

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

Decision No. [2019] NZEnvC 176

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-56)  
Appellant  
AND QUEENSTOWN LAKES DISTRICT  
COUNCIL  
Respondent

Court: Environment Judge J R Jackson  
(sitting alone under section 279(1) of the Act)

Hearing: at Queenstown on 6 August 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: 6 November 2019

Date of Issue: 6 November 2019

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**PROCEDURAL DECISION (ARTHURS POINT 4)**

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A: Under section 279(1)(a) and (e) of the Resource Management Act 1991 the Environment Court rules that:

- (1) the notice of appeal by the Upper Clutha Environmental Society Incorporated raises the issue of the proper location of the outstanding natural landscape boundary in the vicinity of Arthurs Point generally; and
- (2) the Upper Clutha Environmental Society Incorporated appeal seeks both



directly and consequentially that the rezoning by decisions of the Hearing Committee of land zoned Rural in the PC1(N) be reversed and the zoning returned to Rural and that this applies (inter alia) to the properties at 111 and 163 Atley Road, Arthurs Point;

- (3) For the avoidance of doubt, that Arthurs Point Outstanding Natural Landscape Society Incorporated may use its section 274 notice on the Upper Clutha Environmental Society Incorporated's appeal to seek a different outstanding natural boundary and classification on the properties at 111 and 163 Atley Road.

B: Leave is reserved for any party to apply:

- (1) for further or other directions consistent with the spirit and intent of the Reasons below; or
- (2) to the court to resolve the other jurisdictional/procedural issues argued at the hearing. Any applicant must give detailed grounds as to why that resolution is necessary.

C: Costs are reserved.

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## REASONS

### 1. Introduction

#### 1.1 The general issue and the parties

[1] This is a procedural decision on a rehearing to resolve the scope of an appeal by the Upper Clutha Environmental Society Incorporated (“UCESI”) as it relates to the outstanding natural landscape (“ONL”) of the northwestern part of the Wakatipu Basin (an area centred on Arthurs Point). As explained in *Tussock Rise Limited v Queenstown Lakes District Council* (“*Tussock Rise*”)¹ while all the documents of the Queenstown Lakes District Council refer to a “proposed district plan” or “PDP” the legal effect of its actions is that it has undertaken a series of plan changes. The appeal relates to a large plan change (which I will call “PC1”) to the operative Queenstown Lakes District Plan.

[2] The Arthurs Point Outstanding Natural Landscape Society Incorporated (“the Society”) joined the appeal as a party under section 274 Resource Management Act 1991 (“the RMA” or “the Act”) on 8 July 2018 because the mapping in PC1 of landscape lines around Arthurs Point is a matter of concern to the Society (as its name suggests). There are three other section 274 parties to this proceeding as it may relate to Arthurs Point – Gertrude’s Saddlery Limited (“GSL”), Larchmont Developments Limited (“Larchmont”) and the Arthurs Point Land Trust (“APLT”). All are landowners at Arthurs Point. The first two – GSL and Larchmont – own land at the southern edge of Arthurs Point which I call “the Shotover Loop”. The Council abides the decision of the court on the principal issues. The APLT appeared out of caution but its land is not affected by this decision.

[3] The starting point² for any plan change is usually (and should be) the provisions of the Operative District Plan (“ODP”) which are being changed. Relevant to this case Appendix 8A – Map 1 of the ODP – depicts the landscape boundaries in the Wakatipu Basin/Arthurs Point area³. The boundary between the ONL and, for example urban areas, is indicated by either a solid line or a dotted line. The legend explains that a solid

1 *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111.

2 This is not to say that there is any presumption that the status quo is correct, simply that it frames one side of the discourse.

3 A copy is attached as attachment “C” to the first relevant procedural decision in these (and other) proceedings: *Arthurs Point Trustee Limited v Queenstown Lakes District Council* [2019] NZEnvC 14 (“*Arthurs Point 1*”).





line indicates fixed boundaries that have been confirmed by the Environment Court, a dotted line indicates “boundaries that have not been determined by the Environment Court and therefore the exact location of the line has not been confirmed”<sup>4</sup>.

[4] Under the ODP the Shotover Loop properties<sup>5</sup> fell within the outstanding natural landscape<sup>6</sup>. The urban development “capacity” for the first two sites was zero because the land was zoned Rural General.

[5] The converse of these points is obvious: under the ODP there is no boundary excluding Arthurs Point from the ONL. I should add that the “Shotover Gorge” immediately south of the Shotover Loop, is identified as<sup>7</sup> an Outstanding Natural Feature (“ONF”) but the outer edges of that ONF are not defined.

[6] The Council then undertook a provision-by-provision<sup>8</sup> review of the ODP as described in *Tussock Rise*<sup>9</sup>. As for the Section 32 Report on PC1, as Ms Baker-Galloway submitted, it simply contemplated that the ONL lines in the ODP should be rolled over into the notified PC1 planning maps. This is what occurred: in the plan change as notified (“PC1(N)”) Map 13 shows the outstanding natural boundary lines so as to include Arthurs Point and the area around it in the ONL.

[7] Map 39 of PC1(N), which focuses on Arthurs Point, showed the existing developed area of Arthurs Point as a mixture of living zones – mainly Low Density Residential Zone (“LDRZ”) coloured grey. It is surrounded by a red dashed line which indicates an “Urban Growth Boundary” (“UGB”). The Shotover Loop was zoned Rural as signified by the yellow wash on Map 39. While the Legend to the map shows that a brown dashed line indicates a “landscape classification (ONL, ONF, RCL)” there is no such line on Map 39. However, on or in the vicinity of the Shotover Loop the letters “ONL” are written on the yellow wash denoting Rural zoned land.

[8] In the Commissioners’ Decision on PC1 dated 18 April 2018 they amended Maps 13 and 39 – now renumbered as “39a” – to show:

<sup>4</sup> Legal submissions for APLT dated 30 November 2018 at [18].

<sup>5</sup> The legal descriptions are given in *Arthurs Point 1*, above n 3.

<sup>6</sup> Under section 6(6) RMA.

<sup>7</sup> Policy 4.2.5.5 ODP.

<sup>8</sup> Under section 79(1)-(3) RMA.

<sup>9</sup> *Tussock Rise* above n 1 at [6]-[10] and [48]-[49] (inter alia).





- a brown dashed line around Arthurs Point and the Shotover Loop;
- an extension of the UGB to include the Shotover Loop; and
- the Shotover Loop rezoned to LDRZ.

That outcome is surprising first because in fact no submission sought an ONL boundary to be drawn around Arthurs Point so as to exclude it from the ONL and secondly because the relief sought by GSL and Larchmont in respect of the “ONL” status of the Shotover Loop was both indirect and misleading<sup>10</sup>. It certainly did not directly seek any change to the ONL lines.

[9] The court has already released three procedural decisions relating to Arthurs Point and PC1. In the first (procedural) decision *Arthurs Point Trustee Limited v Queenstown Lakes District Council*<sup>11</sup> the court attempted to give direction as to the landscape issues in PC1 as they relate to Arthurs Point. There is a set of maps attached to that decision which can usefully be referred to and which I rely on here.

[10] However, in other respects *Arthurs Point 1* is wrong. It was subject to a rehearing application which was granted in the second procedural decision (“*Arthurs Point 2*”)<sup>12</sup>. *Arthurs Point 1* needs to be read with caution because the decision was oblivious<sup>13</sup> both to the existence of brown ONL boundary lines in the vicinity of Arthurs Point (for example on Map 13 of PC1(N)) and to the fact that the ONL contains other zones than Rural. Those points are not quite as damning as they seem because I expressly recorded that the court’s findings of fact were “provisional at this stage”<sup>14</sup>. Further, the court was then under the impression<sup>15</sup> that the Council was undertaking a full review<sup>16</sup> of the ODP which, as it turns out, is incorrect<sup>17</sup>.

[11] There is a third relevant decision in a separate proceeding brought by the Society: *Arthurs Point Outstanding Natural Landscape Society Incorporated v Queenstown Lakes*

<sup>10</sup> *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 (“*Arthurs Point 3*”).

<sup>11</sup> *Arthurs Point 1* above n 3.

<sup>12</sup> *Upper Clutha Environmental Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 78.

<sup>13</sup> *Arthurs Point 1* above n 3 at [38].

<sup>14</sup> *Arthurs Point 1* above n 3 at [14].

<sup>15</sup> *Arthurs Point 1* above n 3 at [15] under the heading “2 Provisional findings on the facts”.

<sup>16</sup> Under section 79(4) RMA.

<sup>17</sup> *Tussock Rise* above n 1 at [48]-[49].



*District Council*<sup>18</sup> (“*Arthurs Point 3*”) about the adequacy of the public summary of submissions on PC1(N)’s Map 39. That decision is subject to appeals to the High Court.

1.2 The issues, the plan changes and the outstanding natural landscape at Arthurs Point

[12] The primary issues for me to resolve are: first, what is actually sought by the UCESI appeal in relation to Arthurs Point; and second, if the brown ONL boundary drawn around Arthurs Point and the Shotover Loop by the Commissioners is found to be wrong or inappropriate, is relief sought by the appeal, or what consequential relief can the Environment Court grant, in respect of rezonings made in reliance on that boundary?

[13] I described the process leading to the notification of, and the scheme of, PC1(N) in *Tussock Rise*<sup>19</sup> and *Arthurs Point 3*<sup>20</sup>. I adopt those descriptions in full here.

[14] The key relevant points are that Map 39 of PC1(N) shows:

- (a) no brown dashed line indicating an ONL boundary;
- (b) a yellow washed area marked with the letters “ONL” indicating the Rural (yellow wash) land is subzoned as an ONL classification

— and that the effect of the brown dashed ONL boundary line on Map 13 in PC1(N) is that the whole of Arthurs Point is in an outstanding natural landscape.

[15] I will refer to Rural zoned land which is classified as ONL as “ONL(Z)”, and a brown dashed ONL boundary as an “ONL(B)”.

1.3 The UCESI submission on the PC1(N)

[16] The submission<sup>21</sup> by the UCESI is dated 19 October 2015 and states (relevantly):

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<sup>18</sup> *Arthurs Point Outstanding Natural Landscape Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 150.

<sup>19</sup> *Tussock Rise* above n 1.

<sup>20</sup> *Arthurs Point 3* above n 10.

<sup>21</sup> QLDC reference 145/12.





The specific provisions of the proposal that the Society's submission relates to are:

3.2.5.1.1 and 3.2.5.2.1 Landscape Classification Lines and any parts of the plan related to these provisions.

The Society's submission is:

The [PC1] proposes to include definitive Landscape Lines as described in policies 3.2.5.1.1 and 3.2.5.2.1

The S.32 Landscape Evaluation Report says:

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

The S.32 Strategic Direction report states:

Fundamentally, however, the landscape provisions in the Operative District Plan are considered to function well. However, the District Plan review does propose to make some changes, and in particular provide a degree of greater definition and certainty by mapping landscape lines.

The Society agrees that the existing landscape provisions in the Operative District Plan are functioning well. It is accepted that some uncertainty is created by the case by case approach to landscape categorization in the Operative District Plan but in our submission there is no other practical approach available. The imposition of dubious and contentious Landscape Lines as proposed in the Proposed District Plan is not a credible course of action.

The S.32 Landscape Evaluation Report says the proposed Landscape Lines:

Will allow more subdivision and development within the areas identified as suitable for Rural Lifestyle zoning.

Landscape Lines that are wrong or dubious will potentially allow a great deal of subdivision and development in landscapes where this is inappropriate. This has the potential to be a major cost to the community.

Under the existing case by case approach the Environment Court has successfully identified Landscape Lines in a number of contentious parts of the District, including many places in the Upper Clutha. The Society is confident that by the time the District Plan comes up for further review in 10-15 years' time almost all of the contentious Landscape Lines will have been identified under this process.

...



While we understand the arguments in favour of trying to identify all of the Landscape Lines now, the Society believes that this approach is inefficient. If Landscape Lines are definitively identified on maps in the proposed District Plan these may become the subject of numerous appeals by landowners thus delaying the District Plan coming into force.

The Society questions the statement in Proposed District Plan Part 6.1 that says:

Landscapes have been categorised to provide certainty of their importance to the District.

As we explain above, in the Society's opinion the Landscape Lines proposed are not credible in many places.

**The Society seeks the following decision from the Queenstown Lakes District Council:**

The Society seeks 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.

This would be consistent with the approach taken in the Operative District Plan where, as can be seen in the map Appendix B Map 1, a number of dotted landscape lines are shown as guidelines and the key to the map explains that:

Boundary between two different landscape categories ... these lines have not been through the Environment Court process to determine their exact location and are indicative as outlined in Environment Court decision C180/1999.

If this course of action is taken the Society seeks that the text on maps in the Operative District Plan are amended and included in the Proposed District Plan as follows:

Boundary between two different landscape categories ... these dotted lines have been determined under a broad-brush analysis as part of the District Plan process but have not yet been through the Environment Court process to determine their exact location and are not definitive. The dotted lines are purely indicative until their exact location has been determined through the Environment Court process.

Such an approach would give more certainty to landowners and applicants and would be consistent with the Act while at the same time accepting that only a fine-grained analysis under court conditions can accurately define Landscape Lines where they are contentious.

**The Society wishes to be heard in support of its submission.**





[17] It will be observed that UCESI's submission is broad and wide-ranging but does not refer specifically to the Arthurs Point area at all. Rather, it challenges all new or amended ONL lines in PC1(N). It also adopts the approach to the setting of landscape boundaries used in Appendix 8A of the ODP.

#### 1.4 The Commissioners' Decision(s) and the appeal by UCESI

[18] As I have noted, the decision of the Council's Commissioners inserted a new brown dashed ONL boundary around Arthurs Point. Because no submission sought that relief they purported to use the Council's powers under clause 16(2) First Schedule to the RMA. The Commissioners also extended the ONL(B) to include the Shotover Loop relying on the submissions by GSL and Larchmont as discussed in *Arthurs Point 3*.

[19] UCESI lodged its appeal on 8 June 2018. The notice of appeal states (relevantly):

**Upper Clutha Environmental Society (Inc.)  
Notice of Appeal to the Environment Court  
Queenstown Lakes District Council – Proposed District Plan**

**To: The Registrar  
Environment Court  
PO Box 2069  
Christchurch**

**The Upper Clutha Environmental Society (the Society) appeals against parts of a decision of the following plan:**

Queenstown Lakes District Council Proposed District Plan [PC1] Stage 1.

**The Society made submissions and further submissions on the PC1 Stage 1.**

...

**The parts of the decision the Society is appealing:**

The Society is appealing the parts of the [PC1] Stage 1 decision that relate in any way to subdivision and/or development in the Rural Zone.

The Society is also appealing the parts of the [PC1] Stage 1 decision where it makes decisions and/or recommendations on the [PC1] Stage 2 where this in any way relates to



Rural Zone subdivision and/or development.

**The specific provisions the Society is appealing:**

The Society is appealing the parts of the [PC1] Stage 1 that contain objectives, policies, assessment matters, rules and maps and any other provisions that relate in any way to subdivision and/or development in the Rural Zone.

The Society is also appealing the parts of the [PC1] Stage 1 decision where it makes decisions and/or recommendations on the [PC1] Stage 2 where this in any way relates to Rural Zone subdivision and/or development.

**The reasons for the appeal are:**

1. The decision errs in deciding that the [PC1] Stage 1 is efficient and effective in achieving the purposes of the Resource Management Act.
2. The decision errs in deciding that the [PC1] Stage 1 represents sustainable management as described in Section 5 of Part 2 of the Resource Management Act because:
  - the PC1 does not adequately recognise and provide for matters in Section 6 of the Resource Management Act and in particular s.6 (a) and (b). The [PC1] does not adequately protect for future generations the Outstanding Natural Landscape (ONL) and Outstanding Natural Feature (ONF) landscapes of the district from inappropriate subdivision and/or development.
  - the [PC1] does not adequately have particular regard to matters in s.7 of the Resource Management Act and in particular s.7 (b) (c), (f) and (g). The [PC1] does not adequately protect for future generations the Rural Character Landscapes (RCL) from random, sporadic and incremental subdivision and/or development that is in the process of cumulatively degrading existing bucolic and pastoral values.
- ...
  3. The decision errs in failing to recognise that Operative District Plan (ODP) provisions rolled over into [PC1] Stage 1 ... better achieve the purpose of the Act than the provisions in the [PC1] Stage 1 decision ...
  - ...
    5. The decision errs in failing to give sufficient weight and recognition to expert economic evidence ... presented at the [PC1] District Plan Review hearings highlighting the critical importance of protecting landscape values to the economy of the Queenstown Lakes District and New Zealand. The decision errs in failing to include sufficient specific provisions in the ODP that expressly spell-out the critical role landscape values play in contributing to the social, cultural and economic wellbeing of the Queenstown Lakes District and the wider NZ economy.
  - ...





10. The decision errs in deciding that the Landscape Lines delineating ONL, ONF'S and Rural Character Landscape in the maps in the [PC1] Stage 1 decision are credible. The decision errs in failing to recognise that the process behind identifying these landscape lines is flawed. The decision errs in deciding that there is "an adequate evidential foundation for identifying ONL and ONF lines". The decision errs in deciding that, as delineated, these landscape lines will be efficient and effective in categorising landscapes and in implementing the objectives, policies, assessment matters and rules attached to such categorisations ...

**The Society seeks the following relief:**

...

3. That amendments to the [PC1] Stage 1's text and maps consistent with the issues listed below are incorporated into the PC1 where they are additional to those detailed in Appendices A-D and paragraphs 1 and 2 above.

...

7. 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 [PC1] Stage 1 maps, are included in the PC1 as dotted lines (with the exception of the two locations at Dublin Bay/Mount Brown, Waterfall Hill/Waterfall Creek described below) 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.*

...

(emphases added, footnotes omitted)

[20] The other parties made much of the fact that UCESI, through its representative Mr J Haworth, subsequently gave further particulars of the relief sought. Those particulars appear to eschew any claim to relief in respect of the Arthurs Point area. However, since Mr Haworth's emails post-date<sup>22</sup> the Society's joining the appeal on 8 July 2018 I consider they are irrelevant to the Society's reliance on the original appeal.

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<sup>22</sup> The first memorandum of J Haworth, UCESI's representative, is dated 12 August 2018.



### 1.5 The context of PC1

[21] There are a number of contextual matters that need to be borne in mind when assessing the jurisdiction of the court in relation to the landscape setting of Arthurs Point.

[22] First, I need to bear in mind the structure of PC1. It introduces an overarching chapter called “3 Strategic Issues”. This kind of coordinating chapter seems principled, for example, if it assists in the protection of the matters of national importance under section 6 RMA. However, it does potentially cause a problem for the plan process as I observed in *Tussock Rise*<sup>23</sup>. The difficulty 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 the Queenstown Lakes District Council where one of the fundamental issues was always likely to be the recognition/identification of the ONLs and ONFs for the district if they were to be changed (or finalised where not already settled).

[23] Second, there is the difficulty that PC1 is not in fact a proposed plan but a series of proposed plan changes (under section 79(1)-(3) RMA) as discussed in *Tussock Rise*<sup>24</sup>. The notification of PC1 does not tell the reader which provisions or sets of provisions in the ODP are being retained, and which are not. In particular, when writing *Arthurs Point 1* and *Arthurs Point 2*, I conceived of the “PDP” structure as automatically replacing Chapter 4 (“District Wide Issues”) of the ODP but that is probably wrong. There is nothing in the notified PC1 Stage 1 – viewed as a provision-by-provision<sup>25</sup> plan change – that expressly says Chapter 4 ODP is replaced.

[24] Further, the Environment Court in *Darby Planning Partnership Limited v Queenstown Lakes District Council*<sup>26</sup> (“*Darby*”) says Chapter 4 of the ODP is not an overarching strategic chapter. Consequently, it is possible that Chapter 4 ODP lives on, perhaps at the same level as Chapters 4 to 6 of PC1. I must confess to some doubts about *Darby’s* view of Chapter 4 (“District-wide Issues”) in the ODP. It has always seemed to me that Chapter 4 provides some sort of “bottom-lines” (as contemplated by the majority of the Supreme Court in *Environmental Defence Society Incorporated v The*

<sup>23</sup> *Tussock Rise* above n 1 at [47] and [49].

<sup>24</sup> *Tussock Rise* above n 1.

<sup>25</sup> Or even as a “set-of-provisions by set-of-provisions” plan change.

<sup>26</sup> *Darby Planning Partnership Limited v Queenstown Lakes District Council* [2019] NZEnvC 133.





*New Zealand King Salmon Company Limited*<sup>27</sup> (“*King Salmon*”)) and that these provide quite useful strategic direction to the Council.

[25] Fourth, one of the omissions from PC1 is a set of objectives, policies and rules (or other methods) managing the effects of activities in other than rural zones where land with those other zonings is inside the ONL(B) i.e. the land is within an outstanding natural landscape<sup>28</sup>. As the court stated in *Arthurs Point 3* “... there are no separate rules for developing ... LDR zoned land within an ONL ... this [is] “the policy gap” in PC1(N)”. It also appears no person made a submission seeking that the matter excluded (objectives, policies and methods covering the policy gap) be dealt with. That means that no person had a right to appeal about the omission either<sup>29</sup>.

[26] Finally, Policy 4.2.1.5 of PC1(N) states that no UGB should “impinge” onto an ONL. That policy was confirmed in PC1(D) but is subject to appeal. Its effect seems to be that before an UGB can be drawn, the ONL(B) needs to be redrawn (if that is appropriate on the facts).

## 2. The law

### 2.1 The powers of local authorities (and the court) under Schedule 1

[27] As to the Council’s powers when issuing decisions on submissions, clause 10 of Schedule 1 states (relevantly):

#### **10 Decisions on provisions and matters raised in submissions**

- (1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.
- (2) The decision —
  - (a) must include the reasons for accepting or rejecting the submissions and, for that purpose, may address the submissions by grouping them according to —
    - (i) the provisions of the proposed statement or plan to which they relate; or
    - (ii) the matters to which they relate; and
  - (ab) must include a further evaluation of the proposed policy statement or plan undertaken in accordance with section 32AA; and
  - (b) may include—

<sup>27</sup> *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38; [2014] NZLR 593; [2014] NZRMA 195; (2014) 17 ELRNZ 442.

<sup>28</sup> But not within the ONL(Z).

<sup>29</sup> Clause 14(2) Schedule 1 RMA.



- (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and
  - (ii) any other matter relevant to the proposed statement or plan arising from the submissions.
- (3) To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.

[28] If a person is dissatisfied with a council's decision, clause 14 provides:

**14 Appeals to Environment Court**

- (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
- (a) a provision included in the proposed policy statement or plan; or
  - (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
  - (c) a matter excluded from the proposed policy statement or plan; or
  - (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
- (2) However, a person may appeal under subclause (1) only if—
- (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
  - (b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.
- (2A) For the purposes of subclause (2)(b), **proposed plan** does not include a variation or a change.
- (3) The following persons may appeal to the Environment Court against any aspect of a requiring authority's or heritage protection authority's decision:
- (a) any person who made a submission on the requirement that referred to that matter;
  - (b) the territorial authority.
- (4) Any appeal to the Environment Court under this clause must be in the prescribed form and lodged with the Environment Court within 30 working days of service of the notice of decision of the local authority under clause 11 or service of the notice of decision of the requiring authority or heritage protection authority under clause 13, as the case may be.
- (5) The appellant must serve a copy of the notice in the prescribed manner.

[29] Clause 15 then provides (relevantly):

**15 Hearing by the Environment Court**

- (1) The Environment Court shall hold a public hearing into any provision or matter referred to it.





- (2) If the Environment Court, in a hearing into any provision of a proposed policy statement or plan (other than a proposed regional coastal plan), directs a local authority under section 293(1), the local authority must comply with the court's directions.

...

[30] The Environment Court recently summarised these powers in *Lindis Catchment Group Incorporated v Otago Regional Council*<sup>30</sup> ("Lindis") as being:

... the limits of the court's jurisdiction are given by provisions (and some matters) that are<sup>31</sup>:

- (a) clearly stated in a proposed plan (or change); or
- (b) reasonably and fairly raised in a submission on the provision or matter;
- (c) either raised in an appeal which complies with clause 14(1) Schedule 1; or
- (d) "matter(s) ... relating to any consequential alterations necessary to the proposed ... plan arising from the submissions"<sup>32</sup>; or
- (e) which are "any other matter ... relevant to the proposed ... plan arising from the submissions"<sup>33</sup>.

The court added that "the section 293 [RMA] supplementary power is relevant here, principally to resolve fairness issues since (d) and (e) arguably go beyond (a)-(c)"<sup>34</sup>.

## 2.2 The recognition of outstanding natural landscapes

[31] While this decision is purely procedural, I consider that part of the contextual matrix in which I must consider the issues is that identification of the outstanding natural landscapes (and other section 6 matters) of a district should come at an early stage in the preparation of any plan or plan change (if relevant to the plan change as it is here). In *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council*<sup>35</sup> ("WESI") the Environment Court observed:

... the "first stage"<sup>36</sup> in the substantive resolution of a plan change is to identify the facts and matters to be considered; in particular "... it is mandatory to identify the matters of national

<sup>30</sup> *Lindis Catchment Group Incorporated v Otago Regional Council* [2019] NZEnvC 166 at [140].

<sup>31</sup> See *re Vivid Holdings Limited* [1999] NZRMA 467; (1999) 5 ELRNZ 264 (NZEnvC) at (19).

<sup>32</sup> Clause 10(2)(b)(i) Schedule 1 RMA.

<sup>33</sup> Clause 10(2)(b)(ii) Schedule 1 RMA.

<sup>34</sup> *Lindis* above n 30 at [140].

<sup>35</sup> *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (NZEnvC).

<sup>36</sup> *WESI* above n 35 at [56].



importance. [This includes] ... the boundaries of the areas concerned<sup>37</sup>.

[32] A similar point was made by the Court of Appeal in *Man O'War Station Limited v Auckland Council*<sup>38</sup>. Writing for the court, Cooper J stated:

[61] ... the issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s6(b) of the Act requires an essentially factual assessment based upon the inherent quality of the landscape itself. The direction in section 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...

[62] The question 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 s6(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]

That is of course both authoritative and logical. The implications for this proceeding are that the ONL(B) in the vicinity of Arthurs Point should be established before any other provisions applicable to the area are reviewed. The strategic directions in Chapter 2 of PC1 may give some guidance to the same effect.

### 3. The scope of the UCESI appeal

#### 3.1 The issue and the arguments

[33] The principal question is whether the Society can rely on its section 274 notice to the notice of appeal by UCESI to seek amendments to the brown ONL(B) line which the PC1(D) drew around the Arthurs Point township and the Shotover Loop. The answer to that depends on the scope of the UCESI appeal.

<sup>37</sup> *WESI* above n 35 at [56].

<sup>38</sup> *Man O'War Station Limited v Auckland Council* [2017] NZRMA 121 at [61].





[34] Ms Baker-Galloway argued first that UCESI's appeal cannot relate to Arthurs Point as the original submission had no relation to Arthurs Point. For the Society Ms Steven QC answered that there was "... never any need for UCESI to lodge an original submission [on PC1] seeking any change to the solid lines where they had been carried over from the ODP ...".

[35] It is clear that the ODP maps do not include any solid line around Arthurs Point. GSL and Larchmont submit that the correct reading of UCESI's appeal is that it relates only to the reinstatement of the solid ODP ONL lines and consequently there is no jurisdiction for the Society to seek site specific relief in respect of the ONL line at this location. Ms Hockly originally submitted "this is because a reinstatement of the solid ONL lines from the ODP into the PC1 would not impact the location of the ONL boundary at 111 and 163 Atley Road"<sup>39</sup>. GSL and Larchmont also submit that the UCESI appeal does not seek any relief in respect of the rezoning of the Shotover Loop properties from Rural to LDR.

[36] For GSL and Larchmont Ms Baker-Galloway added that because no ONL(B) was identified on Map 39 in the PC1(N) the issue of the integrity or "credibility" of the process for identification of the landscape boundary – as referred to by UCESI in its notice of appeal – is "not relevant". I struggle to understand that reasoning: if the ONL(B) was drawn some distance away (over one kilometre on my measurement) on Map 13 of the PC1(N) but then a new ONL(B) was drawn around Arthurs Point township plus some rural land to the south of the Shotover Loop in Maps 13 and 39 of PC1(D), that seems to be precisely the issue which the UCESI appeal is concerned with.

### 3.2 Consideration

[37] The Commissioners' Decision moved the ONL(B) by drawing a brown line around Arthurs Point and adding the Shotover Loop. As I understand the submissions from the GSL and Larchmont, they had two lines of arguments against the UCESI appeal being about the ONL(B) line drawn around extended Arthurs Point (including the Shotover Loop):




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<sup>39</sup> K L Hockly submissions 28 November 2018 at para 4.35(b).

- (1) there was no ONL(B) around Arthurs Point in PC1(N) so there could be no submission on the location of the line, and if there was no submission there could be no appeal;
- (2) the UCESI appeal only sought as relief a (provisional) "dotted line" to delineate the ONL(B) and the Society's section 274 notice could not widen the scope of the appeal to move the ONL(B).

[38] I consider the parties opposing the Society are selective in their reading of UCESI's submission and notice of appeal. It is axiomatic that each of those documents should be read as a whole and the relief construed "fairly and reasonably": *Countdown Properties (Northlands) Ltd v Dunedin City Council*<sup>40</sup> ("*Countdown*").

[39] The first argument – as to the absence of a submission about an ONL(B) drawn around Arthurs Point so as to exclude the extended village from the outstanding natural landscape – misses two essential points – one factual and one legal.

[40] The factual point is that the first part of the relief sought by UCESI's submission expressly states:

[UCESI] seeks that the Landscape Lines determined in the Proposed District Plan process are excluded from the Plan altogether because they are not credible.

All other relief sought by UCESI in its submission is an alternative to that.

[41] The legal point is that the Commissioners' Decision on Arthurs Point is part of the PC1 process and the UCESI submission – because of its specific wording as quoted in the previous paragraph – can be seen as anticipating that decision. That might seem illogical but the Schedule 1 code for the preparation of district plans and changes expressly states that an appeal may be lodged with the Environment Court if the appellant is a submitter who made a submission on:

- ...
- (b) A provision that the decision on submissions proposed to include in the ... plan.

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<sup>40</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (FC).





[42] For over 20 years it has puzzled me – see *Re Vivid Holdings Ltd*<sup>41</sup> – as to how a submission can be made in respect of a provision that the decision on submissions proposes to include in a plan (change) when the submitter cannot know what a decision will include. The UCESI submission seems to have answered that pre-emptively (but perhaps rather cynically) by disagreeing with any future new ONL(B) before knowing where the boundary was to be drawn. The UCESI submission seeks that any ONL(B) or “landscape line” introduced by PC1 is removed from the plan change. With impressive prescience this brings the submission squarely within clause 14(1)(b) of Schedule 1.

[43] The second issue is straightforward. UCESI’s notice of appeal seeks at paragraph 3 that “... maps consistent with the issues listed below are incorporated into PC1 ...”. Then paragraph 7 seeks:

- (1) that the ONL(B) on the ODP’s maps are transferred as “solid lines” on to PC1’s maps;
- (2) that any new lines are drawn as “dotted lines” until resolved by the Environment Court.

The submissions for GSL and Larchmont ignore the combined effect of the relief sought which seeks that any new landscape line introduced by decisions on PC1 be entered as dotted lines pending resolution by the Environment Court.

[44] What UCESI appears to be seeking by that is that the new line is regarded as provisional and that a definitive line would be determined by the Environment Court when an issue about development arises (and presumably an appeal is lodged). In fact the issue has arisen already – see *Arthurs Point* 3<sup>42</sup> – so the exact location of the ONL(B) will need to be resolved at a substantive hearing of this proceeding (if not earlier by the Council).

[45] If the relevant landowners GSL and Larchmont have already, by their submissions, sought resolution of the issue, it is fair and reasonable that UCESI (and consequently the Society in its shoes) should be allowed to put forward a substantive case as to the appropriate definitive location of the ONL(B).

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<sup>41</sup> *Re Vivid Holdings Ltd* above n 31 at (19).

<sup>42</sup> *Arthurs Point* 3 above n 10 at Order A.



[46] GSL and Larchmont argued that such a wide reading of the submission and appeal would open the floodgates by making the status of every landscape boundary in PC1 subject to potential litigation. But that is precisely what UCESI sought as the first sentence of the “decision sought” in UCESI’s submission makes clear. A submission on a plan change can be wide or narrow provided it is still ‘on’ the plan change as the High Court authorities<sup>43</sup> discussed in *Tussock Rise* make clear. It is notable that none of the parties opposing the Society tried to argue that the UCESI submission was not ‘on’ the plan change (and I think it is unlikely they would have succeeded if they had).

#### 4. Can the court grant consequential relief on the substantive appeal?

[47] The second issue is as to whether (if the Society persuades the Environment Court that the ONL(B) line now drawn around Arthurs Point should be removed or at least redrawn) it can seek consequential relief. Normally, it might be seen as premature to consider the scope of consequential relief but there are peculiar circumstances which make the secondary issue quite important to the parties – unless there is power to reverse the zoning the Council could be faced with a situation where the Environment Court has amended the ONL(B) to include the Shotover Loop but anomalously (and disregarding issues about the location of the UGB for the present) the land is zoned LDRZ with the policy gap identified earlier.

[48] The parties opposing the Society say that the appeal does not seek any consequential relief. I find that is incorrect. The first page of the notice of appeal expressly states that UCESI “... is appealing the parts of the [PC1] Stage 1 decision that relate in any way to subdivision and/or development in the Rural Zone”. The reference to Rural Zone must be to the Rural Zone as shown in PC1(N) and that includes the Shotover Loop. So I hold it is within the court’s jurisdiction to consider whether the UGB around Arthurs Point should be moved and the Rural zoning of the Shotover Loop changed to LDRZ.

[49] I accept that the passage I have referred to in the UCESI appeal is not under the heading “relief sought” but is found close to the beginning of the appeal. I hold that makes no difference: the notice of appeal must be read as a whole, and the sentence quoted makes it clear that UCESI (and now the Society in its shoes) is concerned about any

<sup>43</sup>

*Clearwater Resort Limited v Christchurch City Council* (HC) Christchurch AP 34/02; *Option 5 Inc v Marlborough District Council* (HC) Blenheim CIV-2009-406-144; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290; [2014] NZRMA 519.





rezonings of the former Rural General (under the ODP) and Rural (under PC1(N)) zones to non-rural zonings.

[50] In case I am wrong in my finding that the notice of appeal expressly seeks to set aside changes of zoning after redrawing the ONL(B), I hold that the Society (in UCESI's shoes) is entitled to rely on the Environment Court hearing the substantive appeal having the same powers as the territorial authority. Consequently the court has the powers in clause 10 Schedule 1 RMA. As noted above, they include:

- (i) matters relating to any consequential alterations necessary to the proposed ... plan arising from the submissions; and
- (ii) any other matter relevant to the proposed ... plan arising from the submissions.

[51] Further, I also note that one of the issues facing the parties opposing the Society is that if the Environment Court:

- (a) either holds there was no jurisdiction to add a new ONL(B) around Arthurs Point (and the land of the section 274 parties); or
- (b) finds on the merits that, for example, the land of the section 274 parties should be excluded from Arthurs Point i.e. kept within the ONL(B)

— then it appears that there is no jurisdiction to move the UGB because impinging<sup>44</sup> on an ONL is to be avoided. If the UGB cannot be moved, then logically the Rural zoning (e.g. of the section 274 parties' land) could not have been changed either. This is a further reason for holding that to reverse the zoning is within the Environment Court's jurisdiction.

[52] So it would appear to be an automatic consequence of any finding (if that is made) that the Shotover Loop is part of the ONL that the UGB should move and the Rural zoning be removed, even though there is no appeal directly seeking to overturn the Council's decision in respect of the GSL and Larchmont submissions.

## 5. Outcome

[53] I will make rulings reflecting the evaluation above. In effect I am confirming the

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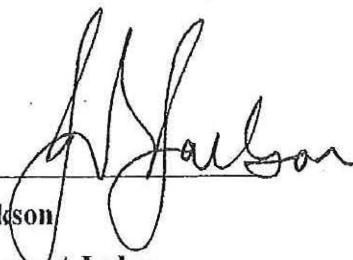
<sup>44</sup> See Policy 4.2.1.5 of PC1(DV).



orders made in *Arthurs Point 1* but on different grounds and on a correct understanding of both the process being followed by the Council and of the relevant facts.

[54] I note that various consequential issues were raised in the court's record of a conference of the parties dated 10 July 2019. For two reasons I do not consider it is necessary to resolve those now. First, the effect of *Arthurs Point 3*<sup>45</sup> is that the Council will have to renotify the GSL and Larchmont submissions so that the Society and other interested persons will be able to lodge cross-submissions on the issues raised by those original (misleading) submissions. Secondly, and more importantly, in the current context the Society may, as a result of the ruling I will make, be able to argue all the substantive merits as to the location of an ONL(B) line around Arthurs Point. However, in case I am wrong about that I will reserve leave for any party to apply to the court to resolve those subsidiary or consequential issues (as I see them).

[55] It should go without saying that nothing in this decision is any comment on the substantive issue of where an ONL(B) line should be drawn in the vicinity of Arthurs Point.

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



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<sup>45</sup> *Arthurs Point 3* above n 10 (subject to appeals to the High Court).