

Before the Queenstown Lakes District
Council

In the matter of The Resource Management Act 1991

And

In the matter of Proposed District Plan – Stage 2 – Wakatipu Basin – Hearing
Stream 14

Submission 655 by Bridesdale Farm Developments Limited

LEGAL SUBMISSIONS for

Bridesdale Farm Developments Limited

Dated 19 July 2018

S655 – Bridesdale – T14 – Goldsmith W – Legal Submissions

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Introduction

- 1 These Submissions are presented on behalf of Submitter 655 Bridesdale Farm Developments Limited (BFDL) which seeks:
 - a. The relocation of a short section of Outstanding Natural Landscape (ONL) boundary at the southern end of the existing Bridesdale development;
 - b. The rezoning of the Bridesdale 'Site' to Medium Density Residential (MDR);
 - c. The removal of Urban Growth Boundaries (UGB's) and related policy framework or, in the alternative, the repositioning of the UGB to include all of the Site.

- 2 The s42A report correctly identifies a degree of uncertainty about the extent of the 'Site' subject to the rezoning request in S655. To clarify that issue, the 'Site' for the purpose of the rezoning aspect is the entire area of land consented for residential development under the Bridesdale SHA consent SH150001 plus a small area of land which was excluded from residential development under SH150001. The latter area is effectively an extension of the Bridesdale development to include the area of land below the existing road which traverses the escarpment slope at the southern end of the Bridesdale development. That extension (beyond what was consented under SH150001) is that part of the area coloured yellow on Mr Skelton's Attachment D south of and below the road (Eastern Extension).

- 3 When S655 was lodged, BFDL still owned all the land subject to SH150001 and was in the process of implementing SH150001. Since then BFDL has developed and sold all the land consented for residential development under SH150001. BFDL now only retains Lot 406 DP 505513, being a small lot containing the Eastern Extension, plus the large Lot 404 DP 505513 comprising the floodplain east and south of the Garden Allotments.

- 4 It follows from the above that BFDL has no ongoing interest in the outcome of this hearing as it relates to the zoning of Bridesdale, other than in relation to the Eastern Extension. However SH150001 is a somewhat complex consent. That has caused difficulties as far as the s42A recommendations are concerned. Mr Duthie was instructed to recommend an overall planning solution which would address a number of the issues raised in the s42A Report, for the assistance of the Panel. I will briefly address that overall solution towards the end of these Submissions.

- 5 BFDL does not pursue the removal of the UGB regime. I submit that the UGB should be located to include all of the land subject to MDR zoning as a

consequence of the Panel's consideration of S655. I take that point no further in these Submissions.

- 6 Accordingly these Submissions address:
- a. the basis upon which the reconsideration of an ONL boundary should be approached;
 - b. the factors relevant to reconsideration of the section of ONL boundary under challenge through S655;
 - c. the evidence presented by Council;
 - d. the appropriateness of enabling residential development of the Eastern Extension;
 - e. the overall zoning solution.

ONL Boundary Reconsideration

- 7 For the assistance of the Panel I note that the following paragraphs 8 to 21 are identical to paragraphs 2 to 15 of my submissions for Michaela Meehan presented at the hearing last week in respect of S526.
- 8 It is accepted that the starting point for many of the ONL boundaries as shown on the publicly notified planning maps are boundaries which have previously been determined by the Environment Court. That starting point must therefore carry considerable weight.
- 9 However I submit that that starting point is not necessarily the finishing point. The Environment Court is not perfect. In many cases there was a lack of fine-grained analysis when the ONL boundaries were determined. Relevant factors may have been overlooked at the time. The passing of time, and in particular ongoing development, may have changed the underlying factual basis. Any or all of those factors might result in a situation where relocation of an ONL boundary is appropriate.
- 10 I submit that the process of reconsidering an ONL boundary should comprise a four step process, as follows:
- a. Consideration of some of the principles which underpin the determination of an ONL;
 - b. Consideration of the decision which determined the ONL boundary in question, with particular attention to the extent or otherwise of fine-grained analysis of the section of ONL boundary under challenge;

- c. Consideration of whether there are any factors which might suggest the Court did not get the determination right in the first place, with particular reference to any factors which should have been taken into account and were not taken into account;
- d. Consideration of any factors which have arisen since the ONL boundary was determined and which might justify reconsideration of the location of the ONL boundary in question, such as additional development.

Principles

11 I do not intend to address this issue in detail, as the principles which underpin the determination of an ONL will be familiar to members of the Panel. However I do consider it to be worthwhile to remind the Panel of some important elements which came out of the Court's seminal decision *C180/99*¹.

12 At paragraph 82 of *C180/99* the Court stated:

"82. The word 'outstanding' means:

- *"conspicuous, eminent, especially because of excellence";*
- *"remarkable in";*

As Mr Marquet pointed out, the Remarkables (mountains) are, by definition, outstanding. The Court observed in Munro v Waitaki District Council that a landscape may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes."

13 The following excerpts from the following paragraphs addressed the context of the required assessment:

"83. A subsidiary issue is whether an outstanding natural landscape has to be assessed on a district, regional or national basis ...

84. ... Thus if section 6(b) is being considered by a regional council then that authority has to consider section 6(b) on a regional basis. Similarly a district council must consider what is outstanding within its district ...

85. We agree: what is outstanding can in our view only be assessed – in relation to a district plan – on a district-wide basis because some of the district's landscapes are the only immediate comparison that the territorial authority has. In the end of course, this is an ill-defined

¹ *Wakatipu Environmental Society Inc and Ors v Queenstown Lakes District Council* Decision No. C180/99

restriction, since our 'mental' view of landscapes is conditioned by our memories of other real and imaginary landscapes in the district and elsewhere, and by pictures and photographs and verbal descriptions of them and other landscapes.

86. *The local approach is consistent with an identification of particular places: the unique landscapes of the given district ...”.*

14 At paragraph 99 the Court stated:

“... ascertaining an area of outstanding natural landscape should not (normally) require experts. Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis ...”.

15 C180/99 also commented on the issue of foregrounds. In paragraph 105 the Court stated:

“... The answer to the question of where the Outstanding Natural Landscapes and features end is not a technical one. It is a robust practical decision based on the importance of foregrounds in (views of) landscape. We do not consider this over-emphasises the pictorial aspects of landscape, merely uses them as a determinative tool.”

16 Against the background of those excerpts of C180/99 I record the advice given to the District Plan Review (DPR) Hearing Panel (differently constituted) to the effect that 96.97% of the total area of the Queenstown Lakes District is classified as ONL or ONF².

17 I invite the Panel to consider the apparent disconnect between the principle that ONL's should be 'outstanding' and 'eminent' within this district and the fact that 96.97% of the district is classified as ONL. Against that factual background I submit that, in any determination of a challenged ONL boundary, the ONL 'bar' should be set relatively high.

18 To put the previous point another way, where there is a case where a section of ONL boundary is genuinely challenged, and where the answer to the challenge is not reasonably obvious, I submit that the default outcome for an area of land subject to the challenge should be non-ONL rather than ONL. I cannot point to any case law which supports that proposition. However I submit that it is a proposition which flows reasonably and naturally from C180/99 and the factual 96.97% ONL classification within the district.

² Memorandum of Counsel for the QLDC providing Requested Further Information, dated 18 March 2016

- 19 I submit that the above proposition can find support in sections 5-7 of the Act. The overall purpose of the Act contains the well-known ‘enabling’ and ‘protection’ elements which must be balanced in order to achieve an outcome which will enable people and communities to provide for their social, economic, and cultural wellbeing. The level of protection applied to ONL’s is stringent, and if anything is becoming more stringent than in the past. The challenges to achieving consent for virtually any form of land use or development within ONL’s are well known. The district must provide for its communities and its people. Having 96.97% of the district classified as ONL creates significant constraints on the use of land. I submit that that general situation supports the proposition that, where a section of ONL boundary is being genuinely challenged, the ONL ‘bar’ should be set relatively high.
- 20 The first case in this district which followed C180/99, in terms of a specific case addressing a challenge to the Court’s initial indicative C180/99 ONL boundaries, was C169/2000³. Paragraph 10 of that judgment established the basis for the subsequent series of cases which resolved a series of challenges to the Court’s original indicative ONL boundaries. I believe it is worth setting out, and considering, that paragraph in full:

“[10] In our view there are four circumstances that suggest that the topographical lines should give way to a recognition of the realities of situation. The first is that there are (due, it appears, to earlier resource consents granted by the Council) two houses up by the line of poplars as we described earlier. Indeed there is a third house site also on the lower slopes of the land although that has not yet been built on. All three houses (if a third is built) would be within the outstanding natural landscape, as Mr Evatt assesses it. Certainly the presence of houses does not automatically disqualify a landscape from being an outstanding natural landscape, but it is a factor to be considered. Secondly the land’s naturalness has also been reduced by the fact that it is sown in exotic (green) grasses, and most of the trees on it – most notably the poplars – are exotic and deciduous. The third aspect for us to consider is that immediately to the east of the site is Mr Broomfield’s land. That contains some rural residential subdivision already. Indeed it transpired at the hearing that the Council has approved further subdivision of that land although it had omitted to inform Mr Evatt of that when he prepared his evidence. Fourthly if we take all those matters into account, and the need for a practical boundary between the outstanding natural landscape and the visual amenity landscape – not just across the referrer’s land but also across adjacent properties on Ferry Hill – we consider the change of slope at the row of poplars is the place to draw the line. Consequently

³ J S Waterston v QLDC Decision No. 169/2000

both the site and some land above 400m asl falls into the visual amenity landscape. We now turn to ascertain the relevant objectives and policies of the amended plan as they apply to the land.”

- 21 Since that case the determination of virtually every ONL boundary by the Environment Court, in the series of decisions which followed that case, has been based upon a boundary informed by one or more of the following five factors:
- a. A distinctive topographical change;
 - b. A distinctive change in vegetation, or a distinctive line of vegetation;
 - c. Existence or otherwise of development (existing or consented);
 - d. Artificial features in the landscape, such as an obvious line caused by a water race;
 - e. A degree of pragmatism, particularly where it is necessary to connect sections of landscape boundary running across areas where there are no such distinct factors present.
- 22 I now address the other three considerations in relation to the section of ONL boundary under challenge. That section of ONL boundary is identified on Attachment C to Mr Skelton’s landscape evidence for this hearing, with the existing ONL boundary identified by a red line and the proposed relocated ONL boundary identified by a yellow line.

Original Environment Court decision

- 23 The Environment Court decision which determined the ONL boundary being challenged in this hearing is Decision No *C203/2004*⁴. The decision dealt with the northern boundary of the Remarkables and Ben Cruachan ONL, extending over a reasonably large area of land. A copy of *C203/2004* is annexed to these Submissions.
- 24 *C203/2004* focused on whether or not there should be a separate Visual Amenity Landscape located at the foot of the Remarkables, south of the Kawarau River. There is no analysis at all, let alone any fine-grained analysis, of the factors relevant to the specific location of the ONL boundary in the area where the ONL boundary is being challenged at this hearing.

Other relevant factors at the time

- 25 Counsel is not sure whether the recreation reserves located on the Kawarau River floodplain, immediately adjoining and west of the BFDL section of the

⁴ *Wakatipu Environmental Society Inc v QLDC Decision No C203/2004*

floodplain, existed at the time of the *C203/2004* decision. If they were, they are not mentioned. If they were not, they fall under the following heading.

Subsequent relevant factors

- 26 The first subsequent relevant factor is obviously the SH150001 consent decision. That decision consented:
- a. the existing residential development running along the edge of the southern and lowest escarpment which overlooks the BFDL floodplain area;
 - b. the road which now runs diagonally down the face of the escarpment and across the floodplain to a public parking area near the bank of the Kawarau River;
 - c. the garden allotments, each of which can contain a garden shed of the dimensions referred to in Mr Skelton's evidence⁵ (the first of which are now under construction).
- 27 None of that existing and consented development existed when *C203/2004* was decided.
- 28 The second subsequent relevant factor is the QLDC recreation reserves located west of, and adjoining, the BFDL land. The following plan and table (extracted from another document) identifies the location and status of QLDC reserves and Crown land in the vicinity of BFDL's land.

⁵ Evidence of Stephen Skelton dated 13 June 2018, at paragraph 10 on page 4



Figure	Legal Description	Area	Land Status	ODP Zoning	ODP Designation	PDP Zoning	PDP Designation
1	Crown Land, Block III	2.6982 hectares	Crown Land	RG	-	R	
2	Lot 321 DP379403	8.1534 hectares	Recreation Reserve	RG	365	Informal Recreation	365 465
3	Part Section 131, Block III Shotover Survey district	3.3340 hectares	Recreation Reserve	RG	-	R	
4	Lot 400 DP445230	9.8778 hectares	Recreation Reserve	RG		Informal Recreation	
5	Lot 205 DP505513	1.648 hectares	Recreation Reserve	RG	-	R	
6	Crown Land Block II, Shotover Survey District	14.3884 hectares	Crown Land Reserved from Sale (Marginal Strip)	RG	-	R	
7	Lot 1 DP 447906	0.3447 hectares	Local Purpose Reserve (Undefined)	RG	-	R	539
8	Undefined	-	Marginal Strip	RG	-	R	
9	Lot 2 DP 447906	0.9722 hectares	Local Purpose Reserve (Undefined)	RG	-	R	
10	Lot 308 DP 505513	1.6148 hectares	Recreation Reserve	RG	-	R	

29 Land parcels 2, 3, 4 and 5 (as shown on the preceding plan), located west of and adjoining the BFDL floodplain area, are all owned by QLDC, are classified as Recreation Reserve under the Reserves Act, but are subject to a somewhat confusing mixture of planning controls:

- (a) Area 2 is a designated Recreation Reserve with an underlining zoning of Informal Recreation (as notified in DPR Stage 2). Public works carried out by QLDC in accordance with the designated Recreation Reserve status override the underlining zoning rules. The conditions applicable to designated Recreation Reserves⁶ provide for site coverage up to 5% of the total site area, a 100m² limitation on individual buildings (but no limit on the number of buildings), a 10 metre height limit for buildings, and a maximum 20% of site area allowed to be covered by impervious surfaces such as courts, footpaths, swimming pools, car parking areas and leased areas. There are also controls on parking, glare, noise and hours of operation.
- (b) Area 3 is QLDC Recreation Reserve but is not designated and is therefore subject to the underlying Rural⁷ zoning rules where most buildings and commercial activities require some form of consent. Non commercial recreation activities are permitted activities.
- (c) Area 4 is QLDC Recreation Reserve which is not designated and which is subject to the notified Stage 2 Informal Recreation zoning. Permitted activities under that zoning include informal recreation (not defined), public amenities, gardens, parks, maintenance, education and research facilities directly related to the open space area, and recreation trails. Most other buildings or activities require some form of consent.
- (d) Area 5 physically contains a road which runs from the Bridesdale residential area down to a public carpark adjoining the riverside Queenstown Trail. Area 5 is shown on all versions of the planning maps as "Hayes Creek Road". However it is actually Recreation Reserve which is not designated and which is zoned Rural.

30 This recreation reserve factor is relevant to this hearing, and to the ONL boundary determination, for the following reasons:

- (a) One of the factors to be taken into account when determining an ONL is not only existing characteristics but reasonably foreseeable likely future characteristics arising from resource consents and/or zoning.
- (b) The mixture of planning regimes described above enable a range of activities, facilities and buildings to occur or be located within these

⁶ Chapter 37 Designations, Part B commencing on page 37-41

⁷ Strangely notified as Informal Recreation in Stage 2 – possibly an error by Council

recreation reserves. That is particularly the case with the designated recreation reserve (Area 2) where Council is not bound by zoning rules when it comes to public recreation activities, facilities and buildings.

- (c) The forecast significant population growth within the Wakatipu Basin and surrounding areas will undoubtedly increase pressure on areas of flat land publicly available for recreational activities.
- (d) It follows from (b) and (c) above that a reasonable prediction can be made that the current undeveloped, pastoral/farming characteristics of those recreation reserves will change in the future, probably to a significant degree. This is evidenced by the fact that the Council has recently commenced development of a Reserve Management Plan for these reserves.⁸
- (e) All of the above is relevant to a determination of whether the wider area of land encompassing the Council recreation reserves and the BFDL floodplain area has characteristics which are “*outstanding*” and “*natural*”.

31 The third subsequent relevant factor is the existence of the riverside Queenstown Trail running along the side of the bank of the Kawarau river, which is now also accessed by the road and the car parking area which resulted from SH150001 as detailed above. That point is relevant to:

- (a) the number of people which view the area of land that is subject to this ONL boundary challenge;
- (b) the viewpoint(s) from which those people view that area of land;
- (c) the ‘foreground’ to those views.

32 A fourth potentially relevant subsequent factor is the submission lodged by BFDL seeking to rezone the BFDL floodplain Lot 404 DP 505513 as Active Sports/Recreation Zone under this Stage 2 hearing process. While it is accepted that the ONL decision must precede the zoning decision, this fact, combined with the existence of the adjoining Council recreation reserves, is potentially relevant to the fundamental decision about ‘where to set the bar’ in terms of determining the boundary of an ONL in a District where 96.97% of the land is classified as ONL/ONF.

Summary re ONL boundary

33 I submit that the floodplain area of land subject to this ONL boundary challenge:

⁸ Verbal advice from Council’s internal legal Counsel

- (a) comprises scrubby farming paddocks with minimal, if any, ONL characteristics;
- (b) is primarily viewed from the riverside trail as a foreground to residential development in the midground;
- (c) does not warrant ONL status as 'outstanding' and 'natural' in the context of the ONL's of the Queenstown Lakes District.

Comments on evidence for the Council

Helen Mellsop

34 In her primary evidence Ms Mellsop discounted the likelihood of development on the Council recreation reserves, to an extent which would have significant adverse effects on the natural character of the floodplain, due to zoning restrictions.⁹ Mr Skelton responded by noting that Ms Mellsop had overlooked a designated recreation reserve containing over 8 ha where a considerable extent of development could occur under the designation¹⁰. In her rebuttal evidence Ms Mellsop responded with the statement *"... I consider the extent of permitted development discussed in Mr Skelton's paragraph 13 to be fanciful, in that it is highly unlikely that QLDC would propose anything close to a 5% building coverage (total 4000m2 of building area) or 20% impervious surface within an ONL that is flood-prone."*¹¹

35 In response, and with respect to Ms Mellsop:

- (a) Mr Skelton did not state that he anticipated that maximum level of permissible development would occur. He was pointing out the limits within which development could occur as (effectively) permitted activities.
- (b) The point being made by Mr Skelton is that there is a wide range of activities which could occur on that designated reserve, even though it is located on a floodplain. It is an obvious matter of fact that that could include activities such as tennis courts, skate parks/pump tracks, BMX trails and facilities, mountain bike trails and facilities, equestrian activities, sportsgrounds, etc, any or all with associated facilities such as clubrooms, public toilets, and the like.
- (c) What is important on this issue is the fact that such a potential future mix of activities is enabled by the Recreation Reserve designation (and to a

⁹ Evidence of Helen Mellsop dated 28 May 2018, at paragraph 6.30 on page 23

¹⁰ Evidence of Stephen Skelton dated 13 June 2018, at paragraph 13 on page 5

¹¹ Rebuttal evidence of Helen Mellsop dated 27 June 2018, at paragraph 9.2 on page 17

lesser extent by the proposed Informal Recreation zoning) and has a reasonable likelihood of occurring.

36 Ms Mellsop criticises Mr Skelton for focussing his attention on the area of land subject to debate. She comments¹² that almost all ONLs within the District contain small areas which would not be considered ONL if evaluated in isolation. Again with respect to Ms Mellsop, I comment:

- (a) We are dealing with an area of approximately 48 hectares.¹³ That is not an insignificant area of land.
- (b) This hearing does not determine the landscape category of a 'landscape'. In this case the two adjoining landscapes, and their characteristics, are obvious and do not require elaboration. The issue is the location of the boundary. It is therefore appropriate to focus on the characteristics of the area of land subject to debate.
- (c) Just because most ONLs may contain small areas of lesser landscape quality does not mean that reasonable efforts should not be taken to minimise the extent of such anomalies and try to ensure that, to as far an extent as is practicable, the landscape boundaries are appropriately located.

37 In this case there are three clear potential demarcation lines which could be determined to be the boundary between these two landscapes. One is the natural northern bank of the Kawarau River and the associated mature vegetation along the riverbank which separates the river to the south from the floodplain to the north, as favoured by Mr Skelton. The other is the terrace edge favoured by Ms Mellsop. There is a third alternative being the change in slope at the foot of the terrace on the edge of the floodplain. A valid argument could be presented for any of those three options.

38 Mr Skelton has approached his task from first principles, by separately considering the individual Pigeon Bay criteria and arriving at a conclusion based upon that first principles assessment.

39 I submit that Ms Mellsop's assessment has a flavour of 'once-over-lightly'. In particular I submit that Ms Mellsop has not given appropriate weight to the Recreation Reserve designation/zoning applicable to about half the land under debate, and the likely consequences of that designation/zoning.

40 I submit that Mr Skelton's analysis and assessment should be preferred.

¹² Rebuttal evidence of Helen Mellsop dated 27 June 2018, at paragraph 9.3 on page 18

¹³ Evidence of Stephen Skelton dated 13 June 2018, at paragraph 23 on page 7

Anita Vanstone

- 41 The starting point of both Ms Vanstone and Mr Duthie is that the District Plan should contain a specific Bridesdale overlay and associated controls applicable only to Bridesdale. From that mutually agreed starting point, it is relatively easy to address and resolve all of the detailed issues identified by both planners.
- 42 The above point is evidenced by the fact that, in her rebuttal evidence, Ms Vanstone comes a lot closer to Mr Duthie's position, with the result that there are now only two or three points of difference between them.
- 43 I do not intend to address the detail of those various issues in these Submissions beyond the submission that, if the Bridesdale overlay approach is adopted, all of those issues can be addressed to the extent of detail necessary to appropriately address them.
- 44 The primary outstanding point of contention between Ms Vanstone and Mr Duthie appears to be whether the southernmost existing Lots 129-138 should all be located within the MDR zone (Mr Duthie's position) or should be split zoned between MDR and Rural (Ms Vanstone's position), with both alternatives including the imposition of a Building Restriction Area (BRA) on the lower part of each of those lots.
- 45 My primary submission on this issue is that land should be zoned for its intended use unless that creates insurmountable difficulties. It makes little sense to apply a split MDR/Rural zoning to a row of small lots which have been created for residential purposes. One reason (amongst others) against that approach is that it potentially undermines the validity and effectiveness of the objectives and policies of the zone which is being inappropriately applied.
- 46 Counsel has difficulty understanding how Ms Vanstone's split zone can provide a greater level of protection to the lower part of those lots than Mr Duthie's MDR zoning, particularly taking into account that:
- (a) any necessary controls, as stringent as are considered necessary, can be applied within the bespoke provisions of the Bridesdale overlay;
 - (b) both the MDR zone¹⁴ and the Rural zone¹⁵ contain a rule providing that any building within a BRA is non-complying.
- 47 This is a technical planning issue which I leave Mr Duthie to address in further detail.

¹⁴ Rule 8.5.16

¹⁵ Rule 21.4.26

Residential development of the Eastern Extension

- 48 Even if the area of land that is subject to this ONL boundary challenge remains within the ONL, I submit that residential development of the Eastern Extension (which could accommodate a maximum of about 10 residential lots) is appropriate and therefore that the MDR zone can be extended to include the Eastern Extension. That submission is based upon the following factors.
- 49 Whether or not in the effects of the ONL in question are more than minor must be determined on the facts. One of those facts must be the extent and quality of the ONL in question. The extent and quality of this ONL, if not patently obvious, is well described in *C203/2004*. It is a vast and overpoweringly magnificent ONL. It would stretch credulity to suggest that this very small amount of development in one little corner of that ONL could have any more than minor adverse effects on the characteristics of that ONL.
- 50 If one focusses on just the visual experience of persons viewing this ONL, from whatever viewpoint they view it from, I submit that it could not reasonably be concluded that the adverse effects of this small development on the experience of that ONL are anything more than minor.
- 51 All services are in place to service that additional amount of development, including fully sealed road access. Residential development will therefore achieve policies and objectives relating to the efficient use of infrastructure.
- 52 Up to 10 families could enjoy the range of benefits which would arise from living in a house in this particular location. Those benefits do not come at any cost in terms of adverse effects on neighbours or on the general public.

Zoning solution

- 53 The s42A Report concludes that the MDR rezoning requested in S655 could enable an additional 44 residential lots. That may be correct, but that was not the intention. The extent of the additional development intended to be sought through S655 is limited to the Eastern Extension which will enable up to about 10 residential lots. Both the s42A recommended the zoning provisions, and the alternative zoning approach recommended by Mr Duthie, effectively preclude the additional 34 residential lots which were not originally intended.
- 54 As BFDL has no ongoing interest in S655 other than in relation to the Eastern Extension, BFDL is not concerned about which zoning solution is adopted. As stated above, Ms Vanstone and Mr Duthie agree that there should be a separate Bridesdale overlay plus associated controls, and they are fairly close to agreement as to what those controls should be. What remains is a matter of

detail that does not require legal input. Accordingly I do not address that any further.

Evidence

- 55 The following witnesses will be present at the Hearing in respect of the following disciplines:
- (a) Paul Faulkner (Geosolve) – geotechnical
 - (b) Gary Dent (Fluent) – flood mitigation
 - (c) Hayden Knight (Clark Fortune McDonald & Associates) – infrastructure
 - (d) Stephen Skelton (Patch) – landscape
 - (e) John Duthie (Tattico) – planning
- 56 The first four of the five witnesses detailed above will not present any further evidence and will be available just to answer questions.
- 57 Mr Duthie may present a one-page brief focussing on the remaining issues of contention between himself and Ms Vanstone.

Warwick Peter Goldsmith
Counsel for Bridesdale Farm Developments Limited

Dated 19 July 2018

Law
KG
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Decision No. C 203 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references pursuant to Clause 14 of the First
Schedule of the Act

BETWEEN WAKATIPU ENVIRONMENTAL SOCIETY
INCORPORATED

(RMA 1165/98)

Referrer

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

UNIVERSITY OF OTAGO

25 JAN 2005

LAW LIBRARY

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)

Environment Commissioner J Rowan

Hearing at Queenstown and site inspection on 14 December 2004

Appearances

Mr J Thompson for Wakatipu Environmental Society Inc

Mr N S Marquet for the Queenstown Lakes District Council

Mr N M McDonald for N M and S M McDonald and others, section 271A parties

Ms J Macdonald for Signature Investments Ltd, a section 271A party

DECISION : LANDSCAPE LINES
KAWARAU RIVER TO ARROW CONFLUENCE

Introduction

[1] The Remarkables are the epitome of an outstanding natural landscape under the Resource Management Act 1991 ("the Act" or "the RMA"). While there is no doubt that the mountains' summits and the precipices and slopes below are part of that landscape, where does the landscape end?



[2] That question arises in this case about where on the northern face of the Remarkables and Ben Cruachan (falling down to the Kawarau River) to locate the line dividing the outstanding natural landscape of the Wakatipu Basin from the visual amenity landscape.

[3] In its first decision¹ in this proceeding – “the Queenstown Landscape Decision” – the Environment Court reserved leave for any party or concerned landowner to apply to the Court to move the outstanding natural landscape boundary in respect of any land in the Wakatipu Basin.

[4] Before this hearing the Queenstown Lakes District Council had circulated to all interested persons and the parties a suggested boundary between the visual amenity landscape and the outstanding natural landscape which showed the boundary as crossing the Kawarau River east of the Boyd Road rural-residential enclave and then generally running on the northern side of the Kawarau River (including kinks in the line so as to include the shingle fans of the lower Shotover River, and Morven Hill) and terminating at the Arrow River Confluence. It lodged and served a brief of evidence from Ms E J Kidson, a landscape architect, in order to justify that line.

[5] The referrer, the Wakatipu Environmental Society Inc, did not call any evidence and appeared only to support the Council. Mr McDonald, a section 271A party, advised that the parties he represents have resolved the boundary in respect of their land with the Council so that they have no further interest in the proceeding.

[6] Signature Investments Ltd (“SIL”), another section 271A party, owns land on the southern side of the Kawarau River, including flood plains and terraces above that river, as well as gently sloping land which is part of the fans of the Rastus Burn and Owen Creek. SIL contends that the river flats, terraces and fans are not part of an ONL, but are a self-contained VAL.



Assessing outstanding natural landscapes

[7] The only legal issue we have to decide is what guidance the proposed district plan gives as to the identification of outstanding natural landscapes, and indeed, why it is necessary to do so.

[8] The partly operative district plan, quoting without acknowledgement from the first Queenstown landscape decision² identifies the following issues (amongst others) in respect of landscape³:

...

(2) **Protection of Outstanding Natural Landscapes and Features**

The outstanding natural landscapes are the romantic landscapes – the mountains and the lakes – landscapes to which Section 6 of the Act applies. The key resource management issues within outstanding natural landscapes are their protection from inappropriate subdivision, use and development, particularly where activity may threaten the landscapes openness and naturalness.

(3) **Maintenance and Enhancement of Visual Amenity Landscapes**

The visual amenity landscapes are the landscapes to which particular regard is to be had under section 7 of the Act. They are landscapes which wear a cloak of human activity much more obviously – pastoral (in the poetic and picturesque sense rather than the functional sense) or Arcadian landscapes with more houses and trees, greener (introduced) grasses and tend to be on the District's downlands, flats and terraces. The extra quality that these landscapes possess which bring them into the category of 'visual amenity landscape' is their prominence because they are:

- adjacent to outstanding natural features or landscapes; or
- on ridges or hills; or
- a combination of the above

The key resource management issues for the visual amenity landscapes are managing adverse effects of subdivision and development (particularly from public places including public roads) to enhance natural character and enable alternative forms of development where there are direct environmental benefits.



² Decision C180/99 at para (93).

³ Paragraph 4.2.4 Issues (2) & (3) [Partly operative district plan (notified March 2004) p. 4-9].

[9] Implicit in that statement of issues is that a decision needs to be made as to whether a rural area fits into one or other of the three landscape categories (the third is “other rural landscapes”⁴). In our view this is a question of fact and opinion.

[10] As the Environment Court stated in the first Queenstown landscape decision⁵:

... ascertaining an area of outstanding natural landscape should not (normally) require experts. Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis.

However that remark was made in the context of the Court’s earlier observation that⁶:

While almost everyone agrees that there are outstanding natural landscapes in the district, none of the parties ... is prepared to say where they finish.

[11] The Court continued⁷:

We consider that unwillingness has led to a basic flaw in the case for all parties (other than WESI) in respect of landscape values. The RMA requires us to evaluate, as one relevant factor, the outstanding natural landscapes of the district so that appropriate objectives and policies (and implementation methods) can be stated for them. If the areas of outstanding natural landscape cannot be identified then how can objectives and policies (and methods) be properly stated for them?

[12] We consider that passage is the answer to Ms Macdonald’s submission that the objectives, policies and anticipated results of the plan have to be looked at to ascertain whether a landscape is an outstanding natural landscape. The answer is that they do not: the facts and opinions should be stated first.

[13] Therefore, there are only two steps to deciding whether a landscape is an outstanding natural landscape under the RMA and the proposed district plan. The first is



⁴ Para 4.2.4(4) [Partly operative district plan (notified March 2004) p. 4-9].

⁵ Decision C180/99; [2000] NZRMA 59 at para (99).

⁶ Decision C180/99; [2000] NZRMA 59 at para (96).

⁷ Decision C180/99; [2000] NZRMA 59 at (97).

to describe the landscape(s) with which one is concerned and the second is to categorise it (or them).

Assessing the northern Remarkables/Ben Cruachan landscape

[14] Ms Kidson applied the amended Pigeon Bay criteria as suggested in the first Queenstown landscape decision⁸.

Geomorphology

[15] The northern face of the Remarkables consists principally of large landslides which occurred after the retreat of glaciers at the end of the last glaciation. The lower slopes also contain shingle fans deposited by the Rastus Burn and Owen Creek. In Ms Kidson's opinion⁹ the floodplains and the bed of the Kawarau River form a division between the SIL land and the floor of the Wakatipu Basin.

Topography

[16] The northern face of the Remarkables fall steeply – although not nearly so precipitately as the western faces toward the Kawarau River. Only at lower levels do the shingle fans appear, and then the terraces, banks and floodplains of the Kawarau River.

Ecology

[17] While the slopes are covered in tussock species, sweetbriar and lupins, the terraces and fans on the SIL land are sown with introduced grasses and other green crops.

[18] The banks of the Kawarau River contain abundant exotic plant species including crack willows, lupins, foxgloves, pines and poplars.



⁸ Decision C180/99; [2000] NZRMA 59 at (80).
⁹ E J Kidson, evidence-in-chief, para 22.

[19] North of the Kawarau River and its 40-60 metre high banks¹⁰ the floor of the Wakatipu Basin contains a wide variety of land uses – including residential and industrial uses, forestry and vineyards, lifestyle blocks and quarries¹¹.

Aesthetics

[20] Ms Kidson wrote that¹²:

In conclusion, the Remarkables and Ben Cruachan are renowned for an aesthetic associated with the powerful and romantic rugged and precipitous form of the Mountains. This character integrates down into the lower river terraces at its base which appears more tamed and pastoral. The Kawarau River has a natural aesthetic that differs from the braided form of the Shotover but is overwhelmingly natural due to the enclosing form of the river banks and surrounding mountains.

The Wakatipu basin floor is more domesticated, with the natural appearance degraded due to cultural modification. The exception of this is the Roche moutonnee forms including Morven Hill which has a distinctive glacially sculptured aesthetic.

Legibility

[21] Ms Kidson continued¹³:

Legibility is the ability to read the formative processes of the landform. This is often the first impression that is gained where one may recognise the importance of a landscape in geological terms or due to the ability to understand the formative processes that were involved in forming the landscape.

The Remarkables are highly legible as a mountain range that is largely intact and complete in terms of visual coherence due to the use of the majority of the lower slopes for farming purposes. The low lying areas adjacent to the Kawarau read clearly as floodplains and terraces, with the fans associated with the Rastus Burn and Owen Creek also clearly legible as a physical landscape process associated with the catchment systems of the mountainside.



¹⁰ E J Kidson, evidence-in-chief, para 31.
¹¹ E J Kidson, evidence-in-chief, para 39.
¹² E J Kidson, evidence-in-chief, paras 46 and 47.
¹³ E J Kidson, evidence-in-chief, paras 48-51.

The Kawarau River area similarly is also highly legible as a river valley that has a confined path with clear banks and floodplains.

Morven Hill as an ice sculptured rock form is a distinctive entity that rises out of the floor of the Wakatipu Basin. This landform has a smoothed hummocky shape that clearly shows its geological past.

Transient and recognised values

[22] The Remarkables are famous for the play of light and shade on tussock, rock and snow. Many visitors to Queenstown – at the airport, in hotels, private residences, the waterfront or at Steamer Wharf – have nursed a coffee or glass of wine or drunk their beer whilst expanding to the glories of that remarkable landscape.

[23] The foot of the northern slopes, while much less visible, contain features which also change. The Kawarau River turns swiftly from its normal deep green to flood-brown; and the flats on the SIL land which are so green in spring and early summer can brown off towards the end of summer, or be covered in silt during floods¹⁴.

Cultural and historical values

[24] Ms Kidson wrote¹⁵:

Historically this area has been influenced by both farming and gold mining activity. Domesticated livestock has traditionally grazed the landscape. Structures on the true right bank of the Kawarau River have traditionally been kept to the foot slopes of the mountain – with farm buildings clustered around Owen Creek.

Consideration

[25] After considering all those matters Ms Kidson's opinion was that the SIL land was part of the ONL of the Remarkables.

[26] Mr A W Craig, the landscape architect called for SIL, had the benefit of Ms Kidson's evidence when he wrote his evidence. He 'generally' agreed¹⁶ with her



¹⁴ E J Kidson, evidence-in-chief, para 59.

¹⁵ E J Kidson, evidence-in-chief, para 79.

¹⁶ A W Craig, evidence-in-chief, para 12.

description of the components of the landscape, but came to a different conclusion in respect of the flats and fans on the SIL land. His view was that where the mountains begin and the basin ends is¹⁷:

... where there is a conspicuous and significant change in slope ...

Such a change in gradient is very apparent where the steep slopes of the Remarkables meet the much flatter gradients of the adjoining floodplains, terraces and fans.

[27] Consequently Mr Craig's opinion was that an area of flats, terraces and fans just over 4 kilometres long on the SIL land was a VAL. We have two major difficulties with that opinion:

- First, Mr Craig seemed to work backwards from the objectives, policies and assessment criteria in the proposed district plan to his decision as to what was outstanding and what was not;
- Secondly, his VAL was sandwiched between the toe of the northern face of the Remarkables and Ben Cruachan (an outstanding natural landscape) and the Kawarau River (an outstanding natural feature).

[28] At its very widest Mr Craig's VAL may be one kilometre wide, and on average it is much narrower than that. At one point his strip narrows down to about 100 metres in width. We cannot accept that the SIL strip is large enough to be a landscape. At all points on the SIL land one is aware of the massif to the south; at many points one is aware of the river, and at most points the round glacier-formed Morven Hill is prominent to the north of the river.

[29] As the Court pointed out in *WESI v Queenstown Lakes District Council*¹⁸ (the Glendhu Bay decision) scale is a relevant factor when considering landscape. Indeed, on the quantitative measure suggested in that decision¹⁹:



¹⁷ A W Craig, evidence-in-chief, para 16.

¹⁸ Decision C73/02, [2003] NZRMA 289 at paras [14] et seq.

¹⁹ Decision C73/02 [2003] NZRMA 289 at para [20].

... an area that has the following characteristics may begin to be considered as a separate landscape:

- (a) it must contain at least one (preferably more) rectangle with at least 1.5 x 2 km sides;
- (b) no part of the landscape may be more than 1 km from such a rectangle;
- (c) it must contain a minimum area of 600 ha and
- (d) internal corners should be rounded.

- the VAL suggested by Mr Craig is clearly not large enough.

Outcome

[30] We conclude that we prefer Ms Kidson's simpler evidence to that of Mr Craig. We find that all the SIL land is inside an ONL, and that the ONL/VAL boundary should be drawn on the Council's planning maps as stated in Ms Kidson's evidence.

[31] If the Council seeks a sealed order to give effect to this decision it shall lodge a draft by 28 February 2005. We are not sure what form such an order should take. The proposed district plan (partly operative) includes an Appendix 8 of "Landscape Categories". However, these were not included in any form in either the notified plan or the revised plan, so we are not sure how Appendix 8 got there, or what its status is. Certainly there is no reference in the "General guide" at para 2.1.1 of the plan to the need to look at Appendix 8, but there probably should be.

[32] Costs are reserved. Any application for costs is to be lodged and served by 14 February 2005, and any reply by 28 February 2005.

DATED at CHRISTCHURCH 22 December 2004.


 J R Jackson
 Environment Judge



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