

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL HEARING PANEL

IN THE MATTER of the Resource Management Act
1991

AND the renotification of two submissions
on Stage 1 of the Queenstown Lakes
Proposed District Plan concerning the
zoning of land at Arthur's Point by
Gertrude's Saddlery Limited and
Larchmont Developments Limited

**SUMMARY OF ORAL LEGAL SUBMISSIONS ON BEHALF OF ARTHURS POINT
OUTSTANDING NATURAL LANDSCAPE SOCIETY INCORPORATED
(FURTHER SUBMITTER 48)**

Dated 3 February 2023

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MAY IT PLEASE THE COMMISSIONERS

1. These legal submissions are intended to be read in conjunction with the Synopsis filed on 26 January 2023. The Commissioners have been addressed by other counsel as to the law guiding the recommendations you are tasked with making. On the law, then, additional submissions on behalf of the Society can be brief.
2. These submissions will then address a potpourri of other matters that have arisen over the last two days of hearing.

Statutory framework

3. The Society substantially agrees with the submissions for the Council as to the relevant statutory tests.¹
4. Having heard the evidence given by witnesses and the Commissioners' questions in response, the Society highlights the following important aspects of your task:
 - (a) You are searching for the "most appropriate" provisions. In terms of s32, the provisions and mapping changes being discussed must serve the related objectives, policies and other rules in the Proposed Plan.²
 - (b) Your quest for the "most appropriate" provisions is different from a resource consent application. You are considering costs, benefits, efficiency and effectiveness of alternate planning options – not combining all the ingredients of s104 to arrive at a "yes" or "no" in respect of a single proposal.
 - (c) Planning processes such as this are superior for determining landscape classifications.³ This is a step-change from the previous District Plan, which left landscape classification to be determined on a case-by-case basis. This meant many areas did not have an ONL boundary identified until the Proposed Plan was notified in 2015.
 - (d) Your enquiry is not focussed on adverse effects or looking for "middle ground". Your very first and fundamental enquiry must be uncluttered by all considerations except one – is the land at issue properly classified as

¹ Opening Legal Submissions for Queenstown Lakes District Council (26 January 2023) at Section 4

²² *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [7]

³ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [33]

ONL? Mr J Brown acknowledged that if this Site is an ONL, an urban zone cannot be superimposed over it because of the Objective and Policy framework applying. The Society agrees and the Council said the same in opening.

- (e) In terms of the incidence of other zones overlaid by ONL classifications, to the best of Mr Giddens' and my knowledge, this has generally occurred because the zone (or prior equivalent) was already there but - applying *Man O'War* – any identified ONL had to be laid over top. Apart from the Rural Visitor zone (which is deliberately designed to be imposed upon an ONL if appropriate), the Society is not aware of any instance where an area has been firstly identified ONL then rezoned from General Rural to another zone that enables greater development.

ONL Identification

- 5. As to what land is properly classified as ONL, you have three different expert opinions (although the Council and Society positions are close). How to choose between those opinions has been exercising the Commissioners' minds.

Proposed LLRB area

- 6. In respect of the area proposed to be LLRB, Ms Mellsop and Mr S Brown agree ONL classification is appropriate, whereas Mr Espie and Ms Pfluger agree it is not. As to the explanation for this difference, I submit:
 - (a) An important difference between the experts is that Ms Mellsop and Mr S Brown assess the Site as being *part of* an ONL whereas Mr Espie and Ms Pfluger focus on the values of the Site and variously refer to it in terms such as "isolated" and "remnant"; and
 - (b) While that Site-centric approach might be appropriate for a consent application, it is not appropriate for determining ONL and ONF boundaries in a plan;⁴ and
 - (c) As otherwise discussed at paragraphs 23(c), (d), (g) and (h) of the Society's Synopsis.

⁴ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [157]

Proposed LDR extension

7. The only material difference between Mr S Brown and Ms Mellsop is whether the existing LDR area should be extended. This comes down to where each of them consider an appropriate ONL boundary *should* sit in relation to the existing urban area.
8. Mr S Brown's "line" is best seen on Attachment 19 to his Evidence. His assessment is, as required by the Court of Appeal, unhampered by existing zoning or cadastral boundaries. It is an "honest" landscape assessment. The boundary he prefers – purely on landscape considerations – sits within the existing boundary for the LDR zone.
9. Ms Mellsop's line is proposed to extend the LDR boundary to create a more "logical" landscape-related boundary. Ms Mellsop confirms this extension would come at a cost and require mitigation (setbacks and screening).⁵
10. Mr Espie and Ms Pfluger expressed a slight preference for Ms Mellsop's line. All three experts used terms such as "logical" and "defensible" when describing why it was better than the existing line.
11. Mr S Brown agrees with Ms Mellsop that the existing ONL boundary (which coincides with the existing LDR and UGB boundaries) is not truly reflective of landscape considerations. It is not in the ideal location. The Society accepts it cannot be put in the "correct" location via this rezoning hearing (but there are other ways it could be done, such as a plan change). However, the Society rejects the suggestion this existing deficiency should be rectified by extending the LDR zone and imposing additional costs in doing so.
12. It is submitted "defensibility" is not a reason for, or benefit of, doing so. Whereas before the Proposed Plan the identification of ONL's was left to individual appeals or resource consent applications – and therefore developed in an ad hoc way – this Plan maps them and wraps a strong policy and regulatory framework around them. Once an ONL boundary is on a map, it is defensible. The framework protecting that "line" is formidable – whether it is in the most landscape-logical place or not.

⁵ Evidence of Helen Mellsop (18 October 2022) at [9.1] to [9.8].

Other considerations relevant to the expert evidence

13. I submit there are other considerations relevant to your decision on whose evidence is to be preferred:
- (a) Mr Espie supported the full extent of the LDRZ request when it was first heard while, in this hearing, Ms Pfluger noted that proposal was not supportable because it would *have a moderate to high degree of effect...[and] At the density that can be achieved under LDRZ it would in my view be impossible to maintain the landform values of the headland above the Shotover Gorge.*⁶;
 - (b) However, while perhaps being the more credible on this issue Ms Pfluger has not conducted a “first principles” assessment;
 - (c) In addition, Ms Pfluger has not peer reviewed anyone’s evidence apart from Mr Espie’s; and
 - (d) Expert opinion is only one part of the puzzle in any event:

Importantly, the judgment required to determine that a landscape or feature is sufficiently natural is not the preserve of the expert. Rather, the expert contributes opinion in order for the relevant decision-maker to exercise that judgment...Doing so wrongly assumes that the judgment rests with the expert. It does not.⁷...Contextual assessment should follow to elicit how people would perceive its relative naturalness, given the associations they may have with a landscape or feature. Community surveys are an important tool for reliably informing expert opinion on these matters...⁸

...the determination of whether a landscape or feature is sufficiently natural calls for the exercise of a well-informed contextual judgment.⁹

It is recognised that in many cases it will be obvious if a landscape or feature is outstanding. However, in some cases, expert assessment will be needed ... The method generally employed involves describing the attributes and values and rating them.

⁶ Evidence of Yvonne Pfluger (15 November 2022) at [64] and [65]

⁷ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [61]

⁸ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [80]

⁹ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [56]

However an overall judgment is made of the significance of the landscape or feature, and its outstandingness.¹⁰

14. Further to this, you have had the benefit of considerable evidence from lay people in this hearing. This is a legitimate – in fact, necessary – input to the judgment you have to exercise and the recommendation you have to make.¹¹

If the Site is not ONL

15. If you decide some or all of the Site is not ONL, you will need to consider whether and to what extent any rezoning might be appropriate. Before you find any rezoning appropriate, you will need to satisfy yourself as to effects on surrounding ONLs or ONFs and then effects/costs more generally.
16. As to the revised request and the provisions proffered by the Submitters, the Society notes:
- (a) There is a lack of certainty as to how many lots and houses might be established in the proposed LDR area. The figure of 10 has been spoken of but that is not guaranteed by any proposed plan provisions. Mr Giddens explains why, in his view, the actual yield could be materially higher;
 - (b) There is a claiming of benefits that are either not assured or not additional to what would happen anyway:
 - (i) This development is not needed for a trail link from Arthurs Point to the potential new bridge discussed yesterday by the representative from the Trails Trust;
 - (ii) This development is not needed to ensure control of wilding conifers. The Society has documentation that explains the Department of Conservation's intended conifer removal and control programme;
 - (iii) This development is not needed to trigger upgrade works on the relevant portion of Atley Road. In questioning Mr Bartlett advised any additional growth would have to deal with the existing issues and constraints. This would include the existing, but undeveloped, LDR Zone;

¹⁰ *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (Decision 2.1) at [58]

¹¹ For example, the Sensory and Associative attributes in Schedule 3 of the pRPS (see paragraph [11] of the *Hawthenden* case for the list) are largely comprised of matters you were addressed on by lay persons yesterday.

- (c) Mr Foy's assessment of demand and supply over the next 10 years does not appear to have accounted for recently zoned land in another part of Arthurs Point that could deliver the 220 houses he referred to – this is uncertain as he has not undertaken this assessment;
- (d) Also in respect of Mr Foy's evidence, there are no provisions in the Plan that mention or suggest this District should start "eating into" its ONLs when geographic constraints mean supply runs short;
- (e) The servicing witnesses are inconsistent in terms of the numbers they have used. In addition, it is unclear whether any of them have properly assessed cumulative effects from any existing but undeveloped allotments. The Council services witnesses do not appear to have taken into account the number of houses that could be built in the existing LDR Zone – again, this number is uncertain because there is no upper-limit in the Plan provisions (now or offered) and Mr Giddens is of the view more than 14 could potentially (but realistically) establish;
- (f) The situation with the existing LDR Zone is also complicated by the fact it is Restricted Discretionary to subdivide and establish residential dwellings, taking into account the expert traffic engineers views that access to the existing zoned land would require upgrade (and consent) to enable any houses to be built. The effects assessments offered by the Submitters' landscape witnesses assume a baseline level of development within the existing (but undeveloped) LDR zone. By doing this their conclusions as to adverse effects are reduced in some cases. However, it is not certain development will occur because traffic is one of the issues that needs to be addressed before subdivision consent can issue. The transport experts who have appeared confirm this is not an easy problem to solve;
- (g) Because the issue of traffic is ostensibly difficult, if some or all of the land is to be rezoned, the provisions in the Plan ought to be upfront about the fact a viable traffic solution may not eventuate and in those circumstances the Zone will not be able to be acted upon. As one of the Further Submitters said, several times, it is not right for the Council or the community to "feel pressured" to find a way to accommodate this. However, without an express provision in the Plan, people deciding a future subdivision application will feel pressured to compromise and find a path through – even if it is of a lesser standard than has been

discussed in this hearing. Certainly, controlled activity status would give the Council very little scope to ensure the traffic outcomes discussed at this hearing, materialised. And a Restricted Discretionary status will only be meaningful if the Plan advises readers there is a genuine chance this Zone may not be able to be developed because the traffic solution anticipated cannot viably be implemented.

Relevance of certain matters

17. Counsel in this case are not entirely agreed as to the relevance of:

- (a) The 2018 decision on these rezoning requests;
- (b) The Landscape Schedules Variation.

The 2018 Decision

18. The Society's submission remains the 2018 decision is irrelevant. Judge Jackson (upheld in the High Court) found that Clause 7 of the First Schedule had not been complied with so the process had to start again from that step. The hearing we are in now is not perfunctory or just a formality – this is an entirely fresh process from Clause 7 onwards.

19. However, even if you were to read and take the decision into account (which will not take long because it is quite brief), the factual differences between then and now are so stark there cannot be any meaningful comparison. For example:

- (a) At that hearing only the Council officers and the Submitters appeared – there were no further submitters;
- (b) There were no lay people providing evidence as to the values of the Site and its relationship with its surrounds;
- (c) There were no legal submissions on the part of an opponent;
- (d) There was no expert evidence called by an opponent;
- (e) The policy framework was infantile in comparison to the one in existence now.

20. The legal submissions for the Submitters suggest there is some significance in the Environment Court suspending the decision rather than overturning it. The

explanation for that is plain – that is all the Court could do in terms of s314(1)(f).

The Landscape Schedules Variation

21. The Landscape Schedules Variation is not particularly influential on the Society's case for two reasons:
 - (a) Whether the Site is ONL (as in the Proposed Plan) or ONF (as in the Proposed Landscapes Schedule Variation), the relevant planning framework for rezoning requires the same planning response; and
 - (b) The evidence as to landscape values from Mr S Brown and the individuals yesterday is corroborated by the Schedules, but not reliant on them.
22. As such, the Society notes it as a relevant matter but the Society's case does not require you to attribute any great weight to the Variation.
23. The Submitters raise another reason for ignoring the Variation, being the existence of declaratory proceedings in the Environment Court. When questioned, Ms Hill advised you only her client and the Council were parties to those proceedings. For completeness and accuracy, the proceedings were not served on the Society but upon finding out about them the Society applied to be a party to those proceedings. Judge Hassan is currently considering that application.
24. In your discussions with Ms Baker-Galloway yesterday there was mention of a memorandum setting out a timeline of steps between this process and the Landscapes Schedules Variation process. The Society is also very familiar with what has happened when, and would respectfully request it also be involved in the preparation of that memorandum.

Site visit

25. Yesterday, Ms Semple asked you to view the Site from her house so you might gain a full understanding of what she was describing to you. Mr Dery has told me he would like to extend the same invitation. Because landscape values include the associative, the perceptual and the experiential, I submit visiting the locations you have heard about would be appropriate and, indeed, the optimal way to fully understand the evidence you have heard. Because you are visiting the area again anyway, the Society would like the opportunity

to prepare an outline of the places it considers would be useful for you to visit and experience the landscape from.

Dated this 3rd day of February 2023

A handwritten signature in black ink, appearing to read 'Alanya', is written over a solid horizontal line.

Alanya Limmer
Counsel for Arthurs Point Outstanding Natural
Landscape Society Inc