IN THE ENVIRONMENT COURT **ENV-2021-CHCH-0000**
AT CHRISTCHURH

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	an appeal under Schedule 1, Clause 14(1), of the Act
BETWEEN	**KEN MUIR**
	Appellant
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	Respondent

NOTICE OF APPEAL BY KEN MUIR

18 MAY 2021

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Counsel instructed:

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TO: The Registrar
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CHRISTCHURCH
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AND TO: The Respondent
(dpappeals@gldc.govt.nz)

(NOTE: Service on submitters and further submitters is waived pursuant to the Environment Court's directions of 1 April 2020]

Notice of appeal

1. Ken Muir ("**appellant**") appeals the following decision ("**Decision**"):

> Decisions on Chapter 39 Wāhi Tupuna, and related variations to Chapters 2, 12-16, 25-27, 29 and 30 of Stage 3 of the Queenstown Lakes District Proposed District Plan ("**PDP**").

Submission and further submission

2. The appellant made a submission on the PDP on or around 18 November 2019, referenced as #3211.

3. The appellant made a further submission on the PDP on or around 18 February 2020, referenced as #3414.

No prohibited trade competition purposes

4. The appellant is not a trade competitor for the purposes of Section 308D of the Act.

Timing / key dates

5. The Decision was made by the Queenstown Lakes District Council ("**Council**") on 18 March 2021, by way of ratification of the recommendations of the Recommendations of the Stage 3 Independent Hearing Panel ("**IHP**").

6. The appellant received notification of the Decision by email on 1 April 2021.

7. The Environment Court, by way of a minute dated 1 April 2021, confirmed that the appeal period ends on 18 May 2021 (with the s274 period ending 16 June 2021).

Decision / part of Decision appealed against

8. The appellant appeals:

   (a) The entirety of the Decision as it relates to the adoption of objectives, policies and rules relating to wāhi tupuna.

   (b) In particular, those provisions which impose uncertainty, and an unnecessary and unreasonable burden on development of land,

including land that has been identified as wāhi tupuna without out proper justification.

Reasons for the appeal

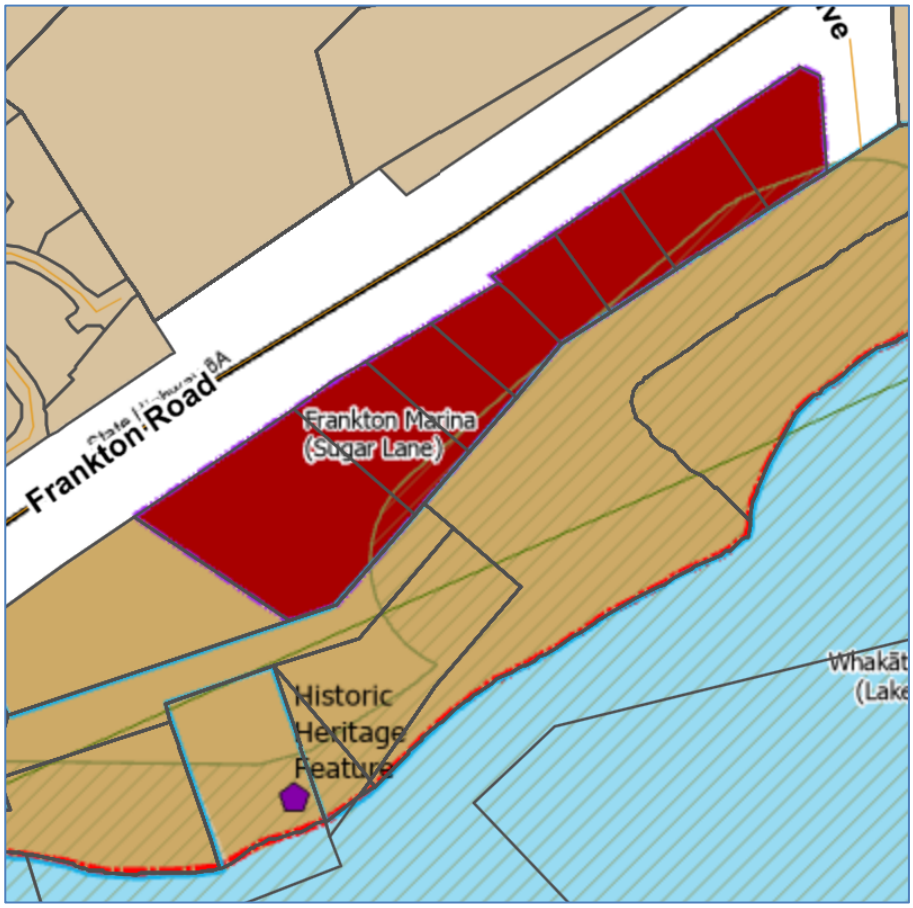
9. The reasons for the appeal are as follows.

Overview/ background

10. As recognised in the Decision, Chapter 39 is an entirely new chapter proposed for the PDP that had no comparable chapter in the ODP. Its stated purpose is "to assist in implementing the strategic direction set out in Chapter 5 Tangata Whenua in relation to providing for the kaitiakitanga of Kāi Tahu as Manawhenua in the district".[1]

11. The appellant has no issue with the PDP seeking to implement that strategic direction. The question is whether Chapter 39 and the other wāhi tupuna provisions do so in a way that is "most appropriate" (and otherwise accords with the relevant statutory requirements) and does not inappropriately and unnecessarily impose process and/ or substantive hurdles to achieving use and development that is otherwise anticipated by the PDP.

12. The appellant is particularly affected by the wāhi tupuna overlay, as follows:



[1] Chapter 39.1

13. The land which the appellant has an interest in is the Sugar Lane Business Mixed Use Zone, shown in maroon. The Sugar Lane Business Mixed Use Zone was recently re-zoned through consent orders of the Court (18 May 2020). Manawhenua were not involved in that process, but could of course have been involved, if they had wished to do so.

14. Table 39.6 identifies the relevant wāhi tupuna area for the Sugar Lane Business Mixed Use Zone (Decisions version):

#	Name	Description	Values	Potential threats
33.	Whakātipu-wai-Māori (Lake Wakātipu)	The name Whakatipu-waimāori originates from the earliest expedition of discovery made many generations ago by the tupuna Rākaihautū and his party from the Uruao waka. In tradition, Rākaihoutū dug the lakes with his kō known Tūwhakarōria. The Lake is key in numerous Kāi Tahu pūrakau (stories) and has a deep spiritual significance for mana whenua. For generations, the Lake also supported nohoaka, kāika, mahika kai as well as transportation routes for pounamu. The knowledge of these associations hold the same value for Kāi Tahu to this day. It also has Statutory Acknowledgement status under the Ngāi Tahu Claims Settlement Act 1998.	Wāhi taoka, mahika kai, ara tawhito.	a. Damming, activities affecting water quality b. Buildings and structures, utilities c. Earthworks d. Subdivision and development e. New roads or additions/alterations to existing roads, vehicle tracks and driveways f. Commercial and commercial recreational activities

15. The notified version of the wāhi tupuna provisions were uncertain in their effect, and had the risk of creating significant obligations and burdens on developers, which might not have been intended – and which were not necessary to achieve the objective of Chapter 39.

16. The Decisions version significantly improves clarity and certainty of how Chapter 39 and the wāhi tupuna provisions in other chapters will be applied.

17. In particular, the provisions now appear to only "bite" where use or development occurs within a wāhi tupuna overlay – rather than in respect of any use or development on a site that might have a wāhi tupuna overlay identified on part of the site (but not within the use or development area).[2]

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[2] This arises from the amended objective, as well as the implementing policies that focus on the "identified wāhi tupuna areas":
(a) Objective 39.2.1: Manawhenua values within identified wāhi tūpuna areas are recognised and provided for.
(b) Policy 39.2.1.1: Recognise that the following activities may have effects that are incompatible with Manawhenua values where they occur within identified wāhi tūpuna areas; ...

18. There is also less inference on compulsory consultation with (if not approval of) manawhenua.[3]

19. The rules have also been clarified/ tightened up, or interpreted in light of the changes to the Objective and Policies above, and explanation of the IHP so as to reduce the impact of the provisions.[4]

20. Accordingly, as the appellant understands it:

    (a) if it seeks consent that avoids any of the identified triggers within any area of land identified as a wāhi tupuna area (even if use or development is proposed on land on the same site or title), then its proposal will not require any additional consents under the wāhi tupuna provisions; and

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(c) Policy 39.2.1.2: Recognise that the effects of activities may be incompatible with Manawhenua values when that activity is listed as a potential threat within an identified wāhi tūpuna area, as set out in Schedule 39.6.
(d) Policy 29.2.13: Within identified wāhi tūpuna areas: ...

[3] This follows from Decisions version of Policy 39.2.14, advice note 39.3.2.1, and the relevant observations of the IHP, as follows:
(a) Policy 39.2.14: Encourage consultation with Manawhenua as the most appropriate way for obtaining understanding of the effects of any activity on Manawhenua values in a wāhi tūpuna area.
(b) Advice note 39.3.2.1: A resource consent application for an activity within an identified wāhi tūpuna area may require a cultural impact assessment as part of an Assessment of Environment Effects so that any adverse effects that the activity may have on Manawhenua values can be better understood.
(c) Decision [188]-[189]:

> ... We do not consider that an applicant can be leveraged into undertaking consultation by the implicit threat that a cultural impact assessment might be required in the absence of consultation. Nor do we consider it appropriate to imply that a well-advised applicant might not wish to undertake a cultural impact assessment in an appropriate case.
>
> The obligation in the Fourth Schedule is to undertake an assessment of an activity's effects on the environment that, among other things, includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment. For an activity with potential cultural effects, then depending on the scale and significance of those effects, a cultural impact assessment might be desirable irrespective of whether consultation has occurred or not. Similarly, if the scale and significance of effects of cultural values is comparatively minor, an applicant may be justified in neither undertaking consultation, nor undertaking a cultural impact assessment.

[4] For example:
(a) In respect of other buildings, Rule 39.4.4 and 39.4.5 now only applies to proposed buildings:
    (i) within an identified wāhi tupuna area (ie not within a site that contains a wāhi tupuna area but the building is not proposed in that area); and
    (ii) within specified zones that do not include the Business Mixed Use Zone (and less than 20m, or 30m, from a wetland, river or lake).
(b) In respect of the earthworks rules it is clear that consent is only required for:
    (i) earthworks over 10m3 for new roads "located within Wāhi Tūpuna areas outside the urban environment where roads have been identified as a potential threat to Manawhenua values" require RDA consent under Rule 25.5.7; and
    (ii) earthworks within wāhi tupua areas not specifically identified in Rule 25.5.10A.1 over 10m3 within 20m of the bed of any wetland, river, or lake (and other requirements, of less interest to the appellant) also require RDA consent under Rule 25.5.10A ;
(c) In respect of subdivision, it is also not clear that where the subdivision is to occur "within a wāhi tupuna area" – "outside of the urban environment, where subdivision is a potential threat as set out in Schedule 39.6", that requires RDA consent under Rule 27.5xx [sic].
(d) In each case, discretion is restricted to effects on Manawhenua values.

(b) if use or development (including subdivision) is to occur within any area land identified as a wāhi tupuna area, then it is:

(i) only the above activities identified at footnote 4 above that will trigger a consent requirement;

(ii) any consent requirement will be RDA only;

(iii) the matter reserved for discretion is limited to effects on Manawhenua values; and

(iv) consultation with Manawhenua is not mandatory, and Manawhenua will only be notified if the statutory tests for notification are met (even if not consulted).

21. If this understanding is correct, then the appellant's original concerns could potentially be largely addressed.

22. However, the appellant's concerns could be entirely resolved if the wāhi tupuna overlay were to be removed from the Sugar Lane Business Mixed Use Zone. The wāhi tupuna overlay only just extends into that zone, and, despite seeking its removal in its submissions, the Decision gave no reason as to why this very minor adjustment could not be made.

23. Accordingly, this appeal is filed to:

(a) remove the wāhi tupuna overlay from the Sugar Lane Business Mixed Use Zone; and

(b) failing that, to better clarify (if not reduce) the impacts of the wāhi tupuna provisions on development at the Sugar Lane Business Mixed Use Zone.

24. For these reasons, the appellant seeks to pursue its appeal to address all the concerns raised in its original submissions – together with the reasons given below.

General reasons for the appeal

25. The general reasons for this appeal are that the Decision generally, and particularly in respect of land that the appellant owns or otherwise has an interest in:

(a) fails to promote sustainable management of resources, including the enabling of people and communities to provide for their social and economic well-being, and will not achieve the section 5 purpose of the Act;

(b) fails to promote the efficient use and development of the land, a matter to have particular regard to under section 7(b) of the Act;

(c) in respect of land that is anticipated by its zoning for use and development (ie the Sugar Lane Business Mixed Use Zone):

(i) fails to achieve or implement the relevant district-wide objectives and policies of the PDP that supported that zoning;

(ii) fails to achieve or implement the relevant objectives and policies of the zone in question; and/ or

(iii) otherwise to support and/or is otherwise inconsistent with achieving the land use outcomes anticipated by the relevant zoning;

(d) fails to achieve the functions of the Council under section 31 of integrated management of the effects of the use and development of land and physical resources;

(e) fails to meet the requirements of section 32;

(f) is procedurally unfair and inefficient.

26. In contrast, granting the appeal will generally, and particularly in in respect of land that the appellant owns or otherwise has an interest in will achieve all of the matters/ outcomes or otherwise address the issues identified above in paragraph 25 immediately above.

Relief sought

27. The appellant seeks the following relief:

(a) For jurisdictional purposes, deletion of all wāhi tupuna provision in their current form. (This is to enable the widest possible scope for resolving the issues raised by the appellant.)

(b) Confirmation of the understandings identified above, in particular at footnote 4, are met.

(c) If not, or issues arise in the Council's implementation of the Decisions version of the wāhi tupuna provisions, then the relief identified in (d)-(g) in particular is pursued:

(d) The Council, and any others defending the current wāhi tupuna provisions, provide further evidence generally and particularly in respect of land that the appellant owns or otherwise has an interest in (ie the Sugar Lane Business Mixed Use Zone), to identify:

(i) the values sought to be protected in each identified wāhi tupuna location;

(ii) the interrelationship of those values with the relevant land, including its zoning, and existing or past development and disturbance;

(iii) how the wāhi tupuna provisions can be amended or otherwise refined in light of that evidence;

(e) The deletion, amendment or other refinement of the wāhi tupuna provisions to address the concerns raised by the appellant (including alternative ways of achieving some outcomes sought).

(f) Aligning the wāhi tupuna overlay with the cadastral, zoning, and road boundary at the Sugar Land Business Mixed Use Zone.

(g) In respect of any wāhi tupuna rule triggers for consent requirements, ensure that:

(i) the requirements will only be triggered if use or development is proposed within the mapped wāhi tupuna overlay area (ie development on the balance of a site which does not trespass into the wāhi tupuna overlay will not trigger the rule requirements);

(ii) consent status is RDA only;

(iii) discretion is restricted to effects on Manawhenua values;

(iv) consultation with Manawhenua is not mandatory, and Manawhenua will only be notified if the statutory tests for notification are met (even if not consulted).

(h) Any other additional or consequential relief to the PDP, including but not limited to, the maps, issues, objectives, policies, rules, discretions, assessment criteria and explanations to fully address the concerns raised by the appellant.

(i) Costs.

Alternative dispute resolution

28. The appellant agrees to participate in mediation or other alternative dispute resolution of the proceeding.

Attachments

29. The following documents are attached to this notice.

(a) a copy of the appellant's original submission; and

(b) a copy of the appellant's further submission; and

(c) a copy of the Decision.

[The Environment Court has waived the requirement to serve submitters and further submitters, and so no list of submitters to be served is required to be filed with this notice. It has also waived the "advice to recipients" requirement, and so that advice is omitted from the notice to the appeal.]

DATED 18 May 2021

J D K Gardner-Hopkins
Counsel for the appellant

The appellant's address for service is C/- James Gardner-Hopkins, Barrister, PO Box 25-160, Wellington 6011.

Documents for service on the appellant may be sent to that address for service or may be emailed to james@jghbarrister.com. Service by email is preferred, with receipt confirmed by return email.

Attachment 1 - the appellant's submission

Attachment 2 - the appellant's further submission

Attachment 3 - the Decision