QUEENSTOWN LAKES DISTRICT COUNCIL

Hearing of Submissions on the Proposed District Plan

Report 16.15

Report and Recommendations of Independent Commissioners Regarding Upper Clutha Planning Maps Sticky Forest

Commissioners
Trevor Robinson (Chair)
Jenny Hudson
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MICHAEL BERESFORD (149)

1. SUMMARY OF RECOMMENDATIONS

1.1. Overall Recommendation

1. We recommend Mr Beresford's submission seeking rezoning of the site be rejected.

1.2. Summary of Reasons for Recommendation

2. Although there is merit in the submitter's contention that some parts of the site are suitable for urban development, in the absence of any clarity as to the nature and location of legal rights of access to the site, it is not possible to determine where and how urban development should be provided for. The submission is premature. In the interim, the Rural Zone is the most appropriate way to achieve the objectives of the PDP

2. PRELIMINARY MATTERS

2.1. Subject of Submission

3. This submission relates to Section 2 of 5 Block XIV Lower Wanaka Survey District (CT OT18C/473), a 50.67 hectare landlocked site with a frontage to Lake Wanaka near its outlet to the Clutha River.

2.2. Outline of Relief Sought

4. Mr Beresford's submission sought rezoning of the site from Rural as shown on Planning Maps 19 and 20 to Low Density Residential.

5. As part of the submitter's case presented to us at the hearing, a revised package of relief was tabled incorporating:
    a. Rezoning part of the site Low Density Residential;
    b. Rezoning another part of the site Large Lot Residential;
    c. Retaining the balance of the site (comprising approximately 31 hectares) as Rural on the basis that it would be made available to the public for recreational purposes;
    d. Shifting both the ONL and UGB boundaries to coincide with the edge of the proposed Large Lot Residential Zone.
    e. Associated changes to Chapters 6 (Landscape), 7 (Low Density Residential Zone), 11 (Large Lot Residential Zone) and 27 (Subdivision).

6. It was emphasised to us that this was a package and that provision of the public recreation rights, as above, relied on the availability of residential development opportunities as sought.

7. In the alternative, the submitter sought amendments to Rule 21.4.21 to make forest, harvesting and replanting with species not subject to Chapter 34 except for Pinus radiata and Douglas fir a permitted activity, together with removal of the ONL overlay.

2.3. Description of the Site and Environs

8. The site is located on a hilltop above Wanaka township. The property is rectangular in shape and currently landlocked – there are no legal rights of access to it other than by boat to its northern side, where it is bounded by the marginal strip adjoining Lake Wanaka. On the other three sides, residential development or land zoned to enable same surrounds it. There is, however, a buffer on each side so that except at one specific location within the Northlake Development (east of the site), residential housing cannot be built right up to the boundary.

9. There is one house located on the site, but this is not readily visible from beyond the site boundary, because of the exotic forest plantation that covers much of the site.

10. The established exotic trees on the site, combined with its hilltop aspect, mean that a significant proportion of the site is readily visible from outlooks around Wanaka as part of the backdrop to the expanding residential areas in the northern part of Wanaka township.

11. There is a ridgeline about two thirds the way up the property (from the south). North of that ridgeline, the site slopes down to the edge of the lake, where it starts to narrow into its outlet (the Clutha River).

12. There is no residential development on the northern side of the ridgeline east and west of the site although there is a Council camping ground on the shores of Lake Wanaka/Clutha River (appropriately named the Outlet camp). From the ridgeline, if not obscured by the existing trees, the site would look out over Dublin Bay and Stevenson's Arm, and the rural areas south of that part of the lake.

13. The site was formerly (until 1998) a Council reserve and there is an extensive network of mountain bike trails on it, which continue to be used by members of the public.

14. The land is now beneficially owned by the descendants of 57 specific individuals who were to have had land transferred to them in settlement of a claim under the South Island Landless Natives Act 1906. The land originally supposed to have been transferred was located at the Neck (at the narrowest point between Lakes Wanaka and Hawea), but the site was nominated in substitution for the original land as part of the Crown's Treaty settlement with Ngāi Tahu implemented through the Ngāi Tahu Claims Settlement Act 1998. The site remains in Crown ownership currently while all of the relevant descendants are located. We were advised that in excess of 1000 beneficiaries have already been identified and that the process of identifying the remainder is ongoing. Mr Beresford is one of those beneficiaries. While his submission seeks to benefit his fellow beneficiaries, Mr Beresford made it clear that he had no authority to speak for them.

15. As above, the site is landlocked, apparently because, when the Kirimoko block to the south of the site was subdivided off from it, this occurred pursuant to the Ngāi Tahu Claims Settlement Act. It was accordingly not the subject of normal processes under the Act which would have identified the issue and required that it be resolved before the subdivision occurred. We were told that negotiations are continuing to resolve the position with the most likely option being access through the adjacent Northlake properties. No resolution had, however, been reached as at the date of hearing.

2.4. The Case for Rezoning

16. To the extent that Mr Beresford now seeks that the ONL line be shifted, that aspect of his submission has been addressed in our Report 16.1, which recommends that the relief sought be granted in part[1].

17. As regards rezoning issues, Counsel for Mr Beresford, Ms Prue Steven QC emphasised the historical background summarised above and submitted that sections 5 and 8 of the Act have particular relevance to this submission. The argument, in summary, was that having acquired rights to the site in compensation for a breach of the Treaty of Waitangi, the benefits of that settlement should not be rendered illusory through constraints on the beneficiaries' ability to

[1] Report 16.1 at Section 2.6

utilise the land granted in substitution for the land they should have received under the 1906 Act.

18. The submitters' case is unusual because the site is of no cultural significance either to the beneficiaries or more broadly, to Ngāi Tahu as an iwi.

19. Its sole value to the beneficiaries is by reason of the potential for its use to provide economic benefits to them. Ms Steven cited the decision of the Environment Court in *Buchanan v Northland Regional Council*[2] as supporting reliance on Section 8 in a case where the iwi sought to construct a mussel spat farm. The Court found there that the principles of the Treaty should not be approached narrowly and require active protection of Maori economic interests.

20. Ms Steven submitted to us also that the Supreme Court's decision in the *King Salmon* litigation[3] did not preclude an overall balancing approach in this situation. In any event, she argued that Mr Beresford's submission might be supported by a reference to provisions in the Proposed RPS, and in Chapters 3 and 5 of the PDP.

21. Ms Steven's legal submissions were supported by evidence from:
    a. The submitter, Mr Michael Beresford, who provided us with the historical background summarised above, the potential land use options available to the beneficiaries once they finally take title of the property and the reasons why Mr Beresford lodged his submission;
    b. Mr Michael Copeland provided expert economic evidence that the revised relief sought by Mr Beresford would provide economic and social benefits to the beneficiaries and to the public, as well as increasing the supply of residential sections consistent with the NPSUDC.
    c. Ms Natalie Hampson provided expert economic evidence directed specifically at the residential land and housing market in the Wanaka area and on the Council's case in relation to the NPSUDC. We have already addressed Ms Hampson's evidence in our Report 16[4] and refer to that discussion.
    d. Mr William Field provided expert landscape evidence in relation to the submission. Again, we have already discussed Mr Field's evidence in the context of our Report 16.1. Importantly, Mr Field provided evidence of his analysis of the site, dividing it into areas that would be suitable for residential development at different densities, that provided the basis for the revised relief sought for Mr Beresford. We have set out a copy of Mr Field's graphical description of the capacity of the site to absorb development in Appendix 1 to this report.
    e. Mr Field identified that some carefully controlled residential development might occur within the ONL he had recommended (which we have recommended in Report 16.1 be accepted) by reason of its low visibility from off the site, and in particular from the lake, provided it is carefully mitigated through design controls.
    f. Mr Andrew Metherell provided expert traffic engineering evidence supporting the proposed Large Lot and Low Density Residential rezoning for part of the site from a transportation perspective. Mr Metherell identified potential road connections into Sticky Forest, and supported a more detailed assessment of local road network form and impacts once practical road access is confirmed. As above, Mr Metherell was of the view that the route through the Northlake development would be the most efficient option.
    g. Mr John McCarthy provided expert engineering advice on infrastructure matters, confirming that, with the reduced density of the proposed development (compared to

[2] A66/2002
[3] [2014] NZSC38
[4] Report 16 at Section 2.9

Low Density Residential over the whole site), infrastructure matters could be resolved. We took Mr McCarthy's evidence as read as we determined that we did not need to hear from him in person, given the revised position of Mr Glasner, withdrawing his opposition to the proposal on infrastructure capacity grounds.

h. Mr Robert Greenaway provided expert evidence on recreation matters. The thrust of Mr Greenaway's evidence was that the loss of public access to Sticky Forest would be a significant loss to recreational values in Wanaka. He was of the view that there was no realistic prospect of using the site as a commercial recreation facility and that ongoing management of the site as a commercial forest would have significant adverse effects on use of the land for recreation purposes, depending on where in the cycle of harvesting and planting it was at any given time. He supported the option proffered by Mr Beresford as a means to secure Sticky Forest as a public recreation facility.

i. Mr Dean Crystal provided expert planning evidence supporting the revised relief sought for Mr Beresford including detailed plan provisions. If accepted, these provisions would in his view ensure that in tandem with provision of the recreation benefits the value of which Mr Greenway emphasised to us, appropriate development would occur in accordance with a Structure Plan, the form of which would be resolved through a future restricted discretionary activity application under Chapter 27. Mr Crystal also addressed the provisions required to permit clearance of the existing forest. He was of the opinion that this should be a controlled activity.

2.5. The Case for Council

22. Following revision of the relief sought for the submitter, the principal areas of contention were in relation to landscape, traffic management and planning. In relation to landscape matters, Ms Mellsop emphasised the visibility of the proposed Low Density Residential Zone from areas within the Northlake development, from Mount Iron and potentially from the Three Parks Zone. She also considered, based on the analysis Mr Field had produced, that the proposed Large Lot Residential Zone would potentially be visible from the surface of the lake, urban Wanaka to the west and south, Northlake and Mt Iron. Ms Mellsop agreed with the areas identified by Mr Field as potentially suitable for development, but was of the view that the proposed objectives, policies and rules proffered by Mr Crystal would not achieve an acceptable outcome in the area identified for Large Lot development and that a lower density of development would be required to avoid significant adverse effects on the integrity of the land and the visual coherence of the landscape. As regards the suggested Low Density Residential development, Ms Mellsop agreed with Mr Field that there is potential capacity to absorb a small area of such development (but somewhat smaller than is sought by Mr Beresford) in the south-eastern part of the site.

23. Ms Mellsop also drew our attention to the complications posed by the open space buffers to the site on the three sides of the site adjoining residential development. She considered that a significant vegetative buffer would be required on the eastern boundary of the proposed low density residential development area in order to maintain the landscape function of the existing buffers.

24. In relation to traffic issues, Ms Banks disagreed with Mr Metherell's view that road layouts can be developed during later planning processes. She was of the opinion that the most appropriate zoning is Rural, based on the uncertainties around obtaining legal access to the site. Even assuming access is through Northlake, her view was that there was potential for some adverse effects on the road network through the residential areas of Northlake.

25. At a planning level, Mr Barr acknowledged the factual circumstances underlying Mr Beresford's submission as being unique, but expressed concern that the vehicle to achieve his aspirations is perhaps not the most appropriate one, bearing in mind the interests of the balance of the community. Mr Barr agreed with Mr Crystal's view that the location and characteristics of the site did not lend themselves favourably to the continuation of forestry, but expressed the view that commercial recreation might be a viable option. Overall, Mr Barr considered that the proposal presented in the evidence for Mr Beresford did not have appropriate regard to the surrounding environment.

26. As regards the specific provisions recommended by Mr Crystal, Mr Barr took issue with the failure to provide for recreational cycling access through the rezoned areas.

27. Ultimately, however, Mr Barr recommended Mr Beresford's submission be rejected other than in relation to the ONL boundary discussed in Report 16.1, but if we took a different view, he recommended that the urban zoning and extension of the Wanaka UGB be limited to the reduced area recommended by Ms Mellsop *"and the remainder of the site is zoned Rural with that Rural Zone land vested in the Council".*

28. In his reply evidence, Mr Barr addressed the question which we had posed on the appropriate activity status for clearing of the trees currently on Sticky Forest. Mr Barr disagreed with Mr Crystal that controlled activity status was appropriate. He recommended restricted discretionary activity status.

2.6. Discussion of Planning Framework

29. In Report 16[5] we summarised the key strategic and other provisions recommended in other chapters of the PDP, so as to provide a reference point for the subsequent site-specific reports. We refer the reader to that report and the discussion therein for the detail.

30. Although zoned Rural, Sticky Forest is not part of a rural area in any meaningful sense, being surrounded on three sides by residential development (or by land zoned for residential development), and by the lake on the fourth side. This is much more a case of possible development at the urban fringe. Accordingly, reference might be made to recommended Objective 3.2.2.1 in its focus on a compact, well designed and integrated urban form.

31. Given the identification of part of the site as ONL, the need to protect that part from more than minor adverse effects, as per recommended Objective 3.2.5.1, together with the related Policy 3.3.30, is of obvious importance. Looking at the policies in the balance of Chapter 3, recommended Policy 3.3.28 is of relevance given that the submitter proffers an opportunity to provide public access to the natural environment.

32. As regards the UGB aspect of the submission, Recommended Objective 4.2.1 requires consideration as to whether the UGB in its current location, excluding the site, provides a defendable urban edge.

33. Policy 4.2.1.4 is also of relevance given its acknowledgement that UGBs need to take account of the constraints on development of the land such as its topography and landscape significance. Recommended Policy 4.2.2.2, suggesting land allocation within UGBs into zones reflecting, among other things, topography and landscape significance, is similarly of relevance as is recommended Policy 4.2.2.12, seeking to ensure that any transition to rural areas is contained within the UGB.

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[5] Report 16 at Section 4

34. As the Introductory Report notes, Chapter 5 is recommended to be amended to make it clear that the chapter relates to Ngāi Tahu's cultural interests only, with the language of Chapter 5 consistently referring to Ngāi Tahu's values, interests and customary resources. Chapter 5 sits generally under the framework of the goal and objectives in Section 3.2.7. We will discuss that and the objectives and policies of Chapter 5 below.

35. As regards the submitter's proposal that land within the recommended ONL be the subject of an urban zoning, recommended Policy 6.3.12 is relevant given its statement that successful applications for subdivision and development of such land is inappropriate in almost all locations, and that successful applications will be exceptional cases where the landscape can absorb the change and where buildings and associated roading and boundary changes will be reasonably difficult to see from beyond the boundary of the site.

36. Those planning provisions need to be read against a background where the submitter argued and counsel for the Council accepted that Part 2 was of relevance, including but not limited to Section 8.

3. ISSUES

37. We have identified that the following issues need to be addressed in order to inform our ultimate recommendation:
   a. Are all aspects of the revised relief sought by the submitter within scope?
   b. What relevance do recommended Objective 3.2.7 and Chapter 5 of the PDP have to consideration of the submission?
   c. What relevance do Section 8 of the Act (and the balance of Part 2) have to our consideration of the submission?
   d. What if any relevance does Section 85 of the Act have to our consideration of this submission?
   e. What is the appropriate zoning for the land within the site over which the submitter seeks relief having regard to the effects of clearing the existing forest and/or undertaking residential development and/or potentially enhancing recreational opportunities for the public?
   f. Assuming we have scope to do so, should we recommend amendment to Chapter 21 sought in the alternative?

4. DISCUSSION OF ISSUES AND CONCLUSIONS

4.1. Scope Issues

38. As above, the submission sought that the whole site be rezoned Low Density Residential. That means that intermediate positions (such as rezoning Low Density Residential in part) are clearly within scope. Consequential changes necessarily flowing from acceptance of the submission are likewise within scope. In this case, the most obvious example is that if we recommend rezoning land to an urban zone, it would necessarily follow that the UGB should be redrawn to include that urban zoning given recommended Policy 3.3.14 states that urban development outside of a UGB should be avoided.

39. The scope for other aspects of the relief sought by the submitter are not, however, quite so obvious.

40. Within the Low Density Residential Zone, forestry activities are prohibited, both in the zone as notified, and in the zone provisions recommended by the Stream 6 Hearing Panel. Mr

Crystal identified that this was a problem, given the site is covered in mature exotic trees and in his Evidence in Chief, he recommended an amendment to the Low Density Zone rules specific to Sticky Forest so that they would be "*Permitted".* As regards the revised relief sought, seeking that part of the site be zoned Low Density Residential, he also recommended that forestry activities specific to Sticky Forest be Permitted in that zone also (rather than non-complying as per both the notified and the recommended zone provisions).

41. Given that the Beresford submission made no reference to permitting forest clearance, we asked Ms Steven what the scope was for that change. She suggested that it was a consequential change because, if the forest was unable to be harvested, that would frustrate the rezoning sought. We agree with Ms Steven, but only to a point. We do not think that the rezoning sought could be frustrated (as it would be if forest harvesting remained a prohibited activity), but that is a long way from finding that the relief sought suggested by Mr Crystal in his Evidence in Chief (that forest harvesting be permitted) is within scope.

42. We discussed with various witnesses the adverse effects that would accompany forest harvesting. Unless they were going to be flown out by helicopter, or floated down the river, both of which would be problematic to say the least, the logs would necessarily have to be trucked through residential areas. Even acknowledging that this would be a one-off forest clearance, one might imagine that the neighbours of Sticky Forest might have a legitimate interest in whether such forest clearance goes ahead, and if so, on what basis. When we asked Ms Steven whether she thought permitted activity was appropriate, she agreed that that might be a bridge too far, but emphasised that Mr Beresford would not want the prospect of an application being declined. She thought that controlled activity status might possibly be appropriate, and this is what Mr Crystal ultimately recommended.

43. Even that, however, is questionable to our mind. While we can understand that Mr Beresford would not wish to have the risk of consent being refused, equally, we do not think that his neighbours could have anticipated there being no circumstances in which consents might be refused.

44. Stepping back from the issue, any position between the relief as sought (Low Density Residential) and the status quo (Rural) is within scope. Forestry activities are discretionary activities in the Rural Zone. On that basis, we think it could properly be contended that discretionary activity status is within scope as a consequential site-specific change to the Low Density Residential and Large Lot Residential Rules, should we recommend rezoning as sought.

45. The other aspect of the requested relief for Mr Beresford that we found problematic on jurisdiction grounds was the alternative relief of providing for forest harvesting and replanting on Sticky Forest as a permitted activity, should the land remain in the Rural Zone. As far as we could identify, Mr Crystal did not discuss this alternative relief and neither he nor Ms Steven (again as far as we can identify), provided us with any explanation as to how it might be considered within scope. Put simply, we do not see how it can be. As above, the scope we have to recommend changes to the PDP lies between Low Density Residential (where forestry would be prohibited) and Rural (where it is discretionary)[6]. We do not consider that amendment to the status quo, to make forest harvesting any less than fully discretionary is consequential on the relief sought, or within scope.

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[6] It is a non-complying activity in the only intermediate urban zone (Large Lot Residential)

4.2. Relevance of Objective 3.2.7 and Chapter 5 of PDP

46. Recommended Objective 3.2.7 provides the framework within which recognition of the principles of the Treaty occurs. The overall goal is that the partnership between the Council and Ngāi Tahu is nurtured. More specific strategic objectives are that Ngāi Tahu values, interests and customary resources are protected and that the expression of kaitiakitanga is enabled by providing for meaningful collaboration with Ngāi Tahu in resource management decision-making and implementation.

47. The recommended policies in Chapter 3 are specific to wāhi tupuna and so we do not think bear upon the matters raised by Mr Beresford's submission.

48. The provisions of Chapter 5 are similarly of potential relevance although, as already noted, they are recommended to include recognition that Ngāai Tahu's values, interests and customary resources do not extend to the commercial interests of companies owned or controlled by Ngāi Tahu.

49. Of the more detailed objectives, we consider the recommended Objective 5.4.4 targeting the sustainable use of Maori land and the related policy in 5.4.4.1 seeking to enable Ngāi Tahu to protect, develop and use Maori land in a way that is consistent with Ngāi Tahu culture and traditions and, among other things, its economic aspirations, is of potential relevance.

50. The balance of the objectives and policies in Chapter 5 focus on consultation with tangata whenua, taonga species and their habitats and wāhi tupuna. We do not consider them relevant to the issues before us.

51. In our view, these provisions collectively are of limited relevance to the matters that Mr Beresford's submission raised. The site is not ancestral Maori land and has, as Mr Beresford advised, no particular cultural significance either to the beneficiaries or to Ngāi Tahu more widely. Recommended Policy 5.4.4.1 comes closest to the point at issue, but we do not think it is directed at any land that any members of Ngāi Tahu may happen to own from time to time. Report 2 notes one of the kaumatua of Ngāi Tahu who appeared before the Stream 1A Hearing Panel as observing that cultural and commercial interests might overlap in areas of cultural sensitivity[7], and we think this is much more likely to be its focus.

52. We think that, because of the unique circumstances surrounding this land, Mr Beresford was on much stronger ground relying on Section 8 of the Act, to which we now turn.

4.3. Relevance of Section 8

53. As above, Ms Steven contended, and Ms Scott for Council accepted, that section 8 is relevant to our consideration of Mr Beresford's submission. We agree. We have found, as above, that the Proposed Plan provisions do not bear directly on consideration of Mr Beresford's submission. It follows that this is a true exception where, to properly consider the submission on its merits, we need to have regard to Section 8.

54. The question that we have to consider however, is what that means in practice. Section 8 of course tells us that we are required to take into account the principles of the Treaty of Waitangi.

[7] Report 2 at Section 3.3

55. This is not the same thing as making us, as the Council's delegates, responsible for ensuring that the substantive commitments to tangata whenua in the Treaty of Waitangi are complied with. However, Ms Steven submitted to us that the High Court's decision in *Ngati Maru ki Hauraki Inc v Kruithof*[8], supports the view that the Council has a responsibility for delivering on the Treaty's Article 2 promise.

56. Counsel for the Council submitted to us in her reply submissions that the Judge's comment that Ms Steven relies upon was in the context of an interim judgment regarding an application for leave to appeal out of time. In the substantive decision on leave[9], the Judge dismissed the application. Ms Scott cited to us Baragwanath J's statement that the provisions in Part 2 recognising Maori values "*do not give them the status of trumps*". In the words of the Judge "*they are to be evaluated by the decision maker*"[10]. Ms Scott also cited to us a more recent Environment Court authority that the Council is not the Crown and not subject to the Crown's obligations under the Treaty[11].

57. We accept the submissions of counsel for the Council on the point.

58. As already noted, Ms Steven cited the *Buchanan* decision as supporting a reading of Section 8 that would give it a positive purpose and not just a protective role.

59. We accept the point that Ms Steven was making, but we consider that it needs to be borne in mind both that *Buchanan* case involved use of natural resources of cultural significance to the iwi and it was the actions of the Department of Conservation that were in issue. The Department being an arm of the Crown means that Treaty issues come more clearly into focus.

60. We also consider that the *Buchanan* decision is not authority for the proposition that the principles of the Treaty prevail over all other issues. They are important, and they do need to be had regard to, but where that takes us is, as Baragwanath J observed in the passage noted above, a matter of evaluation that also has to factor in the other elements of Part 2 of the Act. We have discussed the application of section 6(b) of the Act in the context of Report 3. The provisions of Section 7 also need to be given particular regard, including the maintenance and enhancement of amenity values and the maintenance and enhancement of the quality of the environment. All these matters arise in the context of seeking to achieve the purpose of the Act, although we take on board the clear message from the Supreme Court that Section 5 should not be treated as the primary operative decision-making provision in the Act [12].

4.4. Relevance of Section 85 in the Act

61. We raised this as an issue during the course of our hearing of the Council case because it seemed to us that the Council response to Mr Beresford's submission ran the risk of depriving Mr Beresford and his fellow beneficiaries (once they finally get title to the site) of the ability to make any reasonable use of their land. Mr Barr mooted the possibility of a commercial recreation opportunity and returned to that in reply. Quite frankly, we were dubious about that prospect – after so many years of using the site for free, we rather doubted that the mountain-biking community would be receptive to paying for the privilege of entering the site and there were no other commercial recreation opportunities suggested to us as realistic alternatives. That also accords with Mr Greenaway's evidence. We consider Mr Greenaway

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[8] High Court Hamilton CIV-2004-484-330, Baragwanath J
[9] Reported at [2005] NZRMA1
[10] Ibid at [83]
[11] *Te Puna Matauranga o Whanangui v Wanganui District Council* [2013] NZ EnvC110 at [114]
[12] [2014] NZSC 38 at [130]

is rather better placed than Mr Barr to comment on the viability of commercial recreational activities.

62. Section 85 of the Act is of potential relevance because it confers on the Environment Court a discretion, where it concludes that the provisions of a plan or proposed plan renders any land incapable of reasonable use and places an unfair and unreasonable burden on any person having an interest in the land, to direct the relevant local authority to modify, delete or replace the provision.

63. We observe at the outset that section 85 cannot be directly relevant to us given that, to state the obvious, we are not the Environment Court. Nor did Mr Beresford challenge the provisions of the Plan on this basis in his submission, so as to provide jurisdiction for the Court to exercise the discretion it provides. Moreover, as counsel for the Council reminded us in her submissions in reply, the test to be inferred from Section 85 is not whether a proposed zoning is unreasonable to the owner, but rather whether it serves the statutory purpose[13].

64. The reason we raised the potential application of section 85 was not because we considered its provisions to be directly relevant, but rather because think that the preconditions contained in the section are instructive. If we consider that the existing PDP provisions render the land incapable of reasonable use this suggests to us that we ought to take particular care to satisfy ourselves that the end result is consistent with our legal obligation to identify the most appropriate zoning to give effect to the objectives of the PDP and, more generally, achieve the purpose of the Act, having appropriate regard to the provisions of Sections 6-8.

4.5. Most Appropriate Zoning?

65. It appeared to be common ground as between the witnesses for the submitter Mr Beresford, and the Council that at least some of the site is suitable for urban development. There also appeared to be a consensus as between the landscape architects that Mr Field's diagram attached our Report as Appendix 1, correctly identifies the areas of the site able to absorb residential development. The difficulty we had was that the area suggested to be rezoned by the witnesses for Mr Beresford expanded beyond those areas identified in Mr Field's diagram for reasons that we remained unclear about. We also found it difficult to visualise what urban development on this site might look like because the topography is completely obscured by the existing exotic forest. To the extent the submitter suggested rezoning some of the ONL, Mr Field's evidence suggested that large parts of the area concerned would not meet the "reasonably difficult to see from beyond the boundary of the site" test in recommended policy 6.3.12.

66. If Mr Field's diagram suggested that we should perhaps lean more towards Ms Mellsop's view of the area able to be rezoned, we found her emphasis on the need to buffer the adjacent sites through new planting problematic. It seemed to us that decisions have been made on establishing buffers between the adjacent Residential Zoned land and Sticky Forest (particularly on its southern and eastern sides) on the basis that, in part at least, the forest will remain. We wonder whether those decisions would have been made had parts of Sticky Forest already been zoned for Urban Development.

67. We also wondered about Ms Mellsop's reliance on effects on views from existing residential areas. We do not consider the owners of Sticky Forest have an obligation to maintain their land as an island of forested rural land in the middle of developed urban areas in order to preserve the urban amenity of those areas. Any restrictions on the land need to be based

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[13] Refer *Hastings v Auckland City Council* A068/01 at [98]

more generally on the landscape significance of the land, in line with recommended policy 4.2.2.2.

68. We also found Mr Barr's reasoning somewhat troubling because he seemed to be proceeding on the basis that the owners of Sticky Forest had some obligation to perpetuate public recreational use of the site. We do not agree that that is the case. Still less do we agree that, as Mr Barr seemed to be suggesting, transfer of a substantial part of the site to Council ownership was a potential outcome from consideration of Mr Beresford's submission. If Council wants to own the Sticky Forest land in order to preserve access to it for public recreation purposes, it needs to purchase it from the beneficial owners at a fair value.

69. While the current recreational use of the site is of considerable value to the Wanaka community, it is available to that community entirely at the discretion of the landowners who would be perfectly entitled to erect fences at the boundary and to exclude the public from it. Any continued recreational use of the site is, accordingly, a benefit to the community that might accompany development of the site, at the option of the landowner. To the extent that the landowner proffers such continued access, we think that this is a collateral benefit that ought to be taken into account in determining what if any residential development is permitted on the land, rather than its withdrawal being seen as an adverse effect of development of the site.

70. Put simply, continued access to the land might operate as environmental compensation justifying a greater level of residential development than might otherwise be the case. We do not consider that such environmental compensation would justify a failure to protect the ONL defined as including part of the property, for the reasons discussed in our report related to the Allenby submission[14]. Much of the site, however, is not defined as an ONL and those same reasoning, while relevant, does not have the same force (because of the difference of between the instructions to us in Section 6 and 7 respectively). Last, but not least, we have to factor in the Section 8 issues that Ms Steven QC emphasised in her submissions.

71. We consider, however, that the case for Mr Beresford faced a significant difficulty because of the lack of certainty as to what shape legal access to the site would take. Without that knowledge, we cannot evaluate the effects of clearing the site of the trees, which are inevitable corollary of any decision to approve an urban zoning, or identify where on the site urban development might be located. Mr Crystal exercised considerable ingenuity in endeavouring to overcome this obstacle, but ultimately, we consider it insuperable.

72. While discussing the conundrum provided by the unique set of circumstances surrounding this land, Mr Barr suggested to us that the situation might be a case for a deferred zoning, because there is a need to understand the shape of the roading access before we can be satisfied that it is appropriate to develop the land in any particular manner. We discussed the point at some length also with Ms Steven. She also commented that a deferred zone might be appropriate, but for a slightly different reason. As already noted, Mr Beresford did not purport to represent his fellow beneficiaries. While he had advised the working group of beneficiaries that had been formed of what he was doing, he made it clear to us that he did not speak for all of the beneficiaries who might, ultimately, decide that they did not wish to develop the land for residential purposes (which would necessarily involve subdividing and selling it off in order to maximise the value accrued). The beneficiaries might for instance prefer to retain ownership and continue to run it as a forestry block, notwithstanding the obvious difficulties of doing so

[14] Refer Report 16.14 at Section 4.3

surrounded on three sides by an urban environment, and an urban zoning might impede their pursuing that option.

73. We have given serious consideration to a deferred zoning but there are two difficulties with it. First as Mr Barr commented to us more generally, a deferred zoning requires a framework of plan provisions within which it might sit if it is going to be effective. The PDP does not currently provide such a framework and we had no evidence that would enable us to recommend the form that provisions around a deferred zoning might take.

74. Secondly, the uncertainties around access influence what zoning might be appropriate in future. Depending on where that access is, urban development of greater or lesser density in different parts of the site might be appropriate. Ultimately, we have concluded that we cannot identify with sufficient certainty what might be appropriate in future, even on a deferred basis.

75. While we perfectly understand Mr Beresford's motivation in seizing the opportunity to raise the issue when the PDP was publicly notified, we consider that his submission is premature.

76. In summary, we recommend that Mr Beresford's submission be rejected at this point in time. We record that we have arrived at this conclusion notwithstanding our belief that some form of urban development is likely to be appropriate on the site in future, should the beneficial owners determine to pursue that option, but we cannot make an informed decision as to what the PDP might signal at this time.

77. The lack of clarity regarding the shape of any urban development of the site similarly means that it is not appropriate to recommend alteration of the UGB. Any such alteration is necessarily consequential on our principal recommendation which is that, at this point in time, the Rural Zone is the most appropriate zone to achieve the objectives of the PDP.

4.6. Alternative Relief

78. We can deal with this final issue briefly. Given that our finding that we do not have jurisdiction to consider the alternative relief sought on Mr Beresford's behalf by Mr Crystal, there is no utility in our embarking on a consideration of its merits. We merely observe that it would have faced some formidable difficulties had we had scope to examine those merits.

5. OVERALL CONCLUSIONS AND RECOMMENDATIONS

79. We recommend to the Council that Mr Beresford’s submission be rejected, save for the suggested shift in the location of the ONL line discussed and the subject of recommendation in Report 16.1.

80. This is expressly on the basis that in our view the submission is premature. We record, however, that had the issue of legal access been resolved, it was likely that we would have found an urban zoning of at least part of the site to be appropriate

For the Hearing Panel

Trevor Robinson, Chair
Dated: 27 March 2018

Attachments
Appendix 1- Plan of Landscape sensitivity of Sticky Forest Site

Appendix 1- Plan of Landscape sensitivity of Sticky Forest Site(source William Field Evidence)