

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

**Decision No. [2019] NZEnvC 85**

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  
S XIN  
Section 274 party

Court: Environment Judge J R Jackson  
(Sitting alone under section 279(1) of the Act)  
Hearing: at Queenstown on 20 December 2018  
Appearances: K Hockly for Queenstown Lakes District Council  
M Baker-Galloway and R Giles for S Xin  
Date of Decision: 8 May 2019  
Date of Issue: 8 May 2019

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**PROCEDURAL DECISION  
(re Sunshine Bay)**

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A: The application to strike out Mr Xin's section 274 notice under section 279(4) of the Resource Management Act 1991 is refused.

B: Costs are reserved.



## REASONS

### Introduction

[1] Mr S Xin owns a property<sup>1</sup> at Sunshine Bay, on the Queenstown-Glenorchy Road.

[2] As explained in the Second Procedural Decision concerning Arthurs Point – *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council*<sup>2</sup> – the notified plan change (commonly called “the PDP”) which is the subject of this appeal had two overlapping systems for protecting the outstanding natural landscapes (“ONL”) of the District:

- (1) a sub-zoning – called a “classification” – of the proposed Rural Zone (marked as a yellow wash on the planning maps) denoted by the acronyms “ONL”. I will call this the (“ONL(Z)”); and
- (2) a brown dashed line indicating a boundary (“ONL(B)”) between an outstanding natural landscape (as shown in the “Legend” on the first page of the planning maps).

[3] Mr Xin is concerned about the fact that his land is included in the ONL(B) in the decisions on Map 34 of the PDP. His land is also within the ONL(Z) as shown on Map 34 of the PDP but Mr Xin has not expressed any view on that. Map 34 is marked (in a smaller version) within Map 13, i.e. Map 34 is a zoomed-in version of part of Map 13.

[4] The location of the ONL(B) is the subject of the appeal by the Upper Clutha Environmental Society Incorporated (“UCESI”).

[5] On 30 October 2018 Mr Xin filed a waiver application for the filing of a late section 274 notice to join UCESI’s appeal. Mr Xin claims to have an interest greater than the public generally in the UCESI appeal as it affects his land. The application was granted by the court in its Minute of 14 November 2018.

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<sup>1</sup> Lot 1 DP397058.

<sup>2</sup> *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 78 at [11].



[6] The Council has since raised a jurisdictional question<sup>3</sup> as to whether Mr Xin “can use a section 274 notice on the UCESI appeal to address the location of the ONL boundary line at Sunshine Bay”.

### Background

[7] In case it is relevant I note that in the Operative District Plan (“ODP”), Mr Xin’s property (a red quadrilateral) is excluded from the ONL with the dotted line around the site as shown in Figure 1:



Figure 1: ODP Appendix 8A: Map 1 with Sunshine Bay property highlighted in red.

[8] In the PDP as notified Mr Xin’s property was shown on Map 34 as to the left of both the red Urban Growth Boundary and the (assumed) underlying brown ONL(B) line as in Figure 2:

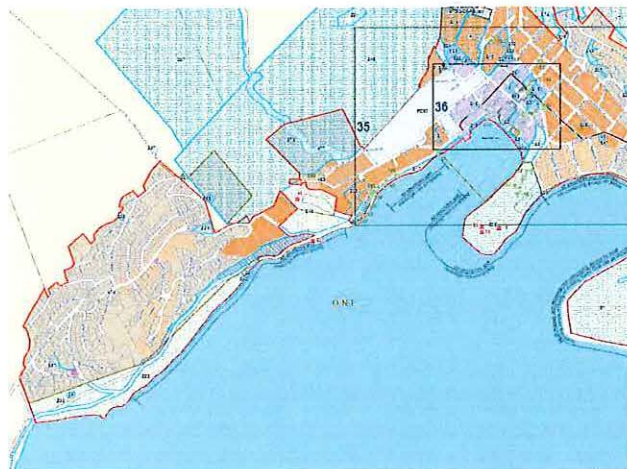


Figure 2: Proposed District Plan Map 34 as notified – Fernhill and Sunshine Bay.

<sup>3</sup>

Queenstown Lakes District Council memorandum 23 November 2018 at [17.4].



In fact the brown line is hard to find, but it can be seen immediately to the left of the extension of Arawhata Terrace adjacent to Mr Xin's land (at least on the original A3 size of Map 34 – it is not visible in Figure 2 above).

[9] Mr Xin did not lodge a submission on the plan change Map 34 (and neither did anyone else) in relation to the location of the ONL(B) line in the vicinity of Sunshine Bay.

[10] In the PDP (decisions version) Mr Xin's property (shown as a black quadrilateral on Figure 3) was again outside in the ONL(B) line as shown in Figure 3:

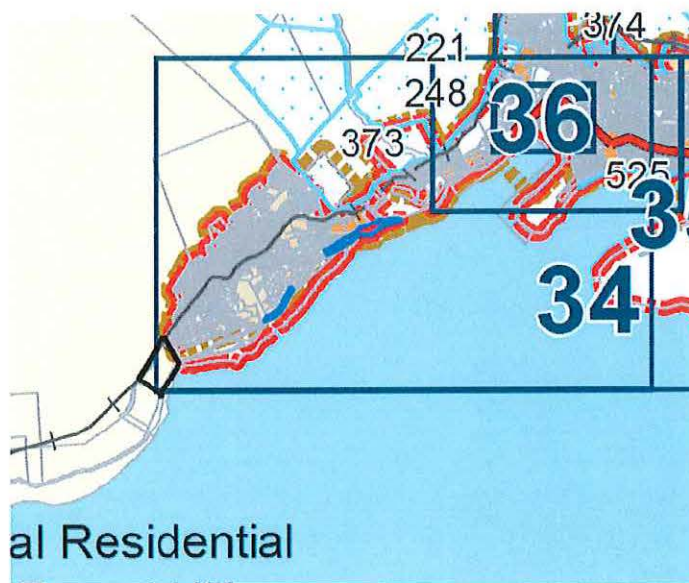


Figure 3: PDP (decisions version) Map 13 showing Mr Xin's property outlined in black outside of the brown ONL boundary.

[11] As I have recorded, the notified PDP's ONL boundary at Sunshine Bay was not directly challenged by any submitter, and therefore was not the subject of inquiry or testing of the evidence before the Hearing Commissioners for the Council.

#### The UCESI submission and appeal

[12] It appears the only potential challenge at the first instance hearing to the drawing of the ONL(B) was in UCESI's submission #145, which sought on a district-wide basis that:

... the Landscape Lines determined in the Proposed District Plan process are excluded from the plan altogether because they are not credible.



Failing this the Society seeks that the Landscape Lines are included on District Plan maps as dotted lines and that the Landscape Lines are described as guidelines that are purely indicative.

[13] The UCESI's notice of appeal seeks (*inter alia*) the following relief:<sup>4</sup>

That the landscape lines shown on the ODP maps are rolled over in their exact current form. That the landscape lines additional to those contained on the ODP maps, shown on the PDP stage 1 maps, are included in the PDP as dotted lines ... with the following attendant text shown on all maps where these dotted lines appear:

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

[14] UCESI has subsequently lodged various memoranda and issued emails attempting to clarify its position. Further particulars given by UCESI on 31 August 2018 indicated that UCESI intended to call evidence in respect of only two identified and mapped locations being Dublin Bay/Mount Brown and Waterfall Hill/Waterfall Creek. It also stated:<sup>5</sup>

We suggest changes to wording in the appeal as follows: ...

The dotted lines are to be assumed to be the location of the landscape categories until such time as evidence is heard relating to them in the Environment Court where they may be subject to change and will become definitive solid lines.

This represents a softening of the Society's position towards the landscape lines. The Society simply wants it recognised that the process the ONL/RCL lines have been through to identify them in the PDP is not as rigorous or reliable as that which takes place at a Court hearing where at least 3 landscape experts prepare evidence for a specific vicinity and are cross-examined on this. This would seem to be an issue that could be settled now.

[15] UCESI also lodged a memorandum on 30 October 2018 (the date of Mr Xin's

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<sup>4</sup> Notice of appeal for UCESI at [7].

<sup>5</sup> UCESI memorandum – further particulars dated 31 August 2018 at [6] and [7].



section 274 notice) stating that:

...

4. It is clear from the text the Society seeks to have attached to the PDP maps above that the Society seeks that the lines derived from the PDP process should be included in the PDP as dotted lines.
5. It is also clear from the above text that the **Society only seeks that the solid lines in the ODP be “rolled-over in their exact current form”** because these are the only lines that have been determined by the court.  
[emphasis added]

To the extent this represents a subsequent modification to the notice of appeal, it cannot apply to the Xin section 274 notice since Mr Xin would not have had notice of the amendment.

#### The arguments

[16] For the Council Ms Hockly submitted<sup>6</sup> that, when UCESI’s appeal is considered alongside the further particulars provided by UCESI, the most accurate interpretation is that UCESI seeks the following relief:

- (a) all *solid* ONL lines included in the ODP at Appendix 8 be included in the PDP maps because these lines have been previously *determined* by the court; and
- (b) any additional lines included in the PDP through the plan review process be included as dotted lines. These dotted lines are to be regarded as indicative and subject to further determination of the court as part of any resource consent application.

[17] Then Ms Hockly submitted that the UCESI appeal is not relevant because Mr Xin is seeking the reinstatement of the dotted ONL line as shown in the ODP (see Figure 1 above). In contrast the Council maintains that the relief sought by UCESI relates only to the reinstatement of the solid lines in the ODP relating to ONL boundaries.

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<sup>6</sup> K Hockly submission 17 December 2018 at [3].



[18] Counsel for Mr Xin submits that “read most generously, this would give scope to have the Sunshine Bay ONL line (shown as a dotted line on [ODP] Appendix 8A – Map 1) amended to a dotted line in its Operative location. If read more conservatively, this would give scope to amend the PDP line from solid to dotted/tentative, but not amend the location”<sup>7</sup>. Consequently, counsel submits<sup>8</sup> the notice of appeal gives Mr Xin scope to seek relief that “the ONL line for Sunshine Bay should be carried through into the PDP in its operative location excluding Mr Xin’s property from the ONL rather than being included in the ONL as per the PDP decisions version Map 13”.

[19] Alternatively, counsel submits<sup>9</sup> that it is also relevant that Appendix II of *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*<sup>10</sup> “showed a solid line to the southwest of Sunshine Bay excluding Mr Xin’s property from the ONL (noting however this was not carried through to Appendix 8A of the ODP, and the UCESI appeal refers explicitly to the “ODP maps”)”.

[20] In my view the Council is taking an overly legalistic approach to the interpretation of the UCESI appeal. The basic question, as stated by the High Court in *Option 5 Incorporated v Marlborough District Council*<sup>11</sup> is whether the issue is fairly raised by the notice of appeal (and by the submission it is based on).

[21] I find that the UCESI submission and appeal fairly raise the question of the ONL(B) location around the district and thus can apply to the site.

[22] I do not consider it necessary (or appropriate) to delve into the minutiae of UCESI’s submission and the status of the lines in the ODP since I have not received any submissions on whether the changes in the notified plan change called the PDP are a valid provision-by-provision review of (in this case) Appendix 8A, Map 1 of the ODP.

[23] Accordingly I hold that the relief sought by Mr Xin – movement of the ONL(B) line – is within jurisdiction.

<sup>7</sup> M Baker-Galloway submissions 7 December 2018 at [11].

<sup>8</sup> M Baker-Galloway submissions 7 December 2018 at [13].

<sup>9</sup> M Baker-Galloway submissions 7 December 2018 at [14].

<sup>10</sup> *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* (1999) C180/99.

<sup>11</sup> *Option 5 Incorporated v Marlborough District Council* (HC) CIV 2009-406-144.



[24] I note that neither the UCESI appeal nor Mr Xin's notice challenge the ONL classification (rural subzone) on Map 13 of the PDP. That may not matter given the Council's Variation to Chapter 6 of the PDP as notified on 21 March 2019 that appears to remove the sub-zoning aspect of the ONL classification.

For the court:

  
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**J R Jackson**  
**Environment Judge**

