

**IN THE ENVIRONMENT COURT OF
NEW ZEALAND
CHRISTCHURCH REGISTRY**

**I MUA I TE KOTI TAIAO O AOTEAROA
ŌTAUTAHI ROHE**

ENV-2024-CHC-

UNDER the Resource Management Act 1991

IN THE MATTER OF an appeal under clause 14(1) of Schedule 1 of the Resource Management Act 1991 in relation to the Queenstown Lakes District Council's decision on a Variation to Chapter 21 (Rural Zon) of the Proposed District Plan in respect of Priority Area Landscape Schedules

BETWEEN **HAWTHENDEN LIMITED**
Appellant

AND **QUEENSTOWN LAKES DISTRICT COUNCIL**
Respondent

NOTICE OF APPEAL

5 August 2024

Appellant's Solicitor

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To: The Registrar
Environment Court
Christchurch

Introduction

- 1 Hawthenden Limited (**Appellant**) appeals against the decision (**Decision**) in respect of a decision made on the variation to introduce priority area landscape schedules 21.22 and 21.23 into Chapter 21 Rural Zone of the Queenstown Lakes Proposed District Plan (**PDP**) (**Variation**).
- 2 The Appellant made submissions (submitter #3) on the PDP and the Variation.
- 3 The Decision was made by a panel of independent hearing commissioners (**Commissioners**) appointed by Queenstown Lakes District Council (**Respondent**) to hear and determine the Variation.
- 4 The Appellant is not a trade competitor for the purposes of section 308D of the Resource Management Act 1991 (**RMA**).
- 5 The Decision was made on 9 May 2024.
- 6 The Appellant received notice of the Decision on 21 June 2024.

The Decision

- 7 The Decision being appealed is the decision by the Commissioners to recommend the Respondent adopt the recommendations in the Decision to the extent that such recommendations:
 - (a) relating to a finding on the jurisdiction of the Commissioners that all submissions relating to priority area mapping and landscape classification lines in either the priority area maps, or in the PDP maps (**PA and ONF/L Boundaries**) failed to meet the relevant legal tests and were, therefore, 'out of scope' of the PDP and the Variation;
 - (b) determining that all discussion relating to PA and ONF/L Boundaries were 'out of scope', in direct contravention of this Court's determination that affected parties held a right to submit on PA and ONF/L Boundaries during the Variation process;
 - (c) rejecting (or dismissing, in part) submissions lodged by the Appellant (and several other submitters) where those submissions sought consideration of, and amendments to, PA and ONF/L Boundaries;

- (d) accepting flawed landscape expert methodology culminating in Joint Witness Statements and s 32 Report that, due to an apparent absence of analysis of geological and geomorphological evidence in respect of PA and ONF/L Boundaries, failed to apply a ‘first principles values assessment’ as directed by this Court;
- (e) failing to address drafting inaccuracies and irregularities in Priority Area Schedule 21.22.19 relating to the Mount Alpha ONL;
- (f) failing to address the inconsistent position adopted by the Respondent in previous related ‘Topic 2’ proceedings in respect of the sequencing of its own planning processes; and
- (g) failing to adequately displace:
 - (i) a presumption of apparent bias; and
 - (ii) a risk of predetermination,

in respect of one Commissioner who simultaneously held a senior elected position on the Respondent council to the extent there is a real danger the Decision may be considered unjust.

Reasons for the appeal

8 The reasons for the appeal are set out below.

Jurisdiction/scope for submissions

9 The finding in paragraph 64(i) of the Decision that:

“The Public Notice, together with the s 32 Report and associated material that informed the notification of the Variation, make it unambiguously clear that the scope of the proposal is limited to the content of the Schedules...”

failed to consider the relevant legal tests posed under *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP 34-02, 14 March 2003 (**Clearwater**) (and affirmed in *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290), and more recently refined in this Court in:

- (a) *Paterson Pitts Limited Partnership v Dunedin City Council* [2022] NZEnvC 234 (**Paterson Pitts**);
- (b) *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187 (**Calcutta Farms**); and

(c) *Bluehaven Management Limited v Rotorua District Council & Bay of Plenty District Council* [2016] NZEnvC 191 (**Bluehaven**).

10 Under Paterson Pitts, the Court observed the respondent territorial authority (**DCC**) deliberately limited the scope of the proposed variation in its public notification, which was found incapable of being read outside the narrowly drafted notification documents. The outcome being that a person reading the notification documents would be unable to reasonably contemplate any outcome other than the DCC's deliberately narrow scope of proposed variations.

11 The "Public Notice" referred in the Decision did not include any such narrowly focussed drafting. Instead, the Public Notice simply notified the public that the proposed variation would "... *introduce proposed landscape schedules 21.22 and 21.23.*"

12 Rather than being "*unambiguously clear*", the Public Notice was widely drafted. Adopting the refined Clearwater test under Paterson Pitts, it was open to reasonable interpretation that submissions were able to be made in relation to PA and ONF/L Boundaries.

13 The further implication in paragraph 64 of the Decision that the s 32 Report made it:

"... unambiguously clear that the scope of the proposal is limited to the content of the Schedules",

incorrectly treats the drafting of the s 32 Report as determinative of whether a submission fell within the scope of the Variation.

14 Under *Calcutta Farms* and *Bluehaven*, a submission that is not expressly addressed under a s 32 Report should not be considered out of scope if it was an option that should have been considered in the s 32 Report's analysis.

15 In dismissing such submissions when arriving at the Decision, the Respondent has:

(a) dismissed potential options for addressing matters on the subject of the Variation; and

(b) has, effectively, ignored submitters (including the Appellant) that raised those matters in their submissions.

16 *Calcutta Farms* also affirmed (citing *Bluehaven*) the failure of the s 32 Report to address options raised by submitters did not prevent those submissions from being "on" the plan change.

17 Bluehaven expanded on that by stating (at paragraph 39):

“The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.”

18 In arriving at the Decision, the Commissioners have, therefore, erred by treating the s 32 Report as determinative when analysing whether a submission met the Clearwater test and was “on” the Variation.

19 The Decision also failed to address the limitations inherent in the drafting of the Public Notice and the s 32 Report and, therefore, the Commissioners erred in finding the public notification documents were “unambiguous”.

20 The effect of the findings in paragraphs 65 to 60 of the Decision is analogous to the comment in Paterson Pitts that submitters seeking mapping amendments (including the Appellant):

“... have been disenfranchised by the process followed by the Council. That brings about a level of unfairness that "militates the second limb" of Clearwater.”

21 The wholesale dismissal of all submissions on PA and ONF/L Boundaries as being ‘out of scope’ on the basis those submissions were (at Decision paragraph 64 (v)):

“... tantamount to an opportunistic attempt to relitigate the concerns of those submitters”

was also improper.

22 On arriving at the Decision, the Commissioners:

(a) erred in reaching a determination in respect of their jurisdiction to hear and consider matters relating to PA and ONF/L Boundaries and the expert evidence (Decision paragraphs 64 to 68); and

(b) placed undue reliance on an inadequate s 32 Report as prepared by the Respondent and inappropriately concluded (at paragraphs 69 to 73 of the Decision):

(i) the s 32 Report was adequate; and

- (ii) no further analysis was required for the purpose of evaluating submissions on the Variation.

- 23 The Decision accordingly:
- (a) failed to make any reference to, and therefore place appropriate weight on, landscape and geological expert evidence presented by the Appellant;
 - (b) failed to take into account, and therefore to place appropriate weight on, the absence of expert geological evidence from the Respondent; and
 - (c) failed to take into account, and therefore to place appropriate weight on, the absence of landscape expert analysis of geological expert evidence when adopting methodology under the resulting Joint Witness Statements.
- 24 The conclusion reached in the Decision that the s 32 Report was 'fit for purpose' was incorrect (Decision paragraphs 100 and 194 to 203).
- 25 The Commissioners failed to address oral submissions on the PA Schedules and the s 32 Report, including in relation to "tortured language" utilised by the Respondent, seemingly in an attempt to 'fit' the Appellant's land within:
- (a) the landscape attributes descriptions required under the s 32 Report; and
 - (b) the varied strata across the range of land within the Mount Alpha Priority Area in order to classify it within the categories developed under the Priority Area Schedules.
- 26 The finding at paragraph 73 of the Decision that
- "...the adequacy of the s 32 Report was not raised in oral submissions at the hearing",*
- is incorrect.
- 27 The Appellant raised issues in respect of the s 32 Report during its oral submissions. Those submissions have also not been addressed in the Decision. Such a finding could not have reasonably been reached, taking into account the oral submissions and expert evidence presented by the Appellant.
- 28 The finding at paragraph 87 of the Decision, essentially accepting the Respondent's submission that the role of the Commissioners was limited in scope, is fundamentally incorrect.
- 29 The finding that the Respondent employed appropriate methodology (outlined at paragraphs 96 to 101 of the Decision), partly based on the Respondent's expert implying the methodology adopted in preparation of the PA Schedules:

(a) was consistent with New Zealand Institute of Landscape Architects, Te Tangi a te Manu: Aotearoa New Zealand Landscape Assessment Guidelines; and

(b) therefore, met the correct legal standard,

is flawed.

30 It is evident to the Appellant that, if the correct legal tests and principles had been adhered when assessing landscape attributes and values (especially in relation to ONFL), the Priority Area Schedules could not have been approved or finalised in their current form.

Implementation of and drafting irregularities in Priority Area Schedule 21.22.19

31 In respect of the findings in the Decision at paragraphs 152 to 159 and 188 to 193 in relation to the contents and drafting in respect of Priority Area Schedules (**PA Schedules**), the Respondent:

(a) failed to analyse or consider the drafting irregularities and flawed methodology in respect of PA Schedule 21.22.19 Mount Alpha ONL (**PA Schedule – Mount Alpha**) as orally presented at the hearing, and in written submissions, relating to:

(i) the description of the Appellant's farmland as having a perception of 'high level naturalness' in comparison to the wider Priority Area;

(ii) the Respondent's admitted absence of natural landscape below 1,100m elevation in the wording used in PA Schedule – Mount Alpha;

(iii) the lack of 'natural' or 'outstanding' landscape qualities in respect of the Appellant's land;

(iv) the absence of any identifiable actual or tangible physical attributes or any prescribed values that can be identified in respect of the majority of the lower Alpha fan area described in PA Schedule – Mount Alpha, including the Appellant's land;

(v) the complete departure from the principles and rigorous tests prescribed under case law;

(vi) in contradiction to the Respondent's own findings contained in the s 32 Report; and

(b) failed to adequately consider and apply the principles of relevant case law cited by the Appellant, including in respect of the Respondent's role in:

- (i) producing the PA Schedules; and
- (ii) undertaking and implementing its planning processes, in general.

Respondent's inconsistent position

- 32 The Decision failed to address the Respondent's inconsistent legal position adopted by it during various stages during the Topic 2 Environment Court proceedings.
- 33 The Appellant considers the Respondent's varied position:
- (a) was in contravention of the relevant case law principles developed during the previous Topic 2 proceedings;
 - (b) created the impression the Respondent sought to suppress consideration by the Commissioners of submissions on PA and ONF/L Boundaries, in direct contrast to those legal principles; and
 - (c) undermined the overall Topic 2 hearing process, including the Variation and the Decision.

Apparent bias and predetermination

- 34 Aside from minor, inconsequential "wordsmithing" amendments to the drafting of the PA Schedules, the Decision materially aligned with all aspects of the Respondent's submissions.
- 35 The Appellant considers the appointment to the hearing panel of a senior elected officer of the Respondent who has publicly expressed concerns relating to the subject matter under the Variation, should have disqualified that Commissioner from being appointed.
- 36 The Decision (and the accompanying Minutes of the Commissioners) inadequately addressed the existence of apparent bias and conflict of interest of that Commissioner. The Commissioners turned their minds solely to the conflict of interest in relation to a submitter group the Commissioner had some direct involvement. However, the Decision neglected to address the overarching conflict of interest and apparent bias in respect of that Commissioner's express political views in relation to the PDP and the Variation.
- 37 The Decision also failed to address the prospect of potential undue influence that may have arisen due to the Commissioner's senior role on the Respondent council.
- 38 Accordingly, the Appellant considers the Decision failed to displace the presumption of apparent bias, and as such, the risk of predetermination.

Statutory considerations

39 The analysis of the Commissioners against the relevant statutory framework was incomplete. The Appellant contends that the Commissioners reached inappropriate or incorrect conclusions in the Decision in relation to the relevant statutory framework for the reasons detailed above.

Relief sought

40 The Appellant seeks the following relief:

- (a) that the Decision be cancelled;
- (b) that all submissions in respect of PA and ONF/L Boundaries, s 32 Report inadequacies, and landscape methodology issues as raised by the Appellant during the hearing process are fully considered and afforded appropriate weight;
- (c) that such alternative, additional or consequential relief be granted as may be considered appropriate as a consequence;
- (d) that Deputy Mayor Mr Quentin Smith be removed from any decision-making role in respect of the Variation; and
- (e) that the Appellant be reimbursed for the costs of and arising from this Notice of Appeal.

Attached documents

41 The following documents are attached to this notice:

- (a) the Appellant's written submissions on the Variation;
- (b) the Appellant's submissions (transcribed, in part) presented at hearing on 9 November 2023;
- (c) a copy of the Decision; and
- (d) a list of names and addresses of persons to be served with a copy of this notice.

Dated this 5th day of August 2024



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Advice to recipients of copy of notice of appeal**How to become party to proceedings**

You may be a party to the appeal if you made a submission or a further submission on the matter of this appeal.

To become a party to the appeal, you must, —

- 1 within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the Appellant; and
- 2 within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (see form 38).

Advice

If you have any questions about this notice, contact the Environment Court in Christchurch.