

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of the Variation to the Proposed District
Plan, Priority Area Landscape Schedules

SECOND MEMORANDUM ON BEHALF OF

DR JOHN COSSENS

Date: 12th September 2023

MAY IT PLEASE THE COMMISSION

APPLICATION FOR THE COMMISSION TO REVIEW THE QLDC LANDSCAPE SCHEDULE METHODOLOGY AND CONSULTATION PROCESS

1. This submission respectfully seeks that the Commission:
 - a. Consider the matter of whether the landscape schedule methodology, in particular the community consultation, was fair, reliable, robust and representative.
 - b. Initiate an expert peer review of the consultative method and landscape methodology employed by the QLDC.
 - c. Allow for submissions to be received on the methodology employed by the QLDC.

2. In my earlier submission to the Commission (to which the Chairperson responded on the 30th of August) I submitted that *'it is respectfully submitted the first order of business for the Commission is to approve the methodology employed based on submissions received, whether they be in the form of individual submitter responses, legal submissions or expert opinion. Respectfully, it would seem a futile, expensive and time consuming exercise to hear submissions on the landscape schedules if the methodology which developed those schedules is flawed.'*¹

3. Following on from that point, I submit that the Commission can only sensibly consider the landscape schedule hearings as a 2-step process, whereby the first step is to accept or reject the methodology used by the Council to develop the PA landscape schedules, and only after that matter has been resolved, then address the landscape schedules themselves.

¹ J Cossens – Submission to the Commission, QLDC landscape schedule hearings, 7th August 2023, [3]

4. As such, it is incumbent upon the Commission to first consider the contents of this submission, decide if there is a case to be heard, and then engage its own expert peer review of the methodology and call for submissions of the parties on the methodology the Council has employed. As previously stated, it would be an inefficient, time-consuming, unfair and expensive process to hear submissions on the landscape schedules only for the Commission to find the methodology employed was flawed. This is not a chicken and egg debate, as day follows night, acceptance of the methodology must precede hearings on the landscape schedules.
5. There is a fundamental pillar of our justice system which is centred on the principle that citizens should have access to justice.
6. Former Principal Environment Judge Laurie Newhook & Environment Judges David Kirkpatrick and John Hassan in a paper to the international symposium **Environmental Adjudication in the 21st Century** outlined what commentators had been saying about access to justice through the RMA:

Commentators have identified certain implications for policy and plan decision making (remembering that that is an area attracting greater attention by participants, given earlier limitations imposed on participation in consenting), as follows:

- Overall, rights of participation in decision-making have been very significantly reduced;
- The option of the collaborative process for plan making, if chosen by councils, will be very similar to the Auckland Unitary Plan process, so many of the concerns arose from that process may continue and be more regularly experienced in the future;
- Public participation having been substantially constrained in relation to consent decision-making, the reforms might be seen to erode the refuge in participation in policy and plan-making that arose in consequence; and

- Commentators accordingly perceive a continuing and significant erosion of the opportunity for citizens to participate in decision-making processes and give effective access to judicial proceedings.²

7. Whether it be the New Zealand Bill of Rights, the Treaty of Waitangi, the Local Government Act, or the Resource Management Act, running through all of these foundational statutes is the basic principle that every person who feels they have been affected by an act or omission of an administrative body, has a fundamental right to be heard. Equally, a common theme through all these statutes is the requirement for administrative bodies to consult with those who may be affected by the actions of that organisation and that this consultation must be meaningful and conducted in an appropriate manner. I would further add, it is not about simply consulting, but to consult fairly and reasonably³.
8. I submit the matters at issue here can be distilled down to whether the proposed plan variation to be heard, that is, the landscape value schedules, are based on reliable information, and accurately portray the views of the community and/or those most likely to be affected by this proposed variation to a plan. I would argue that if the wrong method and questions are asked in a consultative process, then a significant barrier has been put in front of citizens such that they cannot say that a due and fair process has been followed and they have in fact been misled. Put simply, ask the wrong question and you will get the wrong answer.
9. The Council of its own accord, decided to undertake consultation on the landscape schedules and as such where a local body seeks to change or vary a part of a plan, it must follow the process set out in Schedule 1 of the RMA and in relation to consultation it is required to abide by Schedule 1 (3):

² Newhook, Kirkpatrick and Hassan Issues with access to justice in the Environment Court of New Zealand, Environmental Adjudication in the 21st Century, University of Otago, April 2017

³ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, 675

3 Consultation

(1) During the preparation of a proposed policy statement or plan, the local authority concerned shall consult—

(a) the Minister for the Environment; and

(b) those other Ministers of the Crown who may be affected by the policy statement or plan; and

(c) local authorities who may be so affected; and

(d) the tangata whenua of the area who may be so affected, through iwi authorities; and

(e) any customary marine title group in the area.

(2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.

(3) Without limiting subclauses (1) and (2), a regional council which is preparing a regional coastal plan shall consult—

(a) the Minister of Conservation generally as to the content of the plan, and

with particular respect to those activities to be described as restricted coastal activities in the proposed plan; and

(b) the Minister of Transport in relation to matters to do with navigation and the Minister's functions under Parts 18 to 27 of the Maritime Transport Act 1994; and

(c) the Minister of Fisheries in relation to fisheries management, and the management of aquaculture activities.

(4) In consulting persons for the purposes of subclause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.

a. As is highlighted above, local authorities must undertake the consultation in accordance with section 82 Local Government Act:

Consultation

82 Principles of consultation

(1) *Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:*

(a) *that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons:*

(b) *that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority:*

(c) *that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented:*

(d) *that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons:*

(e) *that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration:*

(f) *that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory*

material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.

(2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).

(3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.

(4) A local authority must, in exercising its discretion under subsection (3), have regard to—

(a) the requirements of section 78; and

(b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and

(c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and

(d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and

(e) the costs and benefits of any consultation process or procedure.

(5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.

82A Information requirements for consultation required under this Act

(1) This section applies if this Act requires a local authority to consult in accordance with, or using a process or a manner that gives effect to, the requirements of section 82.

(2) The local authority must, for the purposes of section 82(1)(a) and (c), make the following publicly available:

(a) the proposal and the reasons for the proposal; and

(b) an analysis of the reasonably practicable options, including the proposal, identified under section 77(1); and

(c) if a plan or policy or similar document is proposed to be adopted, a draft of the proposed plan, policy, or other document; and

(d) if a plan or policy or similar document is proposed to be amended, details of the proposed changes to the plan, policy, or other document.

10. The factual evidence indicates that the Council has met few of these 'must do's' and again respectfully, I ask the Commission to look closely at the methodology employed and the questionnaire used in the '*community consultation*' the Council undertook in relation to the landscape schedules. I refer the Commissioners to the community consultation feedback form provided by the Council.

QLDC Landscape Schedules pre-consultation survey

Name:

Do you own land included in these landscape schedules?

Do you live in an area included in these landscape schedules?

I understand my feedback will be treated as public information:

Which outstanding natural features do you wish to share feedback on?

- Share your feedback on Peninsula Hill:
- Share your feedback on Ferry Hill:
- Share your feedback on Shotover River:
- Share your feedback on Morven Hill:
- Share your feedback on Lake Hayes:
- Share your feedback on Slope Hill:
- Share your feedback on Feehly Hill:
- Share your feedback on Arrow River:
- Share your feedback on Kawarau River:
- Share your feedback on Mt Barker:
- Share your feedback on Mt Iron:

Which outstanding natural landscapes do you wish to share feedback on?

- Share your feedback on West Wakatipu Basin:
- Share your feedback on Queenstown Bay and environs:
- Share your feedback on Northern Remarkables:
- Share your feedback on Central Wakatipu Basin Coronet area:
- Share your feedback on East Wakatipu Basin and Crown Terrace area:
- Share your feedback on Victoria Flats:
- Share your feedback on Cardrona Valley:
- Share your feedback on Mount Alpha:
- Share your feedback on Roys Bay:
- Share your feedback on West Wanaka:
- Share your feedback on Dublin Bay:
- Share your feedback on Hawea South and North Grandview:
- Share your feedback on Lake McKay Station and environs:

Which rural character landscapes do you wish to share feedback on?

- Share your feedback on Cardrona River/ Mt Barker Road:
- Share your feedback on Halliday Road/Corbridge:
- Share your feedback on West of Hawea River:
- Share your feedback on Church Road/Shortcut Road:
- Share your feedback on Maungawera Valley:
- Share your feedback on all other Upper Clutha RCL areas:

Share your general feedback on the landscape schedules:

11. This was the extent of the Council's community consultation on the proposed landscape schedules. Like myself, the Commission will immediately be able to see some glaring errors with this consultation which consigned the results to meaningless data, rather than useful information.

12. First, and foremost, the Commission will have noted, that the form asked the community for landscape schedule feedback but provided no draft landscape schedules to review or provide feedback on. They could not have, because the schedules had not been completed.
13. Inconceivably, the Council did not ask a single question about '*landscape values*', nor was the term landscape value even used.
14. The Council did not seek to ensure community responses were reliable and representative of the wider population by asking appropriate demographic questions (Council have confirmed no demographic data was gathered on the respondents)
15. The Council cannot say what priority area people who responded to the survey live in, which means no one knows the responses from those most affected, that is, those people living in the priority areas.
16. This so called 'consultation' resulted in mostly unusable responses because people understandably, were confused about what was being asked and their responses were more on general issues rather than detailing landscape values. I refer the Commission to the attached Council document providing the responses to the feedback form. I have highlighted in grey the responses which are of a general or policy nature and in yellow is the council response '*Some aspects relate to policy queries which are beyond the scope of the PA Landscape Schedules project.*' The commission will appreciate just how many responses received this comment and therefore, how few responses were usable. The sole reason for so many unusable responses is that the Council asked the wrong questions.
17. The consultation methodology also had other flaws:
 - a. The Council have confirmed that, in error, feedback was asked on two areas not identified as priority areas.

- b. interest groups were over-represented in the responses with commentary received from such groups as the Upper Clutha Environmental Society, Kelvin Heights Residents, Association, Southern Lakes Wind Riders Club, and the Queenstown Mountain Bike Club.
 - c. According to the QLDC, the total responses amounted to 196, whereas to be statistically representative of the wider Queenstown Lakes District, the sample should have been 1,000. (which, incidentally, was the sample used in the QLDC Quality of Life survey in 2021 with a margin of error of 3.1%.)
 - d. There were no experts present to explain issues to the community and help decipher complex matters.
 - e. there were no drop-ins, focus groups and workshops were not held.
18. I consider the essence of this submission comes back to the principle espoused by the Environment Court in the PDP appeal hearings of ‘*a plan for the community, by the community*’. I see nothing to suggest that the landscape schedules can even remotely be termed ‘*by the community*’. The Council in its submissions and evidence to the Commissioners has not provided any expert evidence that supports the view that the landscape schedules have been developed either with, or by, the community, nor has the Council produced expert evidence supporting the consultation methodology used.
19. There are many, many barriers to the community actively participating in district plan development and in my view Schedule 1 of the RMA provides an opportunity for the community and those most affected by any proposed district plan to be consulted. In the case of *Tainui v Hastings District Council*⁴ the High Court considered in depth what ‘consultation’ meant in terms of Schedule 1(3) of the RMA. I also present to the Commission the findings in *Wellington International Airport v Air New Zealand*⁵, which again succinctly laid out what meaningful consultation should involve.
20. To reaffirm what was said in these two authorities, both the High and Supreme Court’s held that consultation must occur prior to notification, and if a Council undertook consultation, it must be genuine (i.e. that which is not a sham), provide sufficient time

⁴ Waikato Tainui Te Kauhanganui Inc v Hamilton City Council, CIV 2009-419-1712

⁵ *Wellington International Airport v Air New Zealand* [1993] 1 NZLR 671, 675.

to respond, provide accurate and enough information that the person to be consulted is adequately informed, happen prior to a decision being made and be entered into with an open mind.

21. The Supreme Court in *Wellington International Airport* outlined what fair consultation needed to be:

- *Consultation is not to be equated with 'negotiation'. The word 'negotiation' implies a process that has as its objective arrival at agreement. However, 'consultation' may occur without those consulted agreeing with the outcome.*
- *Consultation is the statement of a proposal not yet fully decided on.*
- *Consultation includes listening to what others have to say and considering the responses.*
- *The consultative process must be genuine and not a sham.*
- *Sufficient time for consultation must be allowed.*
- *The party obliged to consult must provide enough information to enable the person consulted to be adequately informed so as to be able to make intelligent and useful responses.*
- *The party obliged to consult must keep an open mind and be ready to change and even start afresh, although it is entitled to have a work plan already in mind.*

22. On the basis of the factual evidence, the landscape value community consultation which took place can only be considered nothing other than a sham, meaningless and of no value to the landscape consulting team that put together the landscape schedules. It appears to me that the Council, either by its own ineptitude, or by design, crafted a consultation/survey methodology which would not, and could not, provide the correct answers. By the Council's own admission it did not engage outside independent market research consultants or organisations, and rather developed the survey 'in-house'. The Council have not divulged the skills, qualifications and research experience of the staff member who developed the survey.

23. As I have submitted, the Council has not met the requirements of fair consultation, there is little debate in that, but there is even less debate in the fact that the Council has not met the requirements of its own proposed district plan at 3.3.29 and 3.3.33 which required the Council to use best practice methodologies in landscape assessment. I refer the Commission to various parts of the NZILA best practice guidelines which clearly point to community consultation being an essential part of landscape

assessment methodology. I highlight the importance in the NZILA guidelines of understanding community landscape values in the undertaking of landscape assessments:

2.23 Landscapes are not the sole preserve of landscape assessors: everyone experiences and holds views (often heart-felt) about landscapes.

4.5 *The historical roots of the word 'landscape' are explored in Kenneth Olwig's scholarship. Olwig points out that earlier North European forms such as 'landschaft' (and related forms such as the Old English 'landscipe') meant **a region and its people** – a community associated with a specific place with its accompanying physical environment, customs, customary law and responsibilities, ways of life, and identity. The suffix 'scape' has common origins with 'shape' and 'ship' and in this context conveys an area shaped by people, and the standing and belonging of people with an area (as in citizenship). Olwig argues that landscape is not restricted to either 'territory' or 'scenery' but carries what he refers to as its "substantive meaning" of a 'nexus' between community and place. He refers to the definition of landscape in the European Landscape Convention to demonstrate the older meaning is still alive.*

4.20 *NZILA Landscape Assessment Methodology workshops (November 2017) recommended fine-tuning this definition to put perceptions and associative dimensions at the heart of the definition rather than as an after-thought. The following are suggested:*

Landscape embodies the relationship between people and place: It is the character of an area, how the area is experienced and perceived, and the meanings associated with it. An area as perceived by people, including how the area is experienced, understood, interpreted, and regarded.

4.22 *The current professional practice of conceptualising 'landscape' as the overlap of its physical, associative, and perceptual dimensions is reflected in 'case law' including the following recent decision:*

Physical, associative, and perceptual dimensions

“Landscape means the natural and physical attributes of land together with air and water which change over time and which is made known by people’s evolving perceptions and associations.”

- *natural and physical environment: and*
- *perceptual; and*
- *associative aspects (beliefs, uses, values and relationships)*

Landscapes are perceived through cultural lenses

- 4.24 *Landscape is unavoidably cultural, including Te Ao Māori and Te Ao Pākehā perspectives – both worldviews being unique to Aotearoa/New Zealand. Any landscape is composed not only of what lies before our eyes, but what lies within our heads”. Each of the dimensions is understood through cultural concepts and values. Both Māori and Pākehā approaches bring powerful ideas to landscape assessment. Interweaving has the potential to increase the depth of understanding and appreciation of landscapes.*
- 4.25 *To put it another way, cultural ideas influence how we see and feel about a landscape. Even wilderness is a cultural concept: it has an objective physical reality that can be powerfully interpreted through scientific understanding, but also derives its aesthetic qualities and metaphysical meanings from other cultural ideas.*
- 4.26 *Landscape involves **understanding** and **appreciation**. It entails an **experiential** response: what we ‘see’ (smell, feel, sound, taste, etc) and how we feel about it (including such feelings as reverence, attachment, identity, etc). But this immediate response is informed deeply by **knowledge** (what we see is what we know), **memory** (what we see is influenced by what we remember and the **values** we associate with a place – including pūrākau, whakapapa, tikanga, and mauri).*

Visual matters are **integral to landscape** rather than a separate category or factor. Physical, associative, and perceptual dimensions are each experienced visually (as well as through other senses).

“We all have a ‘watchful eye’ that scans the view and takes in the bigger picture. What we ‘see’ depends on our needs and expectations, our intuition and experience. The view is a summary expression of infinitely complex relationships. We can be intimately embedded in such relationships or we can be detached observers. What a landscape or a place means to us and how we value it depends on our relationship with it and with those who live in it.” (Clive Anstey)

6.29 *As discussed at paragraph 2.23, decision makers have regard to people’s perceptions of landscape and visual effects which are normally expressed through submissions and lay evidence. Residents, for instance, will be the most familiar with the amenity values they enjoy and best placed to describe such values (and their interpretation of effects on those values) from an ‘insider’ perspective. An ‘expert’ landscape assessor, on the other hand, is typically an outsider. The role is to provide an independent assessment that decision makers can use to help gauge and interpret community input to the process. To fulfil this role in a balanced manner a landscape assessor should be aware of – and acknowledge – the range of views likely to be held within a community. The role, though, is not to represent the views of others but to provide an independent professional opinion – it is a different and complementary role to that of submitters and lay witnesses. By way of further explanation, decision makers may make findings on (say) amenity values having regard to:*

Expert and community perceptions of landscape and visual effects

- *The lay witnesses (affected parties); and*
- *The amenity values anticipated by the Plan provisions; and*
- *The independent professional evidence*

Methodology

The methodology statement could state that it is consistent with the landscape concepts and principles set out in the Te Tangi a te Manu guidelines and explain the method particular to the region or district. The method might list such matters as:

- *Collaboration with **tangata whenua**.*
- *Consultation with the **community and stakeholders**.*
- *The method and matters covered in the desk-top **research and field work**.*

Collaboration with tangata whenua is necessary for the assessment to capture the landscape of a region or district. Such assessment may be carried out parallel to (and cross referenced with) separate assessments undertaken by tangata whenua with respect to such provisions as s6(e) – the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

Consultation with the community is also essential but there are different ways in which it might be undertaken. Such methods may include, for example, the use of stakeholder workshops, community charettes, co-design, on-line tools, public meetings, and formal submissions Community may be engaged in preparing the assessment or, alternatively, a draft assessment may be carried out first as a tool for engagement.

24. The references in the NZILA best practice guidelines to seeing landscapes through ‘a *community lens*’ are extensive and yet the methodology used by the QLDC in developing the landscape value schedules falls well short of these best practice guidelines. I submit there is no question the Council has not used best practice landscape assessment methodologies as outlined in the NZILA, and if that is the case, then it has not met its own plan at 3.3.29 and 3.3.33.
25. This submission is filed in response to the QLDC Landscape Schedule methodology and in particular, the ‘consultation’ the Council has initiated with the community in

regard to the 'landscape value schedules'. This submission seeks that the Commission find that there is a serious concern and question mark around the Council consultation into landscape value schedules and that it is alleged the consultation methodology employed was, unrepresentative and misleading because of a flawed feedback form which ultimately provided little useful information to assist the schedule development process.

26. Intrinsic to the identification of landscape values is the understanding of how the community assigns different values to different landscape areas and what importance they attach to them. Landscape values are fundamentally about perceptions and attitudes (the associative and sensory elements assigned to the physical) and as such their identification requires a more nuanced, community centric approach rather than being reliant on expert opinion. For example, a landscape value might be an expression of how it makes a person feel but might only be relevant to a particular landscape character area.
27. So it would seem entirely appropriate that a best practice landscape values identification methodology would involve extensive, in-depth collaboration and consultation with the community. However, it is my submission that the community consultation undertaken by the QLDC to establish landscape values was woefully inadequate and nowhere near to being good practice, let alone best practice.
28. The consultation was one of the few avenues for the average citizen to provide input into the development of the landscape schedules, however such was the method of the consultation, that access to justice and to 'have a say' was denied them. This failure of the QLDC to meaningfully consult strikes at the very heart of local democracy. I consider that all that most ratepayers would want is to be 'given a fair go'.
29. In summary, it is respectfully submitted that it is a logical and fair approach for the Commission to first consider the matter of 'methodology' before it hears submissions on the landscape schedules and that submitters, their experts and counsel should be able to make submissions on the matter. It would seem ill-founded to hear the substantive submissions on landscape schedule matters when the Commission may

find the landscape methodology unfair, biased and has not allowed the community at the heart of these hearings to have been misled and that ultimately, impinges on their rights to natural justice and to be fairly heard. In a nutshell, has the community been given a fair go?

30. To reiterate, the relief sought through submission is for the Commission to:
- a. To find there is a case to be heard in regard the consultative and landscape schedules methodology employed by the QLDC.
 - b. To call for submissions on the matter of the landscape and consultation method employed by the QLDC, and
 - c. Once having had the evidence and submissions, determine whether the landscape and consultative methodology was fair, reasonable and provided sufficient information for respondents to make an informed submission on landscape values.
 - d. If the Commission finds the consultative process was not fair, then it is submitted the Commission would have no choice in calling for the consultative process to be re-done in a more reliable, fair and representative manner.

Dated this 12th September 2023



Dr John Cossens, Wanaka