

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

Decision No. [2019] NZEnvC 78

IN THE MATTER of the Resource Management Act 1991  
AND of an appeal under clause 14(1) of the First  
Schedule of the Act  
BETWEEN UPPER CLUTHA ENVIRONMENTAL  
SOCIETY INCORPORATED  
(ENV-2018-CHC-056)  
Appellant  
AND QUEENSTOWN LAKES DISTRICT  
COUNCIL  
Respondent

Court: Environment Judge J R Jackson  
Hearing: at Queenstown on 11 and 26 March 2019  
Appearances: P Steven QC and E L Keeble for Arthurs Point Outstanding Natural  
Landscape Society Incorporated (section 274 party)  
K L Hockly for Queenstown Lakes District Council  
M Baker-Galloway for Gertrude's Saddlery Limited (section 274  
party)  
W Goldsmith for Larchmont Developments Limited  
Date of Decision: 18 April 2019  
Date of Issue: 18 April 2019

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**SECOND PROCEDURAL DECISION (RE ARTHURS POINT)**

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- A: Under section 294 of the Resource Management Act 1991 the Environment Court orders a rehearing of its first procedural decision [2019] NZEnvC 14 in respect of Order B except for Order B(c).
- B: Leave is reserved for Gertrude's Saddlery Limited or Larchmont Developments Limited to apply for a further order to rehear other Orders in [2019] NZEnvC 14 if they are relevant to those parties' concerns.



C: Costs are reserved.

## REASONS

### Introduction

#### The issue, the land at Arthurs Point and the parties

[1] This is an application for rehearing of a procedural decision<sup>1</sup> issued by the Environment Court in this and two other appeals relating to Arthurs Point on 5 February 2019 (“the first procedural decision”). That dealt with various jurisdictional issues raised by the appeal about the landscape lines in the Queenstown Lakes District Council’s decisions on Stage 1 of its proposed plan under the RMA. I should also explain that, while the appeal by Upper Clutha Environmental Society Incorporated (“UCESI”) is general, the section 274 party Arthurs Point Outstanding Natural Landscape Society Incorporated (“APONLSI”) appears to be concerned only with the land in and around Arthurs Point, in particular the location of Outstanding Natural Landscape (“ONL”) boundaries, sub zonings of the Rural zone, rezonings from Rural to residential and, to a lesser extent, the Urban Growth Boundary (“UGB”) in that vicinity.

[2] Subject to qualification in the next paragraph the issues before the court are now principally focused on two properties:

- (a) 111 Atley Road, Arthurs Point which is legally described as Pt Sec 1 SO 24074 Lots 1-2 DP 307630; and
- (b) 163 Atley Road, Arthurs Point which is legally described as Lot 2 DP 393406 (together I will call these “the Shotover Loop”).

The Shotover Loop is shown outlined in yellow on the annexed plan marked “B”<sup>2</sup>. Most of the Loop is part of 111 Atley Road which was owned by Mr Michael Swan and later sold to Gertrude’s Saddlery Limited (“GSL”), the current owner. The smaller area outlined in yellow is 163 Atley Road which is owned by Larchmont Developments Limited (“Larchmont”).

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<sup>1</sup> *Arthurs Point Trustees Limited v Queenstown Lakes District Council* [2019] NZEnvC 14.  
<sup>2</sup> Copy of Map 4-3 from the QLDC decision.



[3] While the focus of these rehearing applications is on the Shotover Loop, it is appropriate to record that the APONLSI is also concerned with the identification of the ONL boundary around Arthurs Point generally.

[4] The relevant orders in the first procedural decision are:

- B: Under section 279(1) RMA of the Environment Court rules:
- (a) subject to (c), that the appeal by the UCESI generally raises the issue of the location of the Outstanding Natural Landscape (“ONL”) lines at Arthurs Point;
  - (b) that Arthurs Point Outstanding Natural Landscape Society Incorporated (“APONLSI”) may use its section 274 notice on the UCESI appeal to seek a different ONL boundary and classification on the properties at 111 and 163 Atley Road and on the Morningstar Reserve;
  - (c) the relief sought by APONLSI in relation to the appeal by APLT (ENV-2018-CHC-076) cannot be granted, that is, it may not seek a different ONL boundary on the hangar land.
- C: (1) The court adjourns the UCESI appeal (ENV-2018-CHC-056) to **Friday 1 March 2019** (or the following week if the hearing of Topic 1 appeals takes up all the week of 25 February 2019) for submissions on the issue whether the Queenstown Lakes District Council had jurisdiction to move the ONL line and classification to the southern boundaries of 111 and 163 Atley Road, Arthurs Point and if not, on what procedure should be followed;

...

In those orders “ONL line” appears to be the edge of Rural land classified as “ONL”.

#### The applications for rehearing

[5] On 28 February 2019 GSL and Larchmont lodged an application under section 294 of the Resource Management Act (“the RMA” or “the Act”) for rehearing of the first procedural decision. A further application on a different ground was made by GSL and Larchmont on 22 March 2019.

[6] Two grounds (and indeed two applications) for rehearing are advanced by Larchmont and GSL. They are:

- (1) that there is new and important evidence which should be considered – the absence of a (brown) ONL boundary on Map 39;
- (2) that there is a change in circumstances in that since the decision the Council has issued its decision on the Variation to Chapter 6 of the PDP



which changes the PDP's use of the term "ONL".

[7] The facts as they relate to the Arthurs Point area were described in the (first) procedural decision<sup>3</sup> and I adopt that statement of them here subject to the following correction.

[8] It is not correct<sup>4</sup> that the landscape architects agreed the location of the ONL boundary before the Hearing Commissioners. Dr Read and Mr Espie agreed that the Shotover River is an ONF and that to the south of the Shotover Loop the cliff edge is the northern edge of the ONF. Mr Espie apparently maintained that was the appropriate place for the ONL boundary also, whereas Dr Read considered the boundary should be further north (towards the urban area of Arthurs Point). The Commissioners preferred Mr Espie's opinion<sup>5</sup>.

### **The relevant steps in the plan change process**

#### The notified PDP

[9] On 17 April 2014 the Council resolved to review parts of its operative district plan ("the ODP") under section 79(1) RMA<sup>6</sup>.

[10] The public notice of the PDP in August 2015 stated:

**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.

<sup>3</sup> [2019] NZEnvC 14 at [6]-[8].

<sup>4</sup> [2019] NZEnvC 14 at [25].

<sup>5</sup> QLDC Report 17-4 at [73(d)].

<sup>6</sup> Memorandum of counsel for QLDC dated 25 February 2019 lodged in response to a request by the court during the "Topic 1" hearing.



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 identify Outstanding Natural Landscapes and Features.**

...

[emphasis added]

[11] The Legend and User Information page in the PDP maps show:

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

Thus a "PDP" map as notified had two ways of describing outstanding natural landscape:

- (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 panel – the "ONL" boundary. Which side of the line is ONL is left to be inferred from the context (which suggests (1) is relevant to (2)).

[12] To avoid ambiguity I refer to rural land classified as ONL as "ONL(Z)", and the brown ONL boundary as the "ONL(B)".

[13] 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<sup>7</sup> 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

<sup>7</sup> [2019] NZEnvC 14 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).



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 PDP (notif), that is, no ONL boundary is shown. Indeed, the Hearing Commissioners seem to have agreed with Mr Espie, the landscape architect, that in the PDP(notif) Map 39a "... all of Arthurs Point currently [fell] within the ONL"<sup>8</sup>.

[14] Because there was no submission seeking addition of an ONL boundary on Map 39a, the Hearing Commissioners decided<sup>9</sup> it was within their jurisdiction under clause 16(2) of the First Schedule to add a brown line demarcating the ONL(B) boundary around Arthurs Point but the court had not then realised that the clause 16(2) power was used to draw a brown ONL boundary around the whole of Arthurs Point including the extension on the Shotover Loop.

[15] There is, potentially, a significant inconsistency in the PDP's approach to outstanding natural landscapes.

[16] There is no evidence that any submission on the notified plan sought to add ONL(B) on Map 39a, unless the UCESI submission has that effect indirectly. The absence of such a submission might suggest that the public could be secure in the knowledge that the whole of Arthurs Point was an ONL and that no ONL(B) would be drawn across it, and thus that no consequential changes in a UGB or any rezoning could follow.

#### Variation to Chapter 6

[17] A further complication is that there is now a variation to the PDP which has just had decisions released on it. This, relevantly, removes the description in Chapter 21 of ONLs as being a classification of land in the Rural Zone. It appears that the ONL notation is now intended to be a simple identification of fact, not a classification as a subzone.

[18] The Variation made two sets of changes to the PDP as I understand it: one was




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<sup>8</sup> QLDC Report 17-4 at [67].  
<sup>9</sup> QLDC Report 17-4 at [68].

to the Wakatipu Basin as part of Stage 2; and the other – of relevance to this proceeding – was a set that affected Chapter 6 (Rural) of the PDP.

[19] Three provisions in Chapter 6 were the subject of amendment by the Variation:

- (1) to delete a paragraph formerly part of Part 6.2. When the Proposed District Plan (Stage 1) was notified, that paragraph read:

Landscapes have been categorised into three classifications within the Rural Zone. These are Outstanding Natural Landscapes (ONL) and Outstanding Natural Features (ONF), where their use, development and protection are a matter of national importance under Section 6 of the RMA. The Rural Landscapes Classification (RLC) makes up the remaining Rural Zoned Land and has varying types of landscape character and amenity values. Specific policy and assessment matters are provided to manage the potential effects of subdivision and development in these locations.

- (2) to delete the first sentence of a rule (Notified Rule 6.4.1.2) which read:

The landscape categories apply only to the Rural Zone. The Landscape Character and Strategic Direction Chapter's objectives and policies are relevant and applicable in all zones where landscape values are at issue.

- (3) to amend Notified Rule 6.4.1.3 (and is not relevant here).

[20] The Council's decision seems to accept<sup>10</sup> those changes.

### **Consideration of the first ground for rehearing**

[21] The grounds of the application are<sup>11</sup>:

- (a) New and important evidence is available which should have been before the court when the court's decision was made and which is relevant to the matters addressed in the court's decision, being that:
- (i) Notified PDP Planning Map 39a did not contain any ONL line [boundary] applicable to Arthurs Point in general or the 'Shotover Loop' (as referred to in the court's decision) in particular. In fact notified PDP Planning Map 39a did not contain any ONL line [boundary] at all.
- (b) This is new evidence because; it appears clear, from a reading of the court's decision,

<sup>10</sup> QLDC Report 18-1 at [228]-[232].

<sup>11</sup> Application for rehearing on behalf of GSL and Larchmont dated 26 February 2019 at [3].



that the court was not aware of this relevant fact.

- (c) This is important evidence because; the court's decision primarily concerns whether the Arthurs Point Outstanding Natural Landscape Society Inc. can rely on the UCESI appeal to challenge the boundary of the ONL in the vicinity of the Shotover Loop; determination of this issue depends upon the interpretation of UCESI's original submission and appeal; and UCESI's original submission and appeal specifically relates to the ONL lines [boundaries] of the PDP planning maps as notified; the court's decision was on the assumption that there were ONL Lines [boundaries] in the PDP maps as notified around Arthurs Point.
- (d) Now that it is apparent there was no ONL line [boundary] in the PDP as notified, that fundamentally alters the factual basis relevant to the court's determination as to jurisdiction arising from the UCESI appeal. Evidence that there was no ONL line in the PDP as notified would probably have had an important influence on the court's determination.

[22] Ms Steven QC, for APONLSI, submitted that there is no new evidence. She said that GSL and Larchmont could have pointed out to the court at the first hearing that there was no brown line on Map 39a as notified. I was initially tempted by that argument.

[23] However on reflection I am concerned that there are factual matters which the parties might have thought relevant but which in retrospect could have been brought to the court's attention. For example they may not have realised themselves the potentially significant ambiguities in the PDP's approach to section 6(b) RMA. Further I was not aware that an ONL(B) boundary was added by the Hearing Commissioners under clause 16(2) of the First Schedule and there must be some questions about the legal propriety of that.

[24] Further, in the first procedural decision I wrote<sup>12</sup>:

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

- (1) the UCESI appeal (ENV-2018-CHC-056) – as supported by APONLSI – relates to the ONL classification and particularly where the ONL/other zone or subzone boundaries should be;
- (2) the other two appeals relate primarily<sup>13</sup> to the Rural / "Urban" zone boundary at Arthurs Point.

[numbering added]



<sup>12</sup> [2019] NZEnvC 14 at [27].

<sup>13</sup> A secondary issue is the relocation of the UGB.



In fact it appears that there is a third issue which neither the submissions nor the appeals address:

- (3) the location of the brown ONL boundary at Arthurs Point.

[25] As I have recorded, the third issue was addressed by the Hearing Commissioners under clause 16(2) RMA. The court has now heard submissions on the lawfulness of that and will reserve its decision pending hearing other matters yet to be resolved. For the moment it is sufficient to record that the ONL(B) issue (i.e. where the ONL(B) should be located) was not argued at the initial hearing.

[26] A further compelling factor is that the first procedural decision expressly stated<sup>14</sup> that its "... findings of facts are provisional at this stage ...".

[27] Since Orders A and B in the first procedural decision were made when only half the picture had been given to the court, it seems appropriate to allow the further evidence to be given to the court especially when that evidence is about the consequences of an absence from a map. In other words, Map 39a has to be read completely counter-intuitively.

[28] In these unusual circumstances I consider there is new evidence within the meaning of section 294 and so the first part of the section 294 test is satisfied.

### **Consideration of the second ground for rehearing**

[29] The grounds for the second application are<sup>15</sup>:

- (a) There has been a change in circumstances since the court's decision was made which is relevant to the matters addressed in the court's decision, being that:
- (i) since the court's decision, the decisions version of the variation to Chapter 6 was ratified by Council on 7 March 2019 and formally notified as Council's decision on 21 March 2019;
  - (ii) the variation deleted the provisions of Chapter 6 which specified that the landscape classifications of Outstanding Natural Landscape (ONL), Outstanding Natural Feature (ONF) and Rural Landscape Classification

<sup>14</sup> [2019] NZEnvC 14 at [14]; see also the heading to Part 2 of the Decision: "Provisional findings on the facts".

<sup>15</sup> Notice of Motion under section 294 for a rehearing of the procedural decision dated 22 March at [4].



(RLC) only apply to the Rural Zone;

(iii) the position as currently expressed is that all of the Rural Zone and Open Space and Recreation Zone must be classified as either ONL, ONF or RLC. However, beyond that Chapter 6 is silent; there is nothing precluding the landscape classifications from being placed over other zones.

(b) This constitutes a change in circumstances.

(c) This change in circumstances is important as this may affect the court's decision because:

(i) the court's decision relied on the understanding that the ONL, ONF and RLC classifications apply only to land zoned Rural. Further, that the ONL, ONF and RLC classifications are effectively subzones of the Rural Zone;

(ii) it is now clear that the ONL classification also applies to land in other zones.

[30] As a result of the Variation and the Council's decision on it, It is not clear to me that there is still a classification – as in the subzone sense. In other words, the Variation may mean that the description of an ONL is simply a matter of fact. That of course would be consistent with the drawing of ONL boundaries across other zones than the Rural Zone.

[31] The second test for granting a rehearing is whether the change of circumstances *might* have lead to a different result, not that it would have done so.

[32] In the circumstances, I consider that the Variation might have made me rethink my conclusions in the first procedural decision quite independently of the first ground discussed above.

### **Discretion**

[33] In my view the general complexity of the legal and factual position and the ambiguities in the PDP's approach to recognising and protecting outstanding natural landscape suggest quite strongly that a rehearing should be ordered.

[34] I am reinforced in that view by the consideration that various challenges to jurisdiction have been raised (and part heard) and that the APONLSI has now made an application for an enforcement order seeking renotification<sup>16</sup> of the submissions on Arthurs Point. That appears to raise an issue on whether the public in general and residents of Arthurs Point and environs in particular have been fairly treated by the

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<sup>16</sup> It does not say so, but I assume this application is made under section 314(1)(f) RMA.



process to date.

### **Outcome**

[35] For the reasons given I consider a rehearing should be ordered at least in respect of the relevant part of Order B of the first procedural decision.

[36] Consequently this decision relates only to the applications for rehearing and only in relation to Order B(a) and (b) since all other orders were procedural or related to other land. Other matters heard in March 2019 will be adjourned.

[37] The Registrar is requested to set the rehearing, the adjourned issues, and the outstanding application for an enforcement order down for hearing as soon as possible.

  
\_\_\_\_\_  
**J R Jackson**  
**Environment Judge**

