BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991 (the "Act")

AND

IN THE MATTER of the Queenstown Lakes District Proposed District Plan

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LEGAL SUBMISSIONS FOR:

Allenby Farms Limited (502)
Crosshill Farm Limited (531)
Mt Cardrona Station Limited (407)

[ONF/ONL/WANAKA UGB ISSUES]

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1. Introduction

1.1 These Submissions are presented on behalf of the Submitters named on the front cover page. Those Submitters have an interest in land which is currently zoned under the Operative District Plan ("**ODP**"), or is proposed to be zoned under the District Plan Review ("**DPR**"), Outstanding Landscape ("**ONL**") or Outstanding Natural Feature ("**ONF**") as finally determined. Allenby Farms Limited ("**Allenby**") also has an interest in Wanaka Urban Growth Boundary ("**UGB**") issues.

1.2 The DPR Hearing is in the nature of an enquiry. The objective is to achieve the optimum outcome for the DPR under the RMA. There is a responsibility on Counsel and witnesses to assist the Panel to achieve that optimum outcome, regardless of individual client interests.

1.3 These legal submissions are presented on the basis that scope is determined by the full range of Submissions lodged to the DPR, not each individual Submission.[1] These submissions therefore, and the evidence briefed and to be presented in support of these submissions, propose and address what are considered to be optimum solutions (rather than necessarily as specifically requested in individual Submissions) on the assumption that any solution is almost certainly within scope.

1.4 To try and minimise confusion, the starting point of these submissions is the DPR provisions as notified, subject to amendments recommended in the s42A Hearing Report, on the assumption that that is the latest position currently being recommended to the Panel. It is understood that the Panel is not bound by those s42A recommendations, but that is the logical starting point.

2. Wanaka UGB

2.1 To address the specific UGB issues raised in the Allenby Submission it is necessary to first consider the wider picture in relation to UGBs in general and the Wanaka UGB in particular.

2.2 The Wanaka UGB is a logical and commonsense example of the application of the UGB concept:

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[1] *Simons Hill Station Ltd* v *Royal Forest & Bird* [2014] NZHC 1362

(a) Refer Auckland Rural Urban Boundary ("**RUB**");

(b) Significant similarities between Auckland situation and Wanaka situation.

2.3 The same cannot be said for the Wakatipu Basin UGBs which are not based upon consistent principles and which appear to be a case of *post ipso facto* justification of lines drawn on a map **[brief comment – to be addressed in more detail at a later hearing date]**.

"***4.2.2*** *Objective - Urban Growth Boundaries are established as a tool to manage the growth of major centres within distinct and defendable urban edges.*

Policies

4.2.2.1 Urban Growth Boundaries define the limits of urban growth, ensuring that urban development is contained within those identified boundaries, and urban development is avoided outside of those identified boundaries.

4.2.2.2 Urban Growth Boundaries are of a scale and form which is consistent with the anticipated demand for urban development over the planning period, and the appropriateness of the land to accommodate growth."

2.4 Query whether an overarching suite of UGB policies is needed to inform the specific UGB policies **[to be addressed in more detail in later hearing]**.

2.5 Council evidence in relation to infrastructure provides no meaningful support for the identified UGBs (whether in Wanaka or Wakatipu) **[also to be addressed in more detail in later hearing]**.

2.6 The DPR planning provisions relevant to the Wanaka UGB do not reflect the rationale for the Wanaka UGB, based upon prior planning exercises in Wanaka.

"***Wanaka***

4.2.6 Objective - Manage the scale and location of urban growth in the Wanaka Urban Growth Boundary.

Policies

4.2.6.1 Limit the spatial growth of Wanaka so that:

- *The rural character of key entrances to the town is retained and protected, as provided by the natural boundaries of the Clutha River and Cardrona River*
- *A distinction between urban and rural areas is maintained to protect the quality and character of the environment and visual amenity*
- *Ad hoc development of rural land is avoided*
- *Outstanding Natural Landscapes and Outstanding Natural Features are protected from encroachment by urban development*"

2.7 Significant missing elements include:

(a) Infrastructure explanation and justification;

(b) A 'planning period' context;

(c) The intended or desirable limitations on extension of the UGB during that planning period;

(d) The overall picture of the Wanaka UGB concept and objective.

3. ONFs and UGBs

3.1 The DPR contains conflicting provisions relevant to the issue of whether the UGB can contain an ONF and (related) whether part of the purpose of a UGB is to protect ONFs. Almost all policy provisions support ONFs being within a UGB:

"*4.2.2.3 Within Urban Growth Boundaries, land is allocated into various zones which are reflective of the appropriate land use.*

4.2.2.4 Not all land within Urban Growth Boundaries will be suitable for urban development, such as (but not limited to) land with ecological, heritage or landscape significance; or land subject to natural hazards. The form and location of urban development shall take account of site specific features or constraints to protect public health and safety.

4.2.5.2 Ensure that development within the Arrowtown Urban Growth Boundary provides:

- *for Feeley's Hill and land along the margins of Bush Creek and the Arrow River to be retained as reserve areas as part of Arrowtown's recreation and amenity resource.*

4.2.6.2 Ensure that development within the Wanaka Urban Growth Boundary:

- *Does not diminish the qualities of significant landscape features*

3.2 However one policy provision suggests the opposite:

4.2.6.1 Limit the spatial growth of Wanaka so that:

- *Outstanding Natural Landscapes and Outstanding Natural Features are protected from encroachment by urban development*"

3.3 This inconsistent treatment of this issue in the policy provisions is reflected in the relevant UGB boundaries:

(a) Mt Iron (Planning Map 26) – excluded;

(b) Hikuwai Conservation Area (Planning Map 26) – excluded;

(c) Feeley's Hill (Planning Maps 26 and 27) – included;

(d) Deer Park Heights/Peninsula Hill (Planning Map 13) – half excluded and half included.

3.4 The DPR contains strong objectives and policies which protect ONFs and address the potential for development on or adjacent to ONFs. There is no need for protection of ONFs to be part of the rationale for an UGB.

3.5 An ONF is generally an isolated and distinct feature located within a wider area or wider landscape, and is frequently prominent in that wider area or wider landscape. The ONF is generally perceived as being part of that wider area or wider landscape.

3.6 Mt Iron is as much a part of the wider Wanaka urban area as Feeley's Hill is part of the Arrowtown urban area (perhaps more so, given the extent of the residential development actually located on Mt Iron). Excluding Mt Iron from the Wanaka UGB is both illogical and

unnecessary. It should be included, just as Feeley's Hill is included in the Arrowtown UGB.

3.7 Policy 4.2.6.1 quoted in paragraph 3.2 above should be amended by deleting "*… and Outstanding Natural Features.*" That removes the policy inconsistency.

4. ONLs

4.1 Comment on recommended amendments to Objective 3.2.5.1 [refer Proposed District Plan Maps Index in **Appendix A**]:

> "***3 Strategic Direction***
>
> ***….***
>
> ***3.2 Goals, Objectives and Policies***
>
> *3.2.5.1* ***Objective -*** *Protect the ~~natural~~ ~~character~~ quality of the Outstanding Natural Landscapes and Outstanding Natural Features from [inappropriate] subdivision, use and development.*"

4.2 Refer *WESI* v *QLDC* at paragraph 69:[2]

> "*69 Secondly, the territorial authority is to recognise and provide for (amongst other things):*
>
> *Section 6.*
>
> *(a) The preservation of the natural character of … lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use and development:*
>
> *(b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development …*
>
> *Both section 6(a) and 6(b) are relevant in this case. We note that they do not entail that the natural character of lakes and rivers or nationally important features and landscapes are to be preserved or protected at all costs: "Trio Holdings Ltd v*

[2] *Wakatipu Environmental Society Inc.* v *QLDC*, C180/99, at para 69.

Marlborough District Council" and "New Zealand Rail Ltd v Marlborough District Council". Further it is only "inappropriate subdivision, use and development" from which they are to be protected. Finally, while only section 6(b) refers to 'landscape'; section 6(a) makes it clear at least by inference that lakes and rivers have a special place in landscape, in that even if the natural values of surrounding land have been compromised, they and their margins are still to be protected anyway."

Note to Commissioners: The Environment Court Decision C180/99 was fundamental to the development of the ODP and will be referred to in a number of hearings. The Commissioners may find it valuable to have a fresh read of this case, or at least Chapters 6 and 7 dealing with "*Landscape in the RMA*" and "*Landscapes of the District*".

4.3 Comment on Policy 6.3.1.2:

"***6.3 Objectives and Policies***

6.3.1 ***[Objective]*** *The District contains and values Outstanding Natural Features, Outstanding Natural Landscapes, and Rural Landscapes that require protection from inappropriate subdivision and development.*

6.3.1.~~3~~2 ***[Policy]*** *That subdivision and development proposals located within the Outstanding Natural Landscape, or an Outstanding Natural Feature, be assessed against the assessment matters in provisions 21.7.1 and 21.7.3 because subdivision and development is inappropriate in almost all locations, meaning successful applications will be exceptional cases.*"

4.4 Two aspects of Policy 6.3.1.2 are inappropriate:

(a) Reference to the assessment matters;

(b) Severe restriction on subdivision and development resulting in the '*exceptional cases*' statement.

4.5 The reference to assessment matters:

(a) Confuses a policy with a method;

(b) Lacks clarity – the policy cannot be understood without reference to the assessment matters (which effectively means the assessment matters should be being debated in this hearing, which is not the case);

(c) Effectively transfers policy guidance into the assessment matters, which is inappropriate;

(d) Is unnecessary because the assessment matters effectively contain the same content.

4.6 The "*exceptional cases*" 'test' cannot reasonably be imposed on all of the ONLs in the Queenstown Lakes District:

(a) Refer Proposed District Plan Maps Index in **Appendix A**;

(b) Based entirely on landscape considerations, without taking into account any RMA enabling provisions (s5, s7(b));

(c) Lack of any landscape analysis to justify this approach;

(d) Inappropriately elevates the ODP ONL-WB regime to apply across the district (refer **Appendix B**).

4.7 The ODP ONL-WB regime resulted from:

(a) An initial two week Environment Court hearing (C180/99) followed by a series of further hearings and decisions which determined the ONL-WB planning framework;

(b) Detailed evidence in relation to the Wakatipu Basin presented by numerous witnesses;

(c) Extensive site visits by the Court.

4.8 The hearing and assessment process detailed above resulted in findings of fact by the Environment Court[3] which justified an extremely stringent suite of planning provisions which set a hurdle effectively higher than non-complying activity status. That factual finding is set out in paragraph 136 of C180/99, which is set out below in full:

"*136 The Wakatipu Basin is more difficult to manage sustainably. The outstanding natural landscapes and features of the basin differ from most of the other outstanding natural landscapes of*

[3] *Wakatipu Environmental Society Inc* **v** *QLDC C180/99* at para 136

the district in that they are more visible from more viewpoints by more people. The scale of the basin is also important as Mr Kruger pointed out. People in the basin are never more than 2-3 kilometres from an outstanding natural feature or landscape. Consequently, we find that it is generally inappropriate to allow any development for residential, industrial or commercial activities on the outstanding natural landscape or features. We accept Mr Kruger's evidence (and Mr Rough said something similar) that, for these reasons, the Wakatipu Basin needs to be treated as a special case and as a coherent whole. We find that there has been inappropriate urban sprawl in the basin - in particular on Centennial Road in the vicinity of Arrow Junction and again along parts of Malaghan Road on its south side. It is arguable from observation that the housing along McDonnell Road (on the top of a prominent terrace) is also inappropriate although we heard no evidence on that issue'?".

We consider the cumulative effects have already gone further than is desirable. In the outstanding natural landscape of the Wakatipu Basin, and on the outstanding natural features in it, any further structures are undesirable - they should be avoided. In the visual amenity landscape (inside the outstanding natural landscape) structures can be built, with appropriate remedial work'!' or mitigation down to some kind of density limit that avoids inappropriate domestication."

4.9 There is no factual analysis before this Panel which could justify a conclusion that a similar regime should apply throughout the ONLs in this District. There is also no policy analysis which justifies that conclusion.

4.10 The appropriate amendment under the circumstances is to delete this Policy. An alternative approach might be to keep the first part, delete the reference to the assessment matters, change "*almost all*" to "*most*", and delete the last phrase relating to exceptional cases.

4.11 The previous submission point (if accepted) raises a consequential issue which would need to be considered:

(a) Because the DPR does away with the distinction between ONL-WB and ONL-DW, the amendment proposed above would remove the existing ODP ONL-WB protection from the ONL-WB;

(b) There appears little doubt that the ODP ONL-WB regime has been successful in achieving its objective (specifically refer Dr Read's Statement of Evidence)[4];

(c) There is no evidence before the Panel which supports removal of the distinction.

4.12 Consequentially the Panel should seriously consider retaining the separate ONL-WB regime because:

(a) The justification for it remains unchanged;

(b) The method has proven successful;

(c) Reinstating it would be simple.

[4] Dr Read's Statement of Evidence 19/02/16, para 3.6(a)

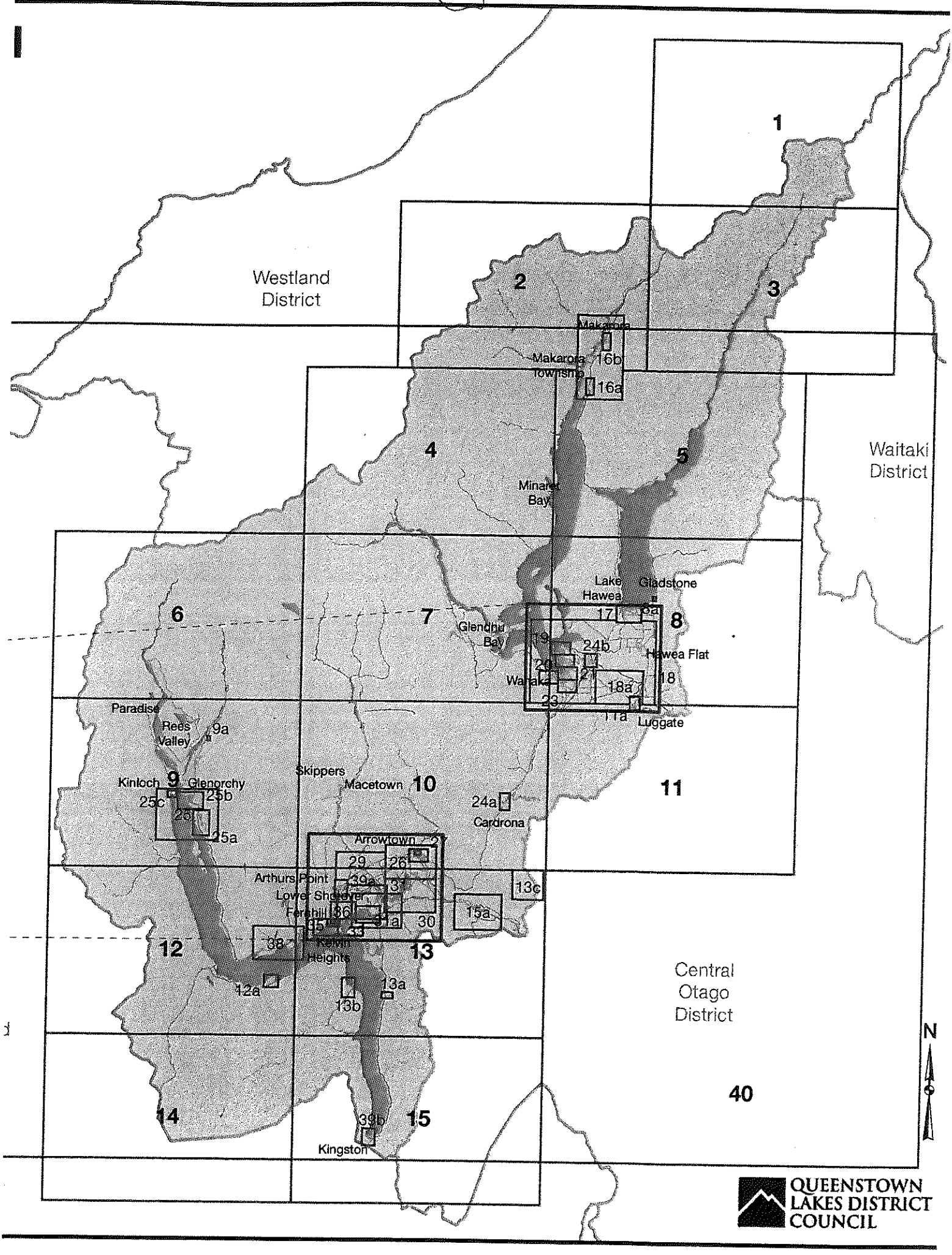
APPENDIX A

[Proposed District Plan Maps Index]

APPENDIX B

[Outstanding Natural Landscape – Wakatipu Basin, ODP Planning Provisions]

APPENDIX A.


Westland District
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Makarora
Makarora Township
16b
16a
Minaret Bay
Lake Hawea
Gladstone
17
5a
Glendhu Bay
19
24b
Hawea Flat
20
21
18
Wanaka
18a
23
11a
Luggate
Paradise
Rees Valley
9a
Kinloch
Glenorchy
25c
25b
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25a
Skippers
Macetown
24a
Cardrona
Arrowtown
2
29
26
Arthurs Point
39a
31
13c
Lower Shotover
Feehill
36
31a
30
15a
35
33
38
Kelvin Heights
12a
13a
13b
39b
Kingston
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QUEENSTOWN LAKES DISTRICT COUNCIL

3. Outstanding Natural Landscapes (Wakatipu Basin)

(a) To avoid subdivision and development on the outstanding natural landscapes and features of the Wakatipu Basin unless the subdivision and/or development will not result in adverse effects which will be more than minor on:

(i) Landscape values and natural character; and

(ii) Visual amenity values

- recognising and providing for:

(iii) The desirability of ensuring that buildings and structures and associated roading plans and boundary developments have a visual impact which will be no more than minor, which in the context of the landscapes of the Wakatipu basin means reasonably difficult to see;

(iv) The need to avoid further cumulative deterioration of the Wakatipu basin's outstanding natural landscapes;

(v) The importance of protecting the naturalness and enhancing the amenity values of views from public places and public roads.

(vi) The essential importance in this area of protecting and enhancing the naturalness of the landscape.

(b) To maintain the openness of those outstanding natural landscapes and features which have an open character at present.

(c) To remedy or mitigate the continuing effects of past inappropriate subdivision and/or development.

4. Visual Amenity Landscapes

(a) To avoid, remedy or mitigate the adverse effects of subdivision and development on the visual amenity landscapes which are:

- highly visible from public places and other places which are frequented by members of the public generally (except any trail as defined in this Plan); and

- visible from public roads.

(b) To mitigate loss of or enhance natural character by appropriate planting and landscaping.

(c) To discourage linear tree planting along roads as a method of achieving (a) or (b) above.

5. Outstanding Natural Features

To avoid subdivision and/or development on and in the vicinity of distinctive landforms and landscape features, including:

(a) in Wakatipu; the Kawarau, Arrow and Shotover Gorges; Peninsula, Queenstown, Ferry, Morven and Slope hills; Lake Hayes; Hillocks; Camp Hill; Mt Alfred; Pig, Pigeon and Tree Islands;

- unless the subdivision and/or development will not result in adverse effects which will be more than minor on:

(i) Landscape values and natural character; and

(ii) Visual amenity values

- recognising and providing for:

(iii) The desirability of ensuring that buildings and structures and associated roading plans and boundary developments have a visual impact which will be no more than minor in the context of the outstanding natural feature, that is, the building etc is reasonably difficult to see;

(iv) The need to avoid further cumulative deterioration of the outstanding natural features;

APPENDIX B

landscape categories in Part 4.2.4 of this Plan, and shall determine what category of landscape applies to the site subject to the application.

In making this determination the Council, shall consider:

(a) to the extent appropriate under the circumstances, both the land subject to the consent application and the wider landscape within which that land is situated; and

(b) the landscape maps in Appendix 8.

Step 3 - Application of the Assessment Matters

Once the Council has determined which landscape category the proposed development falls within, each resource consent application will then be considered:

First, with respect to the prescribed assessment criteria set out in Rule 5.4.2.2 of this section;

Secondly, recognising and providing for the reasons for making the activity discretionary (see para 1.5.3(iii) of the plan [p1/3]) and a general assessment of the frequency with which appropriate sites for development will be found in the locality.

5.4.2.2 Assessment Matters

(1) Outstanding Natural Landscapes (Wakatipu Basin) and Outstanding Natural Features – District wide.

These assessment matters should be read in the light of two further guiding principles. First that they are to be stringently applied to the effect that successful applications for resource consent will be exceptional cases. Secondly, existing vegetation which:

(a) was either
- planted after; or
- self seeded and less than 1 metre in height at
- 28 September 2002; and

(b) obstructs or substantially interferes with views of the landscape (in which the proposed development is set) from roads or other public places
- shall not be considered:
  (1) as beneficial under any of the following assessment matters unless the Council considers the vegetation (or some of it) is appropriate for the location in the context of the proposed development; and
  (2) as part of the permitted baseline.
- nor shall removal of such vegetation be considered as a positive effect of any proposal.

(a) Effects on openness of landscape

In considering whether the proposed development will maintain the openness of those outstanding natural landscapes and features which have an open character at present when viewed from public roads and other public places, the following matters shall be taken into account:

(i) whether the subject land is within a broadly visible expanse of open landscape when viewed from any public road or public place;

(ii) whether, and the extent to which, the proposed development is likely to adversely affect open space values with respect to the site and surrounding landscape;

(iii) whether the site is defined by natural elements such as topography and/or vegetation which may contain and mitigate any adverse effects associated with the development.

(b) Visibility of development

In considering the potential visibility of the proposed development and whether the adverse visual effects are minor, the Council shall be satisfied that:

(i) the proposed development will not be visible or will be reasonably difficult to see when viewed from public roads and other public places and in the case of proposed development in the vicinity of unformed legal roads, the Council shall also consider present use

and the practicalities and likelihood of potential use of unformed legal roads for vehicular and/or pedestrian, equestrian and other means of access; and

(ii) the proposed development will not be visually prominent such that it dominates or detracts from public or private views otherwise characterised by natural landscapes; and

(iii) the proposal can be appropriately screened or hidden from view by any proposed form of artificial screening, being limited to earthworks and/or new planting which is appropriate in the landscape, in accordance with Policy 4.2.5.11 (b).

(iv) any artificial screening or other mitigation will detract from those existing natural patterns and processes within the site and surrounding landscape or otherwise adversely affect the natural landscape character; and

(v) the proposed development is not likely to adversely affect the appreciation of landscape values of the wider landscape (not just the immediate landscape).

(vi) the proposal does not reduce neighbours' amenities significantly.

(c) Visual coherence and integrity of landscape

In considering whether the proposed development will adversely affect the visual coherence and integrity of the landscape and whether these effects are minor, the Council must be satisfied that:

(i) structures will not be located where they will break the line and form of any ridges, hills and any prominent slopes;

(ii) any proposed roads, earthworks and landscaping will not affect the naturalness of the landscape;

(iii) any proposed new boundaries will not give rise to artificial or unnatural lines or otherwise adversely (such as planting and fence lines) affect the natural form of the landscape.

(d) Nature Conservation Values

In considering whether the proposed development will adversely affect nature conservation values and whether these effects are minor with respect to any ecological systems and other nature conservation values, the Council must be satisfied that:

(i) the area affected by the development proposed in the application does not contain any indigenous, ecosystems including indigenous vegetation, wildlife habitats and wetlands or geological or geomorphological feature of significant value;

(ii) the development proposed will not have any adverse effects that are more than minor on these indigenous ecosystems and/or geological or geomorphological feature of significant value;

(iii) the development proposed will avoid the establishment of introduced vegetation that have a high potential to spread and naturalise (such as wilding pines or other noxious species).

(e) Cumulative effects of development on the landscape

In considering the potential adverse cumulative effects of the proposed development on the natural landscape with particular regard to any adverse effects on the wider values of the outstanding natural landscape or feature will be no more than minor, taking into account:

(i) whether and to what extent existing and potential development (ie. existing resource consent or zoning) may already have compromised the visual coherence and naturalness of the landscape;

(ii) where development has occurred, whether further development is likely to lead to further degradation of natural values or domestication of the landscape or feature such that the existing development and/or land use represents a threshold with respect to the site's ability to absorb further change;

(iii) whether, and to what extent the proposed development will result in the introduction of elements which are inconsistent with the natural character of the site and surrounding landscape;

(iv) whether these elements in (iii) above will further compromise the existing natural character of the landscape either visually or ecologically by exacerbating existing and potential adverse effects;

(v) where development has occurred or there is potential for development to occur (ie. existing resource consent or zoning), whether further development is likely to lead to further degradation of natural values or domestication of the landscape or feature.

(f) Positive Effects

In considering whether there are any positive effects in relation to remedying or mitigating the continuing adverse effects of past inappropriate subdivision and/or development, the following matters shall be taken into account:

(i) whether the proposed activity will protect, maintain or enhance any of the ecosystems or features identified in (f) above which has been compromised by past subdivision and/or development;

(ii) whether the proposed activity provides for the retention and/or re-establishment of native vegetation and their appropriate management, particularly where native revegetation has been cleared or otherwise compromised as a result of past subdivision and/or development;

(iii) whether the proposed development provides an opportunity to protect open space from further development which is inconsistent with preserving a natural open landscape, particularly where open space has been compromised by past subdivision and/or development;

(iv) whether the proposed development provides an opportunity to remedy or mitigate existing and potential adverse effects (ie. structures or development anticipated by existing resource consents) by modifying, including mitigation, or removing existing structures or developments; and/or surrendering any existing resource consents;

(g) Other Matters

In addition to consideration of the positive effects (i) - (iv) in (f) above, the following matters shall be taken into account, but considered with respect to those matters listed in (a) to (e) above:

(i) the ability to take esplanade reserves to protect the natural character and nature conservation values around the margins of any lake, river, wetland or stream within the subject site;

(ii) the use of restrictive covenants, easements, consent notices or other legal instruments otherwise necessary to realise those positive effects referred to in (f) (i) - (v) above and/or to ensure that the potential for future effects, particularly cumulative effects, are avoided.

(2) Outstanding Natural Landscapes (District Wide)

These assessment matters should be read in the light of the further guiding principle that existing vegetation which:

(a) was either
- planted after; or
- self seeded and less than 1 metre in height at
- 28 September 2002; and

(b) obstructs or substantially interferes with views of the landscape (in which the proposed development is set) from roads
- shall not be considered:
  (1) as beneficial under any of the following assessment matters unless the Council considers the vegetation (or some of it) is appropriate for the location in the context of the proposed development; and
  (2) as part of the permitted baseline.
- nor shall removal of such vegetation be considered as a positive effect of any proposal.

(a) Potential of the landscape to absorb development

In considering the potential of the landscape to absorb development both visually and ecologically, the following matters shall be taken into account consistent with retaining openness and natural character:

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000054
[2014] NZHC 1362

BETWEEN	SIMONS HILL STATION LIMITED AND SIMONS PASS STATION LIMITED Appellants
AND	ROYAL FOREST & BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED First Respondent
	CANTERBURY REGIONAL COUNCIL Second respondent

Hearing:	12 and 13 May 2014
Appearances:	M E Casey QC and K G Reid for the Appellants S Gepp and P Anderson for the First Respondent M Dysart for the Second Respondent
Judgment:	17 June 2014

JUDGMENT OF GENDALL J

Introduction

[1] This is an appeal against a decision of the Environment Court refusing to partially strike out an appeal by the first respondent ("RFB").[1] RFB's substantive appeal is against the decision of commissioners appointed by the second respondent ("Council") by which the appellants ("Simons") were granted consent pursuant to the Resource Management Act 1991 ("the RMA") to take and use water for irrigation from Lake Pukaki or the Pukaki Canal for their farm properties Simons Hill Station and Simons Pass Station. These consent applications were publicly notified at the same time as 159 other applications for similar activities in the

[1] *Royal Forest and Bird Protection Society of New Zealand Inc v Canterbury Regional Council* [2013] NZEnvC 301.

Upper Waitaki area. RFB's substantive appeal against the decision of the Commissioners cited adverse effects on landscape, terrestrial ecology and water quality.

[2] RFB has additionally filed a cross-appeal relating to the Environment Court's interpretation of s 120 of the RMA.

[3] Simons' strike out application sought to bring an end to RFB's appeals so far as they raise issues which Simons' claim are outside the scope of RFB's submission on the consent applications, dated 28 September 2007 ("the 2007 submission"). Simons say that the 2007 submission was solely confined to issues related to compliance with the Waitaki Catchment Water Allocation Plan ("the Waitaki Plan") relating to the area in question and the effects of the taking of water. The Waitaki Plan, and the 2007 submission, it is said relate only to water *allocation*, whereas any issue relating to water allocation Simons contends has now been abandoned by RFB.

[4] Simons maintains that the matters now proposed to be raised by RFB on its appeal relate only to the effects of the use and application of the water on terrestrial ecology and the landscape. These are matters with which the Waitaki Plan did not deal, and which are, Simons says, outside the scope of the 2007 submission.

[5] The substantive appeal is yet to be heard before the Environment Court as the outcome of the present appeal has the potential to influence the scope of that appeal.

The appeal

[6] The application by Simons for partial strike out of RFB's substantive appeal in the Environment Court was two-pronged:

(a) an appeal against the grant of a resource consent is constrained as to scope by the appealing party's original submission lodged with the consenting authority.

(b) the matters raised by RFB on its appeal to the Environment Court were not, as a matter of interpretation, within the scope of its 2007 submission to the consent authority.

[7] As to the former, the Environment Court agreed with Simons' argument. As to the latter, the Environment Court determined that the matters raised on appeal to the Environment Court fell within the purview of RFB's 2007 submission, therefore circumventing the invocation of the former finding. It was on this basis that the application for partial strike out failed, which in turn led to this appeal. The grounds on which Simons now appeal are that:

(a) the Environment Court incorrectly interpreted RFB's 2007 submission as raising issues as to the effects on terrestrial ecology of Simons' proposed use of the water.

(b) the Environment Court wrongly interpreted the objectives and policies of the Waitaki Plan and reached incorrect conclusions as a result.

(c) the Environment Court wrongly interpreted Policy 12 of the Waitaki Plan and therefore incorrectly concluded it was relevant.

(d) the Environment Court was wrong to consider the adequacy or otherwise of an applicant's AEE and its responses to s 92 requests as a consideration relevant to the scope of submissions made on the application for resource consent.

(e) the Environment Court was wrong to hold that RFB's statement of issues did not qualify its notice of appeal.

[8] In response RFB submits:

(a) the grounds of appeal disclosed by Simons are seeking to relitigate the findings of the Environment Court appeal under the guise of a question of law. Accordingly, this appeal ought to fail as appeals to the High Court may only be on questions of law.

(b) even if the grounds of appeal do legitimately disclose questions of law, these are immaterial when considered in the context of the factual findings of the Environment Court in its entirety.

[9] The Council supports, to a greater or lesser extent, the position of Simons with respect to the appeal. This judgment will therefore concentrate primarily on the submissions of Simons and RFB.

The cross-appeal

[10] RFB cross-appeals against the decision of the Environment Court on the basis that it was wrong to interpret s 120 of the RMA as constraining the scope of an appellant's grounds of appeal to matters raised in its own original submission to the consenting authority.

[11] In response, Simons and the Council submit that the cross appeal should fail on the basis that the interpretation of the Environment Court was correct.

Issues for resolution

[12] Despite the apparent complexity of this case, there are ultimately only two issues which this Court is required to resolve:

(a) Did the Environment Court err *in law* in finding that RFB's original 2007 submission was sufficiently wide to encompass the grounds on which it appealed the granting of the resource consent to the Environment Court?

(b) Was the Environment Court wrong to interpret s 120 of the RMA as meaning that an appeal to the Environment Court is constrained in scope by the original submission of the appellant to the consenting authority?

The Environment Court decision

The application

[13] As previously stated, the application before the Environment Court was an application by Simons to partially strike out three of RFB's appeals on the following grounds:[2]

> (a) the Court has no jurisdiction to entertain the appeals filed by Forest & Bird;
>
> (b) Forest & Bird's submission on the notified applications for resource consent concern non-compliance with the Waitaki Catchment Water Allocation Plan … This matter is no longer in contention;
>
> (c) the court has no jurisdiction to consider the issues identified by Forest & Bird in its memorandum dated 8 March 2013;
>
> (d) Forest & Bird has failed to particularise its appeals so as to ensure that the matters to be raised in evidence are within jurisdiction; and
>
> (e) Forest & Bird has failed to clearly and unambiguously identify the matters that it wishes to raise as part of its appeal "in a way that excludes mattes not being raised".

[14] RFB opposed the application for strike out on the following basis:[3]

> (a) the matters pursued on appeal are within the scope of its submission on the resource consent applications;
>
> (b) if there is any doubt as to scope, this should be resolved in Forest & Bird's favour; and
>
> (c) Forest & Bird's appeals raise issues about water quality and quantity that have yet to settle and therefore remain in contention.

Simons' arguments

[15] In support of its application in the Environment Court, Simons submitted:

> (a) an appeal cannot widen the scope of the original submission put before the consenting authority; this position is consistent with principles of fairness and natural justice.[4]

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2 At [3].
3 At [5].
4 At [35] – [36].

(b) the scope of a submission concerns not only the grounds on which the submission is made, but also the relief sought. Here, the relief sought by RFB is referable to the applications only to the extent that they were contrary to the Waitaki Plan. Therefore, RFB was seeking only to decline non-complying activities, whereas the Simons' activities were discretionary.[5]

(c) Part 2 of the RMA cannot be used to widen the scope of the appeal beyond the scope of the original submission made by RFB. The relevance of Part 2 matters is quite different from the question of whether the Environment Court had any jurisdiction to hear them.[6]

(d) the statement of issues which the Court directed RFB to file is analogous to "further particulars" which qualifies, though does not formally amend, the notice of appeal. To the extent the appeal originally dealt with water quality issues these are no longer in issue as a result of the statement of issues.[7]

(e) RFB cannot lead evidence on the effects of dairying, including the effects of dairying on water quality.[8]

RFB's arguments

[16] In response by way of opposition in the Environment Court, RFB contended:

(a) the meaning of s 120 is clear from its context and is not limited to matters raised by the submitter in their original submission.[9]

(b) in any event, the very broad nature of the submission was sufficient to import relevant concepts from the Waitaki Plan so as to give RFB standing to appeal.[10]

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5 At [38] – [39].
6 At [40].
7 At [41].
8 At [42].
9 At [28].

(c) the Regional Council, by requesting further information pursuant to s 92, acknowledged that Lake Pukaki was considered under the Waitaki Plan to have high natural character and high landscape and visual amenity values. A submitter viewing the correspondence should be entitled to rely on statements that these values are provided for under the Waitaki Plan.[11]

(d) permitting RFB to call evidence on landscape and terrestrial ecology would result in no prejudice to Simons.[12]

(e) the Environment Court either has a discretion or is obliged to consider evidence on Part 2 matters as pursuant to s 6 any person exercising functions and powers under the Act (here the Environment Court) is obliged to so consider.[13]

(f) RFB's submission includes all of Simons' proposed activities, if only for the reason that all consent applications are listed in attachment A to the submission.[14]

(g) while RFB anticipates that the general topic of water quality will be settled, RFB has not withdrawn or abandoned its appeals on this topic, and will remain in issue if the use of water is to support a dairying activity.[15]

Decision of the Environment Court

[17] Rather helpfully, the Environment Court expressly set out the five issues which it was required to determine, and provided findings on each issue in turn. Relevant excerpts from the Environment Court judgment are replicated below:

> [43] From the foregoing the following issues arise for determination:

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10 At [29].
11 At [30].
12 At [31].
13 At [32].
14 At [33].
15 At [34].

(a) is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource application or both?

- Sub-issue: does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?

(b) did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?

- Sub-issue: if it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?

(c) does the Environment Court have a discretion to direct, or indeed is the Court required to direct, the parties produce evidence on matters pertaining to s 6 of the Act?

(d) did the Environment Court's decision on preliminary issues determine the ground of appeal that the Commissioners modified the consent application?

(e) has Forest & Bird partially withdrawn its appeal on water quality?

…

Issue: **Is the scope of an appeal under s 120 constrained by the notice of appeal or by the original submission on a resource consent application, or both?**

Sub-Issue: *Does s 40 and s 274(B) or clause 14(1) of the First Schedule RMA assist Forest & Bird's interpretation of s 120?*

…

[59] If a submitter is able to appeal on grounds not raised in his or her submission on the application, then the appeal would not be against the decision of the consent authority. That is because in accordance with s 104 and s 104B the consent authority makes its decision having considered both the application and any submissions received.

[60] On Forest & Bird's interpretation s 290 would be rendered ineffective as the court would be deciding the application on a different basis to that considered by the consent authority. Thus the court would not be in a position to confirm, amend or cancel the consent authority's decision as it is required to do under s 290. Section 113 requires the consent authority to provide written reasons for its decision, including the main findings of fact. Again, on appeal if a submitter is not constrained by its submission on the application there would be no relevant decision for the court to have regard to under s 290A.

…

[65] Given the fundamental role of the written submission in the consenting process, as recorded in the decision of *Butel Park Homeowners Association v Queenstown Lakes District Council* and *Rowe v Transit New Zealand*, we consider our interpretation to be consistent with the principle that there is finality in litigation.

…

Outcome

[73] We hold that on appeal a submitter is constrained by the subject matter and relief contained in his or her submission on a resource consent application.

Issue: **Did Forest & Bird's submission on the applications address the matters raised in the notice of appeal?**

Sub-issue: *If it did not, does the absence of prejudice confer standing to introduce new grounds for appeal?*

Introduction

[74] Simons' overall submission is that reference to non-complying activities in the Forest & Bird submission, particularises their concern as relating to the non-compliance with the flow and level regime and with the water allocations.

[75] There is no doubt that Forest & Bird could have squarely and clearly set out in the submission its concerns about the landscape and terrestrial ecology effects of the use of the water. Despite the submission having been signed by legal counsel, it is poorly constructed and at times difficult to follow. That said, the submission is to be considered against the context in which it was made, including the backdrop of the Waitaki Plan (and other relevant Plans) and the applications themselves.

…

Consideration and findings

…

[99] At the time the submission was made Forest & Bird did not know whether the Simons' applications were for non-complying activities and therefore it was not in a position to assess the applications in the context of a Plan that envisages change through the allocation and use of water. If Forest & Bird could not assess the effects of the proposal in the broader policy context of the Waitaki Plan's allocation framework- then it would be difficult, if not impossible, to form a view on the individual effects of the proposal on the environment.

[100] We agree with Forest & Bird that anyone reading the consultant's response would reasonably have assumed landscape is a matter addressed under the Waitaki Plan. Indeed, the request for information by the Regional Council also assumed this to be the case. It may be that the Regional Council and Simons had in mind that the Waitaki Plan policy applied to the

applications or that the Waitaki Plan applied because of its stated assumption that the effects related to the taking and use of water are to be addressed under other statutory plans. The writers do not shed any light on their understanding.

[101] Forest & Bird could have front footed its concerns about the landscape and terrestrial ecology effects of the use of the water. However, in this case we find that it would be wrong to alight upon individual words and phrases or to consider the submission in isolation from or with little weight being given to the fact that the submission is on 161 consent applications. Standing back and having regard to the whole of the submission we apprehend that Forest & Bird was generally concerned with the effects on the environment of all of the applications for resource consent. Secondly, it was concerned to uphold the integrity of the Waitaki Plan and to ensure that decision making under that Plan was in accordance with the purpose and principles of the Act. Thirdly, we consider it unsound to particularise or read down the submission as being confined to non-complying activities.

[102] Finally, we do not infer - as we were invited to do so by Simons - that the Assessment of Environmental Effects was adequate because the Regional Council did not determine that the application was incomplete and it to the applicant (s 88A(3)). We observe that s 88A(3) confers a discretion upon the consent authority to deal with the application in this way. It was open to the consent authority to request further information under s 92 of the Act either before or after notification (which it did). Ms Dysart referred us to the affidavit of Ms B Sullivan filed in relation to the jurisdictional hearing, where the Council's practice that applied at the time the application was lodged is discussed. 63 At paragraph [24] Ms Sullivan deposes "[w]hat would now be considered deficient applications were often then receipted, with section 92 of the RMA used to obtain the necessary information for the application to be considered notifiable".

Outcome

[103] Forest & Bird's submission on the notified application does confer scope to appeal the decision to grant resource consents to Simons on the grounds that the effects on landscape and terrestrial ecology are such that the purpose of the Act may not be achieved.

[104] Given this, we do not need to decide the issue whether an absence of prejudice confers standing to introduce new grounds for appeal.

(citations omitted)

The Resource Management Act 1991 appeals regime

[18] This appeal is governed by s 299 of the RMA, which provides:

> **299 Appeal to High Court on question of law**
>
> (1) A party to a proceeding before the Environment Court under this Act or any other enactment may appeal on a question of law to the High Court against any decision, report, or recommendation of the Environment Court made in the proceeding.

(2) The appeal must be made in accordance with the High Court Rules, except to any extent that those rules are inconsistent with sections 300 to 307.

[19] Therefore, if an appeal discloses no discernible question of law, it is not to be entertained by this Court. The principles applicable to RMA appeals can be summarised as follows:

(a) Appeals to this Court from the Environment Court under s 299 are limited to questions of law.

(b) The onus of establishing that the Environment Court erred in law rests on the appellant: *Smith v Takapuna CC* (1988) 13 NZTPA 156 (HC).

(c) In *Countdown Properties (Northland) Ltd v Dunedin City Council* it was said that there will be an error of law justifying interference with the decision of the Environment Court if it can be established that the Environment Court:[16]

(i) applied a wrong legal test;

(ii) came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come;

(iii) took into account matters which it should not have taken into account; or

(iv) failed to take into account matters which it should have taken into account.

(d) The weight to be afforded to relevant considerations is a question for the Environment Court and is not a matter available for

[16] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145 at 153. See also *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153 at [50] – [55]; *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24] – [28].

reconsideration by the High Court as a question of law: *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC).

(e) The Court will not engage in a re-examination of the merits of the case under the guise of a question of law: *Sean Investments Pty Ltd v Mackellar* (1981) 38 ALR 363; *Murphy v Takapuna CC* HC Auckland M456/88, 7 August 1989.

(f) This Court will not grant relief where there has been an error of law unless it has been established that the error materially affected the result of the Environment Court's decision: *Royal Forest & Bird Protection Society Inc v W A Habgood Ltd* (1987) 12 NZTPA 76 (HC) at 81 – 82; *BP Oil NZ Ltd v Waitakere City Council* [1996] NZRMA 67 (HC).

[20] In the context of these general principles, I now turn to consider the appeal and cross appeal. It is useful here to consider the cross-appeal first.

The cross-appeal against the interpretation of s 120

Introduction

[21] A claim that a lower Court or Tribunal has erred in the interpretation of a statute is a clear example of an alleged error of law. This therefore deserves to be afforded consideration in some detail, particularly given the potential implications it might have for the wider consenting process under the RMA. Section 120 provides as follows:

> **120 Right to appeal**
>
> (1) Any one or more of the following persons may appeal to the Environment Court in accordance with section 121 against the whole or any part of a decision of a consent authority on an application for a resource consent, or an application for a change of consent conditions, or on a review of consent conditions:
>
> (a) The applicant or consent holder:
>
> (b) Any person who made a submission on the application or review of consent conditions.

(c) in relation to a coastal permit for a restricted coastal activity, the Minister of Conservation.

(2) This section is in addition to the rights provided for in sections 357A, 357C, and 357D (which provide for objections to the consent authority).

Previous relevant decisions

[22] I was referred by counsel for all parties to a number of decisions as to the proper interpretation of s 120. In this respect an appropriate starting point is the decision of the Supreme Court in *Waitakere City Council v Estate Homes Ltd*.[17] That decision concerned an application by Estate Homes for a land use consent which included, inter alia, a request for compensation for constructing a road wider than was necessary for the subdivision in question.[18] One of the issues was whether *an applicant* could be granted compensation on appeal *greater* than that claimed before the originating tribunal. There the Supreme Court stated:

> [27] The applicant had a right of appeal to the Environment Court, under s 120 of the Act, against the decision of a consent authority. Notice of appeal must be given in the prescribed form under s 121. The notice must state the reasons for the appeal and the relief sought. Under s 290(1), the Environment Court has "the same power, duty, and discretion" in dealing with the appeal as the consent authority. Under s 290(2) it may confirm, amend or cancel the decision to which the appeal relates.
>
> [28] These statutory provisions confer an appellate jurisdiction that is not uncommon in relation to administrative appeals in specialist jurisdictions. As Mr Neutze submitted, they contemplate that the hearing of the appellate tribunal will be "de novo", meaning that it will involve a fresh consideration of the matter that was before the body whose decision is the subject of appeal, with the parties having the right to a full new hearing of evidence. When the legislation provides for a de novo hearing it is the duty of the Environment Court to determine for itself, independently, the matter that was before the body appealed from insofar as it is in issue on appeal. The parties may, however, to the extent that is practicable, instead confine the appellate hearing to specific issues raised by the appeal.
>
> [29] *We accept that in the course of its hearing the Environment Court may permit the party which applied for planning permission to amend its application, but we do not accept that it may do so to an extent that the matter before it becomes in substance a different application. The legislation envisages that the Environment Court will consider the matter that was before the Council and its decision*

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17 *Waitakere City Council v Estate Homes Limited* [2006] NZSC 112, [2007] 2 NZLR 149.

18 At [2] – [10].

> *to the extent that it is in issue on appeal. Legislation providing for de novo appeals has never been read as permitting the appellate tribunal to ignore the opinion of the tribunal whose decision is the subject of appeal. In the planning context, the decision of the local authority will almost always be relevant because of the authority's general knowledge of the local context in which the issues arise.*

(Citations omitted and emphasis added)

[23] In my view however, *Estate Homes* is distinguishable from the present type of case on the simple basis that a decision on appeal granting compensation greater than that claimed in the original application falls outside the ambit of the original decision. To the extent that the compensation was greater than the applicant sought, it had not been considered by the originating tribunal and could not form part of its decision. In the present case RFB is merely seeking that it not be constrained by its own submissions, and for it to be able to appeal the decision in its entirety; not to go beyond that decision as was the case in *Estate Homes*.

[24] There are also a number of authorities which outline statements of principle regarding the scope of appeals under s 120 and similar sections. In the decision of Judge Skelton in *Morris v Marlborough District Council* it was stated:[19]

> … it also has to be noticed that section 120 provides for a right of appeal "against the whole or any part of a decision of a consent authority …" and that seems to me to indicate an intention on the part of the Legislature to allow a person who has made a submission to advance matters by way of appeal that arise out of the decision, even though they may not arise directly out of that persons' original submission.

[25] The decision in *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* evinces a similar, if not broader, interpretation of s 120:[20]

> … It was submitted that to raise an issue for the first time at a *de novo* hearing when such issues could and should have been raised at earlier proceedings is an abuse of process…
>
> I reject this submission on the basis that the Environment Court hears the appeal *de novo*, and is able to receive evidence and submissions not put forward at the first instance hearing before the local authority. Indeed

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19 *Morris v Marlborough District Council* (1993) 2 NZRMA 396, (1993) 1A ELRNZ 294 (PT).

20 *Challenger Scallop Enhancement Company Ltd v Marlborough District Council* [1998] NZRMA 342 (EC).

> without such a power the s 274 provisions, which allow certain non-parties to appear and present evidence, would be of little effect.

[26] The Environment Court in *Hinton v Otago Regional Council* sought to set out the Court's jurisdiction when deciding s 120 appeals:[21]

> The Court's jurisdiction when deciding an appeal under section 120 of the RMA is limited by Part II of the Act and also by:
>
> (a) the application for resource consent – a local authority (an on appeal, the Court) cannot give more than was applied for: *Clevedon Protection Society Inc v Warren Fowler Quarries & Manukau District Council*;
>
> (b) any relevant submissions; and
>
> (c) the notice of appeal.
>
> Generally, each successive document can limit the preceding ones but cannot widen them. That seems to be the effect of the High Court's decision in *Transit NZ v Pearson and Dunedin City Council*.
>
> (Citations omitted)

[27] A further relevant decision is *Avon Hotel Ltd v Christchurch City Council* where it was stated:[22]

> [18] It is axiomatic that an appeal cannot ask for more than the submission on which it is based. I can find no direct authority for that proposition. However, I think the point is made in *Countdown Properties (Northlands) Limited v Dunedin City Council* where the Full Court stated that '… the jurisdiction to amend [the plan, plan change or variation] must have some foundation in submissions'.
>
> (Citations omitted)

[28] Similarly, in a more recent case dealing with a similar issue, *Environmental Defence Society Incorporated v Otorohanga District Council* it was stated:[23]

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21 *Hinton v Otago Regional Council* EC Christchurch C5/2004, 27 January 2004 at [17].

22 *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 at [18].

23 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 70.

> [12] …the paramount test is whether or not the amendments are ones which are raised by and within the ambit of what is reasonably and fairly raised in submissions on the plan change. It acknowledged that this will usually be a question of degree to be judged in terms of the proposed change and the content of the submissions.
>
> (Citations omitted)

[29] Finally, counsel for RFB referred me to the decision in *Transit New Zealand v Pearson* which concerned the appeal regime under s 174, which is similar in structure to s 120.[24] In that case the High Court agreed with the reasoning of the Environment Court that:[25]

> … appeals are constrained only by the scope of the notice of appeal filed under section 120 and in this case under section 174. As an original appellant the Council was required to state the reasons for the appeal and the relief sought and any matters required to be stated by regulations and to be lodged and served within 15 working days as provided under section 174(2). This is equivalent to the provisions under section 121(1). To the extent that Clause 14(1) limits the scope of a reference to an original submission that constraint is not contained within s 174. In this case Mr Pearson's original submission is wide enough to encompass withdrawal of the requirement. He therefore meets the threshold test of Clause 14(1) if he has an appeal in his own right. In this way Clause 14(1) and section 174 are complementary.

Discussion

[30] It seems to me that the plain words of the section, in conjunction with the lack of any real conflict in the authorities, lead to the conclusion that the Environment Court erred here in its interpretation of s 120. To my mind all that must be satisfied on appeal is that the matter in issue was before the originating tribunal. This, of course, does not necessarily mean that the matter in issue must have been put before that tribunal by the appellant submitter; the requirement exists so as to ensure that the matter being appealed was one considered by the originating tribunal. What is important is that the applicant is put on notice, by the submissions in their entirety, of the issues sought to be raised, so that they can be confronted by that consenting authority. In such situations I am satisfied there is no derogation from principles of natural justice by making all of those issues the subject of further consideration on appeal.

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24 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).
25 At [38] and [41].

[31] By this analysis the plain meaning of s 120 is given full effect, without unnecessary constraint or reading down. This is not a case in which any rigid principles of statutory interpretation need be resorted to. The words are clear on their face. An appellant, which itself must have standing, is able to appeal "against the whole or any part of a decision of a consent authority on an application for a resource consent". This does not mean "the whole or any part of a decision of a consent authority [on which the appellant made submissions]".

[32] It would be anathema to the purpose of the RMA that a submitter was required at the outset to specify all the minutiae of its submissions in support or opposition. The originating tribunal would be inundated with material if this were the case. So long as a broad submission puts in issue before the originating tribunal the matters on which an appellant seeks to appeal, the appellate Court or Tribunal of first instance should entertain that appeal. Thus, I reach a different interpretation of the scope and operation of s 120 to that of the Environment Court. RFB as a submitter, who appealed the decision of the Commissioners on Simons' resource consent application under s 120 of the RMA, is not constrained by the subject matter of its original submission and is able to appeal the whole or any part of that original decision. As such, RFB's cross-appeal here must succeed.

[33] The position regarding s 120 can therefore be summarised as follows:

(a) An appealing party must have made submissions to the consenting authority if it is to have standing to appeal that decision.

(b) The Court's jurisdiction on appeal is limited by:

(i) Part 2 of the Act;

(ii) The resource consent itself (the Court cannot give more than was applied for);

(iii) The whole of the decision of the consenting authority which includes <u>all</u> relevant submissions put before it, and not just those submissions advanced initially by the appellant;

(iv) The notice of appeal.

(c) Successive documents can limit the preceding ones, but are unable to widen them.

(d) On appeal, arguments not raised in submissions to the originating tribunal may, with leave of the Court, be advanced by the appellant where there is no prejudice to the other party.

The appeal against refusal to partially strike out

[34] With respect to Simons' present appeal itself, I am required to reach a conclusion as to whether the Environment Court erred in law in refusing to partially strike out three of RFB's appeals. For the reasons set out below I am satisfied that this appeal must fail.

[35] First, this is not a final determination of the issues to be heard on appeal. Rather, it is a strike out application, the purpose of which is to address Simons' intention that certain grounds should never be heard substantively. The statutory foundation of the strike out jurisdiction and procedure is provided for in s 279 of the RMA. It relevantly provides:

> **279 Powers of Environment Judge sitting alone**
>
> …
>
> (4) An Environment Judge sitting alone may, at any stage of the proceedings and on such terms as the Judge thinks fit, order that the whole or any part of that person's case be struck out if the Judge considers —
>
> (a) That it is frivolous or vexatious; or
>
> (b) That it discloses no reasonable or relevant case in respect of the proceedings; or
>
> (c) That it would otherwise be an abuse of the process of the Environment Court to allow the case to be taken further.

[36] As a preliminary matter I note that s 279 expressly refers to the powers of an Environment Court Judge sitting alone. Of course in this case Judge Borthwick was

sitting with Commissioner Edmonds. Nothing turns on this point and this judgment proceeds accordingly.

[37] The threshold for an applicant or appellant to pass in strike out applications is, understandably, very high. If such an application is successful it effectively denies a respondent the right to put its arguments before the Court in substantive proceedings. The applicable principles were considered generally by the Court of Appeal in *Attorney-General v Prince and Gardner* where it was stated:[26]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas and Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314, 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45; *Electricity Corp Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641; but the fact that applications to strike out raise difficult questions of law, and require extensive argument, does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[38] In the RMA context, the decision of the Environment Court in *Hern v Aickin* is relevant.[27] In that case, it was stated:

> 6. The authority to strike-out proceedings is to be exercised sparingly and only in cases where the Court is satisfied that it has the requisite material before it to reach a certain and definite conclusion. The authority is only to be used where the claim is beyond repair and so unobtainable that it could not possibly succeed. In considering striking out applications the Court does not consider material beyond the proceedings and uncontested material and affidavits.
>
> (citations omitted)

[39] In addition, there are at least three further considerations relevant to a strike out application in the RMA context:[28]

> a) The RMA encourages public participation in the resource management process which should not be bound by undue formality:

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[26] *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).
[27] *Hern v Aickin* [2000] NZRMA 475 at [6].
[28] *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [18].

Countdown Properties (Northland) Ltd v Dunedin City Council [1994] NZRMA 145 at 167;

b) Where there is a reference on appeal to the Environment Court, the appellant is not in a position to start again due to statutory time limits; and

c) There are restrictions upon the power to amend. In particular an amendment which would broaden the scope of a reference or appeal is not ordinarily permitted.

[40] On the ground alone that the strike out application fails to meet the high threshold required, I would dismiss the appeal. Patently the Environment Court decision makes it apparent that this is not a case in which RFB's appeal is inevitably destined to fail. The Environment Court was therefore entitled to make a factual finding, having regard to all the evidence before it, that the grounds on which RFB now appeals were sufficiently disclosed in original submissions to warrant the substantive appeal being heard. The Environment Court found that the submissions from RFB were:[29]

(a) generally concerned about effects on the environment of all of the 161 applications for resource consent;

(b) concerned to uphold the integrity of the Waitaki Plan and to ensure that decision-making under the plan was in accordance with the purpose and principles of the RMA; and

(c) was not limited to non-complying activities.

[41] And, with regard to the issue of upholding the integrity of the Waitaki Plan, in my view certain principles, policies and objectives of the Plan clearly are relevant here and would tend to assist RFB's position:

(a) 6. Objectives

Objective 3…in allocating water, to recognise beneficial and adverse effects on the environment and both the national and local costs and benefits (environmental, social, cultural and economic).

---

[29] Royal Forest and Bird, above n 1 at [101].

(b) 7. Policies

> Policy 1 By recognising the importance of connectedness between all parts of the catchment from the mountains to the sea and between all parts of fresh water systems of the Waitaki River…
>
> Explanation
>
> The Waitaki catchment is large and complex. This policy recognises the importance of taking a whole catchment approach "mountains to the sea" approach to water allocation in the catchment – an approach that recognises the physical, ecological, cultural and social connections throughout the catchment.
>
> Policy 12 To establish an allocation to each of the activities listed in Objective 2 (which includes agricultural and horticultural activities) by:
>
> (a) Having regard to the likely national and local effects of those activities; …
>
> (f) Considering the relative environmental effects of the activities including effects on landscape, water quality, Mauri…

9. Anticipated environmental results

> 1. There is a high level of awareness and recognition of the connectedness of the water bodies in the catchment – between the mountains and the sea…
>
> 6. The landscape and amenity values of water bodies within the catchment are maintained or enhanced.

(Emphasis added)

[42] In the Plan, "Waitaki Catchment" is widely defined as set out in s 4(1) Resource Management (Waitaki Catchment) Amendment Act 2004:

> (a) means the area of land bounded by watersheds draining into the Waitaki River; and
>
> (b) includes aquifers draining wholly or partially within that area of land.

[43] I am also mindful of the fact that this Court is to exercise the discretion to strike out a case or part of a case sparingly. In *Everton Farm Limited v Manawatu - Wanganui RC*[30] the Court said that an emphasis on efficiency should not detract from the importance of not depriving a person of their "day in court". I agree.

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[30] *Everton Farm Limited v Manawatu - Wanganui RC* EnvC Wellington, W008/02, 22 March 2002.

[44] I am also cognisant of the fact that my conclusion reached above with respect to s 120 has the result of rendering the application for strike out more unlikely than it was in the Environment Court as it broadens the evidential foundation of RFB's substantive appeal. Nor in my judgment can it be properly suggested here that RFB's appeal grounds are frivolous or vexatious or that they constitute an abuse of process.

[45] I am reinforced in these views by the ordinary principle that an appellate Court ought generally to defer to a specialist tribunal. This principle was applied in the RMA context in *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* where Wylie J stated:[31]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. *As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case.* No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Citations omitted and emphasis added)

[46] I appreciate the grounds of appeal raised by Simons purport to disclose appealable errors of law. However, there is a reasonable argument here that the conclusions reached by the Environment Court are fundamentally findings of fact. It is trite law, as noted above, that this Court, on appeal from the Environment Court, will not permit an appeal against the merits of a decision under the guise of an error of law. Though I need not reach a firm conclusion on this point, it does seem that Simons is simply unhappy with a decision and is now seeking to have those findings reconsidered. Those are matters to be properly addressed in the substantive appeal.

[47] For all these reasons, Simons' appeal against the Environment Court decision refusing to partially strike out RFB's appeal must fail.

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[31] *Guardians of Paku Bay Association Incorporated v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [33].

Costs

[48] RFB has been successful both in its cross-appeal and in resisting Simons' appeal. Costs should follow the event in the usual way.

[49] I have a reasonable expectation here that the question of costs ought to be the subject of agreement between the parties without the need to involve the Court. If however agreement cannot be reached and I am required to make a decision as to an award of costs, then RFB is to file submissions within 15 working days with submissions from Simons and the Council 10 working days thereafter.

.....
Gendall J

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