

**BEFORE THE HEARING COMMISSIONERS**

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**UNDER**

The Resource Management Act 1991

**AND**

**IN THE MATTER**

of the Proposed Otago Regional Policy Statement  
2021

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**ORC SUBMISSIONS FOR HEARING  
NFL – Natural features and landscapes**

Dated 1 May 2023

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**ORC SUBMISSIONS FOR HEARING  
NFL – Natural features and landscapes**

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**May it Please the Commissioners:**

**Sections 6(b) and 7(c)**

1 In achieving the purpose of the Resource Management Act 1991 (**RMA**), the ORC must in the PORPS as a matter of national importance recognise and provide for<sup>1</sup>:

*“(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development.”*

2 Particular regard must be had to<sup>2</sup>:

*“(c) the maintenance and enhancement of amenity values.”*

3 “Amenity values” is defined to mean<sup>3</sup>:

*“...those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes”*

**Principles to apply in giving effect to sections 6(b) and 7(c)**

4 Whether a natural feature or landscape is outstanding is a factual assessment based upon the inherent quality of the feature or landscape itself<sup>4</sup>.

5 While an outstanding feature or landscape must be natural, it need not be pristine or unaltered<sup>5</sup>.

6 The question of what restrictions should apply arises once the outstanding natural feature or landscape has been identified<sup>6</sup>.

7 What is “*inappropriate*” is to be assessed against that which is to be protected. Activities which do not protect the outstanding nature of the feature or landscape will not be appropriate.<sup>7</sup>

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<sup>1</sup> Sections 6 and 61(1)(b) of the RMA

<sup>2</sup> Sections 7 and 61(1)(b) of the RMA

<sup>3</sup> Section 2 of the RMA

<sup>4</sup> *Man O’War Station Ltd v Auckland Council* [2017] NZCA 24 at [61]

<sup>5</sup> *Man O’War Station* at [66]

<sup>6</sup> *Man O’War Station* at [62]

<sup>7</sup> *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 at [47], [55] and [101] to [105]

- 8 This assessment is undertaken by identifying the values of the outstanding natural feature or landscape that is to be protected, which in turn informs what would be appropriate and what would not<sup>8</sup>.
- 9 A construct which is helpful to doing so is 'landscape capacity'<sup>9</sup>.
- 10 For an excellent summary of the relevant section 6(b) and 7(c) principles see paragraphs [103] to [110] of the Environment Court's decision in *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 205. Relevant extracts are **attached**.

### **Plantation forestry**

- 11 The PORPS must be prepared in accordance with the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017 (**NESPF**)<sup>10</sup>.
- 12 The NESPF provides a comprehensive set of provisions to manage plantation forestry and related activities on a consistent basis throughout New Zealand.
- 13 The NESPF is not an easy read. The Ministry for Primary Industries has published an overview which can be viewed here: <https://www.mpi.govt.nz/dmsdocument/28551-overview-of-the-nes-pf> . This reference is provided for context only. Guidance such as this is in no way authoritative as to the meaning (or intended meaning) of the NESPF.

### *The issue*

- 14 The issues which arise at regional policy level are whether any policy would require a regional or district rule in conflict with the NESPF and, if so, whether this is permissible.
- 15 The NESPF provides that in certain circumstances a rule in a plan may be more stringent than the NESPF.
- 16 A rule in a plan may be more stringent than the NESPF if the rule<sup>11</sup>:

*"...recognises and provides for the protection of—*

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<sup>8</sup> *Upper Clutha Environmental Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 205 at [103] to [110] (extract **attached**).

<sup>9</sup> *Upper Clutha Environmental Society* at [10] and [110]

<sup>10</sup> Section 61(1)(e) of the RMA

<sup>11</sup> Regulation 6(2)(a) of the NESPF

(a) *outstanding natural features and landscapes from inappropriate use and development; or...*"

- 17 Therefore, PORPS policies may be more stringent than the NESPF to protect outstanding natural features and landscapes from inappropriate use and development.
- 18 There may not be more permissive plan rules (nor regional policies requiring such rules) because there is no NESPF provision allowing this<sup>12</sup>.
- 19 Regulation 5(4) of the NESPF provides that if the NESPF does not apply to a particular activity, there may be rules in regional or district plans that apply to that activity<sup>13</sup>.
- 20 It should be noted that this provision relates to activities rather than effects.
- 21 It is implicit that there may not be additional rules to deal with the effects of activities permitted by the NESPF (other than where more stringent rules are expressly permitted).

#### *Specific NESPF provisions*

- 22 The NESPF includes provisions specifically relating to outstanding natural features and landscapes, visual amenity landscapes, and wilding tree risk and control.

#### *Outstanding natural features and landscapes*

- 23 An outstanding natural feature or landscape is defined to mean an area identified as such, and with its location identified, in a regional policy statement, regional plan or district plan.
- 24 As a condition to permitted activity status, afforestation must not occur within an outstanding natural feature or landscape<sup>14</sup>.
- 25 If this condition is not complied with, then the afforestation is a restricted discretionary activity<sup>15</sup>.
- 26 Consent is required from the local authority that has identified that area, feature, or landscape within its plan or policy statement<sup>16</sup>.

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<sup>12</sup> Sections 43B and 44A of the RMA.

<sup>13</sup> The activities the NESPF applies to are listed in regulation 5(1). Vegetation clearance before afforestation is specifically excluded by regulation 5(3)(b).

<sup>14</sup> Regulation 12 of the NESPF

<sup>15</sup> Regulation 16 of the NESPF

<sup>16</sup> Regulation 16(3) of the NESPF

- 27 For territorial authority consents, and most regional council consents, discretion is restricted to wilding tree risk, mitigation measures, effects on the values of the outstanding natural feature or landscape and information and monitoring requirements<sup>17</sup>.
- 28 However, for regional council consents if the afforestation is more than 2 hectares in an area with very high erosion risk, or in an area where the erosion risk is undefined, then the discretion is restricted to erosion related factors<sup>18</sup> ie not the values of the outstanding natural feature or landscape.
- 29 Therefore, in some circumstances, whether the impact on outstanding natural features and landscapes can be considered will depend upon which council has identified the landscape or feature in its plan or policy statement.

#### *Visual amenity landscapes*

- 30 A visual amenity landscape is defined to mean a landscape or landscape feature identified in a district plan as having visual amenity values and identified in a policy statement or plan by its location.
- 31 As a condition to permitted activity status, afforestation must not occur in a visual amenity landscape if rules in the relevant plan restrict plantation forestry activities within that landscape<sup>19</sup>.
- 32 It is implicit in this that regional and district plans may include restrictions on plantation forestry activities in visual amenity landscapes.
- 33 If this condition is not complied with, then the afforestation is a controlled activity<sup>20</sup>.
- 34 Control is reserved over the effects on the relevant visual amenity values<sup>21</sup>.

#### *Wilding tree risk and controls*

- 35 As a condition to permitted activity status wilding tree risk must be calculated in accordance with prescribed wilding tree risk guidelines<sup>22</sup> and

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<sup>17</sup> Regulation 17 (1) of the NESPF

<sup>18</sup> Regulation 17(4) of the NESPF

<sup>19</sup> Regulation 13 of the NESPF

<sup>20</sup> Regulation 15(3) of the NESPF

<sup>21</sup> Regulation 15(4) of the NESPF

<sup>22</sup> Regulation 11 of the NESPF

afforestation must not occur in an area with a wilding tree risk calculator score of 12 or more<sup>23</sup>.

- 36 If this condition is not met, then the afforestation is a restricted discretionary activity<sup>24</sup>.
- 37 For territorial authority consents and most regional council consents, discretion is restricted to wilding tree risk, mitigation measures, effects on the values of any relevant outstanding natural feature or landscape and information and monitoring requirements<sup>25</sup>.
- 38 However, as noted above for some regional council consents the discretion is limited to erosion risk factors, and whether a regional council consent or a territorial authority consent is needed depends upon which plan or policy statement identifies the outstanding natural feature or landscape.
- 39 There is a limited requirement to eradicate wilding conifers but not in any manner relevant to outstanding natural features or landscapes, or visual amenity landscapes<sup>26</sup>.
- 40 Specific setbacks apply depending on the nature of the adjoining property<sup>27</sup> but not in any way relevant to outstanding natural features or landscapes, or visual amenity landscapes.

*What does this mean for the PORPS?*

- 41 There are three key points.
- 42 Under regulation 6 there may be more stringent policy settings to protect outstanding natural features and landscapes from inappropriate use and development. These policy settings can be more restrictive than the limited protections in the NESPF. They may lead to plan rules which make plantation forestry a fully discretionary activity, or non-complying or even prohibited, where necessary to protect outstanding natural features and landscapes.
- 43 For the limited protections in the NESPF for outstanding natural features and landscapes, and for visual amenity landscapes, to apply it is necessary to:

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<sup>23</sup> Regulation 11(3) of the NESPF

<sup>24</sup> Regulation 16 of the NESPF

<sup>25</sup> Regulation 17 (1) of the NESPF

<sup>26</sup> Regulation 11(5) of the NESPF

<sup>27</sup> Regulation 14 of the NESPF

- 43.1 Identify outstanding natural features and landscapes as such, and identify their location, in a regional policy statement, regional plan or district plan; and
- 43.2 Identify in district plans relevant landscapes and landscape features as having visual amenity values and in policy statements or plans identify their location.
- 44 Which local authority's policy statement or plan can impact upon whether effects on outstanding natural features and landscapes will be a factor relevant to an application for a restricted discretionary resource consent.

### **The PORPS**

- 45 NFL-P1 provides that the areas and values of outstanding and highly valued natural features and landscapes are to be identified.
- 46 This is in accordance with the case law.
- 47 Identifying the areas and values of outstanding and highly valued natural features and landscapes in plans means that as a minimum the limited protections in the NESPF will apply to those areas, subject to any more restrictive provisions in the plans themselves.
- 48 NFL-P1 also requires identification of the capacity of natural features and landscapes to absorb use and development while protecting or maintaining the values that contribute to the natural feature or landscape being outstanding or highly valued.
- 49 In terms of *King Salmon* this has appropriateness being assessed by reference to that which is to be protected.
- 50 That happens by reference to the values which make the relevant feature or landscape outstanding (or highly valued).
- 51 Assessing capacity to absorb change is a tool to guide what use or development can occur while also protecting or maintaining those values.
- 52 This is not maximum permissible harm policy. To put it in those terms confuses change with harm.
- 53 By identifying the relevant values ("*What makes this special?*") it is then possible to assess the capacity (if any) for change without harming those values.

- 54 NFL-P3 provides for the maintenance or enhancement of highly valued natural features and landscapes by avoiding significant adverse effects on the values of those landscapes and features and avoiding remedying or mitigating other adverse effects.
- 55 The NESPF contemplates that this may include plan provisions restricting plantation forestry activity in these areas.
- 56 NFL-P5 deals with wilding conifer risk. It confines the avoidance of planting and replanting to areas identified as outstanding natural features and landscapes. It confines buffer zones to those necessary to protect outstanding natural features and landscapes.
- 57 By doing so, it stays within the scope of permissible increased stringency in terms of the NESPF.
- 58 Finally, under NFL-M1(1) identification of outstanding (and highly valued) natural features and landscapes is to occur in district plans. Therefore, in terms of the NESPF the discretion for restricted discretionary consent applications under the provisions outlined in these submissions will include effects on the values of the outstanding natural features or landscapes.

#### **ORC expert evidence**

- 59 Mr MacLennan prepared the section 42A report for the HAZ chapter.
- 60 Mr MacLennan has prepared an opening statement dealing with the key matters at issue in this chapter.
- 61 The ORC calls Mr MacLennan.

Dated this 1st day of May 2023



**Simon Anderson**  
Otago Regional Council



**BEFORE THE ENVIRONMENT COURT  
I MUA I TE KOOTI TAIAO O AOTEAROA**

**Decision No. [2019] NZEnvC 205**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals pursuant to clause 14 of the First  
Schedule of the Act  
BETWEEN UPPER CLUTHA ENVIRONMENTAL  
SOCIETY INCORPORATED  
(ENV-2018-CHC-056)  
and all other appellants concerning Topic 2  
of Stage 1 of the Proposed Queenstown  
Lakes District Plan (listed on the attached  
Schedule)  
Appellants  
AND QUEENSTOWN LAKES DISTRICT  
COUNCIL  
Respondent

Court: Environment Judge J J M Hassan  
Environment Commissioner K A Edmonds  
Environment Commissioner J T Baines

Hearing: at Queenstown on 8, 9, 10, 11, 12, 15, 16, 17, 18 April 2019  
6, 7, 8, 9, 10, 13, 14, 15, 16 May 2019; and  
at Christchurch on 24 June 2019  
(Site visits undertaken in the week of 6-10 May 2019)

Appearances: S Scott & M Wakefield for the Queenstown Lakes District Council  
J Gardner-Hopkins for Kawarau Jet Services Holdings Limited &  
Lake McKay Station Ltd  
T J Shiels QC and M G Nidd for Hawthenden Ltd  
J Haworth for Upper Clutha Environmental Society Inc  
M Baker-Galloway for Seven Albert Town Property Owners, Real  
Journeys Ltd, Real Journeys (t/a Go Orange Ltd), Real Journeys  
(t/a Canyon Food and Brew Co.), Jacks Point Residential No.2  
Ltd, Jacks Point Village Holdings Ltd, Jacks Point Developments  
Ltd, Jacks Point Land Ltd, Jacks Point Land No. 2 Ltd, Jacks  
Point Management Ltd, Henley Downs Land Holdings Ltd,  
Henley Downs Farms Holdings Ltd, Coneburn Preserve Holdings  
Ltd, Willow Pond Farm Ltd, Glendhu Bay Trustees Ltd, Darby  
Planning LP, Waterfall Park Developments Ltd, Te Anau  
Developments Ltd, Bill and Jan Walker Family Trust, Darby  
Planning LP, Real Journeys Ltd, Allenby Farms Ltd, NZ Tungsten  
Mining Ltd & others, Mt Christina Ltd, Steve Xin, A B Duncan,  
Gertrude Saddlery Ltd, Sunnyheights Ltd



G M Todd for James W Cooper & SYZ Investments Ltd  
J Leckie for Cardrona Alpine Resort Ltd and Anderson Branch Creek Station, M & C Burgess, Soho Ski Area Limited, Blackmans Creek Holdings No 1 Limited Partnership and Treble Cone Investments Limited  
J Macdonald for the Rob Roy Residents  
P Page & S Peirce for Longview Environmental Trust  
A J Logan for Otago Regional Council  
R Ashton for Remarkables Park Ltd and Queenstown Park Ltd  
Dr J Cossens in person

Date of Decision: 19 December 2019

Date of Issue: 19 December 2019

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**INTERIM DECISION OF THE ENVIRONMENT COURT**  
**Topic 2: Rural Landscapes**  
**Decision 2.2 – Sub-topics 2 – 11**

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- A: The various Topic 2 appeals are allowed in part and/or declined in part as summarised in Annexure 3.
- B: Provisional drafting of changes to Topic 2 provisions of Chapters 3 and 6 of the Decision Version to give effect to the findings in this decision is in Annexure 1.
- C: Further expert conferencing between Messrs Barr and Ferguson, together with Messrs Gilbert, Mellsop and Pflüger, is directed for the purposes described in Part F.
- D: Several associated directions are made in Part F, including to direct QLDC to provide supplementary information and to allow for supplementary closing submissions prior to further decision(s) to finalise the Topic 2 provisions.
- E: Costs are reserved, with a timetable to issue in due course.



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## REASONS

### PART A: INTRODUCTION

#### Background

[1] This is one of two companion decisions on appeals in relation to 'Topic 2 – Rural Landscapes' arising from the review of the Queenstown Lakes District Plan ('ODP').

[2] Queenstown Lakes District Council ('QLDC') is undertaking the review in chapter-related stages ('Plan Review'). It is a partial review in that it does not encompass the entirety of the ODP. Rather, it significantly updates it with various new and revised provisions.<sup>1</sup> However in public notices for the review, QLDC has referred to those changes as a 'proposed district plan'<sup>2</sup> ('PDP'). While that is not precisely correct, it reflects the fact that the partial review seeks a substantially updated ODP.

[3] QLDC's decisions on Stage 1 of the Plan Review were made in 2018. We refer to the plan provisions updated or made by those Stage 1 decisions as the 'DV'.

[4] Appeals against those decisions are being heard and determined in stages and

<sup>1</sup> *Darby Planning Ltd Partnership v Queenstown Lakes District Council* 2019] NZEnvC 133 at [6].  
<sup>2</sup> <https://www.qldc.govt.nz/planning/district-plan/proposed-district-plan-stage-1/>



topic groupings. This decision, like its companion Decision 2.3, is concerned with 'Topic 2' appeals. Those appeals concern the 'Rural Landscapes' provisions of Chapters 3 and 6 of the DV (and associated Rural zone planning maps).<sup>3</sup>

[5] Outstanding Natural Features ('ONFs') and Outstanding Natural Landscapes ('ONLs') (together, 'ONF/Ls') are mapped in the DV for the purposes of s6(b) of the Resource Management Act 1991 ('RMA'). Almost the entire District (97%) is so mapped. Most of the remaining 3% of the District is mapped 'Rural Character Landscape' ('RCL'). That RCL mapping denotes landscapes adjudged to have landscape character and associated amenity values for the purposes of s7(c) RMA.<sup>4</sup>

[6] According to procedural directions made for the hearing of the appeals, Topic 2 is further divided into various sub-topics.

[7] Sub-topic 1 concerns appeals seeking changes to the DV's mapping of ONF/Ls and RCLs. There are six such appeals. Our first substantive decision on Topic 2, issued on 20 September 2019 (*Hawthenden*,<sup>5</sup> 'Decision 2.1'), dealt with three of them. The companion Decision 2.3 deals with the remainder.

[8] This decision deals with the other Topic 2 sub-topics (sub-topics 2 – 10 as detailed in the footnote).<sup>6</sup>

[9] We have issued this decision and Decision 2.3 as separate, companion, decisions for convenience to the parties. In particular, we are mindful that most parties have only confined interests in relation to the several matters that arise in the various sub-topics for consideration. However, both decisions have arisen from the same hearings, and associated deliberations. The reasoning in each decision informs and applies to both.

<sup>3</sup> Our first substantive decision on Topic 1 'A Resilient Economy' was issued in August 2019 (*Darby Planning Ltd Partnership v Queenstown Lakes District Council* [2019] NZEnvC 133, [2019] NZEnvC 142).

<sup>4</sup> Opening submissions for QLDC, dated 8 April 2018, at [2.2].

<sup>5</sup> *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 (*Decision 2.1*).

<sup>6</sup> The court's 24 August 2018 Minute lists these as sub-topic 2 (SOs 3.2.1.7 – 3.2.1.8, 3.2.5 and 3.2.5.1 – 3.2.5.2) sub-topic 3 (SPs 3.3.20 – 3.3.32, excluding SPs 3.3.27 and 3.3.28), sub-topic 4 (Title, Purpose and Values, 6.1 and 6.2), sub-topic 5 (Rural Landscape Categorisation, P 6.3.1 – 6.3.3), sub-topic 7 (Managing activities in ONLs and on ONFs, P 6.3.12 – 6.3.18), sub-topic 8 (Managing activities on lakes and rivers, P 6.3.30 – 6.3.33), sub-topic 10 (Tourism, Ch 6) and sub-topic 11 (Upper Clutha Basin Land Use Planning Study). The regionally significant infrastructure provisions are not the subject of this decision. As they are the subject of a settlement between relevant parties, they will be determined separately.



### Landscape related terms used in this decision

[10] In this decision, when we use certain terms drawn from the landscape evidence, we intend a particular meaning for them. While we may not always be precisely consistent, our intended meanings are as follows:<sup>7</sup>

- (a) **Landscape capacity** (or 'capacity'):
  - (i) when used in relation to an ONF or ONL, refers to the capacity that the natural feature or natural landscape in question has to accommodate change from land use or development, without those landscape values being destroyed or materially compromised;
  - (ii) when used in relation to an RCL, refers to the capacity of a landscape character area to accommodate change from land use or development, without that area's landscape character or visual amenity values being destroyed or materially compromised;
- (b) **Landscape character** (or 'character'), when used in relation to an RCL, refers to the expression of landscape values, and their associated visual amenity values, that combine to distinguish an area (e.g. as a rural or more urbanised landscape);
- (c) **Landscape character area** refers to a geographic area of an RCL where there is a distinctive landscape character;
- (d) **Landscape values** (or 'values'), whether in relation to ONF/Ls or RCLs, includes reference to biophysical, sensory and associative attributes; and
- (e) **Visual amenity values** (or 'amenity values'), when used in relation to an RCL, refers to those qualities and characteristics that contribute to people's appreciation of the landscape character of a landscape character area.

### Overview of the context and related issues

[11] The Topic 2 provisions in Chs 3 and 6 that are most in issue in the appeals fall into two broad categories:

<sup>7</sup>

We also make directions for a number of these terms to be suitably included (subject to final drafting) in provision '3.1B Interpretation and Application of this Chapter'.



Planning that Sch 1 RMA should be used to include them in the ODP. Part of the reason for that is the inherently subjective nature of the assessment and identification of ONF/L values. Ms Scott points out that there has not yet been sufficient work undertaken to confirm ONF/L values for inclusion in any schedules. Counsel observes that, given that QLDC is the statutory functionary, it is "best placed to undertake the initial assessment of ONF/L (whether on a priority basis or otherwise) ahead of any contestable process".<sup>93</sup> Furthermore, Ms Scott emphasises the importance of ensuring policy is directed to targeted Priority Areas. Priority Areas may be only a proportion of particular ONF/Ls and/or extend across ONF/L boundaries. Counsel submits that Mr Ferguson's broader District-wide approach is not supported on a benefit/cost analysis and nor does it duly recognise QLDC's planning authority responsibilities.<sup>94</sup>

[102] As for the appropriate scale for assessment purposes, Ms Scott notes that 6(b) RMA requires the protection of "landscapes" (not landscape character units, as Darby Group pursues).<sup>95</sup>

## Discussion

### *Overarching principles for evaluation of ss6(b) and 7(c) provisions*

[103] The issues we are considering at this stage concern the most effective and appropriate objectives and policies in response to ss6(b) and 7(c) RMA.

[104] Before evaluating the evidence and provisions, there are some preliminary matters concerning the relative roles of district plans and resource consents in relation to ss 6(b) and 7(c), RMA. Our analysis of those matters is on the basis that there are no relevant directives under any NPS, the RPS or the pRPS.

### *Relevant principles as to the roles of plans and consent processes*

[105] In Decision 2.1, we refer extensively to the Court of Appeal decision in *Man*

<sup>93</sup> Second supplementary closing submissions for QLDC, dated 4 September 2019, at [2.60].

<sup>94</sup> Second supplementary closing submissions for QLDC, dated 4 September 2019, at [2.38] – [2.39].

<sup>95</sup> Second supplementary closing submissions for QLDC, dated 4 September 2019, at [2.42] – [2.49]. On the last point, QLDC records that RPL/QPL accepts, relevantly, that QLDC "is best placed to identify Priority Areas that are likely to be subject to particular demand".





*O'War*,<sup>96</sup> on the proper interpretation of s6(b) RMA. In particular, we take guidance and direction from its findings that:

- (a) 'outstanding' in s6(b) imports "special quality" and is a word that involves a reasonably direct appeal to the judgment of the decision-maker;<sup>97</sup>
- (b) s6(b) requires an essentially factual assessment based on a landscape's inherent qualities and necessarily involves comparison with other landscapes;<sup>98</sup>
- (c) in developing a regional policy statement, the regional council (or unitary authority) concerned is engaged on a task that is based upon its stewardship of the region.<sup>99</sup>

[106] In applying that guidance and direction, we treat the ODP as an instrument of such stewardship in the District, in regard to its ONF/L resources.

[107] The Court of Appeal's reference to "special quality" draws from the *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* decision.<sup>100</sup>

[108] As did the court in *Matakana*, so do we draw particular guidance and direction from *King Salmon* in our analysis of the proper role of the ODP in relation to ss 6(b) and 7(c) RMA.<sup>101</sup> In particular, we rely on observations in *King Salmon* to the following relevant effect:

- (a) "inappropriate", in s6(b) RMA, should be assessed by reference to what is sought to be protected;<sup>102</sup>
- (b) s5 RMA is not intended to be an operative provision, in the sense that it is not a provision under which particular planning decisions are made; rather, it sets out the RMA's overall objective;<sup>103</sup>

<sup>96</sup> *Man O'War Station Limited v Auckland City Council* [2017] NZCA 24.

<sup>97</sup> *Man O'War*, at [86].

<sup>98</sup> *Man O'War*, at [61] and [86].

<sup>99</sup> *Man O'War*, at [87].

<sup>100</sup> *Man O'War*, at [84] – [86], discussing *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) at [82].

<sup>101</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38. We note that s7(f) on particular regard to the maintenance and enhancement of the quality of the environment is also relevant, but address matters primarily in terms of s7(c) given the PDP characterises the RCLs as rural amenity landscapes.

<sup>102</sup> *King Salmon*, at [101].

<sup>103</sup> *King Salmon*, at [151].



- (c) the RMA's "cascade of" RMA planning documents form an integral part of the legislative framework of the RMA. Ultimately, each is intended to give effect to s5, and to pt 2 more generally. These documents give substance to the RMA's purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality;<sup>104</sup>
- (d) reflecting the open-textured nature of pt 2 RMA, Parliament has provided for a hierarchy of planning documents the purpose of which is to flesh out the principles in s5 and the remainder of pt 2 RMA, in a manner that is increasingly detailed both as to content and location. It is those documents that provide the basis for decision-making, even though pt 2 remains relevant.<sup>105</sup>

[109] Guided by *King Salmon*, we find that the ODP is part of the intended RMA legislative framework to flesh out, and give local context to, ss 6(b) and 7(c). In those terms, the ODP's proper roles can include:

- (a) identifying what is sought to be protected in regard to natural features and landscapes, both in a geographic and values sense, and what subdivision, use and development is, therefore, inappropriate, for s6(b) purposes;
- (b) identifying the geographic extent of rural character landscapes and those of their related landscape character and amenity values intended to be maintained or enhanced, including so as to effectively protect against cumulative degradation of those identified values, for s7(c) purposes.<sup>106</sup>

[110] We are also assisted by the observations of the Environment Court in *Matakana* to the effect that it is important for a district plan to identify not only ONF/L values but also "those things that would be inappropriate" given those values. The latter reference picks up on the Supreme Court's interpretation, in *King Salmon*, that "inappropriate subdivision, use, and development" in s6(b) RMA is to be understood with reference to what is sought to be protected. A related construct we find helpful is 'landscape capacity', as we have defined that term in Part A.

[111] Those findings are consistent with the following observations in Decision 2.1:

<sup>104</sup> *King Salmon*, at [30].

<sup>105</sup> *King Salmon*, at [151].

<sup>106</sup> We have not lost sight of s7(f) as to the quality of the environment, but the DV is framed with reference to s7(c).



[30] As *Man O'War Station Limited v Auckland City Council*<sup>107</sup> recognised (in the context of a policy instrument that enunciated related values), much turns on what is sought to be protected.<sup>108</sup> Mapping only assists in identifying the geographic extent of what is sought to be protected. Listing those values that inform why a feature or landscape is an ONF or ONL is an important further element of setting out what is sought to be protected. That is particularly given the significant element of judgment required to select features and landscapes as "sufficiently natural" to warrant identification as ONFs or ONLs. In particular, that selection includes choices as to the significance or otherwise of human modifications to a feature or landscape. Associated with those choices are judgments as to the resilience, or otherwise, of the feature or landscape to further human modification. Transparency in the ODP about those choices is highly desirable, in terms of certainty, in that it helps inform what is inappropriate subdivision, use and development.

[31] Objectives, policies, assessment matters and other rules are relatively limited in their capacity to enunciate particular ONF or ONL values because they are designed to apply generically. The listing of relevant values, provided it is properly informed and expressed, helps plug that gap. As such, scheduling values would assist the ODP to fulfil its protective purposes.

[32] The related objectives, policies and rules (including on assessment matters) will be the subject of our further Topic 2 decision(s) (for which we have now received closing submissions).

### ***Evaluation of options in light of those principles and the evidence***

[112] We accept QLDC's opening submission that the ODP must ensure "bottom lines" including "sufficient direction as to what is inappropriate".

[113] However, the principles we have discussed favour a greater degree of direction than the DV provides.

[114] For ONF/Ls, those principles favour an approach that goes significantly beyond the use of planning maps to identify the geographic extent of ONF/Ls (in conjunction with the DV's objectives, policies and rules), in order for the ODP to properly give direction for the purposes of s6(b) RMA.

[115] For the Upper Clutha RCLs, those principles favour an approach that goes

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<sup>107</sup> *Man O'War*.

<sup>108</sup> *Man O'War*, at [65].



significantly further in identifying valued landscape characteristics and visual amenity values.

[116] We acknowledge that resource consent application processes can address ss 6(b) and 7(c) even without a district plan direction. In particular, in regard to the s104 direction that the consideration of consent applications is to be "subject to Part 2", the Court of Appeal, in *R J Davidson*, observed:<sup>109</sup>

If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[117] However, we are of course concerned with the issue of the most appropriate approach in terms of policy direction, in relation to ONF/Ls and RCLs. It is in that sense that we find the principles in the other noted authorities call for a more sophisticated approach than the DV presently provides.

[118] Furthermore, we bear in mind several limitations of resource consent application processes for responding to ss6(b) and 7(c) in the absence of effective district plan direction.

[119] As compared to planning instruments, consent application processes are inherently limited in their capacity to determine what is sought to be protected in an ONF/L<sup>110</sup> or the landscape amenity values sought to be enhanced or maintained in an RCL. One inherent limitation concerns the different context of a consent application process. It is fundamentally concerned with the proposal at issue. Typically, a proposal would concern a much more confined land area than a landscape (or even a feature). Furthermore, landscape assessments, in consent application processes, are not designed to serve the purposes of the district plan *per se*. Rather, the application AEE generally serves to advance the case for consent, landscape evidence by submitters to test that case, and s42A reports to assess the application (including the extent to which

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<sup>109</sup> *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316; [2018] 3 NZLR 283, at [75].

<sup>110</sup> A matter we also address in Decision 2.1 (*Hawthenden*).





it reflects, rather than supplements, the plan's intentions). We recognise that a district plan's policies and assessment matters may influence that to some extent. However, consent application findings on the values of particular features and landscapes for s6(b) RMA purposes, or landscape character and amenity values for s7(c) RMA purposes, do not have necessary statutory relevance beyond the consent decision itself. Even assuming findings from successive consent applications are collated by QLDC, that collation is not a legally valid supplement to what the ODP itself specifies for protection. That is in the sense that plans are an intended part of the RMA's legislative framework, but resource consents, and related findings in consenting processes, are not.

[120] Unless a district plan gives proper strategic direction on its s6(b) RMA protection intentions, resource consent application processes are not an assuredly reliable means of discerning that, nor what is inappropriate by way of subdivision, use or development. Hence, for a district whose economy is so reliant on the protection of ONF/Ls, the DV does not adequately provide for integrated management or, ultimately, sustainable management.

[121] The position is similar for RCLs. Unless the ODP is clear in its identification of relevant landscape amenity values to be maintained or enhanced, resource consent application processes are not likely to be reliable in guarding against cumulative degradation of those values through successive developments in the Rural area, particularly in the Upper Clutha Basin.

### ***Evaluation of options in light of the evidence***

[122] The evidence of Ms Lucas and Ms Gilbert indicate that there are particular rural amenity areas in the Upper Clutha Basin that are at risk of degradation under the DV. On the other hand, Dr Cossens' evidence indicates, from his personal experience, that there may be a number of other areas less sensitive to those cumulative effects but, nevertheless, within the DV's RCL overlay. Mr Haworth also gave perspectives, as a local resident, about these matters. Again, as the DV has not been duly informed by proper land use planning study, its objectives, policies and assessment matters are not well attuned to cumulative effects and related tipping points.

[123] The evidence reveals that an important dimension to the Queenstown District's extensive landscapes is the inter-related nature of several ONF/Ls and RCLs. In essence, as both Ms Lucas and Ms Gilbert observed, nature does not pay much respect



to lines on planning maps. Rather, the image from Denis Glover's poem, *Arawata Bill*, "this country crumpled like an unmade bed", is apt. Hence, an integrated management approach is needed that responds to the nature of those landscapes.<sup>111</sup>

[124] Whilst Ms Lucas and Ms Gilbert each opposes ONF/L scheduling, we find this a helpful mechanism to better provide for the integrated management of ONF/Ls and RCLs in the Upper Clutha Basin. That is in the sense that ONF/L schedules would bring to light those values vulnerable to inappropriate development in the RCL settings of those features and landscapes.

[125] We prefer Ms Pflüger's and Mr Milne's opinions in favour of ONF/L scheduling. We agree with Mr Milne that, in order that the appropriateness or otherwise of activities can be adjudged at the time of resource consenting, the absorption capacity of the landscape and effects of a development on that landscape need to be known.

[126] As to 'absorption capacity', we prefer the construct of 'landscape capacity' (which we define in Part A). It requires that the plan sets quantifiable tolerances, underpinning its rules, and capable of measurement over time in order that cumulative effects can be assessed as change and development in the relevant Priority Areas of ONF/Ls and RCLs occurs.

[127] Landscape capacity cannot be known unless there has been an identification of the landscape character values and their importance (i.e. knowing what the landscape is valued for and why). Evaluating a landscape is inherently an exercise where different landscape experts have different opinions. That is why it is important that a district plan identifies both landscape values and landscape capacity in that both of these are part of the plan's intended statutory authority in regard to ss6(b) and 7(c).

[128] Ms Gilbert spoke with some force about her concerns that scheduling would result in important values being overlooked. However, with respect, we observe that she would appear not to have duly appreciated the intended statutory function of a district plan to make choices about the matters to which s6(b) applies, including how much land is to be classed as ONF/L, what associated landscape values are sought to be protected and, related to that, what is inappropriate subdivision, use and development. All of those are

<sup>111</sup> Borrowed via *Wakatipu Environmental Society Incorporated*, at [1], the reference for which is in Decision 2.1 at [4].



dimensions of fleshing out and contextualising s6(b), according to the guidance of *King Salmon, Man O'War, R J Davidson* and *Matakana*.

[129] We accept that district plans can make choices that landscape experts may later disagree with. However, conceptually, that is no different from the choices that are made by mapping ONF/L areas in a district plan. Provided that the choices for or against protection made by district plan mapping and scheduling are soundly informed by expert and other s32 analysis, those choices help to fulfil the RMA's purpose.

[130] We acknowledge the risk that ONF/L schedules may be poorly drafted or not properly underpinned by landscape assessment. However, managing those risks is an inherent aspect of the planning authority's responsibilities under s32, RMA. As the responsible planning authority, QLDC is in a position to ensure choices about what is to be protected are properly informed. Planning processes allow ample opportunity for contested consideration of these matters, through submissions and further submissions, and hearings. Furthermore, properly drafted descriptions of landscape values in schedules can allow for what is intended. Language can be readily and deliberately prescriptive or open-textured, depending on the intention. Hence, we do not accept Ms Gilbert's recited examples as demonstrating that scheduling has no value.

[131] Nor do we accept arguments to the effect that the task of assessing relevant ONF/Ls and scheduling their values is too large. Rather, the task is part of QLDC's planning authority responsibility. In any case, once we have a clearer understanding of the Priority Areas, where development pressures are more significant, our intended new Strategic Policies will provide for an approach that prioritises where Sch 1 processes to provide for scheduling would be undertaken (according to specification of areas and a timetable).

#### ***Evaluation of benefits and costs of scheduling v not scheduling values***

[132] We adopt the analysis of s32 RMA at [26] – [40] of our Topic 1 (*Darby Group*) decision.<sup>112</sup> As part of that analysis, we noted that we consider s32 in our appellate role (by contrast to QLDC's statutory planning authority role).

[133] The evidence reveals that the DV ONL/F and RCL provisions are based on

<sup>112</sup> *Darby Planning Ltd Partnership v Queenstown Lakes District Council* [2019] NZEnvC 133.



relatively confined landscape analysis in informing the choices made in the NV concerning the mapping of ONF/Ls and Upper Clutha Basin RCLs. Specifically, the election to have resource consent processes used to determine ONF/L and Upper Clutha RCL values has been made without meaningful evaluation of transactional efficiency, as to the relative benefit/cost implications.

[134] For context, we refer to QLDC's opening submissions which emphasise "the obvious tension", concerning ss6(b) and 7(c) landscape matters, given the "current development pressure" experienced within the District.<sup>113</sup>

[135] While QLDC has mapped 97% of its District ONF/L, and much of the balance RCL, it is self-evidently the case that development pressure is in much more confined areas. As a gauge on that, Mr Barr indicated nine discrete areas across the District as Priority Areas in terms of where "the highest level of development pressure currently is".

[136] Yet, QLDC did not call evidence to assist us to understand how the approach of the DV would compare, in benefit/cost terms, to one where the ONF/L values sought to be protected were identified. Mr Osborne's evidence did not traverse those matters in any detail. Mr Ballingall properly drew attention to the fact that Ms Osborne did not offer any proper marginal benefit/cost evaluation of the various planning options. We record that QLDC ought to have been alert to these matters, given the Darby Group appeal.

[137] Notwithstanding the lack of such evidence from QLDC, we are in a position to safely infer (as we do) that scheduling of ONF/L values would offer material economic efficiencies over the DV. We infer that from the evidence we have heard for this and companion Decision 2.3 and our findings in Decision 2.1. In particular, we rely on:

- (a) the findings in Decision 2.1 in relation to the sub-topic 1 appeals by the Seven Albert Town Property Owners (and Otago Regional Council as s274 party to that appeal), and James Cooper, insofar as those findings pertain to the uncertainty of the DV's regime for natural hazard infrastructure and productive farming;
- (b) the findings in Decision 2.3 on similar matters for the productive farming operations at Hawthenden Farm and Lake McKay Station;
- (c) the evidence and representations of Mr Haworth for UCESI and Dr

<sup>113</sup> Opening submissions for QLDC, dated 8 April 2019, at [2.2].





Cossens. Each is informed by local experience, albeit with significantly different perspectives and interests in regard to the use, development or protection of RCL land of the Upper Clutha Basin. Each expresses valid concerns about the present uncertainty in the DV's RCL regime for the Upper Clutha; and

- (d) the significant consensus amongst the landscape experts as to the value, in principle, of scheduling of ONL/F values and of a further landscape and land use analysis in order to better inform the ODP on the character areas, associated values, and cumulative effect and other risks from subdivision and land development pressures for the Upper Clutha Basin.

[138] A further important consideration is as to how the different options would *allocate* costs and benefits. As Ms Baker-Galloway has noted, the DV would transfer the costs of identifying landscape values to resource consent applicants. QLDC raise concerns about the potentially significant costs that would be imposed on participants in the current proceedings, were the court to direct scheduling in determination of these appeals. However, as we have noted, district plans have a statutory purpose of fleshing out and contextualising pt 2 RMA (including ss 6(b) and 7(c)). While there would be transactional costs for ratepayers in Sch 1 plan changes, those are as a consequence of the proper exercise of QLDC's planning authority responsibility.

***The DV regime for ss6(b) and 7(c) is not appropriate***

[139] For all of those reasons, we find the DV's regime for ss 6(b) and 7(c) is not appropriate.

[140] For ONF/Ls, that is particularly in regard to the DV's:

- (a) failure to identify the landscape values and related landscape capacity, particularly for areas needing to be accorded priority given anticipated development pressures;
- (b) inadequate provision for the integrated management of landscapes, including those mapped Upper Clutha RCLs in proximity to ONFs and/or ONLs.

[141] In regard to the Upper Clutha RCLs, that is also by reason of the DV's failure to:

