

BEFORE THE CENTRAL OTAGO DISTRICT COUNCIL

Under the Resource Management Act
1991

In the Matter of the hearing of submissions on
the Central Otago District Plan –
Proposed Plan Change 19

**Memorandum on behalf of Lowburn
Viticulture Limited (Submitter 123) and S
Davies (Submitter 147) re NPS-HPL**

Dated: 3 July 2023

MAY IT PLEASE THE PANEL

1. This memorandum is filed on behalf of Lowburn Viticulture Limited (**LVL**) (Submitter 123) and S Davies (Submitter 147) regarding the NPS-HPL.
2. The purpose of the memorandum is to alert the Hearings Panel to a very recent decision of another council concerning the rezoning of land where the NPS-HPL was at issue. The decision addresses a matter of interpretation directly before the Hearings Panel.

Submitters

3. LVL made a submission on PC19 seeking the rezoning of land at Lowburn. LVL's submission was heard on Thursday 25 May 2023, in Cromwell.
4. S Davies made a submission on PC19 seeking the rezoning of land at Bannockburn. S Davies' submission was heard on Friday 26 May, in Alexandra.
5. The submissions by LVL and S Davies address different land and are not related, however, as counsel represents both submitters, for efficiency, this memorandum addresses both submissions.

Recap

6. LVL and S Davies (together, the **Submitters**) both seek the rezoning of land that has an LUC 3 classification in the regional scale New Zealand Land Resource Inventory (**NZLRI**) mapping.
7. Both Submitters called evidence by Dr Reece Hill on the matter of the LUC classification and the application of the NPS-HPL. Dr Hill undertook a site specific soil assessment for each site and on this basis determined that each site was at best LUC 4 land which, for the purposes of the NPS-HPL, is not "highly productive land".¹
8. Legal submissions were presented for the Submitters as to the proper interpretation and application of the NPS-HPL and the relevance of Dr Hill's evidence.

¹ Statement of Evidence on behalf of Steve Davies, dated 16 May 2023; Statement of Evidence on behalf of Lowburn Viticulture Ltd, dated 16 May 2023.

9. To summarise, the NPS-HPL applies to “highly productive land” and provides that highly productive and is land that is:²
 - (a) zoned general rural or rural production; and
 - (b) LUC 1, 2 or 3 land.
10. It was agreed by the Submitters’ planner and the section 42A report writer, Ms Whyte, that the first limb, limb (a) above, is met for the Submitters’ land.
11. In terms of the second limb, limb (b), the NPS-HPL defines “LUC 1, 2 or 3 land” as *“...land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification.”*³
(emphasis added)
12. It was submitted that Dr Hill’s evidence for the Submitters comprises “*more detailed mapping*” contemplated by the definition, and that on the basis of this evidence, the Submitters’ land does not meet the definition and the NPS-HPL does not apply.
13. At the Crowmell hearing, Ms Ann Rodgers, advisor to the CODC Hearings Panel, indicated some uncertainty with regards to the relevance of and the Panel’s ability to accept Dr Hill’s evidence. The Panel indicated that it would seek further advice on the matter.

QLDC Decision

14. Since the hearing, the Queenstown Lakes District Council (**QLDC**) has made a decision on a very similar matter. More specifically, it has heard and made a decision on a submission on the Queenstown Lakes Proposed District Plan (**PDP**) seeking a residential rezoning of rurally zoned land that has an LUC 3 classification in the NZLRI. For this rezoning submission, Dr Hill undertook a site specific desktop assessment and gave evidence on behalf of the submitters seeking the rezoning that, notwithstanding the NZLRI LUC 3 classification, the

² NPS-HPL cl 3.5(7).

³ NPS-HPL, cl 1.3 (Interpretation).

land was more properly classified as LUC 4, in that case due to slope. Dr Hill's evidence was that the land was not "highly productive" and the NPS-HPL therefore did not apply.

15. The methodology adopted by Dr Hill in the QLDC rezoning case was very similar to that adopted in his evidence given for the Submitters in respect of PC19. A copy of Dr Hill's evidence in the QLDC case is **attached** as **Attachment A**, for completeness and the Panels' reference.
16. The QLDC, in its regulatory (as opposed to decision making) capacity engaged another soils expert, Ian Lynn of Manaaki Whenua Landcare Research, to peer review Dr Hill's assessment. Mr Lynn found that Dr Hill had correctly applied the LUC classification criteria and agreed with Dr Hill's finding that the site was not LUC 3.
17. A further submitter, APONLS, who opposed the rezoning, argued that the NPS-HPL did not permit site specific soil assessments, and that the NZLRI could only be "changed" by regional or district wide mapping.
18. In QLDC's decision on the rezoning submission⁴, the Hearing Commissioners, lawyer Jane Taylor and Planner Ian Munro, had no hesitation in accepting Dr Hill's site specific assessment and his evidence that the land was not LUC 3. The key paragraphs of the QLDC decision are reproduced in full below, for the CODC Hearing Panel's convenience:

"25. The applicability of the NPS-HPL to the site was an issue raised in evidence and in the legal submissions. In his evidence for the Submitters, Dr Reece Hill concluded, based on a detailed mapping exercise, that the site was not Land Use Capability (LUC) 3 land. Council engaged Mr Ian Lynn, of Manaaki Whenua Landcare Research, to undertake a peer review of Dr Hill's evidence. Mr Lynn considered Dr Hill had correctly applied the LUC classification criteria and agreed with Dr Hill's finding that the site is not LUC 3. Accordingly, Council accepted that the NPS-NPL does not apply to the relief sought by the Submitters.

26. Ms Limmer, for the APONLS, relying on the recently published Ministry for the Environment's (MfE) 'Guideline to Implementation, submitted that more mapping work needed to occur at regional or district level (as opposed to the site specific investigation undertaken by Dr Hill) before the LUC 3 classification currently

⁴ Being the ratification, by Full Council on 29 June 2023, of recommendations made by Independent Hearing Commissioners appointed by QLDC to hear submissions and further submissions on the PDP, see <https://www.qldc.govt.nz/your-council/council-documents/agendas-minutes/planning-strategy-committee>

applicable to the Submitters' land can be changed. Ms Scott, for Council, submitted that MfE's guidance was, in effect, an incorrect interpretation of the NPS-HPL policy document in relation to this point and, further, that non-statutory guidance cannot alter the meaning of a statutory instrument. We concur with Ms Scott's interpretation of the relevant Environment Court decisions relied on in reaching her conclusion. We also accept Ms Scott's submission that context and purpose are key factors when resolving competing interpretations in planning instruments, and agree that it would be inconsistent with the purpose of the NPS-HPL, and indeed potentially produce an absurd outcome, if a detailed site specific analysis by a suitably qualified expert could not be relied on, in effect placing restrictions on land which is not intended to be protected by the NPS-HPL.

27. Accordingly, we find, based on the evidence of Dr Hill and Mr Lynn, that the NPS-HPL is not applicable to the Submitter's proposal."

19. Despite this finding, the decision was to reject the rezoning request for landscape reasons. A copy of QLDC's decision is **attached** as **Attachment B**, for the Panel's reference.
20. While the QLDC's decision is not binding on the CODC Hearings Panel, it is nonetheless of significance and direct relevance to the Panel's deliberations in that it squarely addresses the precise NPS-HPL issue that the CODC Hearings Panel must decide, namely, whether the Panel can accept the site specific soil assessments undertaken by Dr Hill as conclusive of LUC classification, when deciding the appropriate zoning of the Submitters' land. The QLDC's decision is that it would be inconsistent with the purpose of the NPS-HPL, and indeed potentially produce an absurd outcome, if a detailed site specific analysis by a suitably qualified expert *could not* be relied on by a decision maker, and would in effect result in restrictions on land that is not intended to be protected by the NPS-HPL. The QDCL's decision is entirely consistent the detailed legal submissions presented for the Submitters at the PC19 hearing.
21. For the avoidance of doubt, the QLDC decision confirms that site specific soil assessments, as undertaken by Dr Hill for the PC19 Submitters LVL and S Davies, are contemplated by and can be accepted under the NPS-HPL, for the purposes of determining whether the NPS-HPL applies.

Dated this 3rd day of July 2023



R Wolt

Counsel for Lowburn Viticulture Limited and S Davies

ATTACHMENT A

Before the Queenstown Lakes District Council Hearing Panel

Under the Resource Management Act 1991

In the matter of the renotification of two submissions on Stage 1 of the Queenstown Lakes Proposed District Plan concerning the zoning of land at Arthur's Point by Gertrude's Saddlery Limited and Larchmont Enterprises Limited

Statement of Evidence of Dr Reece Hill on behalf of Gertrude's Saddlery Limited and Larchmont Enterprises Limited

15 November 2022

Submitter's solicitors:

Maree Baker-Galloway | Rosie Hill
Anderson Lloyd
Level 2, 13 Camp Street, Queenstown 9300
PO Box 201, Queenstown 9348

p + 64 3 450 0700
maree.baker-galloway@al.nz | rosie.hill@al.nz

**anderson
lloyd.**

Introduction

- 1 My full name is Dr Reece Blackburn Hill.
- 2 I hold a Doctor of Philosophy in Soil Science from Lincoln University (2000), a Master of Applied Science in Soil Science from Lincoln University (1994), and a Bachelor of Science with a double major in Biological Sciences and Earth Sciences from University of Waikato (1988).
- 3 I am a past President of the New Zealand Society of Soil Science (2014-2016), and a current member of the New Zealand Society of Soil Science, New Zealand Association of Resource Management, and the New Zealand Institute of Agricultural & Horticultural Science.
- 4 I have 19 years' experience as a Soil Scientist at Waikato Regional Council, six years' experience as a Soil Consultant at Landsystems, of which I have been full time for the past three years, and three years' experience mapping forest soils in Tasmania.
- 5 I specialise in soil characterisation, soil mapping, land use capability assessment, regional soil policy, soil quality and catchment and land management. I have applied these skills in numerous projects within Waikato Regional Council and Landsystems, working with individual landowners including farmers and growers, regional and district council staff, Crown Research Organisations, Universities, and Ministry staff (MPI and MfE).
- 6 I was lead reviewer for the Ministry for the Environment review of national soil quality monitoring and indicators and established the soil quality monitoring programmes for Waikato Regional Council and Nelson City Council. I was lead author of the soil quality monitoring chapter of "Land and Soil Monitoring: A guide for SOE and regional council reporting".
- 7 I have advised central government and district and regional councils throughout New Zealand in relation to soil management, land use capability, high class soils and the use of soil map information. This included regional council representation on the Land Use Capability Classification System (LUCCS) Governance Group.
- 8 I have undertaken property scale soil and Land Use Capability (LUC) assessments to identify high class soils for subdivision applications in the Waikato, Auckland, Bay of Plenty, Marlborough and Otago regions.
- 9 As part of my role at Waikato Regional Council, I was Lead Technical Writer for the Soils chapter (Chapter 14) of the Waikato Regional Policy Statement

which became operative in 2016. Chapter 14 included a policy on High Class Soils (Policy 14.2).

- 10 In 2020, I provided technical soil expertise to support The Waikato District Plan (Stage 1) review, with my main input focussing on Subdivision Rules and high class soils.
- 11 In 2021, I provided a review of the Productive Land Classification for Tasman District Council.
- 12 I have undertaken soil and Land Use Capability (LUC) assessments for subdivision that have required assessment against the NPS-HPL.

Scope of evidence

- 13 In preparing this evidence, I have reviewed the following reports and statements:
 - (a) Available regional scale (NZLRI) LUC map information.
 - (b) Available aerial photography of the subject site.
 - (c) A detailed slope class map of the subject site.
- 14 I have prepared this evidence in relation to:
 - (a) Applicability of the NPS-HPL to the subject site,
 - (b) Land Use Capability Classification system definitions,
 - (c) the Land Use Capability classification of the subject site, and
 - (d) assessment against the National Policy Statement for Highly Productive Land.
- 15 I have not undertaken a field assessment of the subject site. My evidence is based on a desktop analysis of available LUC map information and interpretation of aerial photography and detailed contour map information.

Executive summary

- 16 My evidence is based on a desktop analysis of available LUC map information and interpretation of aerial photography and detailed contour map information.

- 17 The available NZLRI LUC map information indicates that the LUC map unit for the site is 3s6+6e19, where LUC unit 3s6 is the dominant unit and 6e19 is the sub-dominant unit.
- 18 By definition LUC class 1, 2 and 3 land cannot occur on slopes greater than 15 degree slopes.
- 19 My interpretation of available aerial photography indicates that LUC unit 3s6 is the dominant unit in the LUC map unit, with the balance of the map unit area being LUC class 4 or greater.
- 20 My interpretation of a detailed (property scale) slope class map indicates that the slopes on the subject site are predominantly greater than 15 degrees and that the land is more correctly LUC class 4 or greater.
- 21 Council have classed the subject site land as NPS highly productive land based on the dominant LUC unit of the NZLRI map unit (3s6+6e19).
- 22 In my opinion, the use of the NZLRI dominant LUC unit (3s6) fails to acknowledge the presence of other LUC class land in the map unit and on the subject site.
- 23 As my evidence shows, the property scale assessment using aerial photography and detailed slope class map information, indicates that the subject site land would more accurately be class as LUC class 4 or greater, based on slope alone, and as such would not be classed as NPS highly productive land.

National Policy Statement for Highly Productive Land (NPS-HPL)

- 24 Aspects of the NPS-HPL that relate to LUC classification are within my expertise.
- 25 "Highly productive land" is defined in the NPS-HPL as:

means land that has been mapped in accordance with clause 3.4 and is included in an operative regional policy statement as required by clause 3.5 (but see clause 3.5(7) for what is treated as highly productive land before the maps are included in an operative regional policy statement and clause 3.5(6) for when land is rezoned and therefore ceases to be highly productive land)
- 26 My understanding is that clause 3.5(7) applies because maps produced in accordance with clause 3.4 have not yet been included in an operative regional policy statement as required by clause 3.5. Clause 3.5(7) states:

(7) Until a regional policy statement containing maps of highly productive land in the region is operative, each relevant territorial authority and consent authority must apply this National Policy Statement as if references to highly productive land were references to land that, at the commencement date:

(a) is

(i) zoned general rural or rural production; and

(ii) LUC 1, 2, or 3 land; but

(b) is not:

(i) identified for future urban development; or

(ii) subject to a Council initiated, or an adopted, notified plan change to rezone it from general rural or rural production to urban or rural lifestyle.

"LUC 1, 2 and 3" is defined as:

LUC 1, 2, or 3 land means land identified as Land Use Capability Class 1, 2, or 3, as mapped by the New Zealand Land Resource Inventory or by any more detailed mapping that uses the Land Use Capability classification.

LUC classification system

- 27 Land use capability is defined as *the land's properties that determine its capacity for long term sustained production*. The productive capacity of the land is determined by the physical qualities of the land, soil and environment and its limitations. Limitations include susceptibility to erosion, steepness of slope, susceptibility to flooding, liability to wetness or drought, salinity, depth of soil, soil texture, structure and nutrient supply and climate¹. Increasing limitations reduce the land's versatility for use. These concepts are encapsulated in New Zealand's Land Use Capability Classification system.
- 28 The LUC Classification criteria and their use are defined according to the Land Use Capability Survey Handbook 3rd Edition² (Land Use Capability Handbook).

¹ Lynn, IH, Manderson, AK, Harmsworth, GR, Eyles, GO, Douglas, GB, Mackay, AD, Newsome PJF. 2009. Land Use Capability Handbook - a New Zealand handbook for the classification of land 3rd Ed. Hamilton, AgResearch; Lincoln, Landcare Research; Lower Hutt, GNS Science 163pp.

² Lynn, IH, Manderson, AK, Harmsworth, GR, Eyles, GO, Douglas, GB, Mackay, AD, Newsome PJF. 2009. Land Use Capability Handbook - a New Zealand handbook for the classification of land 3rd Ed. Hamilton, AgResearch; Lincoln, Landcare Research; Lower Hutt, GNS Science 163pp.

- 29 The Land Use Capability Handbook provides the most common limitations that define LUC class 3 (p56):
- (a) Moderate susceptibility to erosion under cultivation.
 - (b) Rolling slopes (8-15°).
 - (c) Shallow (20-45 cm) or stony soils.
 - (d) Wetness or waterlogging after drainage.
 - (e) Occasional damaging overflow.
 - (f) Low moisture holding capacity.
 - (g) Moderate structural impediments to cultivation.
 - (h) Low natural fertility.
 - (i) Weak salinity.
 - (j) Moderate climatic limitations.
- 30 The Land Use Capability Handbook provides the most common limitations that define LUC class 6 (p66):
- (a) Moderate erosion hazard under perennial vegetation.
 - (b) Steep and very steep slopes (>26°).
 - (c) Very stony (35-70%) or very shallow (<20 cm) soils.
 - (d) Excessive wetness. Frequent flooding.
 - (e) Low moisture holding capacity.
 - (f) Moderate to strong salinity.
 - (g) Moderate climatic limitations.
- 31 Focussing on the slope limitation, for land to be LUC class 1, 2 or 3, the land must have a slope of 15 degrees or less (irrespective of any other LUC limitation). Land with slopes greater than 15 degrees would be LUC class 4 or greater, depending on the slope class.

- 32 The LUC Classification can be applied (mapped) at any scale and regional scale LUC map units can differ from those identified at property scale³.
- 33 At any scale but more so for regional scale map information, LUC map units may include more than one LUC unit, in association (where they can individually be distinguished in a repeating pattern but are too small to map separately, or in a complex where they cannot be distinguished in an obvious pattern).
- 34 Where two or more LUC units are present within a LUC map unit, The dominant LUC unit is listed first, and the subdominant listed second.

Regional scale LUC map information limitations

- 35 The LUC classification can be applied at any scale. Property scale mapping is typically mapped at a scale between 1:5,000 and 1:15,000, while catchment and regional maps are mapped at 1:15,000 to 1:50,000 scale. The Land Use Capability Handbook sets out recommended mapping scales for inventory surveys and LUC mapping (p100).
- 36 Mapping LUC at a property scale can identify different LUC units (and map units) than depicted by regional scale LUC mapping. This is because property scale mapping includes more observations compared with regional scale mapping.
- 37 Soil and LUC maps are usually drawn at a specific scale depending on the smallest area of interest for a particular use and the density of field observations. For example, a 1:5,000 scale map requires on average four observation/ha while a 1:50,000 scale map requires 0.04 observation/ha (four observations per 100 ha). With GIS tools and geospatial databases, it has become easy to manipulate maps, creating the temptation to rescale a map beyond its original scale of collection.
- 38 For the regional scale LUC map information, map unit boundaries may not align with the topography (slope) and other geographic features (such as rivers). In the case of the regional scale (1:50,000 scale) NZLRI LUC map information this primarily because the mapping used hard copy 20 m contour topography maps as a base for drafting the original maps.
- 39 Technology such as high resolution aerial photography (and its interpretation), and detailed contour mapping enable a closer examination

³ Lynn, IH, Manderson, AK, Harmsworth, GR, Eyles, GO, Douglas, GB, Mackay, AD, Newsome PJF. 2009. Land Use Capability Handbook - a New Zealand handbook for the classification of land 3rd Ed. Hamilton, AgResearch; Lincoln, Landcare Research; Lower Hutt, GNS Science 163pp.

of the accuracy of the regional scale LUC map information to identify areas that may not agree with the mapped LUC unit(s).

- 40 In the following part of my evidence I provide an assessment of LUC class for the subject site using interpretation of available aerial photography and a detailed contour derived slope class map provided by Boffa Miskell (provided in **Appendix 1**).

LUC units on the subject site

- 41 The regional scale Land Use Capability (LUC) map information available (and relied on) for the subject site is provided by the 1:50,000 scale New Land Resource Inventory which can be accessed via the Manaaki Whenua Landcare Research LRIS portal⁴.
- 42 The NZLRI LUC map information indicates that the LUC map unit for the site is 3s6+6e19, where LUC unit 3s6 is the dominant unit and 6e19 is the sub-dominant unit.
- 43 Generally, a subdominant unit is only presented if it occupies greater than 30% of the map unit area.
- 44 Of the common limitations listed for LUC class 3 land (para. 29), limitations (b) rolling slopes (8-15°), (c) shallow (20-45 cm) or stony soils, (f) low moisture holding capacity, and (g) moderate structural impediments to cultivation are likely to apply to the LUC 3s6 unit.
- 45 Of the common limitations listed for LUC class 6 land (para. 30), limitations (a) moderate erosion hazard under perennial vegetation, (b) steep and very steep slopes (>26°), (c) very stony (35-70%) or very shallow (<20 cm) soils, and (e) low moisture holding capacity are likely to apply to the LUC 6e19 unit.
- 46 Irrespective of the soil ('s') limitation defining the LUC 3s6 unit, the land in question would still require a slope of 15 degrees or less to be classified as LUC class 3 land (refer to limitation (b) in para 28 in my evidence).
- 47 Based on my visual assessment of the available aerial photography (available on Google Earth) the distribution of the individual LUC units (3s6 and 6e19) within the NZLRI LUC map unit encompassing the subject site are spread across the map unit.

⁴ <https://iris.scinfo.org.nz/layer/48076-nzlri-land-use-capability-2021/>

- 48 I have provided an image showing the general locations of the LUC 3s6 and LUC 6e19 units within the NZLRI 3s6+6e19 map unit in which the subject area is included as **Appendix 2**.
- 49 Based on my visual interpretation, the subject site would be one of the areas classed as LUC 6e19 within the NLZRI LUC map unit, rather than one of the areas classed as LUC 3s6.
- 50 Based on the slope class map, I have delineated the areas with slopes of 15 degrees or less (yellow and green) areas on the slope class map). The delineated areas are shown in **Appendix 3**.
- 51 Based on the slope class map, the slope classes (0-3°, 4-7°, and 8-15°) that would allow for the land to be classed as LUC class 3 or less, discounting any other limitations, occupy only a small proportion of the subject site.
- 52 I note that existing dwellings, driveways, and curtilage areas are located in some of these areas, and some of the flatter topography is the result of recontouring (flattening) to provide the building platforms and curtilage. These areas are indicated on the image in **Appendix 4** (red circled areas).
- 53 The slope class map indicates that the dominant slopes on the subject site are greater than 15 degrees (orange and red areas).
- 54 In my opinion, if classified at property scale the subject site would be LUC class 6 or 4 land.

Non-productive land on the subject site

- 55 As noted in paragraph 52, the subject site contains existing dwellings, driveways, and curtilage areas, as well as connecting access tracks.
- 56 It is very likely that earthworks in these areas have resulted in the removal or substantial modification of the soil profile. As such, these areas would be considered non-productive land, reducing the area of potentially productive land in the subject area.
- 57 It is my understanding that the site was recently cleared of wilding pines that have self-seeded over the site since approximately the 1970s. Large stumps remain over the site. In order for these areas to be converted to more intensive productive uses such as pasture, cropping or horticulture, the stumps would need to be removed. In my experience, even with careful management, such removal of the stumps is very likely to result in extensive disruption of the soil profile, with mixing of the subsoil and topsoil, or the

loss of the topsoil. In turn, the productive capacity of the land in these areas will be even further reduced.

NPS highly productive land on the subject site

- 58 NPS-HPL clause 3.5(7)(a) allows for detailed mapping that uses the Land Use Capability classification.
- 59 I have used the Land Use Capability classification criteria provided by the Land Use Capability Handbook in combination with detailed slope class map information to interpretation the likely LUC class(s) for the subject site at property scale.
- 60 In my opinion, this assessment provides a more spatially accurate property scale estimate of the LUC classes present on the subject site than the regional scale NZLRI LUC map information.
- 61 Based on my assessment, the subject site has slopes predominantly greater than 15 degrees and at property scale, would most likely be classified as LUC class 4 land or greater.
- 62 As such, I conclude that the subject site is not predominantly LUC class 1, 2 or 3 and is not NPS highly productive land.

Conclusion

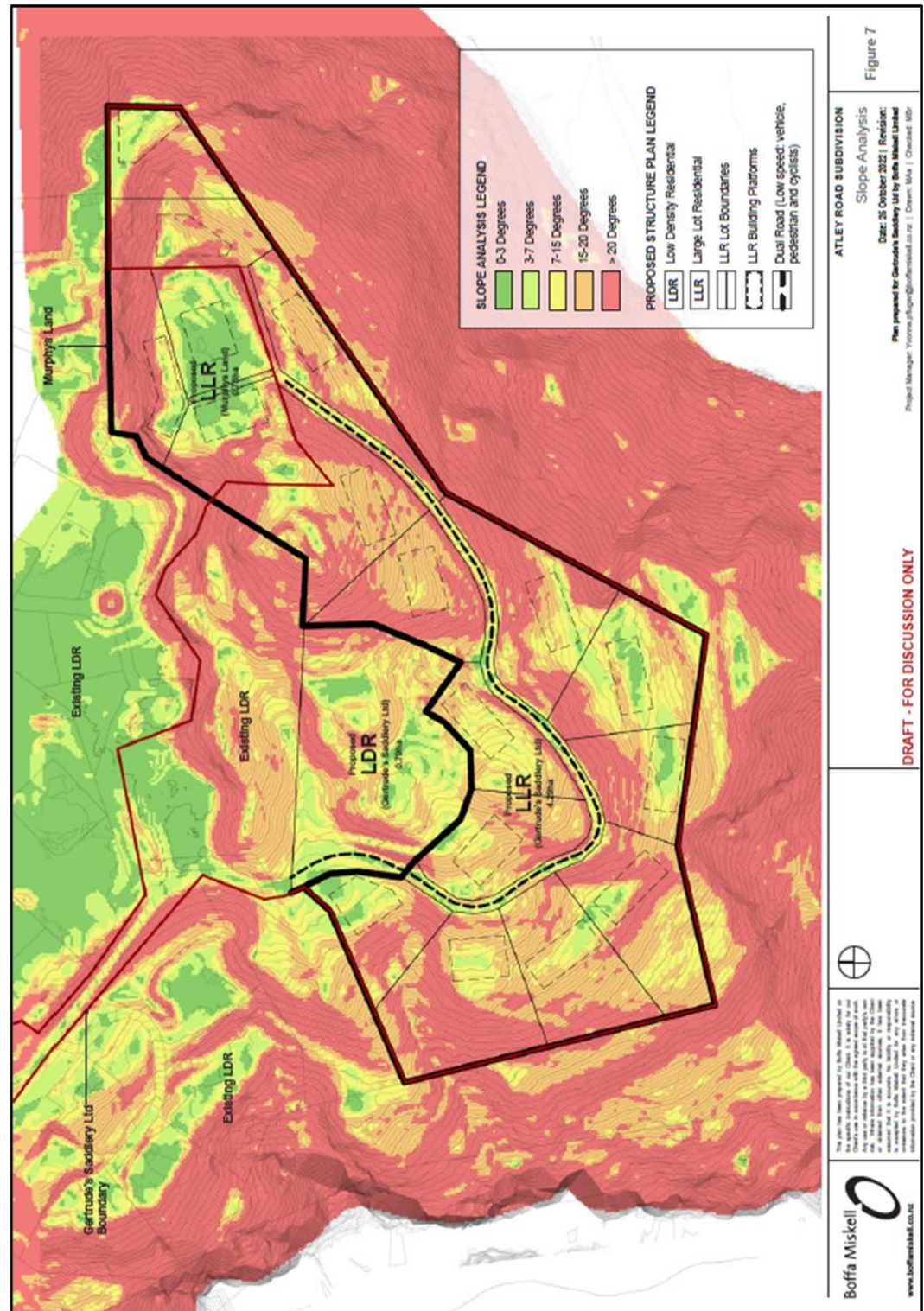
- 63 The regional scale Land Use Capability (LUC) map information available for the subject site is provided by the 1:50,000 scale New Land Resource Inventory.
- 64 The NZLRI LUC map information indicates that the LUC map unit for the site is 3s6+6e19, where LUC unit 3s6 is the dominant unit and 6e19 is the sub-dominant unit.
- 65 My assessment based on the interpretation of aerial photographs and detailed contour derived slope class maps indicates that the subject site is not LUC class 3 land.
- 66 In my opinion, the determination of NPS highly productive land on the site should not solely be based on the dominant LUC unit (3s6) depicted by the NZLRI LUC map information as this ignores available information provided in the NZLRI map information (i.e. that LUC unit 6e19 is present in the greater LUC map unit encompassing the subject site).

67 Additionally, available aerial photography and detailed slope class mapping of the site indicate that the land is not class 3, and therefore, is not NPS highly productive land.

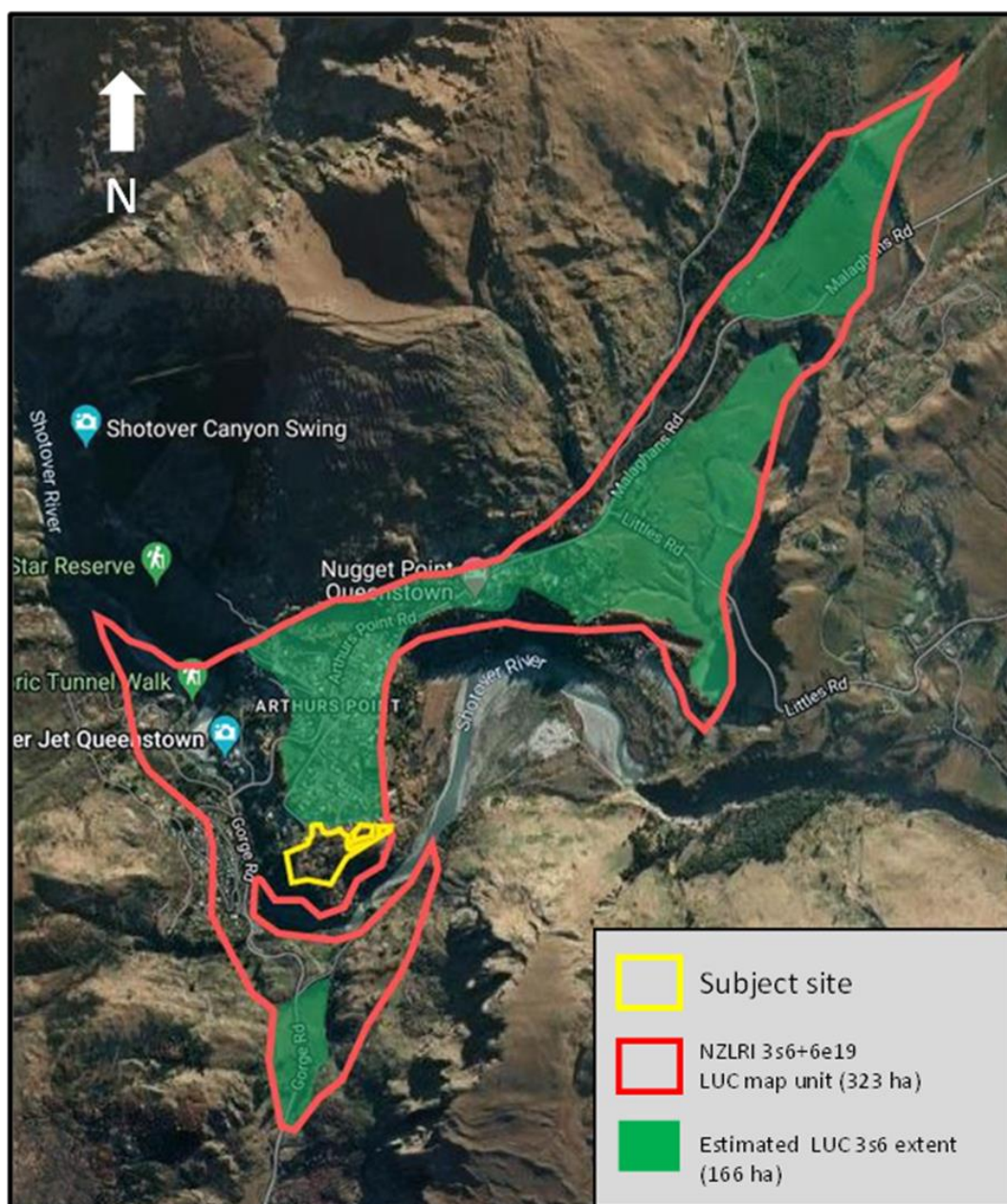
Reece Blackburn Hill

15 November 2022

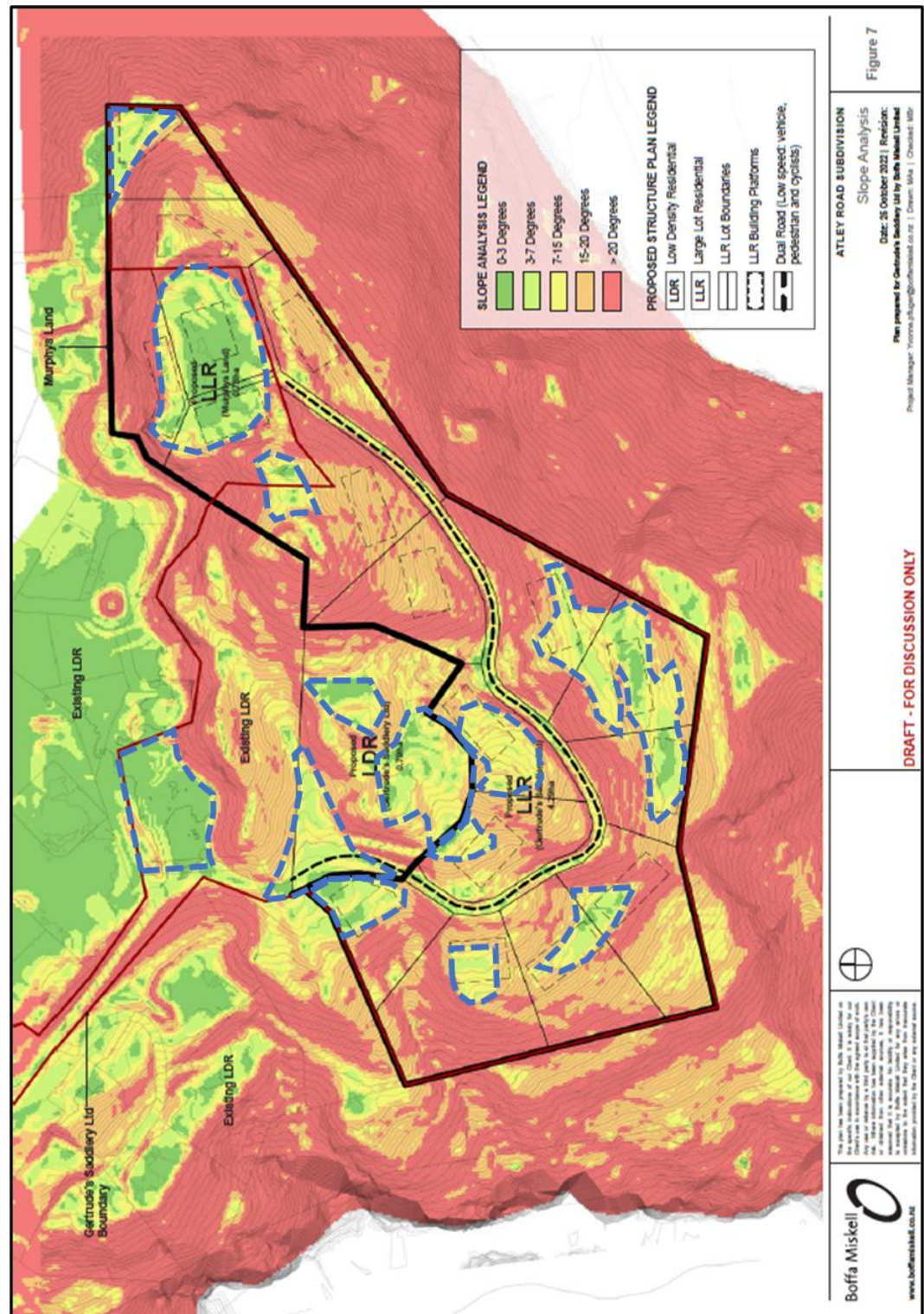
Appendix 1: Detailed contour derived slope class map of the subject site prepared by Boffa Miskell



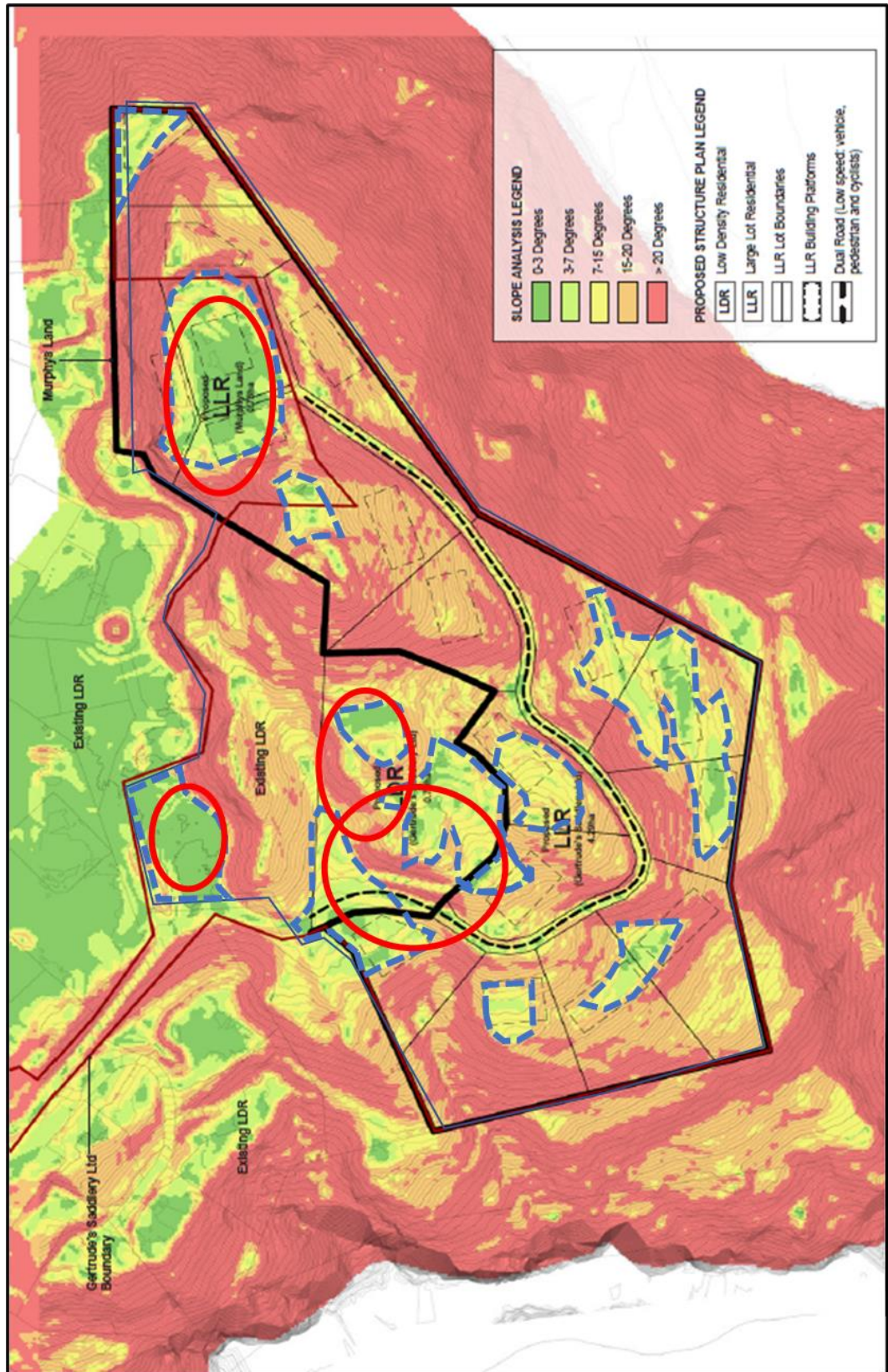
Appendix 2: NZLRI 3s6+6e19 LUC map unit showing estimated extent of LUC 3s6 (green area) within the greater LUC map unit.



Appendix 3: Slope class map of the subject area with delineated areas of $\leq 15^\circ$ slopes (areas indicated by blue dashed lines)



Appendix 4: Slope class map of the subject area with delineated areas of $\leq 15^\circ$ slopes (areas indicated by blue dashed lines) and location of existing dwellings and curtilage (areas indicated by red circles)



ATTACHMENT B

QUEENSTOWN LAKES DISTRICT COUNCIL

RE-HEARING OF SUBMISSIONS ON STAGE 1: PROPOSED

DISTRICT PLAN

GERTRUDE'S SADDLERY LIMITED AND LARCHMONT DEVELOPMENTS LIMITED

AT ARTHURS POINT

REPORT AND RECOMMENDATIONS OF HEARING COMMISSIONERS

COMMISSIONERS

D Jane Taylor (Chair)

Ian Munro

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TERMINOLOGY AND ABBREVIATIONS

The following terminology and abbreviations are used throughout this report:

Queenstown Lakes District Council	Council
Gertrude's Saddlery Limited	GSL
Larchmont Developments Limited	Larchmont
The Submitters	GSL and Larchmont
Arthurs Point Outstanding Natural Landscape Society Inc	APONLS
PDP Independent Hearings Panel	IHP
Resource Management Act 1991	RMA
National Policy Statement for Highly Productive Land	NPS-HPL
Partially Operative Otago Regional Policy Statement 2019	POORPS 2019
Proposed Otago Regional Policy Statement 2021	PORPS 2021
Operative District Plan	ODP
Proposed District Plan	PDP
Outstanding Natural Landscape	ONL
Outstanding Natural Feature	ONF
Low Density Suburban Residential zone	LDSR zone
Large Lot Residential B zone	LLRB zone
Urban Growth Boundary	UGB
Land use Capability	LUC

ATTENDANCES

For the Queenstown Lakes District Council:

Ms Sarah Scott, Counsel
Ms Ruth Evans, Planning
Ms Helen Mellsop, Landscape
Mr Mike Smith, Traffic

For the Submitters, Gertrude's Saddlery Limited and Larchmont Developments Limited:

Ms Maree Baker-Galloway and Ms Rosie Hill, Counsel
Mr Andrew Fairfax, Gertrude's Saddlery Limited, Submitters representative
Mr Jeffrey Brown, Planning
Mr Benjamin Espie, Landscape
Ms Yvonne Pfluger, Landscape
Mr John McCartney, Civil Engineering
Mr Jason Bartlett, Traffic
Mr Derek Foy, Economics

Further Submitters:

Ms Alanya Limmer, Counsel for the Arthurs Point Outstanding Natural Landscape Society Inc.
Mr Brett Giddens, Planning, for the Arthurs Point Outstanding Natural Landscape Society Inc.
Mr Stephen Brown, Landscape, for the Arthurs Point Outstanding Natural Landscape Society Inc.
Mr Tom Dery, on behalf of the Arthurs Point Outstanding Natural Landscape Society Inc.
Ms Rebecca Wolt, representing herself and Mr A Hyland
Mr Russell Hamilton
Mr Andrew Blackford
Ms Mary Jowett
Ms Barbara Lusk
Mr Denis Behan
Ms Charlotte Pringle

Mr Mark Williams, on behalf of Queenstown Trails Trust

Ms Pamela Bramwell

Ms Lindsay Lake

Dr Julian Pedley

Ms Karen Ramsey

Mr Tom Dery

Mr Matthew Semple

Ms Jennie Semple

Ms Anna Hedley

Mr Paul Hollingsworth

Mr Nigel and Ms Vanessa Lloyd

Ms Sonja Kooy and Mr Gavin Kooy

Ms Claire Hazledine

Introductory Matters

1. In 2018 the Queenstown Lakes District Council (Council) made decisions on Stage 1 of the Queenstown Lakes Proposed District Plan (PDP), which included submissions made by Gertrude's Saddlery Limited (GSL)¹ and Larchmont Enterprises Limited (Larchmont)² with respect to land at 111 and 163 Atley Road, Arthurs Point (together referred to as the Submitters). These submissions were originally heard in 2017 as part of Stream 13, Queenstown Mapping. Council adopted the recommendation of the Hearings Panel³ that the Submitters' land be rezoned from Rural to Low Density Residential, with an Urban Growth Boundary to be located around the perimeter, and that the ONL categorisation be deleted from the properties.
2. However, as a result of an error in the original summary of submissions, Council was directed by the Environment Court in 2019 to re-notify the submissions.⁴ The Court also directed that Council's original decision to rezone the Submitters' land at 111 and 163 Atley Road, Arthurs Point (which it referred to as the "Shotover Loop", a term that we will also use) to Low Density Residential be 'suspended' from the date of the decision. Accordingly, the original re-zoning decision of Council no longer has legal effect.
3. The decision of the Environment Court was subsequently appealed to the High Court by Council, GSL and Larchmont.⁵ In short, the appeals were dismissed. By way of reference, the High Court's decision contains a very helpful factual overview of the various complex jurisdictional procedural decisions and the Environment Court's analysis at paragraphs [7] to [38] of the judgment. For the purposes of this Report, we note that the litigation and subsequent decisions of both the Environment Court and High Court have concerned procedural matters only, and that there is no binding authority on the merits of the Council's decision on Stage 1 to rezone the Submitters' land.
4. Following the dismissal of the High Court appeals, Council re-notified the submissions of GSL and Larchmont in accordance with the Environment Court's directions in early 2022, with the submission period closing on 14 April 2022. A total of 101 further submissions were received (including two from GSL and Larchmont respectively). We summarise the main points raised in the further submissions later in this report, at paragraph 13.
5. In the lead up to the Hearing, we issued a number of procedural directions based on what became a large volume of feedback and requests from the parties. We undertook a site visit prior to the commencement of the public hearing, which included the Submitters' land and its surrounds, together with various parts of the existing Arthurs Point settlement. We also pre-read all of the material provided to us.

¹ Submission number 494.

² Submission number 527.

³ Report 17-04, available on the Council website.

⁴ *Arthurs Point Outstanding Natural Landscape Society Inc. v Queenstown Lakes District Council* [2019] NZEnvC 150, Jackson J.

⁵ *Gertrude's Saddlery Limited et al v Arthurs Point Outstanding Natural Landscape Society Inc.* [2021]NZHC 147.

6. During the hearing, and after discussing the issues with the various witnesses, we indicated the possible value in undertaking an additional site visit, including a journey along the Shotover River and around the Shotover Loop itself. This was supported by a number of the parties and, following the adjournment of the hearing, we undertook this additional visit. We entered the river at the Shotover Jet Queenstown facility, rafting downstream beneath the Edith Cavell Bridge and around the Submitters' land, beaching at several points directly opposite the Submitters' land and then further at Big Beach. This experience gave us a variety of near-and-far perspectives on the Submitters' land in the context of its immediate and wider settings. We record that this particular site visit greatly expanded our understanding of the issues. We exited the river at Tucker Beach.

Site and Surrounds

7. The submissions made by GSL and Larchmont relate to property located at 111 and 163 Atley road, legally described as Lot 1 DP 518803 and Lot 2 DP 398656.⁶ The combined area of the two properties is 7.3665 hectares, of which approximately 1.6 hectares is currently zoned Low Density Residential (LDR), with the remainder zoned Rural General in the ODP⁷.
8. For the purposes of this Report, we adopt the factual description of the Submitters' land and surrounds as set out in section 4 of the s.42A Report prepared by Ms Evans. We note that at the time of our site visits both prior to and post the hearing, the operation to remove wilding pines from the Submitters' land had been largely completed, although removal of the woody material (comprising logs and slash) was only at an early stage.
9. The original Stage 1 PDP notified zoning for the Submitters' land comprised part Lower Density Suburban Residential (LDSR) (approximately 1.6 hectares) with the balance land Rural, in the same configuration as the ODP.⁸ The boundary between the LDSR and Rural zones was also proposed to be the boundary of both an Urban Growth Boundary (UGB) and an area of Outstanding Natural Landscape (ONL).

Submissions of GSL and Larchmont

10. At section 5 of her s.42A Report, Ms Evans summarises the background to the original submissions of GSL and Larchmont, which we adopt for the purposes of this Report. We concur with Ms Evans that, in summary, the submissions provide the following scope for our consideration in relation to the Submitters' land:
 - (a) LDSR zoning (or residential zoning of a lesser density for the entire site, somewhere between LDSR and Rural);
 - (b) extension of the UGB to incorporate the whole of the site, and
 - (c) consequential removal of the ONL from the site.

⁶ The properties are hereinafter referred to as the Submitters' land.

⁷ Refer ODP Planning Map 39a.

⁸ Refer PDP Planning Map 39

11. On 14 October 2022, the Submitters filed a 'draft masterplan' of their amended rezoning proposal, which included a much smaller area of LDSR zoned land, with the balance of the land to be rezoned Large Lot Residential (B) (LLRB). We accept that the draft masterplan is within the scope outlined above and note that this was not challenged by any of the parties.
12. The revised relief sought by the Submitters is outlined in detail in the evidence of Mr Espie, Ms Pfluger and Mr J Brown. A bespoke masterplan has been proposed, which is intended to become a structure plan within Chapter 27 of the PDP. In summary, the masterplan provides for:
 - (a) An extension of the LDRZ over the northern side of the knoll within the GSL land.
 - (b) LLRB zoning over the remainder of the submission site, in accordance with a proposed structure plan and planning provisions.
 - (c) A number of proposed design controls, including a minimum 2,000 m² lot size, identified building platforms with building footprint limited to 500 m², a 7 m maximum building height (above Relative Level), recessive building colours and materials, structural mitigation planting with native species to be implemented prior to the issue of titles, and building restriction areas covering small areas of the Kimiākau Shotover River ONF and the upper slopes of the knoll.

Further Submissions

13. Excluding two further submissions from the primary Submitters, GSL and Larchmont, a total of 99 further submissions were received. Of these, 24 further submission points supported the proposed rezoning, with 140 submission points in opposition and 2 further submission points neither supporting nor opposing the rezoning. The majority of further submissions were on both primary submissions, as set out in paragraph 6.1 of the s.42A Report. Positions taken by further submitters ranged from supporting the rezoning proposal in its entirety, to seeking more detail and/or amendments (such as a structure plan) to better understand the proposal, to opposing the rezoning proposal in its entirety.
14. At paragraphs 6.3 and 6.4 of her s.42A Report Ms. Evans recorded the key issues raised by the further submissions, which we adopt and summarise as follows:

Key issues in support:

- (a) the expansion is a natural extension of the existing residential area;
- (b) the proposal will make a positive contribution to additional housing supply; and
- (c) the opportunity for an additional cycle track.

Key issues in opposition:

- (a) the proposal will have significant adverse effects on the ONL and Outstanding Natural Feature (ONF) of Arthurs Point;
- (b) the role of the site in providing 'breathing space' between the urban zoned areas of Arthurs Point and the ONL/ ONF;
- (c) the presence of significant natural hazards;
- (d) part of the site is identified as wāhi tūpuna;

- (e) impacts on the amenity enjoyed by residents in the area; including additional houses, traffic and parking overspill, noise, rubbish bins, impact on the ability of residents to walk along the roads, smoke, night lighting and privacy;
- (f) traffic effects, including the capacity of the Edith Cavell bridge and safety issues associated with the narrow access road;
- (g) significant effects on the night sky, including lighting and glare;
- (h) construction related effects, including noise and dust;
- (i) the capacity of the existing infrastructure networks to support the proposed rezoning; and
- (j) insufficient detail has been provided to enable proper consideration of the rezoning proposal.

Council's Position

15. At the conclusion of the hearing, Council's s.42A recommendations were amended as follows:⁹
- (a) An extension to the LDSR zone to align with Ms Mellsop's proposed 'ONL boundary line' was supported; and
 - (b) The proposed LLRB zone was opposed, together with any changes to Chapter 27 (Subdivision) and to the bespoke structure plan, on the basis that these would have a moderate to high adverse effect on the values of the adjacent Kimiākau Shotover River ONF and a moderate adverse effect on the values of the wider ONL. Rezoning of this part of the Submitter's land was considered to not only fail to protect the values of the ONL and ONF as required by Chapter 3 of the PDP, but to also create "insurmountable plan integrity issues".

Statutory Framework applicable to Rezoning Submissions

16. The Resource Management Act 1991 (**RMA**) sets out the statutory framework for the consideration of Plan Changes (rezoning submissions). Relevant sections include the functions of territorial authorities (section 31), requirements for evaluation reports and further evaluation reports (sections 32 and 32AA), the purpose of district plans (section 72), preparing and changing district plans (section 73) matters to be considered by a territorial authority when changing a district plan (section 74), contents of district plans (section 75) and district plan rules (section 76).
17. We note in particular, sections 74 and 75, which are concerned with matters to be considered by a territorial authority when preparing or changing a district plan. These provisions require:¹⁰
- (a) the district plan to be prepared in accordance with Part 2 of the RMA;
 - (b) a section 32 evaluation;

⁹ Refer to the Reply Legal Submissions for Council dated 24 March 2023 at section 2.

¹⁰ As per Ms Evans' helpful summary at paragraph 7.4 of her s.42A Report.

- (c) the district plan to be prepared in accordance with any national policy statements and any regulations;
 - (d) that any relevant planning document recognised by an iwi authority be taken into account;
 - (e) that the district plan must give effect to any applicable national policy statements; and
 - (f) that the district plan must give effect to any applicable regional policy statements.
18. In *Colonial Vineyard Limited v Marlborough District Council*,¹¹ the Environment Court provided guidance with respect to the statutory requirements applicable to the consideration of rezoning proposals. Additional direction has been provided by subsequent higher order decisions, including but not limited to the decision of the majority of the Supreme Court in *Environmental Defence Society v New Zealand King Salmon Company Limited*.¹² We accept that this guidance, which has been utilised by the PDP Stages 1, 2 and 3 Hearings Panels, is both relevant and appropriate. The key principles derived from case law relevant to our decision-making framework are largely settled, and we refer to the helpful summary set out at Appendix B of the Legal Submissions for GSL and Larchmont dated 26 January 2023 (with the exception of principle (b) following the decision in *Bridesdale Farm Developments Limited v Queenstown Lakes District Council*).¹³
19. Ms Scott, counsel for the Council, referred us to the summary of the statutory framework and related legal principles set out by the Environment Court in the recent *Bridesdale* case.¹⁴ the key points are summarised as follows:
- (a) Council must evaluate which zone option is the most appropriate for achieving relevant PDP objectives. Where bespoke policies and rules are sought, these must be included in its consideration.
 - (b) In relation to the proposed rules, Council must have regard to the actual and potential effects on the environment of the activities that would be enabled, including any adverse effects, and must assess whether the proposed rules achieve the objectives and policies of the PDP.
 - (c) Other matters for consideration include the provisions of Part 2, the functions of territorial authorities and national policy statements.
20. Mr J Brown referred us to *R Adams and others v Auckland Council*,¹⁵ which provides a useful guide to the statutory tests to be applied when considering the most appropriate provisions for a district plan.
21. Ms Baker-Galloway and Ms Hill, counsel for GSL and Larchmont, also helpfully drew our attention to Report 20.1 of the Independent Hearings Panel,¹⁶ which sets out a number of

¹¹ [2014] NZEnvC 55 (*Colonial Vineyards*).

¹² [2014] NZSC 38 (*King Salmon*).

¹³ [2021] NZEnvC 189 (*Bridesdale*).

¹⁴ [2021] NZEnvC at [27] to [30].

¹⁵ [2018] NZEnvC 8.

¹⁶ QLDC PDP Stage 3 Report 20.1 (Introduction) and section 2.9 – which can be located on Council's website.

principles for the determination of the most appropriate zone for a given area of land. These principles do not replace the guidance provided in the *Colonial Vineyards* or *Bridesdale* decisions already noted, but rather elaborate on the relevant statutory tests in a manner that focuses attention on the particular issues zoning (and rezoning) questions give rise to. We accept that these principles are of assistance in making our recommendation on the relief sought by the Submitters, in particular:

- (a) Whether the change is consistent with the Strategic Directions chapters of the PDP (Chapters 3 to 6);
 - (b) Changes to zone boundaries that are consistent/considered alongside PDP maps that indicate additional overlays or constraints (including, relevantly, ONFs and ONLs);
 - (c) Changes should take into account the location and environmental features of the site, for example the existing and consented environment, existing buildings, significant features and infrastructure.
 - (d) Zoning is not determined by existing resource consents and existing use rights, but these will be taken into account.
22. We were not made aware of any disagreement between the planners as to the applicable plans or plan provisions; rather, any substantive differences in view were primarily in relation to the application of the plans in the context of the relief sought, which we will address later in this decision. In particular, relevant chapters in the PDP that the submissions must be assessed against include Chapters 3 (Strategic direction), 4 (Urban Development), 5 (Tangata Whenua), 6 (Landscapes and Rural Character), 7 (Low Density Suburban Residential), 11 (Large Lot Residential), 21 (Rural), 25 (Earthworks), 28 (Natural Hazards), 29 (Transport) and 39 (Wāhi Tūpuna). We note that Chapter 3 provides direction for the development of the more detailed provisions contained in subsequent chapters of the PDP, including specifically in relation to the identification and protection of outstanding natural features and landscapes (Chapter 6).
23. We concur with the submission of counsel for the Submitters that it is well-established principle of case law that in a s.32 evaluation, the Council's proposed plan is not to be assumed to be the most preferred or most appropriate.¹⁷ We record that we have adopted a first principles ("clean sheet of paper") approach to the application for rezoning of the Submitters' land.
24. For completeness, we record that as the submissions relate to a part of the PDP notified in 2015, the version of the Resource Management Act 1991 that must be applied is the version that predates the Resource Legislation Amendment Act 2017.

National Policy Statement for Highly Productive Land (NPS-HPL)

25. The applicability of the NPS-HPL to the site was an issue raised in evidence and in the legal submissions. In his evidence for the Submitters, Dr Reece Hill concluded, based on a detailed mapping exercise, that the site was not Land Use Capability (LUC) 3 land. Council engaged Mr Ian Lynn, of Manaaki Whenua Landcare Research, to undertake a peer review of Dr Hill's evidence. Mr Lynn considered Dr Hill had correctly applied the LUC classification criteria and

¹⁷ Legal Submissions for GSL and Larchmont dated 26 January 2023 at 33, and Synopsis of Legal Submissions dated 1 February 2023 at 32 to 33.

agreed with Dr Hill's finding that the site is not LUC 3. Accordingly, Council accepted that the NPS-NPL does not apply to the relief sought by the Submitters.

26. Ms Limmer, for the APONLS, relying on the recently published Ministry for the Environment's (MfE) 'Guideline to Implementation', submitted that more mapping work needed to occur at regional or district level (as opposed to the site specific investigation undertaken by Dr Hill) before the LUC 3 classification currently applicable to the Submitters' land can be changed. Ms Scott, for Council, submitted that MfE's guidance was, in effect, an incorrect interpretation of the NPS-HPL policy document in relation to this point and, further, that non-statutory guidance cannot alter the meaning of a statutory instrument. We concur with Ms Scott's interpretation of the relevant Environment Court decisions relied on in reaching her conclusion.¹⁸ We also accept Ms Scott's submission that context and purpose are key factors when resolving competing interpretations in planning instruments, and agree that it would be inconsistent with the purpose of the NPS-HPL, and indeed potentially produce an absurd outcome, if a detailed site specific analysis by a suitably qualified expert could not be relied on, in effect placing restrictions on land which is not intended to be protected by the NPS-HPL.
27. Accordingly, we find, based on the evidence of Dr Hill and Mr Lynn, that the NPS-HPL is not applicable to the Submitter's proposal.

Relevance of the Independent Hearings Panel Recommendations

28. Counsel for the Submitters also submitted that one key different 'defining factor' in this hearing is that, in addition to the principles listed above, the previous Council decision based on an Independent Hearings Panel's (IHP) recommendation to rezone the site is a relevant matter to be had regard to by this Commission.¹⁹ In their submission, the IHP recommendation should be given significant weight on the basis that first, the Environment Court merely 'suspended' the Council decision rather than 'overturning' it and did not make any substantive findings as to its merits; secondly, that no intervening policy changes or evidential changes have occurred since the IHP recommendation that would undermine it, and thirdly, that "*a highly skilled inquiry was undertaken into the evidence by the IHP, including findings that the site is not an ONL (or part of one), preferring Mr Espie's evidence to that of Dr Read*"²⁰. It was also submitted that the revised relief sought by the Submitters provides for less environmental effects and greater environmental benefits than the rezoning proposal originally before the IHP.
29. Ms Scott, for Council, submitted that there is no legal requirement for us to take into account the 'suspended' Stage 1 IHP recommendation and report and subsequent Council decision. Ms Limmer, for the APONLS, considered the 2018 decision to be irrelevant, noting that Judge Jackson had determined that as Clause 7 of the First Schedule of the RMA had not been complied with, the process must "start again from that step". She submitted that nothing turns on the use of the word 'suspended' by the Environment Court, as that was the only relief available to the Court under s.314(1)(f).

¹⁸ Reply Legal Submissions for Queenstown Lakes District Council dated 24 March 2023 at 3.6.

¹⁹ Legal Submissions for GSL and Larchmont dated 26 January 2023 at 33.

²⁰ Legal Submissions for GSL and Larchmont dated 26 January 2023 at 33.

30. In our view, it is very clear that the purpose of this rehearing, in accordance with the orders made by the Environment Court, is to bring an independent lens to the zoning relief sought by the Submitters. We have had the benefit of additional comprehensive legal submissions, expert evidence and 99 further submissions from the community. In particular, the landscape expert evidence, which is instrumental to our findings, is considerably more extensive and detailed than was available to the IHP at first instance. We note also that the policy framework has advanced considerably, with the introduction of new National Policy Statements and developments at Regional Council level. In addition, many of the provisions of the PDP, which at the time were under appeal, have now been settled. Accordingly, we have attributed no weight to the IHP's evaluation and conclusions, which may well have been different had the commissioners had access to the evidence before us, particularly in light of the current policy environment.

Key Resource Management Issues and Approach to Evaluation

31. At paragraph 9.1 of her s.42A Report, Ms Evans identified five key resource management issues that she considered required assessment in evaluating the Submitters' rezoning proposal, as follows:
- (a) Landscape
 - (b) Infrastructure and servicing
 - (c) Transport
 - (d) Geotechnical and natural hazards
 - (e) Wāhi tūpuna/cultural effects.
32. At the conclusion of the hearing it was apparent that the only unresolved issue as between the Council and the Submitters related to the effects of the proposed relief on the landscape. We acknowledge that notwithstanding this position, landscape, roading, transport and infrastructure remained at issue with the APONLS and many of the further submitters.
33. Accordingly, we turn first to the landscape issue. We agree with Ms Scott that this is the 'apex' issue for us to determine.²¹ Having considered the submissions and evidence before us, both written and as presented throughout the course of the hearing, together with the relevant case law, it is very clear that the key preliminary matter to be decided is whether or not the site is an ONL and/or an ONF (or otherwise part of a s.6(b) of the RMA landscape). It follows that if the submission site (or any part of it) forms part of an ONL and/or ONF, then the recommended zone provisions must protect the values of the ONL and/or ONF. Further, if the boundary of the ONL and/or ONF is directly adjacent to or near to the submission site, the recommended zone provisions must protect the values of the adjacent ONL and/or ONF insofar as they might impact on it.
34. There was no disagreement between Counsel for the various parties with respect to the preliminary issue to be determined by the Commission as a matter of process.²² It is only after

²¹ Legal Submissions for Queenstown Lakes District Council dated 26 January 2023 at 4.7.

²² Refer Legal Submissions for GSL and Larchmont at 38; Opening Legal Submissions for Council at 4.7; and Legal Submissions for APONLS dated 26 January 2023 at 7.

determination of the landscape category that we can necessarily consider the appropriateness of the rezoning proposal under s.32 including, if applicable, how the directives in s.6(a) and (b) of the RMA can be achieved.

Landscape Assessment

Preliminary Issue: Is the Site an ONL and/or ONF?

Approach to Assessment

35. As the Environment Court observed in *Western Bay of Plenty Council v Bay of Plenty Regional Council et al*,²³ neither the phrase “outstanding natural features and landscapes”, nor any of their elements, is defined in the RMA. There is a significant body of case law concerning the meaning of these words and the scope of the requirement to recognise and provide for the protection of such landscapes.
36. We note that the PDP defines the terms “landscape values” and “landscape capacity” in relation to an ONL, ONF or Rural Character Landscape, although the landscape attributes, values or capacity of these landscape categories (at least insofar as they may be located within identified “Priority Areas”) are yet to be settled.²⁴
37. As previously discussed, the location of the boundary of the ONL (and/or ONF) in relation to the site has been implicitly raised through the GSL and Larchmont submissions. We concur with Ms Scott that although the jurisdiction for a change to the ONL boundary is an implicit part of the submissions, that is not to say that the well accepted principles established in *Man O’War Station Limited v Auckland Council*²⁵ should not be applied. We accept that a ‘top down’ approach must be taken to the categorisation of ONLs and ONFs, which means that the first task is to assess whether the land in question forms part of an ONL or ONF. The planning consequences that flow from categorisation of land as ONL or ONF are irrelevant in determining the underlying ONL or ONF landscape category, as these are conceptually different inquiries.
38. In *Hawthenden Limited v Upper Clutha Environmental Society Inc.*,²⁶ Hassan J carried out a comprehensive review of applicable case law in the wider context of the Queenstown Lakes District, drawing on legal principles to assist with the approach to determination of the ONL and ONF landscape categories. We have endeavoured to summarise the main findings as follows:
 - (a) The leading authority is the decision of the Court of Appeal in *Man O’War Station Limited v Auckland Council*.²⁷ The Court held that for s.6(b) to apply to any natural feature or landscape, it must be ‘outstanding’. Because the word ‘outstanding’ is not defined in the

²³ [2017] NZEnvC 147 (the *Matakana* case) at [78].

²⁴ Refer to the Council’s Landscape Schedules variation to the PDP, publicly notified 30 June 2022.

²⁵ [2017] NZCA 24.

²⁶ [2019] NZEnvC 160 (“*Hawthenden*”).

²⁷ [2017] NZCA 24 (“*Man O’War*”).

RMA, inherently this calls for the exercise of an informed comparative judgment as to the values of any natural feature or landscape.²⁸

- (b) The issue of whether land has attributes sufficient to make it an outstanding landscape within the ambit of s.6(b) of the RMA essentially requires a factual assessment based on the inherent qualities of the landscape itself. The Court noted that the direction in s.6(b), “*that persons acting under the RMA 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.²⁹ As the Court observed, citing the majority decision in *King Salmon*, “much turns on what is sought to be protected”.³⁰ Various courts have made it clear that the fundamental inquiry into whether an area is ONL or ONF must be uncluttered by and independent of any consideration of the alleged benefits arising from any proposed development and/or how effects on the ONL or ONF can be reduced. It is essentially a factual assessment based on the inherent qualities of the landscape itself.
- (c) The question of whether or not a landscape may be described as ‘outstanding’ necessarily involves a comparison with other landscapes. The Court also accepted that the adjective ‘outstanding’ is a strong one, importing the concept that the landscape in question is of special quality.³¹ The Court emphasised that the determination of whether a landscape or feature is sufficiently natural calls for the exercise of well-informed contextual judgment. There is no particular threshold of naturalness that is required to be observed.³² It follows that ‘natural’ is not equivalent to being ‘pristine’ or ‘remote’ – it is a contextual enquiry.
- (d) The judgement required to determine whether a landscape or feature is sufficiently natural is not the preserve of the expert. In *Hawthenden*, the Court stated:³³ “*Rather, the expert contributes opinion in order for the relevant decision-maker to exercise that judgment. That is one reason why we accept Ms Mellso’s opinion, and that of the signatories to the Landscape JWS, in finding that there is no necessary threshold of ‘moderate - high’ to be met in order for the land to qualify as part of an ONF or ONL. It is simply artificial to try to construct a threshold for what is inherently a judgment call. Doing so also wrongly assumes that the judgment rests with the experts. It does not. Rather, an expert’s evaluative role as to assist the decision-maker to make a properly informed judgment on whether land in issue should be within the ONF or ONL*”.
- (e) In *Wakatipu Environmental Society Inc. v Queenstown Lakes District Council*³⁴ Jackson J held that what is or is not an ONL or ONF in most cases should be a finding of fact that is actually reasonably obvious to the ordinary, non-expert viewer: “... *ascertaining an area of outstanding natural landscape should not normally require experts. Usually, an outstanding natural landscape should be so obvious in general terms that there is no need for expert analysis.*” Judge Jackson went on to say: “*The question of what is appropriate development*

²⁸ *Hawthenden* at [42].

²⁹ *Man O’War* at [61].

³⁰ *Hawthenden* at [77].

³¹ *Man O’War* at [86].

³² *Hawthenden* at [55] to [61].

³³ *Hawthenden* at [61].

³⁴ [2000] NZRMA 59 at [99].

is another issue, and one which might require an expert's opinion. Just because an area is or contains an outstanding natural landscape does not mean that development is automatically inappropriate." Similarly, in the *Matakana* case, the Court reiterated:³⁵ *"... an ONFL should be so obvious (in general terms) that there is no need for expert analysis. This is plainly the basis for the approach in a number of the cases of standing back, looking at the whole landscape or feature and asking: does this landscape or features stand out among the other landscapes and features of the district or region?"*

At [58] the Court in *Hawthenden* observed that in many cases it will be obvious if a landscape or feature is outstanding. However, in some cases, expert assessment will be needed, for example, where associative values or less obvious biophysical values are present. The Court cited the Landscape Methodology JWS with approval, stating *"The method generally employed involves describing the attributes and values and rating them. However, an overall judgment is made of the significance of the landscape or feature and its outstandingness"*.

- (f) The primary inquiry should be as to whether the area of land in question belongs within the landform that properly defines the boundaries of the ONF or ONL.³⁶ The Court in *Hawthenden* went on to state: *"Once that is determined, attention turns to the degree of naturalness of the land in question. Contextual evaluation then guides the judgement. The judgement called for is as to whether the area of land in issue is too modified or inappropriately developed such that including it in the ONF or ONL would detract from or undermine the values of the ONL or ONF when considered as a whole"*.
- (g) The Court in *Hawthenden* found that: *"The fact that a landscape or feature is classified as an ONF or ONL on the basis of expert opinion that it has 'moderately high' or even 'high' naturalness does not necessarily dictate that the same threshold must be passed for land to be added to, or excluded from it. Rather, an overriding consideration must be to ensure the overall legibility of the ONL or ONF is maintained. Again, that question is one for properly informed judgement"*.³⁷

39. In addition to the principles above, we found the Court's findings in *Hawthenden* at [80], which dealt with appeals that sought to dispute ONL or ONF boundaries, highly relevant to our assessment:

- (a) We agree that ***evaluation must be at the appropriate geographic scale treating a landscape or feature as a whole***. Relevant to this decision, we add that:
 - (i) *the focus of our task, for this decision, is to determine the most appropriate extent of each ONL or ONF insofar as this is an issue in the appeals. The DV's ONL and ONF maps are ultimately servants of s6(b) of the RMA. The focus in s6(b) is at the landscape scale for ONLs and feature scale for ONFs;*

³⁵ *Matakana* at [136].

³⁶ *Hawthenden* at [62].

³⁷ *Ibid* at [63].

- (ii) ***An important consideration in our evaluation of the landscape evidence is whether the landscape witness has approached assessment at that appropriate scale. That includes consideration of relevant values. An assessment of the landscape or feature, and its relevant values (biophysical, sensory, associative), is a necessary prerequisite to a reliable opinion on whether land at issue in an appeal should be part of an ONL or ONF or excluded from it.***
- (b) ***We agree that ONF and ONL boundaries should be legible and coherent to the community. This is a factor against which we evaluate the expert evidence. Related to that, we also accept the consensus opinion in the Landscape Methodology JWS that:***
 - (i) ***geomorphological boundaries are a desirable first preference for determining appropriate ONL and ONF boundaries;***
 - (ii) *acceptable alternative boundaries, if geomorphology does not so assist, include marked changes in land cover or use patterns (and, potentially, road corridors); and*
 - (iii) ***localised cut-outs from ONL or ONF boundaries, for example for developments, are not generally appropriate where evaluation demonstrates that, with the development included, the landscape or feature remains an ONL or ONF (e.g. by reason of its scale or character).***
- (c) ***We agree that an assessment of biophysical attributes is the appropriate starting point for assessment. This reflects the principle that the evaluative opinion required of a landscape expert ought to be informed by the best available factual/scientific or other foundations for an evaluative opinion. Contextual assessment should follow to elicit how people would perceive its relative naturalness, given the associations they may have with a landscape or feature. Community surveys are an important tool for reliably informing expert opinion on these matters, but not available on the evidence before us. [Our emphasis]***

Does it matter whether the site is an ONL or ONF for the purposes of our evaluation?

- 40. We received submissions on the relevance to our decision as to whether the site is an ONL or an ONF from counsel for both Council and APONLS. Stage 1 of the PDP originally notified the site as part of an ONL. The more recent Landscape Priority Area schedules denote the site as part of the Kimiākau Shotover River ONF.
- 41. It is well established by the courts that an ONL and an ONF are not necessarily one and the same.³⁸ However, having considered the relevant case law and applying the legal principles to our evaluation, we have concluded that whether the site is found to be an ONL or, alternatively, an ONF, is not material to our recommendation. This is because:
 - (a) Section 6(b) of the RMA treats both ONLs and ONFs in the same way. The important matter is that they be identified, which requires definition of the land (whether it is a feature or landscape) and of its attributes.³⁹

³⁸ See, for example, *Hawthenden* at [160].

³⁹ *Matakana* at [139].

- (b) The level of protection afforded by the relevant provisions of the regional and district plans at a policy and regulatory level is the same for both ONLs and ONFs.
- (c) As found by the Court in the *Matakana* case, whether the land comprises an ONL or an ONF will, more often than not, not matter.⁴⁰ The text of s.6(b) should be considered in terms of principles rather than rules or definitions.

Relevance of the Landscape Schedules Variation

- 42. Through decisions on appeals lodged on Stage 1 decisions, a number of ONL or ONF ‘Priority Areas’ were confirmed by the Environment Court, and associated policies inserted into Chapter 3 of the PDP. Of most relevance, Decision 2.5 confirmed the proposed Priority Area boundaries as appropriate, which included the Kimiākau Shotover River ONF Priority Area. The associated values schedules for each of the Priority Areas were notified into Chapter 21 of the PDP on 30 June 2022.
- 43. It was generally agreed by all counsel that, for the purposes of this hearing, neither the Priority Areas nor the associated values schedules (which are currently subject to a Schedule 1 process) formed part of notification of Stage 1 of the PDP, and therefore did not exist at the time the submissions were lodged on Stage 1 of the PDP. We agree with Ms Scott that the clear legal implication is that no submission could have been lodged on the ONF Priority Area boundary and, accordingly, we have no jurisdiction over either the boundary of the Kimiākau Shotover River ONF, or the contents of the relevant schedule. Accordingly, we have given no weight as such to the notified Priority Area maps, which include the Kimiākau Shotover River ONF Priority Area. It follows that we accept that whether or not an area of land is located within a “Priority Area” (as notified) has no direct bearing on whether it is found to be within an ONL (or ONF) for the purposes of our assessment.
- 44. We note, however, that given the potential relevance of the Shotover River ONF and Western Whakātipu Basin ONL Priority Area values schedules to the rezoning request, the landscape experts have referred to and/or considered their content in providing their evidence. It was generally acknowledged that although the schedules as notified do provide initial assistance in terms of identifying the relevant values for respective ONL and ONF areas, a “first principles” landscape assessment of the site, without reliance on the Priority Area mapping, is nonetheless required and that as such, the Priority Area schedules can be given little to no weight in the overall assessment. We concur with this approach.
- 45. We further note that the landscape evidence does not generally support an extension of the Kimiākau Shotover River ONF over the site. We will return to the question of whether we are prepared to recommend a change to the ONF line (as currently shown in the PDP) later in this decision.

⁴⁰ *Matakana* at [82] and [83].

Discussion

46. Based on the principles as set out above, our approach to assessment is:
- (a) identification of the relevance of geomorphological boundaries (biophysical attributes);
 - (b) consideration of the degree of naturalness of the Submitters' land, which includes a contextual assessment as to how people perceive the relative naturalness of the land, given the association they may have with a landscape or feature;
 - (c) if required, identification of acceptable alternative boundaries.
47. In her evidence for Council, Ms Mellsop stated that the site is located within the Arthurs Point Basin, which she described as a lower lying area that has been formed by glacial and fluvial processes and is almost completely surrounded by mountains or *roche moutonnée* landforms. She observed that: *"The context landscape is largely categorised as ONL or Kimiākau Shotover River ONF, with the urban areas of Arthurs Point being 'cut-outs' within this wider natural landscape. The river ONF is nested within the wider ONL of the surrounding mountains"*.⁴¹
48. Relevantly, Ms Mellsop noted that the current ONL/ONF boundaries around the Arthurs Point settlement are largely defined by previous Urban or Rural Visitor zoning under the ODP, rather than being based on topographical boundaries. Some amendments to landscape boundaries in the north-eastern part of Arthurs Point have occurred through Stage 3 of the PDP, which respond to topographical changes that mark the boundary of the Kimiākau Shotover River ONF.
49. Ms Mellsop carried out a comprehensive assessment of the wider landscape context, identifying its physical attributes and values, associative attributes and values, and perceptual (sensory) attributes and values.⁴² We have found this summary helpful, and note that Ms Mellsop's descriptions largely accord with our own observations and experiences during our site visits.
50. In relation to the site, Ms Mellsop described the landform as consisting of *"a schistose knoll that forms the southern end of a peninsula extending from Mount Dewar. The underlying landform is that of a roche moutonnée, where hard rock has been overridden by glaciers moving down the valley. A steep escarpment on the northern side of the knoll leads down to the outwash plateau of Atley Terrace, and on the southern side the knoll has been cut into by the river. There is a transition from the slopes of the roche moutonnée knoll to the steeper escarpments formed by river erosion near the southern boundaries of the site"*.⁴³ She considered that this transition "line" forms the boundary of the Kimiākau Shotover River ONF (as it relates to the Submitters' land), as it marks the extent of the river's more recent influence on landforms.
51. In summary, Ms Mellsop considered that:

⁴¹ Statement of Evidence of Ms Mellsop dated 18 October 2022 at 6.1.

⁴² Ibid at 6.3.

⁴³ Ibid at 7.2.

- (a) The Submitters' land (including the schistose knoll) is part of the ONL that completely surrounds and dominates the urban settlement of Arthurs Point. She described the urban settlement as a 'cut-out' within the ONL.
- (b) The remaining area of the knoll is relatively unmodified in terms of landform, with the exception of some human activity (access driveways and earthworks for building platforms). It remains a memorable and expressive feature within the landscape, forming a southern backdrop to the development on Atley Terrace and a landmark at the sharp bend of the river gorge. She noted that the site has featured in popular images, including paintings, tourism photographs and stamps.⁴⁴
- (c) The knoll retains a moderately high level of naturalness, notwithstanding its unkempt appearance following the clearance of wilding conifers. Natural landscape elements, patterns and processes are dominant, and the extent of human modification does not clearly distinguish this area from other parts of the Arthurs Point Basin ONL where there is scattered rural living integrated by vegetation.⁴⁵

52. Ms Mellsop concluded that some small areas of the Rural zoned portion of the Submitters' land are appropriately classified as part of the Kimiākau Shotover River ONF, with the balance of the Submitters' land comprising part of the wider ONL that surrounds the Arthurs Point settlement. She considered that the natural (and now open) and legible landform, the importance of the Submitters' land in 'bookending' urban development on Atley Terrace and the 'turning point' of the river gorge, together with the memorability of the Submitters' land and its connection to other schistose landforms and mountains, to be apposite in her conclusion. She noted that: *"The exclusion of the knoll from any wider ONL is a mapping artefact rather than any reflection of the physical and perceived landscape. The subject site is not a remnant area of the Rural Zone, but an integral part of the wider ONL that surrounds Arthurs Point"*.⁴⁶

53. Ms Mellsop was of the opinion that the Kimiākau Shotover River ONF, which immediately adjoins the Submitters' land, is nested within the wider ONL and that it would be both contrary to people's perceptions of the landscape and illogical to separate an ONF from the ONL that it sits within.

54. Mr Espie and Ms Pfluger gave landscape evidence on behalf of the Submitters.

55. Mr Espie concluded that the Submitters' land does not form part of Kimiākau Shotover River ONF, nor is it part of the 'broader' ONLs that surround the Arthurs Point urban areas. We understand that he came to these conclusions by considering first, whether the Submitters' land is part of any identified ONL through previous decisions of the Environment Court and/or the landscape descriptions contained in the Landscape Schedules relating to ONLs that form part

⁴⁴ Ibid at 7.3.

⁴⁵ Ibid at 7.4.

⁴⁶ Rebuttal Evidence of Ms Mellsop dated 20 December 2022 at 3.15.

of Council's notified variation.⁴⁷ Mr Espie concluded that the Submitters' land is not part of any identified ONL.⁴⁸

56. Mr Espie considered that his conclusion above was "reinforced" by an examination of the landscape attributes (physical, associative and perceptual) and associated landscape values, with reference to the Priority Area maps and schedules. Although he did not elaborate on the basis for his conclusion, he stated that: *"The part of the subject site that is not operative LDSR does not fit into either the Shotover River ONF nor the Western Whakātipu Basin ONL nor the Central Whakātipu Basin Coronet ONL. It is a remnant part of the rolling headland that accommodates the developed suburban area and associated zoning of Central Arthurs Point"*.⁴⁹
57. Later in his evidence,⁵⁰ Mr Espie summarised his opinion as follows: *"In summary, it is my evidence that the site is not part of the Shotover River Gorge ONF, nor part of any ONL. It is of rolling, rounded topography and is part of the elevated headland that accommodates the zoning and development of Central Arthur's Point. The site comprises 7.3ha and contains four existing dwellings, a number of accessory buildings, an additional partly finished dwelling (consented to be 8m high and in a prominent location), a number of private access tracks and has recently been cleared of wilding larch and Douglas fir forest. It is sandwiched between the Shotover Gorge ONF and the operative LDSR of central Arthur's Point"*. He affirmed his opinion at the hearing, stating:⁵¹ *"... this is a roughly 6 ha piece of rural land, containing various modifications, that is entirely separated both physically and in terms of character from the rugged mountain slopes that form the ONL on the opposite side of the Shotover Gorge and from the ONL slopes to the north of Arthur's Point that take in Mount Dewar and Coronet Peak. It is not a cohesive part of any broader ONL"*.
58. At the hearing, Mr Espie stated that he had formed his opinion that the Submitters' land was not part of an ONL by following the methodology for area-based landscape assessment and identification of ONLs as set out in the NZILA Landscape Assessment Guidelines, and further as set out in the Topic 2 Joint Witness Statement regarding landscape methodology, including the identification of ONLs.⁵² Although, again, he did not elaborate on his analysis of the landscape attributes or values, he stated that: *"As part of an overall assessment following the above methodology, it becomes clear that the attributes and values of the subject site as described in my primary evidence are not in common with the ONL landscapes that surround Arthur's Point. Additionally, an observer within the site does not have the sense that they are within those surrounding ONL landscapes. They are separate from it"*. He went on to state: *"As well as not sharing attributes and values with the broader ONLs, the site is disconnected and separate from both the Central Whakātipu Basin Coronet ONL and the Western Whakātipu Basin ONL. This is evidenced by the Shotover River Gorge ONF that bounds the site to the south and the urban area of Arthur's Point that bounds the site to the north. While urban Arthur's Point is nested in a wider*

⁴⁷ Statement of Evidence of Mr Espie dated 15 November 2022 at 22 to 55.

⁴⁸ Ibid at 51.

⁴⁹ Ibid at 54 and 55.

⁵⁰ Ibid at 57.

⁵¹ Summary of Evidence of Mr Espie dated 26 January 2023 at 21.

⁵² Refer Summary of Evidence of Mr Espie dated 26 January 2023 at 5.

ONL context, that does not lead to the automatic presumption that the site is part of, or contributes to, that ONL context”.

59. In response to questions from the Commission, Mr Espie affirmed his written evidence that the Western Whakātipu Basin ONL is ‘disconnected’ from the Kimiākau Shotover River Gorge ONF, and, accordingly, the ONL cannot extend “across the river” to the Submitters’ land. In his opinion, the Western Whakātipu Basin ONL would have to “jump over” the Shotover Gorge to take in the small area of the terrace on which the site is located for it to be considered part of that ONL.⁵³
60. Ms Pfluger undertook a peer review of Mr Espie’s evidence, noting in particular his conclusion that the Submitters’ land is not part of any ONL as it is disconnected and separate from the Central Whakātipu Basin Coronet ONL and the Western Whakātipu Basin ONL as identified in Council’s notified variation relating to landscape Priority Areas.⁵⁴ She noted that Ms Mellsop was of the opinion that the Kimiākau Shotover River ONF is nested within the wider ONL, in contrast to that of Mr Espie. Although Ms Pfluger agreed that ONFs form part of wider ONLs for other parts of the Whakātipu basin and for the Kimiākau Shotover River ONF upstream and downstream of Arthur’s Point settlement, where the river is nested within a large and coherent extent of a wider ONL, she considered that these wider ONL values are not present on the sliver of Rural zoned land within the Submitters’ land. She was of the view that the area is too small to be considered as a continuation of the surrounding mountainous ONLs.
61. In her evidence Ms Pfluger clarified that she considered the Shotover Gorge/River ONF Priority Area to be embedded within a wider ONL, but that the *“remnant Rural Zone between the southern Arthurs Point UGB and the ONF is not a ‘landscape’ due to its very constrained size. Therefore, it is in my opinion too small to be considered as an ONL, or part of a (disconnected) broader ONL. It also does not display a high level of naturalness or the same notable values as the continuous landscape north and south of Arthur’s point settlement.”*⁵⁵
62. Ms Pfluger did not carry out a detailed landscape value assessment of the surrounding ONLs or Shotover River ONF.⁵⁶ She agreed with the key relevant attributes and values of the context landscape as set out by Ms Mellsop (in paragraph 6.3 of her evidence) but did not consider that these are particularly applicable to the Submitters’ land itself.⁵⁷ In her opinion, the existing urban development has visually and physically severed any connection to the Central Whakātipu Basin Coronet ONL to a point where the two cannot be considered as connected, or the Submitters’ land considered to be nested within the broader ONL. Ms Pfluger considered the Submitters’ land does not display the naturalness (moderate to high) required to qualify as an ONL, but did not elaborate further on the reasons for her opinion.
63. Mr S Brown gave landscape evidence for the APONLS. He carried out a comprehensive analysis of the landscape attributes and values of the Kimiākau Shotover River ONF and the Western

⁵³ Summary of Evidence of Mr Espie dated 26 January 2023 at 15.

⁵⁴ Statement of Evidence of Ms Pfluger dated 15 November 2022 at 46.

⁵⁵ Ibid at 48.

⁵⁶ Ibid at 51.

⁵⁷ Ibid at 52.

Whakātipu Basin ONL, including a detailed assessment of their biophysical, perceptual and associative characteristics, attributes and values.⁵⁸ He was of the opinion that Arthurs Point, the Submitters' land (which he refers to as the Shotover Loop) and the adjacent parts the Shotover River comprise a small-scale 'sub-set' of the Western Whakātipu Basin ONL, and that the Kimiākau Shover River ONF is nested within this ONL.

64. Mr S Brown's conclusions (as relevant to the preliminary question) are summarised as follows:⁵⁹

- (a) The Shotover River does not exist as a feature in its own right: it is intrinsically linked to the gorge, schistose slopes and knolls, and wider alpine landscape that surround and visually frame it. The landform of the river corridor is critical to both its physical character and human perception of its value, and therefore to the combined "*spectacle and drama of its incised, down-cut fairway and dynamic water channel*".⁶⁰ Accordingly, the Shotover River ONF is a distinctive feature of a larger landscape, which is an ONL.
- (b) The area around the river is still dominated by natural landscape elements, patterns and processes, notwithstanding the presence of housing, roading and tourism ventures around its margins. As such, the integration of development with the natural landforms of Arthur's Point is critical to the retention of the core values of this locality.
- (c) The Western Whakātipu Basin ONL retains sufficient naturalness in the vicinity of Arthur's Point to remain intact as an ONL, while the Kimiākau Shotover river ONF consistently displays relatively high levels of intactness and integrity.

65. Mr S Brown referred to Ms Mellsop's detailed analysis of the wider landscape attributes and values with approval, noting that her fine-grained analysis was "poles apart" from that of Mr Espie.⁶¹

66. Any impact on the assessment of the naturalness of the Submitters' land as a result of the subsequent removal of exotic vegetation during the months prior to the hearing, in some cases after their landscape assessments had been completed, was addressed by several of the landscape (and other) experts. Mr S Brown concluded that although the removal of vegetation has impacted the character of the area, it has enhanced the openness of the Submitters' land. Mr Giddens noted that Mr S Brown remained of the view that the Submitters' land remains an ONL "with or without the trees".⁶² Mr Espie also considered the removal of exotic vegetation with a high capacity for wilding spread from the Submitters' land to be an enhancement to natural character.⁶³ Ms Pfluger agreed that the removal of the exotic vegetation has enhanced, rather than detracted from, the natural character of the Submitters' land.⁶⁴

⁵⁸ Statement of Evidence of Mr S Brown dated 6 December 2022 at 28 to 37.

⁵⁹ Ibid at 37.

⁶⁰ Ibid at 37 b).

⁶¹ Ibid at 56 to 57.

⁶² Statement of Evidence of Mr Giddens dated 6 December 2022 at 8.14.

⁶³ Summary of Evidence of Mr Espie dated 26 January 2023 at 17.

⁶⁴ Summary of Evidence of Ms Pfluger dated 1 February 2023 at 13.

67. During the hearing we had the benefit of submissions from a number of Arthur's Point residents, who very colourfully, and at times emotionally, described their association with the Submitters' land and its perceived landscape attributes and values. We set out a selection of their pertinent observations as follows:
- (a) Mrs Barbara Lusk, a long-time resident, considered the Submitters' land to form part of an "unspoilt, exceptional and memorable landscape".
 - (b) Mr Denis Behan, a resident and frequent rafter of the Shotover River corridor, referred to the "wilderness qualities" of the Shotover River between the Edith Cavell bridge and Big Beach, which he considered to be world class and deserving of protection. He noted that it was very rare to have such a unique wilderness area so close and accessible to the community.
 - (c) Dr Julian Pedley told us that the Shotover Loop is a "world class landscape" that is well known internationally. He described the importance of the landscape to him personally as having a "sense of place": a place of tranquillity and grandeur, of joy and profound beauty that evokes a sense of gratitude. In referring to the Submitters' land as part of "paradise found", he considered the landscape brings a sense of wilderness, hope and purity, especially when viewed in the moonlight. He reiterated the strength of feeling that residents have for the Shotover River and Shotover Loop, and the importance of protection of this unique landscape from urbanisation.
 - (d) Mr Tom Dery submitted that the Submitters' land and wider environs has "everything in a landscape sense that New Zealand has to offer". For him personally, it is an inspiring and magnificent landscape "in all of its wonder". He drew our attention to notable paintings and other pictorial images that have depicted the Submitters' land in its wider surrounds over past years.
 - (e) Mr Matthew Semple noted the importance of this section of the Shotover river for recreational rafting and other forms of passive boating (newly accessible activities), in that it provides a "feeling of peace, wildness, and remoteness". He considered the entire vista, which includes the river and the Shotover Loop, to be integral to the experience of recreational users. He affirmed the landscape values identified by Ms Mellsop and Mr S Brown, describing the Submitters' land as "unique and memorable". In terms of his personal values, Mr Semple identified the naturalness of the Shotover Loop, the untouched river margins, the clear legibility of the formative process that have shaped the landscape (which he considered to be a strong contributor to its naturalness), its wilderness values and the strong sense of remoteness. He described the qualities of the Submitters' land, which he noted have been valued for many years, as including the dark sky (no light spill), quietness (a sense of calm and peace) and memorability (distinct and striking scenic beauty worthy of making memories). Mr Semple considered the Submitters' land to be the gateway to the Shotover River (as depicted in numerous photos and artworks) and referenced the importance of its cultural association with the community and tourists to the area.

- (f) Mrs Jennie Semple described the scale of the landscape as “quite magnificent”, referring to its formative geological processes and largely natural state. She considered the knoll to be a “buffer and breathing space” from the urban development behind it. In her view the Shotover Loop/River and wider environs is a very distinctive landscape “from all sides” and one of the most valued ONLs in the world.
 - (g) Mrs Sonja Kooy and Mr Gavin Kooy described the “uninterrupted surrounding hills and mountains, with the Shotover river snaking its way through the gorge” of the wider landscape that includes the Submitters’ land. In their view, the Shotover Loop is unique, an area of outstanding natural beauty that protects and enhances the Shotover river. They considered the Submitters’ land, and its natural formations, to be the gateway to Arthurs Point.
68. The main differences in opinion between the landscape experts for the Council and APONLS, and those for the Submitters, was whether the Submitters’ land is geographically linked to a broader ONL landscape, with which it shares the same values and, if so, whether the site displays the requisite level of naturalness to be considered an ONL. Mr Espie and Ms Pfluger have relied heavily on existing ONL classifications and the Council’s proposed Priority Area maps and schedules to inform their opinion in this regard, whereas Ms Mellsop and Mr S Brown have undertaken comprehensive evaluation of the landscape context of the Submitters’ land from first principles.
69. Applying the principles derived from the case law to the evidence and submissions before us, we find the following:
- (a) With regard to its geomorphology, the Submitters’ land is an intrinsic part of the ONL that surrounds the settlement of Arthurs Point, which includes the Kimiākau Shotover River nested within it. We accept Ms Mellsop’s thorough and principled analysis of the landscape context, attributes and values, supported by that of Mr S Brown. We agree with Ms Mellsop that the transition from the knoll slopes to the river escarpment slopes is not always distinct or obvious and that in perceptual terms, the whole slope is viewed as a continuous enclosure to the river corridor.⁶⁵ As such, the site is geomorphologically linked to and nested within the broader ONL landscape, with which it shares the same values, and in relation to which it is a cohesive part. It follows that it is not a ‘disconnected’ small remnant site that exists between the Kimiākau Shotover River ONF and the Urban Growth Boundary, as has been advanced by Mr Espie and Ms Pfluger. Despite being of a smaller continuous physical scale, we see the role of the slope and knoll on the Submitters’ land leading down to and visually reinforcing the course of the canyon and river at its very distinctive loop feature to be as inescapably contributory to the values of the ONL (and ONF) in this part of the District as the larger-scale slopes on the southern and eastern side.

⁶⁵ Rebuttal Evidence of Ms Mellsop dated 20 December 2023 at 3.17.

- (b) We consider Mr Espie to have adopted an inferior approach by essentially basing his primary assessment on whether the site is part of an *identified* ONL, with reference to previous case law on ONL lines in this District and the notified landscape Priority Area maps and schedules. In our view this fails to satisfy the approach and standard set out in the relevant case law outlined above. Whether land has attributes sufficient to make it an outstanding landscape within the ambit of s.6(b) of the RMA essentially requires a factual assessment based on the inherent qualities of the landscape itself.⁶⁶ The Priority Area values schedules are a reference to assist with a site-specific evaluation – they are not separate landscapes for the purposes of assessment.

We further find Mr Espie’s very brief assessment of the landscape context, attributes and values to be deficient and, accordingly, his secondary conclusions to be unconvincing relative to those of Ms Mellsop and Mr S Brown. Most particularly, we do not find Mr Espie’s opinion that the Kimiākau Shotover River ONF is ‘disconnected’ from the surrounding underlying ONL to be at all credible, a point that was acknowledged by Mr J Brown at the hearing.

- (c) Based on Ms Mellsop and Mr S Brown’s evidence, we find that the area has a similar level of naturalness to many other parts of the ONL in the environs of Arthurs Point. At the hearing Ms Mellsop expressed the view that, while not determinative, the attributes and values of the Submitters’ land are “totally aligned” with the attributes and values set out in the relevant Priority Area values schedules for ONLs. Ms Mellsop’s opinion that the Submitters’ land retains a moderately high degree of naturalness in which natural landscape elements, patterns and processes are dominant was fully supported by the written and oral submissions of many of the Arthurs Point residents, who eloquently and at times passionately described their perceptions of the attributes and values of wilderness, remoteness and memorability. We are cognisant that although a site is not required to be pristine or remote to qualify as “sufficiently natural” (to be considered a s.6(b) of the RMA landscape or feature), the Submitters’ land does in fact exhibit exceptional and quite unique natural qualities associated with the river’s loop feature, particularly those associated with its geomorphology and perceptual values. We accept Ms Mellsop’s evidence that the extent of human modification does not clearly distinguish this area from other parts of the Arthurs Point ONL where there is scattered rural living integrated by vegetation.⁶⁷

70. Accordingly, we find that the Submitters’ land is an integral part of the wider ONL that surrounds Arthurs Point. This finding ensures that the overall legibility of this important area of ONL will be maintained.⁶⁸ Our finding accords with people’s perceptions of the landscape, including our own as experienced on our site visits, particularly as viewed from the Shotover River corridor as far as Big Beach. We do not agree with Ms Pfluger’s observations that “*views from the Gorge itself would only be fleeting and already in an urban context with views limited to Big Beach in the upstream direction where other existing dwellings are already visible*”, or that “*additional*

⁶⁶ Refer to the *Man O’War* case cited above.

⁶⁷ Statement of evidence of Ms Mellsop dated 18 October 2022 at 7.4.

⁶⁸ In accordance with the Court’s findings in *Hawthenden* at paragraph 63.

visibility of the rezoning from the Shotover River corridor between the gorge sections will be low".⁶⁹ On the contrary, it was plain from our site visit (in particular, that undertaken by raft) that the entire site, and in particular the schistose knoll, is an integral, obvious and memorable component of the wider landscape context, and one that contributes very significantly to its outstandingness.

71. We note that there was general agreement between that landscape experts as to the location of the Kimiākau Shotover River ONF 'line' (edge) in relation to the boundary of the Submitters' land. Ms Mellsop considered, however, that the transition from the knoll slopes to the river escarpment slopes is not always distinct or obvious and that in perceptual terms, the whole slope is viewed as a continuous enclosure to the river corridor.⁷⁰ We agree, and find that the 'transition line' between the ONF and the ONL is neither always self-evident nor obvious; rather, it is potentially located somewhere on a perceptual spectrum that, based on our experiences, could well extend to the schistose knoll at the highest point of the site. Given that the location of the Kimiākau Shotover River ONF line is not determinative to our conclusions (having found that the entire site is an ONL), and that this issue will be the subject of a separate decision-making process as part of the Landscape Schedules Variation hearings, we are not minded to make any findings in this regard.

Evaluation of the relief sought by the Submitters and proposed by the Council as a consequence of site's ONL status and directives in s.6 of the RMA

Landscape values and effects, and Plan alignment

72. Having determined that the Submitters' land falls within and should be categorised as an ONL, we must consider which of the available land use zone proposals before us would most appropriately protect the values of the ONL (and the adjacent ONF).
73. In the first instance, we have no jurisdiction to reconsider the notified PDP LDSR zone boundary by way of reducing or 'shrinking' its extent as shown on the PDP maps. We are only able to consider that portion of the Submitters' land that lies within the rural zone shown on the PDP maps that is the subject of the Submitters' and further Submitters' requested relief. Ms Mellsop and Ms Evans have recommended an extension to the LDSR zone into part of the proposed Rural zoned land, which would result in an increase in the extent of LDSR zone as notified in the PDP. We accept that this forms one valid outcome for us to consider, on the basis that the revised zone boundary would extend into the PDP Rural zoned land we are considering, and not regress back beyond that into the notified LDSR zone.
74. The framework of the PDP was explained to us in section 8 of Ms Evans' s.42A report, which we refer to. In section 7 of her legal submissions, Ms Scott also very helpfully summarised the interplay between ONLs, UGBs, and urban zones across Chapters 3 and 6 of the PDP, which we also generally accept having studied the Plan provisions.

⁶⁹ Summary of Evidence of Ms Pfluger dated 1 February 2023 at 12. We note that Ms Pfluger did not view the site from the Shotover River corridor.

⁷⁰ Rebuttal Evidence of Ms Mellsop dated 20 December 2023 at 3.17.

75. We find that the most appropriate, and in fact only appropriate, means to protect and provide for the values of the ONL is by retaining a wholly Rural zone as depicted in the PDP maps. We accept Ms Limmer's submission that it is only the Rural zone that pays sufficient reference to any ONL/ONF values present.⁷¹ In this respect we agree with and adopt Mr Giddens' reasoning at his paragraphs 10.46 to 10.48,⁷² which we have reproduced below for convenience:

10.46 Under the status quo (i.e. Rural Zone), residential activity, buildings and subdivision require a discretionary activity resource consent and applications will need to engage the full suite of policies in PDP Chapters 3, 6, 21 and 27. I consider that this will more effectively protect the landscape values of the ONL and ONF when compared to the proposed LDRZ and LLR zonings. The efficiencies gained through the rezoning to enable urban development are limited to the landowner at the time, and do not outweigh the removal of the need to protect landscape values.

10.47 The Rural zone (Chapter 21) along with Landscapes and Rural Character (Chapter 6) are a more appropriate zone framework than the proposed urban zonings of Lower Density Suburban Residential (Chapter 7), Large Lot Residential (Chapter 11) and Urban Development (Chapter 3).

10.48 The Rural zone will more effectively protect the landscape values of the ONL and/or Shotover River ONF and gives better effect to SO 3.2.5 (the retention of the District's distinctive landscapes). The Proposal will not give effect to, or achieve, SO 3.2.5.

76. The LDSR and LLRB zoning sought by the Submitters would lead to development that would frequently be highly conspicuous and substantially diminish the qualities of the Shotover Loop, even taking into account the various mitigation measures described by the Submitters' witnesses and accepting the thoughtfulness behind the structure plan that was offered to manage the land's development. Specifically, we prefer and agree with the conclusions arrived at by Mr S Brown and Ms Mellsop as to the likely effects of the Submitters' requested relief on ONL values. We adopt-in-part paragraphs 7 and 8 of Ms S Brown's evidence in this respect as follows:

7. As a result, the proposed rezoning would give rise to a fundamental change to the character and values of the southern end of the Shotover Loop: that part which is most crucial in terms of public perception of the Shotover River and its margins, and which is also critical to the sense of connection between the ONL at Arthurs Point and the rest of the Western Whakātipu Basin ONL – linked via the river corridor and terraces / promontories either side of it. The southern end of the Loop and associated river corridor are also fundamental to the ONL's engagement with the alpine domain that encloses it, most notably from Bowen Peak through to Queenstown Hill and the Sugar Loaf, creating the 'sublime landscape' described by Dr Read in 2017.

8. These various considerations suggest... that the proposed development is... contrary to any notion of protection for ONL values, or indeed the regeneration of such values.... In addition, it would encroach on the margins of the Shotover River ONF to a degree that threatens the very integrity of that outstanding natural feature – one of considerable renown and importance for Queenstown.

⁷¹ Legal Submissions of Ms Limmer for APONLS dated 26 January 2023 at 32.

⁷² Evidence of Mr Giddens dated 6 December 2022, at 10.46 to 10.48. Mr Giddens' evidence was cited with approval by Ms Evans in her Rebuttal Evidence dated 20 December 2022.

77. Our collective site visits confirmed to us that the Submitters' land sits at a natural focal point in the landscape located at a very distinctive bend in the Shotover River. The way that the land slopes up to the ridge visually reinforces and complements that feature and the canyon. On our rafting visit we also appreciated the way that the viewer experiences a wide and open sense of the landscape on approach to the Shotover Loop, then an increasing visual 'compression' as slopes and width either side of the river channel give way to the increasingly vertical and at times intimately enclosed canyon and rock faces, finally opening up again to slopes and silt beaches once that feature has been passed. This interaction with the Shotover Loop feature, which is visually obvious, can be appreciated on both sides of the Submitters' land and is not directionally river-flow limited. It reinforced to us experientially and perceptually the distinctiveness of the Shotover Loop feature and the awesomeness of the natural processes that, over eons, have formed this ONF within its wider ONL setting, including inescapably the Submitters' land.⁷³ We find that this land is materially more sensitive to the effects of development than, for example, the flatter escarpment north of it that has already been largely developed as a residential neighbourhood (and that is visible from many parts of the river on the eastern side of Arthurs Point and Big Beach). From many vantages the viewer's eye is naturally drawn down the slopes to the Shotover Loop, and the Submitters' land from the knoll downwards is an integral part of that vista.
78. We then considered whether there might be a zoning rather less intensive than sought by the Submitters (as an alternative to the PDP Rural zone) available as a reasonable and appropriate use of the land. This is a matter that Mr J Brown summarised in section 4 of his evidence, and we record our appreciation to him (and the other planners) for their comprehensiveness in that respect. In terms of the Submitters' proposed LLRB zone, we find that there is no acceptable prospect of regularly visible and spaced dwellings, even at lower densities than sought by the Submitters (such as suggested by Ms Mellsop), spreading around the lower 'skirt' of the slope and above the visually distinctive vertical canyon feature. We could not identify any arrangement of mitigation or limitation on density that could address our concerns. In terms of the Submitters' proposed LDSR zone boundary, we then considered whether that alone (with the proposed LLRB zone reverted to Rural zone) might be acceptable. We note that this forms one alternative that was not considered by Mr J Brown in his evidence. However, our analysis is that even this would result in dwellings placed too prominently and too conspicuously around the upper slopes of the land towards the knoll to be acceptable.
79. In terms of Ms Mellsop's and Ms Evans' 'reduced LDSR zone' proposal, which formed the basis of the Council's position by the close of the hearing, we accept that the area of LDSR they identified would be that part of the land which, if developed, would be the least likely to give rise to adverse effects on the values of the ONL (and the existing ONF). A variety of additional mitigation measures were also proposed. We record that Counsel for the Submitters gave us quite strong submissions opposed to several aspects of the Mellsop-Evans alternative, including of note that *"an illogical and consequently indefensible ONL and UGB boundary not based upon topography and landform"* would result.⁷⁴

⁷³ We record that the experience of the landform opening up and then enclosing around the viewer in association with bends, canyons, and rapids occurs elsewhere along the Shotover River and is not unique to the Loop we are focused on.

⁷⁴ Legal Submissions for GSL and Larchmont at 24 to 26, and specifically 27.

80. From our questioning of Ms Mellsop at the hearing, we interpreted from her not that the boundary she had identified reflected a technical analysis to find the edge of the ONL, but was instead a more practical exercise in judgement to simply improve what she regarded as a very poor existing ONL boundary inherited from the ODP into the notified PDP (i.e., the notified LDSR zone boundary). In other words, Ms Mellsop's proposed ONL edge was not seeking to depict the 'correct' ONL edge but was instead an attempt to provide one that was 'less incorrect', or at least 'less obviously incorrect to a viewer'. Ms Mellsop was particularly concerned with the linearity and axial nature of the notified ONL/LDSR zone boundary, and advised us that a more organic-shaped and sinuous or curvilinear boundary responding to the natural flow of land contours would better define an ONL boundary. We note that Ms Mellsop's suggestion, which would also require a planning method requiring a 5m landscaped buffer strip around the western and southern sides of the extended LDSR zone, would, in her words (from paragraphs 9.5 and 9.6):

...still adversely affect the character and amenity of some views from Atley Terrace, Arthurs Point Road and the McChesney Road area, but the magnitude of effect would be low and acceptable from a landscape perspective. More importantly, the landscape values of the wider ONL and the Kimiākau Shotover ONF would be protected. In my opinion, the southern boundary of the ODP LDSR (and that of the notified PDP LDSR) would have been better located at the foot of the escarpment that separates Atley Terrace from the knoll. However, given that the urban zoning and UGB extends up the escarpment and partly onto the knoll, the urban extension that I have recommended could be absorbed without compromising the values of the landscape.

An UGB on the boundaries of the LDSR extension would, in my view, be more defensible than the existing UGB. It would encompass the easier topography on the northern side of the knoll, within the same visual catchment as existing LDSR, but would exclude those parts of the knoll that are within the visual catchment of the Kimiākau Shotover River corridor.

81. Mr S Brown disagreed with Ms Mellsop's approach. He advised us that there was no proper landscape assessment basis for repositioning the ONL boundary following a revised LDSR zone as identified by Ms Mellsop. In our questioning of him, Mr S Brown confirmed that even if imperfect, the notified ONL/LDSR zone edge was superior to that identified by Ms Mellsop.
82. We prefer and accept Mr S Brown's conclusions, and do not see a proper basis to support an extended LDSR zone as proposed by Ms Mellsop and Ms Evans. If we were to reposition an ONL edge from that notified in the PDP, it would need to be on the basis of expert evidence supporting that positioning as an actual ONL edge. Ms Mellsop's recommendation, and we would take the time to properly recognise her attempt at constructive pragmatism, falls short of this by her own admission. Based on the information before us and the jurisdiction we have to set an ONL limited by the 'starting point' of what was notified by the Council in its PDP, we find that the most appropriate ONL boundary is as per the notified LDSR zone/Rural zone edge and the existing UGB. This consider this would:
- (a) be the most appropriate way for Plan objectives to meet the purpose of the Act;
 - (b) be the most appropriate way for Plan policies and methods to achieve the PDP's objectives, including the strategic Chapters 3 and 6;

- (c) provide for the appropriate protection of, and avoidance of unacceptable adverse effects on, an ONL and an ONF; and
 - (d) reflect what we find to be the most reasonable use of the Submitters' land based on its capabilities and limitations.
83. Counsel for the Submitters warned us of the consequences of not supporting the Submitters' proposal, or of only supporting a limited expansion of the LDSR zone, stating that:⁷⁵
- I urge the Commission to think realistically about what would be the future for the remainder of the Site if just the LDSR component were extended. As discussed in Dr Lloyd's ecology evidence, without rezoning and proposed required revegetation, the Site is likely to revert into wilding and invasive pest species cover, in turn becoming an ongoing seed source with economic consequences of continued maintenance for the wider community. As Ms Pfluger points out, the other consequence is that there may be future consent applications for ad-hoc development of the Site which may not deliver the same comprehensive consideration of effects as proffered in the current structure plan approach, and in my submission almost certainly, will not accrue the same community benefits.*
84. We have considered these concerns carefully, but are not persuaded by them. Ultimately the argument that there will never in the future be a better proposal than one made today is very speculative at best. We recognise the challenge of wilding pest vegetation but are simply not convinced that the values of the ONL would be better protected by enabling development of the sort envisaged by the Submitters. The ONL (and ONF) values must remain our principal focus, as directed by s.6(a) and (b) of the RMA. Similarly, we see no impediment to the establishment of potential community benefits via enhanced pedestrian or bicycle linkages and trails, in resource management terms, across any of the potential land use zone alternatives we have considered. The loss of a commitment from one party (the Submitters) to fund such works is one relevant consideration, but it is not sufficient to influence our decision as to the most appropriate outcome.
85. This has the ultimate effect of meaning that we do not support any expansion of LDSR zone beyond what was notified in the PDP and recommend the Council retain its notified LDSR zone/Rural zone, ONL, and UGB boundaries as set out in the notified PDP material. In reaching our conclusion and in our evaluation of the alternative zones and Plan methods that we have considered, we record that we have worked through all of the matters set out in s.32(1) to (4) of the RMA.
86. In respect of all of the above, we therefore reject or reject in part the submissions of those submitters and further submitters seeking changes to the notified PDP zones, including the UGB and extent of ONL. We accept or accept in part those further submissions seeking retention of the notified LDSR zone and Rural zone boundaries, the notified UGB, and the notified ONL

⁷⁵ Ibid, at 28.

boundary. For completeness, we record that we make no findings on the extent of the adjoining ONF and defer to the separate Landscape Schedule Plan variation process that is underway.

Other Matters

Infrastructure and servicing, transport, geotechnical and natural hazards, wāhi tūpuna/ cultural effects and Plan alignment

87. Based on our principal finding that the Submitters' revised relief should be rejected, the process to consider the remaining points of disagreement became much simpler. Having determined that the notified PDP zones should remain unchanged and that the Submitters' revised relief should be rejected, this has the effect of neutralising the remaining areas of concern. On the basis that the development intensity and pattern sought by the Submitters should not be enabled, the potential infrastructure, transport, natural hazard, and wāhi tūpuna/ cultural effects that might have arisen and that were of concern to further submitters would not arise either, and hence do not require any resolution in terms of the provisions of the Plan.
88. We are satisfied that the PDP provisions that would govern any future resource consent application(s) made to enable development on the land (premised on it having a predominantly Rural zone and ONL classification) will allow for all relevant environmental effects to be considered by the Council. There is nothing in the PDP that would also limit or preclude either limited or full public notification of such application(s), should either of those be requested or preferred.
89. However and for completeness, we record that in terms of merit and on the evidence we received, we agree with Ms Evans in her s.42A report that any environmental effects that the Submitters' proposal might have given rise to in terms of infrastructure and servicing, geotechnical and natural hazards, and wāhi tūpuna/ cultural effects, would be manageable and would not of themselves have precluded the relief sought by the Submitters (or something materially similar to that). In terms of transport, noting that this was a matter of concern to Ms Evans and Mr Smith, we were persuaded by the evidence of Mr Bartlett that a workable and safe solution to access the land, albeit one that would not comply in the first instance with the Council's standards, would also be possible and similarly would not have precluded the Submitters' relief (or something materially similar to that).
90. Overall however, on the basis that we have found no change to the notified PDP zones are warranted, no further changes to the PDP are required as a result of these matters.
91. For the above reasons, we therefore accept in part those submissions of submitters and further submitters in support of the Submitters' requested relief, to the extent that we are persuaded on merit that matters related to infrastructure and servicing, transport, geotechnical and natural hazards, and wāhi tūpuna/ cultural effects could be managed and would not preclude the relief sought by the Submitters.

92. We also accept in part those further submissions opposing the Submitters' revised relief on the basis that, ultimately, we have determined that no changes to the notified PDP zones and associated Plan provisions should occur.

Section 32AA analysis

93. We record that in evaluating the material available to us we reviewed the Council's notified s.32 analysis that accompanied the notified PDP material. We considered the original IHP recommendation and Council decisions, although elected not to give weight to them for the reasons provided previously.
94. We also considered the record of Court proceedings and decisions, the relief sought and the evidence presented at the Hearing by submitters and further submitters alike, and the s.42A report and expert evidence provided by the Council. We considered all of the alternative methods and solutions to the notified PDP that were put to us, and undertook our own further consideration of potential solutions that we could identify, as has been discussed previously. Of note, we record that the relief sought by the Submitters formed one alternative to the proposed PDP zones and is not the subject of the Plan Change itself.
95. In terms of the Council's position, by the close of the Hearing it did not fully support its originally notified PDP position, instead preferring an enlarged LDSR zone as identified by Ms Mellsop and Ms Evans. We have interpreted from the Council's documentation that, on the basis of its own s.32AA analysis as the promoter of the PDP, it had come to prefer its revised position.
96. In this case and for the purpose of s.32AA, the body of expert opinion, evaluation, and submissions and further submissions in support of a variety of different outcomes – and our evaluation of that set out above – collectively comprise a thorough further evaluation required by s.32AA(1) and meet the requirements of s.32(1) to (4).
97. Also in part because we find that no changes should be made to the notified PDP provisions relevant to the submissions and further submissions, we find that no further or additional s.32AA report(s) are required based on the scale and significance of the changes that were proposed to us compared to the original PDP, and our recommended actions for Council. This is in accordance with s.32AA(1)(d)(ii) of the RMA.

Regional Policy Statements

98. We confirm that we have reviewed both the Partially Operative Otago Regional Policy Statement 2019 (POORPS 2019) and the Proposed Otago Regional Policy Statement 2021 (PORPS 2021) as helpfully summarised to us in Ms Evans' s.42A report. There is nothing in these documents that would change the conclusion of our evaluations, or that our overall recommendation would be inconsistent with. To the extent that the POORPS 2019 is partly operative, we are satisfied that the PDP, as it would result from our recommendations, will give effect to it.

Part 2 RMA

99. In light of the unusual history of this matter and that there has already been a process of submissions, further submissions and Council decisions, we have elected to also undertake our own analysis of the matter under Part 2 of the Act. Having done so, we are satisfied that the promotion of sustainable management would be best served by the outcome we have identified as the most appropriate. This is in large part because of the significance of s.6(b) of the RMA to the Submitters' land. Our response to the submissions and further submissions has been very much directed by our findings on the extent of ONL on the land, and the most appropriate means to protect that from what we have found to be inappropriate subdivision, use and development.
100. We confirm that we are also satisfied that the outcome we have identified as most appropriate, noting that it will not provide the community with additional housing supply and other potential benefits identified by the Submitters that the Submitters' relief may have, will also best enable the community's social, economic and cultural wellbeing while also satisfying the matters set out at s.5(2)(a) to (c) of the RMA.

Conclusions and Recommendations

101. In terms of the delegation provided to us to determine submissions and further submissions:
- (a) Those submissions and further submissions seeking that the notified PDP zone configuration of LDSR zone and Rural zone, the Arthurs Point UGB, and the delineation of an ONL (both following the LDSR zone/ Rural zone edge) be changed are **rejected**.
 - (b) Those further submissions seeking that the notified PDP zone configuration of LDSR zone and Rural zone, the Arthurs Point UGB, and the delineation of an ONL (both following the LDSR zone/ Rural zone edge) be retained are **accepted**.
 - (c) Specific submission and further submission points focusing on singular aspects of the various alternatives considered, such as transport, natural hazards, or wāhi tūpuna matters, have been **accepted in part** to the extent that in our evaluation they were found to be manageable issues, but not determinative of our overall recommendations. These are set out in the detail of our evaluations above.
102. In terms of the delegation provided to us to make PDP recommendations to the Council:
- (a) The notified PDP LDSR zone and Rural zone boundaries, the UGB boundary, and the ONL boundary shown on Map 39 of the (notified) PDP shown across 111 and 163 Atley Road, Arthurs Point should be retained as notified without change.
 - (b) The principal reasons for this are:

- (i) The previous PDP IHP recommendation and Council decision on this matter are not binding and were made without the benefit of the same extent and breadth of evidence and analysis as was available in this instance. In particular, Commissioners Taylor and Munro derived substantial additional benefit from having undertaken a raft-based site visit to appreciate the landform and river from that very relevant vantage point. This is a perspective that is understood not to have been available to the IHP.
- (ii) The land forms part of a continuous and coherent ONL, related closely to and containing the adjacent Kimiākau Shotover River ONF.
- (iii) The land is highly sensitive to the effects of development due to its visual prominence as part of a distinctive river-loop landform that is widely, even internationally, renowned and strongly associated with the identity of Arthurs Point.
- (iv) The adverse effects arising from any of the rezoning alternatives identified by the Council, submitters, or further submitters, including effects on the values of the ONL, would be generally substantial and in all cases unacceptable.
- (v) In addition to (iv) above, such rezoning proposals would also not be consistent with the strategic objectives of Chapter 3, as well as s.6(b) of the RMA to the extent that they are not supportable.
- (vi) The recommended outcome will on the whole best and most appropriately implement the balance of the PDP, the POORPS 2019 and the PORPS 2021, and Part 2 of the RMA.
- (vii) We have not made any findings as to the extent of the Kimiākau Shotover River ONF boundary and nothing in our recommendations should be seen as pre-determining or otherwise affecting whatever decision on that matter may result from the current Landscape Schedule Plan Variation process.



Jane Taylor and Ian Munro

Hearings Commissioners

8 June 2023

QLDC Council

29 June 2023

Report for Agenda Item | Rīpoata moto e Rāraki take [4]

Department: Planning & Development

Title | Taitara : Ratification of Commissioner's Recommendation – Arthurs Point renotification

Purpose of the Report | Te Take mō te Pūroko

To purpose of this report is to provide the report and recommendations of the Independent Hearings Commissioners on submissions and further submissions on the zoning relating to the Arthurs Point re-notification.

A resolution from Council is sought to notify the Commissioner's recommendation as a Council decision in accordance with Clause 10 and 11 of the First Schedule of the Resource Management Act 1991.

Recommendation | Kā Tūtohuka

That the Council:

1. **Note** the contents of this report;
2. **Adopt** Independent Commissioners report and recommendations on the submissions as the Council's decision and direct staff to notify the decision in accordance with Clause 10 and 11 of the First Schedule of the Resource Management Act 1991;
3. **Note** that adopting the report and recommendations on submissions as the Council's decision means the Council also adopts the independent hearing panel's reasons for those decisions on submissions as set out in the recommendation report.

Prepared by:



Name: Alyson Hutton
Title: Manager: Policy Planning
7 June 2023

Reviewed and Authorised by:



Name: Rachel Beer
Title: GM Planning & Development (Acting)
7 June 2023

Context | Horopaki

1. In January 2023 Council appointed commissioners and re-heard submissions and further submissions relating to the Arthurs Point. These were Stage 1 submissions that arose from a High Court decision (CA 1202021) requiring the Council to re-notify the submissions to enable further submissions to be heard made and the matter heard.

Gertrude's Saddlery appeal

2. The appeal related to the way Council had summarised particular submissions in Stage 1 of the PDP process. On application by APONLS (Arthurs Point Outstanding Natural Landscape Society Incorporated), the Environment Court granted an enforcement order that required QLDC to re-notify the submissions by Gertrude's Saddlery Limited and Larchmont Developments. The Environment Court agreed that Council had summarised the submissions accurately but determined that QLDC should have gone further in identifying what the relief sought in the submissions might mean.
3. The Environment Court decision was appealed by Council and Gertrude's Saddlery, and the High Court rejected those appeals. Gertrude's Saddlery then appealed to the Court of Appeal. QLDC did not appeal, but submitted in support on limited grounds.
4. **Court of Appeal decision:** The Court of Appeal has indicated that potentially the correct legal test was not applied properly, and was critical of the Environment Court. However, it has held that the point of law is not of general or public importance and therefore refused leave to appeal. No costs were awarded.
5. This meant the Environment Court decision, which granted the enforcement order, stands. That decision required Council to re-notify the rezoning submissions made to the PDP by Gertrude's Saddlery and Larchmont. This gave a new opportunity for further submissions from other parties, including APONLS.

APONLS Appeal

6. APONLS joined the general Upper Clutha Environmental Society (UCESI) Stage 1 appeal in order to seek changes to the ONL boundary, and (consequently) the zoning of land, in and around Arthurs Point. Council opposed that, as did Gertrude's Saddlery and Larchmont. The Environment Court ruled in favour of APONLS, finding that the UCESI submission provided jurisdiction to seek the ONL changes sought.
7. Gertrude's Saddlery appealed to the High Court, supported by Council. The High Court ruled in favour of Gertrude's Saddlery and Council. APONLS then appealed to the Court of Appeal.
8. **Court of Appeal decision:** The Court of Appeal has rejected the appeal by APONLS. This decision supports the position taken by Council and means that APONLS has no standing to seeking changes to the ONL boundary, and zoning, in and around Arthurs Point. They could however take part in the re-notification process that was undertaken.

9. The two submissions [Submission number 494 Gertrude's Saddlery Limited (Gertrude's Saddlery); (b) Submission number 527 Larchmont Developments Limited (Larchmont Developments)] were notified for further submissions in 2022 and closed on 14 April 2022.
10. A total of 101 further submissions was received which included further submissions from APONLS and a number of Arthurs Point residents. A hearing was held in front of Independent Commissioners Jane Taylor and Ian Munro in February 2023.
11. A recommendation has now been received and the purpose of this report is to ratify it as a Council decision. The recommendation is set out in **Attachment A** [Re-hearing of submissions on Stage 1: Proposed District Plan Gertrude's Saddlery Limited and Larchmont Developments Limited at Arthurs Point - Report and Recommendations of Hearings Commissioners], and recommends the following:
 - (a) The notified PDP LDSR zone and Rural zone boundaries, the UGB boundary, and the ONL boundary shown on Map 39 of the (notified) PDP shown across 111 and 163 Atley Road, Arthurs Point should be retained as notified without change.
 - (b) The principal reasons for this are:
 - (i) The previous PDP IHP recommendation and Council decision on this matter are not binding and were made without the benefit of the same extent and breadth of evidence and analysis as was available in this instance. In particular, Commissioners Taylor and Munro derived substantial additional benefit from having undertaken a raft-based site visit to appreciate the landform and river from that very relevant vantage point. This is a perspective that is understood not to have been available to the IHP.
 - (ii) The land forms part of a continuous and coherent ONL, related closely to and containing the adjacent Kimiākau Shotover River ONF.
 - (iii) The land is highly sensitive to the effects of development due to its visual prominence as part of a distinctive river-loop landform that is widely, even internationally, renowned and strongly associated with the identity of Arthurs Point.
 - (iv) The adverse effects arising from any of the rezoning alternatives identified by the Council, submitters, or further submitters, including effects on the values of the ONL, would be generally substantial and in all cases unacceptable.
 - (v) In addition to (iv) above, such rezoning proposals would also not be consistent with the strategic objectives of Chapter 3, as well as s.6(b) of the RMA to the extent that they are not supportable.
 - (vi) The recommended outcome will on the whole best and most appropriately implement the balance of the PDP, the POORPS 2019 and the PORPS 2021, and Part 2 of the RMA.
 - (vii) We have not made any findings as to the extent of the Kimiākau Shotover River ONF boundary and nothing in our recommendations should be seen as pre-determining or

otherwise affecting whatever decision on that matter may result from the current Landscape Schedule Plan Variation process.

Analysis and Advice | Tatāritaka me kā Tohutohu

12. The Hearings Commissioners have heard the submission and further submissions, considered written and oral evidence and submissions, taken advice from experts, questioned participants, and undertaken site visits from various public viewpoints including the Shotover River. The recommendation does not constitute a decision under the RMA. A local authority must make a decision on the provisions and matters raised in the submissions.
13. As discussed in the Options section of this report, for the Council to adopt some aspects of the recommendations and seek to amend others carries a high risk of creating procedural unfairness. Unlike the Panel, Councillors have not considered the full breadth of submissions, or tested the body of evidence that has informed this recommendation. Therefore, it is appropriate that they adopt the recommendations of the Commissioners as a council decision.
14. Once the decision is notified the provisions would have legal effect.
15. This report identifies and assesses the following reasonably practicable options for assessing the matter as required by section 77 of the Local Government Act 2002.
16. **Option 1** - Accept the Hearing Panel's Recommendation.

Advantages:

- The submissions and further submissions has been through a thorough process under Schedule 1 of the RMA. Commissioners were qualified decisions makers with the benefit of reviewing submissions and further submissions, hearing expert evidence from submitters, and Council staff in the form of an officer's recommendation. It is considered the Commissioners have reached a robust recommendation.
- The submissions and hearing process gave people the opportunity to either support or oppose the submissions and be heard in relation to their submissions.

Disadvantages:

- None – Council appointed the Commissioners to hear and make recommendations on the submissions received.
17. **Option 2** – Reject the Hearing Panel's recommendations either in full or in part and re-hear submissions on this aspect of the PDP.

Advantages:

- Would allow Council to appoint new Commissioners onto the Panel to re-hear submissions on aspects of the decision it was unhappy with. It would allow Council to clearly signal concerns with the decisions or the process of deciding submissions without being drawn into the merits of the decisions or submissions.

Disadvantages

- In accordance with Clause 10 (4)(a) of the First Schedule of the Resource Management Act 1991, the Council has to give its decision and publicly notify the decision no later than two years after notification, being 31 October 2021. As a result of the Environment Court and High Court appeals the Council is well in excess of this timeframe. Further delays should be avoided.
- Because the Council has not heard the evidence presented at the hearing or read the submissions on this topic, a new hearing would be required. This will impose significant additional costs and time delays on all parties.
- A re-hearing would be required because changing the recommendations without undertaking a further hearing would not demonstrate procedural fairness or natural justice to those who have inputted into the process, and submitters who have participated in good faith.
- Additional Council, applicant and submitter resources will be required to re-hear the relevant aspects of the PDP which may not be the most efficient remedy, given that parties unhappy with the decisions or process can appeal to the Environment Court on a de novo basis once the recommendation has been ratified and notified by the Council.

18. This report recommends **Option 1** for addressing this matter because the submissions and further submissions has been through a thorough process under Schedule 1 of the RMA. Commissioners were qualified decisions makers with the benefit of reviewing submissions and further submissions, hearing expert evidence from submitters, and Council staff in the form of an officer's recommendation. It is considered the Commissioners have reached a robust recommendation.

Consultation Process | Hātepe Matapaki

Significance and Engagement | Te Whakamahi I kā Whakaaro Hiraka

19. This matter is of medium significance, as determined by reference to the Council's Significance and Engagement Policy because the matter relates to decisions on submissions on the Proposed District Plan, which is a very significant statutory document in terms of the social, economic and environmental wellbeing of the Queenstown Lakes District. However, it only affects a discrete area of the district.

20. The community has had the opportunity to further submit on the original submissions through the process and further submissions were received. A public hearing has been held. The Commissioners considered these submissions and hearing appearances within their recommendations.
21. The views of persons considered to be affected by this matter have been taken into account in developing the recommended decision and they also have the potential to seek recourse through an appeal to the Environment Court.

Māori Consultation | Iwi Rūnaka

22. Consultation with Iwi authorities required pursuant to Schedule 1, clause 4A of the RMA, was undertaken as part of the Proposed Plan process, whereby sets of draft provisions were provided to iwi representatives for consideration and comment. The iwi authorities did not request any changes to the draft provisions and did not provide specific comment.

Risk and Mitigations | Kā Raru Tūpono me kā Whakamaurutaka

23. This matter relates to the strategic risk SR1 'Current and future development needs of the community (including environmental protection)' as documented in the Council's risk register. The risk is classed as high. This matter relates to this risk because it is considered to be of significant importance in terms of the managed growth and regulation of development for the District.
24. The recommended option considered above mitigate the risk by: Treating the risk - putting measures in place which directly impact the risk. The recommended option considered above mitigates the risk by adopting the decision of the Hearing Panel who heard all the evidence before them and made a decision based upon that evidence.

Financial Implications | Kā Riteka ā-Pūtea

25. There are no additional financial implications beyond what is within existing approved budgets.

Council Effects and Views | Kā Whakaaweawe me kā Tirohaka a te Kaunihera

26. The following Council policies, strategies and bylaws were considered:
 - Proposed District Plan
27. This matter is broadly included in the Ten Year Plan/Annual Plan under the District Plan operating expenditure.

Legal Considerations and Statutory Responsibilities | Ka Ture Whaiwhakaaro me kā Takohaka Waeture

28. No specific legal advice has been sought. The process has been undertaken under the requirements (Schedule 1) of the Resource Management Act 1991.

Local Government Act 2002 Purpose Provisions | Te Whakatureture 2002 o te Kāwanataka ā-Kiaka

29. Section 10 of the Local Government Act 2002 states the purpose of local government is (a) to enable democratic local decision-making and action by, and on behalf of, communities; and (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future. The recommended option will assist in the provision of planning for community outcomes.

30. The recommended option:

- Can be implemented through current funding under the Ten Year Plan and Annual Plan;
- Is consistent with the Council's plans and policies; and
- Would not significantly alter the intended level of service provision for any significant activity undertaken by or on behalf of the Council or transfer the ownership or control of a strategic asset to or from the Council.

Attachments | Kā Tāpirihaka

A	Re-hearing of submissions on Stage 1: Proposed District Plan Gertrude's Saddlery Limited and Larchmont Developments Limited at Arthurs Point Report and Recommendations of Hearings Commissioners
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