

ORIGINAL

Decision No. C 169/2000

IN THE MATTER of the Resource Management Act 1991

AND

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

BETWEEN J S WATERSTON

(RMA 160/93 and 1262/98)

Appellant

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson
Environment Commissioner R Grigg
Environment Commissioner R S Tasker

Hearing at Queenstown on 9, 10 and 11 May 2000

Counsel

Mr A More for the referrer

Mr N S Marquet for the Queenstown Lakes District Council

Date of decision: 5 October 2000

INTERIM DECISION



Table of Contents

Paragraph

<i>Introduction</i>	[1]
<i>Matters to be considered</i>	[8]
<i>Objectives and policies</i>	[11]
<i>Consideration</i>	[14]
<i>Result</i>	[24]

Introduction

[1] Mr Waterston, the referrer, had two references set down for hearing. The first of these (RMA 160/93) related to privately requested plan changes to the respondent's transitional plan under the Resource Management Act 1991 ("the Act" or "the RMA"). However, this was superseded by the second reference and thus RMA 160/93 was withdrawn at the commencement of the hearing. The second reference, which is all we now have to consider, relates to the proposed plan, notified in 1995 and revised in 1998, of the Queenstown Lakes District Council ("the Council").

[2] The legal description of Mr Waterston's property ("the land") is that it contains an area of 48.6 hectares approximately in Lots 1 and 2 DP 26910 comprised in Certificates of Title 18D/832 and 18D/833 (Otago Land Registry). Under the proposed plan as notified the land was zoned rural general. In a submission the referrer sought that it be rezoned to rural residential. The Council only partly obliged by rezoning that part of the land ("the site") under the 400 metre (above sea level) contour as "rural lifestyle".

In the latter two zones the consequential construction and use of a house is a controlled activity provided all other site and zone standards are met.

[3] In the reference to this Court the referrer sought as relief:

- (i) *That the Court direct the respondent to amend the zoning of the subject land from Rural Lifestyle (as contained in the deemed proposed district plan) to Rural Residential ...*



Alternative relief was sought also but abandoned at a conference prior to the hearing. We also note that although the relief sought refers to the land (as a whole), only the site - which contains about 20 hectares - was rezoned by the Council as rural lifestyle, and thus our jurisdiction in respect of the land outside the site is very limited.¹ In order to understand why the referrer wants a change of zoning we should explain that the differences between the zones are:

- in the rural general zone subdivision into less than 20 hectare lots is a non-complying activity;
- in the rural lifestyle zone the minimum lot size for a controlled subdivision² is one (1) hectare (provided there is an average of 2 hectares) and
- in the rural residential zone the minimum lot size is 4,000m² for a controlled subdivision.³

Thus a rural residential zoning would allow the referrer to subdivide land into smaller lots.

[4] The land is located at the base of Ferry Hill on its north-eastern side and above the Shotover River which curls around Ferry Hill. It is within the inner circle of the Wakatipu Basin⁴ and, like most of the land within that inner circle, cannot be seen from either State Highway 6 or from Malaghans Road between Queenstown and Arrowtown. Access to the site is gained from Tuckers Beach Road which runs along its northern boundary at a height of approximately 360 metres above sea level (“asl”). Tuckers Beach Road terminates approximately 2 kilometres further south. On the site immediately adjacent to Tuckers Beach Road is a flat terrace. Beyond that is a steep bank approximately 10-12 metres high, and above that is a generally flat area parallel to the road terrace. The land then gradually rises - crossing the 400m asl contour - to join the steeper slopes of Ferry Hill (694m asl). Where Ferry

¹ Being confined perhaps, to our powers under section 293 of the Act.

² Rule 15.2.6.3(i)(a) [Revised plan p.15/16].

³ Rule 15.2.6.3(i)(a) [Revised plan p.15/16].

⁴ See the description of the topography of the Wakatipu Basin in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* Decision C180/99; [2000] NZRMA 59 at para 108.



Hill steepens significantly there is a row of poplars which can be seen from several kilometres away within parts of the inner Wakatipu basin. High on the slopes immediately underneath the row of poplars the referrer has built himself a large garage on a house site at the south-eastern corner of the land. The building is perceivable, if not readily, from a distance. We add that to draw the zone boundary on the 400m contour as the Council did in its decision is rather meaningless on this part of Ferry Hill: it is an arbitrary line across a broad slope with no topographical or ecological sense.

[5] The referrer filed a concept development plan which we annex to this decision as Appendix "BB". This shows Mr Waterston's house site on the land. It also shows, outside the land but on land formerly owned by Mr Waterston and contained in an earlier subdivision, a house owned by a Mr Hodgson. This is sited at the south-western end of the land - even higher than Mr Waterston's garage and house foundations and just behind the row of poplars. There is also an approved building platform on the slope of the property immediately north of the Hodgson site. A house on that platform would, in our view, have the potential to be moderately obtrusive. However, Mr Waterston said at the hearing, and this was confirmed by his counsel, that if rezoning was granted as sought then he would be prepared to surrender the resource consent for the approved building platform.

[6] We should also point out that there is one small part of the site in the shape of an axe handle to the east of the main area of the land. This consists of a strip of land running east along Tucker Beach Road on the terrace we described earlier. A bite out of that handle is an existing allotment owned by a Mr and Mrs Britland which is not part of the rezoning proposal in this reference. To the east of the land is a property owned by a Mr Broomfield which will be referred to later because it has been partially subdivided and there are further resource consents in respect of it. Along the western edge of the land there are a number of other rural residential or rural lifestyle properties between the western boundary of the land and Tucker Beach Road, and on the other side of the road.

[7] The concept plan shows that the referrer contemplates eight allotments running from west to east along the low terrace adjacent to Tucker Beach Road, and a further

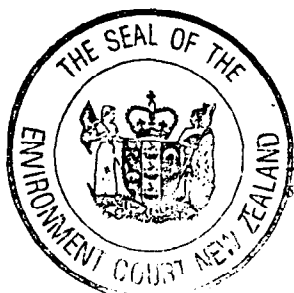


two allotments (Lots 16 and 17) on the axe handle described earlier. Above the bank run a further five allotments (Lots 9 to 13) on the north-western edge, and a further two allotments (Lots 14 and 15) on the eastern edge adjacent to the Broomfield block. It will be seen from the concept plan that the development would be on the lower part of the land if the site was rezoned.

Matters to be considered

[8] When preparing a proposed plan, section 74 sets out various matters to be considered by a local authority (or an appeal by this Court). However, in this case, most of those matters need only be considered indirectly since the objectives and policies which achieve the purpose of the Act for the rural areas of the district have been set either by previous decisions of this Court: C180/99 and C74/00, or in parts of the plan which have not been challenged by reference. The objectives and policies in Part 4 of the proposed plan as revised (“the 1998 plan”) following hearings by the Council and the Court (“the amended plan”) are based on a finding⁵ by the Court that landscapes of this district can, in a crude way, be divided into three: outstanding natural landscapes; visual amenity landscapes and “other” landscapes. The first issue in this case is what category the property falls into (as a mixed matter of fact and law) since the relevant objectives and policies that apply change accordingly. We heard from two landscape architects on this issue, Mr P J Baxter for the referrer and Mr T W Evatt for the Council.

[9] Mr Evatt is an independent landscape architect formerly employed by Civic Corp Limited – which carries out the Council’s resource management work under contract – but now acting as a consultant on his own behalf. He gave evidence that the appropriate place to draw a line between the outstanding natural landscape of the Wakatipu Basin and the visual amenity landscape was at the base of the bank. In its decision C180/99 the Environment Court had (of course without any knowledge of the particular circumstances of this case) provisionally drawn a line indicating that

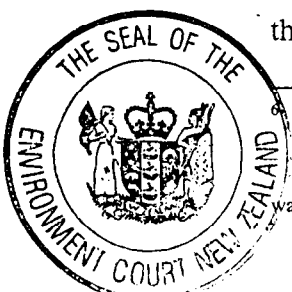


C180/99 [2000] NZRMA 59 at para (92).

the “boundary” between the outstanding natural landscape and the visual amenity landscape on the land was much higher - along the line of the poplar trees we described earlier. We respect Mr Evatt for conscientiously and without fear drawing the line where he has. We also appreciate there is a strong topographical logic to his line. For the referrer, Mr Baxter - who in his written evidence in chief had assumed the boundary was where the Court indicated it was⁶ - even in cross-examination did not redraw it where Mr Evatt did. In response to a request by Mr Marquet he identified it as being on the uphill side of the second row of lots (9 to 15) shown on the concept plan. As it happens that is close to where the 400m asl contour runs.

[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 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.

P J Baxter written evidence in chief para 8.



Objectives and Policies

[11] The relevant policies of the amended plan state⁷:

1. *Future Development*

- (a) *To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.*
- (b) *To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detracting from landscape and visual amenity values.*
- (c) *To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.*

...

4. *Visual Amenity Landscapes*

- (a) *To avoid, remedy or mitigate the adverse effects of subdivision and development on the visual amenity landscapes which are:*
- *highly visible from public places and other places which are frequented by members of the public generally; and*
 - *visible from scenic rural roads.*
- (b) *To mitigate loss of or enhance natural character by appropriate planting and landscaping.*

5. *Outstanding Natural Features*⁸

To avoid subdivision and/or development on and in the vicinity of distinctive landforms and landscape features, including:

- (a) *in Wanaka/Hawea/Makarora; ... [adjourned issue]*

⁷ Part 4.2 revised district plan [see C180/99 Appendix III].

⁸ See Erratum dated 29 September 2000: Corrections to the (second) decision C74/00.



(b) *in Wakatipu; the Kawarau, Arrow and Shotover Gorges; Peninsula, Queenstown, Ferry, Morven and Slope hills; Lake Hayes; the Hillocks; Camp Hill; Mt Alfred; Pig, Pigeon and Tree Islands;*

- unless the subdivision and/or development will not result in adverse effects which will be more than minor on:

i. Landscape values and natural character; and

ii. Visual amenity values

- recognising and providing for

iii. The desirability of ensuring that buildings and structures and associated roading plans and boundary developments have a visual impact which will be no more than minor in the context of the outstanding natural feature, that is, the building etc is reasonably difficult to see.

iv. The need to avoid further cumulative deterioration of outstanding natural features;

v. The importance of protecting the naturalness and enhancing the amenity values of views from public places (especially rural scenic roads):

vi. The essential importance in this area of protecting and enhancing the naturalness of the landscape.

There are other policies discouraging urban subdivision in the visual amenity landscapes of the district and avoiding cumulative degradation. There is also a policy as to structures which states:



9. Structures

To preserve the visual coherence of

(a) outstanding natural landscapes and features (subject to (b)) and visual amenity landscapes by:

- encouraging structures which are in harmony with the line and form of the landscape;
- avoiding, remedying or mitigating any adverse effects of structures on the skyline, ridges and prominent slopes and hilltops;
- encouraging the colour of buildings and structures to complement the dominant colours in the landscape;
- encouraging placement of structures in locations where they are in harmony with the landscape;
- promoting the use of local, natural materials in construction;
- providing for a minimum lot size for subdivision; ...

.....

(c) ... visual amenity landscapes

- by screening structures from roads and other public places by vegetation whenever possible to maintain and enhance the naturalness of the environment; and ...

[12] The meaning of those policies was largely non-controversial. However there was some debate between counsel over the meaning of “*in the vicinity of*” in policy 5. Mr Marquet submitted that that effectively precluded rezoning as sought by the referrer. Mr More submitted that those words were somehow anomalous having regard to the other policies as to outstanding natural landscapes and features. However, we do not consider that we have any particular difficulty applying the words. Indeed, the concept plan shows exactly how Policy 5 might be applied. That part of the land containing the higher slopes leading up to the row of poplars can be described as being “*in the vicinity of*” the outstanding natural feature, that is Ferry Hill. However the site is not in the context of this property “*in the vicinity of*” Ferry Hill and thus is an area within which some development can be contemplated.

[13] Turning to the methods by which those objectives and policies are to be implemented we find the rural lifestyle and rural residential zones and their related



rules. We accept the evidence of Mr W D Whitney, the resource manager who gave evidence for the referrer, when he wrote that⁹:

It appears that the distinction between the Rural Lifestyle and Rural Residential Zones is to -

- *Provide for a diversity of rural and/or residential activities in the Rural Lifestyle Zone.*
- *To protect the character and viability of the Rural Lifestyle Zone.*
- *To protect adjoining rural activities to the Rural Lifestyle Zone.*
- *Acknowledge that rural activities are not likely to remain a major use of land in the Rural Residential Zone/or a necessary part of the Rural Residential environment.*

Ms V S Jones, the resource manager called for the Council, summarized the reasons in similar terms.¹⁰

Consideration

[14] There is not a particularly good fit between the objectives and policies of the proposed plan on the one hand, and the methods of implementation on the other. That is exacerbated in this case by the fact that, as we have already pointed out, drawing the zone boundary across the middle of the slope at the 400m asl contour makes no sense on this land. This mismatch has arisen out of the evolution of the revised plan through the following three steps:

(1) In the notified plan there were 3 (or 4) rural zones:

- rural uplands
- rural downlands
- rural residential; and

⁹ W D Whitney evidence in chief para 29.
¹⁰ V S Jones evidence in chief para 34.



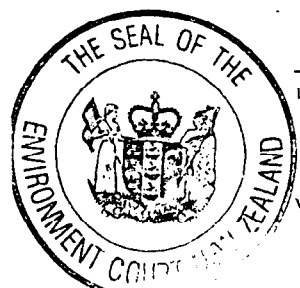
- areas of landscape importance (as an overlay).
- (2) In the revised plan the Council decided to change the rural zonings (drastically) to:
- rural general
 - rural lifestyle
 - rural residential.
- (3) In Decision C180/99 the Environment Court decided that as a matter of fact the district contained the three rural landscape categories described earlier in this decision, but made no findings as to how they related to the three rural zonings in (2) above.

[15] The issue now is whether we should shoehorn proposals for residential development of the land into one of the categories in the revised plan, or whether as the referrer suggests, we should allow a spot zoning of the land tailored to its specific environment. For the Council, Mr Evatt's concerns about rezoning the site as rural residential were that that would allow 45-50 lots¹¹ with a minimum area of 4,000m² as a controlled activity and no building platform requirement. By contrast the rural lifestyle zone (as in the revised plan) would allow 9 to 10 lots as a controlled activity, subject to each lot having a nominated building platform.

[16] However in relation to the referrer's concept plan, Mr Evatt's concerns were far more limited. Mr Evatt had no difficulty accepting the proposed ten lots (Lots 1 to 8, 16 and 17) running along the lower terrace parallel to Tucker's Beach Road. His difficulty was with the remaining 7 proposed allotments (Lots 9 to 16). His main concerns were that these allotments:

- (a) were in the outstanding natural landscape;

¹¹ T W Evatt evidence in chief para 16.



- (b) were a detraction from the visual amenities of the area in that buildings on these could not be¹² “absorbed” into the landscape;
- (c) would cause adverse cumulative effects with the existing buildings above the land.¹³

[17] However there are several reasons why we find that evidence difficult to accept. First we have held that the site is not in an outstanding natural landscape. Secondly Mr Evatt was rather embarrassed in cross-examination when he learned that the Bloomfield land adjacent to, and at the same level as, proposed Lots 14 and 15 has recently had further subdivision and residential development approved¹⁴ by the Council. We hold that proposed Lots 14 and 15 are similar to those on the Bloomfield land and that there is no reason to treat them differently.

[18] As for the only other contentious lots (Lots 8 to 14) - they are on the western side of the land. We find, as Mr Baxter suggested, that they contain small individual terraces on which houses with some landscaping and other conditions could be absorbed into the landscape. At the hearing he filed an amended concept plan¹⁵ showing how the bank and the road frontage between Lot 8 and the Britland land could be retained in a separate landscape lot to ensure that the proposed landscaping was maintained. His original landscaping listed a number of exotic species (Lombardy Poplar, Willow, Larch, Maple and Fir). At the hearing he agreed that should be amended in two ways. First, Douglas Fir might be inappropriate because of their tendency to spread wildings. Secondly it would be preferable to plant some native species on and at the base of the bank.

[19] We have carefully considered the evidence of Ms Jones, the resource manager called for the Council. However we disagree with her conclusions in two ways because they are based on an assessment of the factual situation which is not wholly correct. First the referrer is, on the case as presented to us, no longer pursuing the more intense rural-residential development for the site, but an

¹² T W Evatt evidence in chief para 9.
¹³ T W Evatt evidence in chief para 10.
¹⁴ Note of cross-examination p. 46.
¹⁵ P J Baxter Exhibit BBB.



intermediate subdivision and development pattern as shown on the concept plan. In particular the proposed allotments on the upper terraces are greater than 4000m² in area (ranging from 5740m² [Lot 14] to 9640m² [Lot 11] representing a compromise between zone lot sizes. We add that Ms Jones cannot be criticised for not assessing the concept plan since that was only advanced in the exchange of evidence by the parties. Secondly while Ms Jones was alive¹⁶ to the importance of maintaining and enhancing the open character of the outstanding natural landscape (and features) and the natural character of the visual amenity landscape, she considers that retaining the open-ness of the site is important, notwithstanding that she agrees it is in a visual amenities landscape. In our view the relevant policy requires that the quality to be maintained and enhanced on the site is its naturalness rather than open-ness (although that does not preclude both if possible).

[20] Ms Jones also wrote that:¹⁷

one does not perceive Ferry Hill as two separate landscapes, being that below the 400m contour and that above the 400m contour.

We agree with that: the 400m contour is a meaningless division on this land. In our view this part of Ferry Hill has four landscape components. They start with a separation at the level of the row of poplars - with a more natural (outstanding) landscape above. The second component is a visual amenity landscape below the poplars down to the bank. The third and fourth components are the bank and lower terrace respectively. The second component should be treated as a whole in order to avoid resource consent creep¹⁸ with unacceptable cumulative effects. Thus we hold that if lots are to be subdivided on the site and developed above the bank it should be done in a way that precludes further development of the land. We explored this with witnesses and counsel at the hearing but without any obvious mechanism being identified or offered to achieve that.

¹⁶ V S Jones evidence in chief para 52.

¹⁷ See V S Jones evidence in chief para 55.

¹⁸ *Auckland Regional Council v Arrigato Investments Ltd* HC, Auckland AP 138/99, Chambers J, 14 September 2000.



[21] Overall we consider the Council witnesses Mr Evatt and Ms Jones have slightly overstated the visual effects of development if carried out in accordance with the concept plan. We prefer Mr Baxter and Mr Whitney's assessment except to the extent that we share the council's concerns about potential over-development of the visual amenity landscape above the bank. When we check the proposal against Policy 4 we find that it (on visual amenity landscapes) deals differently with visual amenity landscapes that are either highly visible from public places or visible from rural scenic roads. Policy 4 also encourages mitigation of damage and enhancement of natural character. In this case we find - based on the evidence of Mr Baxter (which we prefer), as confirmed by our site and area inspection - that the site is neither visible from a rural scenic road nor highly visible from a public place. Nor will development of it significantly affect the amenities of those who live on the other side of the Shotover River. The mitigation policy is also being complied with: quite apart from the proposed planting on the "landscape lot"¹⁹ the referrer has agreed to surrender the third residential house site.

[22] Because we are concerned about cumulative effects in other cases and the potential for this case to be regarded as a precedent we record that this case turns on its own facts. Important points are:

- (a) the case is not about a visual amenity landscape in the rural general zone, but in the rural lifestyle zone which allows subdivision down to a one hectare minimum (2 hectare average);
- (b) the land is in the inner Wakatipu basin, not in the outer ring where it might be more visible from public places and scenic roads.
- (c) the clustering of Lots 9-15 at the foot of the visual amenity landscape will maximise naturalness and, if the owners so choose, open-ness of the slopes leading up to the poplar row.

[23] The parties did not argue section 32 or section 7(b) of the Act except in passing. However we agree with Mr Whitney - who did deal with the issue briefly -

¹⁹ Shown on Mr Baxter's Exhibit "BBB".



that efficiency considerations favour the referrer developing the site largely as he proposes.

Result

[24] We find that the purpose of the Act will be met if the referrer's concept plan is put into effect subject to restrictive covenants or some other mechanism being put into place to avoid further residential development of the land. The reference is partially (and conditionally) successful. As an interim decision we direct that the parties are to file (if they can agree) proposed rules achieving the following:

- (a) the intensity of subdivision contemplated in the concept plan;
- (b) enshrinement of the concept plan for the 'Waterston' sub-zone;
- (c) rules and/or a recipe for the imposition of covenants for the creation and maintenance of the landscaping including, importantly, first the screening along Tuckers Beach Road, and second the planting of trees and shrubs (preferably natives) at the foot of, on the face of, and immediately above the bank;
- (d) rules similar to those proposed by Mr Whitney in his appendix 7 with the proviso that we see no vital need to impose design constraints on buildings on Lots 1-8 and 16 and 17;
- (e) restrictive covenants or some other mechanism for avoiding further subdivision and development of the land, and to ensure the proposed clustering of all the development hereby permitted at the foot of the slope (above the bank) in terms of the concept plan.

[25] Failing agreement leave is reserved to apply to the Court:

- (a) to settle the relevant rules; and

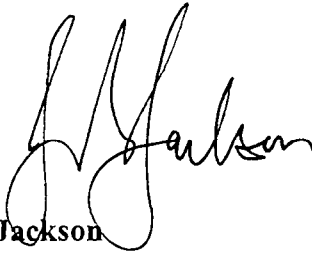


- (b) to present further submissions
 - (i) about our jurisdiction to deal with the remainder of the land; and
 - (ii) on section 32 of the Act.

For the avoidance of doubt, and to emphasise that the decision is a finely balanced one, we should say that we consider it is important to deal with the land as a whole, and if that cannot be achieved then the ultimate result may be that the reference has to fail after all.

[26] When the proposed rules are filed as contemplated by the orders above, a surrender of the referrer's rights to build on Lot 2 DP 26910 should also be filed.

[27] Costs are also reserved although our preliminary view is that they should lie where they fall in accordance with the normal practice on a reference.



J R Jackson

Environment Judge



46 SB

BB



LEGEND

Line of rural residential boundary as per DLDC Proposed Plan Planning Map # 31

- Site boundary
- Existing tree
- Proposed tree

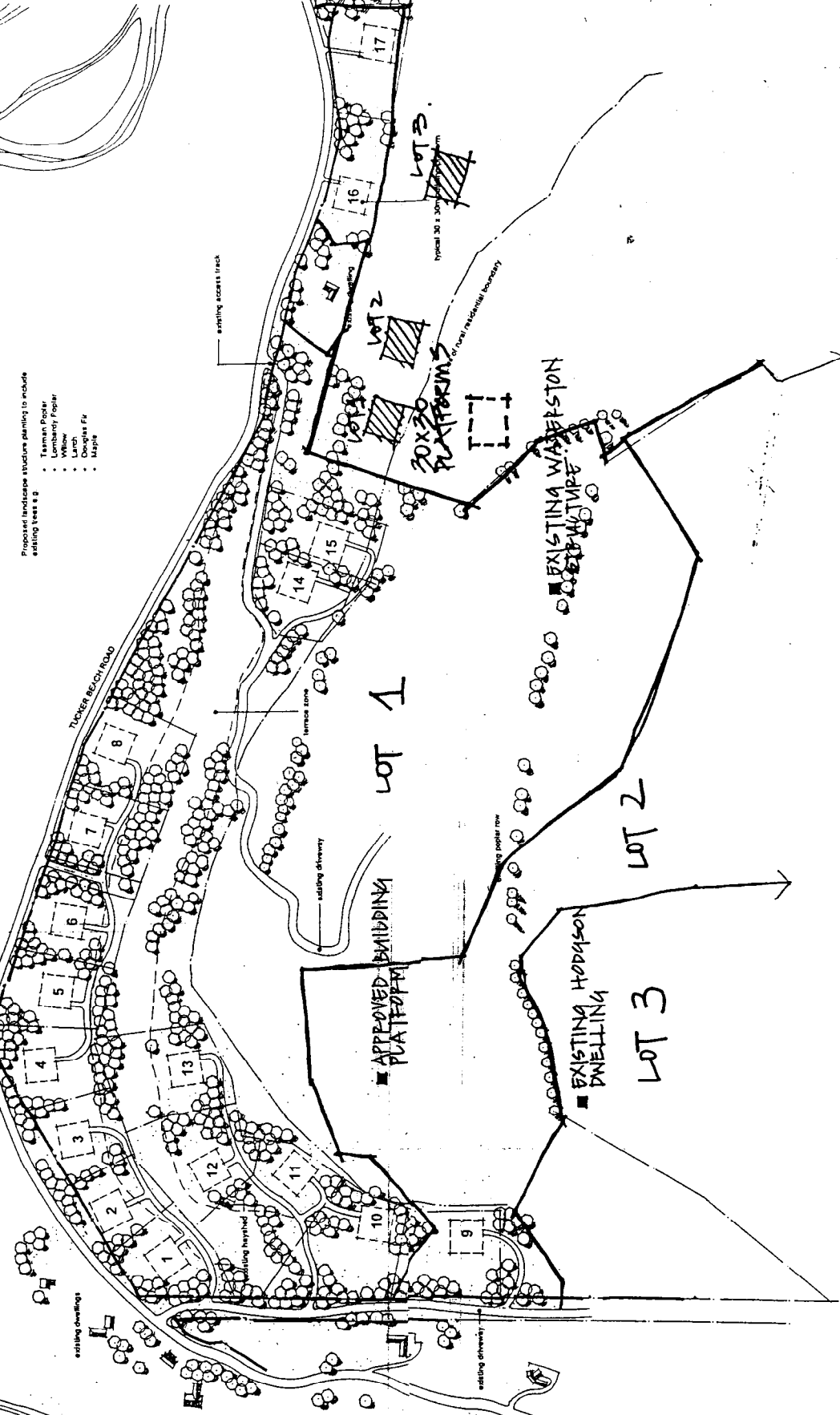
Proposed landscape structure planting to include

- Tasman Poplar
- Lombardy Poplar
- Larch
- Douglas Fir
- Maple

To closed DLDC landfill site

SHOYCER RIVER

TIPPER BEACH ROAD



WATERSTON SUBDIVISION

CONCEPT DEVELOPMENT PLAN

Drawn and Prepared by Baxter Brown Ltd. Overlain Scale 1:2000 © A1. Oct. May 2000. Ref. 0148-1

