

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

**Decision No. [2019] NZEnvC 14**

IN THE MATTER of the Resource Management Act 1991  
AND of appeals under clause 14(1) of the First  
Schedule of the Act  
BETWEEN ARTHURS POINT TRUSTEE LIMITED AS  
TRUSTEE OF THE ARTHURS POINT  
LAND TRUST  
(ENV-2018-CHC-076)  
UPPER CLUTHA ENVIRONMENTAL  
SOCIETY INCORPORATED  
(ENV-2018-CHC-056)  
NGĀI TAHU TOURISM LIMITED  
(ENV-2018-CHC-134)  
Appellants  
AND QUEENSTOWN LAKES DISTRICT  
COUNCIL  
Respondent

Court: Environment Judge J R Jackson  
Sitting alone under section 279(1) of the Act

Hearing: At Queenstown on 19 December 2018

Appearances: J Leckie for Arthurs Point Land Trust  
K L Hockly for Queenstown Lakes District Council  
M E Parker and E L Keeble for Arthurs Point Outstanding Natural  
Landscape Society Incorporated (section 274 party)  
M Baker-Galloway, H Mahon and R Giles for Gertrude Saddlery  
Limited (section 274 party)

Date of Decision: 5 February 2019

Date of Issue: 5 February 2019

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**PROCEDURAL DECISION (RE ARTHURS POINT)**

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- A: In relation to appeal ENV-2018-CHC-056 (by the Upper Clutha Environmental Society Incorporated) (“UCESI”) under section 281 Resource Management Act 1991 (“the RMA” or “the Act”) the Environment Court waives late lodgement by Arthurs Point Land Trust (“APLT”) and Gertrude Saddlery Limited (“GSL”) of section 274 notices.
- B: Under section 279(1) RMA of the Environment Court rules:
- (a) subject to (c), that the appeal by the UCESI generally raises the issue of the location of the Outstanding Natural Landscape (“ONL”) lines at Arthurs Point;
  - (b) that Arthurs Point Outstanding Natural Landscape Society Incorporated (“APONLSI”) may use its section 274 notice on the UCESI appeal to seek a different ONL boundary and classification on the properties at 111 and 163 Atley Road and on the Morningstar Reserve;
  - (c) the relief sought by APONLSI in relation to the appeal by APLT (ENV-2018-CHC-076) cannot be granted, that is, it may not seek a different ONL boundary on the hangar land.
- C: (1) The court adjourns the UCESI appeal (ENV-2018-CHC-056) to **Friday 1 March 2019** (or the following week if the hearing of Topic 1 appeals takes up all the week of 25 February 2019) for submissions on the issue whether the Queenstown Lakes District Council had jurisdiction to move the ONL line and classification to the southern boundaries of 111 and 163 Atley Road, Arthurs Point and if not, on what procedure should be followed;
- (2) The court directs the Council to lodge and serve a memorandum (and, if necessary, a supporting affidavit) setting out its position and a summary of its grounds on the issue raised in (1) by **Friday 15 February 2019**.
- D: The time for APONLSI to join the Ngāi Tahu Tourism Limited appeal (ENV-2018-CHC-134) under section 271(1) RMA is waived.
- E: The court directs under section 279(1) RMA that:
- (a) the appeal by APLT should be heard as part of Topic 16 of the appeals on the proposed district plan; and
  - (b) the other two appeals should be heard as part of Topic 2.



F: Leave is reserved for any party to apply for further consequential directions, or to remind the court if any application has not been resolved.

G: Costs are reserved.

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**REASONS**

**1. Introduction**

1.1 The land at Arthurs Point and the parties

[1] This decision is about various procedural and jurisdictional issues raised by three appeals about the Queenstown Lakes District Council's decisions on Stage 1 of its proposed plan under the Resource Management Act ("the RMA" or "the Act"). All three appeals relate to land at Arthurs Point and concern the location of Outstanding Natural Landscape ("ONL") boundaries, rezonings from Rural to residential and, to a lesser extent, the Urban Growth Boundary ("UGB") in that vicinity.



- [2] The proceedings are focused on three sets of properties:
- (a) 182D Arthurs Point Road, Arthurs Point which is legally described as Lot 2 DP 24233. I will call this “the hangar land” because of the prominence of a large hangar on the property. The hangar land is owned by the appellant Arthurs Point Trustee Limited (“APLT”);
  - (b) 111 Atley Road, Arthurs Point which is legally described as Pt Sec 1 SO 24074 Lots 1-2 DP 307630, and 163 Atley Road, Arthurs Point which is legally described as Lot 2 DP 393406 (together called “the Shotover Loop”); and
  - (c) the Morningstar Reserve<sup>1</sup> adjacent to the Shotover River, upstream of the Edith Cavell Bridge.

[3] The hangar land is shown outlined in yellow on the annexed plan marked “A”<sup>2</sup> and was owned by Ms L Cooper and Mr D Sampson (the original submitters) to whom APLT is successor<sup>3</sup>.

[4] The Shotover Loop is shown outlined in yellow on the annexed plan marked “B”<sup>4</sup>. Most of the Loop is part of 111 Atley Road which was owned by Mr Michael Swan and later sold to Gertrude Saddlery Limited (“GSL”), the current owner. The smaller area outlined in yellow is 163 Atley Road which is owned by Larchmont Developments Limited (“Larchmont”).

[5] The Morningstar Reserve is a reserve under the Reserves Act 1977. Part of the Reserve is managed by Ngāi Tahu Tourism Limited (“NTTL”) for the operation of the well-known “Shotover Jet” tourism operation.

## 1.2 The parties and the issues

[6] There was no appearance at the December hearing for the appellant UCESI because, as it explained in a memorandum dated 30 November 2018, the issues raised

<sup>1</sup> SEC 1 SO 23662 SEC 4 SO 23901, PT SEC 3 SO 23901 BLK XIX SO, LOTS 1-2 OP 25724, and the adjoining road reserve/marginal strip.

<sup>2</sup> Copy of Map 4-7 from the QLDC decision.

<sup>3</sup> Under section 2A RMA.

<sup>4</sup> Copy of Map 4-3 from the QLDC decision.



in the notice of hearing of these procedural issues "... are not relevant to the Society's appeal".

[7] Arthurs Point Outstanding Natural Landscape Society Incorporated ("APONLSI"), the first section 274 party to the UCESI appeal, is an incorporated society with 124 members who are, for the most part, owners<sup>5</sup> of land at Arthurs Point. The main purpose of the Society is to "pursue and protect the landscape values generally and in particular within the vicinity of the Wakatipu Basin"<sup>6</sup>.

[8] The other parties are the respondent and the landowners.

[9] The jurisdictional/procedural issues before the court at the hearing were:

- (a) whether the application for waiver of time for lodging a section 274 notice by GSL in respect of the UCESI appeal should be granted;
- (b) whether APLT should be granted a waiver for late lodgement of a section 274 notice in relation to the UCESI appeal;
- (c) whether APONLSI can use its section 274 notice on the UCESI appeal to seek a different ONL boundary on APLT's land;
- (d) the scope of the UCESI appeal as it relates to the ONL lines at Arthurs Point;
- (e) whether the relief sought by APONLSI in relation to the appeal by APLT can be granted; and
- (f) whether the Arthurs Point appeals should be heard as part of Topic 2 or Topic 16.

[10] The application by APLT for waiver of time to join the UCESI appeal will be granted pro forma since at the hearing there was no opposition to it. I accept that as land owner APLT has an interest greater than the public generally in the location of the ONL line in relation to the hangar land. A similar application by NTTL would likely be granted in relation to the Morningstar Reserve. An application by GSL to join the UCESI appeal as a section 274 party is opposed by APONLSI and I will consider that later.

[11] For its part APONLSI sought a waiver of the time limit to file a section 274 notice

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<sup>5</sup> Affidavit of M B Semple 13 December 2018 Exhibit MBS-2.

<sup>6</sup> Rules of APONLSI – Exhibit MBS-1 attached to Mr Semple's affidavit, above n 5.



in relation to NTTL's appeal (ENV-2018-CHC-136). While NTTL initially opposed this application, its opposition was withdrawn at the hearing. Accordingly APONLSI will be granted a waiver of time to join that appeal.

[12] The more controversial jurisdictional/procedural issues are:

- (a) over the scope of the UCESI appeal – does it/can it seek amendment to the ONL lines in the PDP decisions version (“PDP (dv)”) at Arthurs Point?
- (b) if the ONL can be moved, how does that affect unchallenged decisions by the Council on rezoning?
- (c) what relief can the APONLSI seek?

Other more serious jurisdictional issues arise as I have realised while writing this decision. I will identify these shortly. But their (possible) existence means that I may not be able to resolve all of (a) to (c) in this Decision.

[13] APONLSI claims that the Council process for notifying submissions made in relation to the PDP was inadequate. Consequently, it says a significant number of affected members of the public, including the 124 members of APONLSI, were unaware of those submissions made, including those by GSL, APLT, and NTTL. It also claims that “had the members of APONLSI been so aware, they would have made responsive submissions<sup>7</sup> opposing those applications”. I was initially rather skeptical of this claim.

[14] However, reflection on the context of these appeals suggests there is potentially another set of jurisdictional issues: whether the submissions of Larchmont and (in part) Mr Swan and, as importantly, the Council's notified Summary of Decisions requested<sup>8</sup> were fair, accurate and not misleading. I now turn to outline the facts that raise (or may raise) the complex issues I have adverted to. I record two matters: first I was not referred to and therefore have not looked at the Council's section 32 Report (if there is one) on Arthurs Point. Second, my findings of fact are provisional at this stage except for those relative to the hangar land (because I heard fuller argument on this and the facts are not disputed).

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<sup>7</sup> Under clause 8 Schedule 1, RMA.

<sup>8</sup> Under clause 7 Schedule 1, RMA.



## 2. Provisional findings on the facts

### 2.1 The operative plan's ONL in the vicinity of Arthurs Point

[15] Normally the situation under an operative plan is of minimal relevance under a full review<sup>9</sup> but some of the relief in the UCESI appeal specifically refers to maps in the Council's operative district plan ("the ODP"). Accordingly as background I record that Appendix 8A – Map 1 of the ODP (a copy is attached as attachment "C" to these Reasons) depicts the landscape categorisation in the Wakatipu Basin/Arthurs Point area. The boundary between two different landscape categories (e.g. an ONL and an urban area) is indicated by either a solid line or a dotted line. The solid line indicates fixed boundaries that have been confirmed by the Environment Court and were not subject to change. A dotted line indicates "boundaries that have not been determined by the Environment Court and therefore the exact location of the line has not been confirmed"<sup>10</sup>.

[16] Under the ODP the Shotover Loop properties are zoned Rural General and the hangar property is split zoned – part of the site is zoned Rural General and part Rural Visitor. The Shotover Loop and the NTTL fell within the ONL classification. The hangar land was Visual Amenity Landscape ("VAL") not ONL. The urban development capacity for the first two sites was zero, given the Rural General zoning.

### 2.2 The PDP as notified and after the Council's decisions

[17] In August 2015 the Council notified what it called "Stage 1" of a proposed district plan ("the PDP (notif)"), under section 79 RMA.

[18] The PDP (notif) contained an objective 6.3.1 that recognises that the district contains ONLs and Outstanding Natural Features ("ONF") which require protection from inappropriate subdivision and development. The first implementing policy<sup>11</sup> states that ONLs are to be identified on the planning maps.

[19] Most of the difficulties in these proceedings arise from the fact that the PDP

<sup>9</sup> Under section 79(4) RMA.

<sup>10</sup> Legal submissions for APLT dated 30 November 2018 at [18].

<sup>11</sup> Policy 6.3.1.1 PDP (notif).



appears to have three approaches to the zoning/classification of rural land:

- (1) the ONL, ONF or Rural Character Landscape ("RCL") classification;
- (2) Rural/other zones;
- (3) urban growth boundaries.

[20] (1) arises from policy 6.3.1.2 which states that "all Rural Zoned landscapes" in the district must be "classif[ied]" as (presumably one of) "ONL", "ONF" or "Rural Landscape Classification". This means that the Rural zone under the PDP is effectively divided into three classes (effectively subzones) one of which is called "ONL". The second classification of rural land is that all (or almost all) rural land is zoned Rural. Third, Rural zoned land may also, it appears, be within (or outside) the UGB, although I understand this is not intended to be a zoning.

[21] It may be important that under the PDP, ONL and RCL are subzones of Rural, i.e. their ONL or ONF status is official and more than a factual finding as it was in the ODP.

[22] The land around the existing urban area of Arthurs Point is shown on Map 39A of the PDP (notif) as "ONL" (a copy is annexed as "D"). It shows:

- (a) most of the Shotover Loop properties as Rural zone and below the ONL boundary, but part, north of the ONL, zoned as Low Density Residential zone;
- (b) most of the hangar land as Rural and ONL with the north-west section as 'Rural Visitor' outside the ONL line; and
- (c) all of the NTTL land as Rural and ONL.

[23] I will give the detail of the relevant submissions later. It is sufficient to note here that in only two of the four relevant submissions about rezoning that are specific to Arthurs Point is there any mention (and then only "consequentially") of there being any change required to the ONL status of the land. That raises questions as to the Commissioners' and court's jurisdiction to change the location of the ONL boundary in the vicinity of Arthurs Point. It also raises questions about consequential moving of the UGB and rezonings.

[24] The Commissioners recorded that:





- (a) granted the relief sought in GSL and Larchmont's applications. In addition they rerouted the ONL line around the Shotover Loop properties allowing the potential development of 89 lots; and
- (b) rezoned part of the hangar property from Rural General to Medium Density Residential allowing the development of 47 lots. They also moved the UGB and the ONL to the amended edge of the Rural zone.

[25] The location of the ONL line at Arthurs Point was agreed by the landscape architects during the Council hearings and confirmed in the decisions version of the proposed plan. The Commissioners recommended<sup>12</sup> that the ONL boundary be drawn along a terrace edge above as agreed by Dr Read and Mr Espie. The Commissioners<sup>13</sup> also accepted the evidence of Dr Read (for the Council) and Mr Espie (for the APLT) that the part of the APLT's land on flattish terraces above the Lower Shotover Gorge could be developed for residential purposes without adverse effects on the landscape, but that the part of the property below the lip of the escarpment should be within the ONL and remain undeveloped.

[26] The Commissioners' recommendations were accepted and now form part of the decisions version of the proposed plan Map 39A (a copy is annexed marked "E").

[27] At least some of the difficulties of these proceedings are caused by the fact that the parties are addressing different things:

- the UCESI appeal (ENV-2018-CHC-056) – as supported by APONLSI – relates to the ONL classification and particularly where the ONL/other zone or subzone boundaries should be;
- the other two appeals relate primarily<sup>14</sup> to the Rural/"Urban" zone boundary at Arthurs Point.

<sup>12</sup> Report 17-4 "Report and Recommendations of Independent Commissioners Regarding Mapping of Arthurs Point" ("Commissioners' decision").

<sup>13</sup> Report 17-4 above n 12 para 98.

<sup>14</sup> A secondary issue is the relocation of the UGB.



### 3. The UCESI appeal in relation to Arthurs Point

#### 3.1 The submission and notice of appeal

[28] The UCESI submission is lengthy. None of it specifically refers to Arthurs Point but it contains a general submission<sup>15</sup> seeking that<sup>16</sup> the landscape lines determined in the PDP process are excluded from the plan altogether “because they are not credible”. Failing this the Society seeks that the landscape lines are included on district plan maps as dotted lines and that the landscape lines are described as guidelines that are purely indicative. If this course of action is taken the Society seeks that the text on maps in the ODP are amended and included in the PDP.

[29] The relief sought by UCESI seems to be accurately summarised in the Council’s Summary of Decisions sought.

[30] UCESI lodged its appeal on 8 June 2018. The notice of appeal states (relevantly):

**Upper Clutha Environmental Society (Inc.)  
Notice of Appeal to the Environment Court  
Queenstown Lakes District Council – Proposed District Plan**

**To: The Registrar  
Environment Court  
PO Box 2069  
Christchurch**

**The Upper Clutha Environmental Society (the Society) appeals against parts of a decision of the following plan:**

Queenstown Lakes District Council Proposed District Plan Stage 1 (PDP Stage 1)

**The Society made submissions and further submissions on the PDP Stage 1.**

...

**The parts of the decision the Society is appealing:**

<sup>15</sup> Queenstown Lakes District Council reference 145.14.

<sup>16</sup> UCESI submission on “...Landscape Classification Lines and any parts of the plan related to those provisions” undated at page 3 para 3.



The Society is appealing the parts of the PDP Stage 1 decision that relate in any way to subdivision and/or development in the Rural Zone.

The Society is also appealing the parts of the PDP Stage 1 decision where it makes decisions and/or recommendations on the PDP Stage 2 where this in any way relates to Rural Zone subdivision and/or development.

**The specific provisions the Society is appealing:**

The Society is appealing the parts of the PDP Stage 1 that contain objectives, policies, assessment matters, rules and maps and any other provisions that relate in any way to subdivision and/or development in the Rural Zone.

The Society is also appealing the parts of the PDP Stage 1 decision where it makes decisions and/or recommendations on the PDP Stage 2 where this in any way relates to Rural Zone subdivision and/or development.

**The reasons for the appeal are:**

1. The decision errs in deciding that the PDP Stage 1 is efficient and effective in achieving the purposes of the Resource Management Act.
2. The decision errs in deciding that the PDP Stage 1 represents sustainable management as described in Section 5 of Part 2 of the Resource Management Act because:
  - the PDP does not adequately recognise and provide for matters in Section 6 of the Resource Management Act and in particular section 6(a) and (b). The PDP does not adequately protect for future generations the Outstanding Natural Landscape (ONL) and Outstanding Natural Feature (ONF) landscapes of the district from inappropriate subdivision and/or development.
  - the PDP does not adequately have particular regard to matters in section 7 of the Resource Management Act and in particular section 7(b), (c), (f) and (g). The PDP does not adequately protect for future generations the Rural Character Landscapes (RCL) from random, sporadic and incremental subdivision and/or development that is in the process of cumulatively degrading existing bucolic and pastoral values.
3. The decision errs in failing to recognise that Operative District Plan (ODP) provisions rolled over into PDP Stage 1 ... better achieve the purpose of the Act than the provisions in the PDP Stage 1 decision ...
- ...
5. The decision errs in failing to give sufficient weight and recognition to expert economic evidence ... presented at the PDP district plan review hearings highlighting the critical importance of protecting landscape values to the economy of the Queenstown Lakes



District and New Zealand. The decision errs in failing to include sufficient specific provisions in the ODP that expressly spell out the critical role landscape values play in contributing to the social, cultural and economic wellbeing of the Queenstown Lakes District and the wider New Zealand economy.

...

10. The decision errs in deciding that the landscape lines delineating ONL, ONF and Rural Character Landscape in the maps in the PDP Stage 1 decision are credible. The decision errs in failing to recognise that the process behind identifying these landscape lines is flawed. The decision errs in deciding that there is "an adequate evidential foundation for identifying ONL and ONF lines" ... The decision errs in deciding that, as delineated, these landscape lines will be efficient and effective in categorising landscapes and in implementing the objectives, policies, assessment matters and rules attached to such categorisations ..."

(emphases added)

**The Society seeks the following relief:**

3. That amendments to the PDP Stage 1's text and maps consistent with the issues listed below are incorporated into the PDP where they are additional to those detailed in Appendices A-D and paragraphs 1 and 2 above.

...

7. That the landscape lines shown on the ODP maps are rolled over in their exact current form. That the landscape lines additional to those contained on the ODP maps, shown on the PDP Stage 1 maps, are included in the PDP as dotted lines (with the exception of the two locations at Dublin Bay/Mount Brown, Waterfall Hill/Waterfall Creek described below) with the following attendant text shown on all maps where these dotted lines appear:

*Boundary between two different landscape categories. The solid lines represent landscape categories determined by the court and are not subject to change. The dotted lines have been determined under a broad-brush analysis as part of the District Plan process but have not yet been through a detailed analysis of specific physical circumstances of each site in the Environment Court to determine their exact location and so are not definitive. The dotted lines are purely indicative until their exact location has been determined through the Environment Court process.*

...

[31] The parties referred to the fact that, UCESI through Mr Haworth, its representative, has attempted to give further particulars of the relief sought. First, on 23 November 2018 he indicated that in respect of landscape lines in the decisions version



of the proposed plan<sup>17</sup>:

We seek that the solid [landscape lines] in the ODP should be rolled over as they are shown on the ODP maps (the dotted [landscape lines] on the ODP maps have no status in the Society's appeal) and that the "new" [landscape lines] proposed in the PDP should appear as dotted lines on the PDP maps until confirmed in their location (or in another location) by the court when they will become solid.

[32] Then in his memorandum of 30 November 2018 from UCESI, Mr Haworth repeated the Society's position as quoted directly above and elaborated on it further:

The Society's position in regard to the dotted landscape lines in the ODP is that they have no status at all in the sense that they were never intended to be relied upon or binding on any party in any proceedings.

It follows that section 274 status should not be granted to any party on the basis of the dotted lines in the ODP.

[33] That is the clearest explanation yet of what UCESI now seeks. But in the context of land at Arthurs Point is it binding on APONLSI. The problem is that treating the decisions version of the PDP's ONL (where it differs from the ODP lines) as 'dotted lines' will be difficult if there is also a rezoning based on them.

[34] It is quite difficult to work out from its express terms what relief is being sought in the Notice of Appeal. The key passage appears to be in paragraph 7 being:

That the landscape lines shown on the ODP maps are rolled over in their exact current form.  
That the landscape lines additional to those contained on the ODP maps, shown on the PDP Stage 1 maps, are included in the PDP as dotted lines...

[35] Reading the relief sought in respect of the additional PDP lines in isolation, I have some doubt about its legality. It appears to be deferring the identification of the location of the ONL/ONF lines. Under the RMA if there is a dispute of fact and judgment over the lines then that should be resolved now, not later because section 6(b) RMA expressly requires the identification of (*inter alia*) the ONLs of the district. Further, there may be implications from the fact that ONLs are sub-zones which need to be worked through. The appeal must be read as a whole. Paragraph 10 of the reasons for appeal states that

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<sup>17</sup> Email from J Haworth on behalf of UCESI to the Registrar and parties dated 23 November 2018.



the Commissioners' decision erred in deciding that the lines in the proposed plan are "credible". I infer that anywhere the PDP's ONL lines depart from the ODP, UCESI's notice of appeal challenges their location.

### 3.2 What relief can (potentially) be granted?

[36] It is clear that a section 274 party cannot enlarge the scope of the proceedings<sup>18</sup>: *Winstone Aggregates Limited v Franklin District Council*<sup>19</sup>. This principle was upheld by the High Court in *Transit New Zealand v Pearson* ("*Transit*") which remains the leading authority on issues of enlarging scope. The High Court in *Transit* also determined that there is no ability to amend or extend a notice of appeal (not a section 274 notice) to other aspects of the decision not already "pleaded"<sup>20</sup>.

[37] Given that the Commissioners' decision moved the ONL line in this vicinity the first question is whether the relief sought by UCESI that the ONL lines revert to the "solid lines" in the ODP provides jurisdiction for APONLSI to seek a relocation of the ONL line over the Shotover Loop.

[38] The ODP maps do not include any solid line indicating that the site at 111 and 163 Atley Road is within the Arthurs Point ONL. The Council and GSL submit first that, on the basis of their interpretation of UCESI's appeal (that the appeal relates only to the reinstatement of the solid ODP ONL lines), there is no jurisdiction for APONLS to seek site specific relief in respect of the ONL line at this location. Ms Hockly submitted "this is because a reinstatement of the solid ONL lines from the ODP into the PDP would not impact the location of the ONL boundary at 111 and 163 Atley Road"<sup>21</sup>. Second, in any event the UCESI appeal seeks no relief in respect of the (other) rezoning of the Shotover Loop properties from Rural to residential.

[39] If the Environment Court has jurisdiction under section 290 RMA<sup>22</sup> then it is expressly given the same powers as the Council, and that local authority has powers to grant consequential relief under clause 9 of Schedule 1. It is at least arguable that if the

<sup>18</sup> *Transit New Zealand v Pearson* [2002] NZRMA 318 at [55] and [56].

<sup>19</sup> *Winstone Aggregates Limited v Franklin District Council* (2001) 7 ERLNZ 79 at [28].

<sup>20</sup> *Transit* above n 18 at [48].

<sup>21</sup> K L Hockly submissions 28 November 2018 at para 4.35(b).

<sup>22</sup> Clause 16 Schedule 1 of the RMA is silent on this issue which will (I hope) be addressed in the Topic 1 hearings.



ONL line was to be restored to its position on Map 39A as notified then the rezoning of Rural to Low Density Residential must also be changed as a consequential change.

#### 4. The APLT appeal on the hangar land

[40] APONLSI lodged a section 274 notice in opposition to the APLT appeal on 9 July 2018 because members own or reside in residential properties in close proximity to the Shotover Loop properties and to the hangar land. They say they will be directly affected (both visually and by other effects including noise, traffic and light spill) by the development that results from the redrawing and removal of the ONL and UGB from the subject properties and the subsequent rezoning.

[41] APONLSI's notice seeks<sup>23</sup> to "retain the zone that applied prior"<sup>24</sup> to the decisions version of the proposed plan for Arthurs Point and believes that this outcome would maintain the ONL at Arthurs Point. Subsequently, APONLSI sought by memorandum to specifically add the ONL boundary on the APLT's land to the list of contested ONL boundaries for Topic 2<sup>25</sup>. The relief sought by APONLSI is therefore at first sight outside the scope of APLT's appeal.

[42] The APLT's appeal relates solely to what is the appropriate zoning of APLT's land<sup>26</sup>. Accordingly, the scope for relief is between what the decisions version of the proposed plan sets out and what the APLT's notice of appeal has sought. There is no ability to widen the scope.

[43] The Environment Court has previously stated that a section 274 party is "confined to supporting or opposing only what is raised by the scope of the appeal documents"<sup>27</sup>. Further, if relief is sought outside of the appeal documents, then the proper course of action is for the party to lodge its own appeal<sup>28</sup> if the person has the power to do so.

[44] The Council and APLT have questioned the scope of APONLSI's notice because:

<sup>23</sup> Under section 274(1)(d) RMA.

<sup>24</sup> Paragraph 6 APONLSI 274 notice.

<sup>25</sup> APONLSI memorandum dated 26 September 2018 [8].

<sup>26</sup> Minute dated 22 November 2018, at [3].

<sup>27</sup> *Meridian Energy Limited v Wellington RC* [2012] NZEnvC 148 at [6].

<sup>28</sup> *Ibid* at [7].



- (a) the UCESI appeal does not relate to the zoning of the APLT's land;
- (b) the UCESI appeal does not seek any site-specific relief in relation to the ONL boundary surrounding the APLT's land; and
- (c) the APLT appeal does not refer to, nor seeks to change, the ONL boundary.

[45] For APLT Mr Leckie submits that the relief sought by APONLSI (amendments to the Arthurs Point ONL and rezoning) are two distinct methods under the decisions version of the proposed plan and cannot be collected under the UCESI appeal. That is, an amendment to the location of the ONL at Arthurs Point will not change the zoning of Arthurs Point and vice versa. Either way, he submits the ONL boundary does not move.

[46] As shown on the attached copy of Map 39A from the PDP (notif) – Attachment D – the hangar land was mostly inside the ONL and zoned Rural. In their submission<sup>29</sup> Ms Cooper and Mr Sampson, predecessors of APLT, sought that the Council move the UGB so that the hangar land would be included in an extended “Rural Visitor Zone” from Arthurs Point. The submission added “By default this then deletes the ONL landscape classification from that part of our property”.

[47] That submission was, it appears to me, accurately stated in the Council's Summary of Submissions notified on 3 December 2015.

[48] In the Council's decisions issued in early May 2018 it granted some of the relief sought by Ms Cooper and Mr Sampson: it moved the UGB and excluded the hangar land from the ONL. However it rezoned the land, not as Rural Visitor, but as Medium Density Residential. APTL, which by then was owner of the hangar land, was not completely happy with the Council's decision since it prefers a Rural Visitor zoning to a Medium Density Residential. Hence it appealed (ENV-2018-CHC-076) part of the decision, seeking Rural Visitor zoning. But the issue of concern for APONLSI is the location of the ONL line.

[49] In the PDP (notif) the hangar land was on the urban side of the ONL boundary. In relation to the hangar land, the operative and proposed lines (at least in the PDP (dv)) are in the same place.

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<sup>29</sup> Given the number 495 by the Queenstown Lakes District Council – see Ms Hockly's memorandum of 14 December 2018.





[50] It is common ground that in this location the ONL has been:

- (a) the subject of evidence before the Environment Court<sup>30</sup>;
- (b) determined by the Environment Court as appropriate;
- (c) the subject of evidence from experts on behalf of APLT and the Council at the proposed plan hearings; and
- (d) confirmed as appropriate under the PDP by the commissioners in the decisions version.

[51] The plans do what the UCESI seeks in relation to the hangar land, i.e. retain the ODP's ONL boundary. Appendix 8A – Map 1 of the ODP – attached as “C” – shows a solid line on the eastern side of APLT's land. The location of this solid line was confirmed by the Environment Court in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council (No 8)*<sup>31</sup>. Consequently no relief is sought by the UCESI appeal in respect of the hangar land, because Map 39A does what UCESI wants. The same must apply to APONLSI since it steps into UCESI's shoes and cannot seek more than UCESI sought in respect of the hangar land.

[52] Consequently while APONLSI joined this proceeding as a section 274 party I rule that it may not call evidence seeking to move the location of the ONL boundary as fixed in the PDP (dv) on the hangar land, because that would go beyond the scope of the UCESI appeal.

## 5. The submissions and appeal on the Shotover Loop land

[53] In the notified PDP (notif) most of this land was within the ONL as I have recorded. It was also zoned Rural.

*111 Atley Road*

[54] After notification of the PDP Mr M Swan, then owner of 111 Atley Road, lodged a submission<sup>32</sup> seeking:

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<sup>30</sup> *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council (No 8)* EnvC Christchurch C003/02, 22 January 2002.

<sup>31</sup> Above n 30 at Appendix 3 and 4.

<sup>32</sup> Submission 494 (GSL).



- (i) adopt[ion of] low density residential zoning over my property (as shown on the attached map);
- (ii) delet[ion of] part of the rural zoning from our property and extend the low density residential zoning in its place as shown on the map attached to this submission;
- (iii) exten[sions of] the urban growth boundary around the extended low density residential zone as requested in (ii). By default this then deletes the ONL landscape classification from that part of my property;
- (iv) the balance of our land ... remain[ing] rural zoning.

[55] It should be noted that Mr Swan did not seek that the ONL line be moved to the southern or eastern boundaries of the property or that the whole of 111 Atley Road be rezoned. Rather, he proposed that the area shown as brick-red on the plan attached to his submission be rezoned (and the ONL boundary moved “consequentially”). I attach marked “F” a copy of the map of the Shotover Loop as annexed to his submission which shows the line he sought that the ONL be moved to.

[56] After the Commissioners’ hearing the whole of 111 Atley Road was excluded from the ONL, but included within the UGB and rezoned as Low Density Residential. The owner did not appeal. Presumably it was satisfied with the Council’s decision. I find that outcome is partly within jurisdiction because both the submission and Summary of Decisions drew attention to the fact that part of the property would be excluded from the ONL.

[57] However, I record that the submission and summary appear to be slightly misleading in two ways. First the summary repeats the submitter’s suggestion that the exclusion of the property from the ONL would be “by default”. In my view that is probably the primary issue not a secondary one. It appears to have been treated as such by the Hearing Commissioners. However, I do not consider the submission was so misleading as to raise questions about the validity of most of the Commissioners’ decision, or to raise a failure of jurisdiction for unfairness to potential submitters such as the APONLSI or its members. The submission should be read in a “realistic workable fashion” as Panckhurst J stated in *Royal Forest and Bird Protection Society Incorporated v Southland District Council*<sup>33</sup>. Read in that way I consider the proposed amendment to the ONL boundary

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<sup>33</sup> *Royal Forest and Bird Protection Society Incorporated v Southland District Council* [1997] NZRMA 408 at p 10.



was “reasonably and fairly raised”<sup>34</sup>.

[58] What appears to have been not fairly raised by the Summary of Submissions, because it was not sought in Mr Swan’s submission is an extension of the ONL line to the southern boundary of 111 Atley Road. In my tentative view the outcome in the PDP (dv) Map 39A may exceed the Council’s jurisdiction since it was neither sought in a submission nor notified to the extent that land south (and east) of the brick-red area on Attachment “F” has been excluded from the ONL.

[59] I have recorded that the APONLSI has raised questions about the fairness of the notification process. In view of my provisional findings above, I am, again without yet hearing proper argument, initially drawn to consider its complaint may have some substance. Neither the Council’s Summary of Decisions sought by Mr Swan for 111 Atley Road, nor the submission if examined, gave any clue that the submitter was seeking to move the ONL boundary to that extent and thus remove the ONL classification.

*163 Atley Road*

[60] Larchmont<sup>35</sup> opposed the PDP proposed Rural zoning over 163 Atley Road and sought rezoning the property from Rural to Low Density Residential (extending the UGB). Larchmont did not seek any relief in respect of the ONL.

[61] The relief sought by Larchmont was accurately summarised in the Council’s summary. It does not refer to the movement of the ONL at all.

[62] The Commissioners moved the ONL boundary to the boundary of this property without considering whether they had jurisdiction to do so. In other words they treated the ONL classification as a (mere) matter of fact, whereas as I have stated it is – under the PDP – probably now a sub classification (or subzone) within the Rural zone. At first sight the Commissioners had no jurisdiction to make that decision. However, I do not decide that here since the issue has neither been raised nor argued.



<sup>34</sup> *Countdown Properties (Northland) Limited v Dunedin City Council* [1994] NZRMA 145; (1994) 1 B ERLNZ 150 at p 41.

<sup>35</sup> Queenstown Lakes District Council reference 527.

*The UCESI appeal*

[63] The UCESI appeal, supported by the APONLSI's section 274 notice, seeks to maintain the ONL where it was in the ODP. The difficulty for UCESI (and hence APONLSI) is that the ODP is silent (see attachment "C") on location of the ONL around Arthurs Point (but see Decision C3/2002)

[64] If the UCESI appeal is live in respect of ONL boundaries at Arthurs Point (i.e. the difficulties in the previous paragraph can be answered) then the answer to the jurisdictional point about there being no change sought to the residential zoning may be that the reinstatement of the Rural zoning would be consequential relief. That is probably a matter for further argument at the substantive hearings.

[65] However there is one issue on which the APONLSI should be heard now. It arises out of GSL's opposition to APONLSI calling any evidence about the ONL line and/or the residential zoning (and UGB) over or adjacent to the Shotover Loop on the grounds there is no appeal raising the ONL live. It seems to me that APONLSI (and the other parties) should be heard on the court's jurisdiction on appeal having regard to the matters raised above. In other words if the Council had no (or less) jurisdiction than it assumed, can the Environment Court have any more?

## 6. Morningstar Reserve

[66] The NTTL submission<sup>36</sup> was a general one. However it contained a specific reference to Arthurs Point which sought to rezone the Morningstar Reserve and the adjoining road reserve/marginal strip [on the Shotover River] from "Rural General" [sic] to "Rural Visitor" or "Visitor"<sup>37</sup>. That was quoted in the Council's Summary of Submissions.

[67] No specific relief was sought in respect of the ONL at Arthurs Point. A general submission<sup>38</sup> by NTTL in respect of proposed objective 3.2.5.1(i), sought to amend its wording to read:

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<sup>36</sup> Queenstown Lakes District Council reference 716.

<sup>37</sup> Queenstown Lakes District Council reference 716.16.

<sup>38</sup> Queenstown Lakes District Council reference 716.13.



Identify the district's Outstanding Natural Landscapes and Outstanding Natural Features on the district plan maps, and ~~protect them from~~ manage the adverse effects of subdivision and development.

That submission highlights the importance of identifying that its specific Arthurs Point relief, in its submissions, should have referred to the ONL.

[68] For the avoidance of doubt I confirm that all substantive issues are live in the NTTL appeal and in the UCESI appeal as they relate to the Morningstar Reserve.

## 7. Other procedural issues relating to Arthurs Point

### 7.1 Should the APLT appeal be heard in Topic 2 or Topic 16?

[69] APONLSI seeks<sup>39</sup> that APLT's appeal be dealt with as part of the substantive hearing on Topic 2 in April 2019 rather than Topic 16. However, APLT's appeal relates solely to the question of the appropriate zoning of APLT's land.

[70] I accept that APLT does not contest the location of the ONL boundary. Accordingly this appeal should be addressed with the other rezoning requests in Topic 16. In fact the appeal has already been allocated to Topic 16 since the court's Minute on 11 September 2018 and APONLSI did not apply for further or other directions in relation to the allocation at that time. Further, the evidence service timetable is already well underway for Topic 2's April 2019 hearing. No evidence has been lodged by APLT in relation to the zoning for its land (given it is allocated to Topic 16). The answer is that this appeal should remain to be heard in Topic 16. The other two should be heard (initially) in Topic 2.

### 7.2 GSL waiver application

[71] GSL did not seek leave to file a section 274 notice to join UCESI's appeal until 3 October 2018 after the Council first raised questions regarding APONLSI's section 274 notices in a memorandum to the court dated 28 September 2018. GSL's late section 274 notice is opposed by APONLSI primarily on the basis of costs.

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<sup>39</sup> Memorandum from APONLSI 14 November 2018.



[72] Mr Parker, for APONLSI, submits<sup>40</sup>:

Gertrude appears to have sought to join the UCESI and APTL appeals primarily so that it may attempt to have APONLSI's section 274 notices struck out. Had Gertrude joined the proceedings at the earliest opportunity (such applications being out of time, but likely to have been granted by the court) then Gertrude would have been able to make strike out applications and these would have been dealt with at an early stage (no such strike out application has been made).

[73] APONLSI has already engaged a number of experts to provide evidence for the substantive hearing, which would have been provided in accordance with the timetable for Topic 2 (but for the need to address the alleged jurisdictional issues). APONLSI claims it will suffer significant prejudice quite apart from having satisfied all of the section 274 criteria, if its section 274 notice is struck out at this very late stage. However there is at present no application to strike out APONLSI's notice that I am aware of, although GSL has certainly pointed out that there is no appeal seeking a rezoning of the Shotover Loop. I have outlined other potential difficulties (for GSL) above and will give directions enabling argument on this issue.

[74] Out of caution I consider it is appropriate and fair to let GSL join the UCESI appeal.

## 8. Outcome

[75] I will make orders reflecting my suggested directions and thoughts respectively on the procedural and jurisdictional issues discussed above.

[76] The Council should probably produce the section 32 Report which relates to Arthurs Point since that may be relevant to the jurisdictional questions I have raised.

  
 J R Jackson  
 Environment Judge



<sup>40</sup> M Parker submissions dated 10 December 2018 at [22].

Attachments:

- A: The Hangar Land (copy of Figure 4.7 from the QLDC decision).
- B: The Shotover Loop (copy of Figure 4.3 from the QLDC decision).
- C: Copy of Map 8A from the ODP.
- D: Copy of Map 39A from the PDP (notif).
- E: Copy of Map 39A from the PDP (dv).
- F: Copy of the map of the Shotover Loop as annexed to Mr Swan's submission.





Figure 4-7 – Submission site



Figure 4-8 – Planning Map extract. Yellow is ODP Rural Visitor Zone, cream is Rural







Figure 4-3 – Submission sites



# APPENDIX 8A - MAP 1 LANDSCAPE CATEGORISATION IN THE WAKATIPU BASIN

ONL (WB) Outstanding Natural Landscape (Wakatipu Basin)  
 ONL (DW) Outstanding Natural Landscape (District Wide)  
 VAL Visual Amenity Landscape  
 ONF Outstanding Natural Feature



Legend



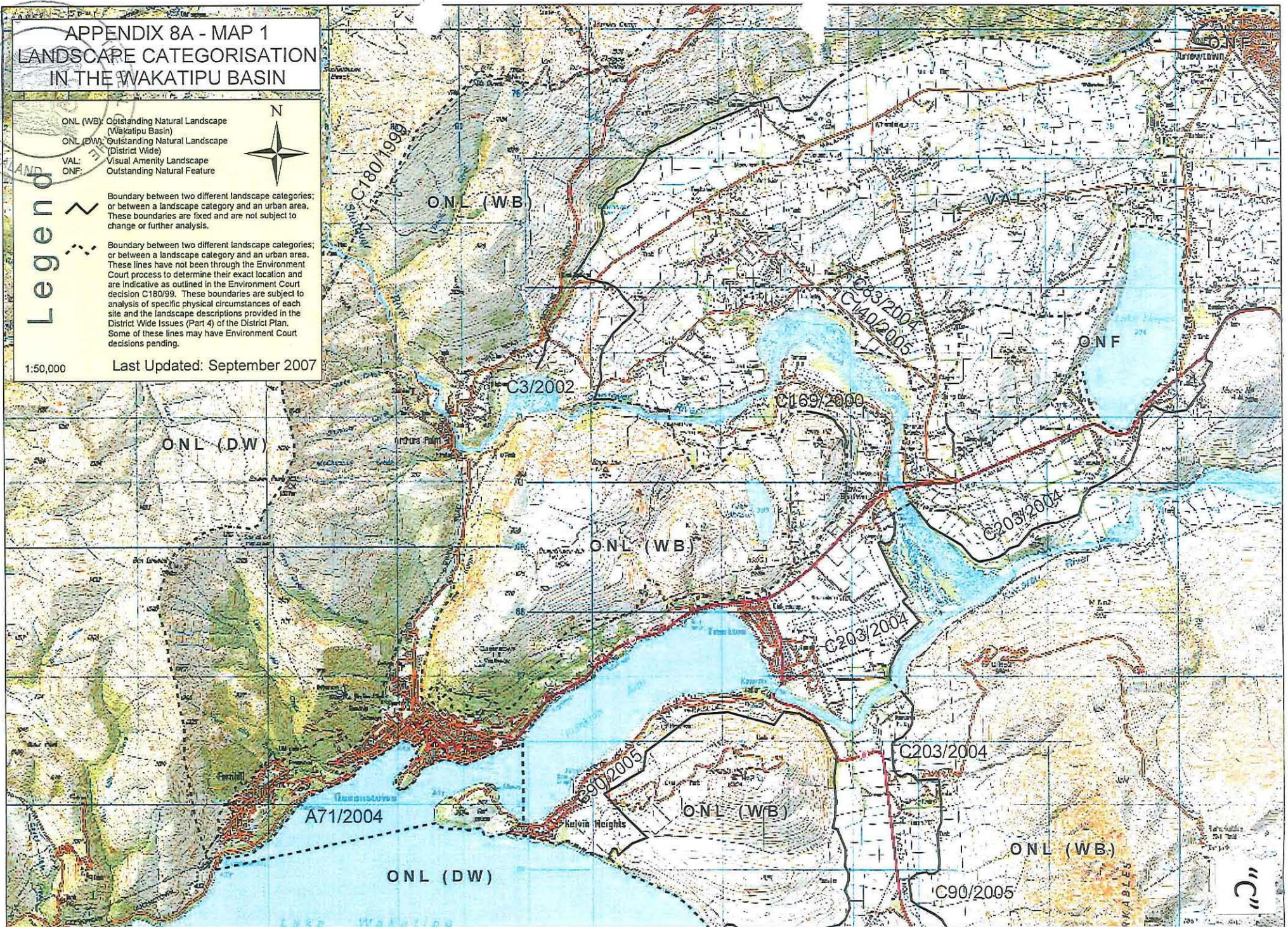
Boundary between two different landscape categories; or between a landscape category and an urban area. These boundaries are fixed and are not subject to change or further analysis.



Boundary between two different landscape categories; or between a landscape category and an urban area. These lines have not been through the Environment Court process to determine their exact location and are indicative as outlined in the Environment Court decision C180/99. These boundaries are subject to analysis of specific physical circumstances of each site and the landscape descriptions provided in the District Wide Issues (Part 4) of the District Plan. Some of these lines may have Environment Court decisions pending.

1:50,000

Last Updated: September 2007



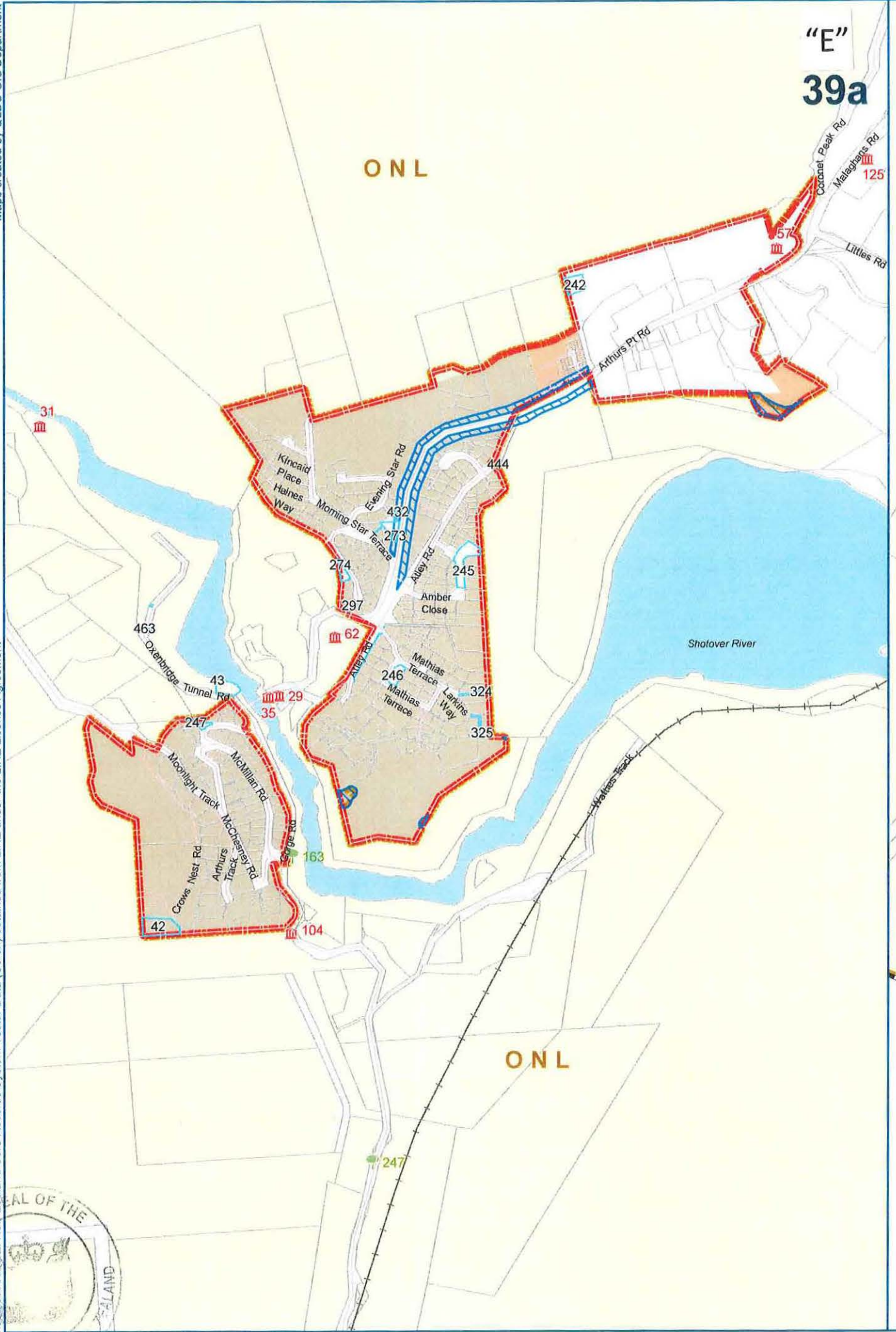
# "D" 39a



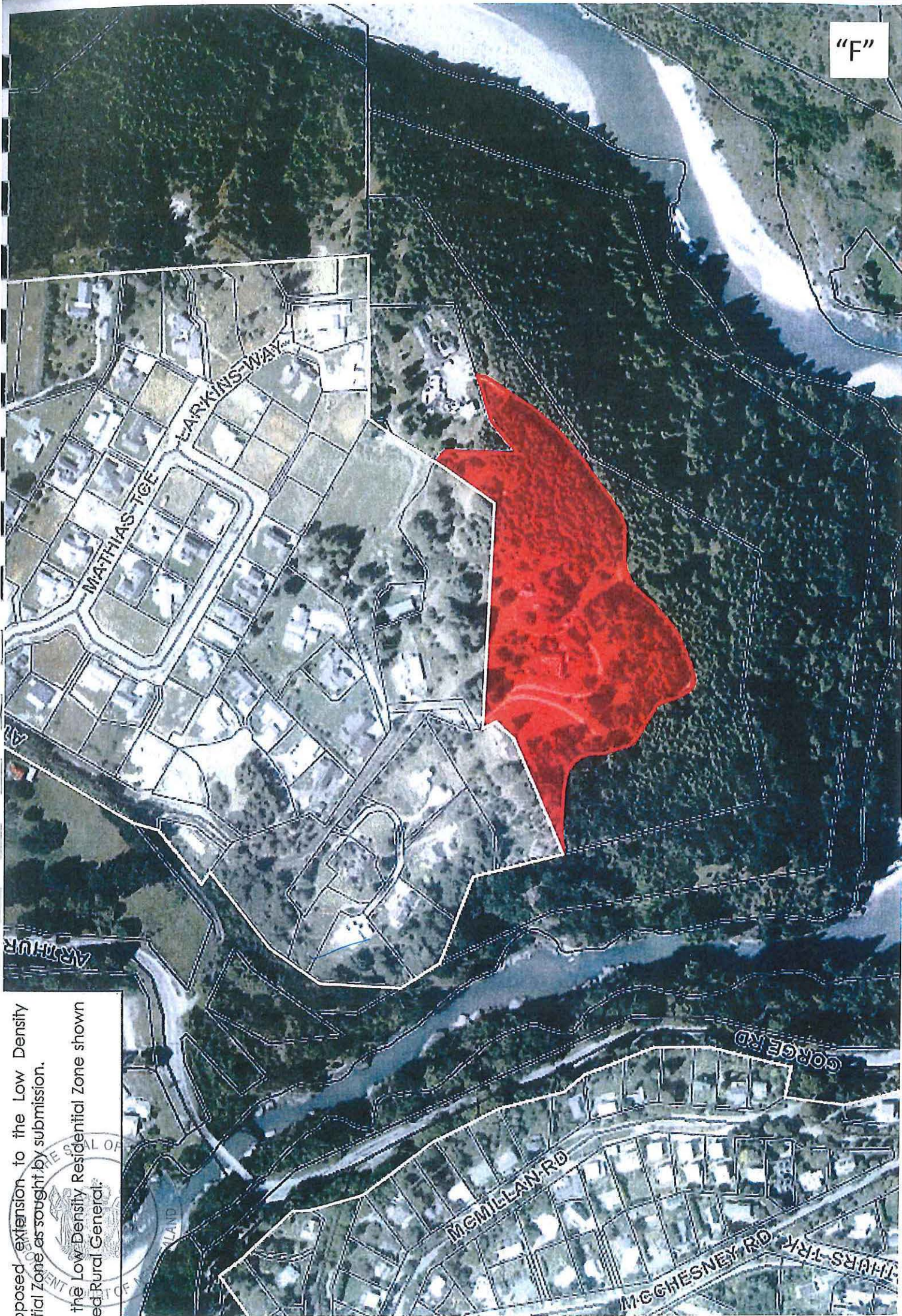
# "E" 39a

ONL

ONL



"F"



proposed extension to the Low Density Residential Zone as sought by submission.

the Low Density Residential Zone shown on the Rural General.

