

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2022] NZEnvC 198

IN THE MATTER of the Resource Management Act 1991

AND of appeals pursuant to clause 14 of the
First Schedule of the Act

BETWEEN UPPER CLUTHA
ENVIRONMENTAL SOCIETY
INCORPORATED

(ENV-2018-CHC-56)

and all other parties concerning
Topic 2 to Stage 1, specifically the
mapping of the Clutha
River/Mata Au ONF corridor, of
the Proposed Queenstown Lakes
District Plan

Parties

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge J J M Hassan
Environment Commissioner K A Edmonds
Environment Commissioner J T Baines

Hearing: In Chambers at Christchurch

Last case event: 30 March 2022

Date of Decision: 6 October 2022

Date of Issue: 6 October 2022



INTERIM DECISION OF THE ENVIRONMENT COURT**Topic 2: Rural Landscapes****Section 293 determination on the Clutha River/Mata Au ONF corridor
Decision 2.14**

- A: Under ss 290 and 293 RMA,¹ directions are made for Queenstown Lakes District Council to confer with the s274 parties and file a memorandum proposing directions for the preparation of a final revised complete set of amended provisions for the court's final approval and directions (including maps and an amended r 25.5.2).
- B: Costs are reserved with any timetable to be set in the final decision, subject to any memoranda filed for such purposes.

REASONS**Introduction**

[1] This decision is part of a series on Topic 2 of the staged consideration of appeal points on the review of the Queenstown Lakes District Plan ('PDP'). Topic 2 concerns PDP provisions in relation to landscapes and rural character. In Decision 2.1,² the court determined that the Clutha River/Mata Au corridor should be classified as ONF, rather than ONL, with any changes to the boundaries a matter for evaluation. Under s293, RMA directions were made in Decision 2.9³ for Queenstown Lakes District Council to notify the proposed boundary adjustments (the 'proposal'). Notification occurred on 21 September 2021.

[2] The court's s293 directions allowed for the making of submissions on the

¹ Resource Management Act 1991.

² *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160.

³ [2021] NZEnvC 124.

proposal direct to QLDC. QLDC filed a memorandum of counsel and accompanying report, both dated 3 November 2021.⁴ That report described the 13 submissions received and provided an initial recommendation to the court based on those submissions. A supplementary report by the same author was later received dated 9 November 2021⁵ informing the court of an additional submission. In total, 14 submissions were received.⁶

Joining of s274 parties

[3] The Woodfields⁷ and Pittaway Family Trust⁸ filed s274 notices to join as parties, their notices are not opposed, and we are satisfied that each qualifies to join as parties given the direct consequences that arise for them. No other person who made a submission to QLDC filed a s274 notice. Therefore, we record the Woodfields and the Trust as parties to the proceeding.

Submissions to QLDC on the Proposal and QLDC's response

[4] QLDC Principal Planner, Ms Grace recorded that, despite no submitter having filed expert affidavit evidence to support its position, many raised landscape related concerns. Ms Grace recorded her response to these concerns, informed by her discussions with landscape architect, Ms Helen Mellsop. Ms Mellsop is well

⁴ Summary report of Emily Suzanne Grace on behalf of QLDC in relation to s293 process for Clutha River/Mata Au Outstanding Natural Feature Corridor dated 3 November 2021 ('Summary report').

⁵ Supplementary summary report of Emily Suzanne Grace on behalf of Queenstown Lakes District Council in relation to s293 process for Clutha River/Mata Au Outstanding Natural Feature Corridor dated 9 November 2021 ('Supplementary report').

⁶ Submissions were received from The Director-General of Conservation, Silverlight Studios Limited, Sunnyheights Limited, Otago Regional Council, Black Peak Farming Limited, Corbridge Estates Limited Partnership, D and R Venter, C and D Pollard, K and V Woodfield, Zozzy Limited, Exclusive Developments Limited, The NW & DJ Pittaway Family Trust, T Blood and T and V Barke.

⁷ Section 274 notice of K and V Woodfield dated 19 November 2021. The owners of 216 Stevenson Road, RD2, Wānaka, legally described as Lot 6 DP 325795.

⁸ Section 274 notice of NW & DJ Pittaway Family Trust dated 19 November 2021. The owners of the following titles Lot 1 DP 25265, Lot 2 DP 26911, Lot 3 DP 26911, Lot 2 DP 22247, Lot 3 DP 22247, Lot 4 DP 22247, Lot 5 DP 22247, Lot 6 DP 22247, Lot 7 DP 22247 and Lot 8 DP 22247.

known to the court for her significant role in providing expert landscape evidence as a QLDC witness in Topic 2.

Submissions received in support, support ‘in part’ or which are neutral

[5] The submissions received from the Director-General of Conservation and Silverlight Studios Limited support the proposal. The Director-General described it as logical and necessary and complimentary to the management of public conservation land along the Clutha River/Mata Au corridor.⁹ Silverlight Studios did not specify any reasons.¹⁰

[6] The submissions by Sunnyheights Limited, Otago Regional Council (‘ORC’) and Black Peak Farming Limited are grouped together by Ms Grace’s summary as submissions that are either neutral or support only part of the proposal. Sunnyheights expressed general support for the identification of the Clutha River/Mata Au Corridor as an ONF, and specific support for the boundary amendment as it applies to Lot 3 DP 27742 seeking confirmation of the ONF as it was notified in this location.¹¹

[7] ORC’s submission confirmed it has no concerns with the notified ONF boundaries. It noted a matter concerning what we understand to be the interface between natural hazards and the ONF mapping. We understand QLDC is dealing with this matter separately (outside the scope of this decision).¹²

Key issues raised in submissions and QLDC’s initial response

The relationship between the ONF classification and high class soils

[8] Black Peak Farming’s submission supports the protection of natural

⁹ Summary report at [2.2].

¹⁰ Summary report at [2.3].

¹¹ Summary report at [3.2].

¹² Summary report at [3.5].

character but does not support placing restrictions on existing high-class soils. To ensure the ONF boundary does not include land with high class soils, it seeks an amendment to the notified boundary to ensure the reclassification would not inhibit its ability to renew pastures, oversow and cultivate areas that have high class soils.¹³

[9] In her initial response for QLDC, Ms Grace observed that the management of soils is a separate matter for consideration through the PDP's policies and rules. Properly, she noted that the presence of high-class soils does not prevent that land from being included within an ONF. Rather, the classification and mapping of areas of ONF and ONL is informed by geomorphology and geological aspects.¹⁴

Different landscape positions in relation to the mapping and/or landscape classification

[10] Several submitters stated that, due to either its modified nature or a lack of defining landscape attributes, certain land should not be included in the Clutha River/Mata Au ONF corridor. These submissions are summarised as follows.

The Woodfields, Blood and Barke

[11] The Woodfields, Blood and Barkes own land at 216, 218 and 213 Stevenson Road. The land is located on an intermediate river terrace on the true right of the river, accessed from the Wānaka – Luggate Highway via Stevenson Road. On the basis that such land is not natural or outstanding, the Woodfield submission seeks that the intermediate terrace be excluded from the ONF. However, both Blood and Barke seek that their land retain its ONL landscape classification.¹⁵ Blood argues that it is only when the hillsides, terraces and river are combined that they attract consideration as being 'outstanding'. From that premise, Blood reasons

¹³ Summary report at [3.6].

¹⁴ Summary report at [6.2].

¹⁵ Summary report at [4.10]. Supplementary report at [2.1].

that together they constitute a landscape, not a feature.¹⁶

[12] On behalf of QLDC, Ms Grace offered an initial view that the terrace land is sufficiently natural to be included within the ONF, and its inclusion does not detract from the landscape values of the ONF as a whole. In Ms Grace's opinion, the lower terraces are an integral part of the river corridor, and their biophysical and aesthetic attributes and values, including their legibility and expressiveness, are important to the assessment of the corridor as outstanding within the District. The terrace where the Woodfields' Stevenson Road property is located has been subdivided into lots of about 20 to 40ha. Her summary report records that Ms Mellsop noted dwellings, farm sheds and other modifications are present, but the land use is predominantly pastoral farming with significant areas of regenerating Kānuka.¹⁷

[13] In her Supplementary report, Ms Grace records that Decision 2.1 determined that the Clutha River/Mata Au corridor should be classified as ONF, rather than ONL, with any changes to the boundaries a matter for evaluation. In relation to planning consequences, which she describes as secondary considerations, she comments that there is a realistic consenting pathway for new land use activities within the Rural Zone for land classified as ONF.¹⁸

Pittaway Family Trust

[14] The trustees of the Pittaway Family Trust seek that its land be retained as ONL as they consider that it does not display the landscape characteristics of being highly legible and expressive of the historical relationship to the Clutha River/Mata Au. Their view is that the wider environment is different in character to the enclosing banks of the Clutha River/Mata Au.¹⁹ Ms Grace states the Trust's land

¹⁶ Summary report at [4.10].

¹⁷ Summary report at [6.6].

¹⁸ Supplementary report at [3.2].

¹⁹ Summary report at [4.9].

is within the legible boundaries of the Clutha River/Mata Au corridor and consists of river terraces and/or enclosing escarpments. We note, however, her observation that QLDC's choice of ONF boundary at Lot 1 DP 25265, near the intersection of Church and Shortcut Roads, has been determined on the basis of land use and vegetation patterns rather than geomorphological features such as escarpments or terraces. Ms Grace explains that the property is located within a promontory that is surrounded on three sides by the river course and is at least partially within the escarpment slope down to the river on the north-western side of this promontory.²⁰

Zozzy Limited

[15] Zozzy Limited opposes the proposed alteration as it would apply overly restrictive rules to its land which would hinder any future improvement of the land.²¹

Exclusive Developments Limited

[16] Exclusive Developments Limited opposes the proposal insofar as it relates to its property at Joe Brown Drive, Albert Town. The submission seeks that the ONF boundary be amended to exclude its land and follow the property boundary, where it adjoins the neighbouring properties to the north and east. The part of the land captured by the ONF classification is covered in mature pine trees, and the submitter considers that it has no landscape attributes that warrant the land being classified as part of the ONF.²²

[17] Ms Grace states the north-eastern corner of the lot extends down onto a sloping river terrace that extends further south-east into Hikuwai Reserve. The ONF boundary follows an escarpment that divides this river terrace from the

²⁰ Summary report at [6.6].

²¹ Summary report at [4.7].

²² Summary report at [4.8].

rolling or hummocky moraine of the Northlake development. She considers that this escarpment provides a legible geomorphological boundary to the river ONF in this location.²³

Black Peak Farming

[18] Black Peak Farming seeks an amendment to the notified boundary.²⁴ Ms Grace states the property includes a distinctive and highly legible escarpment leading down from Wānaka airport to the Luggate area, which was formed by the Clutha River/Mata Au and is consequently included in the Clutha River/Mata Au ONF. The northern triangle of the property extends down onto a large river terrace enclosed by an escarpment and surrounded on three sides by a meander of the river.²⁵

Sunnyheights

[19] Sunnyheights opposes the classification of Lots 1 and 2 DP 26282 as ONF or ONL, seeking that these lots be reclassified as Rural Character Landscape ('RCL').²⁶ The land is located immediately west of Albert Town – Lake Hawea (SH6) and north of the Albert Town Campground.²⁷

Concerns regarding the planning consequences of the proposal for existing and future land uses within the proposed ONF corridor

[20] Several submitters express concern regarding the planning consequences associated with reclassifying the corridor as an ONF. Corbridge Estates, the Venters, Pollards and the Pittaway Family Trust all express concern that the more restrictive ONF plan provisions will impact their ability to develop and use their

²³ Summary report at [6.6].

²⁴ Summary report at [3.7].

²⁵ Summary report at [6.6].

²⁶ Summary report at [3.3].

²⁷ Mellsop affidavit dated 23 February 2022 at [21].

land. Their concern includes that the change would exacerbate the requirement to obtain resource consent for even the most basic of farming activities, the cost of which would be better spent on land improvements.²⁸

[21] In her capacity as planning manager for QLDC, Ms Hutton states the ONF landscape categorisation will mean that some land holdings will have a more onerous consenting regime for two activities: earthworks and farm activities. She acknowledges that almost all earthworks within the ONF will require resource consent unless they meet exemption requirements. However, she also notes that most farming activities are provided for under the exemptions listed in rule 25.3.2.11.²⁹

[22] Furthermore, she explains that, where an activity does not fall within an exemption and the earthworks are up to a maximum volume of 10m³, a restricted discretionary resource consent is required. Any resource consent application will need to be assessed against the planning framework including, amongst other policies, Pol 6.3.3.5 which requires that, where it is open at present, the open landscape character of the ONF must be maintained.³⁰

[23] Ms Hutton explains that the protection of the ONF from inappropriate earthworks (in excess of 10m³) supports s6(b) RMA and PDP Obj 6.3.3, Pol 6.3.3.2 and Pol 6.3.3.5. Ms Hutton acknowledges that the earthworks volume standard is more restrictive for ONFs than it is for ONLs in the Rural zone. She explains that this is so as to protect the integrity of the ONF from inappropriate development. However, she expresses the opinion that many farming activities can continue without breaching these rules.³¹

[24] Ms Hutton responds to the concerns expressed by Black Peak Farming

²⁸ Summary report at [4.2]-[4.4], [4.9].

²⁹ Hutton affidavit dated 23 February 2022 at [30]-[33].

³⁰ Hutton affidavit dated 23 February 2022 at [35].

³¹ Hutton affidavit dated 23 February 2022 at [36]-[37].

Limited that 15ha of its land will become unavailable for certain farming activities (i.e. the ability to renew pastures, oversow or cultivate) if an ONF classification is imposed. Ms Hutton clarifies that cropping and cultivation are exempt from the maximum earthworks volumes and associated rules, so production of this land for these activities can continue.³²

[25] The Pollard, Barke and Zozy Limited submissions each express concern about the potential for unintended consequences. By way of example, Pollard and Barke both refer to the visual effects of future buildings located on the site.³³ The Pollards also refer to the concern that more restrictive provisions would render its land unproductive or decrease its value by preventing future uses such as viticulture.³⁴ Zozy Limited's key concern is the impact of more restrictive earthwork provisions hindering any future improvements on the land.³⁵

[26] In response, Ms Hutton notes that the construction of a family home requires consent outside of a building platform whether the site is ONF or ONL and viticulture is considered farming activity under the PDP.³⁶

[27] Ms Grace considers that planning consequences arising from the classification of land as ONF are a secondary issue that cannot inform the determination of the landscape boundaries at issue. Nevertheless, she considers that there is a realistic consenting pathway available for new land use activities within the Rural Zone for land classified as ONF. She also reminds the submitters that cultivation and cropping are specifically excluded from the earthwork's rules in Ch 25 of the PDP by virtue of provision 25.3.2.11.³⁷

³² Hutton affidavit dated 23 February 2022 at [34].

³³ Summary report at [4.4], supplementary report at [2.1].

³⁴ Summary report at [4.4].

³⁵ Summary report at [4.7].

³⁶ Hutton affidavit dated 23 February 2022 at [38].

³⁷ Summary report at [6.10].

The relationship between this proposal and the values identification framework process, including the interface between natural hazards and ONF mapping

[28] Ms Grace concurs with ORC's assumption that matters such as landscape capacity for additional built form and natural hazards within the Clutha River/Mata Au corridor will be considered as part of the VIF work. However, in her view the proposal can be progressed separately as with other ONF/L boundary matters that the court has heard in advance of the future scheduling exercise. This is because the landscape boundary/classification exercise will not need to wait for the final formulation of values and capacity. That is because, in this case, the court has directed that it will be the enclosing landforms that frame the Clutha River/Mata Au ONF.³⁸

QLDC's response to submitter positions

[29] QLDC's legal submissions were accompanied by affidavits from QLDC's landscape expert, Ms Mellsop and QLDC's Manager Policy Planning, Ms Hutton. QLDC's submissions summarise that the methodology to be used in identifying areas of ONF/L, as agreed by the Landscape Methodology JWS and endorsed by the court in Decision 2.1, requires consideration as to whether:³⁹

- (a) the area is a 'landscape' or 'feature';
- (b) the landscape or feature is natural;
- (c) the natural landscape or feature is 'outstanding'.

Sunnyheights

[30] Ms Mellsop's affidavit states that the entirety of the lot Sunnyheights seeks to be reclassified as RCL is located within the ONF as notified and comprises farmed open river terraces, separated from part of the highway by a steep scarp.

³⁸ Summary report at [6.11]-[6.12].

³⁹ Decision 2.1 at [41].

Lot 2 includes a distinctive and legible river escarpment of 20-25m in height that forms the geomorphological boundary of the ONF in this location. In her assessment, the inclusion of the land within the ONF does not detract in any way from the values of the river corridor feature as a whole and the ONF classification is appropriate.⁴⁰

Woodfield, Blood and Barke

[31] Ms Mellsop considers the ONF classification for these properties is appropriate. She explains that the intermediate terrace is within the enclosing escarpments of the corridor and is mirrored by terraces at the same elevation on the true left of the river. These northern terraces are also within the enclosing escarpments and were confirmed to be part of the corridor ONF in Decision 2.1.⁴¹

[32] The terrace where the submitters' properties are located has been subdivided (Poplar Beach subdivision) into lots of about 20 to 40ha. Dwellings, consented residential building platforms, farm sheds and other modifications are present but the land use is currently mainly pastoral farming or hobby farming with significant areas of regenerating Kānuka and dryland cushionfield (some of which are protected by Significant Natural Area overlays in the PDP). The Upper Clutha River walking/cycling track traverses the terrace close to the river, and there is public access to the track via Stevenson Road. Ms Mellsop's assessment concludes that the terrace has a moderate level of naturalness and is sufficiently natural to be included within the ONF.⁴²

[33] The highest enclosing escarpments on this stretch of the river enclose the intermediate terraces and together they form an integral part of the biophysical and perceptual values of the ONF. The landforms are highly legible, clearly expressing the eroding action of the Clutha River/Mata Au on the surrounding glacial

⁴⁰ Mellsop affidavit dated 23 February 2022 at [21]-[23].

⁴¹ Mellsop affidavit dated 23 February 2022 at [30].

⁴² Mellsop affidavit dated 23 February 2022 at [31].

outwash plains. They also contribute strongly to the aesthetic attributes experienced by people within the ONF, including the dramatic scale of the river corridor, the sense of enclosure, and the contrasts between scarp and terrace landforms.⁴³

Pittaway Family Trust

[34] Ms Mellsop states that the landscape classification boundaries as they relate to the Trust's land were originally determined as part of the landscape assessments completed by Dr Read and Ms Steven in preparation for the notified Stage 1 of the PDP. Ms Mellsop states that in her evidence before the first instance Council hearing she supported the notified PDP inclusion of the large river terrace adjacent to Rekos Point within what was then a Clutha River Mata Au Corridor ONL. This terrace is either pastoral, Kānuka woodland or indigenous and exotic grassland or cushionfield and is separated from a higher terrace to the south west by a clear escarpment. The terrace has an overall high level of naturalness, is a legible and coherent part of the river corridor and contributes to its expressiveness and aesthetic values. It is also similar in character to other river terraces to the north and east that are included within the ONF.⁴⁴

[35] A higher terrace to the south-west of the Trust's land, which extends as far as the toe of the Pisa Range, has also been formed by the Clutha River/Mata-Au. However, it has been significantly modified by Luggate Township and rural living in the Shortcut Road/Church Road triangle. There is no legible geomorphological boundary that would define a subset of this terrace that has sufficient naturalness to be included within the ONF. The ONF boundaries in this area therefore follow the crest of the immediate enclosing escarpment of the river to the north and east.⁴⁵

⁴³ Mellsop affidavit dated 23 February 2022 at [32].

⁴⁴ Mellsop affidavit dated 23 February 2022 at [35].

⁴⁵ Mellsop affidavit dated 23 February 2022 at [36].

[36] The exception is at Red Bridge where a headland protrudes into a large meander of the river and there is no clear escarpment crest. The headland has significant cultural and historic attributes, as the site of a permanent pa (Te Rua Tupapaku) and as the site of early gold mining, a ferry crossing and later the scheduled historic Red Bridge. These cultural and historical attributes form part of the associative values of the ONF.⁴⁶

[37] Having taken a site visit to the area on 16 December 2021 to ground truth the proposal mapping, which had been refined from Decisions Version mapping on the basis of aerial photographs and contour information, Ms Mellsop concludes that the boundary should be amended to include only the tip of the headland, where important cultural and historic associations are recognised in the historic and conservation reserves. The recommended amendment excludes Lot 1 DP 25265, that is owned by the Trust from the ONF. The remainder of the Trust land, however, is to be retained as ONF.⁴⁷

Exclusive Developments Limited

[38] Exclusive Developments Limited's land is part of a sloping terrace/alluvial fan that extends further south-east into Hikuwai reserve. In this location, the ONF boundary follows a legible geomorphological feature – an escarpment that divides the lower terrace/fan from the rolling or hummocky moraine of the Northlake development. The character of the triangle of land differs from that of the surrounding sloping terrace/fan in that it has a mature conifer woodlot rather than Kānuka forest. However, other parts of the ONF also have exotic plantation forest land cover and it is possible that the trees may be harvested in the future. Ms Mellsop concludes that inclusion of this block of land would not detract from the naturalness of the ONF overall or from its associative or perceptual values so

⁴⁶ Mellsop affidavit dated 23 February 2022 at [37].

⁴⁷ Mellsop affidavit dated 23 February 2022 at [38]-[39].

it should be retained as ONF.⁴⁸

Black Peak Farming

[39] As to Black Peak Farming's submission, Ms Mellsoy states the Decisions Version PDP and the notified s293 proposal map includes the distinctive high escarpment between Wānaka Airport and Luggate within an ONF, as well as an approximately 11.5ha triangle of the submitter's land. That triangle of land adjoins Crown reserve along the river edge and contains part of a river scarp and river terrace, the latter of which extends to the east as far as Rekos Point.⁴⁹ In her expert opinion, the escarpment is appropriately included within the ONF as the landform adds to rather than detracts from the values of the river corridor.⁵⁰

[40] Furthermore, she finds that the change to the ONF boundary sought in the northern triangle of the submitter's land would be contrary to the court endorsed principle of using geomorphological boundaries to define the edges of ONF and ONL. In this area, the boundaries of the lot do not follow any legible landform or topographical change and would instead artificially subdivide the scarp that defines the boundary of the ONF and the river terrace that is within it. While part of the triangle is irrigated improved pasture, this is also true of other land within the ONF, including the intermediate terraces north of the river at Devon Dairy.⁵¹

The s274 parties' positions

[41] Neither the Trust nor the Woodfields filed expert affidavit evidence. Instead, the Trust confirmed it would no longer pursue the exclusion of the remainder of the Trust land (with the exception of Red Bridge Block) from the ONF.⁵² Similarly, the Woodfields focussed their submissions on the regulatory

⁴⁸ Mellsoy affidavit dated 23 February 2022 at [40]-[41].

⁴⁹ Mellsoy affidavit dated 23 February 2022 at [24].

⁵⁰ Mellsoy affidavit dated 23 February 2022 at [26].

⁵¹ Mellsoy affidavit dated 23 February 2022 at [27].

⁵² The Trust memorandum dated 15 March 2022 at [9].

changes to its land that would result from the reclassification of the corridor.

The appropriate classification of the Red Bridge Block land

[42] The Trust supports Ms Mellsoy's evidence to the extent that the Red Bridge Block should be excluded from the ONF.⁵³ Mr Leckie and Ms Turner, counsel for the Trust, submit that the appropriate landscape outcome is for the Red Bridge Block to be reclassified as Rural Character Landscape ('RCL') given it is too small to be considered as a landscape in its own right.⁵⁴ QLDC concurs, stating its view that since there is no wider ONL in the vicinity that the Block could form part of, the most appropriate outcome for the Red Bridge Block is reclassification as part of the adjoining RCL.⁵⁵

[43] Our findings reflect this consensus.

Proposed change to the ONF earthworks volume threshold (rule 25.5.2) for Clutha River/Mata Au

[44] The Woodfields' submissions record that their primary concern is the regulatory change to their land, specifically the reduction in the permitted volume of earthworks applicable to ONFs.⁵⁶ They calculate that the proposed reclassification represents a 99% reduction from the previously permitted maximum earthworks volumes.⁵⁷ The Woodfields seek amendment to r 25.5.2, insofar as it relates to the Clutha/Mata Au ONF, to authorise the same volume of earthworks as provided for in the Rural Zone ONLs in the District as follows:

⁵³ The Trust memorandum dated 15 March 2022 at [7]. Mellsoy affidavit 23 February 2022 at [37]-[38].

⁵⁴ The Trust memorandum dated 15 March 2022 at [8].

⁵⁵ QLDC reply dated 30 March 2022 at [2.3].

⁵⁶ Woodfield submissions dated 16 March 2022 at [6].

⁵⁷ Woodfield submissions dated 16 March 2022 at [13].

Rule	Table 25.2 – maximum volume	Maximum total volume
25.5.2	Heritage Landscape Overlay Area Heritage Precinct Outstanding Natural Feature (<u>except for the Clutha/Mata Au ONF</u>)	10m ³

[45] The Woodfields characterise the amendment as effectively maintaining the pre-s293 status quo for their permitted rights.

[46] QLDC point out that the amendment the Woodfields seek to r 25.5.2 would apply to all ONFs across the district. It submits that the court has no ability to make the amendment because the rule is already operative under s86F RMA (with all appeals on Ch 25 now fully resolved or withdrawn).⁵⁸

[47] Counsel for the Woodfields point out that the policy and rule change that would arise from the s293 proposal would amount to a significant departure from existing rights under the current ONL classification. Ms Baker-Galloway and Ms Hill submit that QLDC has significantly underplayed this consequence in taking the position that the scope of the proposal is limited to the extent/boundaries of the ONF.⁵⁹

[48] The Woodfields acknowledge that their proposed amended r 25.5.2 is a district-wide ONF earthworks volume rule that is now operative and beyond challenge. However, they say the fundamental consequence of the s293 ONF reclassification proposal would be to retrospectively apply this rule.

[49] The Woodfields submit that the 10m³ earthworks volume restriction is prohibitive and inconsistent with the enablement of farming on their property as

⁵⁸ QLDC submissions dated 30 March 2022 at [3.3]. With the exception of rule 25.6 all earthwork provisions were resolved by consent order on 5 October 2020. A second consent order resolving 25.6 was issued on 5 February 2021. Appeal point ENV-2019-CHC-76-003 was lodged by Wayfare Group Limited which sought the deletion of the ONF threshold in 25.5.2 but this appeal point was withdrawn by memorandum on 21 September 2020.

⁵⁹ Woodfield submissions dated 16 March 2022 at [11]-[12].

a permitted activity under the current Rural zoning.⁶⁰ Counsel submit that such an outcome would seem contradictory to revised Pol 6.3.3.⁶¹ which acknowledges ONLs and ONFs on the same basis, and that both may exhibit working farms, the operation of which can have landscape effects.⁶²

[50] Counsel also point out that the PDP provides no policy differentiation between ONLs and ONFs throughout Chapters 3 and 6, with any provision that refers to Outstanding Natural Feature also referring to ‘Outstanding Natural Landscape’.

[51] Counsel assert there is not a single planning provision which identifies an ONF as being subject to a different or more onerous policy standard than an ONL. They refer, by way of example, to Pols 6.3.3, 6.3.3.1, 6.3.3.2 and 6.3.3.5. Noting that Ms Hutton cites those policies (at [36] of her affidavit) in support of the restricted earthworks volume in ONFs, counsel submit that each refers to ONLs and ONFs on the same policy footing. Given that the policy matrix is the same, counsel submit that it is difficult to understand a rationale for such a distinctly different rule framework in respect of earthworks’ volumes.⁶³

[52] Counsel further submit that it would be a breach of natural justice to limit the scope of the s293 process to the extent/boundaries of the ONF. The Woodfields did not make a submission on, or appeal, the earthworks provisions in Stage 2 of the Plan review and appeal process because those provisions were limited only to ONFs and their land was not included within the ONF at that time. Counsel submit that this puts the Woodfields in a position where they essentially have had no say in what rules apply to their land. Counsel submit this this would be the antithesis of the participatory framework of the RMA.⁶⁴

⁶⁰ Woodfield submissions dated 16 March 2022 at [24].

⁶¹ As finalised in Decision 2.13.

⁶² Woodfield submissions dated 16 March 2022 at [26].

⁶³ Woodfield submissions dated 16 March 2022 at [28]-[29].

⁶⁴ Woodfield submissions dated 16 March 2022 at [18].

[53] Counsel submit therefore that a proper inquiry should be had into the appropriateness of a site-specific suite of rules to this particular ONF.⁶⁵ At the time of Decision 2.1, when the court considered that the mapping change was required, appeals on the earthworks chapter had not been resolved which were yet to confirm the significant distinction between ONL and ONF volumes operative/beyond challenge. Counsel respectfully submit that the materiality of the planning framework changes subject to this mapping change may not have been appreciated at the time that subsequent directions were made in May 2021.⁶⁶

[54] Counsel acknowledge that the s293 process and powers are prima facie very broad, but submit that the discretion must be exercised judicially in accordance with the RMA's overall participatory regime. They conclude on this point that it cannot be the intent of s293 to allow for a significant rule change to apply to landowners without their ability to submit or have comment on that.⁶⁷

[55] Acknowledging the 10m³ earthworks volume standard is a low threshold, counsel for QLDC point out that it was a policy choice that reflected the particular sensitivity of ONFs. In particular it was intended to ensure that the potential adverse effects of earthworks on the landscape values can be considered and managed, as appropriate through the resource consent process. Given that r 25.5.2 is now operative, counsel submit that there would need to be compelling justification to amend it and this has not been provided by the Woodfields.⁶⁸

[56] Counsel submit that allowing the Woodfields' preferred relief would require that there be a different threshold specified for appropriate earthworks' activity depending on the ONF in question. As for the Clutha/Mata Au ONF, counsel submit that this would be a difficult exercise. They submit in any case that 1000m³ would be excessive, bearing in mind that it is a long linear feature, with

⁶⁵ Woodfield submissions dated 16 March 2022 at [19].

⁶⁶ Woodfield submissions dated 16 March 2022 at [23].

⁶⁷ Woodfield submissions dated 16 March 2022 at [39].

⁶⁸ QLDC reply dated 30 March 2022 at [3.6].

approximately 30 landowners having properties located either wholly or partially within the ONF landscape classification. Allowing each landowner to undertake 1000m³ of earthworks each year would have the potential to transform the feature through cumulative effects.⁶⁹

[57] In the absence of proper justification being advanced in evidence, QLDC submits that the 10m³ earthworks threshold for ONFs in r 25.5.2 should remain unchanged. Stating the appropriateness of any earthworks is better assessed through a resource consent application, noting that not every activity will trigger a resource consent.⁷⁰

[58] While the 10m³ may trigger the need to obtain resource consent to undertake earthworks for some activities, counsel submit that the importance of effectively protecting the ONF warrants this so that the effects of the earthworks can be properly assessed through a resource consent process.⁷¹

Findings and determinations

[59] As is recorded in Decision 2.1, the re-classification of the Clutha River/Mata Au corridor from ONL to ONF is to correct what the evidence revealed as a mapping anomaly. Whilst s6(b) addresses both ONFs and ONLs, it does not intend that these should be treated in a uniform way. Nor is that the intention of the PDP. Whilst several key objectives and policies apply to both, their application relies significantly on sound identification of values that inform the selection of any feature as an ONF or landscape as an ONL in order to ensure effective protection for the purposes of s6(b). The PDP's rules are similarly tuned, including the restrictive earthworks volume standard of r 25.5.2. It effectively acknowledges the different nature and scale of effects that can be associated with

⁶⁹ QLDC reply dated 30 March 2022 at [3.7].

⁷⁰ QLDC reply dated 30 March 2022 at [3.8].

⁷¹ QLDC reply dated 30 March 2022 at [3.11].

earthworks on an ONF by contrast to earthworks in a much more extensive ONL.

[60] The Clutha River/Mata Au is plainly an ONF of high significance for the district, including the Upper Clutha. There is an associated high level of importance, in terms of the effective administration of the PDP, in ensuring it is properly classified. Otherwise, for example, the important exercise of soundly identifying its associated values for protection could be compromised.

[61] We also accept the importance of approaching our discretion under s293 judicially, including in giving proper consideration to issues of natural justice or unfairness. We also acknowledge that r 25.5.2 is now operative and that changing it on the broad basis proposed by the Woodfields would give rise to jurisdictional difficulties and would be unsound in any case given the lack of proper underpinning evidential evaluation.

[62] Nevertheless, we find that these difficulties could be overcome on a basis that allows for a sound s293 direction to be made for change to the PDP.

[63] Providing site-specific exceptions to particular rules is similar to spot-zoning and is typically not endorsed as sound planning practice. On the other hand, it is permissible within the RMA framework.

[64] We accept QLDC's evidence in finding that its proposed mapping and classification of the Clutha River/Mata Au ONF is appropriate (subject to the adjustment in relation to the Trust's Red Bridge Block as earlier discussed). Whilst acknowledging the different perspectives offered by the various submitters, ultimately we are satisfied that the QLDC witnesses present opinions that are both reliable and consistent with our relevant Topic 2 decisions (particularly Decision 2.1). In a relative sense, this re-classification is preferable to retaining the present anomalous ONL mapping and most appropriate for achieving the related PDP objectives and policies.

[65] Aside from the matter of earthworks, we find that this outcome is

appropriate, including in properly taking account of established land use considerations.

[66] However, in terms of principles of natural justice, we find however that the final s293 outcome should be properly tempered so as to maintain the status quo position for the Woodfields in regard to r 25.4.2. Contrary to the perspectives offered for QLDC on this rule, we find the status quo starting point for our consideration of it is that it does not currently apply to this s274 party's property. Whether or not it should be applied to this property in view of ONF values is a matter for QLDC to consider at the proper time. In essence, we should not seek to fulfil QLDC's planning authority responsibilities for this through s293.

[67] We accept that the change proposed to this rule by the Woodfields would essentially amount to a revisiting of an operative rule beyond the proper ambit of s293. On the other hand, we are satisfied that site-specific exception to this rule for their property is within scope in essence as a remedial consequential change as part of the s293 proposal.

[68] We find it would not be appropriate to extend this exception to other properties along the Clutha/Mata Au corridor. Whilst this would leave them subject to r 25.4.2, our s293 directions gave ample scope for those interested to express any concerns. Apart from the Trust whose interests are now satisfactorily accounted for by a mapping amendment, only the Woodfields chose to do so through s274. Hence we find natural justice considerations are fully accounted for.

[69] We will need further details of the legal description before we can finally confirm the s293 changes. We will leave QLDC and the Woodfields to confer about that and to file a joint memorandum for such purposes.

[70] In the meantime, however, we find that this remedial change to the rule would be as follows (or to like effect):

Rule	Table 25.2 – maximum volume	Maximum total volume
25.5.2	Heritage Landscape Overlay Area Heritage Precinct Outstanding Natural Feature <u>except for the following parcel of land within the Clutha/Mata Au:</u> <u>i. [legal description Woodfields];</u>	10m ³

Outcome

[71] Under ss 290(2) and 293 RMA, QLDC is directed to confer with the s274 parties and by **Friday 21 October 2022** file a memorandum:

- (a) reporting on progress towards completing a revised complete set of amended provisions for the court’s final approval and directions (including maps and an amended r 25.5.2 incorporating the noted matters); and
- (b) proposing an associated timetable direction for those purposes.

[72] Costs are reserved with any timetable to be set in the final decision, subject to any memoranda filed for such purposes.

For the court



J J M Hassan
Environment Judge