

# Decision to Plan Change 9 by the Hearings Panel to the Queenstown Lakes District Council

<b>Issue:</b>	<b>Farm Buildings on Outstanding Natural Features</b>
<b>Dated:</b>	<b>25<sup>th</sup> August 2006</b>
<b>Ratified by Council:</b>	<b>29 September 2006</b>
<b>Decision Notified:</b>	<b>4 October 2006</b>

## Contents

1.0	Introduction
2.0	Background
3.0	Statutory Considerations
4.0	List of Submitters
5.0	The Hearing
6.0	Submission Discussion and Decision
7.0	Overall Decision

## 1.0 Introduction

This decision discusses and decides on submissions received on Queenstown Lakes District Council Plan Change 9: Farm Buildings on Outstanding Natural Features.

The relevant provisions of the Queenstown Lakes Partially Operative District Plan are:

### **Section 5.3 Rural General and Ski Area Sub-Zone Rules**

Submissions are assessed individually. In considering and deciding on submissions, the name of the submitter is shown in **bold** for original submissions, while bold *italics* is used in reference to further submissions.

In making this decision, Council has been assisted by a report prepared by Vivian and Espie Limited, commissioned in accordance with Section 42A of the Resource Management Act 1991 (hereafter the "RMA"). This report was circulated to those submitters wishing to be heard at the hearing prior to the hearing taking place. The Council has taken into account all those matters raised by submitters and further submitters in their respective submissions including relevant matters raised at the Council hearing; and had regard to the provisions of section 32 of the RMA 1991.

All decisions on submissions are included under the heading 'Decision'. Where the decision makes changes to the relevant provisions of the Partially Operative District Plan all relevant text is underlined. Text that is shown as struck out (for example ~~struck-out~~) indicates text that is to be removed from the Partially Operative District Plan.

## 2.0 Background

At the time the Proposed District Plan was notified in 1998, the relevant rules for the Rural General Zone attributed controlled activity status to buildings in all locations (Rule 5.5.3.3(i)). While this rule was not specifically challenged through Environment Court reference proceedings, the Wakatipu Environmental Society Inc. (WESI) lodged a reference in relation to Areas of Landscape Importance (ALI's) which by implication sought discretionary activity status for accessory buildings in ALI's and non-complying activity status for residential units in ALI's. As part of these proceedings, the Court found that it lacked the necessary jurisdiction to implement a rule specific to "farm buildings" due to the limited scope of the reference. The ultimate outcome of these proceedings resulted in a discretionary activity rule for the addition, alteration or construction of "any building" accompanied by a direction from the Court that the implementation of a rule relating specifically to farm buildings would require an application under section 292 of the RMA for the remedy of an alleged defect in the Plan.

Accordingly, WESI lodged an application under section 292 of the RMA requesting discretionary activity status for farm buildings in the Rural General Zone. In response, the QLDC lodged a further section 292 application requesting a restricted discretionary regime for farm buildings in the Rural General Zone. These proceedings lead to the District Plan controlled / discretionary activity regime for farm buildings which existed prior to the notification of Plan Change 9.

While this regime specifically singled out applications for farm buildings within Outstanding Natural Landscapes within the Wakatipu Basin (hereafter "ONL-WB") as requiring discretionary activity consent, there was no reference to or specific treatment of farm buildings located on or within Outstanding Natural Features. In November 2003, the QLDC lodged a further section 292 application with the Court requesting that the relevant provisions be amended to include reference to Outstanding Natural Features. The rationale behind this application was that the absence of any reference to Outstanding Natural Features was the result of a drafting error in the Court's original decision. However, the Court declined the application on the basis that it was not clear that this omission was in fact a drafting error.

Following on from this decision, the QLDC initiated further research that lead to the initiation of Plan Change proceedings seeking discretionary activity status for the construction of farm buildings on Outstanding Natural Features within the Wakatipu Basin.

## 3.0 Statutory Considerations

The following Statutory considerations have been taken into account in making a decision on Plan Change 9.

## Section 74 of the RMA

Section 74 sets out the matters that must be considered in preparing a change to the District Plan. Section 74 states:

- “(1) A territorial authority shall prepare and change its district plan in accordance with its functions under section 31, the provisions of Part 2, its duty under section 32, and any regulations.
- (2) In addition to the requirements of section 75(2), when preparing or changing a district plan, a territorial authority shall have regard to—
  - (a) Any—
    - (i) Proposed regional policy statement; or
    - (ii) Proposed regional plan of its region in regard to any matter of regional significance or for which the regional council has primary responsibility under Part 4; and]
  - (b) Any –
    - (i) Management plans and strategies prepared under other Acts; and
    - (ii) Repealed
    - (iii) Relevant entry in the Historic Places Register; and
    - (iv) Regulations relating to ensuring sustainability, or the conservation, management, or sustainability of fisheries resources (including regulations or bylaws relating to taiapure, mahinga mataitai, or other non-commercial Maori customary fishing).—]to the extent that their content has a bearing on resource management issues of the district; and
- (c) The extent to which the district plan needs to be consistent with the plans or proposed plans of adjacent territorial authorities.
- (2A) A territorial authority, when preparing or changing a district plan, must –
  - (a) take into account any relevant planning document recognised by an iwi authority and lodged with the territorial authority, to the extent that its content has a bearing on resource management issues of the district; and
  - (b) recognise and provide for the management plan for a foreshore and seabed reserve adjoining its district, once the management plan has been lodged with the territorial authority, to the extent that its contents have a bearing on the resource management issues of the district.
- (3) In preparing or changing any district plan, a territorial authority must not have regard to trade competition.”

## Section 31 of the RMA

Among other things, section 74 requires a local authority to comply with its functions under sections 31, 32, 75(2) and Part 2 of the Act in preparing a change to a district plan.

Section 31 of the Act sets out the functions of territorial authorities in giving effect to the purpose of the RMA and provides as follows:

- “(1) Every territorial authority shall have the following functions for the purpose of giving effect to this Act in its district:

- (a) The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the use, development, or protection of land and associated natural and physical resources of the district:
  - (b) the control of any actual or potential effects of the use, development, or protection of land, including for the purpose of—
    - i) the avoidance or mitigation of natural hazards; and
    - ii) the prevention or mitigation of any adverse effects of the storage, use, disposal, or transportation of hazardous substances; and
    - iii) the maintenance of indigenous biological diversity:
  - (c) Repealed
  - (d) The control of the emission of noise and the mitigation of the effects of noise:
  - (e) The control of any actual or potential effects of activities in relation to the surface of water in rivers and lakes:
  - (f) Any other functions specified in this Act
- (2) The methods used to carry out any functions under subsection (1) may include the control of subdivision."

## Part 2 of the RMA

The provisions of Part 2 of the Act include: the purpose of the Act as contained in Section 5; Section 6 - Matters of National Importance; Section 7 Other Matters that require particular regard in achieving the purpose of the Act; and Section 8 Treaty of Waitangi.

Section 5(1) states that the purpose of the Act is to promote the sustainable management of natural and physical resources.

"Natural and physical resources" are defined in Section 2 of the Act as including "land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures."

Under Section 5(2) "sustainable management" is interpreted to mean:

- "... managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well being and for their health and safety while:
- (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
  - (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
  - (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment."

Section 6 Matters of National Importance identifies the following matters of national importance in achieving the purpose of the Act:

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:

- a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
- b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:

- c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
- d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
- e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
- f) the protection of historic heritage from inappropriate subdivision, use, and development.]
- g) the protection of recognised customary activities."

(Underlining indicates sections that are particularly relevant to the plan change).

Section 7 Other Matters identifies the following items that shall be had particular regard to in achieving the purpose of the Act:

- "In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
- (a) Kaitiakitanga;
  - (aa) The ethic of stewardship
  - (b) The efficient use and development of natural and physical resources
  - (ba) the efficiency of the end use of energy
  - (c) The maintenance and enhancement of amenity values
  - (d) Intrinsic values of ecosystems
  - (e) Repealed
  - (f) Maintenance and enhancement of the quality of the environment
  - (g) Any finite characteristics of natural and physical resources:
  - (h) The protection of the habitat of trout and salmon
  - (i) the effects of climate change
  - (j) the benefits to be derived from the use and development of renewable energy."

(Underlining indicates sections that are particularly relevant to the plan change).

Section 8 Treaty of Waitangi states:

"In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

### Section 32 of the RMA

In accordance with Section 32 of the Act, the Council has a duty to consider alternatives, benefits and costs of the proposed change. Section 32 states:

- "(1) In achieving the purpose of this Act, before a proposed plan, proposed policy statement, change, or variation is publicly notified, a national policy statement or New Zealand coastal policy statement is notified under section 48, or a regulation is made, an evaluation must be carried out by—
  - (a) the Minister, for a national policy statement or regulations made under section 43; or
  - (b) the Minister of Conservation, for the New Zealand coastal policy statement; or
  - (c) the local authority, for a policy statement or a plan (except for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of Schedule 1); or
  - (d) the person who made the request, for plan changes that have been requested and the request accepted under clause 25(2)(b) of Part 2 of the Schedule 1.
- (2) A further evaluation must also be made by—
  - (a) a local authority before making a decision under clause 10 or clause 29(4) of the Schedule 1; and
  - (b) the relevant Minister before issuing a national policy statement or New Zealand coastal policy statement.
- (3) An evaluation must examine—
  - (a) the extent to which each objective is the most appropriate way to achieve the purpose of this Act; and
  - (b) whether, having regard to their efficiency and effectiveness, the policies, rules, or other methods are the most appropriate for achieving the objectives.

- (3A) This subsection applies to a rule that imposes a greater prohibition or restriction on an activity to which a national environmental standard applies than any prohibition or restriction in the standard. The evaluation of such a rule must examine whether the prohibition or restriction it imposes is justified in the circumstances of the region or district.
- (4) For the purposes of the examinations referred to in subsections (3) and (3A), an evaluation must take into account –
  - (a) the benefits and costs of policies, rules, or other methods; and
  - (b) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods.
- (5) The person required to carry out an evaluation under subsection (1) must prepare a report summarising the evaluation and giving reasons for that evaluation.
- (6) The report must be available for public inspection at the same time as the document to which the report relates is publicly notified or the regulation is made.”

Section 32 of the RMA was amended 1 August 2003. This Plan Change was publicly re-notified on 10 June 2005 thus the amended provisions of the Act are therefore relevant.

### Section 75 of the RMA

In addition, Section 75(2) also requires the District Plan not to be inconsistent with the Regional Policy Statement or Regional Plan.

It is noted that the section 32 evaluation prepared by the QLDC in relation to this plan change has considered the function of the Council in accordance with section 31 of the RMA and has taken into account the matters which must be considered in preparing a plan change in accordance with sections 74, 75(2) and Part 2 of the RMA. In addition to this analysis and in accordance with the Council’s jurisdiction under section 32(2) of the RMA, a number of additional matters relevant to this Plan Change have been considered as part of this Decision. These matters are clearly identified and discussed below.

For completeness, it is noted that in making a decision on the plan change, the Council is guided by Clause 10 of the First Schedule to the RMA, which provides as follows:

“10. Decision of local authority

- (1) Subject to clause 9, whether or not a hearing is held on a proposed policy statement or plan, the local authority shall give its decisions, which shall include the reasons for accepting or rejecting any submissions (grouped by subject-matter or individually).
- (2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.
- (3) If a local authority publicly notifies a proposed policy statement or plan under clause 5, it must, not later than 2 years after giving that notice, make its decisions under subclause (1) and publicly notify that fact.
- (4) On and from the date of the public notice given under subclause (3), the proposed plan is amended in accordance with the decisions of the local authority given under subclause (1).”

## **4.0 List of Submitters**

### **Original Submitters**

1. Damper Bay Estates Limited
2. Just One Life Limited
3. Matukituki Trust
4. Iris Scott
5. Grant Stalker

6. Denis Thorn
7. Upper Clutha Environmental Society Incorporated

### **Further Submitters**

1. Federated Farmers New Zealand Incorporated
2. Central Land Holdings Limited
3. Infinity Investments Group Limited
4. Damper Bay Estates Limited

## **5.0 The Hearing**

The hearing to consider submissions and further submissions to Plan Change 9 commenced at 10:30am, Thursday 6<sup>th</sup> July, 2006 at the Edgewater Resort, Wanaka. The Hearings Committee consisted of Commissioner Trevor Shiels and Commissioner Leigh Overton, assisted by Carey Vivian (Planner) and Cathy Walker (Secretary).

In attendance at the hearing was: Mr. Craig McKibbin (Mitchell Partnerships); Mr. Paul Majurey, Mr. Malcolm Moore, Mr. Gregory Marler and Mr. James Gardner- Hopkins (Matukituki Trust); Mr. Matt Harcombe, Mr. John Pawson and Mr. Richard Burdon (Federated Farmers); John May (Just One Life Limited) and one member of the media.

Evidence was tabled from the following Submitters: Mrs. Iris Scott (by email), Central Land Holdings Limited and Infinity Investments Group Limited.

## **6.0 Submission Discussion and Decisions**

Part 6 will consider the submissions received, discuss the issues raised in the submissions and further submissions, make a decision as to whether those submissions should be accepted or rejected and give reasons for the decision. Each submission, (including any relevant evidence presented by the submitter at the hearing) will be considered individually.

### (1) Submission - Damper Bay Estates Limited

#### **Submission Summary:**

**DBEL** submitted in general support of Plan Change 9 and raised the following issues in its submission:

- (a) ONF's as identified need to be adequately protected from inappropriate subdivision, use and development;
- (b) The controlled activity status provided in the District Plan for farm buildings on ONF's does not provide for the appropriate level of protection that should be attributed to those landscape features that are deemed to be truly outstanding.

- (c) As opposed to discretionary status, restrictive discretionary activity status would be more appropriate for applications which relate to farm buildings on ONF's with discretion being restricted to location (anywhere within the property); external appearance; and the provision of water supply, sewage treatment and disposal, electricity and communication services (where necessary).
- (d) Restrictive discretionary activity status is appropriate as it provides the consent authority with the ability to assess each application on its merits while recognising that farm buildings are an anticipated feature within the Rural General zone.
- (e) A more stringent activity status would infer that farm buildings are not anticipated in the Rural General zone, which would result in an unduly restrictive situation for what is a legitimate rural activity.
- (f) The exclusion of ONL from this Plan Change is appropriate, as the extension of a more limited activity status to include farm buildings on ONL would be too onerous, and unduly restrictive for what is a legitimate rural activity.

#### **Decision Requested:**

**DBEL** seek that Plan Change 9 be accepted in part, insofar as a more restrictive activity status be imposed for farm buildings on ONF's in the Rural General zone. Specifically, **DBEL** request that a restricted discretionary activity status be imposed on farm buildings on ONF's, with the consent authority's discretion being restricted to the following matters:

1. location anywhere within the property;
2. external appearance; and
3. the provision of water supply, sewage treatment and disposal, electricity and communication services (where necessary).

#### **Further Submissions:**

**DBEL's** original submission was supported by **Federated Farmers (FFNZ)**, **Central Land Holdings Limited (CLHL)** and **Infinity Investments Group Limited (IIGL)**. These further submissions were in support of **DBEL's** original submission for the following reasons:

- (a) **FFNZ** submit that if farm buildings on ONF's are to be a discretionary activity then discretion should be limited to the assessment of visual effects and the provision of sewage and water.
- (b) **CLHL** and **IIGL** submit that the relief sought by **DBEL** is appropriate and justified in terms of Part 2 of the RMA; and that the Plan Change should be limited to ONF's.
- (c) **IIGL** submit that restricted discretionary activity status is an appropriate mechanism to ensure the protection of ONF's in the future and will further provide the Council with an opportunity to assess each application in terms of the



finite characteristics of the land whilst still recognising that farm buildings are a necessary adjunct to farming operations within the district.

- (d) **IIGL** support the exclusion of ONL's on the basis that such a provision would be too onerous in terms of the economic costs associated with what is a legitimate rural activity.

**Issues Raised in Submissions:**

- (a) General support for plan change.
- (b) Restrictive discretionary status is more appropriate.

**Consideration:**

*General Support for Plan Change.*

It is agreed that ONF's within the Wakatipu Basin need to be protected from inappropriate subdivision, use and development and that controlled activity status is not the appropriate mechanism to achieve this.

*Restricted discretionary status*

ONF's Within the Wakatipu Basin

**DBEL** have requested that the Plan Change be amended from a discretionary to restricted discretionary activity regime. It is agreed that the appropriate activity status for the construction of farm buildings on ONF's within the Wakatipu Basin is restricted discretionary activity status for the following reasons:

1. Restricted discretionary status provides the Council with the ability to assess each application on its merits, and decline to grant consent to such applications where appropriate.
2. Restricted discretionary status provides sufficient certainty to landowners that in making a decision on a farm building application, the Council's discretion will be limited to matters which relate to the farm building only;
3. Restricted discretionary status allows the consent authority to decline farm building applications where the effects (particularly visual effects) of the proposed location are more than minor and where there is no other suitable location within the property; and
4. Restricting the Council's discretion will result in efficiencies in the preparation and processing of farm building applications.

Overall, it is considered that restricted discretionary status for applications within the Wakatipu Basin will result in a regime which effectively balances the time and expense incurred by farmers / applicants in the preparation and processing of farm building applications with the need to avoid, remedy and mitigate any adverse environmental effects of such activities.

However, it is not considered necessary to identify all of the specific matters in relation to which Council's discretion is to be restricted (visibility, location, external appearance, access, water supply, sewerage, treatment and disposal, electricity and telecommunications (where necessary)) as suggested by **DBEL** for the following reasons:

1. Where a proposed farm building does not comply with Site Standard 5.3.5.1(xi) but otherwise complies with relevant Site and Zone Standards, the activity will be a discretionary activity with the exercise of the Council's discretion being confined to the matters specified in the Site Standard not complied with – that is the matters specified in Standard 5.3.5.1(xii). This will enable the Council to exercise its discretion in relation to all matters concerning the farm building including the consideration of Assessment Matters in Section 5.4.2.2. Thus there is nothing to be gained by specifying 'visibility', 'location', 'external appearance' and servicing requirements in the matters over which Council's discretion is reserved.
2. Effectively, **DBEL** is seeking restricted discretionary activity status for farm buildings on Outstanding Natural Features with the Council's discretion being restricted to all matters concerning that farm building. The amended Site Standard achieves this purpose.

The amended Site Standard is provided below.

#### ONF's Outside of the Wakatipu Basin

In the case of farm buildings on ONF's outside of the Wakatipu Basin, a different rule is considered appropriate. The Environment Court has consistently ruled that the ONL-WB is a special case. For this reason, it is considered that ONF's outside of the Wakatipu Basin do not require such rigorous control with respect to farm buildings. Thus, in relation to ONF's elsewhere (outside of the Wakatipu Basin), the controlled activity regime should continue to apply (providing the circumstances specified below can be met).

#### *Limitations on Controlled Activity Status for ONF's Outside of the Wakatipu Basin*

It is considered that the controlled activity regime (where ONF's are concerned) should only apply to one farm building per land "holding" while any additional farm building thereafter should require restricted discretionary activity consent. Where there is other land within an applicant's "holding" that does not form part of an ONF yet the application proposes to locate a farm building on an ONF, restricted discretionary activity status should apply. These additional restrictions which will trigger the need for restricted discretionary activity consent in relation to ONF's elsewhere are considered necessary for the following reasons:

1. The location of farm buildings on land which does not form part of an ONF should be encouraged and preferred to land identified as forming part of an ONF. Thus, where an applicant's entire land "holding" (an area of land in one ownership which may include a number of lots and / or titles) contains non ONF land, it is

necessary for Council to reserve its discretion in relation to the location of farm buildings on non ONF land as an alternative (noting that controlled activity status is not sufficient in this respect as it restricts the Councils control to anywhere within the “property” as opposed to the applicants entire “holding”).

2. By definition a “farm building” is a building which is “necessary” for farming activities. Difficulties arise in determining what farm buildings are or are not “necessary” for farming activities. It is considered that the potential adverse effects which may arise from the location of more than one farm building per “holding” are significant and it may be difficult to determine whether or not such a building is in fact “necessary” for the farming activity to take place. Accordingly, in circumstances where a “holding” already contains one farm building and a second farm building is sought to be located on an ONF, it is considered appropriate for restricted discretionary activity status to be triggered by such an application, thereby enabling the Council to consider the effects associated with the proposed farm building and decline to grant consent to that farm building if appropriate.

#### *General Rationale for Controlled Activity Status in Certain Circumstances*

Council acknowledges that farmers play a very important role in the stewardship of the landscape and that farm buildings are an integral part of this function. Thus Council accepts that where there is a holding of over 100 hectares, there is no other farm building within the holding and where the applicant can establish that the building proposed is in fact a “farm building” (in accordance with the test of necessity) the plan should clearly indicate that while there are controls on location, external appearance and services, a farm building is allowed.

#### Notification

The question of notification of farm building applications is considered highly relevant to the protection of ONF’s from inappropriate use and development. Thus while it is considered that a controlled / restricted discretionary regime is appropriate in relation to farm building activities on ONF’s, public input is considered useful and important in terms of determining what is appropriate or inappropriate use and development of ONF’s. Public input on such applications can only be sought through the public notification of farm building applications.

Section 94D(1) of the RMA provides:

“94D When public notification and service requirements may be varied

- (1) Despite section 93(1)(a), a consent authority must notify an application for a resource consent for a controlled activity in accordance with section 93(2) if a rule in a plan or proposed plan expressly provides that such an application must be notified.”

This rule clearly indicates that Council may insert a rule in a Plan requiring certain applications to be notified. Such a rule is considered appropriate in the case of both controlled and restricted discretionary farm building applications in order to ensure that members of the public are able to have input in what is the appropriate use and

development of ONF's. This public input is considered to be most useful in relation to visibility issues and the particular location of farm buildings on ONF's.

## Decision (1) – DBEL Submission

- (a) The Council's decision is to make the following amendments to Site Standard 5.3.5.1(xi) Farm Buildings such that the submission by **DBEL**, and the further submissions in support by **FFNZ**, **CLHL** and **IIGL**, be **accepted in part** by adopting a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retaining a controlled activity regime for farm buildings outside of the Wakatipu Basin except: where more than one farm building is proposed per holding; where the "holding" contains land not located within an ONF; and by adopting a rule which enables public notification of farm building applications.

### "Site Standard (xi) Farm Buildings

(a) No farm building shall be replaced, extended or constructed:

- (i) On any holdings (as defined) less than 100 hectares in area; or
- (ii) At a density of more than one farm building per 50 hectares; or
- (iii) On any land above 600 masl; or
- (iv) Within the Outstanding Natural Landscape - Wakatipu Basin ~~or Outstanding Natural Features (district wide, including the Wakatipu Basin)~~ or an Outstanding Natural Feature within the Wakatipu Basin as identified in the appropriate schedule of the District Plan; or
- (v) On an Outstanding Natural Feature outside of the Wakatipu Basin as identified in the appropriate schedule of the district plan, if:

- there is already a farm building within that holding (as defined) or if there is land within that holding (as defined) that is not on an Outstanding Natural Feature; or
- the site containing all or part of the Outstanding Natural Feature was not contained in a separate certificate of title prior to 10 June 2005

(b) The existence of a farm building approved under Rule 5.3.3.2(i)(d) shall not be considered as part of the permitted baseline for development within the Rural General zone."

### "5.7.4 Non-Notification of Applications

An application for a resource consent for the following matters may be considered without the need to obtain written approval of affected persons and need not be notified in accordance with Section 93 of the Act unless the Council considers that special circumstances exist in relation to any such application.

(i) Except as provided in (i)(a) all applications for **Controlled Activities**

(a) Any application for consent for a farm building on an Outstanding Natural Feature shall be notified unless Council is satisfied that the adverse effects of the activity on the environment will be minor.

(ii) Applications for the exercise of Council's discretion in respect of the following Site Standards:

(a) Access ..."

- (b) To the extent that the above decision retains controlled activity status for farm buildings on ONFs outside of the Wakatipu Basin, **DBEL** submission is rejected.

The reasons for this decisions (a) and (b) are as follows:

1. Restricted discretionary activity status provides the Council with the ability to assess each application on its merits, and decline to grant consent to farm building applications where appropriate.
2. There is merit in applying a restricted discretionary activity regime for farm buildings on ONF's within the Wakatipu Basin.
3. The Environment Court has consistently ruled that the ONL-WB is a special case and it is considered that ONF's within the Wakatipu basin also fall within that category. Therefore, it is considered appropriate to apply a lesser activity status (controlled) with respect to farm buildings on ONF's outside of the Wakatipu Basin where certain circumstances can be met.
4. In the case of ONF's outside of the Wakatipu Basin, in situations where the applicant's land "holding" contains non ONF land; or where the "holding" already contains a farm building and a second farm building is sought to be located on an ONF, restricted discretionary activity status is considered appropriate.
5. The requirement to publicly notify all farm building applications except those where the Council is satisfied that the adverse effects of the proposed activity will be minor will ensure that ONF's are adequately protected from inappropriate use and development by ensuring that there is opportunity for public input in relation to such applications.

(2) Submission – Just One Life Limited (JOLL)

**Submission Summary:**

JOLL have submitted in general support of the plan change for the following reasons:

- (a) The proposed plan change will provide for additional protection of ONF's from inappropriate use and development;
- (b) The proposed plan change will ensure consistency with sections 5-7 of the RMA and various parts of the Partially Operative District Plan;
- (c) The proposed plan change will not prohibit or limit the replacement, extension of existing farm buildings or the construction of new farm buildings on ONF's in general, but will ensure that a more stringent assessment and more stringent controls are applied.

Mr. May further elaborated on these points with oral submissions presented at the hearing where he noted the following:

- (d) JOLL is in support of the construction and use of genuine farm buildings for farming activities, although there is a strong conflict between sincere farming activities and serious property and development pressure;
- (e) Most land holdings in the district would not require more than one farm building on ONF land;
- (f) The Site Standard restriction relating to farm buildings can be exploited through land owners altering property areas by obtaining controlled activity boundary adjustment consent.
- (g) In terms of distinguishing between sincere farming activities from farm building applications which seek to facilitate non-farming development within a site – it may be possible to require applicants to enter into a bond to ensure that the continued use of the farm building for farming purposes.

**Decision Requested:**

**JOLL** submit that while the proposed plan change is supported in general they consider that the scope of the plan change should be extended to the Outstanding Natural Landscapes District Wide (hereafter “ONL–DW”).

If an extension of the proposed plan change towards ONL-DW is considered not to be appropriate, **JOLL** submit that at least some kind of amendment needs to be incorporated into the Plan to ensure a rigorous application of the controls that are available for ONL-DW.

**Further submissions:**

**FFNZ** oppose this submission on the basis that:

- (a) The restrictions considered by **JOLL** can be imposed under the current controlled activity regime; and the lack of stringent rules itself does not mean that the existing regime is inconsistent with sections 5-7 of the Act.
- (b) The increased status of farm building applications will result in significant costs to applicants which may in turn limit the farming enterprises which take place.

**DBEL** oppose the submission of **JOLL** for the following reasons:

- (a) The relief sought by JOLL is contrary to Part 2 of the Act and can not be justified in terms of section 32 of the Act.
- (b) Extending restricted discretionary activity status to farm buildings within the ONL will be too onerous, and overly restrictive for what is a legitimate rural activity, particularly as a large part of the District is currently regarded as an ONL and most of that land supports rural type activities including farming operations.

**Issues Raised Submissions:**

- (a) Support for plan change.

(b) Consider further plan change to make ONL-DW consistent with ONL-WB.

**Consideration:**

*Adopt Rule as proposed.*

It is acknowledged that **JOLL** has submitted in support of the plan change. It is agreed that the intent of the plan change is to provide additional protection of ONF's from inappropriate use and development.

However, in the decision above in relation to the submission by **DBEL**, Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding and where the "holding" contains land not located within an ONF.

*Extension of the Proposed Plan Change to ONL-DW.*

**JOLL** seek to extend the scope of this plan change to include farm buildings on Outstanding Natural Landscapes District Wide ("ONL DW"). It is considered that this relief cannot be granted in relation to this plan change on the basis that this relief is not within the scope of the plan change as notified and accordingly, such relief falls outside of Council's jurisdiction.

As noted in the Section 42A Report, the legal principles of procedural fairness and natural justice apply to the Plan Change process prescribed by the RMA and it is widely accepted that the concept of public participation is integral to this process and the procedural purpose of the RMA generally (see *Estate Homes v Waitakere City Council* CA210/04, *Westfield (NZ) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC); *Christchurch International Airport Limited v Christchurch City Council* C77/99; *Atkinson v Wellington Regional Council* W13/99; *Re An Application by Christchurch City Council* C71/99). To this end, it is understood that a local authority will exceed its powers if it issues a decision on a plan change without ensuring that all people who may wish to be heard on potential decisions have had a fair opportunity to register their interest by lodging a submission on the proposed change.

It is noted that the plan change as notified was very specific. The section 32 Report defines the purpose of this plan change as follows:

Close a loophole that currently exists within the Rural General Zone rules of the Plan that allows farm buildings to be erected on ONF as a controlled activity. The closing of this loophole will assist in ensuring that the naturalness and openness of the ONF is maintained by avoiding development on ONF that have no capacity to absorb change.

It is acknowledged that the original submissions lodged by **JOLL** raise the issue of extending the scope of this Plan Change to include farm buildings within ONL-DW and that following public notification of the summary of these submissions, members of the public would have had an opportunity to respond by lodging a further submission in accordance with Clause 8 of the RMA. However, this relief can not be said to be fairly and reasonably raised in the context of the plan change as notified.

The above purpose of the plan change is very specific and clearly defines the scope of the plan change to correcting a perceived “loophole” in the Rural General Zone rules relating to farm buildings on ONF’s. The specificity of this purpose would not have alerted certain members of the public – particularly those who own land located within an ONL-DW, that they may be actually or potentially affected by this plan change. It would have had the opposite effect of providing assurance that the scope of this plan change was very limited and did not relate to or affect their interests in any way. For this reason, it is considered that the underlying procedural purpose of the RMA – that of public participation, would not be met by extending the scope of plan change to include relief relating to farm buildings on ONL-DW.

#### *Distinguishing “Genuine” or “Sincere” Farm Building Applications*

**JOLL** have submitted that they support the construction and use of farm buildings for “genuine” or “sincere” farming activities, but have noted the difficulties in distinguishing such activities from farm building applications which seek to facilitate or assist the non-rural development of Rural General land. By definition, a “Farm Building” has to be “necessary” for farming activities. Council acknowledge that this definition raises issues in terms of determining whether or not a “farm building” application will facilitate a legitimate rural use of rural land or not. This is a particularly important question as the construction of buildings which are not necessary for the farming use of a property (and therefore not farm buildings) requires fully discretionary activity consent under the relevant rules of Part 5 of the Plan. It is further agreed that the justification for the construction of more than one farm building on an Outstanding Natural Feature requires careful scrutiny and public input is likely to assist such scrutiny. Thus, Council consider it useful to distinguish applications which seek to construct a second farm building on an ONF where that land holding already contains an existing farm building.

At the hearing, Mr. May suggested in oral submissions that some sort of bond may be appropriate to ensure that farm buildings continue to be used solely for farming activities. We have considered this suggestion and note that a bond may be useful way for Council to ensure that farm buildings are and continue to be used as farm buildings. However, it is not considered appropriate to require such bonds to be entered into via an express rule in the Plan, although we do not preclude the possibility that conditions of consent to this effect may be imposed on farm building applications. We also note that while neither the plan nor a consent requires the continued use of the building as a farm building, any use for any other purpose would require consent.

#### *Exploitation of Farm Building Regime Via Controlled Activity Boundary Adjustment*

Mr. May also raised the point that it is possible for land owners to exploit the controlled / discretionary farm building regime in the District Plan by reconfiguring land “holdings” through obtaining a controlled activity boundary adjustment consent. It is noted that the revised rule outlined in decision (1) above in relation to ONF’s outside of the Wakatipu Basin (which refers to land “holdings” which contain non ONF land and land holdings which already contain a farm building) increases the risk of the Site Standard being evaded through boundary adjustment applications which create a holding containing entirely ONF land. Thus to avoid the potential evasion of the regime through the use of controlled activity boundary adjustment consents, a further amendment to the Site Standard is considered appropriate (see decision below).



## Decision (2)- JOLL Submission

- (a) The Council's decision is that that part of JOLL's submission which supports the increased control of farm buildings on ONFs through this Plan Change be **accepted in part** to the extent that Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding and where the "holding" contains land not located within an ONF; or if the site was created after the 10<sup>th</sup> of June 2005.
- (b) Given that that part of **JOLL's** submission which seeks the extension of the Plan Change rules to the ONL-DW is considered to fall outside of the scope of this Plan Change, Council is unable to either reject or accept this part of the submission, it can only be noted that a decision cannot be made in relation to this point on jurisdictional grounds.
- (c) That part of **JOLL's** submission which seeks to distinguish the "genuine" and "sincere" use of farm building activities be **accepted in part** by applying restricted discretionary activity status to applications concerning ONF's outside of the Wakatipu Basin where the applicant's land "holding" contains non ONF land, or where the "holding" already contains a farm building and a second farm building is sought to be located on ONF (amendments specified in decision (1) above).
- (d) That part of **JOLL's** submission which seeks to prevent the farm building regime being evaded through the use of controlled activity boundary adjustments be **accepted** and Site Standard 5.3.5.1(xi) Farm Buildings of the Plan amended by adding the following (refer second bullet point below):

### "Site Standard (xi) Farm Buildings

(a) No farm building shall be replaced, extended or constructed:

- (i) On any holdings (as defined) less than 100 hectares in area; or
- (ii) At a density of more than one farm building per 50 hectares; or
- (iii) On any land above 600 masl; or
- (iv) ~~Within the Outstanding Natural Landscape - Wakatipu Basin or Outstanding Natural Features (district wide, including the Wakatipu Basin) or an Outstanding Natural Feature within the Wakatipu Basin as identified in the appropriate schedule of the District Plan; or~~
- (v) On an Outstanding Natural Feature outside of the Wakatipu Basin as identified in the appropriate schedule of the district plan, if:

- there is already a farm building within that holding (as defined) or if there is land within that holding (as defined) that is not on an Outstanding Natural Feature; or
- the site containing all or part of the Outstanding Natural Feature was not contained in a separate certificate of title prior to 10 June 2005

(b) The existence of a farm building approved under Rule 5.3.3.2(i)(d) shall not be considered as part of the permitted baseline for development within the Rural General zone."

- (e) The Council's decision is that the further submissions by **FFNZ** and **DBEL** in opposition to the **JOLL** submission be **accepted** to the extent that this plan change not be extended to include ONL-DW.

The reasons for decisions 2(a) through (e) above are as follows:

1. Restricted discretionary activity status provides the Council with the ability to assess each application on its merits, and decline to grant consent to farm building applications where appropriate.
2. There is merit in applying a restricted discretionary activity regime for farm buildings on ONF's within the Wakatipu Basin.
3. The Environment Court has consistently ruled that the ONL-WB is a special case. It is considered that ONF's within the Wakatipu basin also fall within that category thus it is considered appropriate to apply a lesser activity status (controlled) with respect to farm buildings on ONF's outside of the Wakatipu Basin where certain circumstances can be met.
4. The justification for the construction of more than one farm building on an Outstanding Natural Feature requires careful scrutiny and public input is likely to assist such scrutiny. Thus Council consider it useful to distinguish applications which seek to construct a second farm building on an ONF where that land holding already contains an existing farm building.
5. In the absence of any rule to the contrary, it is possible for land owners to evade the controlled / restricted discretionary farm building regime by reconfiguring land "holdings" through obtaining controlled activity boundary adjustment consents. Thus additional controls which prevent evasion of the rule through boundary adjustment applications containing ONF land are considered necessary and appropriate.
6. The relief sought in relation to ONL-DW can not be said to be fairly and reasonably raised in the context of the Plan Change as notified.
7. That the underlying procedural purpose of the RMA – that of public participation, would not be met by extending the scope of Plan Change to include relief relating to farm buildings on ONL-DW.

(3) Submission – Upper Clutha Environmental Society Inc. (UCESI)

**Submission Summary:**

UCESI supports the proposed change for the following reason:

- (a) The use of different rules for ONF's in different parts of the QLDC is illogical, confusing and not consistent with the Act.

UCESI also submit that:

- (b) This plan change raises issues of consistency of rules in the PODP relating to the ONL. **UCESI** do not believe the Wakatipu Basin is a special case and it

follows that there should be only one set of objectives, policies, rules and assessment matters relating to ONL's based on the "reasonably difficult to see" provisions.

**Decision Requested:**

UCESI request the following decision from the Council:

- (a) That the plan change be made in the manner suggested.
- (b) That consideration be given to a further plan change that will bring about consistency in the PODP. This plan change relates to the ONL of the District and should promote the objectives, policies, rules and assessment matters currently in place for ONL-WB over the entire District.

**Further Submissions:**

**FFNZ** oppose this submission for the following reason:

- (a) **UCESI** seeks extension or change to the status of a rule that will affect all farm owners in the district.

**Issues Raised in Submissions:**

- (a) Support for Plan Change.
- (b) Consider further plan change to make ONL-DW consistent with ONL-WB.

**Consideration:**

*Adopt rule as proposed.*

Council acknowledge UCESI's submission in support of the plan change. Council agree that the intent of the plan change is to provide additional protection of ONF's from inappropriate use and development.

However, in the decision above in relation to the submission by **DBEL**, Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding and where the "holding" contains land not located within an ONF; or if the site was created after the 10<sup>th</sup> of June 2005.

*Consider further plan change to make ONL-DW consistent with ONL-WB.*

UCESI have also sought the relief that the QLDC initiate a plan change to implement a discretionary regime for the erection of farm buildings on property located within an ONL-DW.

Clauses 21 to 29 of Schedule 1 of the RMA provide for a separate process to be followed in the case of requested Plan Changes. The Council's jurisdiction to adopt

requested changes arises out of Clause 25 of Schedule 1, subsequent to the process under clauses 21 – 24 being followed.

The request made in the **UCESI** submission arises outside of the prescribed process and accordingly, Council has no jurisdiction to grant this request within this Plan Change process.

### **Decision (3) – UCESI Submission**

- (a) The Council's decision is that that part of **UCESI's** submission which supports the increased control of farm buildings on ONFs through this Plan Change be **accepted in part** to the extent that Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding; and where the "holding" contains land not located within an ONF.
- (b) Given that the part of **UCESI's** submission which asks the Council to consider a further plan change to make ONL-DW consistent with ONL-WB is considered to fall outside of the scope of this Plan Change, Council is unable to either accept or reject this part of the submission, Council can only decide not to make a decision on this point on jurisdictional grounds.
- (c) Council decides that the further submission by **FFNZ** in opposition to **UCESI's** submission be **accepted**.

The reasons for decision (3)(a) are as per decision (1) above.

The reasons for decision (3)(b) and (c) is that the request made in the **UCESI** submission arises outside of the prescribed statutory process for requested plan changes and accordingly, Council has no jurisdiction to grant this relief within the plan change process.

### (4) Submission – Mr D Thorn

#### **Submission:**

Mr Thorn supports the move by Council to close the loophole with respect to farming buildings within ONF's.

Mr Thorn also submits that the Council should, at the same time, remove the inconsistencies within the PODP relating to ONL's and extend the rule to include ONL-DW for the following reasons:

- (a) Section 6(b) of the RMA places the same duty on the Council to protect ONL's as it does ONF's. There is no distinction, yet Council is making a distinction by limiting the change to ONF's only.

- (b) The PODP provides numerous protection measures for ONL's so as to protect their visual and landscape amenity. There is no case for a different or higher degree of protection for the Wakatipu Basin only. That is an anomaly that should also be corrected.
- (c) The Council has decided that Environment Court decision C177/2002 is no bar to changing the rule as it affects ONF's in the Rural General zone. Similarly, there is no bar to changing the rule as it affects ONL-DW in the Rural General zone.

**Decision Requested:**

Mr Thorn requests amendment of Rule 5.3.5.1(xi)(a)(iv) as follows:

"Within Outstanding Natural Landscapes and Outstanding Natural Features district wide as defined in the appropriate schedule of the District Plan."

**Further submissions:**

**FFNZ** oppose this submission for the following reason:

- (a) Mr. Thorns submission seeks extension or change to the status of a rule that will affect all farm owners in the district.

**DBEL** opposes the submission of Mr Thorn for the following reasons:

- (a) The relief sought by Mr Thorn is contrary to Part 2 and can not be justified in terms of section 32 of the RMA.
- (b) Extending the restricted discretionary activity status for farm buildings within the ONL will would be too onerous, and overly restrictive for what is a legitimate rural activity, particularly because a large part of the District is currently regarded as a ONL and most of that land supports rural type activities including farming operations.
- (c) Restricted discretionary activity status for farm buildings would burden landowners with unnecessary costs and time delays which can not be justified in terms of the section 32 analysis that has been prepared.

**Issues Raised in Submissions:**

- (a) Adopt rule as proposed.
- (b) Extension of the Proposed Plan Change to ONL-DW.

**Consideration:**

*Adopt Rule as proposed.*

Council acknowledges Mr. Thorn's submission in support of the Plan change in order to close the loophole with respect to farm buildings on ONF's.

However, it is noted that under decision (1) above, Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding and where the "holding" contains land not located within an ONF; or if the site was created after the 10<sup>th</sup> of June 2005. The discussion on this aspect of the Plan Change is addressed above.

*Extension of the Proposed Plan Change to ONL-DW.*

The original submission of Mr Thorn seeks to extend the scope of this Plan Change to include farm buildings on Outstanding Natural Landscapes District Wide ("ONL DW"). Council has already considered this issue in relation to Submissions (2) and (3) above where Council has concluded that the proposed plan change cannot be extended in this way due to lack of jurisdiction.

**Decision (4) – D Thorn Submission**

- (a) Council's decision is that that part of Mr Thorn's submission which supports the increased control of farm buildings on ONFs through this Plan Change be **accepted in part** to the extent that Council has decided to adopt a restricted discretionary regime for farm buildings on ONF's within the Wakatipu Basin and retain a controlled activity regime for farm buildings outside of the Wakatipu Basin except where more than one farm building is proposed per holding and where the "holding" contains land not located within an ONF; or if the site was created after the 10<sup>th</sup> of June 2005.
- (b) Given that that part of Mr Thorn's submission which seeks the extension of the Plan Change rules to the ONL-DW is considered to fall outside of the scope of this Plan Change, Council is unable to decide to either accept or reject this part of the submission, Council can only recommend that a decision is not made in relation to this point on jurisdictional grounds.
- (c) Council decision is that the further submission by **FFNZ** in opposition to Mr Thorn's submission be **accepted**.

The reasons for recommendation (4)(a) have been addressed in Decision (1) above.

The reasons for decisions 4(b) and (c) are as per decision (2)(b) and (c) above.

(5) Submission by Federated Farmers New Zealand Incorporated (FFNZ)

**Submission:**

**FFNZ** opposes proposed plan change for the following reasons:

- (a) Farm buildings present no threat to ONF areas in terms of subdivision.
- (b) The term "inappropriate development" is subjective.

- (c) The Court considered and agreed in its decision on farm buildings that controlled activity status for farm buildings was an appropriate level of control for most of the district, which include ONL.
- (d) The plan change has the potential to compromise the ability for farming operations to operate as a functional unit, expand or diversify as the proposed plan change has the potential to limit the erection of farm buildings and is likely to substantially increase the cost of farm buildings in these areas. Council has not provided adequate justification that the lack of distinction of ONF is a loophole.
- (e) Council have made light of the potential costs associated with a discretionary activity for farm buildings. The cost of such an application is likely to outweigh the cost of the final building itself, yet this building may be essential for the continued operation of the farming business. This fails to provide for the economic wellbeing of the applicant.

**FFNZI** support the status quo (i.e. controlled activity status) for the following reasons:

- (a) Council has the ability under the existing provisions to control the effect of farm buildings in respect to their external appearance and location within the property.
- (b) **FFNZI** considers controlled activity status provides certainty for farmers with properties within ONF's that normal farming practice will not be limited or unduly restricted allowing them to provide for their economic well being and that of the community. A level of control is available to the Council that is appropriate for the activity and will limit any adverse effects of the building. **FFNZI** submit that these are likely to be minor given that the definition of farm buildings does not allow for any residential or tourist development and would be limited in floor area and height, by the nature of activities carried out within them. **FFNZI** further submit that farm buildings that are likely to be replaced or erected within these areas will most likely be supplementary buildings that have extremely limited impact.
- (c) While a resource consent for a controlled activity can not be declined, equally there is an onus on the applicant to meet certain standards relating to the appearance and location of the farm building. Council does not provide a comprehensive assessment of how many landowners might be affected by the plan change or more importantly how many farm buildings may even likely be erected within the ONF in the district.
- (d) **FFNZI** submits that Council has underestimated the use of non regulatory methods to achieve the desired outcome. **FFNZI** submit that farmers respond positively to non adversarial methods.

**Decision Requested:**

**FFNZI** request that no change be made to the status of farm buildings within ONF's.

**FFNZI** further request that all affected landowners be given further opportunity to submit on the proposed plan change. Council should write to each landowner in an ONF outlining the proposed plan change and provide an opportunity for them to submit on the

proposed plan change within a reasonable time period. This will also give the Council a better opportunity to determine the actual threats, if any, from farm buildings on ONF's.

In the event the plan change is accepted then **FFNZI** seeks:

- (a) Public notification limited to when the Council considers the impacts of the farm building to be significant. This provides greater incentive for the applicant to put forward a proposal that limits any impact on the value of the ONF; and
- (b) That the cost of processing the consent is limited to a consent processed under a controlled activity. **FFNZI** submit that there is a high possibility that the cost of a fully notified and potentially disputed application could far outweigh the cost of the farm building itself.

**Further submissions:**

Nil.

**Issues Raised in Submissions:**

- (a) No change in status of farm buildings on ONF's.
- (b) Further consultation.
- (c) Notification.
- (d) Cost of processing applications (controlled vs. discretionary).

**Consideration:**

No Change in status of farm buildings on ONF's.

**FFNZI** have sought that farm buildings be retained as a controlled activity on ONF's. Council's concern with retaining farm buildings on ONF's as a controlled activity is the inability to decline resource consent applications in situations where any development is inappropriate and no viable alternative exists within that property. While we acknowledge that the term "inappropriate development" is to a degree subjective, this is the statutory language that we have to work with when considering issues relating to ONF's.

Council acknowledges that there is benefit to the farming community in terms of processing costs and certainty in retaining controlled activity status. However, ONF's have been identified in the District Plan as being outstanding features of the landscape and such prominence is considered to justify the increased control of farm building activities on ONF's considered by the Council in this plan change.

Further consultation.

**FFNZI** request that all affected landowners are given further opportunity to submit on the proposed plan change. **FFNZI** submit that the Council should write to each landowner in an ONF outlining the proposed plan change within a reasonable time period.



Part 4 of the Council's section 32 analysis outlines the public consultation undertaken as part of the Plan Change. The evaluation states:

"In addition to the above the Council may consult with anyone else during the plan change process. With regards to the wider community, it has been determined that there are several landholders affected by this proposed Plan Change. These affected persons have not been consulted with due to the nature of the change, i.e. closing a loophole in the plan."

The Council publicly notified the plan change in accordance with the above. A person who was affected by the change then challenged the fact that they had not been consulted with prior to notification. As a result of this, the Council withdrew the plan change and re-notified it in consultation with affected landowners.

As a result of this re-notification, it is understood that all landowners affected by the plan change were alerted and given an opportunity to make an original submission within the statutory time frame prescribed by the RMA.

Accordingly, sufficient opportunity has been given to landowners to submit on the proposed plan change within a statutory time period.

#### Notification.

**FFNZI** request that public notification be limited only to when the Council considers the impact of farm buildings to be significant. **FFNZI** submit that this provides greater incentive for the applicant to put forward a proposal that limits any impact on the value of the ONF.

Council disagrees with **FFNZI's** reasoning above. Non-notification should not be an incentive for an applicant to put forward a proposal that limits any impact on the ONF. That should occur in every case – especially within ONF's.

Given the nature of the activity proposed, it is considered that public notification of farm building applications is appropriate (as discussed above in relation to decision (1)) to ensure that ONF's are adequately protected from inappropriate use and development by providing the opportunity for public input on such applications except in cases where the Council is satisfied that the adverse effects of the activity on the environment will be minor.

#### Cost of Processing applications (controlled vs. discretionary).

**FFNZ** request that the cost of processing consents be limited to a consent processed as a controlled activity. **FFNZ** submit that there is a high possibility that the cost of a fully notified and potentially disputed application could far outweigh the cost of the farm building itself.

The question of costs was dealt with in detail in the Section 42A Report commissioned by Council in relation to this Plan Change. Council agrees with comments in the Section 42A Report in particular that while farmers play a very important role in the stewardship of the landscape, the potential adverse effects in relation to the erection of farm buildings on ONF's within the Wakatipu Basin necessitates the retention of the ability of Council to decline consent to such applications. Thus Council has decided to implement the

controlled / restricted discretionary regime discussed in decision (1) above. It is considered that the Council's need to retain its discretion in relation to these applications is not outweighed by the need to reduce the cost to farmers in applying for consent to erect farm buildings on ONF's in the Wakatipu Basin.

#### **Decision (5) – Submission by FFNZ**

- (a) It is Council's decision that that part of **FFNZ** submission which seeks to retain controlled activity status for farm buildings on ONF's be **accepted in part** in relation to applications for farm buildings on ONF's outside of the Wakatipu Basin where: the holding concerned does not contain ONF land; and where the holding concerned does not contain an existing farm building.
- (b) Council also decides that that part of **FFNZ** submission which seeks further consultation with affected landowners be **rejected**.
- (c) Council decides that that part of **FFNZ** submission which seeks that public notification be limited only to when the Council considers the impact of farm buildings to be significant be **rejected**.
- (d) Council decides that that part of **FFNZ** submission which seeks that the cost of processing consents be limited to a consent processed under a controlled activity be **rejected**.

The reasons for decision (5)(a) are as follows:

- 1. Some situations may exist where a farm building is inappropriate on an ONF within the Wakatipu Basin and no viable alternative location exists within that property. In such situations the Council should retain the ability to decline consent.
- 2. ONF's have been identified in the District Plan as being outstanding features of the landscape. Such prominence justifies the increased control proposed by the Council in this Plan Change.

The reasons for decision (5)(b) is that although at the time of original notification consultation with all affected landowners had not occurred, the Council has now rectified this. No further consultation is considered necessary as a result.

The reasons for this decision (5)(c) are as follows:

- 1. Non-notification should not be an incentive for an applicant to put forward a proposal that limits any impact on the ONF. That should occur in every case – especially within ONF's.
- 2. Public notification of all farm building applications except where the Council is satisfied that the adverse effects will be minor ensures that ONF's are adequately protected from inappropriate use and development by ensuring that there is opportunity for public input in relation to such applications.

The reasons for decision (5)(d) are as follows:

1. The need for the Council to retain its discretion in relation to applications for farm buildings on ONF's is not outweighed by the need to reduce the cost to farmers in applying for consent to erect such farm buildings.

(6) Submission by Mr. G Stalker

**Submission:**

**Mr Stalker** submits that the plan change adds significant cost to farmers wishing to shift or build new buildings on their ONF land and is of no benefit to them. Mr Stalker also submits that farmers should not be expected to bear the additional cost of future resource consent applications if this plan change is implemented.

**Decision Requested:**

**Mr Stalker** seeks the following decision:

1. Leave farm buildings on ONF as a controlled activity.
2. If this plan change proceeds make changes to stop cost increases on resource consents for farm buildings.

**Further submissions:**

**FFNZ** support Mr Stalker as they believe the current plan provisions provide for sufficient control on farm buildings within the ONF.

**Issues Raised in Submissions**

- (a) Retain controlled activity status.
- (b) Prevent processing cost increases.

**Consideration**

*Retain controlled activity status*

**Mr Stalker** has sought that farm buildings be retained as a controlled activity within ONF's. As addressed earlier in this decision, it is considered that in relation to ONF's within the Wakatipu Basin and where applicant land holdings contain non-ONF land or where a farm building already exists on that holding, Council must retain the ability to decline resource consent applications.

It is acknowledged that there is benefit to the farming community in terms of processing costs and certainty to retain controlled activity status, however, ONF's have been identified in the District Plan as being outstanding features of the landscape and such prominence is considered to justify the increased control proposed in this plan change.

*Prevent processing cost increases*

Issues relating to the cost of processing resource consent applications have been addressed above in relation to Submission and decision (5).

#### **Decision (6) – Submission by Mr. G Stalker**

- (a) It is Council's decision that that part of **Mr Stalker's** submission which seeks to retain controlled activity status for farm buildings on ONF's (supported by **FFNZ**) be **accepted in part** in relation to applications for farm buildings on ONF's outside of the Wakatipu Basin where: the holding concerned does not contain non-ONF land; and where the holding concerned does not contain an existing farm building.
- (b) It is decided that that part of that part of **Mr Stalker's** submission which seeks no increase in processing costs, which is supported by **FFNZ**, be rejected.

The reasons for decision (6)(a) are as follows:

1. Some situations may exist where a farm building is inappropriate on ONF's within the Wakatipu Basin and no viable alternative location exists within that property. In such situations the Council should retain the ability to decline consent.
2. ONF's have been identified in the District Plan as being outstanding features of the landscape and such prominence justifies the increased control proposed in this Plan Change.

The reasons for decision (6)(b) have been addressed above in relation to decision (5)(d).

#### (7) Submission by Ms. I Scott

##### **Submission:**

Ms. Scott submits that improvements to existing farm buildings in keeping with existing style should not incur extra cost or delay.

##### **Decision Requested:**

Ms Scott has not requested any specific relief.

##### **Further submissions:**

**FFNZ** supports Ms Scott's submission. **FFNZ** submit that farming is an established and long held use within the district and that farm buildings are an integral and essential part of that use and should be provided for with limited restriction and cost.

##### **Issues Raised in Submissions**

- (a) Extra cost and delays with improvements to existing farm buildings as a result of the discretionary regime.

##### **Consideration**

*Extra cost and delays for improvements to farm buildings as a result of the discretionary regime.*

It is unclear whether or not Ms. Scott's submission is referring specifically to the extra costs and delays the proposed plan change will cause to farmers who wish to make minor improvements to existing farm buildings or the extra costs and delays resulting from the discretionary regime so far as it applies to improvements which constitute the replacement or extension of an existing farm building. To avoid doubt, both of these options have been considered.

*Cost and Delays from Improvement to a farm building which is not a replacement or extension*

The proposed rule relates only to the replacement, or extension of an existing farm building or the construction of a new farm building - as does Rule 5.3.3.2(i)(a) for controlled farm building activities. There are no additional rules in the District Plan which seek to control alterations or improvements to a farm building which do not come within the purview of the replacement or extension to an existing farm building.

Rule 5.3.3.2(i)(a)i refers to additions or alternations to "an existing building". This rule does not extend to include "farm buildings". Farm buildings are referred to specifically and defined separately to other buildings in the Plan, thus the alteration of or addition to a farm building would not be caught by Rule 5.3.3.2(i)(a)i. On that basis and in accordance with the permissive presumption under section 9 of the Act, any minor improvements which do not replace or extend an existing farm building can be undertaken as a permitted activity.

Therefore, Ms Scott need not be concerned that the discretionary regime proposed will result in cost and delays for minor improvements to farm buildings as the activity itself does not trigger the need for consent.

*Cost and Delays resulting from Improvements to a farm building which is a replacement or extension*

Improvements or alterations to farm buildings will be caught by the proposed discretionary regime where such improvements fall within the definition of the extension to or replacement of these farm buildings.

The issue of costs has already been discussed in this decision in relation to submissions (2), (3) and (5) and the consideration of these submissions is equally applicable to Ms. Scott's submission.

Ms Scott does raise a further issue, that the discretionary activity regime adds extra delays in receiving resource consent decisions.

Technically, it is noted that a discretionary activity resource consent decision should not take any longer than a controlled activity decision. The most significant factor in the time it takes to process an application is whether or not the application is publicly notified. The issue of notification has also been addressed above and it is noted that Council has decided to require public notification of applications for farm buildings on ONF's except in cases where Council are satisfied that the adverse effects of the activity on the

environment are minor. Council acknowledges that public notification will result in longer processing times for farm building applications where ONF's are concerned, however, in this instance it is considered that these delays are insignificant when balanced against the need for Council to protect ONF's from inappropriate use and development and the role that public notification will play achieving that purpose.

### **Decision (7) – Submission by Mrs. I Scott**

(a) It is Council's decision that the submission by **Ms. Scott** and **FFNZ** be **rejected**.

The reasons for decision (7)(a) are as follows:

1. The controlled / restricted discretionary regime decided on by Council will not result in cost and delays for minor improvements to farm buildings as the activity itself does not trigger the need for consent.
2. The need for the Council to retain its discretion in relation to improvements that constitute the replacement or extension to farm buildings on ONF's is not outweighed by the need to reduce the cost to farmers in applying for consent to erect such farm buildings.
3. The extra delays in processing farm building applications as a result of public notification are justified in this case.

### **(8) Submission by Matukituki Trust (MT)**

#### **Submission:**

**MT** opposes the plan change as the outcomes sought are not adequately justified by the section 32 analysis and subsequent report. The Council has not fully evaluated the costs and benefits of the plan change prior to its promulgation.

#### **Decision Requested:**

**MT** seek that the plan change be withdrawn until such a time as an adequate s 32 analysis and report is prepared.

#### **Further submissions:**

**FFNZ** supports Matukituki Trusts submission for the reason that they agree that the section 32 has not thoroughly explored the options for the control of farm buildings within ONF's.

### **Issues Raised in Submissions**

(a) Inadequate Section 32 evaluation

#### **Consideration**

#### **Alleged Section 32 Deficiencies**

In accordance with Section 32 of the Act, Council has a duty to consider alternatives, benefits and costs of the proposed change.

An evaluation was carried out and made available at the time of public notification of the Plan Change. It was included in the Agenda for the hearing.

Counsel for Matukituki Trust challenges the adequacy of this analysis. They note that the Plan Change does not seek to alter Objectives and Policies and that the rules stood for 27 months before the Plan Change was notified.

They further submit that Plan Change 9 can only proceed if the Council can answer yes to two questions:

- (a) Is there a risk?
- (b) Does it need to be controlled?

We are satisfied there is a risk of farm buildings being inappropriately located on Outstanding Natural Features and that the risk needs to be controlled. Mr Gardner-Hopkins stated in oral submissions that there was a legitimate fear that there could be a problem with farm buildings inappropriately located on Outstanding Natural Features. Mr McKibbin in his evidence proposed the addition of the visibility of farm buildings as a matter over which the Council had control. We take this as a tacit acceptance that there is a potential problem. Notwithstanding that, Mr Gardner-Hopkins came close in oral submissions to saying that the Council had to wait for at least one instance of a farm building being inappropriately placed on an Outstanding Natural Feature before it could act. When pressed, he disclaimed any submission to that effect. We are satisfied that such a proposition cannot be correct and the Council is entitled to react to a perceived risk that has not yet eventuated.

In written submissions filed with leave after the hearing, Counsel for Matukituki Trust referred us to *Kirkland v Dunedin City Council* [2001] NZRMA 529 where the Court of Appeal said:

"[17] If a step, such as the carrying out of a cost benefit analysis, is omitted or seriously inadequate, the draft plan may be flawed in material respects. Nevertheless it does not appear to us that Parliament was of the view that if a step were omitted it ought to follow that the local authority should be required to begin again. Rather, it would seem that Parliament anticipated that the flaw which results would be corrected by addressing the merits of the plan by means of the submission and referral process. In s32(3) it was stipulated that someone who had a complaint about the local authority's s32 process must pursue that complaint "only" by way of submission to the local authority. That is directed, we think, not only to preventing such challenges after a plan has come into force (for example, in the defence of a prosecution for non-compliance) but also while the final form of the plan is being settled. The mandatory use of a submission for this purpose provides an opportunity for the Council to reconsider its s32 processes, before making a decision whether or not to modify the plan. The Council will take into account criticisms made by a submitter of its processes."

Section 32 has been modified since that decision and there is now an express requirement that we undertake a Section 32 evaluation at this stage. We take that as confirming the approach in *Kirkland*.

However, in *Kirkland* the Court of Appeal did acknowledge the possibility of an extreme case and said, at paragraph [22]:

“[22] In an extreme case – one which we think is unlikely to arise very often in practice – where a Council has made no effort to comply with s32 or its effort has been perfunctory (“going through the motions”), the remedy for an aggrieved person will be to move speedily to seek judicial review. Section 296 prohibits judicial review where there is a right to appeal against a decision of a local authority to the Environment Court unless that right has been exercised and that Court has made a decision. But in our view a challenge by way of judicial review to the antecedent process adopted by a local authority under s32 is not precluded by that provision. Section 32(3) goes no further than to preclude the right to appeal to the Environment Court on a process ground (as opposed to a merits ground). It is, however, unlikely in view of the policy of s32(3) that the High Court would grant relief unless it regarded the process deficiencies as so great that the applicant was substantially disadvantaged in bringing a challenge to the particular provisions of the proposed plan on their merits by way of the submission procedure and, if that failed, by referral to the Environment Court.”

Note that even in such an extreme case the remedy is judicial review in the High Court.

We have a duty to now carry out a Section 32 evaluation. We consider we have the material before us to enable us to do so. This is comprised of:

- the original Section 32 evaluation;
- Mr Vivian's report;
- the evidence and submissions at the hearing;
- the report by Mr Bashford to the Council's Strategy Committee Meeting of 9 February 2005 (which Mr McKibbin produced);
- *WESI V QLDC* (Decision No. C129/2001) which is known to Matukituki Trust and is a matter of public record.

It is not necessary for us to express any conclusion on the adequacy of the original Section 32 evaluation, although we agree that the expression “closing a loophole” was unhelpful.

We asked Mr Gardner-Hopkins what information he said we lacked, thereby depriving us of the ability to now make a Section 32 evaluation. He mentioned:

- The different costs to landowners for different types of applications (i.e. for controlled activity or some form of discretionary activity).
- The possibility that a landowner might be deprived of the ability to farm (and the possible application of Section 85).



- The extent to which landowners might be willing to offer covenants or other property mechanisms to achieve a similar outcome.
- Other possible controls, including additional matters over which Council reserves discretion for a controlled activity.

We agree that all those matters are relevant and we have considered them all.

Accordingly, Council rejects any arguments against the Plan Change based on alleged deficiencies in the original Section 32 evaluation or alleged gaps in the information to enable us to now undertake a Section 32 evaluation.

### **Decision (8) - Submission by Matukituki Trust**

- (a) It is Council's decision that the **Matukituki Trust** and **FFNZ** submissions be **rejected**.

The reasons for decision (8)(a) are as follows:

1. Any deficiency in the Council's section 32 analysis can be rectified by the Council at the time of issuing its decision on submissions.
2. Perceived deficiencies in the section 32 evaluation are not a justified reason to withdraw or reject to the plan change at this stage of the process.

## **7.0 Overall Decision**

Pursuant to Section 32(2) of the RMA a further evaluation must be made in accordance with this section prior to making a decision under clause 10 or 29(4) of the First Schedule. As stated previously, in making our decision we have had the benefit of the Council's original section 32 evaluation.

We consider the Plan Change is necessary in achieving the purpose and principles of the RM Act and in achieving the objectives of the District Plan (in particular section 4.2 District Wide Landscape and Visual Amenity).

In making the above decision, we have conducted an evaluation in accordance with Section 32(3) and 32(4) and our "reasons for decision" above have taken into account all of these matters.

Following the above evaluation, consideration of submissions and subsequent decisions outlined above, it is decided that the following changes be made to the relevant provisions of the District Plan:

*Site Standard 5.3.5.1 (xi) Farm Buildings in Part 5 of the District Plan*

"Site Standard (xi) Farm Buildings

- (a) No farm building shall be replaced, extended or constructed:
- (i) On any holdings (as defined) less than 100 hectares in area; or
  - (ii) At a density of more than one farm building per 50 hectares; or
  - (iii) On any land above 600 masl; or
  - (iv) Within the Outstanding Natural Landscape - Wakatipu Basin ~~or Outstanding Natural Features (district wide, including the Wakatipu Basin)~~ or an Outstanding Natural Feature within the Wakatipu Basin as identified in the appropriate schedule of the District Plan; or
  - (v) On an Outstanding Natural Feature outside of the Wakatipu Basin as identified in the appropriate schedule of the district plan, if:

- there is already a farm building within that holding (as defined) or if there is land within that holding (as defined) that is not on an Outstanding Natural Feature; or
- the site containing all or part of the Outstanding Natural Feature was not contained in a separate certificate of title prior to 10 June 2005.

(b) The existence of a farm building approved under Rule 5.3.3.2(i)(d) shall not be considered as part of the permitted baseline for development within the Rural General zone."

### *Rule 5.7.4 relating to Notification*

#### "5.7.4 Non-Notification of Applications

An application for a resource consent for the following matters may be considered without the need to obtain written approval of affected persons and need not be notified in accordance with Section 93 of the Act unless the Council considers that special circumstances exist in relation to any such application.

(i) Except as provided in (i)(a) all applications for Controlled Activities

(a) Any application for consent for a farm building on an Outstanding Natural Feature shall be notified unless Council is satisfied that the adverse effects of the activity on the environment will be minor.

(ii) Applications for the exercise of Council's discretion in respect of the following Site Standards:

(a) Access ..."

N.B. Underlining represents additions to the proposed rule. ~~Strike through~~ represents deletion to the proposed rule.

## **Decision to Plan Change 9 by the Hearings Panel to the Queenstown Lakes District Council**

**25th August 2006**