Notification:	Publicly notified
Commissioners:	Denis Nugent
Date of Decision:	**30 October 2019**
Decision:	**Granted Subject to Conditions**

REASONS FOR THE DECISION

The Hearing

1. The Council has delegated to me, under section 34A of the Act, its powers and functions to hear and decide this resource consent application.

2. The hearing was held in Wanaka on 17 October 2019. Appearances were as follows:

Applicants:
- Duncan White – Planner
- Jude Battson

Submitters
- Don Robertson on behalf of himself and Gaye Roberston

Council
- Esther Neill – Reporting Planner
- Sarah Gathercole – Senior Planner

3. Ms Trish Anderson was the hearing administrator.

4. I received written tabled comments from Amelia Brittingham and Peter Whitworth, via an email dated 16 October 2019.

5. As required by the Act, I received the Council's Section 42A Report and the applicants' evidence in advance, which I read prior to the hearing. At the hearing I received a written presentation from Mr White, which verbally summarised for me. Ms Battson provided an oral statement additional to her pre-lodged evidence.

6. Mr Robertson provided a written statement which he presented. Ms Neill provided brief oral comments additional to her Section 42A Report, and Ms Gathercole was available to answer questions.

7. The applicant's reply submissions were received on 24 October 2019.

Abbreviations Used in this Decision

LLR A Zone	Large Lot Residential Zone Area A
ODP	Queenstown Lakes Operative District Plan
ORPS	Otago Regional Policy Statement
PDP	Queenstown lakes Proposed District Plan
UGB	Urban Growth Boundary

Site Visit

8. I undertook a site visit on Wednesday 9 October 2019.

The Proposal

9. The applicants sought consent to subdivide Lot 2 DP 328577 (20C and 20D Sam John Place) into two fee simple lots and to provide each of these with a 1/40th share in the jointly owned access lot (Sam John Place – Lot 31 DP 306940), and to cancel or modify existing consent notices applying to Lot 2 DP 328577.

10. Lot 2 DP 328577 is a rear site of 4,000m^2 obtaining access to Sam John Place via easements over Lots 1 and 3 DP 328577. The existing dwelling on the site is located to the north (rear) of the site. To achieve an equal area for each lot, the proposed boundary forms a three-sided "bulge" to encompass the existing house and associated parking in proposed Lot 2. The existing driveway would be contained within an approximately 8 metre wide right of way easement running through proposed Lot 1. The effect of this easement is to reduce the net site area of Lot 1 to 1,682m^2. Of this, a little over 400m^2 is located in a triangular area west of the driveway easement. That land can be considered landscaping along the western boundary.

11. Lot 2 DP 328577 is subject to two consent notices: 5205874.3 and 6121952.2. The application proposed the cancellation of both consent notices and re-imposition of any required conditions in a new consent notice on proposed Lot 1.

Existing Environment

12. The site is a reasonably level grassed property sloping gently from north to south. A dwelling has been erected in the northern part of the property and planting separates the buildable area on proposed Lot 1 from the existing dwelling and the accessway. The boundaries of the whole site are also well planted. Water and sewerage services are provided to the site. Stormwater is disposed to ground on site.

13. The sites adjoining to the east and west each contain a single dwelling and have an area of, or in excess of, 4,000m^2. The properties to the immediate south, 20A and 20B Sam John Place, are each slightly larger than 2,000m^2. Overall, the development off Sam John Place comprises single dwellings on large lots.

14. North of the subject site is a vacant site of some 8.5 ha available for urban development. It is expected that this development would be at a greater density than that in Sam John Place.

District Plan Rules Affected

15. Before listed the relevant rules it is necessary to determine the District Plan provisions that apply given the progress of the PDP. Under the ODP this site was zoned Rural Residential. The Council's decisions on Stage 1 of the PDP rezoned this site (and other sites in Sam John Place) as LLR A Zone and included the site within the UGB for Hawea. No appeals were lodged in relation to the PDP Stage 1 provisions of the Large Lot Residential Zone or the change of zoning.

16. The PDP Stage 1 also included subdivision provisions (Chapter 27) to replace those in the ODP and a new definitions chapter (Chapter 2).

17. Section 86F of the Act states that "*a rule in a 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,*" no appeals have been lodged. In this instance, the only relevant rules from the PDP are rules which have, by the operation of s.86F, been made operative, and the former ODP rules therefore made inoperative. I do not need to consider, therefore, the former Rural Residential Zone provisions.

18. Consequently, consent is required under the following PDP Stage 1 rules:

Rule	Requirement	Reason	Activity Status
27.6.1	Minimum net site area of 2,000m^2	Lot 1 would have a net site area of 1,682m^2	Non-complying activity (Rule 27.5.19)
11.5.9.1	Maximum of one residential unit per 2,000m^2 of net site area	Lot 1 would have a net site area of 1,682m^2	Discretionary activity

19. "Net Area (Site or Lot)" is defined as "the total area of the site or lot less any area subject to a designation for any purpose, and/or any area contained in the access to any site or lot, and/or any strip of land less than 6m in width". This definition in PDP Chapter 2 is also to be treated as operative.

20. PDP Stage 2 included new transport provisions (Chapter 29 Transport). Rule 29.5.14I sets a limit of 12 units that may be served by a private vehicle access or shared access. Breach of that is a restricted discretionary activity with Council's discretion restricted to:

    a) *Effects on safety, efficiency, and amenity of the site and of the transport network, including the pedestrian and cycling environment;*
    b) *The design of the access, including the width of the formed and legal width;*
    c) *The ongoing management and maintenance of the access;*
    d) *Urban design outcomes;*
    e) *The vesting of the access in Council.*

21. Rule 29.5.14 is not subject to appeal so can be treated as operative and any former equivalent rule in the ODP be treated as inoperative (s.86F).

22. I note for completeness that PDP Stage 2 provisions related to visitor accommodation in the Large Lot Residential Zone are subject to appeal, but those are not relevant to this application. The PDP Stage 2 provisions also included rules relating to earthworks (Chapter 25). It appears that Rule 25.5.4, as it applies to the LLR Zone, is also beyond appeal and to be treated as operative. That sets a maximum volume of earthworks of 400m^2 in this zone. I understand from the application that is not breached.

23. The application to cancel the consent notices applying to the site under s.221 of the Act is to be treated as an application for a discretionary activity consent (s.87B).

24. Overall, the proposal is a non-complying activity.

Summary of the Evidence

25. Mr White provided pre-lodged evidence, a succinct written brief at the hearing, which he summarised, and evidence in closing. Rather than summarise each of those, and his answers to questions at the hearing, I will summarise the evidential position reached as a cumulation of those documents and replies to questions:

- Mr White provided an accurate description of the site and surrounding neighbourhood;
- He explained that the proposed boundary between the lots was located to take account of the existing house and driveway, and generally following an existing hedge;
- He described Consent Notice 5205874.3 as relating to an underlying subdivision and the conditions relating to firefighting water storage and wastewater disposal had been superseded by provision of reticulated services;

- Turning to Consent Notice 6121952.2, his evidence was that condition (a) (which related to the provision of on-site stormwater disposal) was no longer relevant to proposed Lot 2 but that a revised condition (included in his reply evidence) would be appropriate on proposed Lot 1;
- He considered conditions (b) and (c) of to be no longer necessary, and that the condition controlling fencing recommended by Ms Neill to an unnecessary fetter on a permitted activity;
- In relation to the submissions seeking a limit on building height and a greater set back from the southern boundary, Mr White noted that the applicant agreed to those limitations, and that arrangements had been made for those to be dealt with in a private restrictive covenant (notes of the agreement were included in the reply);
- Mr White noted that building a second residential unit on the existing site was a permitted activity provided it complied with the 8m height limit, 4m boundary set back, recession plane limitation, and the 15% site coverage;
- Turning to the effects of the proposal on the environment, he agreed with the Section 42A Report that the effects on access, infrastructure and servicing, and hazards would be less than minor;
- In terms of effects on the environment arising from the non-compliance with the net site area requirement, Mr White opined that the outcome would be no different from a complying second residential unit being erected on the site, and as the property is a rear section, there would be limited views into the site from public places making it difficult to perceive this infringement;
- Mr White considered there would be no difference in character or amenity between the non-complying Lot 1 and the complying Lot 2, or the lot adjacent to the south;
- Mr White considered that the objectives and policies of the PDP should be given substantial weight as those relevant to this application were not subject to appeal;
- It was his evidence that the proposal was not contrary to the objectives and policies of the ODP or the PDP;
- In terms of s.104D, Mr White considered the proposal passed both threshold tests and was able to be considered under s.104;
- Mr White provided a list of consents for subdivisions in the LLR A Zone where the net site area had not been met that had been granted by the Council and suggested that these applicants should be treated similarly;
- Mr White raised no matters under s.106 and considered consent should be granted under s.104B subject to conditions set out in his reply evidence.

26. Ms Battson provided written evidence (pre-lodged) which set out the history of ownership of the property, changes to Council infrastructure, her involvement in rezoning the land under PDP Stage 1, and her consultation with neighbours. Her oral evidence at the hearing summarised this evidence.

27. Mr Robertson provided a written statement on behalf of himself and his wife. He advised that they was relaxed about the outcome in regard to lot size, building height and set back from the southern boundary. Their concern was focused on the provision of Consent Notice 6121952.2 in relation to damage to road infrastructure. This resulted from the physical access to the subject site extending on their property. He advised that they would be happy to be a party to any private covenant regarding future building height and set backs on proposed Lot 1.

28. Mr White clarified in his reply that the right of way easement to the subject site did not extend onto the Robertsons' property although it appears the formed width extended further west into the Robertson property than provided for by the right of way documentation.

29. Ms Neill provided a comprehensive Section 42A Report in which she recommended that consent be refused. As part of this report, she provided a draft set of conditions which she considered would be appropriate if I were to grant consent.

30. After hearing the applicant's evidence, Ms Neill advised that in light of the proposed conditions she would alter her recommendation to approve, subject to the following matters:

- She considered her proposed fencing condition to be covered by consent notice appropriate to retain residential character in the area;
- She agreed that the consent notice condition relating to stormwater disposal should be amended to ensure an on-going requirement;
- She considered condition (b) of Consent Notice 6121952.2 (which required construction activities be retained in the site and damage to road infrastructure be repaired) was covered by an engineering condition recommended by Ms Overton and could therefore be removed;
- She agreed that condition I of Consent Notice 6121952.2 had been overtaken by the development contribution regime and could be deleted.

31. Ms Neill agreed that very little weight should be given to the objectives and policies of the ODP as no rules in the ODP were triggered by this application. She accepted that the ability of the applicants to erect a second residential unit on the site as a permitted activity, and then to undertake a unit title subdivision as a controlled activity was a relevant consideration. She also stated that as the proposal was not contrary to the objectives and policies of the PDP, granting consent to this proposal was unlikely to establish a precedent.

32. Finally, Ms Neill confirmed that there were no matters in the PDP Stage 3 (which was notified after the lodgement of this application) that were relevant to this application.

33. For completeness, I note that the tabled submission from Ms Brittingham and Mr Whitworth supported the application.

Major Issues in Dispute

34. By the conclusion of the hearing, the major issues in dispute related to the nature of conditions to be applied to the consent. In particular, this relates to whether a fencing condition should be included; whether height and set back should be controlled by consent notice; and the extent to which the existing Consent Notices have ongoing relevance.

Relevant Statutory Provisions

35. The proposal is a non-complying activity. Section 104D provides that a consent authority may grant consent to a non-complying activity only if it is satisfied that either –

a. the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

b. the application is for an activity that will not be contrary to the objectives and policies of –

i. the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

ii. the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

iii. both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

36. The logical approach to assessing a non-complying activity is to consider the actual and potential effects of the activity on the environment[1] and the relevant provisions of the operative and proposed district plans[2] and arrive at a conclusion as to whether the threshold tests in section 104D are met before considering the other matters required by section 104. In assessing the effects of the proposal on the environment I can disregard any adverse effects on the environment of the proposal if the plan permits an activity with those effects[3] (the permitted baseline).

37. It is considered good practice to consider the other matters in section 104 even if the application fails to pass the section 104D tests.

38. The other relevant statutory provisions in this instance are:

    a. the National Policy Statement on Urban Development Capacity;
    b. the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011; and
    c. the Partially Operative Otago Regional Policy Statement and Proposed Otago Regional Policy Statement.

39. Section 104 is subject to Part 2 of the Act. No matters from sections 6 or 8 were raised as relevant. Ms Neill clauses from s.7 which she considered relevant[4]. I agree with her that the following clauses are one I must have particular regard to:

    (b) The efficient use and development of natural and physical resources:
    I The maintenance and enhancement of amenity values:
    (f) The maintenance and enhancement of the quality of the environment:
    (g) Any finite characteristics of natural and physical resources:

40. If I conclude consent should be granted I must consider the restrictions in section 106 and may impose conditions under sections 108 and 220, subject to the restrictions of s.108AA.

The Permitted Baseline

41. Although there are no permitted subdivision provisions relevant, Mr White did raise the fact that under the LLR A Zone rules, a second residential unit could be erected on this site as of right.

42. Rule 11.5.9.1 provides for a maximum of one residential unit per 2,000m^2 of net site area. The definition of net site area is such that the existing driveway on the site would not be excluded from the net site area in the absence of subdivision of the site.

43. A second residential unit would be limited to 8m in height (Rule 11.5.1.1) and need to be setback 4m from each site boundary (Rule 11.5.3.1). The maximum building coverage of all buildings on the site would be 15% of the net site area (Rule 11.5.2). As the existing site is 4,000m^2, Rule 11.5.11 requiring recession planes, would not apply.

44. While on the face of it there is a permitted baseline available, the effect of Rule 29.5.14 is to make every new dwelling having access from Sam John Place a restricted discretionary activity. Thus no permitted baseline exists.

---

1 Section 104(1)(a) and section 104(1)(ab)
2 Section 104(1)(b)(vi)
3 Section 104(2)
4 E Neill, Section 42A Report, Section 10

Effects of the Proposal on the Environment

45. There was agreement between Mr White and Ms Neill that the effects arising from access, infrastructure and servicing, and hazards would be less than minor. I note that Ms Neill's assessment in relation to access relied on Ms Overton's advice that, while strictly speaking the Council should seek the vesting of Sam John Place as road, it would be onerous to require applicants for a two-lot subdivision to undertake the upgrading required to bring the private road up to Council standards.

46. Ms Overton's report, in discussing the two consent notices, provided advice to Ms Neill on the adequacy of the vehicle crossings. While Ms Overton was satisfied that adequate provision had been made, I am not certain that a proper evaluation of the PDP requirements have been made in this instance. Rule 29.5.15 (not subject to appeal) sets the standards for the width and design of vehicle crossings in urban zones. Vehicle crossing is defined in Chapter 2. It means the formed and constructed vehicle entry/exit from the carriageway of any road up to and including the road boundary of any site across which vehicle entry or exit is obtained. Road is defined as having the same meaning as given in section 315 of the Local Government Act 1974. The essential effect of that definition is that to be a road, it must be vested in the Council as a road.

47. Given that Sam John Place is an access lot, the vehicle crossing applicable to this site can only be that between the southern boundary of Sam John Place (Lot 31 DP 306940) and the carriageway of Cemetery Road. Therefore, I do not consider Rule 29.5.15 to be relevant and see no reason for any reference to vehicle crossings in any consent notice that would apply solely to Proposed Lot 1.

48. In her Section 42A Report, Ms Neill concluded that the reduced net site area of proposed Lot 1 would have adverse effects on the character and amenity of the LLR A Zone that would be more than minor. While there is no permitted baseline for development on this site (or any other in Sam John Place), the only reason why a consent would be needed for a second residential unit on the site derives from the private nature of Sam John Place. Ms Neill considered that issue to be such a minor concern that an advice note would be adequate to deal with it.

49. If I were to disregard the issue of more than 12 residential units having access off Sam John Place as Ms Overton and Ms Neill appear to have done, then it would be logical for me to conclude that a second dwelling of substantial size could be erected on the applicants' site in accordance with the zone rules. In such a circumstance I find it difficult to see how the subsequent creation of an easement over part of the site and the site's subdivision could affect the character and amenity of the adjacent LLR A Zone. One must presume that development in accordance with the bulk and location and density rules has no effect on character and amenity values of the zone given those rules must implement the policies applying to the zone.

50. Given that proposed Lot 1 would have a net site area of 1,682m^2 and a coverage limit of 252.3m^2, future residents of the site would have adequate outdoor space. I note also that the permitted maximum building coverage would be reduced from the 300m^2 permitted for a complying 2,000m^2 site.

51. Overall, I am satisfied that the effects of the proposal would be less than minor.

Consideration Against the Objectives and Policies of the District Plans

Operative District Plan

52. While s.86F states that ODP rules are replaced by PDP rules that are to be treated as operative, no such provision applies in the case of objectives and policies. However, as the PDP zoning of the site is to be treated as operative and ODP zoning inoperative, I consider it is only the higher order objectives and policies that can be relevant.

53. Ms Neill referred me to Objective 4.2.5 and Policy 1 under that objective, and Objective 4.8.1 and Policy 1.6 under that objective. These relate to Future Development and Natural Hazards respectively. Ms Neill also referred me to Objective 2 and Policies 2.6 and 2.7 in Chapter 14 Transport, and Objectives 1 Servicing and 5 Amenity Protection in Chapter 15 Subdivision, and a series of policies under each of those.

54. With respect to the objective and policy related to future development, I consider the rezoning of the land as an urban zone and including it within the UGB diminishes their relevance such that they are deserving of very little weight. The proposal is certainly not contrary to them.

55. The proposal raises no natural hazard issues and is consistent with the objective and policy from Section 4.8.

56. I am satisfied that the proposal is consistent with the Transport objective and policies, noting that where those policies relate to roads, this proposal does not adjoin or directly access a road.

57. Subject to adequate conditioning, the proposal is consistent with the objective and policies relating to servicing.

58. I am also satisfied that the proposal is consistent with the objective and policies related to amenity protection. The proposal is in an urban area where built form is expected.

Proposed District Plan

59. Ms Neill referred me to a series of objectives and policies from Chapters 3 (Strategic Direction) and 4 (Urban Development). Many of these are subject to appeal. However, it is fair to say that, as they are high level strategic objectives and policies, their direct relevance to this application is limited as the proposal represents an activity that is in large part provided for by the PDP zone provisions, which give effect to the high level objectives and policies. I am satisfied that the proposal is consistent with the objectives and policies in Chapters 3 and 4.

60. The relevant objectives and policies in Chapter 11 are not subject to appeal. Objective 11.2.1 is to maintain a high quality of residential amenity values within the LLR zone. The relevant policy to achieve this objective is to maintain the low density residential character and amenity through minimum allotment sizes that efficiently utilise the land resource and infrastructure (Policy 11.1.1.1). Ms Neill also referred me to Policies 11.2.1.2 and 11.2.1.3. The first of these seeks to maintain and enhance residential character and high amenity values by controlling the colour, scale, location and height of buildings in LLR A Zone (although I note the rules for Area A do not control colour). The second policy is implemented by Rule 11.5.8 which I do not understand to be in contention.

61. Ms Neill also referred me to Objective 11.2.2 which commences “Predominant land uses are residential”. Policy 11.2.2.1 commences “Provide for residential and home occupation as permitted activities”.

62. I am satisfied that this proposal is generally consistent with the relevant objectives and policies from Chapter 11. I note in particular that Policy 11.2.1.1 is concerned with achieving the residential character and amenity through minimum lot sizes. The character and amenity is to be derived from the low density of development, which, in my view, infers openness is preferred to built-form. An area dedicated to access retains openness and ensures that overall density on the two proposes sites remains consistent with that proposed overall for the zone.

63. Chapter 27 contains and extensive list of objectives and policies. None of those relevant to this application are subject to appeal. Objectives 27.2.1 and 27.2.2 relate to the design of subdivisions. Policy 27.2.1.4 is to discourage non-compliance with minimum allotment sizes, but in urban areas allows consideration of mitigating factors. In this instance, greater efficiency in the development of the land resource would mitigate any adverse effects arising from the failure to achieve the minimum net site area. The size of the land available for development on proposed Lot 1 would mean that the future residents would still enjoy a high level of amenity (Policy 27.2.2.1), and all infrastructure and services can be provided (Policy 27.2.1.3).

64. Objective 27.2.3 provides for small scale infill subdivision. This proposal is consistent with this objective and the ensuing policies.

65. Objective 27.2.5 deals with infrastructure and services. The proposal is consistent with that objective and the ensuing policies.

66. Ms Neill referred me to Objectives 29.2.2 and 29.24 and Policy 29.2.2.11 of Chapter 29 Transport and considered the proposal was consistent with them. I also consider Policy 29.2.2.1 is relevant in part in that it requires access to be compatible with the character and amenity of the surrounding environment. I am satisfied that the proposal is consistent with these objectives and policies.

Overall Conclusion on Objectives and Policies

67. The proposal is consistent with the objectives and policies of the PDP and the ODP. Given that no rules in the ODP are relevant to the consideration of this application, and that most of the PDP objectives and policies, particularly those most pertinent to the application, are not subject to appeal, I conclude that more weight should be given to the PDP provisions, with very little weight given to the ODP provisions.

Section 104D Tests

68. I am satisfied the adverse effects of the environment of the proposal are less than minor and that the proposal is not contrary to the objectives and policies of the PDP nor to those of the ODP. The proposal can be considered under s.104.

National Policy Statement on Urban Development Capacity 2016

69. This NPS is in large part aimed at ensuring that a strategic level, councils make adequate provisions for future urban development. However, the Council's decisions on the PDP were made in accordance with the provisions of the NPS. There was no suggestion from Mr White or Ms Neill that the PDP contained omissions or deficiencies that would lead me to look beyond the PDP provisions and into the detail of the NPS.

National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health

70. Ms Neill advised that based on the Council records, this land is not a HAIL site and the NES does not apply. I accept that advice.

Partially Operative Otago Regional Policy Statement and Proposed Otago Regional Policy Statement

71. Although Ms Neill discussed provisions from these documents, there was no suggestion that the PDP had failed to give effect to the Partially Operative ORPS or have regard to the Proposed ORPS. While there is perhaps a level of uncertainty given the appeals on the provisions of Chapters 3 and 4, any decision on those appeals must give effect to the Partially Operative ORPS.

72. To ensure I have not omitted consideration of these documents, I have reviewed the provisions referred to by Ms Neill. I do not agree with her that the proposal is not contrary to the documents because that is not the test. Rather, I see no inconsistency between the two ORPS documents and the proposal.

Consent Notices

73. There was agreement between Ms Neill and Mr White that Consent Notice 5205874.3 no longer serves any purpose on this site and can be cancelled. I accept that recommendation.

74. Consent Notice 6121952.2 contained three conditions. Condition (a) required the installation of on-site disposal of stormwater when a dwelling was constructed on the lot. Condition (b) required all construction to be contained within the boundaries of the lot with the only access for construction vehicles being via the vehicle crossing constructed at the time of subdivision. In addition, any damage to same vehicle crossing was to be made good. Condition (c) required the payment of headworks fees for water and sewerage if an additional household unit were established on the site.

75. There was agreement that Condition I had been overtaken by the ability of the council to impose Development Contributions.

76. Mr White considered that Condition (a) no longer need apply to Lot 2 as a dwelling had been erected and an on-site stormwater disposal system installed. He agreed that such a condition needed to be placed on Lot 1 and recommended a revised version that provided for on-going maintenance of such a system. At the hearing I discussed with Mr White whether Lot 2 should be subject to an on-going requirement to maintain the on-site stormwater disposal system. The existing condition made no mention of on-going maintenance. While he agreed in principle, he did not suggest a revised condition which could be applied to Lot 2.

77. Ms Overton's report was ambiguous as to whether Condition (a) should remain or not. While noting the requirements of Condition (a), she went on to state "*I am satisfied that stormwater disposal will be a requirement of Building consent and assessed at the time a future residential unit is constructed*"[5]. That statement is consistent with Mr White's comment that stormwater disposal is a standard component of any building consent and so will be assessed at building consent stage whether the consent notice was in place or not[6]. At the hearing Ms Neill considered that the condition could be amended to require on-going maintenance.

---

5 L Overton, Engineering Report, Appendix 2 of Section 42A Report, at page 29

6 D White, Statement of Evidence, paragraph 21

78. Mr White considered there was no need for Condition (b) to remain as there was only one entry to proposed Lot 1 and other legal requirements would ensure construction should remain within the site. Ms Overton did not address that aspect of the condition, but considered the condition should remain to ensure repair to any damage to the vehicle crossing. Ms Overton also recommended a condition requiring remediation of any damage to roads or berms as a result of exercise of the consent. Ms Neill supported the inclusion of the recommended 11 condition.

79. Ms Neill also recommended an additional condition be imposed by consent notice to restrict the erection of either a solid fence or one greater than 1.2 m in height along the boundary between Lot 1 and the right of way easement. Mr White did not accept that such a condition was appropriate, noting that fences are a permitted activity in the LLR A Zone. He did note that such a condition had been imposed on at least one other non-complying LLR A Zone subdivision, but suggested this was accepted by the applicant to avoid a hearing.

80. The power to impose conditions on a resource consent is provided by s.108 of the Act, and in respect of subdivision consents, s.220. That power is limited both by common law[7] and s.108AA of the Act. Particularly relevant to this discussion are the limitations imposed by s.108AA(1) which states:

> *A consent authority must not include a condition in a resource consent for an activity unless-*
> *a) The applicant for the resource consent agrees to the condition; or*
> *b) The condition is directly connected to 1 or both of the following:*
> *i. An adverse effect of the activity on the environment:*
> *ii. An applicable district or regional rule, or a national environmental standard; or*
> *c) The condition relates to administrative matters that are essential for the efficient implementation of the relevant resource consent.*

81. The was no suggestion that clause I was relevant to these proposed conditions. Nor was I referred to any PDP rules which the proposed conditions related to. I note, however, that Rule 27.5.7, which would apply if the minimum allotment size was achieved, includes "stormwater design and disposal" as a matter of discretion. That rule is not applicable in this application. I note also that, even where an applicant has agreed to a condition, it remains the discretion of the decision-maker as to whether to impose that condition.

82. The essential consideration, given the limitations imposed by s.108AA, is the extent to which the conditions proposed relate directly to an adverse effect on the environment.

83. Turning first to Condition (b), the part of the condition requiring construction be contained within the site does not appear to relate to any adverse effect on the environment. It appears to relate only to a land ownership issue. In this instance I consider it unnecessary. The remaining parts of the condition relating to the vehicle crossing appear to be supported by Ms Overton by a fundamental misunderstanding of the PDP provisions relating to vehicle crossings. The only relevant vehicle crossing in this instance is at the junction of Sam John Place and Cemetery Road. There was no suggestion that that piece of road reserve was susceptible to construction traffic damage, and there appears no other physical means of accessing the site. The ability to erect a dwelling on proposed Lot 1 is not, given the provisions of s.108AA, sufficient reason to apply condition (b).

84. I conclude that condition (b), or any amended wording of it, should not be applied if I were to grant consent.

---

7 *Newbury DC v Secretary of State for the Environment* [1981] AC 578

85. Condition (a) recommended by Mr White following discussion with Ms Overton[8], would only apply to proposed Lot 1. While I accept that the failure to deal properly with stormwater could lead to adverse effects on the environment, if the matter is one that is dealt with at the building consent stage anyway, there is no obvious reason why it need be imposed on the subdivision consent. I note also that while there are rules in Chapter 27 of the PDP requiring the installation of infrastructure for potable water (Rules 27.7.15.1 and 27.7.15.3), telecommunications (Rules 27.7.15.5 and 27.7.15.6) and electricity (Rule 27.7.15.4), no such rule exists in respect of stormwater disposal, despite a policy to ensure adequate stormwater management (Policy 27.2.5.11).

86. On balance, given that the applicants agree to have the condition imposed on Lot 2, notwithstanding that it is probably an unnecessary impediment on the title, if I grant consent I will impose the condition proposed by Mr White in the Applicants' Closing.

87. Finally I need to consider the fencing restriction recommended by Ms Neill. I note at the outset that the wording proposed by Ms Neill in the Section 42A Report contained internal contradictions. However, following questioning at the hearing, it was apparent that she was seeking a condition that limited any fencing between the accessway easement and Lot 1 to a post and wire fence no greater than 1.2m in height. Ms Neill's reasons for imposing this condition are set out in the paragraph at the top of page 13 of her Section 42A Report. Essentially they were that a solid fence in this location would diminish the open space and large lot character of the area. She considered that a solid hedge would equally have such effects but did not propose a condition in respect of hedging.

88. Under the provisions of the PDP, fences less than 2m in height are not buildings and, due to the application of s.9 of the Act, are permitted activities anywhere in the LLR A Zone. I take from the general provision allowing fences up to 2m in height, whether solid or otherwise, that they are not considered to have any adverse effects on the environment, notwithstanding Ms Neill's comments. In my view, s.108AA precludes the Council's ability to impose such a condition absent the consent of the applicants.

89. Ms Neill, in response to matters raised by submitters, in the Section 42A Report proposed additional conditions limiting the maximum building height to 5.5m and requiring a minimum setback of 6m from internal boundaries. In my view those matters both fall into the same category of the fencing condition. They seek to impose more restrictive rules than those applying generally in the LLR A Zone with no demonstration that adverse effects on the environment greater than could be expected from a building complying with the zone rules would arise from erection of a building on Lot 1. In my view s.108AA would preclude the imposition of the conditions proposed by Ms Neill. As it is, Mr White has advised that the submitters and the applicants have agreed to private arrangements to deal with the submitters' concerns.

Other Matters – Section 104(1)I

Precedent

90. Mr White presented[9] an extensive list of consents granted in the LLR A Zone where the minimum net site area of one or more sites was not achieved. As presented, this list contained several applications which were on-hold or had been withdrawn, and one that was listed as "in progress" which, he advised, was subject to discussions regarding conditions. Deleting those applications, his list comprised 27 applications. Of those, it appears that 7 applications involved subdivisions in the LLR A Zone where one or more of the proposed lots had a net site area of less than 2,000m^2 and the combined net site area of all the lots in the subdivision was less than 2000m^2 multiplied by the number of lots. I have used that distinction as there were several consents granted for a two-lot subdivision

8 D White, Applicants' Closing, paragraph 9

9 Exhibit C

where the combined net site area of the two lots equalled or exceeded 4,000m^2. I note that it appears that all of these consents were granted without a hearing.

91. Mr White considered that the consents granted demonstrated a baseline of adverse effects which must be no more than minor to enable the granting of the consents. It was his evidence that this proposal had less adverse effects than that baseline and was therefore worthy of consent.[10] He also stated that the granting of those approvals (the oldest of which was dated 4 September 2018) means that this proposal cannot set a precedent.

92. Ms Neill considered the matter of precedent and concluded that while this proposal did not have unique qualities, assessing on its merits the granting of consent would not set a precedent.

93. It is well established law that an applicant should be able to expect that like applications will be treated in the same manner. Mr White did not explicitly state that the previous consents established a precedent which I should follow, but he considered that the Council's failure to treat LLR A Zone applications consistently was contrary to the procedural principles in s.18A.[11]

94. While the Environment Court has observed that the precedent created by earlier decisions provides an expectation of like treatment, not an entitlement[12], inconsistency can threaten not only the integrity of the district plan, but also the integrity of the consent authorities themselves[13].

95. In my view the Council has, by granting so many non-complying activity consents for sites not able to meet the minimum net site area, set a precedent which would create an expectation of like treatment in subsequent applicants. That these consents were granted without a hearing would appear to suggest a Council policy, albeit not one contained in the PDP.

96. There is another potential issue of precedent raised in this application that was not noted by Mr White or Ms Neill. That is the issue of additional residential units having access of Sam John Place in contravention of Rule 29.5.14. Ms Overton's report noted that Sam John Place served in excess of 12 units when formed and further subdivisions since that time have led to there now being 23 lots served by the private access lot. It appears from her report that, from an engineering standpoint, there is no real impediment to other residential units having access off Sam John Place up to a total of 200. Ms Overton treated her advice on a previous application as being applicable to this application. One would expect from that approach that future subdivisions in Sam John Place should not be impeded by Rule 29.5.14, and that no conditions would be required as a result of any consent under that application.

Integrity of the PDP

97. The provisions in the PDP that apply to this proposal achieved the status of being treated as operative very recently – mid-2018 for Stage 1 provisions and mid-2019 for Stage 2 provisions. It is apparent from the number of consents granted where the minimum net site area has not be met that there a number of sites in the LLR A Zone similar to the applicants' site where the minimum lot size of 2,000m^2 is met, but designations or accessways mean the minimum net site area of 2,000m^2 is breached. As the zone was created over land that had in large part been previously subdivided with a minimum lot size of 4,000m^2 there may be many sites in the zone facing the same consent process as these applicants.

---

10 D White, Hearing Presentation, Section 14

11 D White, Statement of Evidence, paragraph 79

12 *Feron v Central Otago* DC C75/09

13 *Auckland RC v Waitakere CC* A169/05

98. While Ms Neill is correct that each application needs to be considered on its merits, if the rules in the district plan are continually requiring consents because of the unforeseen consequences of zoning rules, maintenance of the integrity of the district plan requires amendment to the plan. Otherwise, as well as suggesting the district plan rules are lacking integrity, applicants are been penalised with costs and time delays which would be contrary to the principles in s.18A that Mr White referred me to.

Section 106

99. This section requires particular consideration of natural hazards and the adequacy of legal and physical access to each allotment.

100. No natural hazards beyond those generally applying in the district were identified. As to access, each lot will hold an equal share in Sam John Place as a result of an amalgamation condition proposed. In addition, each lot will have access over the right of way easement over Lots 1 and 3 DP 3828577.

101. I am satisfied that no additional provision be made under s.106 beyond the conditions recommended.

Overall Conclusions

102. This application has effects consistent with those expected for a permitted activity in the LLR A Zone. This zone has been applied to areas that have previously been zoned to allow subdivision to 4,000m^2. The new zone allows an increased in density of development and a halving of the minimum allotment size. It is apparent from the number of consents the council has already dealt with in this zone that to benefit from the increased development potential the zone offers, there are instances where the minimum net site area cannot be achieved.

103. Having considered this proposal against the rules in the PDP and compared it against the permitted baseline, I am satisfied that, in instances in the LLR A Zone where each lot can contain at least 2,000m^2, but the only way of achieving access to one or more of the sites requires that one or more of them cannot met the minimum net site area of 2,000m^2, such subdivisions are not contrary to the objectives and policies of the PDP and the adverse effects arising from the failure to achieve the minimum net site area are minor or less than minor. That is not to say that in any particular instance there may be other factors which make a proposal contrary to the objectives and policies of the PDP, or which generate adverse effect on the environment that are more than minor. Such an approach is consistent with the strategic objectives and policies of the PDP and the NPSUDC.

104. The one factor which could be a particular issue in any application of this nature is the limit on the number of residential units served by private access (PDP Rule 29.5.14). As I understand the advice from Ms Overton, this is not an issue in relation to Sam John Place provided advice is included that at some stage owners of that private access may need to financially contribute to upgrading to enable vesting in the Council. Access from Sam John Place to each of these lots would comply with Rule 29.5.14 if Sam John Place were so vested.

105. Having had particular regard to the relevant provisions in Part 2 of the Act, I am satisfied that this proposal represents an efficient use of urban land which maintains and enhances amenity values and quality of the environment in the vicinity. Overall, I conclude that this application is worthy of consent.

106. I have been presented with draft conditions of consent for the subdivision consent by Ms Neil and Mr White. The only difference between those drafts is in respect of the ongoing conditions to be subject to consent notice under s.221 of the Act. As discussed above, I prefer Mr White's version.

107. The application also seeks a land use consent to erect a residential unit on Lot 1 in breach of Rule 11.5.9.1 Residential Density. No conditions have been recommended in respect of that consent. I consider it important that the consent make it clear that breach of other standards in Section 11.5 of the PDP are not consented. However, to make that a condition of consent would make breaches of some standards discretionary rather than restricted discretionary activities due to the need to amend the condition on this consent. Thus I propose an advice note to clarify the extent of the consent.

108. The other matter not raised in respect of the land use consent, but important, is the commencement date. There exists the possibility that the land use consent could lapse before Lot 1 came into existence. I consider it appropriate to set the commencement date of the land use consent as the date the council approves the survey plan for the subdivision under s.223(1A) of the Act.

Decisions

A. Pursuant to section 104B of the Resource Management Act 1991 Subdivision Consent is granted to J Battson and D Manson to subdivide Lot 2 DP 328577 being 20C and 20D Sam John Place in two lots subject to the conditions set out in Appendix 1.

B. Pursuant to section 104B of the Resource Management Act 1991 Subdivision Consent is granted to J Battson and D Manson to cancel Consent Notice 5205874.3 and Consent Notice 6121952.2 as they apply to Lot 2 DP 328577.

C. Pursuant to section 104B of the Resource Management Act 1991 Land Use Consent is granted to J Battson and D Manson to erect a residential unit on proposed Lot 1 shown on the Patterson Pitts Group plan entitled "*Jude Battson 20A Sam John Place, Scheme Plan Lots 1 and 2 being subdivision of Lot 2 DP 328577, Sheet No: 100 Revisions No: A, Date Created: 26/02/2019*" in breach of Rules 11.5.9.1 and 29.5.14 of the Queenstown Lakes Proposed District Plan. This consent shall commence on the date the survey plan for Subdivision Consent A above has been approved by the Council under section 221(1A) of the Resource Management Act 1991.

Advice Note: This land use consent does not remove the need for the consent holder to comply with all relevant provisions of the Queenstown Lakes Proposed District Plan other than Rules 11.5.9.1 and 29.5.14.

Dated 30 October 2019

Denis Nugent
Hearing Commissioner

Appendix 1 – Consent Conditions

APPENDIX 1 – SUBDIVISION CONSENT CONDITIONS

General Conditions

1. That the development must be undertaken/carried out in accordance with the plans:

   - Paterson Pitts Group, Jude Battson 20A Sam John Place, 'Scheme Plan Lots 1 and 2 being Subdivision of Lot 2 DP 328577', Sheet No: 100, Revision No: A, Date Created: 26/02/2019

   stamped as approved on 30 October 2019

   and the application as submitted, with the exception of the amendments required by the following conditions of consent.

2. This consent shall not be exercised and no work or activity associated with it may be commenced or continued until the following charges have been paid in full: all charges fixed in accordance with section 36(1) of the Resource Management Act 1991 and any finalised, additional charges under section 36(3) of the Act.

Engineering

General

3. All engineering works, shall be carried out in accordance with the Queenstown Lakes District Council's policies and standards, being QLDC's Land Development and Subdivision Code of Practice adopted on 3rd May 2018 and subsequent amendments to that document up to the date of issue of any resource consent.

   Note: The current standards are available on Council's website via the following link: http://www.qldc.govt.nz

To be completed prior to the commencement of any works on-site

4. The owner of the land being developed shall provide a letter to the Manager of Resource Management Engineering at Council advising who their representative is for the design and execution of the engineering works and construction works required in association with this development and shall confirm that these representatives will be responsible for all aspects of the works covered under Sections 1.7 & 1.8 of QLDC's Land Development and Subdivision Code of Practice, in relation to this development.

To be completed before Council approval of the Survey Plan

5. Prior to the Council signing the Survey Plan pursuant to Section 223 of the Resource Management Act 1991, the consent holder shall complete the following:

   a) All necessary easements shall be shown in the Memorandum of Easements attached to the Survey Plan and shall be duly granted or reserved.

Amalgamation Condition

6. The following shall be registered with Land Information New Zealand (CSN XXXXX):

   - *"That Lot 31 DP 306940 (legal access) be held in two undivided one-fortieth shares and that individual records of title be issued in accordance with the amalgamation condition as directed by LINZ."*

To be completed before issue of the s224(c) certificate

7. Prior to certification pursuant to section 224(c) of the Resource Management Act 1991, the consent holder shall complete the following:

   a) The submission of 'as-built' plans and information required to detail all engineering works completed in relation to or in association with this subdivision at the consent holder's cost. This information shall be formatted in accordance with Council's 'as-built' standards and shall include all Roads (including right of ways and access lots), Water, Wastewater and Stormwater reticulation (including private laterals and toby positions).

   b) The provision of a water supply to Lots 1 and 2 in terms of Council's standards and connection policy. This shall include an Acuflo GM900 as the toby valve and an approved water meter as detailed in QLDC Water Meter Policy (Appendix A), dated June 2017. The costs of the connections shall be borne by the consent holder.

   c) The provision of a foul sewer connection from Lots 1 and 2 to Council's reticulated sewerage system in accordance with Council's standards and connection policy, which shall be able to drain the buildable area within each lot. This shall include an inspection chamber/rodding eye at the junction of the laterals for the two lots if the existing lateral is to be utilised for both lots. The costs of the connections shall be borne by the consent holder.

   d) An Elster PSM V100 or Sensus 620 water meter shall be installed on to the Acuflo manifold for Lots 1 and 2 as per condition 7b) above, and evidence of supply shall be provided to Council's Subdivision Inspector.

   e) Written confirmation shall be provided from the electricity network supplier responsible for the area, that provision of an underground electricity supply has been made available (minimum supply of single phase 15kVA capacity) to the net area of all saleable lots created and that all the network supplier's requirements for making such means of supply available have been met.

   f) Written confirmation shall be provided from the telecommunications network supplier responsible for the area, that provision of underground telephone services has been made available to the net area of all saleable lots created and that all the network supplier's requirements for making such means of supply available have been met.

   g) All earth worked and/or exposed areas created as part of the subdivision shall be top-soiled and grassed, revegetated, or otherwise stabilised.

   h) The consent holder shall remedy any damage to all existing road surfaces and berms that result from work carried out for this consent.

Ongoing Conditions/Consent Notices

8. The following condition of consent shall be complied with in perpetuity and shall be registered on the title to Lot 1 by way of Consent Notice pursuant to s.221 of the Act.

   At the time a building is erected on the lot, the owner for the time being shall engage a suitably qualified professional as defined in Section 1.7 of QLDC's Land Development and Subdivision Code of Practice to design a stormwater disposal system that is to provide stormwater disposal from all impervious areas within the site. The proposed stormwater system shall be subject to the review of Council prior to implementation and shall be installed prior to occupation of the residential unit.

   This shall include **:**

   (i) Percolation testing shall be undertaken at the individual soak pit locations to confirm soakage. A copy of the test results shall be provided to Council and shall be in general accordance with the "Acceptable Solutions and Verification Methods for New Zealand Building Code Clause: E1 Surface Water".

   (ii) The final design and sizing of each soak pit shall be based on the individual percolation test results and provided to Council for acceptance prior to installation of the individual soak pit infrastructure.

   (iii) The owner of the lot shall be responsible for the ongoing monitoring and maintenance of the stormwater disposal system to ensure the soak pits continue to provide adequate soakage and do not become blocked or damaged.

Advice Notes:

1) This consent triggers a requirement for Development Contributions, please see the attached information sheet for more details on when a development contribution is triggered and when it is payable. For further information please contact the DCN Officer at QLDC.

2) The consent holder is advised that in order to vest Sam John Place to Council the cul- de-sac turning head would need to upgraded to comply with Council's standards. Any upgrades would need to be undertaken as a collaborated exercise with all owners of the shared access being involved in a cost share process.

QUEENSTOWN LAKES DISTRICT COUNCIL

APPROVED PLAN:
RM190261

Wednesday, 30 October 2019

Lot 1
DP 300226

(55.83)

Lot 2
2000m²

36.03

24.54

Existing
Building

4.3m

21.57

(85.68)

23.05

Lot 2 DP 328577

14.18

Lot 1
DP 328577

(75.00)

existing driveway

30mx30m Shape Factor

Ⓐ

50.46

Lot 1
2000m²
1682m² (net)

49.65

(45.60)

Ⓓ

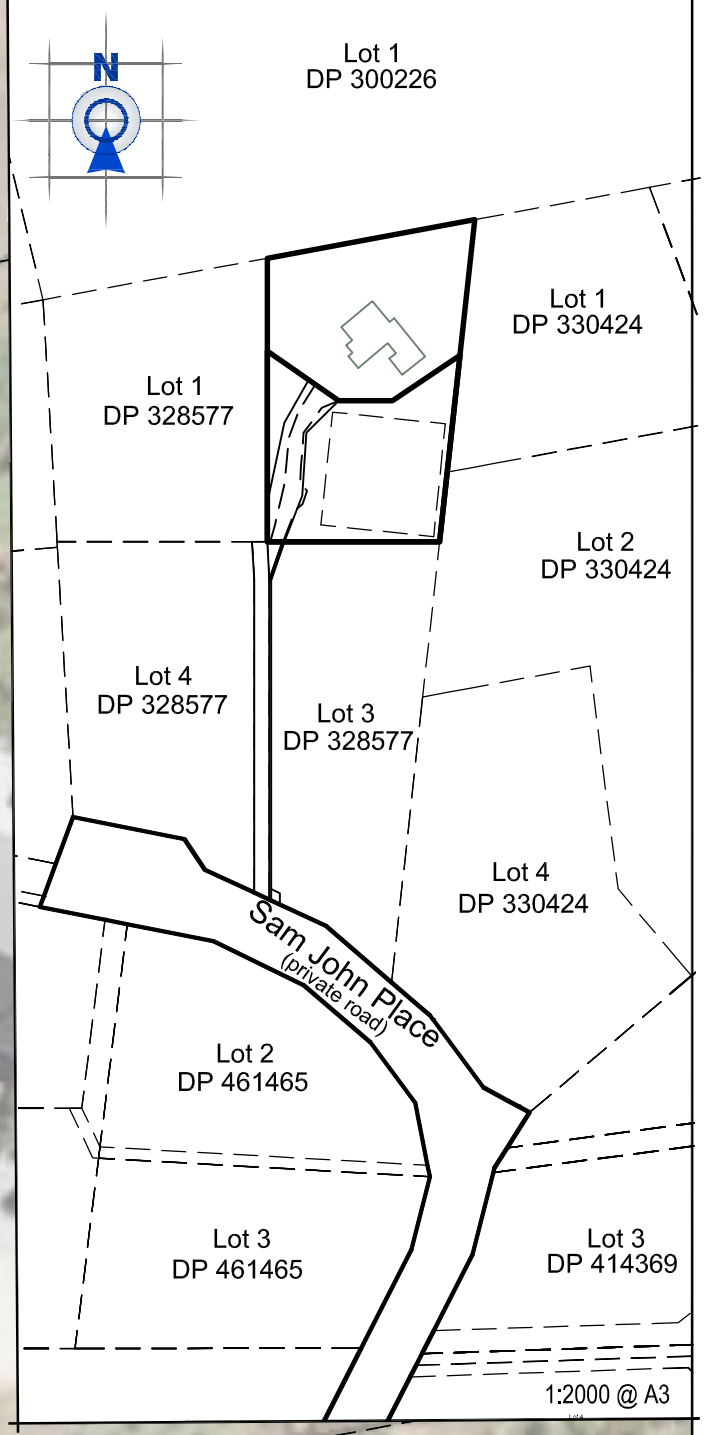
Ⓔ

Ⓒ

Lot 3
DP 328577

Lot 1
DP 330424

Lot 2
DP 330424



SCHEDULE OF PROPOSED EASEMENTS			
SHOWN	PURPOSE	SERVIENT TENEMENT/ BURDENED LAND	DOMINANT TENEMENT/ BENEFITED LAND
A	Right of Way	Lot 1	Lot 2

SCHEDULE OF EXISTING EASEMENTS			
SHOWN	PURPOSE	SERVIENT TENEMENT/ BURDENED LAND	DOMINANT TENEMENT/ BENEFITED LAND
C,D,E	Right to Convey Electricity	Lot 1 DP 328577 Lot 3 DP 328577	Aurora Energy Ltd.
C,D,E	Right to Convey Telecommunications	Lot 1 DP 328577 Lot 3 DP 328577	Telecom NZ Ltd
C,D,E	Right to Drain Foul Sewerage, Right to Convey Water	Lot 1 DP 328577 Lot 3 DP 328577	QLDC
C, D	Right of Way	Lot 1 DP 328577 Lot 3 DP 328577	Lots 2 DP328577

WANAKA
19 Reece Crescent
or P.O. Box 283
Wanaka 9343
T 03 443 0110
E wanaka@ppgroup.co.nz

Note: Areas and Dimensions subject to final survey.

PATERSONPITTSGROUP
Your Land Professionals
www.ppgroup.co.nz
0800 PPGROUP

Client & Location:
Jude Battson
20A Sam John Place

Purpose & Drawing Title:
Scheme Plan
Lots 1 and 2 Being Subdivision of Lot 2 DP 328577

Surveyed by:	PH	Original Size:	A3
Designed by:	xxx		
Drawn by:	TJE		
Checked by:	SD		
Approved by:	SD		
Job No: W5746		Sheet No: 100	Revision No: A
Scale: 1:400 @ A3		DO NOT SCALE	
Date Created: 26/02/2019			

L:\DATA\5700\5746 BATTSON JUDE\ACAD\W5746 190225 SCHEME PLAN 20 SAM JOHN PL.DWG