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

Decision No. [2019] NZEnvC 150

IN THE MATTER	of the Resource Management Act 1991
AND	of an application for enforcement order under section 316 of the Act
BETWEEN	ARTHURS POINT OUTSTANDING NATURAL LANDSCAPE SOCIETY INCORPORATED
	(ENV-2019-CHC-102)
	Applicant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J R Jackson (sitting alone under section 309(1) of the Act)
Hearing:	at Queenstown on 26 and 27 June 2019
Appearances:	P Steven QC and E L Keeble for Arthurs Point Outstanding Natural Landscape Society Incorporated K L Hockly for the Queenstown Lakes District Council M Baker-Galloway for Gertrude's Saddlery Limited W Goldsmith and R Giles for Larchmont Developments Limited J Leckie for Arthurs Point Land Trust
Date of Decision:	11 September 2019
Date of Issue:	11 September 2019

DECISION

A: Under section 314(1)(f) and section 319 of the Resource Management Act 1991 the Environment Court orders:

(1) that the Queenstown Lakes District Council complies with clause 7 of Schedule 1 RMA by re-notifying a summary of the decisions requested on

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

the Queenstown Lakes District Council's proposed plan change by Gertrude's Saddlery Limited and Larchmont Developments Limited in terms similar to the following:

(a) In addition to the relief expressly sought, which is [as previously summarised];

(b) the submission implicitly seeks to exclude the land from the outstanding natural landscape by drawing a brown dashed line indicating an outstanding natural landscape boundary around the land being Pt Sec 1 SO 24074 Lots 1-2 DP 307630 and Lot 2 DP 393406;

(2) that the drawing of the outstanding natural landscape boundary line around, the movement of the Urban Growth Boundary to include, and the rezoning to Low Density Residential of the Shotover Loop (111 and 163 Atley Road, Arthurs Point) being Pt Sec 1 SO 24074 Lots 1-2 DP 307630 and Lot 2 DP 393406 is suspended from the date of this decision.

B: Leave is reserved for any party to apply to amend Order A to correct or add information and to apply for any further process orders that may be necessary.

C: The application by Arthurs Point Outstanding Natural Landscape Society Incorporated in respect of the land and submission of the Arthurs Point Land Trust is adjourned. The Society is to advise by 27 September 2019 whether it still seeks orders in relation to the Arthurs Point Land Trust land.

D: Costs are reserved.

REASONS

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1. Introduction

1.1 The general issue and the parties

[1] Was a fair process followed when identifying an entirely new inside edge to the outstanding natural landscape[1] around Arthurs Point in a decision on a plan change resulting from the Queenstown Lakes District Council's review of parts of its operative district plan? That primary issue for this decision is raised directly by an application by the Arthurs Point Outstanding Natural Landscape Society Incorporated ("the Society") for an enforcement order under section 314(1)(f) of the Resource Management Act 1991 ("the RMA" or "the Act"). The issues are restated more precisely below.

[2] The treatment of the Arthurs Point area in the plan change has already been the subject of two relevant procedural decisions between the same parties in appeals by the Upper Clutha Environmental Society Incorporated (ENV-2018-CHC-56) ("the UCESI appeal") and by Arthurs Point Land Trust ("APLT") (ENV-2018-CHC-76). The procedural decision[2] *Arthurs Point Trustee Limited v Queenstown Lakes District Council* ("Decision *AP1*") concerned landscape boundary lines and landscape clarification in the Queenstown Lakes District Council's ("QLDC") Proposed District Plan at Arthurs Point.

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1 Under section 6(b) RMA.

2 *Arthurs Point Trustee Limited v Queenstown Lakes District Council* [2019] NZEnvC 14.

Decision *AP1* was then subject to a rehearing application which was granted in the second procedural decision ("Decision *AP2*")[3]. The rehearing has been conducted but no decision has been issued yet.

1.2 Background: the proposed plan changes and the outstanding natural landscape

[3] On 17 April 2014 the Council resolved[4] to review parts of the Operative District Plan ("the ODP") under section 79(1) RMA. The resolution[5] identifies the provisions "… that will be excluded from the review and will not be the subject of a public notice under clause 5 of Schedule 1 to the RMA when the review is completed …".

[4] What was called "Stage 1" of the "Proposed District Plan" was notified in August 2015. This document is actually a large set of plan changes to the ODP which I will accordingly call "PC1". The public notification of PC1 as notified ("PC1(N)") commenced:

> **PUBLIC NOTIFICATION OF THE PROPOSED QUEENSTOWN LAKES DISTRICT PLAN (STAGE 1)**
>
> The Council has completed the first stage of the District Plan review and is now notifying the Proposed Queenstown Lakes District Plan (Stage 1) for public submission pursuant to Schedule 1 Clause 5 of the RMA.
>
> There are many differences between the current Operative District Plan and the Proposed District Plan. The Proposed District Plan affects all properties in the District and may affect what you and your neighbours can do with your properties. You should take a look to see what it means for you.
>
> In summary, some of the key substantive changes include:
>
> - A new Strategic Direction chapter that sets out the overall approach to ensuring the District's sustainable management in an integrated manner.
> - An Urban Development chapter that sets out a growth management direction for the District, and introduction of Urban Growth Boundaries around urban areas.
> - **A Landscape chapter that sets out how development affecting the District's valued landscapes will be managed – including the mapping of lines that**

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3 *Upper Clutha Environment Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 78. All reference to documents are to the enforcement proceeding (ENV-2019-CHC-102) unless specifically identified.

4 Quoted in *Tussock Rise Ltd v Queenstown Lakes District Council* [2019] NZEnvC 111 at [6].

5 Above n 4, referring to the memorandum of counsel for QLDC dated 26 April 2019 Attachment 4 in the Tussock Rise Ltd appeal (ENV-2018-CHC-121).

> **identify Outstanding Natural Landscapes and Features.**
>
> ...
>
> [emphasis added]

[5] It will be seen that the "mapping of lines" that identify outstanding natural landscapes and features is identified as a "key substantive change". That is entirely appropriate because it has long been established that recognition of outstanding natural landscapes (and therefore of their boundaries) must occur early in the plan review process. That was settled by the Environment Court in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* (*"WESI"*)[6] where the Environment Court stated:

> In respect of a district council's functions, including integrated management of land, the starting point for the first stage must be to identify the facts and the appropriate matters[7] to be considered. In particular it is fundamental to consider Part 2 of the Act. That means it is mandatory[8] to identify the matters of national importance[9]. We do not see how that can be achieved without identifying (necessarily with a broad pencil, but with as much accuracy as possible) the boundaries of the areas concerned.

[6] A similar approach was taken recently by the Court of Appeal in *Man O'War Station Limited v Auckland Council* ("*Man O'War*") where the Court of Appeal framed the first question before it as:[10]

> Is the identification (<u>including mapping</u>) of an [outstanding natural landscape] in a planning instrument prepared under the Resource Management Act 1991 for the purpose of s 6(b) of that Act informed by (or dependent upon) the protection afforded to that landscape under the Act and/or the planning instrument?
> [Underlining added]

[7] The Court's answer was[11]:

> However, the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s 6(b) of the Act requires an essentially factual assessment

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6 *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* [2000] NZRMA 59 (NZEnvC) at [56].

7 Section 75(1) RMA.

8 Section 74(1) RMA.

9 Section 6 RMA.

10 *Man O'War Station Limited v Auckland Council* [2017] NZCA 24; (2017) 19 ERLNZ 662; [2017] NZRMA 121 at [31(a)].

11 *Man O'War* above n 10 at [61]-[62].

based upon the inherent quality of the landscape itself. The direction in s 6(b) of the Act (that persons acting under the Act must recognise and provide for the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development) clearly intends that such landscapes be protected …

The questions of what restrictions apply to land that is identified as an outstanding natural landscape and what criteria might be applied when assessing whether or not consent should be granted to carry out an activity within an ONL arise once the ONL has been identified. Those are questions that do not relate to the quality of the landscape at the time the necessary assessment is made; rather, they relate to subsequent actions that might or might not be appropriate within the ONL so identified. It would be illogical and ultimately contrary to the intent of s 6(a) and (b) to conclude that the outstanding area should only be so classified if it were not suitable for a range of other activities.
[Underlining added]

[8] After providing further detail about the proposed plan changes, how to view and make submissions on them, the public notification concluded – and this is of particular relevance because it relates to the summary of decisions requested ("the SDR")[12] at the heart of the Society's application:

The closing date for submissions is Friday 23 October 2015.
What happens next?

After submissions close:

- we will prepare a summary of decisions requested by submitters and publicly notify the availability of this summary and where the summary and full submissions can be inspected;
- people who represent a relevant aspect of the public interest or have an interest greater than the interest of the general public may make a further submission, in the prescribed form within 10 working days of notification of the summary of decisions sought, supporting or opposing submissions already made;
- a copy of the further submission must also be served on the Council and the person who made the original submission;
- submitters may speak in support of their submission(s) at a hearing if they have indicated in their submission that they wish to be heard;
- following the hearing the Council will give notice of its decision on the Proposed District Plan and matters raised in submissions, including its reasons for accepting or rejecting submissions;
- every submitter then has the right to appeal the decision on the Proposed District Plan to the Environment Court.

12 Under clause 7 Schedule 1 RMA.

Want more info or help understanding the proposals?

Visit www.qldc.govt.nz/proposed-district-plan to find a range of fact sheets and diagrams to help you understand some of the more technical parts of the Proposed District Plan.

A duty policy planner will also be available every workday until submissions close. Call 03 441 0499 (Queenstown) or 03 443 0024 (Wanaka).

This notice is in accordance with clause 5 of Schedule 1 of the Resource Management Act 1991.

[9] The Society's application before me is primarily concerned with the maps in PC1(N) that relate to Arthurs Point. Maps 13 and 39 of PC1 both cover the Arthurs Point area. Map 13 covers the Wakatipu Basin generally and Map 39 covers the environs of Arthurs Point.

[10] As the public notice of PC1(N) stated, one of the matters covered in the plan change is the recognition of the outstanding natural landscapes of the district under section 6(b) RMA and in particular the identification of their edges within lines. Map 13 of PC1(N) shows that the Wakatipu Basin, including the three town centres of Queenstown, Arrowtown and (de facto) Frankton, is surrounded by an irregular circle – a brown dashed line – which demonstrates the boundary between the outstanding natural landscape (on the outside of the ring) and other urban, industrial and rural landscapes or landscape units.

[11] Although the village of Arthurs Point is urban in nature (being zoned Low Density Residential amongst other zones) it is within the Outstanding Natural Landscape ("ONL") boundary as shown on Map 13 of PC1(N). In other words, Arthurs Point is part of the outstanding natural landscape of Wakatipu Basin. The larger scale Map 39 of Arthurs Point itself and its immediate environs, shows no ONL boundary at all because the brown line indicating the boundary is east (off) of the map, as can be seen on the small scale Map 13. I will call any such brown line on the planning maps an "ONL(B)".

[12] No submission expressly sought the addition of a brown dashed line indicating an ONL(B) in the vicinity of Arthurs Point.

[13] Despite the lack of an express submission on the issue, in the Commissioners'

decision a brown dashed circle was drawn on Map 39 (renamed as Map 39a in 2016)[13] around the whole of Arthurs Point's urban area and some extra rural land ("the Shotover Loop") to the south. In effect, Arthurs Point and some additional rural land have been excluded from the outstanding natural landscape and the additional land rezoned and included within the Urban Growth Boundary ("UGB").

1.3 The application for an enforcement order

[14] On 25 March 2019 the Society lodged its application for an enforcement order, followed by an amended application on 29 May 2019. The enforcement order proceeding relates to the process followed by the respondent Council when mapping landscape and other lines around Arthurs Point. Specifically, the application seeks an order that the Queenstown Lakes District Council "re-notify" a summary of the following submissions made in response to a plan change notified in August 2015:

(a) #494 ("the GSL submission") which was initially lodged by Mr Michael Swan who has been succeeded by Gertrude's Saddlery Limited ("GSL" – the owner of 111 Atley Road)[14];
(b) #527 ("the Larchmont submission") Larchmont Developments Limited ("Larchmont" – the owner of 163 Atley Road)[15];
(c) #495 Daryl Sampson and Louise Cooper succeeded by Arthurs Point Land Trust ("APLT" – the owner of 182D Atley Road).

The properties at 111 Atley Road and 163 Atley Road are what I have called "the Shotover Loop". This decision does not consider the land in (c) because it is in a different location on the eastern edge of Arthurs Point.

[15] The enforcement application also refers to submission #1281 by Larchmont in relation to 111 Atley Road. However that is a cross-submission[16] in response to primary submissions and so never required summarising in the first place.

[16] The Society seeks that the enforcement order is made on the following terms[17]:

13 C A Barr affidavit 14 June 2019 at [12.5] [Environment Court document 15].
14 The legal description is Pt Sec 1 SO 24074 Lots 1-2 DP 307630.
15 The legal description is Lot 2 DP 393406.
16 Under clause 8 Schedule 1, RMA.
17 Amended application for enforcement order by the Society dated 29 May 2019 at [3].

(a) that the respondent re-notify the summary of submission changes to the plan sought in the submissions referred to … above as soon as reasonably practicable; and

(b) that the respondent re-notifies the Proposed District Plan Map 39a relating to Arthurs Point showing what is proposed in the submissions referred to … above as soon as reasonably practicable; and

(c) setting aside the Commissioners' decision in relation to the submissions referred to … above as contained in Report 17-4 Report and Recommendations of Independent Commissioners Regarding Mapping of Arthurs Point, notified on 7 May 2018 ("the Commissioners' decision");

(d) in light of the number of submissions lodged to Stage 1 of [PC1], setting aside QLDC's decision to ratify the Commissioners' decision.

[17] The Society relies on affidavits from:

- Mr S H Beale dated 26 April 2019;
- Mr J R Haworth dated 27 May 2019;
- Mr M B Semple dated 29 May 2019, and in reply dated 19 June 2019;
- Mr B J Giddens, a planner, unsworn but filed on 5 June 2019 and in reply dated 24 June 2019.

[18] I am satisfied by these affidavits that members of the public, including members of the Society, may be directly affected by the Council's decision on those submissions.

[19] The Council has filed a notice[18] advising of its opposition supported by affidavits[19] from a consultant planner Mr C A Barr dated 14 June and 9 July 2019.

[20] The submitters referred to in the application for an enforcement order – GSL and Larchmont – have filed notices of opposition[20]. APLT has filed a section 274 notice dated 7 June 2019 and also opposes the relief sought. The Society on the other hand did not make any submission on the plan change(s) and nor did any of its members. Indeed, the Society did not exist at the time of the decisions version of PC1 ("PC1(D)").

[21] GSL and Larchmont rely on affidavits[21] from their consultant planner Mr C Vivian

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18 Dated 7 June 2019 [Environment Court document 10].

19 Environment Court documents 15 and 27.

20 Both dated 7 June 2019 [Environment Court documents 8 and 9].

21 Environment Court documents 16 and 19.

dated 14 and 25 June 2019.

[22] To set the context for resolving the issues raised by the Society's application I first set out the scheme of PC1 and the relevant submissions.

2 The scheme of PC1, the maps and the submissions

2.1 PC1(N) and its relationship to the operative plan

[23] The complex procedure adopted by the QLDC in its review of its ODP was described by the Environment Court in *Tussock Rise Ltd v Queenstown Lakes District Council*[22] ("*Tussock Rise*"). More recently the Environment Court – differently constituted – observed in *Darby Planning Limited Partnership v Queenstown Lakes District Council*[23] that "[t]he [PC1] provisions that become operative will merge into and form part of the ODP, rather than constituting a replacement district plan".

The ODP and the Section 32 Report

[24] Because the proceedings are about a plan change it is worth outlining very summarily the provisions of the plan being changed, that is the ODP. The ODP does not have an ONL(B) cutting out Arthurs Point, either in the planning maps or in its Appendix 8A. The ONL for the Wakatipu Basin is mapped provisionally (as a dashed line) on Appendix 8A of the ODP in the general vicinity of Arthurs Point[24].

[25] Part of PC1(N) is to introduce a new "Strategic Issues" Chapter 3. It also contains three intermediate chapters:

> Chapter 4 Urban development;
> Chapter 5 Tangata whenua;
> Chapter 6 Landscapes and rural character.

It is not clear what provisions of the ODP these three chapters replace since there is no equivalent mid-level chapter in the operative plan. Finally, PC1(N) introduced many

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22 *Tussock Rise Ltd v Queenstown Lakes District Council* above n 4.
23 *Darby Planning Limited Partnership v Queenstown Lakes District Council* [2019] NZEnvC 133 at [6].
24 M B Semple Exhibit "A" [Environment Court document 18a].

chapters dealing with different areas and activities in the district.

Chapter 3 PC1(N)

[26] The Strategic Directions chapter (Chapter 3) of PC1(N) contained a "goal" that "Our distinctive landscapes are protected from inappropriate development"[25]. A "goal" is presumably a kind of super-objective. The first relevant objective[26] in the PC1(N) cut down section 6(b) by protecting not the ONLs and ONFs of the district, but only their "natural character"[27]. The second objective is not relevant, and the third proposed objective[28] is to direct new subdivision development and use to occur in areas "... which have the potential to absorb change without detracting from landscape and visual amenity values". The only – but an important – implementing policy is[29] "to direct urban development to be within ... UGB[s] where these apply, or within the existing rural townships".

[27] It is worth observing that although an integrating and coordinating chapter like Chapter 3 in PC1(N) seems principled, it does potentially cause problems for the plan change process if it is not part of a rolling review (the increasingly common practice whereby one chapter is reviewed at a time at least at the upper levels of an operative district plan). I observed in *Tussock Rise*[30] that a potential difficulty with what the Council is doing here is that any subsequent step in the plan preparation process seems premature if the strategic issues have not been resolved first. That is particularly the case for QLDC where, as I have stated, one of the fundamental issues is the recognition/identification of the ONLs and ONFs for the district. Second there is the difficulty that PC1 is not in fact a proposed plan but a series of proposed plan changes[31] as discussed (again) in *Tussock Rise*[32]. The notification – quoted above – does not tell the reader which provisions or sets of provisions in the ODP are being retained, and which are not. Bearing those complexities in mind I now turn to the mid-level objectives and policies contained in PC1(N)'s Chapters 4 and 6 (Chapter 5 appears not to be relevant to this proceeding).

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25 Objective 3.2.5 "Goal" (PC1(N)) – renamed in PC1(D) as a "strategic objective").
26 Objective 3.2.5.1 (PC1(N)).
27 This may be changed since it is subject to appeal.
28 Objective 3.2.5.3 (PC1(N)).
29 Policy 3.2.5.3.1 (PC1(N)).
30 *Tussock Rise* above n 4.
31 Under section 79(1)-(3) RMA.
32 *Tussock Rise* above n 4 at [70]-[72].

Chapter 4 (Urban Development)

[28] In Chapter 4 (Urban development) of PC1(N), the first objective[33] requires that, in addition to coordinating with infrastructure, urban development is to be undertaken in a manner that protects amongst other things, outstanding natural landscapes and features. The only implementing policy referring to landscapes is "to avoid sporadic development that would adversely affect... landscape values [*inter alia*]" [34].

[29] The next objective[35] is to establish Urban Growth Boundaries "as a tool to manage the growth of major centres within distinct and defendable urban edges". (This reads more like a policy than a substantive objective).

Chapter 6 (Landscapes)

[30] The first objective[36] in Chapter 6 (Landscapes) of PC1(N) again[37] unhelpfully paraphrases section 6(b) RMA. The first implementing policy directs[38] that the district's ONLs and features be identified on the planning maps.

[31] The second policy[39] is:

> ... to classify the Rural Zoned landscapes in the District as:
> - Outstanding Natural Feature (ONF);
> - Outstanding Natural Landscape (ONL);
> - Rural Landscape Classification (RLC).

I will call rural zoned land with the ONL classification, ONL(Z). This is a confusing policy: it looks as if a policy exercise has to be carried out, whereas in fact all that may be intended is the parts of the Rural zone which have been found to be in (relevantly) an outstanding natural landscape, are notated as such. In effect the "classification" exercise of other Rural land to "RLC" is by elimination: it is all Rural zoned land that is neither in an ONL or an ONF.

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33 Objective 4.2.1 (PC1(N)).
34 Policy 4.2.1.6 (PC1(N)).
35 Objective 4.2.2 (PC1(N)).
36 Objective 6.3.1 (PC1(N)).
37 See Objective 3.2.5.1 (PC1(N)).
38 Policy 6.3.1.1 (PC1(N)).
39 Policy 6.3.1.2 (PC1(N)). This is now policy 6.3.1 in the PC1(D).

[32] The consequences of this classification are even more confusing because the rules and assessment criteria for development and subdivision of outstanding natural landscapes only relate to Rural land classified as ONL, not all ONLs. The converse of this is that there are no separate rules for developing for example Low Density Residential ("LDR") zoned land which is contained within an ONL. I will call this "the policy gap" in PC1(N). A similar policy gap for land zoned "Open Space" has recently been filled by a subsequent variation.

[33] An important policy in PC1(N) for its relevance to these proceedings states[40] (relevantly):

> 6.3.1.7 When locating urban growth boundaries or extending urban settlements through plan changes avoid impinging on [ONLs] or [ONFs] ...

Since UGBs are merely a tool[41], whereas identification of ONLs is a matter of national importance, this policy reflected that recognition of ONLs should come first and that those landscapes should then be avoided when drawing UGBs.

[34] Maps 13 and 39 in PC1(N) are theoretically inconsistent with that, because both show a UGB around the developed zonings of Arthurs Point village despite it being within an ONL(B). However, there are no adverse practical consequences precisely because the urban area is already developed. This represented a pragmatic technique in the ODP which has been carried forward to PC1(N).

[35] For the purposes of this decision I do not need to set out the changes to PC1(N) as made by the Council after the Commissioners' decision other than to planning Map 39 which was also renumbered Map 39a.

2.2 <u>The maps in PC1(N)</u>

[36] The "Legend and User Information" page in the PC1(N) maps shows:

- an ONL classification within the Rural Zone. This is identified on the maps

40 Policy 6.3.1.7 (PC1(N)) now amended and renumbered as 4.2.1.5 in PC1(D) and subject to appeal.
41 Objective 4.2.2 (PC1(N)) quoted above.

by the acronym "ONL" written on the yellow wash which the Legend shows is the Rural zone; and

- land described as being within or outside a brown dashed line which the key to the maps calls "Landscape classification (ONL, ONF, RCL)" (but I always need to bear in mind that despite the key, there is no brown dashed line on Map 39).

As stated I refer to rural land classified as ONL as "ONL(Z)", and the brown ONL boundary as the "ONL(B)". A map in PC1(N) thus had two ways (with different purposes as I discuss shortly) of describing outstanding natural landscapes or parts of them:

(1) the notation "ONL" on the yellow wash (which signifies a "Rural" zoning);
(2) a brown double-dashed line which marks – according to the Legend at the side of each map – the boundary of the outstanding natural landscape or the outstanding natural feature. The reference to RCL covers where a Rural Zone is "subdivided" (classified) into contiguous areas of ONL(Z) on one side of the ONL(B) and RCL on the other (which side of the line is ONL is left to be inferred from the context).

[37] In Decision *AP2*[42] I wrote:

> The two ways of describing an ONL are troubling because of the potential for misunderstanding. The difference is that the ONL(Z) classification – which the (first) procedural decision described[43] as a type of subzone – only applies to the large Rural Zone. In contrast, examination of the planning maps (Mr Goldsmith took me through a number) shows that the brown ONL(B) boundaries sometimes include land outside the Urban Growth Boundary, or which is in other rural zones (lower case) such as Rural Residential, or even in residential zones. The absence of a brown line on Map 39a might suggest that there is no outstanding natural landscape in the area of the map. However by reference to the wider map (39) it appears that despite the urban conclave Arthurs Point is actually within an ONL(B). There is no visible brown line on Map 39 in the [PC1(N)], that is, no ONL boundary is shown. Indeed, the Hearing Commissioners seem to have agreed with Mr Espie, the landscape architect, that in the [PC1(N)] Map 39a "… all of Arthurs Point currently [fell] within the ONL"[44].

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42 *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* above n 3 at [13].

43 *Arthurs Point Trustee Limited v Queenstown Lakes District Council* above n 2 at [20]. That the classification is a kind of subzone is borne out by the fact that different assessment criteria apply to development under each classification (e.g. Rule 21.8.1 PDP).

44 QLDC Report 17-4 at [67].

[38] In effect the land within an ONL(Z) is a subset of (Rural) land contained within an ONL(B). That is confirmed by the fact that the PC1(N) planning maps (both in the notified and decisions versions) show a number of places where the ONL boundary does not coincide with the Rural Zone boundary. Examples identified by counsel during the hearings on Arthurs Point are:

- Map 2, 5 and 16b (Makarora Township);
- Map 8 and 17 (Hawea Township);
- Map 9 and 25b and 25c (Glenorchy and Kinloch);
- Map 10 and 24a (Cardrona);
- Map 21 (base of Mt Iron);
- Map 30 (Frankton (north));
- Map 37 (part of Medium Density Residential ("MDR") Kelvin Peninsula);
- Map 39 (Jacks Point).

[39] Those maps show that the ONL(B) not only (usually) separates ONL(Z) from RLC within the Rural zone, (but not in the case of Map 39 PC1(N)) but also runs across zone boundaries and into other zones. Consequently there are areas of Open Space zones, Jacks Point zone, Rural Visitor zones, special zones, MDR zones and LDR zones within the ONL(B) including villages such as Glenorchy, Makarora and Hawea and most relevantly Arthurs Point. Having these areas in an ONL was (and in some cases remains) anomalous because there is no policy guidance as to what the consequences of that should be. This may not matter for developed land but is potentially serious for (literal) greenfields areas included within an ONL(B) but not zoned rural. The Council has by a variation attempted to remedy this problem for Open Space zones but not for others.

[40] Clearly the two "ONL" provisions are closely related but they have different purposes:

(1) the ONL(B) lines both identify the borders of the outstanding natural landscape and define the areas in which high level objectives[45] and policies[46] are operative. Policy 6.3.1.7 of PC1(N) is, as I have said, particularly important because it prevents UGBs from encroaching into

45 Objective 3.2.5.1 and objective 6.3.1 (PC1(N)).

46 Policy 6.3.1.7 (PC1(N)) now policy 4.2.1.5 (PC1(D)).

ONLs;

(2) in contrast the ONL(Z) works further down inside the PC1 hierarchy of "subsequent actions" as envisaged by *Man O'War*[47]: it simply entails that a specific set of rules and assessment matters applies to the subzone or classification of the Rural Zone where it is inside an ONL(B).

[41] On Map 13 of PC1(N) the ONL(B) generally follows the line on Appendix 8A of the ODP. Turning to the vicinity of the existing urban area of Arthurs Point, I have recorded this is shown on Map 39 of PC1(N). A copy is annexed as "A". Three things should be noted about this page:

- Map 39a on the right-hand side relates to Kingston at the southern end of Lake Wakatipu and is irrelevant to this proceeding;
- in the Decisions version of PC1 ("PC1(D)"), Map 39 is renumbered as Map 39a and the Kingston map is renumbered as Map 39b;
- there is an area hatched by hand at the southern end of Arthurs Point on Attachment "A". That hatching is not part of PC1(N)'s Map 39 but added to denote (approximately) the Shotover Loop as described in Larchmont's submission;
- most of the Shotover Loop properties are shown as Rural zone and in the ONL(Z), but part, north of the Rural zone edge is zoned as Low Density Residential zone.

Conversely, there is nothing on Map 39 to show where the ONL(B) is in the vicinity of Arthurs Point.

[42] Before notification of PC1(N) the Council had prepared evaluations under section 32 RMA. The relevant report is the Section 32 Report on *Landscape, Rural Zone and Gibbston Character Zone* ("the Section 32 Report"). It says[48]:

> It is inefficient to continue with the case-by-case classification of landscape categories.

[43] The Section 32 Report does not suggest that the anomalous but practical habit of

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47 *Man O'War* above n 10 at [62].

48 *Landscape, Rural Zone and Gibbston Character Zone* Section 32 Report p 24.

including small urban settlements within ONLs would change. Certainly it did not specifically address zoning of the Shotover Loop or the Atley Road properties or even draw a brown ONL(B) line around Arthurs Point village.

The structure of PC1(N)

[44] To ascertain where the ONL(B) is the reader has to look at Map 13 of PC1(N) (a copy is annexed as "B"). A close examination of Map 13 suggests that the whole of Arthurs Point is within an outstanding natural landscape. Thus I do not accept Ms Baker-Galloway's submission for GSL that the only logical interpretation of Map 39a when read by itself is that the whole of Arthurs Point is within an outstanding natural landscape. She suggests[49] that is "assisted" by reference to other maps, but I think she significantly underplays the point. A reader of the Map 39 in PC1(N) would not have a clue about where the ONL(B) is in the vicinity of Arthurs Point without reference to Map 13. That is not "assistance": that is essential knowledge.

[45] In the context of the issues before the court, the scheme of PC1(N) and PC1(D) seems to contemplate that the landscape and zoning issues should be resolved in the following order noting that step 1 does not involve policy issues as stated in *Man O'War*[50], but steps 2 to 4 do:

1. recognition of outstanding natural landscapes and their boundaries by the drawing of brown dashed ONL(B) lines;
2. fixing the UGB boundary provided it does not impinge on ONLs;
3. if an ONL is over a Rural Zone (or now an Open Space zone as a consequence of the variation) classification that zone into one of three "subzones" or areas:
   - ONL(Z);
   - RLC;
   - ONF.
4. If a UGB is moved to include rural land, then that may be rezoned for example as LDR and consequently any rural subzoning classification such as ONL(Z) is removed (by default).

49 GSL opening submissions at [22] [Environment Court document 22].

50 *Man O'War* above n 10.

There may of course be other intermediate steps arising from other submissions and/or appeals but those are the crucial steps relevant here.

[46] As will appear, GSL made a submission starting at step 2 and jumping down to step 4. While the express words of its submission relate to those steps, it also claims its submission and the summary of it in the SDR fairly and reasonably raises a challenge to the ONL(B) in relation to its land.

[47] As part of the context to this proceeding I should add that the appeal by UCESI in ENV-2018-CHC-56 starts and (directly) finishes at Stage 1. There is potential jurisdiction[51] for it to seek consequential relief at following steps but these have been challenged by the landowners and that will be the subject of a separate decision.

[48] The conundrum for the court in relation to its jurisdiction over the Shotover Loop is that the UCESI submission and appeal do not engage directly with the later steps; conversely the GSL and Larchmont submissions do not appear to engage directly with step 1.

2.3 The summary of decisions requested

[49] I will not describe the submissions here since for members of the public interested in the environs of Arthurs Point the next thing they knew about PC1(N) after initial notification was not the submissions but the Council's notification of the SDR.

[50] I will turn to that shortly but first I record that a set of maps[52] called the "Online Rezoning Map" ("the ORM") was loaded on one of the Council's webpages from at least 25 August 2015[53] (prior to notification of the SDR) containing a map showing the rural areas proposed (in over 300 submissions) for rezoning. There was conflicting evidence as to where this map was on the Council's website and when it was uploaded. In effect interested parties could (theoretically) look for submissions on areas of interest to them before notification of the SDR.

[51] The SDR[54] under clause 7 of Schedule 1 RMA was notified on 3 December 2015.

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51 Clause 10(2) Schedule 1.

52 Exhibit "A", produced by Mr Semple [Environment Court document 18a].

53 C A Barr affidavit 14 June 2019 at [11] [Environment Court document 15].

54 M B Semple affidavit 29 May 2019 Appendix O [Environment Court document 5].

The public notice states[55]:

> In addition to viewing the Summary of Decisions Requested and Full Submissions online it can also be viewed at any of the following locations …
> [a list of Council offices and libraries followed]

[52] It includes the following summary of the relief sought in the Swan/GSL submission:

> 494.1
> Submitter owns the titles 29585 and OT17C/968 located at 111 Atley Road, Arthurs Point, Queenstown. Supports that part of the land zoned Low Density Residential; opposes Rural Zoning over that part of the land that extends to the south of the proposed Low Density Residential Zoning; and opposes the [Urban] Growth Boundary and Landscape Classification.
>
> Requests that Council:
>
> – Delete 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.
> – Extend the Urban Growth Boundary around the extended Low Density Residential Zone as requested above. By default this then deletes the ONL landscape classification from that part of the property.
> – The balance of land remains Rural Zoning.

[53] As it happens the second half of the GSL Summary (quoted above) repeats almost verbatim what is stated in the original submission. The SDR also references Arthurs Point and the Swan/GSL land by title reference and street address and refers to the fact that there is a map (a copy is annexed as "C") attached to the submission showing the extent of land sought to be rezoned.

Larchmont

[54] The relief sought by Larchmont was accurately summarised in the SDR as seeking a movement of the SDR and a rezoning of the area shown on the attached map to LDR. It does not refer to a change of the ONL(Z) or a movement of ONL(B) at all. Further, there is no street address given for the property and no map annexed to the

55 Memorandum for QLDC 14 December 2018 Appendix A in the *UCESI appeal* attaching some of the Summary of submissions.

Summary so it is impossible to work out where on Map 39 ("Arthurs Point, Kingston") is referred to.

Cross-submissions

[55] Neither UCESI nor the Society lodged cross-submissions[56] on the specific Shotover Loop submissions.

2.4 The Commissioners' decision (17 April 2018)

[56] As I have recorded, the Commissioners' decision included the Shotover Loop and land at 182D Atley Road[57] within the UGB and excluded it from the ONL. It did so by drawing a brown line showing a new ONL(B) around Arthurs Point and the extra (rural) land of the Shotover Loop. Since no submission sought the former outcome this (large) change was made by purporting to use powers under clause 16(2) of the First Schedule. That states:

> **16 Amendment of Proposed Policy Statement or Plan**
>
> (1) A local authority must, without using the process in this schedule, make an amendment to its proposed policy statement or plan that is required by section 55(2) or by a direction of the Environment Court under section 293.
>
> (2) A local authority may make an amendment, without using the process in this schedule, to its proposed policy statement or plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.

There are two identified circumstances when clause 16(2) can be used. Either:

(1) information in the plan may be altered where it is of minor effect; or
(2) the plan may be changed to correct minor errors.

[57] In *Re an Application by Christchurch City Council*[58] the Planning Tribunal held that, given the general intention of the RMA to preserve the rights of public participation, clause 16 was not intended to allow the Council to make changes to the information contained in a plan where, had that information been present in the proposed plan, it might have drawn a submission. In this proceeding the existence of the enforcement

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56 Under clause 8 Schedule 1 RMA (in its pre-2017 form).
57 See [14](c) above.
58 *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431.

proceedings is evidence that the insertion of the ONL(B) into the PC1(N) planning maps has a more than minor effect on members of the public.

[58] Further, while the existence of an ONL may be a matter of fact – see *Man O'War*[59] – that information is unlikely to be of minor effect given that the recognition of an ONL is a matter of national importance[60].

[59] On the facts before me I have real doubts about whether either of the clause 16(2) tests is met. That is of some importance because the Council's decision on this tends to validate its decision on the Shotover Loop in a way that could not possibly have been foreseen by any reader of the SDR.

3. Was the SDR unfair and/or misleading?

3.1 The requirements of clause 7 Schedule 1 and fairness

[60] The importance of public participation in plan (changes) processes has been stated many times. The requirements of Schedule 1 to achieve that were summarised recently by the High Court in *Albany North Landowners v Auckland Council*[61] ("*Albany North*"). Whata J stated:

> Participation by the public in district and regional plan processes is a long standing policy of the RMA[62]. The First Schedule process envisages an opportunity for participation by affected persons. There must be public notification of a proposed policy statement or proposed plan[63]. Directly affected ratepayers must be served a copy of a public notice of a proposed plan of (sic) by a territorial authority[64]. Regional Councils must send a copy of a public notice and such further information as the [C]ouncil thinks fit relating to a proposed policy statement or plan to any person likely to be directly affected by the proposed policy or the plan[65]. Any notice must, among other things, state that any person may make a submission on the proposed planning instrument[66]. Any person (except trade competitors unless directly affected by a non trade competition effect) may make a submission. The

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59 *Man O'War* above n 10 at [76].
60 Under section 6(b) RMA.
61 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [110].
62 *Discount Brands Limited v Westfield (New Zealand) Limited* [2005] NZSC 17; [2005] 2 NZLR 597.
63 Clause 5(1)(b) of the First Schedule RMA.
64 Clause 5(1A) of the First Schedule RMA.
65 Clause 5(1C) of the First Schedule RMA.
66 Clause 5(2) of the First Schedule RMA.

> Council must then give public notice of the availability of a summary of submissions and any person may make further submissions in support or opposition to a submission[67]. Public hearings must be held unless no submitters wish to be heard[68].

[61] A crucial step in assisting the public to decide whether to participate is the notification of the SDR under clause 7. That document is obviously important because it gives the public notice of what submissions they should check to see if they are affected. It is also important to realise that questions as to the scope (reasonableness and fairness) of submissions, when the Council is deciding what it may decide under clause 10 of Schedule 1, come after questions about the adequacy of the SDR.

[62] Clause 7 of Schedule 1 sets out the requirements for Council in relation to publicly notifying a summary of decisions requested on a proposed district plan or (in this case) plan change:

> **7 Public notice of submissions**
>
> (1) A local authority must give public notice of –
>
> (a) the availability of a summary of decisions requested by persons making submissions on a proposed policy statement or plan; and
>
> (b) where the summary of decisions and the submissions can be inspected; and
>
> (c) the fact that no later than ten (10) working days after the day on which this public notice is given, the persons described in clause 8(1) may make a further submission on the proposed policy statement or plan; and
>
> (d) the date of the last day for making further submissions (as calculated under paragraph (c)); and
>
> (e) the limitations on the content and form of a further submission.
>
> (2) The local authority must serve a copy of the public notice on all persons who made submissions.

[63] In *re Christchurch City Council (Montgomery Spur)* the Environment Court wrote[69]:

> In relation to the general requirements for notification we agree with the definitions of "summary" given in *Wellington City Council v Cowie*[70] **that it is "a concise statement of the main points ...". We hold that the summary of decisions requested**[71] **must be "fair**

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67 Clauses 7 and 8 of the First Schedule RMA.

68 Clause 8B of the First Schedule RMA.

69 *Re Christchurch City Council* (NZEnvC) C71/99; (1999) 5 ELRNZ 227 at [15].

70 *Wellington City Council v Howie* [1971] NZLR 1089 at [116].

71 Clause 7 of the First Schedule RMA.

> **and accurate and certainly not misleading":** to adopt the phrase in *Hodge v Christchurch City Council*[72]. **It must be sufficient to alert the reasonable non-expert reader of the summary to the fact that they should go to the submissions in full and examine the proposed differences for themselves.**
> [Emphasis added]

[64] *Healthlink South Limited v Christchurch International Airport Limited*[73] ("*Healthlink*") concerned the Christchurch City Council's proposed new plan under the RMA. Healthlink, which owned land around the Templeton Hospital lodged a submission that "it would be more appropriate to apply the provisions of a low density living zone to the area" – and I note this was Healthlink's real intention – but it sought as relief a rule for permitted activities including the phrase:

> *As for Living 1 zone (Rural activities ...)*
> [my underlining]

The local authority (the Christchurch City Council) summarised the submission in identical terms. No party lodged a cross-submission. It turned out that Healthlink really sought that the underlined phrase should read "Residential activities ..." which is consistent with the earlier statement in the submission about low density living.

[65] Christchurch International Airport Limited and another party sought a declaration from the Environment Court that the alternative phrase could not be substituted by the local authority. The Environment Court stated: "...the issue raised ... is what happens if the local authority summary is absolutely accurate but misleading"[74] and declared[75]:

> ... that the Council has no power to amend Clause 2.1 in the Special Purpose (Hospital) Zone section of the plan to provide for residential activities to be carried out on the Templeton Hospital land under a default zoning unless the Council amends the clause 7 summary and renotifies the availability of it so that any interested persons may lodge further submissions if they wish to.

[66] On appeal Hansen J stated[76]:

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72 *Hodge v Christchurch City Council* [1996] NZRMA 127 at [137].
73 *Healthlink South Limited v Christchurch International Airport Limited* [2000] NZRMA 375 (HC).
74 *Christchurch International Airport Limited v Christchurch City Council* C77/99 (NZEnvC) at [20].
75 *Christchurch International Airport Limited v Christchurch City Council* above n 74 at [27].
76 *Healthlink* above n 73 at [19].

> Crucial to the ... Environment ... Judge's finding was whether or not the error had the potential to mislead a reasonable non-expert reader as to what was intended by Healthlink. It seems to me, with all due respect to the extensive submissions, that the evidence that such confusion was possible is compelling.

The Environment Court decision was upheld.

[67] While the decisions discussed above seem to be the most relevant to the question of what is required under clause 7 Schedule 1, counsel outlined the requirements as to the scope of a submission (and a local authority's decision on it) as set out in a series of longstanding decisions of the High Court. The leading authority is *Countdown Properties (Northlands) Limited v Dunedin City Council*[77] ("*Countdown*") where the Full Court stated:

> The local authority or tribunal must consider whether any amendment made to the plan ... as notified goes beyond what is reasonably and fairly raised in submissions on the plan ... It will usually be a question of degree to be judged by the terms of the proposed ... [plan] and of the content of the submissions.

The point about reference to the proposed plan – in addition to the submissions themselves – is in my view important. It is also worth bearing in mind that the Full Court was there writing about the limits of the Council's decision[78] not the earlier question as to what is reasonably and fairly raised by the SDR.

[68] In *Royal Forest and Bird Protection Society Incorporated v Southland District Council*[79] Panckhurst J observed that the assessment of whether the amendment was reasonably and fairly raised should be approached in a "realistic and workable" fashion[80].

[69] Ms Hockly also submitted, relying on *Albany North*, that reasonably foreseeable consequential relief may be in scope. I have previously pointed out a potential ambiguity in that decision[81] first in *Federated Farmers of New Zealand (Inc) Mackenzie Branch v*

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77 *Countdown Properties (Northlands) Limited v Dunedin City Council* (1994) 1B ELRNZ 150; [1994] NZRMA 145, p 44.

78 Under clause 10 Schedule 1.

79 *Royal Forest and Bird Protection Society Incorporated v Southland District Council* [1997] NZRMA 408, p 10.

80 *Royal Forest and Bird Protection Society Incorporated v Southland District Council* above n 79.

81 *Albany North* above n 61.

Mackenzie District Council (Eleventh Decision)[82] and more recently in *Tussock Rise*[83]. While I accept that consequential relief may be granted as a matter of law[84], subject to considerations of fairness (for which section 293 may be a remedy) and the application of *Motor Machinists*[85], I consider that *Albany North* did not introduce a principle that submissions on lower order provisions in a plan (change) can drive 'consequential' changes further up the hierarchy of provisions in the same document, precisely because they are not usually (in my view) 'reasonably foreseeable'.

[70] It is also worth noting that reasonableness and fairness may work against each other in this context. There is a tension between a reasonable interpretation of a submission – which tends to widen the express words – and fairness, which tends to read them closely so that members of the public are not surprised.

[71] Most of those High Court authorities were discussed in *Albany North*. Some care has to be taken over what that decision says about issues of scope since the proceeding was governed in part by special legislation. However, on adequacy of a SDR under the RMA *Albany North* is now a leading authority subject to bearing in mind how contextual these issues are as that decision recognises. Whata J wrote[86]:

> I agree a search on a specific address, street or neighbourhood might not uncover submissions seeking residential intensification at an address, street or neighbourhood. However, I do not accept that this is the standard of enquiry to be expected of a potentially affected landowner on matters as significant as 30 year provision for urban growth and residential amenity. It is not necessary to be precise about the standard, but it must be reasonable in the context of the planning process and the issue under consideration. The present context included a s 32 report signaling that major residential intensification was needed and required major reformation of Auckland residential zones. The central issue raised by the "out of scope" parties is the effect of provision for residential intensification on local character and amenity. In this context, a reasonable level of diligence is to be expected by landowners genuinely interested in preserving the status quo, whether at a site specific or more general neighbourhood or zone level. It is not sufficient to simply examine the PAUP maps or the summary of submissions on those maps, which as the s 32 report signaled, were based on preliminary assessments of growth only. Rather, *a reasonable landowner genuinely interested in preserving, for example, the status quo in terms of local character*

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82 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2017] NZEnvC 53 at [176] and [177].

83 *Tussock Rise Limited v Queenstown Lakes District Council* above n 4 at [44]-[46].

84 Clause 10(2) Schedule 2 RMA.

85 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290; [2014] NZRMA 519 at [81]-[83].

86 *Albany North* above n 61 at [172].

> *and amenity should be expected to search more broadly on topics such as urban growth and residential zoning which directly affect residential character and amenity.*
> [Italics added]

As I understand the decision Whata J says that merely searching the SDR by street address may not be enough depending on the context. Rather a reasonable landowner interested in protecting the status quo should be expected to search more broadly. The decision does not assist much when it is suggested that the opposite has taken place.

[72] For example in this case Mr S H Beale, a planner and ecologist who has lived at 61 Mathias Terrace, Arthurs Point for over 14 years undertook[87] a broad online search and found no reference to introducing a new ONL(B) between Arthurs Point and the Shotover River, and failed to find the references in submissions to a movement in the UGB and the LDR zone for Swan/GSL or Larchmont. It appears he did not use a search function.

[73] I consider *Hodge v Christchurch City Council*[88] and the succeeding Christchurch cases on clause 7 are consistent with the general principles set out above and confirmed by *Albany North*. Obviously the principle as to reasonableness (legality) and fairness need to be applied carefully about a summary in a SDR because the reader should, if in doubt, go to the submissions themselves. Subject to that qualification, in summary a claimed reading of a summary of a submission may be unreasonable because the submission is irrelevant or raises "no reasonable … case"[89] or is "frivolous or vexatious"[90], or where it is not "on" the plan or plan change: *Clearwater Resort Limited v Christchurch City Council*[91] and *Palmerston North City Council v Motor Machinists Limited*[92] ("*Motor Machinists*").

[74] There is an important qualification to those principles which recognises both the impracticality of hardcopy searching of a SDR and the overwhelming importance these days of online searching since it is now standard practice for Councils to have dedicated webpages for plan changes (and new plans). While recognising that there is no statutory obligation to put the SDR online, if a local authority has said it would do so then it has an

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87 S H Beale affidavit 26 April 2019 at [6] [Environment Court document 6].
88 *Hodge v Christchurch City Council* above n 72.
89 Section 279(4)(b) RMA.
90 Section 279(4)(a) RMA.
91 *Clearwater Resort Limited v Christchurch City Council* (HC) Christchurch AP34/02 William Young J.
92 *Motor Machinists* above n 85.

obligation to ensure that the information is accurate: *Creswick Valley Residents Association v Wellington City Council*[93]. MacKenzie J qualified that by observing:

> It would not be appropriate to apply an overly critical assessment to whether this additional information was misleading. To do so might discourage Councils from doing more than the bare statutory minimum.

[75] That is illustrated to some extent in *Albany North* where in relation to the Auckland Council's online summary under clause 7 Whata J stated[94]:

> The Council noted that the submissions seeking residential intensification were coded to a "RPS", "Urban Growth", "Residential Zones" and Topic "Residential"; Theme "Zoning" and Topic "Central" and Theme "General" and Topic "Cross Plan Matters". A cursory search of topics such as "Urban Growth" and "Residential" quickly brought into frame submissions relief on zoning and intensification, including those seeking wholesale reformation of residential zones to accommodate growth. A more refined, but not arduous search, also revealed changes specifically affecting various neighbourhoods and in particular by reference to the HNZC submission. I am satisfied therefore that the Council summary of submissions was sufficiently accessible to persons genuinely interested in the issues of urban growth, residential intensification and residential amenity to provide sufficient notice of the potential for changes of the kind recommended by the IHP.
> [footnote omitted]

[76] It appears that conversely an alleged reasonable reading of a SDR may be unfair if it does not raise the issue in a way that alerts members of the public to the fact that a wider or different issue is being raised. In my view an otherwise reasonably "workable and practicable" solution cannot be adopted if it unfairly prejudices potential submitters.

3.2 The online SDR

[77] From the evidence it appears that there were potentially three ways in which persons interested in changes to the ONL(B), UGB or zonings at Arthurs Point could find submissions on those matters:

(1) by searching the online SDR;

(2) by examining the ORM;

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93 *Creswick Valley Residents Association v Wellington City Council* [2012] NZHC 644; [2013] NZRMA 503 at [64].

94 *Albany North* above n 61 at [173].

(3) by inspecting the hardcopy SDR.

I will consider each in turn. My consideration has not been helped by conflicts on the evidence which were not resolved by cross-examination. I will be careful to bear in mind that the basic burden is on the Society to prove the relevant facts.

[78] As I have recorded, the availability of the SDR was posted on the Council's website and advertised[95] in local newspapers on 2 December 2015.

[79] The Society argues that the SDR was not organised in a way that enabled a non-expert interested person to understand what part of the plan or location of land to which a submission related. It says that the website given in the public notice was not the "website address providing a direct link to the online version of the [SDR] or to the full submissions"[96]. Its witness Mr M B Semple describes the summary as "unwieldy, very difficult to navigate, and … riddled with errors"[97]. The Society says that ordering the SDR by submission number of the submitter was not intuitive, as the reader would have to know what they were looking for (i.e. know the identity and number of an original submitter).

[80] In response Ms Baker-Galloway submits that there is no evidence from the Society that its members looked for or used the SDR in December 2015, and failed to find the SDR itself, or failed to work out how to search the "PDF" document of the online summary for Arthurs Point. That is not correct: Mr Beale says he did – although he was not specific about the date. He states[98]:

> I was aware that QLDC had notified the [SDR]. I scanned through the summary of submissions which I accessed through a link to all submissions submitted for each zone. I recall the summaries were listed by submitter name. I looked for anything that might be related to Arthurs Point under the low residential zone and rural zone chapters, but in amongst the large number of submissions I did not see anything that alerted me to something I might be interested in submitting on. I did not see any summary for Larchmont or Swan (or Gertrude's Saddlery).

He was not cross-examined.

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95 Transcript (26/6/19) pp 4 and 5.

96 Society opening submissions at [21] [Environment Court document 20].

97 M B Semple affidavit in reply at [18] [Environment Court document 18].

98 S H Beale affidavit 26 April 2019 at [6]-[7] [Environment Court document 6].

[81] For the Society Mr Semple deposes that he accessed an archive version of the website provided to him by QLDC[99]. He searched the archive versions and the first mention of how to search the SDR appeared after the website was edited in October 2016 when under the heading "Summary of Decisions Requested" some italicised words appeared: "Note: you can search for key words or phrases with these documents using the "Find" function with PDF". In his opinion this established that the earliest date at which the instruction regarding the search function for the Summary was available online was 31 October 2016[100] – that is 11 months after the cross-submission period closed. He was not cross-examined on this either.

[82] GSL, Larchmont and the Council rely on the affidavits of Mr Vivian and Mr Barr to establish that the search function was always there. Their opinions were that a reasonable layperson using the online SDR could have located a particular submission of interest by either of two methods[101]. Ms Baker-Galloway summarised these as:

- using the CTRL+F search function within the PDF[102] document. This is a built-in function in all PDF documents. The Society asserts[103] that this is a Council developed function that was not available in the SDR document. That is not correct. The CTRL+F search function can be used in any PDF document containing words;
- scrolling through the SDR and identifying a particular submission of interest based on reference to a planning map or provision, area of land, submitter name or submitter number. In regard to the Swan / GSL and Larchmont submissions, both referenced planning Map 39 and Arthurs Point which would have alerted any person with a potential interest in the Arthurs Point area.

[83] Ms Hockly submits that while the SDR document was large, the Council had collated the submission points as best as it could. Searching through the Summary online would have been a far easier task than reviewing all the written submissions made on Stage 1 of PC1. In any event the Council complied with its Schedule 1 requirements in compiling the SDR. Noting that the standard is reasonable compliance with clause 7, she submits that the Council took appropriate measures to make the Summary useable for laypersons.

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99 In response to a LGOIMA request.

100 M B Semple affidavit in reply 19 June 2019 at [9] [Environment Court document 18].

101 GSL opening submissions at [42] [Environment Court document 22].

102 "Portable Document Format".

103 M B Semple affidavit in reply 19 June 2019 at [9] [Environment Court document 18].

[84] Mr Semple seems to be envisaging that there was a special search tool on the Council's "PDP" webpage. On the evidence of Mr Barr and Mr Vivian which I prefer, subject to two qualifications, I find that the standard search tool "CTRL+F" was available in the PDF[104] document which can in theory be used by anyone with a PC at any time. The first qualification is that anyone with a PC knows, that is not necessarily the case in practice. Second, unless the standard user had prior knowledge of the PDF's "Ctrl+F" function it may not have been clear to them how to search the online SDR as there is no evidence the Council's advice note about how to use it was on the website prior to 2016.

[85] On balance, I find that the Society has not made out its case in relation to the unreasonableness of the process for notifying the summaries of the GSL and Larchmont submissions online. As for the fairness of the summaries, that is the same issue as arises for any (notional) inspection of the hardcopy SDR and I will address that below.

3.3 The Online Rezoning Map

[86] The Society asserts[105] that the online mapping tool was not made available on the Council's website for the entirety of the further submission period.

[87] Mr Beale deposes[106] that he "did not submit on any matters to do with Arthurs Point as the PDP map for Arthurs Point (39A), which I looked at, showed no changes to the low density residential area". He did not say when he looked at the map, and the fact he referred to the map as "39a" not "39" suggests he looked at a later version of the map as the map renumbering is listed in the schedule of changes document 2016 on the notified plan page[107].

[88] Mr Beale says:

> I am instructed that Craig Barr of QLDC has said that there was an online zoning map accompanying the summary of submissions. The only planning map for the PDP on the website was map 39A which was accessed via a link that you could click on. There was no other map.

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104 "Portable Document Format". It is designed to assist digital file exchange so that any person with a PC (and later Apple products) could open, read and print the saved document.

105 Society opening submissions at [36] [Environment Court document 20]; B Giddens affidavit in reply dated 24 June 2019 at [41] [Environment Court document 17].

106 S H Beale affidavit 26 April 2019 at [5] [Environment Court document 6].

107 C A Barr affidavit 14 June 2019 at [12.3] [Environment Court document 15].

[89] Another deponent for the Society, Mr Semple did not examine the SDR or ORM in December 2015 but has tried since to work out what was searchable online. In his opinion[108]:

> I have looked at QLDC's website many, many times and it is only in preparing this affidavit and spending many hours looking at QLDC's website that I have come across the online zoning map, which is now available on QLDC's website and is accessed by a link called "View Online Map of Areas Submitted for Rezoning", which is buried under the heading "Related Submission Documents" near the foot of the page headed up "Proposed District Plan – Stage 1", which can be found here: https://www.qldc.govt.nz/planning/district-plan/proposed-district-plan-stage-1/.

[90] The experiences of the expert planners called for (respectively) GSL/Larchmont and the Council were different. Mr Vivian and Mr Barr state in their respective affidavits that they each personally used[109] the online mapping tool after the SDR was notified. Neither was cross-examined. However, there is some internal inconsistency in their evidence about the availability of the online mapping. In particular, although Mr Barr (for the Council) produced screenshots of pages said to have been available online during the further submission period which commenced 3 December 2015, these pages were produced later in the Stage 1 process (in 2016) and not during the Stage 1 further submission period. That is clear from one of the screenshots under the heading 'Proposed District Plan – Stage 1' on the left of the page: there is a link to the 'Wakatipu Basin Land Use Study', which was commissioned in 2016. Similarly, the search tool shown in Mr Vivian's affidavit is a screenshot of the current search tool[110]. In other words, their exhibits do not bear out their assertions.

[91] Further, Mr Barr admits[111] that the ORM was originally posted on an incorrect location on the Council's website on 3 December. It was moved to the correct location on 4 December 2015[112]. He added[113] his recollection that the link and the Summary webpage was in a more prominent and readily accessible location in December 2015 than it is now. He did not provide a screenshot to establish the correctness of that

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108 M B Semple affidavit at [45] [Environment Court document 5].

109 C Vivian affidavit 14 June 2019 at [49] [Environment Court document 16]; C Barr affidavit 14 June 2019 at [54] [Environment Court document 15].

110 M B Semple affidavit in reply 19 June 2019 at [12] [Environment Court document 18].

111 C A Barr affidavit 14 June 2019 at [52] [Environment Court document 15].

112 Referring to his Exhibit K.

113 C A Barr affidavit 14 June 2019 at [56] [Environment Court document 15].

memory, so I am rather dubious about it.

[92] For Larchmont and GSL Mr Vivian deposes that he did not use the ORM until on or after 7 December 2015[114]. He subsequently used it although he does not say where it was eventually located or what further assistance he had from a Council officer Mr B Devlin after the latter's email of 7 December which stated only "It's on the website"[115] to enable him to find maps on the QLDC's website.

[93] All this is complicated by the fact that the online maps were apparently continually annotated by different authors/units within the Council. Many were annotated by persons identified with the 'QLDCGIS' descriptor[116]. Mr Giddens[117] deposes that the QLDCGIS is a different website page provided by a third party service provider and the mapping function is unrelated to the PDP process[118]. This fueled both Mr Giddens' and Mr Semple's suspicion that the ORM was originally published in the wrong location on the Council's website[119] and may have continued to be in the wrong place for a period of time thereafter.

[94] There are in fact two websites identified in the evidence: the QLDC PDP page web address is https://www.qldc.govt.nz whereas the ORM is found on http://qldc.maps.arcgis.com. The ArcGIS online is a special platform that runs an interactive map and the PDP (i.e. PC1) webpage refers to that if the user of the PDP (PC1) webpage clicks on "Maps" they are transferred to the GIS website. There are separate webpages for the notified and decisions versions in addition to the website for the ORM.

[95] Even after the date that the Council says the ORM was available (on 4 December 2015), amendments were made to it from 7 December 2015 for the remainder of the submission period and by several persons. The page containing the link to the ORM was amended at least 11 times between 2 and 11 December 2015 at the Council's end[120] and various changes were made to the content of the ORM itself from 7 December 2015

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114 C Vivian affidavit 14 June 2019 at [48] [Environment Court document 16].

115 C Vivian affidavit 14 June 2019 Annexure B [Environment Court document 16].

116 For example, see page 4 of Annexure "J" of C A Barr's affidavit 14 June 2019 [Environment Court document 15].

117 B J Giddens affidavit in reply 24 June 2019 at [35] [Environment Court document 17].

118 M B Semple affidavit in reply 19 June 2019 Annexure "A" [Environment Court document 18].

119 M B Semple affidavit in reply 19 June 2019 at [13] [Environment Court document 18].

120 B J Giddens affidavit in reply 24 June 2019 at [17] [Environment Court document 17].

onwards.

[96] The Council submits (correctly) that the ORM is not a statutory requirement of Schedule 1. In creating the online mapping tool the Council went beyond the requirements of Schedule 1. Further, the tool itself included a detailed disclaimer[121] which states:

> The mapped areas submitted for rezoning are indicative only and do not include all areas submitted for rezoning. Refer to the Summary of Submissions.

However, especially when potential submitters were faced with over 1,200 submissions seeking in total thousands of points of relief it fell on the Council to ensure that its online website is reasonably user-friendly and accurate as explained by MacKenzie J in *Creswick*[122].

[97] Even now the link to the ORM from the "QLDC PDP" page is not straight forward to find since it is tucked down under the heading "Related Submission Documents". It is currently found by going to the "Proposed District Plan Stage 1" column, scrolling down to "Related Submission Document" and clicking on: "View Online Map of Areas Submitted for Rezoning". Where it was located in 2015 is a matter of contention as discussed above.

[98] In contrast to the evidence of Mr Barr and Mr Vivian, another experienced planner Mr B J Giddens gave evidence for the Society. He gave evidence of his involvement for many clients in the PC1 submission and cross-submission process. He deposes that:

> I do not recall seeing a link to an Online Rezoning Map or the map itself on any of the occasions that I accessed QLDC's website to look at the summary of submissions in December 2015.
>
> I do recall that at a later stage, in approximately early 2016, QLDC sent an email advising of the new maps and thereafter there was a version of a zoning map on QLDC's website, but I recall it was different from the one referred to in Mr Barr's affidavit. The first version was very difficult to use. I also recall it did not show the property address unless you hovered over a certain location of the property on the GIS. The current GIS that the QLDC has adopted is much more user friendly but it was not available during the further submission

121 C A Barr affidavit 14 June 2019 Appendix J [Environment Court document 15].

122 *Creswick* above n 93 at [64].

period and so was of no help in making further submissions.

[99] I consider that the evidence of Messrs Barr and Vivian overstates significantly what on the Council's website was reasonably accessible to an informed member of the public. On balance I find that the Society is correct that the ORM was not reasonably accessible in December 2015. That problem was compounded slightly by the facts that the ORM was only moved[123] to the PDP webpage on 4 December 2015 and that there were multiple changes recorded by Mr Giddens to the PDP (PC1) webpage during the cross-submission period.

3.4 Were the hardcopy SDRs of the Larchmont and GSL submissions fair, accurate and not misleading?

[100] I accept that in this case there is no evidence that any member of the Society looked at the SDR in hardcopy. However, that is not the issue. The question is whether the summary of the submission accurately, fairly and not misleadingly, alerts a reasonably informed member of the public[124] that there is a submission seeking that the ONL(B) be drawn around the Shotover Loop (or part of it).

[101] The SDR is arranged in an unhelpful way – by submission number (as the memorandum from the Council attaching the relevant SDR for Arthurs Point shows)[125]. In theory a potential submitter had to trawl through over one thousand summaries to find any submissions of potential relevance.

The Larchmont summary

[102] The relevant parts of the SDR for the Larchmont submission refer to amending Map 39 so that the hatched area on the map "attached to the submission" is changed from Rural to Low Density Residential. Ms Baker-Galloway submitted[126] that if any third-party layperson with an interest in Arthurs Point had read the submission they would have been on notice that the map attached to the GSL submission will show them the extent

123 C A Barr affidavit dated 14 July 2019 Annexure "K" [Environment Court document 15].

124 *Christchurch Civic Trust v Christchurch City Council* [2001] NZRMA 385 (NZEnvC); (2001) 7 ELRNZ 57; also *Healthlink* above n 73.

125 Memorandum for QLDC 14 December 2018 *UCESI appeal* attaching the separate summaries of submissions for properties at Arthurs Point.

126 GSL opening submissions at [38] [Environment Court document 22].

of the change sought. In her submission[127] the fact the SDR does not refer to the street address or title is not material – the summary clearly refers to Arthurs Point, Map 39 and the relief sought to change Rural land to LDR, in not just one, but in two places (527.1 and 527.7). She submitted that "Any person interested in the ONL surrounds of Arthurs Point is put clearly on notice". At this point in her submissions she rather cautiously does not say of what notice was given.

[103] I hold that the summary of this submission is insufficiently accurate as it omits both a street address and the legal description of the land. So beyond identifying that it applies to Map 39 somewhere in Arthurs Point, the summary is not clear where this submission refers to. Further, the SDR does not give any more information to help the reader work out what might possibly be sought (other than the UGB movement and the rezoning). In particular the Larchmont summary does not give any indication that an ONL(B) line might be drawn around the Shotover Loop. It does not refer to the ONL(B) or ONL(Z) at all.

The GSL summary

[104] The summary of the GSL submission does at least refer to the letters "ONL". Two (conflicting) theories were put forward as to what the summary of GSL's sentence about the ONL means:

(1) the parties' apparently preferred understanding of the "by default" sentence in the GSL submission is that it refers to the removal of the letters "ONL" from Map 39 and (implicitly) removal of the brown dashed ONL(B) line at Arthurs Point. Unfortunately the implicit part of that is meaningless when there is no brown dashed line anywhere near the GSL or Larchmont land;

(2) if I understand the arguments[128] correctly, GSL and Larchmont also claimed that the brown dashed line introduced by the Commissioners' decision to Map 39a was not sought and is unnecessary. From their point of view once the ONL(Z) is removed from the map and a LDR zoning substituted, the presence or absence of a brown line around the Shotover Loop (and Arthurs Point village) is irrelevant. That is because there is only one applicable

127 GSL opening submissions at [39] [Environment Court document 22].

128 In fact Ms Steven also seems to say this is the case in her submissions for the Society 5 July 2019 [Environment Court document 25].

policy (in chapter 4 of PC1) and that is effectively subverted by moving the UGB and rezoning the Rural land to a LDR zoning. That approach is inconsistent with their other argument. Further it simply illustrates the policy gap, that the PC1 contains a policy "black hole" for non-rural land contained within an outstanding natural landscape. The PC1(N) is thus incomplete and extra care should have been taken by the Council in its SDR to alert the public of the consequences of the submissions summarised.

[105] I find that the first interpretation is misleading because it is either in part meaningless (there is no brown line to be moved) or it is the opposite of what the submitter probably intends which is that a brown dashed ONL(B) line should be added at the southern edge of the orange land on its submission but none of that can be ascertained from the summary. I also find that the alternative scenario demonstrates how the SDR was unfair and misleading. If the Council considered that was a tenable view of its plan it should have amended its SDR in 2015, or at least agreed to notification of a new SDR in relation to the GSL and Larchmont submissions now so that persons affected could (can) make submissions (*inter alia*) on the effect of the policy vacuum for greenfields land zoned LDR and also within an ONL.

[106] I do not consider it appropriate to attempt to resolve what the Council meant by its summary which (since it was simply copied from the GSL submissions) is whatever GSL intended. The point is that the relief sought is very confusing given the absence of any brown dashed line on Map 39 in PC1(N).

[107] The use of the words "by default" suggests that the "ONL classification" will be removed "automatically" or "as a matter of law". Especially given the policy context which I have explained, that summary even though accurate on its face is in fact very misleading. If the Council was intending to contemplate a wide reading of the submission – to take the submission from Step 4 of the process I have identified[129] to Step 1 – then to be fair to potential submitters, it needed to say so.

[108] I consider that a summary under clause 7 Schedule 1 should not use words like "by default" which suggest that will happen automatically. That could reasonably lead a potential submitter to think that there is no point in making a submission. In this case the misleading nature of those words is further compounded by two more factors. One is

129 In [45] above.

that the last piece of relief sought (as to the ONL "classification") should in fact be the first under the scheme of the Act and of PC1.

[109] The final factor is that despite the references in the GSL and Larchmont summaries to movement of the UGB and rezoning of Rural land to LDR, there is only one reference[130] in relation to the Shotover Loop to the three letters "ONL". Looking for that even in the online form of the SDR was obviously difficult. Finding it in the hardcopy SDR would be like searching for a contact lens in a scatter of confetti.

4. Conclusions

4.1 Evaluation

[110] If the only issues to be resolved in relation to the landscape setting of the Shotover Loop were the location of the UGB and whether the land should be rezoned as Low Density Residential I would have no difficulty finding that the submissions on those issues were adequately summarised. However in relation to the logically prior (see *Man O'War*[131] cited above)[132] questions of the location of the ONL(B) there are serious problems as I have identified.

[111] A challenge to the fairness of the process (and in particular the clause 7 Summary) was one of the many issues in *Albany North*[133]. Some of the multiple appellants argued that the presentation of the SDR on the Auckland Council's website may have affected the ability of interested landowners to participate in the submission process. Whata J described[134]:

> The basic tenor of [counsel's] submission [as] that interested landowners would not have been put on notice of changes affecting them because a search for submissions on a particular address, street or neighbourhood would not have triggered notification of, for example, the HNZC or Ockham submissions.

[112] The High Court held that the SDR must be reasonable in the context of the

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130 There was one similar reference in the "hangar land" reference about 600-800 metres to the east which I bear in mind.

131 *Man O'War* above n 10 at [62].

132 At [7].

133 *Albany North* above n 61.

134 *Albany North* above n 61 at [171].

planning process and issue under consideration. That planning context included a Section 32 Report which signaled major residential intensification was needed, including a major reformation of the residential zones. Intensification was a central issued raised by the submissions that were alleged to have been out of scope and/or difficult to find in the SDR on the Council's website.

[113] Whata J concluded[135] that:

(1) in that planning context, a reasonable level of diligence was to be expected by landowners genuinely interested in preserving the 'status quo', as the issue of change had been sufficiently flagged in the Section 32 Report; and
(2) he was "fortified in this view" by the record of further submissions lodged to the original submissions made by numerous parties.

[114] In this case only a search of one correct street address – 111 Atley Street – would have thrown up the Swan/GSL submission. Online that may have been easy to find; on the hardcopy SDR finding it would have been a matter of luck.

[115] I accept that slightly wider online searches in the SDR of Map 39 for "UGB" or "Low Density Residential" would likely have revealed the Swan/GSL submission and a painstaking hardcopy search of the SDR would have achieved the same. However I consider that in the circumstances of a normal plan change under the RMA (as opposed to the particular circumstances of *Albany North* under its special legislation) there was in the unusual circumstances of this case, no duty for interested persons to search for changes to the Urban Growth Boundary on the Rural Zoning given that Arthurs Point was in an ONL. It would be sufficient to search for changes to the ONL(B) and that is where the difficulties arise.

[116] While I accept that a reasonable level of diligence must be expected of landowners and other potential submitters, the situation here is very different from *Albany North* in that:

(1) the proposal is a series of plan changes (with the jurisdictional constraints identified by *Clearwater*[136] and succeeding cases) not a new plan;

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135 *Albany North* above n 61 at [172]-[174].
136 *Clearwater* above n 91.

(2) the Section 32 Report recommends no general change to the ONL(B) lines but does say some changes should be made;

(3) there were no cross-submissions lodged on rezoning at Arthurs Point (except for Larchmont supporting GSL);

(4) the online map was both not reasonably accessible and (for one day) not even linked to the PC1 webpage;

(5) in *Albany North* there were many different submissions (all summarised) at different levels of generality. Here there were only two and only one mentioned the "ONL".

I accept Ms Steven's submission that *Albany North* can be distinguished and I take all those factors into account.

[117] Those considerations are reinforced by the following matters all of which support the Society's position:

- the proposed plan change is ambiguous: there are no ONL(B) lines on Map 39 of PC1(N);
- the relevant summarised relief is very confusing: either the addition of a hole (the Shotover Loop) in the ONL was to occur or a non-existent brown line was to be removed;
- whatever was sought was to occur "by default" which suggests without adjudication or decision by the Council;
- because of the complexities and layers of the PC1, the sheer volume of submissions and the specific terms of the GSL submission (repeated verbatim in the SDR) there is a real risk that potential submitters have been deprived of the opportunity to participate;
- the higher order policies which lead to my provisional conclusions in [45] as to the proper order for resolving submissions. The GSL and Larchmont submissions as summarised in the SDR attempt to move the UGB first and then rezone the Shotover Loop or most of it to LDR zoning (and "consequentially" remove the ONL(Z) classification). The contradiction in this process is that the UGB cannot be moved until an ONL(B) is added, and no submitter has sought that;
- there was no indication in the SDR that the Council might attempt to exercise its powers under clause 16(2) Schedule 1 to rationalise and draw

a ONL(B) around Arthurs Point;

- the order of decision-making suggested by the summary in the SDR is illogical applying the *Man O'War* principle[137] that location of the ONL (and therefore of the ONL(B)) should come first;
- the fact that it seems basically unfair that the opposing parties should both attempt to say that the Society cannot be heard here and at the same time also attempt to argue that the Society (stepping into UCESI's shoes in the latter's appeal) with its direct challenge to the ONL(B) drawn by the Commissioners' decision around Arthurs Point and the Shotover Loop, cannot seek consequential relief so that the UGB moves back to the PC1(N) line (and the zoning should revert to Rural and ONL(Z)). I have been troubled by whether that is a relevant factor but consider I should be quite candid that it seems to be so and that it is a (small) factor in my evaluation of this decision.

4.2 The powers of the court and the exercise of discretion

[118] That brings me back to the Society's application. It has applied for an order under Section 314 RMA. That sets out the scope of an enforcement order as follows:

> (1) An enforcement order is an order made under section 319 by the Environment Court that may do any 1 or more of the following:
>
> ...
>
> (b) require a person to do something that, in the opinion of the court, is necessary in order to—
>
> (i) ensure compliance by or on behalf of that person with this Act, any regulations, a rule in a plan, a rule in a proposed plan, a requirement for a designation or for a heritage order, or a resource consent; or
>
> (ii) avoid, remedy, or mitigate any actual or likely adverse effect on the environment caused by or on behalf of that person:
>
> ...
>
> (f) where the court determines that any 1 or more of the requirements of Schedule 1 have not been observed in respect of a policy statement or a plan, do any 1 or more of the following:
>
> (i) grant a dispensation from the need to comply with those requirements:
>
> (ii) direct compliance with any of those requirements:
>
> (iii) suspend the whole or any part of the policy statement or plan from a particular date (which may be on or after the date of the order, but no

137 *Man O'War* above n 10.

> such suspension shall affect any court order made before the date of the suspension order).

[119] I determine that the requirements of clause 7 have not been observed because the summaries of the GSL and Larchmont submissions are in the unusual circumstances I have described as being illogical (and therefore unreasonable) and misleading (and therefore unfair).

[120] In *Queenstown Lakes District Council v Marcam Lakes Limited*[138] the Environment Court stated as to consequences:

> The powers given in section 314(1)(f) of the RMA amount to an express, but limited, power of review. They show that Parliament contemplated that the intensity of the review would depend on the circumstances. Not every failure to observe the requirements of the First Schedule is fatal. Some may be so minor that they could be waived. Other defects might be so significant that after weighing them the court needs to direct compliance with the First Schedule's requirements.

[121] In relation to the exercise of my discretion[139] the Council argues that to grant an enforcement order will delay PC1 becoming operative. That is correct but it is a result of the complexity of the process chosen, the approach to recognition and protection of the outstanding natural landscapes of the district and the unthinking SDR of those submissions, in this case the prejudice caused by delay is outweighed by the prejudice to persons not before the Council (or now the Environment Court).

[122] Similar considerations apply in respect of the costs of (re)notification: if potential submitters have been unfairly misled (as I have held they have) on a matter of national importance, then the extra costs must be borne by the ratepayers. The public interest is in getting a fair hearing of the issues. Any extra costs which will be incurred arise from the Council's own actions. If it seeks to conduct a review in too large then this case demonstrates precisely the sort of problem that will arise.

[123] If other parties seek an opportunity to "re-litigate" matters concerning Arthurs Point then that is an unfortunate consequence of the process adopted. I do not feel too uncomfortable about that given my preliminary view that the clause 16(2) action taken by

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138 *Queenstown Lakes District Council v Marcam Lakes Limited* [NZEnvC] C156/02 at [57].

139 Under section 319 RMA.

the Council may have been illegal.

4.3 Result

[124] This is a particularly difficult case, but given the contextual complexities I have explained, I find that the Council's summary of submissions was unfair and misleading. The issue is then how to remedy any unfairness to non-parties (represented by the Society). I judge that requires that the QLDC complies with clause 7 by re-notifying a summary of each of GSL's and Larchmont's submissions by adding an explanation that the submission implicitly seeks to exclude the land from the outstanding natural landscape by drawing a brown dashed line indicating an ONL boundary around the Shotover Loop.

[125] Those considerations are amplified by the fact that the zonings on Map 39 PC1(N) may be premature since the relevant background information such as the location of the ONL(B) in PC1(N) and PC1(D) and/or whether policy 4.2.1.5 of PC1(D) will survive the appeals is relevant.

[126] At least in the circumstances of this case any defect relating to the location of an ONL is potentially a matter of national importance[140] so a dispensation[141] as to defects in process should not be granted. In fact to preserve the rights of potential submitters I will direct that the rezoning of the Shotover Loop to LDR be suspended from the date of this decision.

[127] Counsel referred me to the directions as to a process set out in *The Waiareka Valley Preservation Society Incorporated v Waitaki District Council*[142]. I do not fully understand why the Environment Court directed that only some of the provisions of Schedule 1 should be complied with. In my view every step after clause 7 in Schedule 1 should be followed for the GSL and Larchmont submissions after they are renotified.

[128] I observe that a preferable course of action would be for the Council to promote a variation to PC1 in relation to Arthurs Point which:

140 Under section 6(b) RMA.
141 Under section 314(1)(f)(i).
142 *The Waiareka Valley Preservation Society Incorporated v Waitaki District Council* (NZEnvC) C9/2008.

(a) draws an ONL(B) around the developed areas of Arthurs Point; and

(b) if it considers an extension appropriate, draws an ONL(B) around the outer edge of the Shotover Loop (or a line inside that).

[129] This decision is silent about the APLT land because different factual circumstances apply as stated in Decision *AP1*. I will reserve leave for the Society to advise the court whether it wishes to pursue its enforcement order application in respect of the land at the eastern end of Arthurs Point or whether it may be withdrawn.

[130] Nothing in this decision should be taken as a view on any of the merits or the location of an ONL(B) in the vicinity of Arthurs Point.

J R Jackson
Environment Judge

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

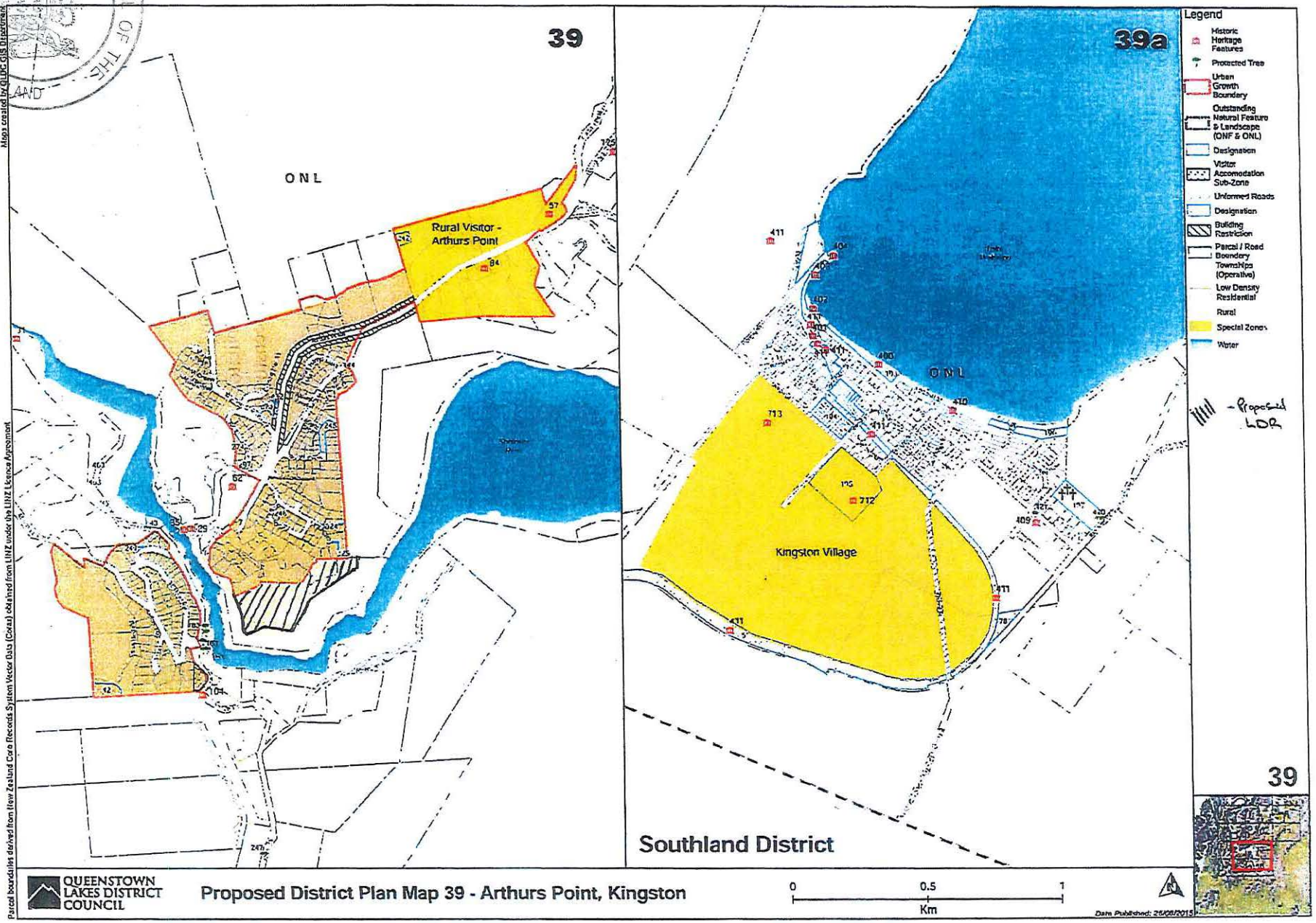
Annexures

A: PC1(N) Map 39

B: PC1(N) Map 13

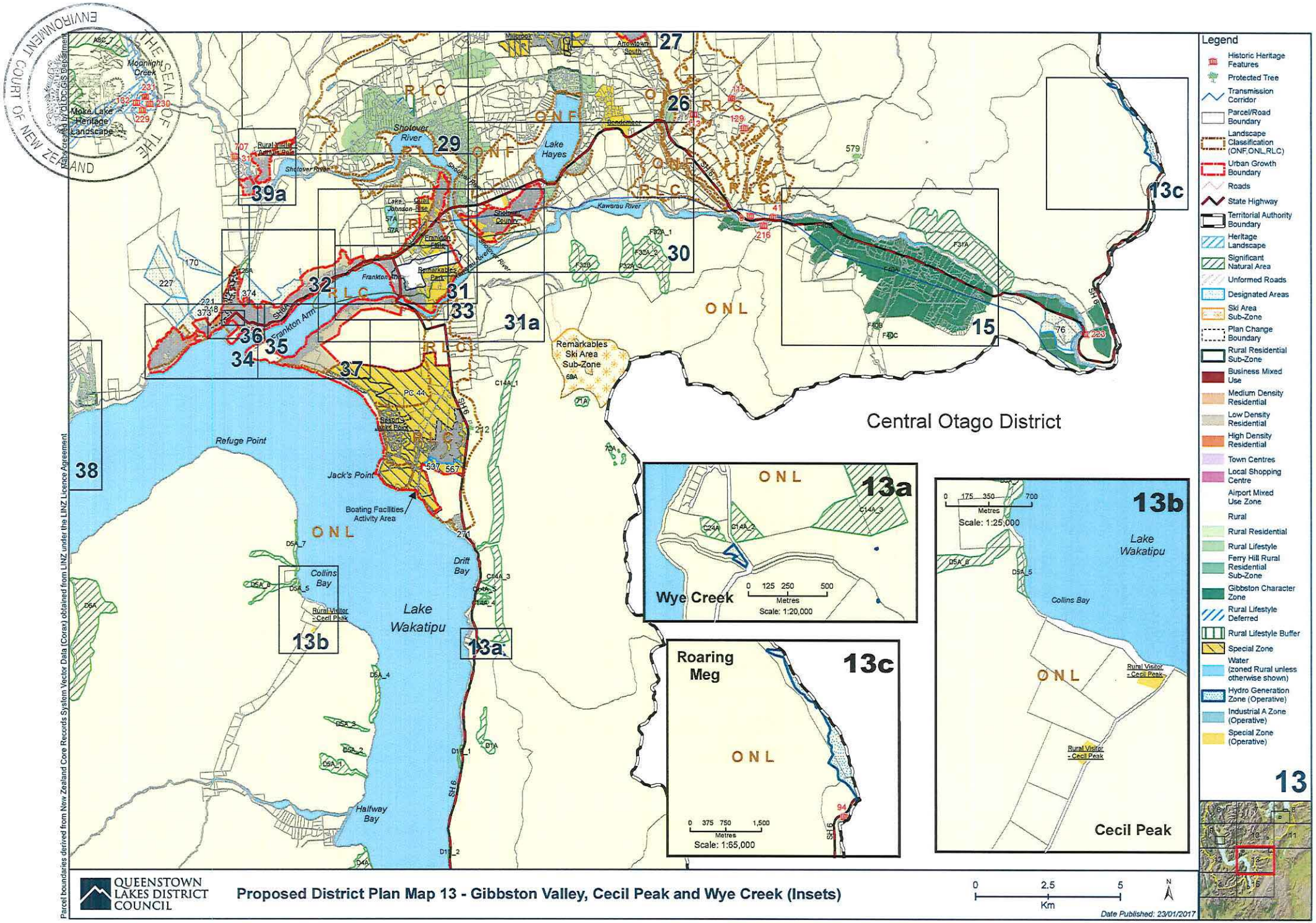
C: GSL Map attached to submission QLDC reference #494

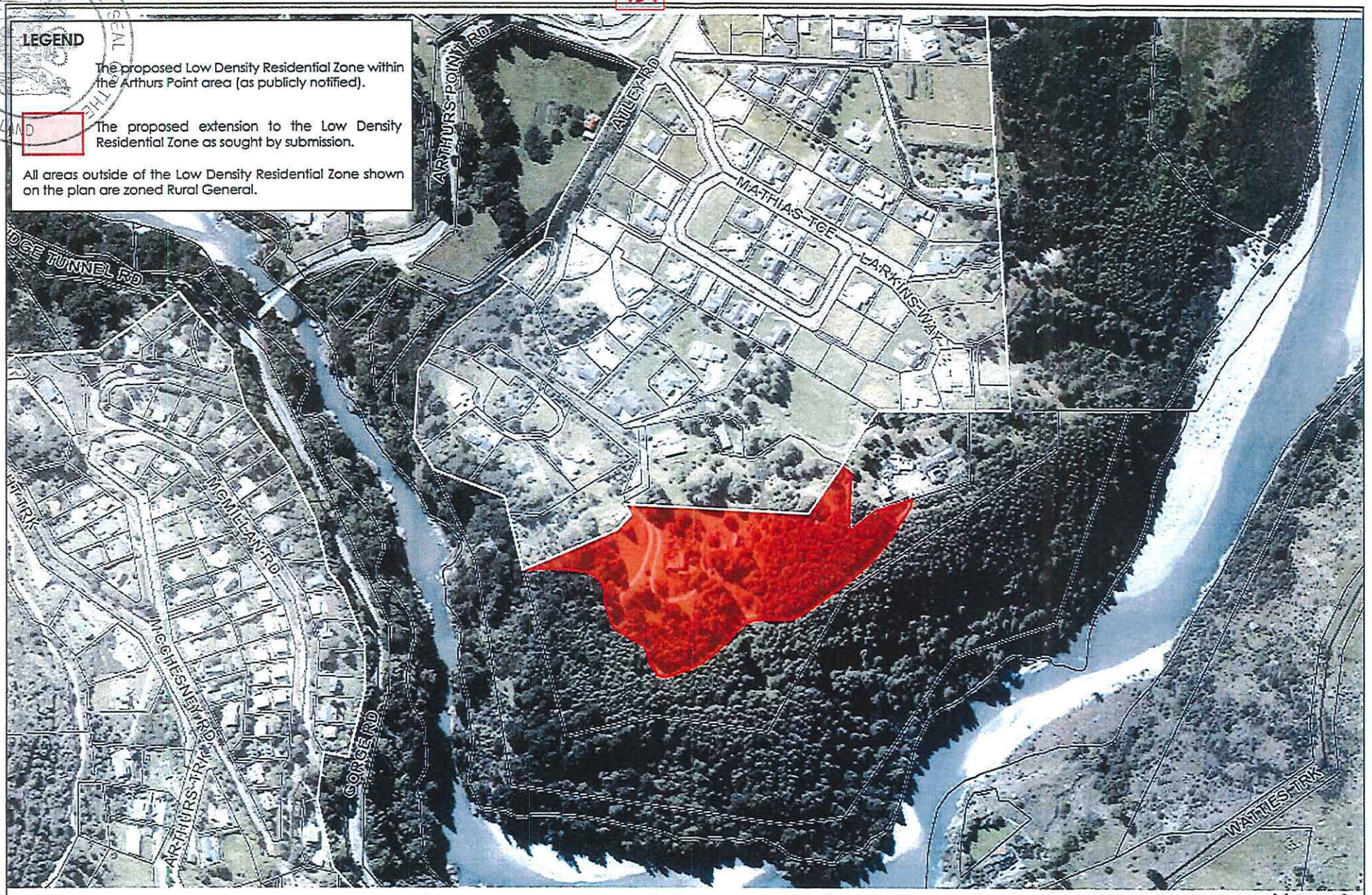
Larchmont



"A"

527


Central Otago District
Lake Wakatipu
Lake Hayes
Shotover River
Kawarau River
Frankton Arm
Refuge Point
Jack's Point
Boating Facilities Activity Area
Collins Bay
Drift Bay
Halfway Bay
Remarkables Ski Area Sub-Zone
Moke Lake Heritage Landscape
Moonlight Creek
Millbrook
Arrowtown South
Shotover Country
Frankton Flats
Remarkables Park
Rural Visitor Activity Area
Rural Visitor - Cecil Peak
ONL
RLC
ONF
SH6
SH6A
Wye Creek
Roaring Meg
Cecil Peak
Scale: 1:20,000
Scale: 1:65,000
Scale: 1:25,000
Metres
Legend
Historic Heritage Features
Protected Tree
Transmission Corridor
Parcel/Road Boundary
Landscape Classification (ONF,ONL,RLC)
Urban Growth Boundary
Roads
State Highway
Territorial Authority Boundary
Heritage Landscape
Significant Natural Area
Unformed Roads
Designated Areas
Ski Area Sub-Zone
Plan Change Boundary
Rural Residential Sub-Zone
Business Mixed Use
Medium Density Residential
Low Density Residential
High Density Residential
Town Centres
Local Shopping Centre
Airport Mixed Use Zone
Rural
Rural Residential
Rural Lifestyle
Ferry Hill Rural Residential Sub-Zone
Gibbston Character Zone
Rural Lifestyle Deferred
Rural Lifestyle Buffer
Special Zone
Water (zoned Rural unless otherwise shown)
Hydro Generation Zone (Operative)
Industrial A Zone (Operative)
Special Zone (Operative)
13
Parcel boundaries derived from New Zealand Core Records System Vector Data (Coras) obtained from LINZ under the LINZ Licence Agreement
QUEENSTOWN LAKES DISTRICT COUNCIL
Proposed District Plan Map 13 - Gibbston Valley, Cecil Peak and Wye Creek (Insets)
0 2.5 5 Km
N
Date Published: 23/01/2017



REF: 1032 - PLDRZ P1
DATE: 02.10.2015
SCALE: NOT TO SCALE

Proposed Low Density Residential Zone
Arthurs Point, Queenstown

vivian+espie