IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 182

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under clause 14 of the First Schedule of the Act
BETWEEN	M J BERESFORD, R T BUNKER & L M ROUSE
	(ENV-2018-CHC-69)
	Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Environment Judge S Tepania Environment Commissioner J T Baines
Hearing:	at Queenstown on 29 and 30 November 2023; and 7 December 2023
Appearances:	I Gordon & R Murdoch for the appellants S Scott & S Hart for the respondent P Page for Kirimoko No. 3 Limited Partnership (a s274 party) R Dixon and A Hill for the Attorney-General (a s274 party) Northlake Investments Ltd excused from attending hearing
Last case event:	8 February 2024
Date of Decision:	31 July 2024
Date of Issue:	31 July 2024

DECISION OF THE ENVIRONMENT COURT

A: The appellants' modified relief is the most appropriate, subject to some refinements. The appeal is allowed in part.

B: QLDC is directed to file proposed timetable directions for the filing of a final set of updated provisions for the court's approval (and to address the noted consequential matter concerning RCL notation).

C: The making of any s293 directions for the rezoning as Large Lot Residential, a strip of Rural zoned land on the western part of the Site, is reserved. Directions are made for the appellants to confirm their position on whether or not they seek the above-noted reserved s293 directions.

D: The making of any s293 directions to correct the Explanatory Statement to Ch 5 is reserved. Directions are made for QLDC to confer with parties and report on what is preferred.

E: Costs are reserved and a timetable will be set if need be in due course (but not before a final decision issues).

In memory

The Environment Court acknowledges the passing of Mr Michael Joseph Beresford, the original submitter and appellant, Mr Rangi Theodore (Theo) Bunker who was a co-successor in the appeal following Mr Beresford's passing and Dr Terry Ryan, the appellants' whakapapa Kāwai Kaitiaki who passed away following the filing of his written statement of evidence.

We express our condolences to their whānau, including to the remaining successor in the appeal, Ms Lorraine Rouse.

E ngā rangatira, kua ngaro koutou ki te pō, ki te pū o mahara

Kua kore koutou i te tirohanga tangata

Kua whetūrangitia i te korowai o Ranginui

He mihi, he poroporoaki

E moe, i te moenga roa, ki reira okioki ai

To you Sirs who have been lost to the night, to the void of memories

To you who are lost from sight

Who have been adorned as stars in the heavens

We acknowledge and farewell you

Rest now in peace.

REASONS

Introduction

[1] This appeal in the review of the Queenstown Lakes District Plan ('PDP'), concerns the appropriate zoning of a site in Wānaka known locally as 'Sticky Forest' ('Site').[1]

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1 The appeal is assigned as Topic 16, Stage 1, in our staged consideration of appeals in the PDP. The Site is legally described as Sec 2 of 5, Blk XIV, Lower Wanaka Survey District (CT OT18C/473).

[2] The approximately 50.7 ha Site is part of an elevated ridge, being a remnant glacial moraine deposit from ice scours that formed Lakes Hāwea and Wānaka. Some 25 ha of the Site, facing Lake Wānaka, is included in a large Outstanding Natural Landscape ('ONL') that the PDP planning maps show as extending across Lake Wānaka and its Rural-zoned environs. The balance of the Site, together with some contiguous land, is the subject of a Rural Character Landscape ('RCL') notation on the PDP planning maps.

[3] The Site is cloaked with a mature Pinus Radiata and Douglas Fir production forestry plantation. It is traversed by a myriad of mountain bike tracks that were developed by volunteers with the acquiescence of the Crown as the current administrator of the Site.

[4] The Site was at one stage a QLDC local purpose reserve. However, the Crown is now its temporary administrator pending completion of its obligations under the Ngāi Tahu Claims Settlement Act 1998 ('NTCSA') and the associated Ngāi Tahu Deed of Settlement ('Deed'). Those obligations have a long history as we later explain. It is sufficient at this point to record that the appellants, who are Ngāi Tahu Whānui, are some of the successors of certain persons to whom the Crown was required, under the South Island Landless Natives Act 1906 ('SILNA'), to have transferred land near "the Neck" between Lakes Hāwea and Wānaka, but never did so prior to that Act's repeal. The Site is substitute redress for that other land as provided for in the NTCSA and the Deed.

[5] As a result of administrative errors that occurred in the period of its transfer from QLDC reserve to the Crown's administration, the Site became legally landlocked. That contributed to QLDC's decision to decline Mr Beresford's submission seeking that the Site be rezoned for residential development. QLDC maintained its Rural zoning on the recommendation of its independent hearings panel ('IHP').[2] The IHP characterised Mr Beresford's submission as "premature",

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2 The IHP comprised Trevor Robinson (Chair), Jenny Hudson and Calum MacLeod.

recording that:[3]

> …. had the issue of legal access been resolved, it was likely that we would have found an urban zoning of at least part of the site to be appropriate.

[6] Insofar as the landlocked state of the Site was an impediment to its rezoning, that has now been resolved to QLDC's satisfaction. That is because the Crown has secured an access agreement with developers of the neighbouring Northlake residential area.

The zoning options

[7] In determining the appeal, we may consider zoning outcomes that range between the status quo Rural zoning and the relief in the appeal. However, the appellants have narrowed their relief and no party advocates that the entire Site remain zoned Rural (and nor does the evidence support that). Differences between the parties centre on the nature and extent of appropriate residential rezoning of that part of the Site that is outside the Dublin Bay ONL.

[8] In essence, subject to some confined issues of jurisdictional scope, the zoning options we consider are within a spectrum between the different zoning outcomes pursued by the parties as we now describe.

The appellants' modified relief

[9] The appellants accept that Rural zoning can be maintained over the 25 ha within the Dublin Bay ONL and an approximately 7 ha strip that runs along the Site's western boundary (i.e. for approximately 32 ha of the Site in total). For the remaining 19 ha of the Site, they seek rezoning to Large Lot Residential ('LLR') and Lower Density Suburban Residential ('LDSR'). The appellants also seek that the PDP urban growth boundary ('UGB') on the planning maps be repositioned

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3 IHP Report 16.15, dated 27 March 2018.

to align with those residentially zoned parts of the Site. This would be subject to:[4]

(a) a structure plan, a copy of which is Fig 1 in **Annexure 1**; and

(b) associated policies, rules and other provisions in PDP Chs 7 (LDSR), 11 (LLR), 21 (Rural) and 27 (Subdivision and Development).[5]

QLDC's preferred zoning outcome

[10] QLDC does not take issue with the extent of residential rezoning pursued by the appellants but seeks greater development restrictions. Its particular concern is about an approximately 5 ha[6] narrow strip that extends along the northern part of the Site adjacent to the Dublin Bay ONL ('Northern Finger'). It also seeks more generous building setbacks and planting buffers than the appellants propose.

[11] To reflect its position, QLDC proposed a modified structure plan in its opening submissions. A copy of this is Fig 2 in Annexure 1. As we later address, QLDC's closing submissions soften its position somewhat on these matters.

Kirimoko's preferred zoning outcome

[12] Kirimoko No. 3 Limited Partnership ('Kirimoko') seeks that Rural zoning be maintained over a larger proportion of the Site.[7] This is as depicted in the modified structure plan recommended by Ms Steven and which we reproduce as Fig 3 in Annexure 1. Counsel's opening submissions explain that Kirimoko seeks

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4 This summary is from the appellants' opening submissions and Chrystal EIC, dated 22 September 2022 at [3.1]-[3.4].

5 In their opening submissions, the appellants also sought that subdivision that accords with their proposed structure plan be assigned controlled activity status. That was instead of restricted discretionary status as would be otherwise provided for under the PDP. However, that request was not part of the appellants' original submission or appeal. Annexure 2 sets out why we find this change in relief is beyond jurisdictional scope.

6 Calculated from Coombes EIC, Fig 4.

7 Closing submissions for Kirimoko, dated 19 January 2024, at [14]-[27].

that:[8]

> … the relief should be limited to that set out by Ms Steven in her recommended structure plan at GA1.10; but subject to an *Augier* legal mechanism to secure public recreation access to the whole of the rural zoned land per the Notice of Appeal.
>
> [footnote omitted]

The zoning issues

[13] The key issues that arise from those zoning options concern these questions:

(a) would the relationship of Māori and their culture and traditions with their ancestral lands and sites be properly recognised and provided for having particular regard to kaitiakitanga and account for Te Tiriti?
(b) how would each option affect landscape values?
(c) what would best represent strategic and integrated urban development within the District?

[14] There are of course a range of associated issues. However, our findings pertaining to those questions inform our determinations on the zoning outcomes, including provisions that are in issue.

[15] Some issues of jurisdictional scope were raised on aspects of the appellants' modified relief. Our findings on those are in **Annexure 2**. The only part of the appellants' modified relief beyond jurisdictional scope is their request that controlled (as opposed to restricted discretionary) activity status be accorded to subdivision that accords with the proposed structure plan. We decline that relief by reason that it is both beyond scope and substantially inappropriate, as we explain.

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8 Opening submissions for Kirimoko, dated 23 November 2023, at [79].

Statutory framework and related principles concerning the zoning options

Our powers duties and discretions

[16] We have the same powers, duties and discretions in respect of the appealed decision as QLDC had at first instance. We may confirm, amend or cancel the associated first instance decision.[9] We must have regard to the appealed decision (implicitly including the associated report and recommendation of the IHP).[10]

Recognition of tikanga

[17] We must recognise tikanga Māori where appropriate.[11] The RMA defines tikanga Māori as Māori "customary values and practices". We are guided by the Higher Courts in these matters, including in the following observation by the Supreme Court in *Ellis v R*:[12]

> … while judges must increasingly work with tikanga, they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga … those roles belong in another place.

Evaluative matters

[18] We evaluate the various zoning options in terms of what is the most appropriate for achieving relevant PDP objectives.[13] In the case of rules, that evaluation is with regard to actual and potential effects on the environment of the activities they would enable, including adverse effects. Those include predicted future effects, bearing in mind that zoning serves to enable choices for future use,

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9 RMA, s290.

10 RMA, s290A.

11 RMA, s269(3).

12 *Ellis* v R [2022] NZSC 114, at [270]; also similar observations are made by Whata J in *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352 (HC), at [68].

13 RMA, ss 32, 32AA, as discussed in *Bridesdale Farm Developments Ltd v Queenstown Lakes District Council* [2021] NZEnvC 189, at [27]-[30].

development and protection of natural and physical resources.[14]

Pt 2 directions and considerations

[19] The preparation of the PDP is to be in accordance with QLDC's RMA functions (under s31) and pt 2.[15] QLDC's functions are already addressed in the PDP's relevant objectives that are not under challenge in the appeal. Hence, we consider those functions through the lens of those PDP provisions.

[20] We can consider the various pt 2 directions through relevant PDP objectives and policies, except where there are significant gaps or inaccuracies in those provisions.[16] On the evidence, the most significant pt 2 directions for achieving the s5 RMA purpose are:

(a) recognise and provide for:
    (i) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development (s6(b)); and
    (ii) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu, and other taonga (s6(e));
(b) have particular regard to kaitiakitanga, the maintenance and enhancement of amenity values and of the quality of the environment (ss7(a), (c), (f)); and
(c) take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi) (s8).

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14 RMA, s76(3), as discussed in *Bridesdale Farm Developments Ltd* at [27]-[30].

15 RMA, s72.

16 *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA), at [73]-[75]; *Environmental Defence Soc. Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 (SC) at [90].

Higher order instruments

[21] In all relevant respects, the PDP gives effect to relevant higher order RMA national and regional instruments. Nor are any of the zoning options sensitive to those instruments. Therefore, we do not further report findings on them.[17]

PDP objectives and policies concerning the zoning issues

Matters as to ss6(e), 7(a) and 8

[22] The PDP intends that the partnership between QLDC and Ngāi Tahu be nurtured. That includes recognising and providing for Ngāi Tahu as a partner in the management of the District's natural and physical resources "though [*sic*] the implementation of" the PDP (SO 3.2.7, Ch 5 explanatory text). Ch 5 includes Obj 5.3.4, "the sustainable use of Māori land" and Pol 5.3.4.1 is:

> Enable Ngāi Tahu to protect, develop and use Māori land in a way consistent with their culture and traditions, and economic, cultural and social aspirations including papakainga housing.

[23] However, inaccuracies in related PDP provisions give rise to uncertainty concerning whether Obj 5.3.4 and Pol 5.3.4.1 are applicable to the Site.

[24] The explanatory text introducing Ch 5 includes the following statement (our emphasis):

> The Ngāi Tahu Claims Settlement Act 1998 relates to remedying breaches of the Treaty of Waitangi **and does not cover Maori Freehold and South Island Landless Natives Act lands**. [emphasis added]

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17 In particular, in regard to those referred to in planning evidence, the National Policy Statement on Urban Development 2020 does not favour or count against any option, the National Policy Statement on Urban Development 2020 is not engaged on the evidence and the PDP already gives relevant effect to the various operative, partly operative or proposed Otago regional policy statements (which in any case do not count materially for or against any option).

[25] Contrary to that statement, as we discuss shortly, the NTCSA expressly addresses the Crown's Treaty breaches with respect to the SILNA. Furthermore, the NTCSA expressly allows for vesting of the Site according to the notified preferences of those in whom the land is to be vested pursuant to the NTCSA and the Deed. That does not exclude the potential for the Site to be vested as Māori Freehold land. Compounding matters, the PDP does not define Māori land for the purposes of Obj 5.3.4 and Pol 5.3.4.1.

Landscape matters

[26] The PDP comprehensively addresses s6(b), RMA in regard to identified outstanding natural features and landscapes ('ONF/Ls') of the District. The PDP identifies ONF/Ls by mapping and seeks to protect their landscape values (SO 3.2.5.2, SO 3.2.5.3, SO 3.3.30, SO 3.3.31). That includes by:

(a) treating as inappropriate any subdivision and development on or in an ONL unless the landscape values are protected and all buildings and other structures and all changes to landform or other physical changes to the appearance of land "will be reasonably difficult to see from beyond the boundary of the site in question" (Pol 6.3.3.1); and

(b) not compromising those values through subdivision and development within RCLs in proximity to ONLs (Pol 6.3.2.7, Obj 21.2.1 and related policies).

[27] The PDP also gives direction for the scheduling (in Sch 21.22) of identified landscape attributes and values and the landscape capacity of specified 'priority areas' within the PDP's ONF/Ls (SP 3.3.36 – SP 3.3.38). Dublin Bay, including

the 25 ha of the Site within the ONL, is a priority area for which a PDP variation has been notified for those purposes ('Dublin Bay ONL').[18]

[28] The PDP also provides for a class of landscape termed RCLs, in response to the directions in ss7(e) and (f) concerning amenity values and the quality of the environment. For those areas denoted RCL on the PDP planning maps, the PDP seeks that landscape character be maintained and visual amenity values be maintained or enhanced (SO 3.2.5.5, SP 3.3.35).

[29] There is also a policy to not degrade distinctive landscapes by production forestry planting and harvesting activities (Pol 6.3.2.3).

Recreational tracks

[30] The PDP seeks to provide for a range of activities that support the vitality, use and enjoyment of the Upper Clutha Tracks networks. That is "on the basis that landscape, visual amenity" and nature conservation values "are protected, maintained or enhanced", and established activities are not compromised (Pol 21.2.1.16). We have regard to this policy mindful that the network of tracks on the Site is not supported by any formal rights. Rather, the tracks were formed with the acquiescence of the Crown.

Urban growth and development

[31] The PDP seeks to manage urban growth in a strategic and integrated manner (SO 3.2.2) and provide for a quality built environment taking into account the character of individual communities (SO 3.2.3). As we later address, there are related policy directions including in regard to UGBs (Chs 3 and 4).

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18 Priority areas denote areas where, according to policy directions included in the PDP by decisions in appeals in Topic 30, QLDC is notifying PDP variations to schedule ONL values. We refer to this as the Dublin Bay ONL for convenience, recognising it is a landscape unit and priority area within the broader Lake Wānaka ONL.

The intentions of the relevant zones

LDSR zone

[32] The intentions of the LDSR, as reflected in its objectives and policies, are as follows:[19]

> … to enable development that provides for a mix of compatible densities (including higher density development where appropriate to the context) and a high amenity low density residential living environment, and which efficiently utilises existing infrastructure and minimises impacts on infrastructure networks. Of note, the existing LDRZ objectives and policies are not concerned with the visual effects of the development from beyond the zone but are very much internally focused.

LLR zone

[33] The intentions of the LLR, as reflected in its relevant objectives and policies, are as follows:[20]

> … to provide a low density residential area that achieves a high quality of residential amenity through lot size and building controls and having regard to hazards and human safety, including fire risk from vegetation. Again, the LLRZ objectives and policies are focused on the visual and amenity effects of the development within the zone rather than from beyond it.

Rural zone

[34] On matters of landscape, the objectives and policies of the Rural zone work together with those in PDP Chs 3 and 6. The Rural zone primarily seeks to:[21]

> (a) enable a range of activities, including recreation, (limited) commercial

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19 Jones EIC, dated 17 October 2022, at [6.32].
20 Jones EIC, dated 17 October 2022, at [6.34].
21 Jones EIC, dated 17 October 2022, at [6.36].

recreation, and commercial activities that have a link to the rural land;

(b) encourage production forestry to locate outside ONLs and not degrade landscape and visual amenity values, ensure harvesting avoids effects on landscape values;

(c) limit wilding species;

(d) provide for activities that support the Upper Clutha Tracks network; and

(e) enable earthworks where necessary for the use and enjoyment of land, including for recreation, including public walkways and trails while managing the adverse effects of it in order to protect the values of ONLs and maintain the amenity values of RCLs.

[35] The Rural zone does not include any policy enabling residential development.[22]

Evidence as to the zoning options

[36] **Annexure 5** is a table setting out the range of evidence called by the parties.

[37] Expert conferencing was undertaken according to the court's directions. A joint statement of the landscape experts ('JWS – Landscape') was filed prior to the commencement of the hearing.[23] Two rounds of expert conferencing were directed for the planning witnesses, producing two joint witness statements ('JWS – Planning (1)', 'JWS – Planning (2)').[24] The second round was directed after the court made the preliminary directions in **Annexure 4**.

[38] To assist our consideration of the evidence, we took viewings of the Site and environs from various locations (reporting back in open court on what we observed). That was according to the parties' recommended itinerary, although we also took some viewings from some other street viewpoints.

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22 Jones EIC, dated 17 October 2022, at [6.37].

23 Signed by Nikki Smetham, Shannon Bray, Bridget Gilbert, Brad Coombs and Anne Steven, dated 25 January 2023.

24 JWS – Planning (1) and (2) signed by Dean Chrystal, Katrina Ellis, Vicki Jones and Graham Taylor, respectively dated 9 February 2023 and 7 December 2023.

[39] As is noted in **Annexure 6**, several witness statements were entered into the record by consent. That includes a statement by the late Dr Ryan which informs our findings on some key issues. Except where we state otherwise, we accept all uncontested evidence.

Findings on key issues concerning the zoning options

[40] In the remainder of this discussion of the zoning options, we set out findings on the various issues arising under the questions we earlier noted, namely:

(a) would the relationship of Māori and their culture and traditions with their ancestral lands and sites be properly recognised and provided for having particular regard to kaitiakitanga and account for Te Tiriti?
(b) how would each option affect landscape values?
(c) what would best represent strategic and integrated urban development?

The court's preliminary observations

[41] The court made the preliminary observations in Annexure 5 following the testing of the landscape and ecology evidence and prior to the further round of expert conferencing of the planning experts that resulted in JWS - Planning (2). Those observations were about those key issues and how they pertain to our consideration of the zoning options, including as addressed in the JWS – Planning (1).

[42] A record of the preliminary observations was provided by Minute to the parties and the planners prior to that further conferencing. The planners were called to give evidence after the conclusion of the second round of conferencing.

The relationship of Māori and their culture and traditions to the Site

The evidence

[43] The only evidence on this set of issues was from the appellants and the Attorney-General ('AG'). As noted, the late Dr Ryan's evidence was entered onto the record by consent. Nor was the AG's relevant evidence materially challenged in cross-examination. We accept all that evidence as reliable for informing our related findings.

Submissions

[44] In his submissions for Kirimoko, Mr Page describes s8 RMA as a "shield" rather than "a sword to advance Treaty settlement or commercial imperatives".[25] He refers to the observation by Hinton J in *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* that the s8 direction is no higher than "to consider the particular factor in making a decision, to weigh it out with the other relevant factors, and to give it whatever weight is appropriate in all the circumstances".[26] Mr Page maintains that the appeal does not involve "claimed cultural value or association with this land for which the shield of protection is called for". He submits that the appellants "enjoy no greater rights to zones under the RMA than anyone else".[27]

[45] In contrast, the appellants submit that, on the evidence, the combined consequence of ss6(e) and 8 is to:[28]

> invite consideration of outcomes that will support active protection of the successors' interests in this Site as a source of economic support, and will enable – or at least not inhibit – some restoration/correcting of the impact of the

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25 Opening submissions for Kirimoko, dated 23 November 2023, at [49], [50].

26 *The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2022] NZHC 1846 at [77].

27 Opening submissions for Kirimoko, dated 23 November 2023 at [44]-[48], [50].

28 Opening submissions for the appellants, dated 23 November 2023, at [2.12].

grievances inherited from their ancestors on their mana.

[46] The AG concurs with the appellants' submission. QLDC does not materially differ from the appellants on these matters.

Evaluation

[47] We have noted some significant gaps and deficiencies in how the PDP addresses the relationship between Māori and natural and physical resources (ss6(e), 7(a) and 8). That particularly concerns the application of Obj 5.3.4 and Pol 5.3.4.1 to the Site. Furthermore, insofar as the PDP and higher order instruments address those pt 2 RMA provisions, they generally do not offer associated direction in the context of redress land provided as a substitute for land previously committed for transfer under SILNA. It is, therefore, appropriate that we have direct recourse to those aspects of pt 2 insofar as they are relevant and instructive for our decision.

[48] As the appellants submit, it is the unique historical context which establishes the relationship between the appellants and their fellow successors and the Site. That is not addressed in Ch 5 PDP nor in any other higher order document – a point that was not challenged by any other party.

[49] The appellants highlight that the architecture of Ch 5 PDP is framed around relationships between Papatipu Rūnaka and the environment within the district. The appellants are not members of the Papatipu Rūnaka who hold mana whenua over the part of the district within which the Site falls.[29] However, that does not preclude them from calling on ss6(e) and 8 in this case.

[50] We find that s6(e) is engaged in this instance because:

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29 "Members" reflects the language of Te Runanga o Ngai Tahu Act 1996, s13. "Each member of Ngai Tahu Whanui is entitled to be a member of each Papatipu Runanga of Ngai Tahu Whanui to which he or she can establish entitlement by descent."

(a) the appellants and their fellow successors are Kāti Irakehu, Kāi Tahu;

(b) the Site is ancestral land because of its location within the takiwā of Kāi Tahu, and that takiwā is ancestral land to Kāi Tahu, as recognised in the PDP;[30]

(c) the Site is ancestral land because of its specific whakapapa as the final resting place for long-standing grievances inherited by the appellants and their successors from their ancestors;[31]

(d) the relationship between the appellants and their fellow successors to the Site is fundamentally shaped by that whakapapa and, in particular, the Site's role in supporting and maintaining their economic wellbeing.[32] As the evidence of Dr Ryan and Mr Parker explains, that relationship originates from the Crown's unlawful alienation/deprivation of their tīpuna/ancestors from their land, and its subsequent initiatives to provide redress for that. That is reflected in the language of the Ngāi Tahu Deed of Settlement[33] and again in evidence given on behalf of Te Rūnanga o Ngāi Tahu in recent, related proceedings:[34]

> …the purpose of the Hāwea/Wānaka-Sticky Forest block allocation is to provide for the economic wellbeing of the successors…

[51] We accept the appellants' submissions that it would misinterpret s6(e) to treat it as inapplicable on the basis that the Site is not "ancestral" to the appellants

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30 Ryan EIC, dated 22 September 2022, at [3.1]-[3.3]; Proposed Queenstown Lakes District Plan, Chapter 39 – Wāhi Tūpuna, 39.1 – Purpose: "…Kāi Tahu regard the whole of the district as its ancestral land".

31 Ryan EIC, dated 22 September 2022, at [5.7]-[5.10].

32 Ryan EIC, dated 22 September 2022, at [4.16] and [5.10].

33 Referenced in Ryan EIC at [4.16]: Deed of Settlement between Te Rūnanga o Ngāi Tahu and Her Majesty the Queen in right of New Zealand, 21 November 1997, section 15.2, B, i and ii: "This failure to allocate these lands served to exacerbate the earlier Crown failure to set aside sufficient lands within the purchase areas to [give Ngāi Tahu] an economic base…".

34 Proposed variation to Chapter 21 – Rural zone of the Queenstown Lakes Proposed District Plan to include Landscape Schedules 21.22 and 21.23; Statement of Evidence of Rachael Pull on behalf of Te Rūnanga o Ngāi Tahu, 8 September 2023, at [29].

and their ancestors. Such an interpretation would be akin to enshrining that original severance and adding significant insult to injury. It would also be contrary to the jurisprudential direction of travel (including from the Higher Courts) which recognises the place of Māori to determine (with evidence) the nature of their relationship with natural and physical resources.[35] That is intrinsically linked to tikanga (and whanaungatanga specifically) which, as the Supreme Court has observed, "remains rooted in its own world".[36]

[52] We therefore acknowledge that s6(e) applies to our decision such that, along with other relevant matters in s6, we must "recognise and provide for" the appellants' relationship and their culture and traditions to the Site, the nature of that obligation being stronger than the other pt 2 directives in ss7 and 8.[37] As observed by the High Court in *Bleakley v Environmental Risk Management Authority*, "one does not "provide for" a factor by considering and then discarding it".[38] More is required. In cases involving s6(e), that obligation has commonly been

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35 See for example, *Ngati Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 11 (NZEnvC), at [43]; *Maungaharuru-Tangitu Trust v Hastings District Council* [2018] NZEnvC 79, at [59]: "What Māori regard as waahi tapu and other taonga is for them"; *Ngāti Maru Trust v Ngāti Whātua Ōrākei Whaia Maia Ltd* [2021] 3 NZLR 352 (HC) at [68], where Whata J observed that decision-makers must meaningfully respond to a claim by iwi that a particular outcome is required to meet statutory directions, which could involve evidential findings in respect of the applicable tikanga, and a choice as to which course of action best discharges the decision-maker's duties; and at [73]: "the obligation "to recognise and provide for" the relationship of Māori and their culture and traditions with their whenua and other taonga must necessarily involve seeking input from affected iwi about how their relationship, as defined by them in tikanga Māori, is affected by a resource management decision".

36 *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 11 (NZEnvC), at [39]; *Ellis v R* [2022] NZSC 114, at [181]. See also at [270]: "…while judges must increasingly work with tikanga, they have neither the mandate nor the expertise to develop or authoritatively declare the content of tikanga…those roles belong in another place".

37 *Long Bay-Okura Great Park Society Inc v North Shore City Council*, A78/2008, at [282].

38 *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213 (HC), at [72]; See also *Ngāti Hokopu ki Hokowhitu v Whakatane District Council* (2002) 9 ELRNZ 11 (NZEnvC), at [36].

effected by investigating alternative options and methods which may better "provide for" the nature of that relationship (as established on the evidence).[39]

[53] It is in that context that s7(a), requiring particular regard to kaitiakitanga, is engaged. Kaitiakitanga is defined within the RMA as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources…". Tangata whenua is defined in relation to a particular area as "…the iwi or hapu that holds mana whenua over that area".[40]

[54] We are mindful that we do not have expertise in mātauranga Māori before the court that speaks directly to a Kāi Tahu perspective of kaitiakitanga/kaitiakitaka. We do not wish to undermine Kāi Tahu and the exercise of kaitikiatanga/kaitiakitaka by the Papatipu Rūnaka. That said, we do not consider it a stretch to infer that for Kāi Tahu, the concomitant kaitiaki responsibility for the environment recognised in s7(a) RMA is an inherent part of the exercise of tino rangatiratanga or tino rakatirataka.

[55] Kāi Tahu through its Treaty relationship with the Crown, and in recognition of its ancestral connection to this land and close whakapapa-based inter-relationships (whanaungatanga/whanaukataka) within Kāi Tahu including with the hapū of Kati Irakehu, has sought to ensure that the appellants and their fellow successors do not remain landless, agreeing to the substitution of the Site for the ancestral land that should have been returned to the original claimants.

[56] Ownership of the Site is being transferred to the successors through the Ngāi Tahu Deed of Settlement. Te Rūnanga o Ngāi Tahu was one of the two signatories to that Deed, representing (as it still does) the Ngāi/Kāi Tahu Whānui and the 18 Papatipu Rūnaka of Kāi Tahu, including those who hold mana whenua

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39 See for example *Te Runanga o Ati Awa ki Whakarongotai Inc v Kapiti Coast District Council* W050/2003, at [75]; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* (2008) 14 ELRNZ 331 (EnvC), at [131]-[132] and [138].

40 RMA, s2.

over the Queenstown Lakes district area.[41] It is through Kāi Tahu's exercise of its mana motuhake and customary authority, consistent with its culture and traditions and its relationship with the Crown, that the provision of this land as redress was determined.

[57] Critically, the Deed recognises that the intended function of the Site is to provide for the economic wellbeing of the successors.[42] Enabling the use of the Site to best achieve that purpose is therefore consistent with Kāi Tahu's expression in that Deed of what it means to exercise guardianship over the Site. As further described in the evidence on behalf of Kāi Tahu:[43]

> The mamae (pain) generally felt by Kāi Tahu associated with land dispossession and alienation from traditional resources is represented by the Sticky Forest substitute land and the difficulty in accessing and using this whenua. Allowing for future uses of the land to realise whānau aspirations is viewed by Kāi Tahu as being in accordance with the principles of Te Tiriti o Waitangi.

[58] In continuing to exercise their cultural authority over the Site, Kāi Tahu continues to be involved with the Crown in the identification of owners for the transfer of interests through the Māori Land Court. As there is no representative body or entity in place to speak to the interests of the intended owners at large, the AG has joined this appeal so that the collective interests of the intended owners are before this court (acknowledging that the appellants are of that cohort). The AG's involvement in the appeal is in the public interest as the Site is redress land committed by the Crown in Treaty settlement.[44]

[59] Both Te Rūnanga o Ngāi Tahu and the Crown made submissions on the

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41 Te Rūnanga o Ngāi Tahu Act 1996, ss 9, 15(1). Te Rūnanga o Moeraki; Kāti Huirapa Rūnaka ki Puketeraki; Te Rūnanga o Ōtākou; Hokonui Rūnaka; Te Rūnanga o Oraka-Aparima; Te Rūnanga o Awarua; Waihopai Rūnaka.

42 Ngāi Tahu Deed of Settlement, 21 November 1997, section 15, Preamble (A), at 15.1.

43 Proposed variation to Chapter 21 – Rural zone of the Queenstown Lakes Proposed District Plan to include Landscape Schedules 21.22 and 21.23; statement of evidence of Rachael Pull on behalf of Te Rūnanga o Ngāi Tahu, 8 September 2023, at [38].

44 Monique Ahi King for the AG, EIC, dated 14 November 2022, at [17].

PDP essentially supporting the position of the appellants. They similarly participated in other planning matters impacting the land.[45] The continued exercise and assertion of authority over this land on behalf of the appellants and their fellow successors demonstrates the ongoing relationship of Kāi Tahu with the Site and their role as kaitiaki.[46]

[60] As the Site is redress land to be transferred in response to breaches of Te Tiriti committed by the Crown against the appellants' ancestors, the appellants submit that s8 is also engaged. We agree. As the Waitangi Tribunal found:[47]

> … The tribunal is unable to escape the conclusion that, to appease its conscience, the Crown wished to appear to be doing something when in fact it was perpetrating a cruel hoax. In the tribunal's view the facts speak for themselves. The tribunal is unable to reconcile the Crown's action with its duty to act in the utmost good faith towards its Treaty partner. The Act and its implementation cannot be reconciled with the honour of the Crown. The tribunal finds the Crown's policy and the legislative implementation of the policy in relation to landless Ngai Tahu to be a serious breach of the Treaty principle requiring it to act in good faith.

[61] The appellants describe this in relation to tikanga principles of *hara* and *ea*. In reference to the Supreme Court's decision in *Ellis v R*, they note that:[48]

> …"hara" at a simplified level means: the transgression of tapu; the commission of a wrong, and the violation of tikanga resulting in an imbalance. This requires a restoration of balance or the achieving of a state of "ea".
>
> …
>
> …The notion of ea indicates the successful closing of a sequence and the restoration of relationships, or the securing of a peaceful outcome.

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45 King EIC, dated 14 November 2022, at [46].

46 King EIC, dated 14 November 2022, at [47].

47 Waitangi Tribunal (1991) *The Ngāi Tahu Report*, Wai 27, Volume 3. GP Publications, Wellington New Zealand, pp 999-1000. Also refer Dr Ryan, EIC, pp 10-11.

48 Opening submissions for the appellants, dated 23 November 2023, at [2.12]. Counsel cite a statement of evidence in *Ellis v R* [2022] NZSC 114, Sir Hirini Moko Mead and Prof Sir Pou Temara, dated 31 January 2020, at [59]-[61].

[62] We accept the AG's submission that the Treaty principles of partnership, active protection, and redress, are particularly apt in this case.[49] As counsel for the AG submits:[50]

> 46. The principle of partnership contains a concomitant duty to act in good faith. The Environment Court has previously found that it is inherent in the obligation to act in good faith that decision-makers exercising functions under the RMA are obliged to make informed decisions on matters affecting the interests of Māori.[51]
>
> 47. Under the principle of active protection, the Crown has a positive duty to protect Māori interests and taonga. In the *Lands* case, the Court of Appeal said that the Crown's duty to protect Māori rights and interests "is not merely passive but extends to active protection of Māori people in the use of their lands and waters".[52] The Privy Council has stated that the duty requires what is reasonable in the prevailing circumstances.
>
> 48. In the present circumstances, the principle of active protection requires consideration, in determining the most appropriate zoning and provisions for the Land, of the outcome that will best enable the intended owners to use their redress land to support their wellbeing into the future. The Court should take into account the extent to which the relief sought by each party to these proceedings actively protects the interests of the intended owners. The relief which enables greater choice and opportunity for the intended owners to use the Land is best aligned with the principle of active protection.
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> 49. Under the principle of redress, where the Crown has breached the Treaty and its principles, a right of redress arises. The appropriate remedy will vary from case to case but it should be practical,[53] adequate,[54] fair and

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49 The application of the principles of active protection and redress are discussed in the legal submissions on behalf of the AG under the heading *Application of Part 2 RMA in this case – section 8*.

50 Submissions on behalf of the AG, dated 23 November 2023, at [46]-[49].

51 *Sustainable Matatā v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [209]-[211].

52 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664.

53 Waitangi Tribunal, *Report on the Manukau Claim*, at 99.

54 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 664-665.

> reasonable,[55] and proportionate to the nature of the breach and the prejudice identified.[56] The Court is being asked to determine the most appropriate planning provisions for land which is redress for historical breaches of the Treaty. The Appellants are two of the persons entitled to that redress and are seeking to progress this rezoning to facilitate their aspirations for future use of their redress land. Enabling greater choice and opportunity for the intended owners to use the Land is consistent with the principle of redress.

[63] We accept that in that context, and consistent with a "broad and generous construction",[57] Te Tiriti and its principles invite consideration of outcomes that will support active protection of the successors' interests in this Site as a source of economic support and will enable – or at least not inhibit – some restoration/correcting of the impact of the grievances inherited from their ancestors on their mana.[58]

[64] We find Mr Chrystal and Ms Ellis give appropriate consideration to ss6(e) and 8 rather than unduly prioritising them over other relevant pt 2 directions (as particularised through the PDP). We find their conclusion that ss6(e) and 8 also invite consideration of an outcome that will best support the economic wellbeing of the appellants and their successors is entirely appropriate as a matter of law. On the evidence, not recognising that would not properly respond to the direction in those provisions.[59]

[65] We acknowledge that the nature of the obligation of the court under s8 RMA can be distinguished from the role of the Crown in delivering redress to the appellants or their fellow successors for breaches of Te Tiriti. But nor do ss6(e), 7(a) and 8 allow us to disregard that context which informs the appellants'

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55 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 at 693.

56 Waitangi Tribunal, *The Turangi Township Remedies Report*, at 77.

57 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, at [151].

58 Kāi Tahu ki Otago Natural Resource Management Plan 2005, section 4.2.5, principle of active protection and principle of redress for past grievances.

59 Opening submissions for appellants, at [4.7].

relationship to the Site and engages Te Tiriti principles. It is appropriate for us to recognise that the Site is redress land intended to be transferred by the Crown so that the appellants and other descendants can realise the economic aspirations that should have been afforded their tīpuna. As a principle under s8 the appellants and their fellow successors must not be deprived of the redress promised to them by the Crown. To the extent to which any available zoning option would diminish the value of the Site for those redress purposes is a relevant matter for us to consider, given the principle of redress and the Crown's obligation to right past wrongs.

[66] We agree with the appellants that, within the unique circumstances of this case, those matters must shape what it means to promote sustainable management toward an outcome which will enable "highest and best use" of the Site for the appellants and their successors.

[67] For those reasons, we do not accept Kirimoko's analogy with "swords and shields" or its submission that the appellants "enjoy no greater rights to zones under the RMA than anyone else". The relevant pt 2 provisions, and related PDP provisions, are concerned with the different relationships as between people and places, including those that are identified as valued landscapes. Rather than espousing an equal rights approach, pt 2 singles out and prioritises certain matters as we have discussed.

[68] We find the appellants' modified relief (including with respect to the zoning treatment of the Northern Finger) is the most appropriate means of achieving the purpose of the RMA:

(a) regarding s6(e), that is particularly considering the evidence concerning the Site's history and the relationship of the appellants and the broader iwi to the Site;
(b) regarding s7(a), that is particularly in terms of the evidence concerning steps taken by Kāi Tahu to maintain and facilitate that connection

consistent with their whanaungatanga with the appellants and their fellow successors and Kāi Tahu's customary authority to determine the same; and

(c) regarding s8, that is in terms of the evidence as to the overarching redress purpose of the Site to provide for the economic wellbeing of the successors and taking into account the Treaty principles of redress, partnership and active protection.

How would each option affect landscape values?

What is a landscape?

[69] Neither the RMA nor the PDP defines 'landscape'. Given that the landscape experts endorse and apply the current landscape professionals' assessment guidelines, *Te Tangi a te Manu* ('Guidelines'), we adopt its definition of this term, as follows:[60]

> Landscape embodies the relationship between people and place. It is the character of an area, how the area is experienced and perceived, and the meanings associated with it.

[70] According to that definition, we treat landscapes as a geographic embodiment of relationships between people and place. That is in the sense that:[61]

> Landscapes are part of who we are. They are the natural systems on which we depend, how we live with our land, and the meaning and pleasure we take from our surroundings. They are part of our identity. Landscapes are important to us all. …

[71] In one sense, the mountains, lakes, roche moutonnée, outwash terminal moraine and other features of the Upper Clutha are a vast ice-sculptured landscape.

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60 *Te Tangi a te Manu, Aotearoa New Zealand Landscape Assessment Guidelines*, Tuia Pito Ora, NZILA (July 2022).

61 *Te Tangi a te Manu*, at [1.01].

However, small landscapes can nest within larger ones. A practical approach is required for identifying the spatial extent of the relevant landscape for assessment purposes. *Te Tangi a te Manu* offers relevant guidance.[62] District plan maps that identify landscape overlays do not necessarily delineate the boundaries of a landscape for assessment purposes. Landscape values and attributes can spill beyond boundaries "in both directions" and, hence, landscape assessments need to "look beyond lines on maps to the actual landscape".[63]

[72] Drawing from her earlier work, Ms Steven describes a landscape unit that she considers to inform the "geomorphic value" of the Site.[64] That is as "the largest, highest and most prominent part of the terminal moraine loop enclosing the south end of Lake Wānaka, reaching over 400m in altitude". She explains:[65]

> The Beacon Point Ridge is largely intact and highly legible as a moraine ridge with a moderately natural character as undeveloped rural land. The conifer forest cover reduces naturalness and masks topographical detail but the overall form of the deposit is legible. This is particularly so from the west and south where the reasonably abrupt change in slope represents the ice-contact face. In the event of the removal of the plantation, under a more natural grassland/shrubland cover legibility would improve. The ridge rolls away more gently and expansively to the east, and descends southward through Peak View Ridge to a meltwater channel where Aubrey Road is.
>
> The landform has a spatial and visual relationship with other features in the vicinity – the river-cut Outlet, the roche moutonnee of Mt Iron, the meltwater channels of Aubrey Road and SH6, and other loops of the moraine ridge in open space such as Scurr Heights, Lismore Park and the Golf course.
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> Overall whilst urban development over the last 20-30 years has compromised the legibility of the Wānaka terminal moraine landform in places through physical

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62 *Te Tangi a te Manu*, at [5.15]-[5.20].

63 *Te Tangi a te Manu*, at [5.20].

64 This work was undertaken in 2003, together with another highly experienced landscape Expert, Di Lucas. This was in relation to an earlier district plan review.

65 Steven EIC, dated 28 November 2022, at [9.5]-[9.7].

> alteration and masking it with housing, sufficient key parts remain in open space for it to remain identifiable as a distinctive landform element along with Mt Iron. The Beacon Point Ridge is the largest and most legible part. The landforms collectively contribute strongly to the sense of place of Wānaka and tells an important part of the story of the genesis of the place of Wānaka.

[73] As can be observed, Ms Steven's landscape unit treats the Site as a whole and extends well beyond it. The geographic extent of the unit is guided by cues of legible terminal moraine landform. It encompasses large areas of suburban Wānaka that are not ascribed any landscape notation or value in the PDP. However, for landscape assessment purposes, we see no difficulty with that. Rather, those evaluative matters pertain to the further stage of considering landscape values and effects. It is at that stage that the PDP's directions on what landscapes have value and why becomes more significant.

[74] We accept Ms Steven's Beacon Point Ridge landscape unit as coherent and helpful for our assessment purposes and we rely on it accordingly.

What landscape classes are recognised in the PDP?

[75] As we have explained, the PDP identifies two classes of landscape in the Upper Clutha part of the District, namely:

(a) ONF/Ls being those mapped natural features or landscapes whose landscape values the PDP seeks to identify and protect for the purposes of s6(b) RMA; and

(b) RCLs being mapped areas typically within Rural zones and in respect of which the PDP seeks that landscape character be maintained and visual amenity values be maintained or enhanced for the purposes of ss7(c) and (f) RMA.

[76] The PDP does not map or recognise any landscape classes other than ONF/Ls and RCLs.

What parts of the Site are within a relevant PDP landscape?

The evidence

[77] Some 25 ha of the Site, facing Lake Wānaka, is within the PDP's mapped Dublin Bay ONL boundaries.

[78] The remainder of the Site is denoted RCL under the PDP. In essence, that notation is a remnant of the RCL that once extended across Rural zoned land as far as Albert Town but which has now been mostly subsumed into suburban Wānaka.

[79] Ms Smetham and Mr Bray consider that the RCL component of the Site is too small to be considered a "rural landscape".[66] In her rebuttal of this aspect of Mr Bray's evidence, Ms Steven disagrees that the Site "is too small as a piece of rural land to retain any values as rural land".[67] Notably, in that response, she does not use the word "landscape", but rather "rural land" (a term not used by Mr Bray).

Submissions

[80] The appellants submit that the Site is not a RCL and does not have any relevant RCL values. The question of whether or not this part of the Site is a rural character landscape is less significant for QLDC in that it does not seek retention of Rural zoning other than in respect to the Dublin Bay ONL part of the Site (on which point the appellants concur). On the other hand, Kirimoko submits that this part of the Site together with Rural zoned parts of Kirimoko Block constitute a RCL. It further submits that the consensus of the landscape experts is that their identified RCL values would not be maintained or enhanced by the appellants' modified relief.[68]

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66 JWS – Landscape, at [8.2].

67 Steven EIC, dated 28 November 2022, at [9.21].

68 Closing submissions for Kirimoko, dated 19 January 2024, at [3].

Evaluation

[81] While we adopt Ms Steven's landscape unit for our assessment purposes, we prefer the opinions of Ms Smetham and Mr Bray concerning the landscape significance of the Site.

[82] Although noting that the Site is shown on the PDP planning maps as within the Dublin Bay ONL and a RCL, we apply a purposive and contextual approach, according to the Legislation Act 2019. We read the planning maps subject to relevant PDP objectives concerning landscapes.[69] The RCL mapping of part of the Site does not serve the intentions of the PDP. That is because that mapping is essentially a small remnant of an original rural character landscape that is now far too small to constitute a landscape. Therefore, we find that the PDP:

(a) intends that subdivision and development of the 25 ha of the Site that is within the Dublin Bay ONL protect ONL values; but
(b) does not intend that the landscape character of the remainder of the Site be maintained or that its visual amenity values be maintained or enhanced.

How does the landscape embody a relationship between people and place?

Introduction

[83] *Te Tangi a te Manu* describes the following overlapping dimensions of landscapes:[70]

(a) *Physical* encompassing both natural and human features, and the action (and interaction) of natural and human processes over time;
(b) *Associative* encompassing intangible things that influence how places

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69 Legislation Act 2019, s10.
70 *Te Tangi a te Manu*, at [4.23], emphasis added.

are perceived – such as history, identity, customs, laws, narratives, creation stories, and activities specifically associated with the qualities of a landscape; and

(c) *Perceptual* encompassing both direct sensory experience and broader interpretation through the senses.

[84] The evidence reveals that, in terms of the relationship of people and place, the described 'associative' dimension to landscape is of particular significance for our purposes.

The evidence

[85] Each of the landscape experts accounts for the above-described associative dimension of landscape in their evidence concerning the Site.

[86] Mr Coombs, called by QLDC, refers to "the perceived naturalness" of the Dublin Bay ONL as contributing to the "particular landscape values" of that part of the lake including the northern slopes of the Site. That set of associative matters contributes to his rating of landscape values for this part of the Dublin Bay ONL as "Moderate-high" in that those values are a synthesis of "physical, associative and perceptual values.[71] His perspective on that informs his concern as to the effects of allowing development on the Northern Finger. He explains:[72]

> The heightened naturalness as experienced from the lake waters and the foreshore are directly related to the dominance of land use and landcover patterns, as described in the Dublin Bay ONL schedule. The presence or visibility of individual houses or buildings in the landscape may be small or noticeable intrusions into the local landscape, however they are still subservient to the overall dominance of the natural elements and processes that are experienced from the lake.

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71 Coombs EIC, dated 17 October 2022, at [7.14].

72 Coombs EIC, dated 17 October 2022, at [9.6].

[87] In response to Mr Bray's opinion that the appellants' modified relief avoids "landscape effects on the ONL itself", Mr Coombs refers to *Te Tangi a te Manu* as providing guidance that supports his own approach of treating development outside the ONL as leading to adverse effects on the ONL values.

[88] Ms Gilbert's brief was a narrow one. Accounting for Mr Coombs' landscape assessment evidence, she gave her opinion on how this should be reflected in an appropriate landscape policy response. That is in particular in terms of what changes should be made to the PDP's policy settings as part of a rezoning decision. Ms Gilbert agrees with Mr Coombs that those settings should direct that "urban built form" be set back "behind natural landform so that it is not visible from the eastern arm of Lake Wānaka". That is so as to create "the impression of sympathetic 'urban landscape' / 'outstanding landscape' interface sequence, in which the overtly visible urban development in the vicinity of Beacon Point gives way to a very limited scattering of houses at the north-western end of Peninsula Bay".[73]

[89] In her rebuttal, Ms Smetham confirms that she reads the production forestry (aligning to cadastral boundaries) and mountain bike tracks as detracting from perceptions of naturalness.[74] Hence, she defends her view that this part of the Dublin Bay ONL has a lower landscape value (although she does not take issue with the Dublin Bay ONL having Moderate-High natural character).[75]

[90] Ms Steven disagrees with Mr Bray's opinion that only the northern end of Beacon Point ridge has any landscape value. In her opinion, Sticky Forest is particularly important in terms of its "larger scale and diversity of opportunities (notably mountain biking) and a relatively natural and remote experience despite proximity to the urban areas". In her view, the "continued visual presence and legibility of the remaining more natural undeveloped higher and large parts of the

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73 Gilbert EIC, dated 17 October 2022, at [7.13]-[7.19].

74 Smetham rebuttal, dated 20 December 2022, at [5.10].

75 Smetham EIC, dated 22 September 2022 at [6.28].

terminal moraine ridges is important to the town's character and identity and to its perceived experiential and functional quality".[76]

[91] All of the landscape experts endorse the PDP's identification of mana whenua associations with respect to the Dublin Bay ONL. Ms Smetham discusses those associations with the Site.[77] However, none of the experts appear to have accounted for those associations as are explained in Dr Ryan's evidence.

[92] Ms Gilbert and Ms Steven regarded Dr Ryan's evidence as beyond their remit as it was concerned with the economics of land development.[78]

[93] Apart from what is stated in the PDP variation concerning mana whenua values, Ms Steven explained that she did not consider that she had any further information available to her. She commented that she preferred to focus on information that she considered would be helpful to the court in relation to matters that she "… had a professional obligation to provide …".[79]

[94] Ms Gilbert commented on the difficulty she found in "reconciling if you like landscape effects and enabling cultural aspirations". She agreed that "we see what we see through the eyes that we see them, don't we, and we carry with it the history that goes with what we perceive".[80]

Submissions

[95] In closing submissions, Mr Gordon identifies this gap and related imbalance in the landscape evidence as going to how the court should weigh matters, particularly in regard to the cases advanced by QLDC and Kirimoko. He characterises QLDC as having taken a "single-minded and unreasonable"

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76 Steven EIC, dated 28 November 2022, at [9.18], [9.19].
77 Smetham EIC, dated 22 September 2022 at [7.15].
78 Transcript, p 154, l 21, p 231.
79 Transcript, p 220, l 6-8.
80 Transcript, p 156, l 7-34, p 157, l 6.

approach in light of the "whakapapa evidence" and "the overarching redress purpose of the Site to provide for the economic wellbeing of the successors".[81] He criticises Ms Steven's approach as being resistant to the consideration of "the associative values deriving from the whakapapa of the Site as a key value of the ONL part of the Site".

[96] Surprisingly, given the court's questioning of Ms Gilbert, QLDC does not offer specific closing submissions on these matters.

[97] For Kirimoko, Mr Page defends Ms Steven as having been rigorous in not going outside the scope of her role and her expertise. He submits that it is for the court to evaluate Dr Ryan's evidence, although accepting that he should have ensured that Ms Steven's written evidence acknowledged that such associations exist but were not evaluated.[82]

[98] Mr Page also submits that "criticism of the evidence of Ms Steven implicit in Judge Hassan's questions of her were, with respect, unnecessary".[83] In the interests of transparency, we include a full record of the transcript of the questioning in Annexure 4.

[99] According to s269 RMA, it is part of the court's role to question witnesses, subject of course to principles of natural justice. In this case, the landscape opinions offered by the various experts, particularly as to associative dimensions of the landscape, go to the ultimate issue between the parties. That is in the sense that the determination of the most appropriate zoning outcome very much turns on what the court may find concerning the landscape consequences.

[100] The court's questioning of Ms Steven was lengthy and at times robust. However, she is a highly experienced expert whom the court adjudged capable of

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81 Closing submissions for the appellants, dated 9 February 2024, at [3.5].

82 Closing submissions for Kirimoko, dated 19 January 2024, at [4].

83 Closing submissions for Kirimoko, dated 19 January 2024, at [4].

assisting even when the issues being tested were challenging. The transcript reveals that her answers were full and frank, according to her Code responsibilities, and of assistance to the court. Insofar as counsel had any concern about anything the court asked Ms Steven, it was open to him to ask Ms Steven questions arising, but he did not do so.

Evaluation

[101] The ultimate issue of the most appropriate zoning outcome turns significantly on how enabled development would affect what people associate and value with respect to the landscape in issue. That is in the sense that landscapes concern a relationship of people and place and are "part of who we are".

[102] We have already commented that we find that none of the landscape experts accounted for mana whenua associations in their assessments, according to the guidelines in *Te Tangi a Te Manu*. As this is a matter affecting how we weigh the landscape evidence, we commence this part of our decision with a discussion of what those Guidelines recommend.

Relevant guidance in *Te Tangi a Te Manu*

[103] On the associative dimension to landscape, the Guidelines explain:

> Such associations typically arise over time and out of the relationship between people and place. Tāngata whenua associations are therefore especially relevant because of primacy and duration. Pūrākau, tikanga, whakapapa, and mātauranga are key considerations of the associative dimension from a Te Ao Māori perspective, particularly important when considering matters such as mauri and wairua. Other terms sometimes used for this dimension include 'intangible', 'meanings', 'place-related', and 'sense of place'.

[104] Recognising that landscape assessment practice evolves, *Te Tangi a te Manu* offers detailed guidance on the undertaking of landscape assessment from both te

ao Māori and Western perspectives, stating:[84]

> In Aotearoa New Zealand, being informed on landscape matters includes awareness of Te Ao Māori and having regard to tāngata whenua matters. Such matters are integral to Aotearoa's landscapes.

[105] Te ao Māori is a term for an indigenous world view within Aotearoa. Te ao Māori comprises te reo Māori, tikanga Māori, values, beliefs and histories: collectively framing a world view by which tangata whenua in Aotearoa can engage with, and make sense of, the world.[85]

[106] Noting that 'landscape' is a Western concept that has evolved and will continue to evolve in an Aotearoa context, the Guidelines caution that there are differences in te ao Pākeha and te ao Māori perspectives on the relationship of people and place being a central aspect of the definition of 'landscape'.[86] Within te ao Māori, landscape is a non-Māori cultural construct that sits within the broader concept of whenua.[87] *Te Tangi a te Manu* offers the following guidance:[88]

> 4.14 … while 'landscape' has Western origins, it is now a shared concept. Professional landscape assessment should therefore also pay attention to tāngata whenua matters which enrich understanding and appreciation of the landscape. Such matters may include:
>
> - tāngata whenua pūrākau, tikanga and whakapapa associated with a landscape (including creation and origin narratives)
>
> - the significance and meaning of place names and landscape features
>
> - metaphysical concepts such as wairua and mauri

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84 *Te Tangi a te Manu*, at p 51.
85 *Te Tangi a te Manu*, at [3.22].
86 *Te Tangi a te Manu*, at [4.07]-[4.09].
87 *Te Tangi a te Manu*, at [4.08].
88 *Te Tangi a te Manu*, at [4.14].

- landscape stewardship concepts such as kaitiakitanga and mātauranga

- customary activities associated with places

- legal recognition of certain features as having the legal status of a person (Whanganui River, Te Urewera, Taranaki maunga).

[107] The Guidelines summarise "tangata whenua have a holistic relationship with whenua that integrates physical, associative and perceptual dimensions".[89] That contrasts with a school of 'Western' thinking that puts man at the centre of creation (e.g. *Genesis* 1:28). Nevertheless, the Guidelines recognise correlations between the profession's understanding of the three dimensions of landscape, whenua and mātauranga Māori concepts, as it portrays in the following diagram:[90]

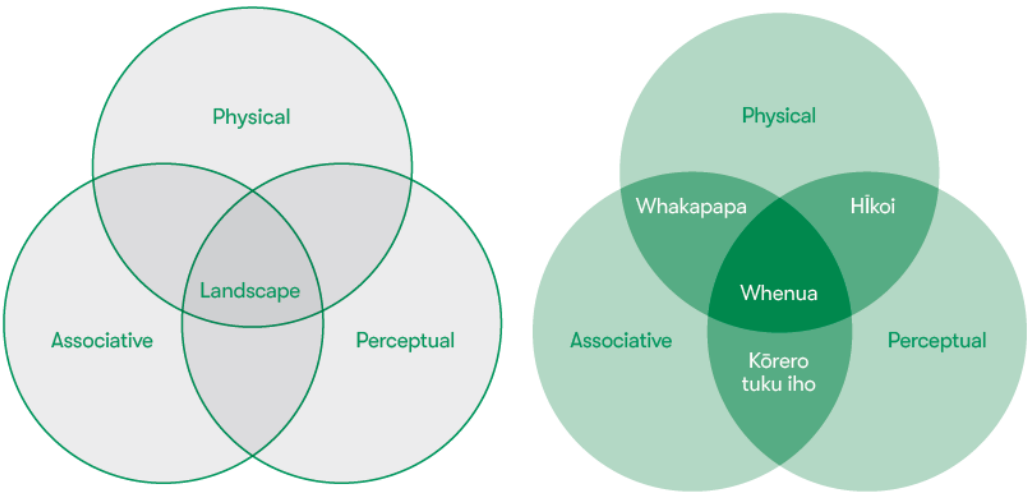

Figure 4. Landscape conceptualised as the intersection of three overlapping dimensions (left). Whenua conceptualised as the intersection of three overlapping dimensions and an overlay that integrates mātauranga (right).

89 *Te Tangi a te Manu*, at [4.15].

90 *Te Tangi a te Manu*, [4.10], [4.11] citing Hatton, William and Paul, Jacqueline in Hill, C. (Ed), Kia Whakanuia te Whenua, People Place Landscape, 2021, p 196.

[108] As to the right-hand diagram, *Te Tangi a te Manu* states (with reference to cited sources):[91]

Whakapapa:	the genealogy and layers of landscape and people (reflective of an overlap between biophysical and associative dimensions).
Hikoi:	walking and talking with landscape and people – experiencing and perceiving the land in all its entirety (reflective of an overlap between the biophysical and perceptual dimensions).
Kōrero tuku iho:	ancestral knowledge passed down through generations interconnected through time, place, and people – pūrākau (reflective of an overlap between perceptual and associative values).

[109] We did not receive any direct evidence challenging the way in which te ao Māori perspectives and approaches to landscape assessment are reflected in *Te Tangi a te Manu*. The Guidelines provide detailed references to recognised sources. On that basis, we find them sufficiently reliable on these matters for our purposes.

[110] In summary, the Guidelines recommend that landscape assessment applies a properly-informed pluralistic approach to the consideration of landscapes as a relationship between people and place. That reflects the RMA s5 "sustainable management" purpose, insofar as it refers to the enablement of the wellbeing, including cultural wellbeing, of "people and communities". It also reflects the inter-relationships that can apply between the directions in ss6(b) and 6(e), in light of ss7(a), (c) and (f) and s8, RMA.

[111] Ms Steven commented in questioning that landscape experts would not

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91 T*e Tangi a te Manu*, at [4.11], citing Hatton, William and Paul, Jacqueline in Hill, C. (Ed), Kia Whakanuia te Whenua, People Place Landscape, 2021, p 195, drawing from research of Smith, Huhana, Hei Whenua Ora, PhD thesis, Massey University, 2007.

normally speak for tāngata whenua unless delegated to do so. However, there is a difference between 'speaking for tāngata whenua' and reading and accounting for available evidence on associations, including mana whenua associations.

[112] That is not to say the expert would reach the same conclusions as the court on the relative significance of known associations. That is a matter for judgement, on the basis of the court's evidential findings and relevant directions under the PDP and RMA. However, part of the expert's duty is to be transparent as to what has been considered, what they have not considered, and why the expert has given priority to one set of known associations with the landscape over another.

[113] Importantly, whilst a landscape expert applies their trained expert eye in their process of landscape assessment, the exercise is not intended to be simply one of personal subjective judgement. Rather, an expert's evaluation of the associative dimension of a landscape is ultimately in order that relevant community values are accounted for. Hence, the trained expert eye must also be duly informed concerning those community values of particular significance in the relevant context. That is especially so when there are clear divergences in associations with a landscape that are relevant to the court's findings.

[114] *Te Tangi a te Manu* comments as follows on the role of the landscape expert with respect to the community (our emphasis):[92]

> People and communities have input to the management of landscapes through: i) submissions on policy (such as district plans …), and ii) submissions on specific proposals ….. Decision-makers will have regard to such views alongside expert evidence and the relevant statutory provisions …. The professional landscape assessor's role in this context is to assist decision-makers by:
>
> - providing an objective account of relevant landscape facts against which to test others' opinions

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92 *Te Tangi a te Manu*, at [2.23] and [2.24].

- providing an unbiased and independent expert opinion against which the range of community views might be compared

- assessing landscape matters in the context of the relevant provisions

- analysing, interpreting, and explaining landscape matters that other participants may lack the training to articulate.

> The role of an independent landscape assessor is therefore different from, but complementary to, that of communities and individual submitters. A landscape assessor should remain aware of the range of opinions and perceptions of landscape matters in the community and draw on available sources of information. **The purpose of such knowledge, though, is to help maintain the balance and insight of an impartial and independent professional assessment.**

[115] The Guidelines comment that part of a landscape assessor's role is to "assimilate an understanding of the range of views on landscape matters in the community".[93] Although the Guidelines make clear that it is "the prerogative of tāngata whenua to interpret their relationship to landscape", they explain that "landscape assessors should acknowledge tāngata whenua perspectives and endeavour to integrate such information into a landscape assessment". The Guidelines suggest the following as helpful sources of such information:[94]

- direct engagement with tāngata whenua[95]
- cultural impact assessments (CIA) or cultural landscape assessments (CLA)
- iwi management plans
- reports of the Waitangi Tribunal[96]

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93 *Te Tangi a te Manu*, fn 33 to [2.24].

94 *Te Tangi a te Manu*, at [5.41].

95 A potential pitfall is to rely solely on documentary research at the expense of engagement with tāngata whenua. Engagement is more important.

96 https://waitangitribunal.govt.nz/publications-and-resources/waitangi-tribunal-reports/

- statutory acknowledgements made as part of Waitangi Tribunal settlements[97]
- district plans
- general publications
- internet searches including marae websites which often contain hapū background.

[116] Surprisingly, the Guidelines do not refer to other evidence as a useful source of information. However, where that evidence is uncontested and directly concerns associative values in a landscape, it is plainly relevant to the purpose the Guidelines describe, namely to help maintain "the balance and insight of an impartial and independent professional assessment". That purpose is essentially a reflection of the experts' duties under the Practice Note code of conduct for expert witnesses ('Code').[98]

[117] That is not to say an expert cannot recommend an approach that gives preference to one set of associations with a landscape over another. For example, that may be in light of policy directions given in a relevant planning instrument. However, if landscape opinion is to fulfil the intentions of impartial and independent professional assessment, it needs to consider and account for what is available and relevant foundation evidence or information on associations with the landscape. In addition, the expert needs to report in evidence on why they find certain associations to be more significant than others as revealed in that evidence or information. Otherwise, the court is impeded in understanding whether the opinion offered is reliable and of substantial assistance.

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97 Statutory acknowledgements are recognition by the Crown of the mana of tāngata whenua over specified areas. Statements of statutory acknowledgements are set out in Treaty of Waitangi settlement legislation. Such 'statutory areas' relate only to Crown land. They are often recorded by regional and district councils in policy statements and district plans or on council websites.

98 https://environmentcourt.govt.nz/assets/Practice-Note-2023-.pdf.

Foundation evidence as to associative values

[118] For over 30 years, Dr Ryan was Kāwai Kaitiaki of Ngāi Tahu Whakapapa (an acknowledged authority on the contemporary whakapapa of the Ngāi Tahu people) which his evidence addresses.[99] His evidence describes the unique context in which the Site became involved in the NTCSA and "the manner in which this history anchors the relationship between the Appellants and their fellow successors and the Site".[100] He summarises the history dating back to the 1870s, whereby that relationship has come about, including:

(a) the significant shortfall by the Crown in delivering on the promise in the Kemp Purchase that it set apart "ample reserves for the present and future wants of" Ngāi Tahu in return for the acquisition of "some 13,551,400 acres of land from Ngāi Tahu, comprising most of Canterbury, Westland and Otago (including the Site)";[101]

(b) the failure to deliver redress under the SILNA by way of allocation of "around 1,658 acres of land at Manuhaea, or "the Neck" between Lakes Wānaka and Hāwea, as a permanent reserve for 50 individuals", before the SILNA was repealed in 1909;[102]

(c) Ngāi Tahu's "unremitting search for redress" from the Crown throughout the 20th century to honour its obligations under Treaty of Waitangi/Te Tiriti o Waitangi, including in relation to the various land purchases, and its promises made under SILNA;[103] and

(d) the Crown's "prevarication, neglect and indifference" prior to the Waitangi Tribunal's 1991 report and the Crown entering the Deed with Ngāi Tahu whereby the Site was identified as substitute redress land.[104]

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99 Ryan EIC, dated 22 September 2022, at [1.1].

100 Ryan EIC, dated 22 September 2022, at [2.2].

101 Ryan EIC, dated 22 September 2022, at [4.2], [4.3].

102 Ryan EIC, dated 22 September 2022, at [4.6], [4.9]-[4.16].

103 Ryan EIC, dated 22 September 2022, at [5.1].

104 Ryan EIC, dated 22 September 2022, at [5.1]-[5.3].

[119] We acknowledge that the landscape experts may not have encountered another case involving Treaty breach substitute redress land. However, reflective of his expertise, Dr Ryan's evidence conveys an understanding of tangata whenua associations.

[120] His evidence concerns longstanding mana whenua cultural associations of whanaungatanga, rangatiratanga and kaitiakitanga derived in part through the Crown's *hara*. He explains that, like Ngāi Tahu's cry in 2006, until the appellants' aspirations are answered by a realisation of the economic potential of the Site, that historically-anchored relationship with the Site by the appellants and their fellow successors will continue to be very painful. He explains why enabling the economic potential of the Site to be realised is the only way to address a longstanding *mamae*, arising from the Crown's breach of its obligations, dishonouring of the Treaty and consequential economic deprivation.

[121] Those are all matters at the heart of the associative dimension to landscape as described in the Guidelines, i.e. intangibles that influence how the place is perceived including history, identity, customs, laws and narratives.

[122] His evidence is relevantly corroborated by evidence for the AG on these matters, which was also not contested.

[123] Furthermore, the nature of the associations Dr Ryan's evidence addresses is recognised in the list of the Dublin Bay ONL landscape values in the PDP variation that the landscape experts materially endorse, that is:[105]

> High associative values relating to the mana whenua associations of the area, the strong recreational attributes of the landscape, and the shared and recognised values as part of the natural landform framing and enclosing Lake Wānaka.

[124] Dr Ryan's evidence is in all respects consistent with what the PDP variation

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105 PDP, EPlan, https://districtplan.qldc.govt.nz/proposed/rules/0/275/0/0/0/103.

explains on these associations, namely that the:

> … mamae (pain) generally felt by Kāi Tahu associated with land dispossession and alienation from traditional resources is represented by Sticky Forest substitute land and the difficulty in accessing and using this whenua. Kāi Tahu considers that allowing for future uses of the land to realise whānau aspirations is in accordance with the principles of Te Tiriti o Waitangi.

Findings on the evidence

[125] The court has an overriding discretion as to the admission and weighing of expert evidence, guided by the Code and principles under the Evidence Act 2006.[106] The landscape experts offer opinions on an ultimate issue, namely the most appropriate zoning outcome for achieving relevant PDP objectives concerning landscapes. Of itself, that does not render those opinions inadmissible.[107] The more significant issue, however, is whether the opinions are of substantial help on issues for determination, given that they do not account for mana whenua associations with the landscape.[108] That imbalance in the landscape evidence is a matter going to the reliability of the experts' related opinions on zoning outcomes. That is particularly given that the PDP intends that we evaluate the associative dimension to landscape from both te ao Māori and te ao Pākehā perspectives. On the basis of the evidence of Dr Ryan and Crown witnesses, we find that mana whenua landscape associations with the Site as part of the landscape include longstanding:

(a) *mamae* derived from the Crown's dishonouring of its obligations; and
(b) whanaungatanga by Kāi Tahu with the appellants and their fellow successors.

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106 Code, cl 9(e).

107 EA, s25(2)(a).

108 EA, s25 specifies to the effect that the admissibility of expert opinion is contingent on whether the opinion is of substantial help for the purpose of understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.

[126] As we discuss later, those associations favour the appellants' modified relief option.

[127] In respect to other associations with the landscape, we prefer the opinions of Mr Bray and Ms Smetham overall. Our viewings of the Site from identified viewpoints reinforced our confidence that their opinions are realistic, albeit subject to the limitations we have noted.

[128] Relying on their evidence, we find the northern slopes of the Site, as part of an enclosing landform, contribute to the perceived naturalness of the Dublin Bay ONL at least from a te ao Pākehā perspective. We find that that perceived naturalness, an associative dimension of the landscape unit we have earlier described, is important to the relationship of people and place and is an aspect of the landscape values that the PDP seeks be protected (including according to the listing of landscape values in the noted PDP variation).

What are the landscape values of the Site and how do we rate them?

The evidence and submissions

[129] Submissions of the parties on these matters essentially reflect the different landscape opinions as we now summarise.

<u>The part of the Site within the Dublin Bay ONL</u>

[130] For the part of the Site that is within the Dublin Bay ONL, the landscape experts have similar opinions on the relevant landscape values. In particular, the JWS – Landscape records agreement that the list of values proposed (by variation)

to be included in the PDP is "generally appropriate".[109] The list is as follows:[110]

> The physical, associative, and perceptual attributes and values described above for Dublin Bay PA come together and can be summarised as follows:
>
> 40. **Moderate-high physical values** due to the clarity, quality and enclosed nature of the lake waters, the largely unmodified roche moutonnée and moraines surrounding the lake, and the mana whenua features associated with the area.
>
> 41. **High associative values** relating to the mana whenua associations of the area, the strong recreational attributes of the landscape, and the shared and recognised values as part of the natural landform framing and enclosing Lake Wānaka.
>
> 42. **Moderate-high perceptual value**s relating to:
>
> a. The expressiveness values of Mount Brown and the moraines and terraces enclosing the lake and outlet;
>
> b. The aesthetic and memorability values due to the accessibility of the PA for residents of and visitors to Wānaka, the highly attractive views available across the lake waters to the enclosing landforms, the extent of regenerating indigenous vegetation or open pasture, and the naturalness of the lake and lake foreshore.

[131] Ms Steven considers the true ONL boundary should extend further into the Site to align with Beacon Point ridge. Any such adjustment of the PDP boundary is beyond jurisdictional scope. We acknowledge that, in Ms Steven's professional opinion, the boundary is not correctly positioned. However, we are satisfied that the current positioning of the boundary is well-supported in an

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109 JWS – Landscape, at [7.2]. The variation has been notified by QLDC in response to the court's decisions on appeals in Topic 30 and which continue to be considered according to RMA Sch 1 processes.

110 This is from QLDC's June 2024 decision version as recorded on QLDC's website. (https://www.qldc.govt.nz/Your Council/district plan/proposed district plan/decisions of Council. The website records that appeals close on 5 August 2024.

evidential sense (including by expert opinion).

[132] Apart from that matter, differences between the landscape experts largely centre on perceptions of naturalness. Mr Coombs ascribes a Moderate-High rating to the landscape values of the Site, notwithstanding that it is cloaked in a production forest that follows uniform cadastral boundaries. Ms Gilbert supports his opinion on that. Ms Smetham and Mr Bray consider the production forestry to diminish landscape values. Nevertheless, Ms Smetham ascribes a Moderate-High rating to landscape values of the Dublin Bay ONL overall.

[133] Those ratings of landscape values inform the experts' opinions on the most appropriate zoning outcome. Mr Coombs and Ms Gilbert favour additional development constraints on the Northern Finger part of the Site, particularly so that residential development is set back by landscape buffers and not seen from what they consider to be sensitive viewpoints from parts of Lake Wānaka.

<u>The part of the Site that is subject to RCL notation</u>

[134] Notwithstanding whether the Site is too small to be a rural character landscape, the JWS – Landscape records agreement between the landscape experts that the Site expresses the following landscape values:

i. Geomorphic values associated with being part of a terminal moraine landform.
ii. Very high level of openness characterised by lack of built development providing visual relief.
iii. Moderate natural character.
iv. High visual coherence.
v. High visual profile.
vi. From some viewpoints it has value as an undeveloped part of the foreground to ONL.
vii. Way finding value due to the dominance of its current forest cover and the attributes of the forest cover (straight lines, simplicity, dark colour).

[135] However, there are significant differences between Ms Smetham and Ms Steven concerning the impact that development enabled under the different rezoning options would have on those values. Their differences arise from how they read the Site with reference to its predominantly urban setting.

[136] Ms Smetham reads the Site's setting as giving it capacity for residential development according to the appellants' modified relief. She considers the surrounding urban context and the scale of the wider receiving environment gives capacity for residential rezoning of the Site outside the Dublin Bay ONL. She considers that residential development of the Site according to the appellants' modified relief would integrate and be consistent with the wider settlement pattern.

[137] Ms Steven reads the urban "base" to the Site as highlighting the Site's "intact, legible and distinctive landform" as a visually prominent and highly legible remnant of the terminal moraine within the Wānaka urban area.[111]

Evaluation

Landscape values of the Dublin Bay ONL part of the Site

[138] On the matter of landscape values, *Te Tangi a te Manu* explains:[112]

> Landscape values are the various reasons a landscape is valued—the aspects that are important or special or meaningful. Values may relate to each of a landscape's dimensions—or, more typically, the interaction between the dimensions. Values can relate to the landscape's physical condition, meanings associated with certain landscape attributes, and a landscape's aesthetic or perceptual qualities. Importantly, landscape values depend on certain physical attributes. Values are not attributes but are embodied in attributes.

[139] We adopt that meaning of landscape values in the absence of any definition

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111 Steven EIC, dated 28 November 2022, at [3.4]-[3.7].

112 *Te Tangi a te Manu*, at [5.06].

in the PDP.

[140] We find that only the Dublin Bay ONL part of the Site is within a relevant landscape for PDP purposes.

[141] SO 3.2.5.1 is that the district's ONF/Ls "and their landscape values" and related landscape capacity are identified. SO 3.2.5.2 is to the effect that landscape values of ONF/Ls "are protected" from inappropriate subdivision and development. That is supplemented by other policies including 6.3.3.2 which brings additional focus as follows:

> Ensure that the protection of Outstanding Natural Features and Outstanding Natural Landscapes includes recognition of any values relating to cultural and historic elements, geological features and matters of cultural and spiritual value to Tangata Whenua, including tōpuni and wāhi tūpuna

[142] From a te ao Pākehā perspective, we find the following listed landscape values as proposed in the PDP variation reflect the evidence and are appropriate with respect to the PDP's intentions:

> strong recreational attributes of the landscape … shared and recognised values as part of the natural landform framing and enclosing Lake Wānaka.

[143] From a te ao Pākehā perspective, we accept the consensus opinion of the landscape experts that Dublin Bay ONL has Moderate-High landscape values overall. That is as a composite of its contributing physical, perceptual and associative attributes.

[144] Preferring the opinions of Ms Smetham and Mr Bray, we find the Site's perceived naturalness is comparatively degraded. That is by reason of the dominant presence of exotic production forestry within cadastral boundaries. That adds to an impression of a cultured developed component of the Dublin Bay ONL. The fact that this woodlot is oddly perched within an urbanised setting adds to this degraded perception, as does the fact that it is a seed source for wilding

pines that continue to degrade other parts of the Dublin Bay ONL. As Ms Steven notes, the forestry masks topographical detail and reduces naturalness. In essence, removing the production forestry from the Site would enhance the perception of the naturalness of the Dublin Bay ONL. Overall, given the degrading influence of the production forestry, we rate the existing landscape values of this part of the Dublin Bay ONL as Moderate.

[145] The PDP variation also lists the following landscape value with respect to the Dublin Bay ONL:

> mana whenua associations of [sic] the area.

[146] That is plainly a highly generic description. However, further clarity is provided in the following associated text (under mana whenua "features and their locations" and "associations and experience"):

> … Kāi Tahu whakapapa connections to whenua and wai generate a kaitiaki duty to uphold the mauri of all important landscape areas.
>
> Wānaka is one of the lakes referred to in the tradition of "Ngā Puna Wai Karikari o Rākaihautū" which tells how the principal lakes of Te Wai Pounamu were dug by the rangatira (chief) Rākaihautū. Through these pūrakau (stories), this area holds a deep spiritual significance both traditionally and for Kāi Tahu today.
>
> Identified Kāi Tahu values in this area may include, but are not limited to, wāhi taoka, mahika kai, ara tawhito, nohoaka. … .

[147] Considering the noted landscape values and that text together, we interpret the PDP as intending that those mana whenua associations with the Dublin Bay ONL are to be protected. That is also according to the directions in Pol 6.3.3.2 and is consistent with the following statement of purpose commencing Ch 5, PDP:

> Queenstown Lakes District Council will recognise and provide for Ngāi Tahu as a partner in the management of the District's natural and physical resources though the implementation of this District Plan. The Council will actively foster

> this partnership through meaningful collaboration, seeking formal and informal advice, providing for Ngāi Tahu's role as kaitiaki, and protecting its values, interests and customary resources. … .

[148] The PDP variation for Dublin Bay ONL (under mana whenua "features and their locations" and "associations and experience") also includes the above-noted text specifically pertaining to the Site describing the *mamae* and recognising that allowing for future uses of the Site "to realise whānau aspirations" is viewed by Kāi Tahu as being in accordance with the principles of Te Tiriti.[113]

[149] We understand that that text to be included is relevant to the consideration of the landscape values of this part of the Dublin Bay ONL, at least as it pertains to mana whenua associations.

[150] We recognise that the variation continues to progress through Sch 1 processes and hence represents only a proposed change to the PDP. Nevertheless, it is generally in accordance with our evidential findings on the landscape values of the Dublin Bay part of the Site, from a te ao Māori perspective. From that perspective, we find as follows:

(a) the Dublin Bay ONL's strong recreational attributes are compromised in respect to the Site because they are enabled through a longstanding failure by the Crown to fulfil its Treaty and Deed obligations and associated mamae;
(b) the shared and recognised values as part of mana whenua associations are those that are expressed in whanaungatanga, particularly in ensuring the realisation of whānau aspirations (including as may in the future pertain to any use of that part of the Site that remains included in the Dublin Bay ONL).

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113 Proposed variation, at [20]-[24].

Findings as to attributes identified for the remainder of the Site

[151] Given that we find that only the Dublin Bay ONL part of the Site is within a relevant landscape for PDP purposes, we do not accept the opinions of the landscape experts that the remainder of the Site exhibits landscape values. That is in terms of how "landscape values" is explained in *Te Tangi a te Manu* and used within the PDP. Instead, for the various matters identified by experts as "values", we use the neutral descriptor "attributes".

[152] We accept that those attributes currently include being part of a visually prominent and legible terminal moraine landform. We find none of the other descriptors offered by the experts assists our consideration of the zoning options. In particular, insofar as there are no residential dwellings on the Site at present, it is "open" but that fact does not favour one zoning choice over another. Other descriptors (e.g. "natural character", "visual coherence") are highly subjective and debatable. An exotic production forest and source of wilding pines is not in our view "natural" in a character sense. We interpret the production forest as an anomalous patch over an established predominantly urbanised setting, rather than being particularly reflective of "visual coherence".

How do the zoning options compare in their effects on landscape values?

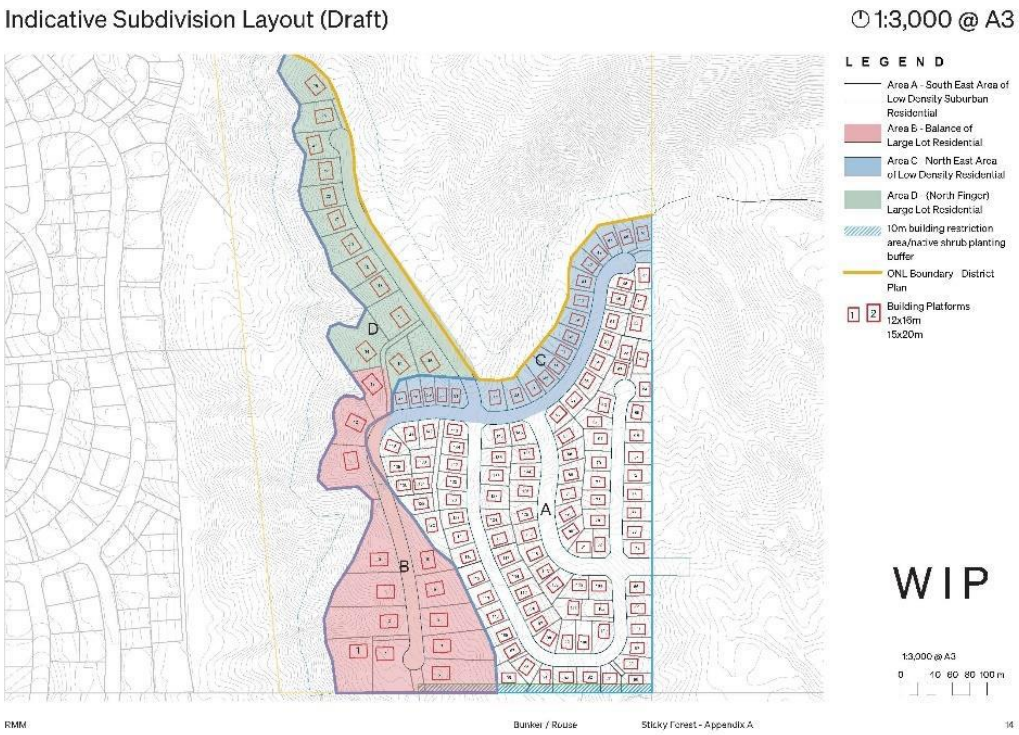
The evidence

[153] Although the landscape experts agree that the PDP variation properly lists relevant Dublin Bay ONL values, they differ about how sensitive those values are to residential development outside of, but in proximity to, the ONL. Those differences inform the experts' perspectives on:

(a) the extent of the Site that should remain zoned Rural; and
(b) what if any change should be made to the PDP's policy settings as part of any rezoning.

[154] As to the extent of the Site that should remain zoned Rural, the experts' different perspectives are reflected in the parties' preferred structure plans (copies of which are reproduced in Annexure 1).

[155] As noted, QLDC seeks greater development restriction, including landscape buffers, in that part of the Site referred to as the 'Northern Finger' as shown in Fig 4 of Mr Coombs evidence:[114]



[156] Mr Coombs considers that allowing for residential development of the Northern Finger would harm the Dublin Bay ONL values, notwithstanding that this part of the Site is outside the ONL boundary.[115] That is because he evaluates the "heightened naturalness" experienced in viewing the ONL from the lake as "directly related" to the dominance of landcover patterns. He acknowledges that there are existing dwellings and other buildings in this landscape, but considers these "subservient to the overall dominance" of those landcover patterns. He

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114 Coombs EIC, dated 17 October 2022, at [8.4].

115 Coombs EIC, dated 17 October 2022, at [8.5].

considers the naturalness and scale of the ONL allows it to absorb "small intrusions" such as individual buildings and access and curtilage development.[116] However, he is concerned that development on the elevated Northern Finger would introduce a line up or pattern of residential development that cannot presently be experienced from the eastern arm of Lake Wānaka within the Dublin Bay ONL. Therefore, he recommends that "any residential development" within the Site "protects those values that are identified in the Dublin Bay ONL schedule, without introducing a pattern of residential development to the area".[117]

[157] Kirimoko seeks that significantly more of the Site remains zoned Rural. That is as shown in Ms Steven's modified structure plan GA1.10 (reproduced as Fig 3 in Annexure 1).

[158] As for policy direction, with some specified exceptions, the PDP presently provides to the effect that subdivision or development within an ONF/L must be "reasonably difficult to see" from beyond the Site.[118] That policy does not pertain to development outside the boundaries of an ONF/L.

[159] Ms Gilbert recommends that a bespoke policy be added to the PDP to the effect that residential development of the Site must be "reasonably difficult to see from the south-eastern arm of Lake Wānaka" (this arm being within an ONL).[119] That is in order that development of the Site would be "glimpsed, at best" with "very limited parts of building elevations (and other development) seen in the outlook". She anticipates this would require care "to ensure the built development is visually recessive via exterior colour controls and building height and building form controls (amongst other methods)". She anticipates that landform and "well-

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116 Coombs EIC, dated 17 October 2022, at [9.6], [9.9].

117 Coombs EIC, dated 17 October 2022, at [9.9].

118 Jones EIC, dated 17 October 2022, at [6.20].

119 Gilbert EIC, dated 17 October 2022, at [8.2], with the actual provision as recommended by Ms Jones.

established" vegetation would also be used to achieve the policy intent.[120]

[160] Ms Steven recommends an even more stringent policy addition. In her opinion "there needs to be a complete absence of built form on the ridgelines and skyline to retain their open natural character and the overall intactness of the Outlet ONL area" (a reference to that part of the ONL in the vicinity of the lake outlet to the Mata Au/Clutha river).[121]

[161] Ms Smetham and Mr Bray do not support QLDC's proposed development restrictions on the Northern Finger. They consider the policy additions recommended by Ms Gilbert and Ms Steven are not warranted for the purposes of protecting the Dublin Bay ONL values.

[162] In her rebuttal, Ms Smetham reiterates that she is satisfied that partial visibility of dwellings in areas adjoining the ONL would not adversely affect the values of that ONL, "particularly the natural character and integrity of the terminal moraine when viewed from Dublin Bay".[122] In response to Mr Coombs, Mr Bray points out that any effects would be perceptual, relating to people's appreciation of the ONL values. As to those values, Mr Bray agrees with Ms Smetham, noting that the list of values proposed for inclusion in the PDP are for Dublin Bay ONL as a whole. The Site is included in it as part of "a long [and] sequenced landform that, as a whole, provides attractive views from, and is in contrast to, the Lake". He questions the accuracy of Mr Coombs' visual simulations and his associated visual impact assessment and considers this not to justify what Mr Coombs recommends concerning the Northern Finger.[123]

[163] The planners' opinions on these matters essentially correspond to those different landscape opinions, including in their recommendations on the drafting

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120 Gilbert EIC, dated 17 October 2022, at [7.8].
121 Steven EIC, dated 28 November 2022, at [3.14].
122 Smetham rebuttal, dated 20 December 2022, at [5.27].
123 Bray rebuttal, dated 20 December 2022, at [3.1]-[3.14].

of associated changes to the PDP.

Submissions

[164] Submissions on these matters generally reflect the evidence of those respective experts.

[165] QLDC's closing submissions emphasise that the Dublin Bay ONL values are sensitive to viewpoints within the ONL from the south-eastern arm of Lake Wānaka. Counsel refer to answers given by Ms Steven as to the "extensive use of the lake between Beacon Point and Stevenson Arm in the height of summer". In particular, Ms Steven observed that "you can go out… and not get a spot on the southern shore of Lake Peninsula because it's just crammed full of boats and people".[124] Ms Scott and Mr Hart submit that it remains appropriate for policy direction to be given as to the "appropriate viewing locations" for the "maxim[um] screening of development" within the Site.[125] They seek policies to provide that the landscape buffer area "achieves maximum screening of development when viewed from locations "in the eastern arm of Lake Wānaka", rather than only viewing locations within the Dublin Bay ONL itself".[126]

[166] Kirimoko is taken to support the even more stringent policy recommended by Ms Steven.[127]

[167] The appellants and the AG submit that none of those policies or restrictions is warranted for the purposes of protection of the Dublin Bay ONL values. As for the recognised mana whenua associative values, Mr Gordon and Ms Murdoch highlight Ms Gilbert's acknowledgement of the "adverse impacts"

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124 Closing submissions for QLDC, dated 2 February 2024, at [3.5].

125 Closing submissions for QLDC, dated 2 February 2024, at [3.2].

126 Closing submissions for QLDC, dated 2 February 2024, at [3.2]-[3.11].

127 Kirimoko's submissions do not directly address Ms Steven's recommended policy but seek that relief be "limited to that set out" in her "recommended structure plan". Opening submissions for Kirimoko, dated 23 November 2023, at [70]. Closing submissions for Kirimoko, dated 19 January 2024.

that her policy addition would have "on the associative landscape values of the Site deriving from its unique whakapapa".[128]

Evaluation

Methodologies – visual simulations and consideration of viewpoints

[168] In submissions, counsel relied reasonably significantly on photographic visual simulations presented in evidence as somehow capturing visual impacts. Frequently, in cross-examination, those visual simulations were put to landscape witnesses on a similar basis.

[169] Such simulations represent a two-dimensional frozen point in time. They do not reflect how we experience landscapes. That is as a dynamic lived experience, influenced by our ranges of senses and thinking processes, emotional dispositions, lived experiences, cultural associations, histories, tikanga and whakapapa.

[170] Our findings are informed by what the evidence revealed on that landscape experience, helpfully reinforced by our viewings of the Site.

Dublin Bay ONL part of the Site and the Northern Finger

[171] We prefer the landscape opinions of Ms Smetham and Mr Bray and the associated planning opinions of Mr Chrystal and Ms Ellis. In particular, we accept Ms Smetham's opinion in finding that:

(a) views from the lake and other noted viewpoints of built form on the Site would be partial only and would appear to sit beyond the ONL;
(b) standards for buffer planting, internal site planting, building setbacks and use of recessive building colours and materials will further reduce

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128 Closing submissions for the appellants, dated 9 February 2024, at [2.2](d).

any visual effects (even for more sensitive viewers), and hence any impact on associative and perceptual values, of the ONL; and

(c) those factors would assist to ensure the natural character and sequence of the terminal moraine landform would remain intact.

[172] We accept that there is extensive use of the lake between Beacon Point and Stevenson Arm in the height of summer. To infer that those users of the lake would be particularly sensitive to what they may see in terms of development of the Site is in our judgment unrealistic. What they see would be a part of a wide and majestic landscape vista that is a backdrop to their recreational pursuits. We find that even a more sensitive viewer would more likely perceive development, including of the Northern Finger, as a visual change that is essentially in keeping with the existing presence of many dwellings in this landscape. It would not realistically be perceived by most viewers as materially detracting from Dublin Bay ONL landscape values. Nor would there be any material detraction from how users of the lake would enjoy their recreational pursuits, whether that involves tearing about in a boat, or quietly kayaking or fishing or otherwise recreating.

[173] Turning to the ONL values as listed in the PDP variation, as endorsed by the experts, we find as follows:

Listed value	***Findings as to effect on values***
Moderate-high physical values due to the clarity, quality and enclosed nature of the lake waters, the largely unmodified roche moutonnée and moraines surrounding the lake, and the mana whenua features associated with the area.	No effect
Moderate-high associative values relating to the mana whenua associations of the area, the strong recreational attributes of the landscape, and the shared and recognised values as part of the natural landform framing and enclosing Lake Wānaka.	The modified relief would assist whanangataunga including by healing associations of *mamae*, hence enhancing mana whenua associations. The modified relief would not diminish the recreational attributes enjoyed in the ONL. The modified relief would not diminish values associated with natural landform within the ONL boundary.
Moderate-high perceptual values relating to: (i) The expressiveness values of Mount Brown and the moraines and terraces enclosing the lake and outlet; (ii) The aesthetic and memorability values due to the accessibility of the PA for residents of and visitors to Wānaka, the highly attractive views available across the lake waters to the enclosing landforms, the extent of regenerating indigenous vegetation or open pasture, and the naturalness of the lake and lake foreshore.	The modified relief would not materially detract from expressiveness values in that these will continue to be associated with the moraines and terraces within the Dublin Bay ONL. Overall, the modified relief option would not diminish aesthetic and memorability values. Depending on what viewers may perceive as attractive, some may perceive some loss of naturalness but realistically as an incremental addition to an already well established pattern of the many residential dwellings scattered through this end of the Dublin Bay ONL closest to urban Wānaka. Other viewers would not be as sensitive to the change.

[174] Therefore, we confirm our preliminary observations in finding that protection of the Dublin Bay ONL values does not warrant:

(a) any change to the PDP's policy settings whereby the "reasonably difficult to see" policy is confined to subdivision or development within a ONF/L; or
(b) any of the associated additional development restrictions recommended by QLDC's witnesses for the Northern Finger.

Consequences for the remainder of the Site outside Dublin Bay ONL

[175] For the remainder of the Site outside Dublin Bay ONL, we prefer the opinions of Ms Smetham and Mr Bray.

[176] Both the appellants' modified relief and QLDC's preferred zoning outcome would significantly lessen the legibility of the terminal moraine landform presently evident on the Site (albeit presently diminished by the forestry plantation). Those options would also lessen the Site's naturalness insofar as that is measured by its current lack of visible development. In a comparative sense, Kirimoko's preferred option would have significantly less effect on those current attributes. Those changes would be noticeable given the visual prominence of the Site.

[177] On these matters, we agree with Ms Smetham and Mr Bray that the urban setting of the Site allows for its development according to the appellants' modified relief. We find there would be no material detraction from any landscape character. That is because that character is predominantly of a residential suburb.

[178] The zoning options would have different consequences for the Site's "visual coherence" and "visual prominence". Subject to appropriate subdivision design controls, residential development of this part of the Site could remain visually coherent, in terms of urban design. That could extend to how such development was perceived in the context of the Dublin Bay ONL component of

the Site. There would be a visual change on this prominent Site but no loss of any recognised visual coherence. Rather, what is prominent now as a pocket of production forest would become an extension of an established residential suburb.

[179] Kirimoko's preferred option would have the most significant adverse effects on mana whenua associations as described by Dr Ryan. That is in the fact that it would significantly curtail the economic potential of the Site. On this aspect, QLDC's option would also have some adverse effect, but not to the same extent. The appellants' modified relief would plainly have the least such adverse effect on these values. That finding is on the basis that the appellants voluntarily relinquished their earlier relief concerning rezoning of the Dublin Bay ONL component of the Site.

[180] We acknowledge that some in the community would seek to retain access to 'Sticky Forest' as an informal recreational open space. That part of the community will regard the harvesting of the trees and residential development as detracting from their amenity values. However, as Ms Jones explained, aside from the ONL, the objectives and policies of the LDSR and the LLR "are not concerned with the visual effects of … development from beyond the zone".[129] Furthermore, nor does the PDP indicate any overall intention that visual or other amenity values be maintained or enhanced other than with respect to RCLs. Rather, the broader emphasis, at least in the PDP's Ch 3 Strategic Direction, is on achieving a "quality built environment taking into account the character of individual communities" (SO 3.2.3). That includes achieving built form that "integrates well with its surrounding urban environment" (SO 3.2.3.2).

[181] We acknowledge that the Kirimoko Block building restriction area ('BRA') was imposed with a view to maintaining RCL "values". However, that was a finding on the facts in that case and in its context. It does not count against our finding that the appellants' modified relief option is to be preferred in terms of the

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129 Jones EIC, dated 17 October 2022, at [6.32], [6.34].

PDP's intentions.

What zoning outcome best represents strategic and integrated urban development?

The evidence

[182] The planning evidence on these matters is essentially to the effect summarised in our discussion of related submissions. There is related evidence in various statements entered by consent and which we accept, namely:

(a) Mr Ford's statement that none of the predominant rural uses enabled by Rural zoning of the Site would be economically viable or appropriate, including exotic forestry or indigenous vegetation for carbon credits, any form of pastoral farming or horticulture;
(b) Mr McCartney's statement that, should the Site be rezoned as sought, water supply and wastewater upgrades suitable for servicing could be feasibly developed, and stormwater runoff could be appropriately managed (using Low Impact Design principles) according to QLDC requirements; and
(c) Mr Penny's statement that the access easement to be provided to the Site (via commercial arrangements) would safely and efficiently accommodate traffic movements from the predicted residential yield of the Site without significant effects on the network.

Submissions

[183] Kirimoko submits that, in contrast to "the current zone structure in and around Sticky Forest", the appellants' modified relief does not represent integrated management. Rather, Kirimoko claims it would "introduce an incoherency" that

is inconsistent with QLDC's s31(1)(a) RMA functions.[130]

[184] Mr Page explains that only 2.54 ha of Kirimoko Block was zoned residential (under PC13). The remaining 6.6 ha is zoned Rural subject to a BRA. As counsel puts it, Kirimoko is "effectively required to hold that [BRA] land as a *de facto* reserve for the public benefit of protecting the landscape values of Sticky Forest". Counsel informed us that the lost development opportunity cost is in the order of $25-30M. In that context, Mr Page characterises QLDC's support for the residential rezoning of the Site as "profoundly unfair and inconsistent".[131] He submits that any enabling of residential development of the Site should be approached through a Sch 1 RMA process for the purposes of determining the "location and sequence for new urban development capacity" in Wānaka.[132]

[185] In support of those submissions, Mr Page explains that QLDC has recently undertaken an urban capacity planning process in accordance with the National Policy Statement on Urban Development 2020 ('NPSUD'). He notes that both Mr Chrystal and Ms Jones acknowledge that residential rezoning of the Site may have flow-on implications for the zoning of the Kirimoko Block. He submits that, were those implications to be left to a subsequent Sch 1 RMA process, as Ms Jones suggests, that would "defeat[s] the whole reason for" the PDP having UGBs and not be in accordance with Obj SO 3.2.2.[133]

[186] Other parties submit to the effect that nothing in the PDP nor the RMA dictates that rezoning of the Site cannot proceed at this time.

Evaluation

[187] The court must hear and determine all proceedings "as soon as practicable" "unless, in the circumstances of a particular case, it is not considered appropriate

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130 Opening submissions for Kirimoko, dated 23 November 2023, at [3] and [5].
131 Opening submissions for Kirimoko, dated 23 November 2023, at [9].
132 Opening submissions for Kirimoko, dated 23 November 2023, at [21].
133 Opening submissions for Kirimoko, dated 23 November 2023, at [23]-[25].

to do so".[134] Given Kirimoko is alone in seeking delayed determination of the appeal and has not sought adjournment, it is not appropriate to put the proceedings on hold.

[188] QLDC's s31(1)(a) functions concerning establishment, implementation, and review of objectives, policies, and methods to achieve integrated management are to be understood in light of related RMA processes. Those allow for incremental planning to be undertaken, whether by variation, change or review. Related PDP provisions on urban growth and integrated management are to be similarly understood. SO 3.2.2, relied on by counsel, does not dictate that zoning cannot be approached incrementally. SO 3.2.2.1 directs that it be approached "in a logical manner" for certain specified ends including to:

(a) promote a compact, well-designed and integrated urban form;
(b) achieve a built environment that provides desirable, healthy and safe places to live, work and play;
(c) protect the District's rural landscapes from sporadic and sprawling urban development;
(d) ensure a mix of housing opportunities including access to housing that is more affordable for residents to live in;
(e) contain a high quality network of open spaces and community facilities; and
(f) be integrated with existing, and proposed infrastructure and appropriately manage effects on that infrastructure.

[189] Nothing in the evidence suggests that, by dealing with Kirimoko Block through a later Sch 1 process, QLDC would compromise fulfilment of any of those stated ends or other PDP intentions concerning urban growth and integrated management. Nor do we find on the evidence that, by dealing with Kirimoko Block through a separate Sch 1 process, QLDC would offend any of the PDP's

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134 RMA, s272(1).

intentions for UGBs. Those include the intentions to:

(a) assign UGB's with the purpose of helping to manage the growth of urban areas "within distinct and defendable urban edges" (Obj 4.2.1 and related policies);
(b) seek to achieve "a compact, integrated and well-designed" urban form within UGBs (Obj 4.2.2.A and related policies);
(c) contain urban development to be within UGBs for various reasons including to maintain and enhance "the environment and rural amenity" and protect ONF/Ls (Obj 4.2.2B and related policies); and
(d) define UGBs for Wānaka and Lake Hāwea Settlement that, relevantly (Pol 4.2.2.21):
    (i) are based on existing urbanised areas;
    (ii) identify sufficient areas of urban development and the potential intensification of existing urban areas to provide for predicted visitor and resident population increases in the Upper Clutha Basin over the planning period;
    (iii) have community support as expressed through strategic community planning processes;
    (iv) utilise the Clutha and Cardrona Rivers and the lower slopes of Mt. Alpha as natural boundaries to the growth of Wānaka; and
    (v) avoid sprawling and sporadic urban development across the rural areas of the Upper Clutha Basin.
(e) not use Rural land outside of the UGBs for urban development until a change to the PDP amends the UGB and zones additional land for urban development purposes (Pol 4.2.2.22).

[190] The court is not a planning authority. Insofar as there are consequential zoning treatment issues raised for Kirimoko Block, those are more properly addressed through usual Sch 1 processes. It is not inconsistent with either s31(1)(a) or SO 3.2.2 or any other PDP provision and does not offend the NPSUD to approach matters in such an incremental way.

How the zoning outcomes compare with respect to the key issues?

Relationships

[191] For the reasons we have given, we find that:

(a) the appellants' modified relief duly recognises and provides for the relationship of Māori and their culture and traditions with their ancestral lands and sites, with particular regard to kaitiakitanga and will properly account for Te Tiriti; whereas

(b) QLDC's and Kirimoko's preferred zoning outcomes each significantly fail in those terms, to varying degrees each working contrary to those intentions of the RMA and PDP;

(c) the appellants' modified relief option is the most appropriate in that it would:

  (i) protect Dublin Bay ONL landscape values, from both a te ao Pākehā and te ao Māori perspective;

  (ii) have no other material landscape effects, including on landscape character; and

  (iii) recognise and provide for the matters in ss6(b) and (e), and duly address ss7(a), (c) and (f) and s8 so as to assist to achieve the related intentions of the PDP;

(d) QLDC's and Kirimoko's zoning outcome preferences would:

  (i) reinforce adverse mana whenua associations and hence degrade Dublin Bay ONL landscape values; and

  (ii) fail to recognise and provide for the matters in ss6(b) and (e), not duly address ss7(a), (c) and (f) and s8 and fail to assist the related intentions of the PDP.

Strategic and integrated urban development

[192] Each of the zoning options would satisfactorily represent so-termed 'strategic and integrated urban development'. However, the appellants' modified

relief is the most appropriate in terms of these issues in that it would enable a greater proportion of the Site to be developed to assist to provide for community housing needs, according to the intentions of PDP SO 3.2.2.1.f. The appellants' modified relief would also assist the intentions of the LDSR and LLR subject to our findings on some refinements to certain proposed provisions (as we discuss later).

[193] On the other hand, maintaining Rural zoning over more of the Site would not assist to fulfil the intentions of the Rural zone. That is particularly given the uneconomic nature of production forestry and forest-related usage of the Site and the nuisance potential in seeding wilding pines.

PDP intentions and sustainable management

[194] For those reasons, we find that the appellants' modified relief would best assist the purposes of the PDP and is the only option that assists to promote sustainable management according to s5, RMA.

Associated findings on provisions in the JWS – Planning (2)

[195] In Annexure 3, we give our reasons for requiring some changes to the updated PDP provisions in the JWS – Planning (2) ('Updated Version'). By way of summary, leaving aside some finer drafting points we discuss in that Annexure:

(a) Pol 5.3.4.2 as recommended by the AG is to be included in the PDP;
(b) the activity status for LDSR subdivision that accords with the structure plan is to be restricted discretionary, but subject to some refinements to the specified matters to which that discretion is restricted;
(c) some refinements are to be made to certain landscape policies, but only for clarity purposes not to the extent sought by QLDC;
(d) some refinements should be made to the walking and cycling connection provisions;

(e) the positioning of the UGB, as depicted on the structure plan, is appropriate for inclusion in the PDP;

(f) the access restrictions are not needed and will not be included in the PDP; and

(g) QLDC's recommended refinements to the forestry provisions are to be made.

Should s293 directions be made?

Introduction

[196] Under s293, the court has a discretion to direct that changes be made to a proposed planning instrument that may extend beyond the jurisdictional scope of an appeal. That discretion arises now that we have heard the appeal.[135] The court may direct the local authority to prepare proposed plan provisions, consult on them and submit them to court for confirmation. As all parties acknowledge, the s293 discretion is to be exercised sparingly, bearing in mind that the court is not a planning authority.[136]

[197] As part of its case, Kirimoko raises a concern about the relative severity of zoning restrictions in place for Kirimoko Block. In particular, Kirimoko's concern centres on the extent of Rural zoning and so-termed BRAs. As was explained by Mr Taylor, and in counsel's submissions, those BRAs were imposed by reason of views taken at that time about Sticky Forest, which as we have explained, has for many years been used as an informal mountain biking and recreational space. The consequence is plainly evident in swathes of undeveloped land bordering the Site.

[198] Having considered Kirimoko's case on these matters, we enquired whether consideration had been given to seeking s293 directions. Kirimoko took up that

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135 RMA, s293.

136 *Federated Farmers of New Zealand (Inc) Mackenzie Branch v Mackenzie District Council* [2014] NZHC 2616 at [121].

invitation in their closing submissions.[137]

[199] In respect to the Site, it seeks directions ('Site directions') to:

(a) change the UGB boundary so that it follows the Dublin Bay ONL boundary through the Site; and
(b) extend LLR zoning to encompass some "leftover" land on the western margins of the Site that would otherwise remain Rural (with a RCL overlay) as the appeal did not encompass it.

[200] For the Kirimoko Block, it seeks that a PDP structure plan and associated provisions be revised so as to achieve an integrated urban development pattern with the newly rezoned Site and other adjacent residential areas. To those ends, it seeks s293 directions ('Kirimoko Block directions') to:

(a) uplift the BRA from the PDP planning maps;
(b) amend the remnant Rural zoning to LLR to be consistent with the LLR zoning of the Site and at Peak View Ridge;
(c) amend PDP r 27.13.1 concerning the Kirimoko structure plan to replace the key reference to the cross-hatched BRA with LLR, again to achieve zoning consistency with the zoning of contiguous land of the Site; and
(d) make consequential changes to Ch 27 objectives, policies and rules to remove references to the BRA and Rural portions of the Kirimoko Block (according to tracked changes provided with counsel's submissions).

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137 Closing submissions for Kirimoko, dated 19 January 2024, at [15]. We leave aside proposed Pol 5.3.4.2 as we find that we can include that provision within scope.

Submissions

Kirimoko

[201] Kirimoko submits that its request is supported by the planning evidence. Mr Page refers to the planners' agreement that there is "planning logic" to support repositioning the UGB on the Site as Kirimoko seeks.[138] He refers to Mr Chrystal's acknowledgement (in cross-examination) that the remnant strip of Rural land on the western margins of the Site (assuming the Site is rezoned) would not be "a great fit" in terms of the intentions of the Rural zone. That is especially given its size and location and what the Rural zone is set up for.[139] Mr Page also notes that the planners agree that the Site no longer has any RCL values. He also points out that maintaining Rural zoning over this strip of land would not align with the appellants' proposed Pol 5.3.4.2. In any case, he submits that it would be inappropriate and pointless to maintain it in Rural zoning, assuming the court rules in favour of the appellants' modified relief.[140]

[202] Mr Page submits that the court would not assume a planning authority role by making the Kirimoko Block directions.[141] That is in part because those directions would remediate what would otherwise be a plan anomaly by way of a residual Rural zoned island. On this aspect, Mr Page draws analogy with the directions made in *Morcom v Thames-Coromandel District Council* concerning an "island" of properties zoned Rural surrounded by another zone (in that case a Coastal zone).[142] Mr Page is instructed that all landowners who own land in the Kirimoko Block BRA would consent (with the possible exception of QLDC).[143] Furthermore, Mr Page submits that there are no associated RCL landscape values

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138 Transcript p 375, l 22-26, closing submissions for Kirimoko, dated 19 January 2024, at [15](a).

139 Transcript p 304 l 27.

140 Closing submissions for Kirimoko, dated 19 January 2024, at [15](c).

141 Closing submissions for Kirimoko, dated 19 January 2024, at [15], [19].

142 *Morcom v Thames-Coromandel District Council* [2017] NZEnvC 158.

143 Closing submissions for Kirimoko, dated 19 January 2024, at [18], where the owners names are listed.

that could be impacted.

[203] Mr Page points out that a s293 process would not involve having to consider the exact arrangements for physical integration across the Kirimoko Block and the Site (e.g. road layouts, services design and so on). Those matters would remain to be addressed at the subdivision consent stage.[144]

[204] Mr Page submits that it would be at least appropriate to make s293 directions for the uplifting of the BRA. In particular, that is in the sense that the evidence reveals that there is no longer any policy justification for it. He submits that removal of the BRA could be addressed without needing to determine how the affected land should be used.[145]

[205] Kirimoko does not wish to delay the Site's development. However, Mr Page notes Ms King's evidence that transfer of the Site to the beneficiaries is not likely to be before some time in 2025. As such, he submits that "it is hard to see how prejudice might arise in the meantime".[146] As for QLDC's submissions on a lack of a s32 evaluation in support of the directions, he submits that this can be addressed through directions to QLDC for those purposes.

QLDC

[206] QLDC submits that, were the court to make the s293 directions sought by Kirimoko, it would be assuming a planning authority role that would deny potentially affected persons their opportunity to participate in usual Sch 1 processes.[147]

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144 Closing submissions for Kirimoko, dated 19 January 2024, at [20].
145 Closing submissions for Kirimoko, dated 19 January 2024, at [21].
146 Closing submissions for Kirimoko, dated 19 January 2024, at [28].
147 Closing submissions for QLDC, dated 2 February 2024, at [9.1]-[9.14].

The appellants and the AG

[207] The appellants and AG would not favour use of s293 if that would give rise to significant delay in the finalisation of zoning of the Site. Subject to that, they would support a s293 direction that is confined to rezoning the remnant Rural strip on the Site as LLR and reconsidering the 30m landscape buffer that traverses the strip.[148] On the same qualified basis, the appellants would not oppose s293 directions for the rezoning of the Kirimoko Block.[149]

Evaluation

No Kirimoko Block directions should be made

[208] We find some justification for the concerns raised by Kirimoko as to the extent of Rural zoning and BRA overlay of Kirimoko Block. It is at least highly questionable whether it remains sensible to maintain such large swathes of bare unbuildable land, particularly bearing in mind the PDP's priority of helping to meet community housing needs. However, we find the proper approach to re-consideration of the zoning treatment of Kirimoko Block is through usual Sch 1 processes, not s293.

[209] That is in part because of the very limited evidence before us. Section 293 is not an intended substitute or proxy for s32 evaluation more properly led by QLDC as the planning authority. We do not agree that these issues would not be an impediment to s293 directions confined simply to the BRA. The BRA covers an extensive area, wrapping around the southern and western edges of the Site and properties from Peak View Road to Aubrey Road. In a practical sense, it would not represent sound planning to deal with it in isolation from resolving the underlining zoning treatment of the relevant land. Hence, a Sch 1 process is more

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148 Closing submissions for the appellants, dated 9 February 2024, at [6.2], closing submissions for the AG, dated 26 January 2024, at [28].

149 Closing submissions for the appellants, dated 9 February 2024, at [6.3].

appropriate given the range of associated issues that would be involved, including how much residential development should be enabled and what that could mean for services and infrastructure.

[210] Nor are we satisfied that the relevant potential interests are as confined as Kirimoko suggests.

[211] Given these various matters, there would be a risk of significant delay in the finalisation of the zoning outcome of the Site.

Subject to confirmation from the appellants, the Site directions may be made

[212] By contrast, for the residual Rural zone strip on the western margins of the Site, there is significantly more complete evidence before the court. Extending the LLR zoning in this part of the Site is logical and reasonably confined. Repositioning the UGB is similarly confined and essentially consequential on LLR rezoning of this part of the Site. For the reasons we have given, we do not find the 30m landscape buffer in this locality serves any relevant landscape purpose. Whilst there may well be other matters for consideration, such as pertaining to the interests of those living nearby, this aspect would also seem much more able to be managed under s293 directions. Overall, we are satisfied the making of confined directions just pertaining to the Site would not likely mean the court would enter an inappropriate planning authority realm.

[213] Procedurally, the making of such confined s293 directions could be staged. Following this decision, a further decision could include s293 directions (including as to consultation) as to the rezoning only of the residual Rural strip of the Site as LLR. A further decision could then make all necessary determinations concerning s293 (as well as any residual matters such as any costs directions needed).

[214] Given there remains a risk of some delay, we will allow for the appellants to inform the court of whether or not they would seek the confined directions just pertaining to the Site, as we have outlined. That is according to our directions

below.

Conclusion and directions

[215] Subject to the changes that, in Annexure 3, we determine are to be made to the drafting provided in the JWS – Planning (2), we find that drafting to represent the most appropriate expression of the appellant's modified relief option. Subject to those refinements, we find that option the most appropriate rezoning outcome for the Site. That is particularly insofar as it satisfies the RMA in all relevant respects, including in being the most appropriate for achieving the PDP's objectives. All other options fail in those terms.

[216] Hence, the appeal is allowed in part. However, in order for the court to give final approval to what is to be included in the PDP to give effect to this decision, a number of steps need to be completed. The structure plan needs to be updated, particularly to show removal of the noted length of landscape buffer on the western perimeter of the Site. A full set of updated provisions will need to be provided to the court for checking, including planning maps.

[217] Furthermore, if it is the appellants' preference that limited s293 directions be made for a change to LLR zoning of the remnant Rural land on the western edge of the Site, directions for those purposes will be needed.

[218] Finally, there is a consequential matter needing to be clarified. It is our preliminary view that the present RCL notation over the Site should be deleted, as a consequential change, by the replacement of relevant PDP planning maps to update the Rural zoning of the Site with LDR and LLR zoning. However, as this was not addressed in submissions, we make directions for supplementary closing submissions on this point.

[219] The court's strong preference is for all of these matters to be considered by the parties before directions are made on them. Plainly, if agreement is reached, that will assist in those terms. Hence, all we direct at this stage is that **within 15**

working days:

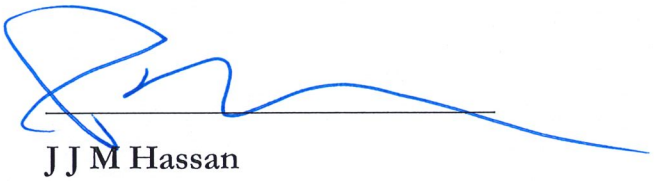
(a) QLDC is to confer and file a memorandum proposing timetabling directions for the filing of a final set of updated provisions for the court's approval (and to address the noted consequential matter concerning RCL notation). This update must in due course be provided in tracked change style, as against the JWS – Planning (2) drafting, with an accompanying guide as to how the updates give effect to our findings;

(b) the appellants are to file a memorandum reporting on whether or not they seek the court make the s293 directions this decision records as appropriate. If the appellants elect that directions be made, the memorandum must propose related directions; and

(c) QLDC is to confer with the parties and file a memorandum on whether s293 directions are sought to correct noted inaccuracies in the Explanatory Statement to PDP Ch 5.

[220] Costs are reserved and a timetable will be set, if need be, in due course (not before the issuance of a final decision).

For the court:

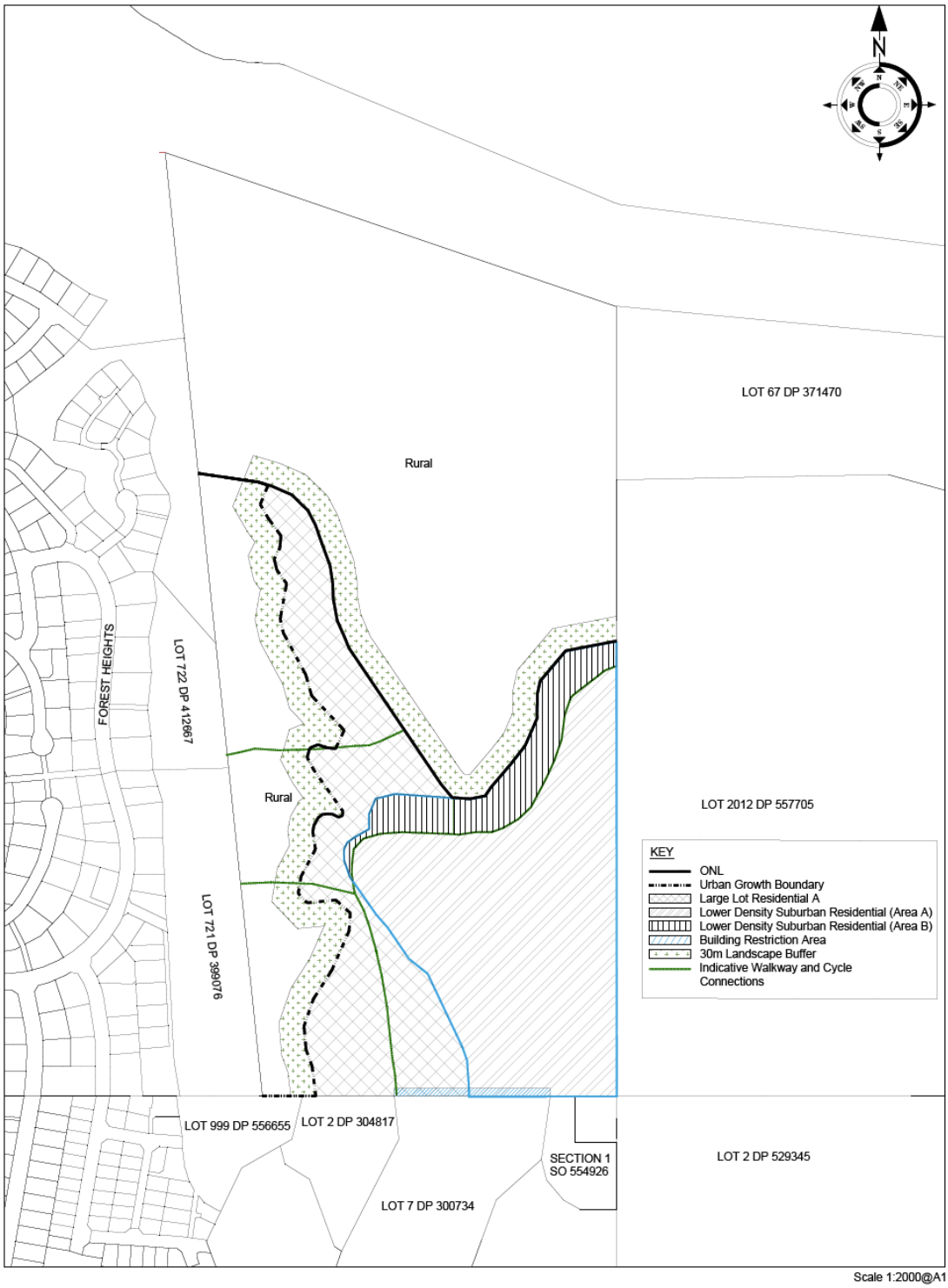


J J M Hassan
Environment Judge

Annexure 1

Parties' alternative structure plan preferences

Figure 1 – the appellants' proposed structure plan[150]

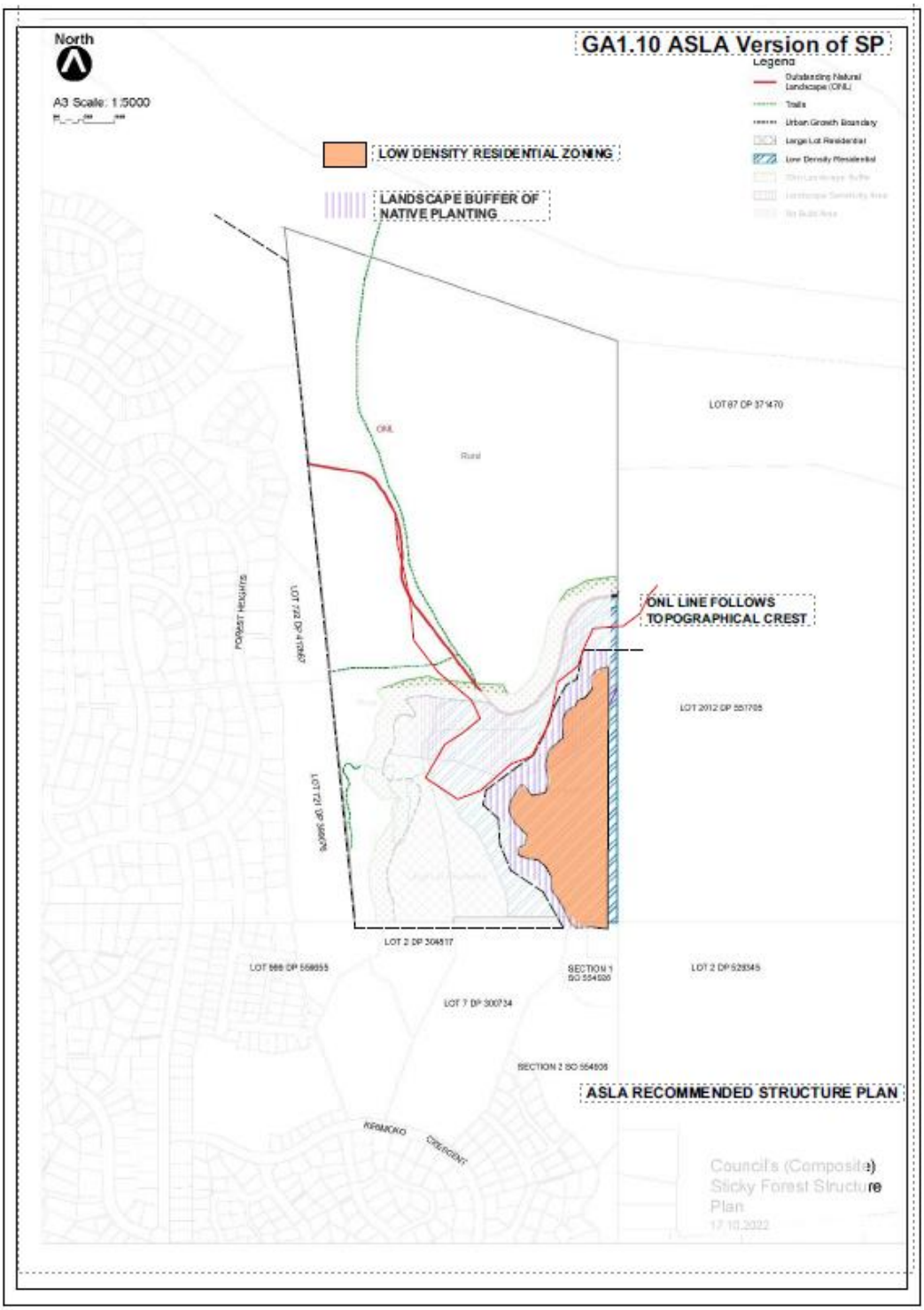


150 Closing submissions for the appellants, dated 9 February 2024, App. A.

Figure 2 – QLDC's initially recommended structure plan[151]

151 Coombs EIC, at [8.6], Fig 5, opening submissions for QLDC, dated 23 November 2023.

Figure 3 – Kirimoko's proposed structure plan[152]



152 Steven EIC, dated 28 November 2022, GA1.10, closing submissions for Kirimoko, dated 19 January 2024.

Annexure 2

Reasons concerning issues as to jurisdictional scope

Principles as to scope

[1] Our overall task is to determine the most appropriate zoning outcome for the Site, within the available jurisdictional scope.[153]

[2] The principles governing jurisdictional scope are well-settled. Even if incidental or consequential alterations to a proposed plan are not expressly sought in relief, there is scope to allow for these.[154] Otherwise, the court's jurisdiction to make amendments to a proposed plan through an appeal, leaving aside s293, are confined to what is within the scope of both:

(a) what is "reasonably and fairly raised" in the original submission or the proposed plan as notified; and
(b) the relief in the notice of appeal.

[3] Adjudging what is "reasonably and fairly raised", involving questions of degree, should be approached in a realistic and workable fashion.[155] That judgment should be informed by the RMA's intentions for public participation (including in giving interested persons opportunity to oppose or otherwise comment on changes sought by the submitter).[156] A further lens on this matter is procedural fairness, specifically whether allowing for some change from the relief expressed in a submission and appeal would give rise to a "real risk" of denying any person affected by the change an effective opportunity to participate in the

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153 See *Donaldson v Queenstown Lakes District Council* [2023] NZEnvC 190, Annexure 1 at [4].

154 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at [166]; *Tussock Rise Ltd v Queenstown Lakes District Council* [2019] NZEnvC 111, at [51].

155 *Royal Forest and Bird Protection Soc of New Zealand Inc v Southland Regional Council* [1997] NZRMA 408 (HC) at 413.

156 *Royal Forest and Bird Protection Society of New Zealand Incorporated v Dunedin City Council* [2023] NZEnvC 79 at [42]-[44].

process.[157]

Must any Rural zoned part of the Site be made available to the public for recreational purposes?

[4] This issue of scope arises from the fact that Mr Beresford's case before the IHP at first instance was in part that maintaining Rural zoning over the Dublin Bay ONL part of the Site would enable usage of it for recreational purposes. In particular, Mr Page refers to legal submissions made on Mr Bereford's behalf before the IHP that retaining Rural zoning over part of the Site would:[158]

> …
>
> [9.3] Provide for public access to the retained rural land so as to enable the past informal (and unlawful) use of the land for recreational activities to continue, as well as increasing the supply of residential land in Wanaka, both being a 'win' for the wider community.

Submissions

Kirimoko

[5] Kirimoko argues that there is no jurisdictional scope to resile from that commitment. Having originally advocated for a "win-win" outcome in those terms, counsel submits that it is not open to the appellants to now "pick and choose the elements of that package that suit them". By now seeking to resile from this initial position, he submits that the appellants' modified relief is beyond jurisdictional scope.

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157 Opening submissions for the appellants, dated 23 November 2023, at [2.18], referring to *Clearwater Resort Ltd v Christchurch City Council*, HC Christchurch, AP 34/02, 14 March 2003, at [66]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

158 Legal submissions for Mr Beresford (Submitter 149) presented to IHP dated 9 June 2017.

Other parties

[6] Mr Gordon and Ms Murdoch submit that the appellants' modified relief was "reasonably and fairly raised" by Mr Beresford's submission and there are no conceivable issues of breach of natural justice. In essence, the original submission gave fair notice of an intention to seek a shift from the existing rural/forestry usage of the Site to a residential one. Counsel for the AG essentially concur, adding that commitments as may be made in statements to the IHP do not constrain jurisdictional scope. Given that the originally notified PDP did not include provisions requiring public access to the Site for recreational purposes, counsel submit that the court has jurisdiction to decide to not approve provisions requiring public access to the Rural balance of the Site.[159] QLDC concurs in those submissions.

There is scope not to require that public recreation be enabled

[7] Mr Bereford's original PDP submission allowed scope to consider anything on the spectrum between retaining the Site as a whole as Rural and rezoning it entirely Residential Low Density (now LDSR). That was narrowed by the relief in the notice of appeal. Most pertinently, at [11], the notice of appeal seeks "relief as sought in the package of relief presented to the hearing before the Council" and that "revised package of relief" is specified at [4.3] of the notice as follows (emphasis added):

> Retaining the balance of the site (comprising approximately 31 hectares) as Rural **on the basis that it would be made available to the public for recreational purposes.** [emphasis added]

[8] However, the notice of appeal does not further elaborate on what is intended by making the Rural land "available to the public for recreational

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159 Opening submissions for the AG, dated 23 November 2023 at [88]-[92].

purposes".

[9] Nothing in the Rural zone or remainder of the PDP presently requires any part of the Site must be made available to the public for recreational purposes. Rather, as we have explained, the existing usage of the Site for those purposes is a matter of informal "grace and favour" by the Crown.[160] However, the Rural zone provisions allow for the imposition of controls in the consenting of subdivision or development of Rural zoned land for the purposes of enabling and supporting recreational usage of, for example, trails networks. Pol 21.2.1.16 is to provide for activities that support "the vitality, use and enjoyment" of the Upper Clutha Tracks network.

[10] The expression of relief in the notice of appeal is fairly open to being read as referring to what the Ch 21 Rural zone already provides by way of controls or more or less than that. It does not necessarily imply anything further by way of provisions being added to the PDP so as to enable or provide for recreational usage of any part of the Site.

[11] Within the scope of the appeal, the court has jurisdiction to:

(a) decline the modified relief entirely, with the consequence that the status quo Rural zoning under Ch 21 PDP would remain without change;
(b) decline the modified relief in part, for instance to the effect that the Ch 21 PDP Rural zoning remain without change for part of the Site (e.g. for the 31 ha specified);
(c) grant the modified relief but subject to making modifications that accord with the scope principles we have outlined.

[12] We are satisfied that the appellants' appeal allows jurisdiction to consider a range of outcomes. There is scope to add to Ch 21 Rural provisions that direct

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160 Ellis EIC, dated 14 November 2022, at [77].

that access be provided to a greater or lesser extent than the appellants now propose. There is also scope to not include any such provisions in Ch 21 at all.

[13] Applying the lens of procedural fairness, the expression of relief in the original submission fairly forewarned those with potentially relevant interests that there could be a significant change from the Rural zone status quo. It provided fair notice that zoning could change or put an end to informal recreational usage of the entire Site. Nor is it conceivable that the modification to the original relief in the appeal could have prejudiced anyone including those who are not parties. It is not clear what it meant by "available to the public for recreational purposes". Hence, no reasonable person with interests in recreational usage of the Site would realistically have been disarmed by that relief so as to not join the appeal.

[14] Therefore, we find scope not to require that public recreation be enabled.

Is proposed new Pol 5.3.4.2 beyond scope?

Submissions

[15] Kirimoko submits that the appellants' proposed new Pol 5.3.4.2 is beyond scope because it was not sought by the notice of appeal and is not properly a consequence of the relief sought. Mr Page comments that he is not aware of any appeal on Ch 5 and that he understands that its objectives and policies are beyond challenge. He points out that QLDC's website refers to it as having "no specific appeals".[161]

[16] Other parties submit that this policy addition is a foreseeable consequence of changes directly proposed in the notice of appeal. The policy addition was recommended initially by the AG's planning expert, Ms Ellis. Counsel for the AG point out that Ms Ellis made this recommendation in light of the relevant context of the Site and the fact that the PDP "does not currently contain any policies which

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161 Opening submissions for Kirimoko dated 23 November 2023, at [72].

address matters relevant to use or management of SILNA land".[162]

The proposed new Pol 5.3.4.2 is within scope as a consequential addition

[17] We refer to our discussion under the heading 'PDP objectives and policies concerning the zoning issues' where we discuss the errors in the PDP's Ch 5 and the resulting uncertainties in the application of PDP Obj 5.3.4 and Pol 5.3.4.1. In essence, the lacuna means that these provisions are not framed to reliably deliver on their intentions. As Ms Ellis properly notes, the uncontested evidence of the late Dr Ryan and Mr Parker strongly justifies remediating this lacuna as a consequential change. We find no issues of procedural unfairness or breach of natural justice would arise from remediating this matter by an appropriate policy amendment. Plainly, the Crown and intended beneficiaries of redress according to the Deed are represented. So too is QLDC which expresses relevant partnership intentions in the explanatory text to Ch 5. Providing equivalent use and development enablement as accorded to Māori land under Ch 5 would not conceivably prejudice the interests of anyone.

[18] Therefore, we find we have jurisdictional scope. We discuss the most appropriate change in **Annexure 3** of this decision.

Is there scope to re-position the UGB on the PDP maps?

Introduction

[19] Under the PDP, the UGB runs along three of the Site's boundaries.[163] Existing residential development is currently located on the southern and western sides, with the Northlake residential development located further to the east. Mr Chrystal explains that approval of the Northlake Plan Change, which was being assessed by QLDC at the time of our hearing, would enable development on the

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162 Opening submissions for the AG, dated 23 November 2023, at [87.2(b)].

163 Chrystal EIC, dated 22 September 2022, at [4.8] and [6.3].

Site's immediate eastern boundary.[164]

[20] Mr Chrystal evaluates the repositioning of the UGB (as shown on his proposed structure plan) with reference to the various objectives on integrated growth management in PDP Chs 3 and 4, concluding that the appellants' "proposal" meets those objectives.[165]

Submissions

[21] The material substantive difference between the parties is as to where the UGB should be repositioned to – the appellants seeking this repositioning according to their structure plan and Kirimoko preferring that it be realigned to follow the Dublin Bay ONL boundary.

[22] Kirimoko submits that s293 directions would be needed whether the court favoured the appellants' preferred location or its own. In the case of the appellants' preferred repositioning, that is essentially because this was not sought by Mr Beresford's PDP submission. Mr Page points out that PDP Ch 4 is dedicated to UGBs, including objectives and policies giving guidance on their function and location and submits these have not been properly assessed. He submits that it would be unsound to assume the appeal allows scope on the basis of the UGB boundary shift being treated as "consequential" relief.[166]

[23] The other parties agree that Kirimoko's preference would require s293 directions. However, they submit that relocating the UGB to where the appellants would prefer it would be within scope as consequential relief. Mr Gordon and Ms Murdoch point out that, on Mr Chrystal's assessment against the relevant Ch 4 provisions, including Obj 4.2.1, the repositioning of the UGB meets the directives

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164 Chrystal EIC, dated 22 September 2022, at [6.3].

165 Chrystal EIC, dated 22 September 2022, at App 2, [69]-[74].

166 Closing submissions for Kirimoko, at [15].

given by Chs 3 and 4.[167]

The UGB repositioning sought in the appeal is within scope

[24] The repositioning of the UGB preferred by Kirimoko is not within the scope of the appellants' appeal and would require s293 directions. No party claimed otherwise.

[25] Mr Beresford's written submission on the PDP did not expressly seek the repositioning of the UGB. However, the evidence shows it would fit comfortably with all the relevant substantive intentions in PDP Ch 4. That is particularly in that it would:

(a) properly encompass the developable components of the Site that are proposed to be rezoned for residential purposes and effectively and logically align the UGB with neighbouring residential suburbs that are now within the UGB; and
(b) avoid the 30m landscape buffer and duly set the UGB back from the Dublin Bay ONL.

[26] As such, we find that the repositioning of the UGB as sought by the appellants would substantively:

(a) recognise that the UGB is a tool to manage the growth of urban areas within distinct and defendable urban edges (Obj 4.2.1);
(b) define a revised UGB that identifies an area available for the growth of urban settlements (Pol 4.2.1.1);
(c) assist to contain urban development within the revised UGB (Pol 4.2.1.3);
(d) protect ONL values and assist to support indigenous flora and fauna by setting the UGB boundary inside landscape buffers and away from

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167 Closing submissions for the appellants, at [5.8].

the Dublin Bay ONL (Pol 4.2.1.5, Obj 4.2.2B);

(e) assist to address changing community needs, including as revealed in the evidence of Dr Ryan and with respect to the provision of additional land for housing as part of urban development in the Wānaka area (Pol 4.2.1.7).

[27] Furthermore, we find on the evidence that the repositioning of the UGB as sought by the appellants would properly accord with Pols 4.2.2.21 and 4.2.2.22 at least to the following extent:

(a) aligning with timing of the rezoning of present Rural zoned parts of the Site for urban development purposes (Pol 4.2.2.20);

(b) reflecting existing urbanised areas in the sense of doing no more than adjusting the UGB so that it continues to be aligned with the boundaries of land in the vicinity that is zoned and intended for urban development purposes (Pol 4.2.2.21.a).

[28] Pol 4.2.2.21.d and e are not engaged. The remaining issue is as to procedural due process and pertains to Pol 4.2.2.21.c, i.e.

> have community support as expressed through strategic community planning processes.

[29] Those policies do not dictate that any repositioning of the UGB has to be through a dedicated plan change process. Such an approach would have significant procedural flow on consequences for the resolution of appeals seeking a zoning change from Rural to any of the PDP's other zoning classes. The better interpretation, available on a plain reading of Ch 4 including Pols 4.2.2.21 and 4.2.2.22, is that adjustments to the UGB can be considered in the context of the rezoning appeal to which they pertain. Indeed, that intention is reflected in the reference in Pol 4.2.2.22 to "until **a change** to the Plan **amends** the Urban Growth Boundary **and** zones additional land for urban development purposes" [emphasis added].

[30] In Pol 4.2.2.21, "community support" is intended to be read in relation to "strategic community planning processes". Those processes include appeals on the PDP. Where the relief in an appeal seeks a repositioning of the UGB, the determination of the appeal effectively serves to determine what constitutes "community support" for any re-defined UGB.

[31] We are satisfied that the lack of expression of relief in the submission concerning the positioning of the UGB vis-à-vis the Site has not resulted in any procedural prejudice. That is particularly in the sense of disarming anyone from joining the proceedings. We are satisfied there is no credible risk of that kind. That is in part because of the context we have explained, whereby the Site is already neighboured on three sides by developing residential parts of the established Wānaka urban area already within the UGB. The adjustment sought to the UGB by the appellants is largely of a technical and consequential nature. The management of the effects of residential subdivision and development, including on those living in proximity to it, are addressed through the relevant proposed PDP residential zone provisions rather than the UGB per se.

[32] Therefore, we find that the repositioning of the UGB as sought by the appellants, is within jurisdictional scope as consequential relief, notwithstanding that this was not expressed in the originating submission.

Is there scope to prescribe subdivision as a controlled activity in those parts of the Site rezoned LDSR?

Submissions

QLDC

[33] QLDC submits that this aspect of the modified relief falls outside of jurisdictional scope (and, in any case, submits that the activity classification should

be restricted discretionary).[168] Primarily, that is because Mr Beresford's originating submission simply sought that the Site be rezoned "Residential – Low Density" (now LDSR), a zone that does not provide for subdivision as a controlled activity (its equivalent activity classification being restricted discretionary). QLDC points out that the originating submission did not provide any signal that Mr Beresford sought any different activity classification than is provided in the Residential – Low Density zone (and as remains so under the decision-version LDSR provisions).

The appellants

[34] The appellants submit that there is jurisdictional scope for this aspect of their modified relief.

[35] In opening, Mr Gordon and Ms Murdoch explain how the appellants' relief, as originally expressed in its submission, was first refined at the first instance IHP hearing to reflect the technical advice of experts. Their summary of that set of refinements does not specify the now-proposed structure plan nor any request for controlled activity classification for subdivision that accords with the structure plan.[169] Counsel describe the further refinements sought to the relief as specified in the notice of appeal, again in response to the advice of experts. They note, in particular, the refinement at that stage whereby a rule requiring preparation of a structure plan (as a restricted discretionary activity) was replaced with an actual structure plan with an associated controlled activity classification for subdivision that is consistent with that structure plan. They submit in opening that these refinements come within the ambit of what Mr Beresford originally sought and were all "reasonably and fairly raised" by that submission as refined in the notice of appeal.[170]

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168 Opening submissions for QLDC, dated 23 November 2023, at [4.34], closing submissions for QLDC, dated 2 February 2024, at [5.1].

169 Opening submissions for the appellants, at [2.19]-[2.20].

170 Opening submissions for the appellants, at [2.21]-[2.24].

[36] In those opening submissions, they also point out that PDP r 27.5.7 qualifies its restricted discretionary activity classification for subdivision with "unless otherwise provided for". They point to the notation to that rule to the effect that where a site is governed by a structure plan included in the PDP, subdivision is to be assessed in accordance with r 27.7.1, unless otherwise stated, which rule classes subdivision consistent with a structure plan as a controlled activity.[171]

[37] In closing, counsel depart from that chronology somewhat in submitting that a structure plan solution to governing residential development of this Site "has been proposed" since the first instance QLDC hearing. That is in contrast to the position stated in opening that this preference for a structure plan approach only emerged as a consequence of expert advice at the appeal stage, not at first instance.

[38] The true point at which the structure plan approach emerged is significant, as we come to shortly. In particular, from their somewhat changed narrative on these events, counsel go on to submit that no issue arises if the court takes "the same approach for subdivision within the LDSR zone where that occurs in accordance with the Hāwea/Wānaka – Sticky Forest Structure Plan".[172]

There is no scope to provide for controlled activity subdivision

[39] Rule 27.7.1 assigns controlled activity status to subdivision that is consistent with a structure plan included in the PDP, and that qualifies the restricted discretionary status accorded under r 27.5.7. "Structure plan" is broadly defined such that we have no difficulty in finding the appellants' proposed structure plan to accord with it.[173]

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171 Opening submissions for the appellants, at fn 64 to [2.23].

172 Closing submissions for the appellants, at [4.4].

173 R 2.1 definitions defines 'structure plan' to mean "a plan included in the district plan, and includes spatial development plans, concept development plans and other similarly titled documents".

[40] However, the originating submission makes no reference to seeking a structure plan approach. We have some difficulty with counsel's submissions in closing. That is especially given those submissions appear to contradict their opening submissions that these refinements only emerged in response to expert advice at the appeal stage.

[41] We acknowledge that, under PDP r 27.10, the same regime of non-notification of subdivision consent applications applies whether a subdivision is a restricted discretionary or controlled activity. In each case, applications do not require the written approval of other persons and "shall not be notified or limited notified" subject to some exceptions that do not apply to the Site. However, in such a context, outcomes for people and communities of subdivision application processes very much turn on the effectiveness of QLDC's consent authority powers. A material difference there is as to the different consent authority discretions available under the RMA.

[42] In the case of controlled activities, if information is sufficient, consent must be granted and discretion is confined to the imposition of conditions.[174] In the case of restricted discretionary activities, consent authority discretion is restricted but consent may be granted or refused.[175] Hence, as compared to the position in regard to restricted discretionary activities, whether or not the interests of people and communities are duly addressed in consenting will depend significantly on the effectiveness of condition-setting. In circumstances where a structure plan is reasonably well prescribed, that risk may be significantly more confined. However, as compared to other structure plans in the PDP, the appellants' proposed structure plan is minimalist. In any case, on matters such as infrastructure provision and design, management and maintenance of landscape buffers, effective supervision and oversight by the consent authority is even more important when there is no opportunity for contest through submissions. That is

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174 RMA, s104A.

175 RMA, s104C.

even more so if QLDC would be precluded from declining consent as would be the consequence of controlled activity classification.

[43] In the absence of evidence supporting the appellants' closing submissions that structure planning was part of the relief at first instance, we decline to rely on those submissions. If the position as advanced in opening for the appellants is the accurate one, for the reasons we have set out, we find there is a lack of jurisdictional scope for assigning controlled activity classification to subdivision that is consistent with the proposed structure plan. In any case, on the basis of our landscape findings, we find restricted discretionary, rather than controlled, activity status is the most appropriate for achieving relevant PDP objectives.

Can the RCL notation be uplifted as a consequential technical change?

[44] This was not a matter of apparent contention between the parties, but we address it for completeness.

[45] The court presently understands that the updating of the PDP zoning maps so as to reflect the court's rezoning decision would automatically uplift the RCL notation (in that it is shown on the Rural zone maps). However, our directions allow for this to be addressed, if need be, in supplementary closing submissions.

Annexure 3

Findings on specific modified zoning provisions

Introduction

[1] Our findings on specific provisions for inclusion in the PDP with respect to the appellants' modified relief are in the order of issues we identify in the main part of this decision. Except where we state otherwise, we find all provisions recommended in the JWS – Planning (2) appropriate with reference to relevant PDP objectives and the statutory framework we have summarised (including in their drafting).

Should the AG's recommended Pol 5.3.4.2 be included?

[2] The AG recommends the addition of the following Pol 5.3.4.2:

> 5.3.4.2 Enable the people who receive Hāwea / Wānaka Sticky Forest under the Ngāi Tahu Claims Settlement Act 1998 to manage and use their land in a way that will meet their economic, social, and cultural aspirations.

[3] We have addressed why we find jurisdictional scope for this additional policy. Its inclusion is supported by the appellants and is otherwise not opposed (other than to the extent Kirimoko submits it is beyond scope). It is materially consistent with PDP Pol 5.3.4.1 (i.e. enable Ngāi Tahu to protect, develop and use Māori land in a way consistent with their culture and traditions, and economic, cultural and social aspirations including papakainga housing). We have explained how errors and gaps in the Explanatory Statement and a lack of clarity as to the meaning of "Māori land" in the PDP combine to create uncertainty on whether Pol 5.3.4.1 pertains to the Site. The evidence satisfies us that it is in accordance with the intentions of PDP Ch 5 to include an enablement policy of the kind proposed pertaining to the Site. In particular, it assists to address an important dimension of the tangata whenua relationship that exists with the Site, namely that

enabling realisation of its economic potential is fundamental to alleviating the *mamae* arising from Treaty breach injustice. Therefore, we determine that proposed Pol 5.3.4.2 is to be included in the PDP.

[4] In addition, in light of our findings, the errors in the Explanatory Statement to Ch 5 should also be addressed, whether by s293 or QLDC-initiated change. We make directions to allow for a final determination on that.

Should subdivision in the LDSR that accords with the structure plan be controlled or restricted discretionary?

[5] For the reasons we give in Annexure 2, we find there is no jurisdictional scope to accommodate the appellants' preference for controlled activity classification for subdivision in the LDSR. Nevertheless, we find controlled is not an appropriate activity classification on the merits. That is in view of a comparative lack of specificity, and hence development design and outcome certainty, in the appellants' proposed structure plan.

[6] QLDC properly points out that, apart from details already depicted in PDP planning maps, the structure plan essentially only adds elements concerning the landscape buffer area and indicative walking and cycle connections.

[7] Landscape management with regard to the protection of ONL values is one dimension of why it is important that QLDC maintain sufficient consent authority scrutiny of proposals. There are also other strategic reasons for this, for example as to the provision and design of infrastructure ultimately serving this part of Wānaka's growing urban community. Hence, we find that the structure planning approach in this case is not a sound justification for preferring controlled activity classification.

[8] Restricted discretionary activity classification carries somewhat greater uncertainty in the fact that consent can be declined. However, given that the PDP provides that consent applications would still be expected to be processed on a

non-notified basis, we find that this is not significant in terms of development outcomes overall. In effect, with sound subdivision design and proper engagement with QLDC, a developer ought to be able to ensure effective realisation of the Site's economic potential in a manner that does not impose any unreasonable transfer of costs to the community.

[9] As such, we find that restricted discretionary activity classification, rather than controlled, is the most appropriate. However, whilst we determine that r 27.7.29 is to be included in the PDP, that is subject to some refinements as we next discuss in the context of a range of related landscape provisions.

Should the drafting of landscape provisions be refined?

[10] We deal with a number of related provisions in this discussion. Most concern what is most appropriate for protecting Dublin Bay ONL values. That is principally with regard to controls applying to development near to the Dublin Bay ONL boundary. However, some broader issues are also raised in closing submissions.

QLDC's closing position

[11] QLDC proposes a range of changes to the drafting in the JWS – Planning (2) as pertains to the protection of ONL values and landscape matters more generally (our tracking to illustrate QLDC's position against the drafting in the JWS – Planning (2)):

(a) in Ch 7, QLDC proposes that Pol 7.2.1.8 be amended to read:

> In the Hāwea / Wānaka Sticky Forest Structure Plan area, protect the values of the Dublin Bay Outstanding Natural Landscape ~~ONL~~ by managing the effects of buildings on sites that ~~where they~~ adjoin the Outstanding Natural Landscape ~~ONL~~ boundary, including where such sites are separated from the Outstanding Natural Landscape by a site that is held either publicly or privately for the purpose of access,

open space, or servicing (Objective 3.2.5.3).

(b) in Ch 11, QLDC proposes that Pol 11.2.1.X be amended to read:

11.2.1.X In the Hāwea / Wānaka Sticky Forest Structure Plan area, protect the values of the Dublin Bay Outstanding Natural Landscape ~~ONL~~ by managing the effects of buildings on sites that adjoin the Outstanding Natural Landscape boundary, including where such sites are separated from the Outstanding Natural Landscape by a site that it is held either publicly or privately for the purpose of access, open space, or servicing ~~where they adjoin the ONL boundary~~ (Objective 3.2.5.3).

(c) in Ch 27, QLDC proposes the following policy changes:

27.3.24.3 Ensure that the landscape values of the Dublin Bay Outstanding Natural Landscape are protected by:

a. Managing the design and location of building platforms, landform modification and planting; and

b. Planting the Landscape Buffer Area in indigenous vegetation, including trees at a height and density that maximises screening of development when viewed from the eastern arm of Lake Wanaka ~~Dublin Bay ONL~~. (for the purpose of this policy the eastern arm includes Dublin Bay and Stevenson Arm to the point between the south end of the Peninsula and Beacon Point).

c. Establishing an Additional Buffer Area where plantation forestry is required to be harvested prior to planting the Landscape Buffer Area, to protect the Landscape Buffer Area from the risk

of damage from plantation forestry at risk of deterioration and/or windfall.

27.3.24.4 Ensure that the Landscape Buffer Area and Building Restriction Area are planted in indigenous vegetation, which:

a. Maximises screening of development when viewed from the Eastern Arm of Lake Wanaka and reduces the visual effects of building adjoining the building restriction area ~~within the residential zones~~, and;

b. Integrates with and complements the patterning of existing indigenous vegetation and open space on adjoining land; and

c. Mitigates fire risk to adjoining residential zones.

27.7.30 Within the Large Lot Residential zone and on those sites within ~~that part of~~ the Lower Density Suburban Residential Zone ~~immediately~~ that adjoin~~ing~~ the Outstanding Natural Landscape ~~ONL~~ boundary , including where such sites are separated from the Outstanding Natural Landscape by a site that it is held either publicly or privately for the purpose of access, open space, or servicing within the Hāwea / Wānaka Sticky Forest Structure Plan area, every allotment created for the purposes of containing residential activity shall identify one building platform of not less than 70m² in area and not greater than 500m² in area.

[12] Reflecting those policy adjustments, QLDC seeks consequential changes to similar effect to rr 7.4.21 and 27.7.29.1 including to the effect the relevant matter of discretion in the latter rule would read:

> the landscape effects of subdivision and development including the location, size and finished ground levels of building platforms within the Large Lot Residential Zone and that part of the Lower Density Suburban Residential Zone on sites that adjoins the Outstanding Natural Landscape; including where such sites are separated from the Outstanding Natural Landscape by a site that it is held either publicly or privately for the purpose of access, open space, or servicing;

[13] To similar ends, QLDC seeks that the listed matters for discretion in restricted discretionary r 11.4.Y, relevantly to following effect:

> b. Methods used to minimise effects on the landscape values of the Dublin Bay Outstanding Natural Landscape ~~ONL~~.
>
> c. The landscape ~~and visual amenity~~ effects of the location, bulk, and finished ground levels of building(s)

[14] Finally on this set of matters, QLDC seeks that restricted discretionary activity r 27.7.29 be amended to the effect that discretion extends to the provision of the Additional Buffer Area in those described circumstances.

[15] QLDC also seeks changes as follows:

(a) Pol 27.3.24.3 would have an additional provision:

> c. Establishing an Additional Buffer Area where plantation forestry is required to be harvested prior to planting the Landscape Buffer Area, to protect the Landscape Buffer Area from the risk of damage from plantation forestry at risk of deterioration and/or windfall.

(b) restricted discretionary activity r 27.7.29 would be amended to the effect that discretion extends to the provision of the Additional Buffer Area in those described circumstances.

[16] From QLDC's closing submissions, we understand the reasons for seeking these changes are generally as follows:

(a) the changes to Pols 7.2.1.8, 11.2.1.X and 27.7.30 and related rules helps guard against any undermining of the intentions of these policies by any strategy to use access lots to separate building lots from the Dublin Bay ONL;

(b) the changes to Pols 27.3.24.3.b and 27.3.24.4.a reflect the importance of these viewing locations of the Dublin Bay ONL (relative to less important ones from the lake), including in light of Ms Steven's answers to counsel on popular usage areas on the lake;

(c) the changes to Pol 27.3.24.3.a to refer to landform modification and planting, as well as building platforms, reflects the opinion of Ms Jones (supported by the JWS – Planning (2)) that this better ensures protection of the Dublin Bay ONL values;

(d) the addition of "landscape" to "values" and related refinements to some provisions are to ensure greater clarity;

(e) the provision for an 'Additional Buffer Area' reflects the evidence of Mr Watson concerning health and safety setback requirements in forestry harvesting.

The appellants' closing position

[17] The appellants oppose these changes as unwarranted. As for Pol 7.2.1.8, counsel point out that there is already a definition of "adjoining land" in the PDP and QLDC's request does not align with how these matters are addressed elsewhere in the PDP. We understand that definition is as follows:

> Adjoining Land (Subdivision) Includes land separated from other land only by a road, railway, drain, water race, river or stream.

[18] As for QLDC's proposals for the Ch 27 provisions, the appellants refer to Ms Gilbert's evidence. They note that the Dublin Bay ONL coincides with the "eastern arm" of Lake Wānaka where Ms Gilbert described an "increasing subservience" to "natural landscape patterns and features". By contrast, views to the Site from the Peninsula Bay/Beacon Point part of the lake already include

plainly visible built form. They submit that the additional buffer proposed by QLDC is neither necessary nor appropriate.[176]

Evaluation

Pols 7.2.1.8, 11.2.1.X and 27.7.30 and rr 7.4.21 and 27.7.29.1

[19] The PDP definition of additional land (subdivision) would not in fact apply to these policies as they do not use the defined words. On the other hand, the definition serves to highlight the potential for difficulties of a similar nature to arise without clarification. We accept QLDC's submission that there is some risk that subdivision design could undermine the intentions of Obj 3.2.5.3 in terms of serving to protect Dublin Bay ONL values. We note that there may well not be an equivalent clarity in how these matters are addressed by other PDP zoning regimes. However, the point of clarification is relatively confined and we find would not likely materially detract from realising the Site's economic potential. Rather, it essentially is to the effect of avoiding unwarranted doubt as to the intentions in Obj 3.2.5.3 concerning the protection of ONL values.

[20] On the relevant wording common to all relevant policies, we find QLDC's drafting could be improved as follows:

> … where they adjoin the Outstanding Natural Landscape boundary or are separated from that boundary by a site that is held either publicly or privately for any access, open space and/or servicing purpose.

[21] Subject to those matters we accept QLDC's submissions. Our directions provide for QLDC to provide updated drafting for final approval.

Pols 27.3.24.3.b and 27.3.24.4.a

[22] In view of our evidential findings, we do not accept QLDC's submission

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176 Closing submissions for the appellants, dated 9 February 2024, at [5.3]-[5.5].

that these policies should be changed to maximise screening from the eastern arm of Lake Wānaka. QLDC's reliance on answers given by Ms Steven concerning the recreational popularity of this arm of the lake reinforces to us the overreach in this part of QLDC's case. In essence, we find the concerns on behalf of recreational boaties and other lake users as to viewing ambience are overstated. That is in light of our findings on the related evidence, considered in the context of our viewing of the Site from a boat at the relevant viewpoints. That view is realistically in a context of established dwellings and the likelihood that most viewers will not fixate on these viewpoints. Furthermore, QLDC's position reflects a weighting in favour of only one sector of the community. We find that this change is not needed so as to protect ONL values, as we find them.

[23] As for the remaining drafting changes to these provisions suggested by QLDC, we agree that improved clarity is provided in the following change:

> reduces the visual effects of building adjoining the building restriction area ~~within the residential zones~~, and

[24] Our directions provide for QLDC to provide updated drafting of the provisions to reflect that refinement.

27.3.24.3.c and r 27.7.29.n

[25] The JWS – Planning (2) recommends classifying subdivision as a restricted discretionary activity if in accordance with the proposed structure plan (including its 30m landscape buffer). The noted evidence of Mr Watson was in his 15 December 2023 email answering QLDC's emailed written questions from counsel for QLDC (according to directions made prior to the adjournment). The relevant questions and answer are as follows:

> 7: If deterioration of the radiata pine will occur more quickly once a 30m area is harvested on the southern and western boundaries, will leaving the rest of the radiata pine pose a health & safety risk?

a: If so, does this consideration support undertaking a complete rather than partial harvest of the radiata pine?

A: The Radiata Pine trees left after harvesting have the potential to grow well over 30 metres tall. If they are left in perpetuity, they will likely grow to about 38- 40 metres tall before ceasing to grow in height. This will create a Health and Safety Risk sometime in the future for both the forest owner and any residents of properties. Trees of this maximum height will have the potential to contact through residential boundaries by 8 to 10 metres in this scenario. The Buffer zone could be increased 40m, if that was deemed appropriate, to cover of this risk.

If it was decided at a later date, that there was further harvesting to take place after a residential subdivision was built there would at that point be difficulties. Rules for felling of trees under the H&S at work Act (and related Forestry and related Forestry Code or Practice) stipulate that no person (other than the machine operator) can be within two tree lengths of a tree falling operation. This would therefore require an 80 metre tree felling setback from residents property boundaries. If tree felling was to take place closer than two tree lengths to a neighbours property, measures must be put in place so that no persons will be within two tree lengths of the base of the trees as they are being felled. This will be an onerous and expensive tree felling exercise if it took place after residential properties are sold. If a second tranche of harvesting was likely to take place then there could be a case for an 80 metre buffer zone.

[26] We refer to our earlier stated reasons for why we find no value in the 30m buffer on the western side of the Site. We are not persuaded that Mr Watson's explanations provide a sufficient case to revisit the recommendation of the JWS – Planning (2) on this aspect of drafting. We bear in mind that the Health and Safety at Work Act 2015 is itself a code for its purposes, including in its prescribed duties concerning risk management. While the RMA's purpose also concerns the enablement of health and safety, we do not find a case on the evidence for supplementary PDP regulation of these matters. Allowance should be made for common sense approaches to be taken by the owner(s) of the Site and those undertaking its development pursuant to the new zoning. Nor do we find

additional buffering warranted for landscape purposes, in light of our findings on the evidence.

[27] Therefore, we find QLDC's proposed changes to these provisions unwarranted and that the drafting in the JWS – Planning (2) is the most appropriate (except that QLDC's proposed addition of the word 'Area' following 'Landscape Buffer' is appropriate and to be made).

r 27.7.29.1m

[28] For context, this rule relevantly specifies the following to be a restricted discretionary activity at 'Hāwea/Wānaka Sticky Forest' (i.e. the Site) with the consent authority discretion restricted to specified matters a. – o.:

> Subdivision of the Large Lot Residential and Lower Density Suburban Residential Zones consistent with the Structure Plan 27.13.19 Hāwea / Wānaka Sticky Forest.

[29] QLDC's preferred revision to this part of the rule as included in the JWS – Planning (2) is as follows (tracking as shown in the JWS):

> m. the landscape effects of subdivision and development including the location, size and finished ground levels of building platforms within the Large Lot Residential Zone and that part of the Lower Density Suburban Residential Zone <u>on sites</u> that adjoins the Outstanding Natural Landscape<u>; including where such sites are separated from the Outstanding Natural Landscape by a site that it is held either publicly or privately for the purpose of access, open space, or servicing</u>;

[30] The lengthening of the provision is somewhat at the expense of clarity. The drafting aligns generally with our findings that the only landscape values pertain to the Dublin Bay ONL. However, "landscape effects" could be misread as having more general application, particularly in the fact that it appears well removed from the later reference to the ONL. Furthermore, this would be more clearly expressed as effects on the landscape values of the ONL. There is also no need to refer to

the LLR and LDSR zones as those are already captured in the expression of the rule. These drafting infelicities can be readily resolved with the following re-expression:

> m. on sites that adjoins the Outstanding Natural Landscape boundary (and any sites that are separated from that boundary only by a site that is held either publicly or privately for any access, open space, and/or servicing purpose), effects of subdivision and development on identified landscape values of the Outstanding Natural Landscape including any such effects arising from the location, size and finished ground levels of building platforms.

[31] The drafting is to be clarified accordingly for the provision to be included in the PDP.

Should the walking and cycling provisions be refined?

[32] The relevant provisions of the JWS – Planning (2) version are in restricted discretionary r 27.7.29 and related non-complying activity r 27.7.29.2. These are part of the set of 'Location Specific Rules' and pertain to subdivision on the Site.

[33] In r 27.7.29, subparagraph (o) prescribes the following as a matter to which discretion in consenting is restricted:

> o. The provision and design for walking and cycling connections.

[34] In non-complying r 27.7.29.2, the following applies to the application of the rule triggered by non-compliance with the structure plan:

> For the purpose of this rule, walking and cycling connections will be deemed to comply provided the proposed alignment enables a similar journey and connects to the boundary of the Hāwea / Wānaka Sticky Forest in a similar location.

[35] Clarity in controls on matters concerning walking and cycling connections is important in this evidential context. In particular, as we have explained at the commencement of this decision, the Site has been in use for many years as an

informal recreational mountain biking facility, by acquiesce of the Crown as administrator. Along with that, the PDP plays an important role in re-setting community expectations. That is that this informal usage will not be a matter for the Crown to allow for and rezoning is with the plain, and appropriate, purpose of enabling residential development of much of the Site such that its economic potential can be realised.

[36] Furthermore, in addition to development potential implications, there is an obvious cost dimension to consider with respect to such connections, particularly given the size and topography of the Site. On that aspect, in response to the court's enquiry prior to the adjournment, counsel report that QLDC cannot give assurance that it would take future responsibility for cycle connections.

[37] The drafting of 27.7.29.1.o should be clarified to the effect that the connections referred to are those indicated on the structure plan. Appreciating that the structure plan is only indicative, we find the following refinement is sufficient:

> o. The provision and design for walking and cycling connections <u>in the general locations and extents indicated on the Hāwea / Wānaka Sticky Forest Structure Plan located in Section 27.13.</u>

[38] This refinement is to be made for the provision to be included in the PDP.

r 11.4.Y

[39] The addition of "landscape" before "values" in this rule, as proposed by QLDC, would ensure greater clarity and hence better assist to achieve related PDP objectives.

[40] Our directions provide for QLDC to provide updated drafting to reflect that refinement.

Should the UGB be repositioned?

Evidence and submissions

[41] In reliance on Mr Chrystal's evidence, the appellants submit that the most appropriate relocation of the UGB boundary is to where it is shown on the structure plan attached to their closing submissions.[177] In essence, that would follow a route heading:

(a) southwards from the Dublin Bay ONL boundary along the western boundary of the Site to the Kirimoko Block boundary; and then
(b) northwards following the western boundary of the LLR zoned part of the Site;
(c) so as to connect back to the existing ONL boundary.

[42] As an aspect of its alternative option, involving the making of s293 directions, Kirimoko seeks that the UGB be repositioned so as to align with the Dublin Bay ONL boundary through the Site.[178] In terms of the evidence, Mr Page submits that this repositioning would reflect the consensus of the planning witnesses in answering the court's questions on these matters (the experts having been called together for these purposes).[179]

[43] Kirimoko submits that the appellants' preferred repositioning would not accord with Obj 4.2.1 and was not assessed against that provision by the relevant experts. That is a further reason why Kirimoko submits that the repositioning of the UGB should be through s293 directions.[180]

[44] Counsel for the appellants dispute the claim that the repositioning of the

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177 Closing submissions for the appellants, dated 9 February 2024, at [5.8].
178 Closing submissions for Kirimoko, dated 19 January 2024, at [15].
179 Closing submissions for Kirimoko, dated 19 January 2024, at [15](a)(ii), referring to Transcript, p 375, l 26.
180 Closing submissions for Kirimoko, dated 19 January 2024, at [15](a)(ii).

UGB was not duly evaluated by Mr Chrystal, noting his opinion, as stated in evidence, is that the repositioning proposed by the appellants meets the intentions of Obj 4.2.1 and other Ch 4 provisions.[181]

[45] The AG materially concurs with the appellants' submissions. QLDC agrees that the repositioning sought by the appellants is within jurisdictional scope and hence does not require s293 directions.[182]

Evaluation

[46] Assisted by Mr Chrystal's opinion, we find that the repositioning of the UGB as proposed by the appellants is appropriate, including in terms of the intentions of Obj 4.2.1 and other Ch 4 provisions. That in part is because we find it sufficiently assists to manage the growth of urban areas "within distinct and defendable urban edges", namely as shown on the structure plan. Nor does it offend Pols 4.2.2.21 or 4.2.2.22 or other Ch 4 provisions. It leaves for later consideration what, if anything, should be done consequentially concerning the Kirimoko Block. However, as Ch 4 intends, any readjustment for that area should be done in conjunction with any associated residential zoning adjustments so that the outcome continues to achieve the intentions of Chs 3 and 4.

[47] Therefore, we find the positioning of the UGB, as depicted on the modified relief structure plan, is appropriate and is to be so shown on the structure plan to be included in the PDP (subject to the above-noted refinement to remove the 30m landscape buffer on the western side of the Site).

Can access restrictions as proposed be dropped?

[48] The JWS – Planning (2) recommended a set of PDP provisions to the effect

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181 Closing submissions for the appellants, dated 19 January 2024, at [5.8] referring to Chrystal EIC, dated 22 September 2022, at [71]-[74].

182 Closing submissions for QLDC, dated 2 February 2024, at [9.2].

that development would be classed as non-complying according to a policy of avoidance pending the securing of a suitable "legal vehicle access" to the Site. Counsel inform the court that PC54 is able to now be operative, in the absence of any appeals. As PC54 provides for access, any need for these provisions falls away. Hence, we accept the appellants' submission on this aspect, noting it is supported by the AG and QLDC. We record that this does not imply that we would necessarily have imposed the provisions recommended in the JWS, mindful that other statutory mechanisms may have also allowed satisfactory remedy.

[49] Therefore, we find that the access restrictions are not needed and that they are not to be included in the PDP.

Should the forestry harvesting provisions be refined?

QLDC's closing position

[50] We have addressed why we find QLDC's proposed Additional Buffer Area unwarranted including for health and safety purposes. We now address remaining issues concerning these related provisions.

[51] QLDC proposes that r 21.4.X.a be amended to the effect that an additional matter that a Harvesting Management Plan must include is "landscape effects of earthworks associated with harvesting". That is on the evidence of Ms Jones. The addition is sought in view of the fact that the PDP's earthworks rules (in Ch 25, Tables 25.1 – 25.3) do not apply in that regulations under the National Environmental Standard for Commercial Forestry ('NES-CF') prevail.[183]

[52] QLDC also proposes a "minor refinement" to r 21.2.1.x to clarify that replanting of land in native species has positive effects provided it follows harvesting. QLDC explains that this picks up on questioning from the court of the planning experts concerning whether the application of Pol 21.2.1.13 and

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183 Closing submissions for QLDC, dated 7 February 2024, at [4.7]-[4.8].

r 21.2.1.x is clear.[184]

Other parties

[53] These refinements are not opposed by the appellants.

Finding

[54] We find QLDC's recommended refinements to the forestry provisions are sensible and appropriate and are to be included in updated provisions for inclusion in the PDP.

Consequential changes to the modified relief structure plan

[55] We find that there should be a consequential change to an aspect of the modified relief structure plan. This concerns the depicted 30m buffer on the western side of the Site. The version of the structure plan, as included in the appellants' closing submissions, is shown in Annexure 1 of this decision.

[56] The noted 30m buffer sits on the western margin of the Site between the repositioned UGB and a residual strip of Rural zoned land. Given our findings on the zoning outcome, we find that residual Rural strip does not serve the PDP's intentions for Rural zoned land and is an anomaly. By contrast to the 30m buffer that skirts the Dublin Bay ONL part of the Site, we find this 30m buffer is unwarranted in terms of relevant PDP objectives and policies.

[57] We find the buffer is not justified for any landscape purposes, whether for the protection of ONL values or the maintenance of landscape character or visual amenity values. The part of the Site immediately westward is presently Rural zoned. However, it does not have any PDP value as a landscape (for the reasons

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184 Closing submissions for QLDC, dated 2 February 2024, at [4.1].

we have discussed concerning the Site).

[58] For those reasons, our directions require that the structure plan be amended so as to remove this section of the 30m landscape buffer.

[59] Furthermore, whilst not essential to our reasons, we bear in mind that the anomalous residual Rural zoning of the portion of the Site below the buffer zone can be anticipated to be revisited. That may be as a consequence of s293 directions we make, in light of closing submissions, as we have discussed. If not, it is realistic to anticipate this could well occur by future Sch 1 processes.

Other matters

[60] The court notes the consensus concerning the AG's recommended wording changes to refer to "Hāwea/Wānaka Sticky Forest", both in the structure plan and more generally. We find that an appropriate refinement to the drafting in the JWS – Planning (2) (as is QLDC's recommended striking through of the title "Sticky Forest Structure Plan Area") above Pol 27.3.24.1.

[61] That refinement is to be made in the provisions to be included in the PDP.

Annexure 4

Observations in open court on 6 December 2023 in light of the landscape and ecology evidence and recorded in Minute dated 6 December 2023

[1] As the court observed by Minute prior to the hearing, the evidence and submissions indicate a consensus that urban residential rezoning of the Site is appropriate. Differences centre on matters concerning the extent of that rezoning and issues as to development yield and various matters of detail concerning appropriate PDP provisions.

[2] In that context, it remains our view that it is consistent with fairness and efficiency principles to offer guidance to parties on matters as they are tested. That is with a view to ultimately arriving at the most appropriate urban rezoning outcome for the Site.

[3] At this juncture, the court has heard opening submissions and all landscape and ecology evidence has been tested. The court has concluded its site visit, according to parties' agreed itinerary. As reported, that provided us with significant assistance in putting the landscape and ecology evidence in context. Most valuably, it has put in our minds eye the various agreed viewpoints of and from the appeal Site. Photomontages have not been a substitute for that, in some cases exaggerating and other cases diminishing what the eye reveals.

[4] In addition, uncontested evidence has been entered onto the record by consent. That includes evidence of several witnesses for the appellants and the Attorney General and documents in the bundle.

[5] The planning evidence remains to be called, but the court has carefully read the written statements including the planners' joint witness statement dated 9 January 2023 ('JWS – Planning 1'). The court has also considered the PDP provisions, including relevant objectives and policies and submissions on them as well as higher order instruments.

[6] We have also had careful regard to the first instance decision, the subject of the appeal, and the related reports of the independent hearing's commissioners.

[7] The planning evidence, included in the JWS – Planning 1, sets out those experts' opinions on the most appropriate zoning outcomes for the Site. That includes their different perspectives on a range of matters. On many of those, the planners rely, for their foundations, on the different opinions offered by the landscape experts (and, related to that the ecologist called by the appellants).

[8] Those opinions were on the basis of the written evidence, but those experts have now been called and tested. Therefore, at this juncture, it is timely that we offer our preliminary observations in order to assist the planners to undertake further expert conferencing and update their opinions on related planning provisions.

[9] In these preliminary observations, we leave aside matters such as concerning forestry harvesting, road access and other matters where the planners do not significantly draw from the landscape and ecology evidence for their recommendations on the most appropriate PDP outcome.

[10] We also leave aside matters raised in legal submissions as to jurisdictional scope and other matters on which we must make findings in due course. Our observations are preliminary and simply for the purposes of assisting the planners in the task we direct, such that they can provide a second joint witness statement following conferencing in time for them to be called tomorrow.

Rezoning should be according to a structure plan essentially as per Mr Chrystal's evidence

[11] The rezoning should include a structure plan as per that shown as 27.13.19 Sticky Forest Structure Plan in the EIC of Mr Chrystal. That should depict all of its aspects including the following:

(a) those parts of the Site to be rezoned Large Lot Residential, Low Density Residential or to remain zoned Rural;

(b) the ONL;

(c) the revised UGB;

(d) the 30m landscape buffer, but not the further landscape sensitivity

area overlay that was recommended by QLDC; and

(e) the illustrated no build areas.

[12] As for the indicative recreation connections, we make some further observations shortly.

[13] In addition, these PDP provisions should include the associated provision 27.13.19b Sticky Forest Area, Typical Plant List in Mr Chrystal's evidence.

What areas are to be shown as rezoned

[14] The zoning treatments of the Site should be as illustrated in Mr Chrystal's structure plan, namely including:

(a) Large Lot Residential including on the so-termed Northern Finger;

(b) Low Density Residential where shown;

(c) Rural elsewhere.

[15] The PDP planning maps should be amended accordingly.

The revised UGB and the Kirimoko/Sticky Forest BRA

[16] We find nothing in the landscape and ecology evidence to either:

(a) militate against the repositioning of the UGB as shown in Mr Chrystal's structure plan; or

(b) warrant any expansion of the building restriction area beyond the 10m recommended by Mr Chrystal.

[17] However, we note that there are other matters concerning the UGB raised in opening submissions on which we will need to make findings in due course. On both these matters also, we are mindful that the issues extend beyond simply landscape considerations and we have yet to hear from the planning witnesses about them.

[18] Hence, our provisional observations on this leave reserved our determination on these matters, including as to matters of PDP integrity, integrated management and on the most appropriate approach to the interface with the Kirimoko site.

Any provision for walking and cycling connections to and through the structure plan area

[19] The question of what if any provision should be made for walking and cycling connections plainly extends further than the landscape evidence. We simply record that it remains very much a live question as to whether any form of regulation beyond what the appellants offer would be appropriate in the circumstances.

Preliminary observations on related proposed PDP provisions

[20] We now turn to the associated proposed plan provisions recommended by the planners in Appendix A to the JWS – Planning 1. Our observations are confined to those provisions that are recommended in light of the landscape and ecology evidence.

[21] However, the planners should consider they can offer any updates they consider appropriate on other provisions when they report the outcome of their conferencing in their second JWS. For example, any updates offered in regard to plantation forestry harvesting would be welcome. We touch on this matter briefly only insofar as matters arise concerning landscape values.

Some overarching drafting principles

[22] In terms of the drafting approach:

(a) matters of restriction and control, and associated standards, should be designed to serve the PDP's intentions as expressed in its objectives and policies (particularly as these pertain to ONLs and RCLs);

(b) that includes carefully considering whether additions to the existing objective and policy framework are truly justified on the evidence,

including carefully testing the soundness of any claims that the Site is 'bespoke';

(c) the planners should be careful to avoid adding other non-statutory 'strategic' or contextual overlays in their evaluation of what is most appropriate by way of PDP outcomes. That includes misplaced assumptions arising from historical usage of the Site as an informal recreational park and unsound reliance on Environment Court decisions concerning land in the environs that significantly pre-date the PDP.

Chapter 7 – Lower Density Suburban Residential Zone

Proposed Pol 7.2.1.8

[23] This policy would seem generally appropriate, subject to not referring to the Landscape Sensitivity Area which the court does not consider justified on the landscape evidence.

Proposed Pols 7.2.1.9 and 10

[24] The court does not consider the 'reasonably difficult to see' addition appropriate or justified as a form of addition to the PDP regime. Nor is the court at this stage persuaded on the landscape evidence that there is sound justification for these proposed policies. Rather, subject to the testing of the planning evidence, the court sees no present reason to expand upon what the PDP already provides for through its relevant objectives and policies.

Proposed Pol 7.2.1.11

[25] By contrast, this proposed new policy as to managing colour and reflectivity of buildings to ensure buildings are visually recessive and well-integrated in the landscape, would appear to be generally appropriate and in accordance with PDP intentions.

7.4 rules – activities

[26] The planners' proposed RDA rule 7.4.21 is generally appropriate. That is

as to buildings not located within a building platform approved by resource consent where the site immediately adjoins an ONL boundary (including the proposed matters of discretion).

[27] We note that Mr Taylor considers this rule may need to be amended, or a controlled activity rule added, concerning sites adjoining the Kirimoko BRA, but we reserve our findings on this at this time.

7.5 – Standards – building materials and colours

[28] Proposed RDA rule 7.5.x is generally appropriate.

7.5 – Standards – building height

[29] Proposed rr 7.5.1.4 and 7.5.2.3 as to a 'Sticky Forest Landscape Sensitivity' area are unwarranted on the basis of the landscape and ecology evidence.

[30] On the landscape and ecology evidence, the court is not persuaded that there should be any change to the usual building height standards that apply within Large Lot Residential and Low Density Residential zoned areas in Wānaka.

Chapter 11 – Large Lot Residential Zone

11.1 – Zone Purpose

[31] We reserve our findings on the proposed additional sentence until we have heard the planning evidence.

Proposed new Pols 11.2.1.X, 11.2.1.X1 and X2

[32] The court does not consider the 'reasonably difficult to see' addition appropriate or justified as a form of addition to the PDP regime. Nor is the court at this stage persuaded on the landscape evidence that there is sound justification for these proposed policies. Rather, subject to the testing of the planning evidence, the court sees no present reason to expand upon what the PDP already provides for through its relevant objectives and policies. The court's findings on these policies is therefore reserved.

11.4 – rules on activities – r 11.4.Y

[33] The planners' proposed RDC rule 11.4.Y is generally appropriate.

11.5 – Standards – Building height – 11.5.1

[34] On the landscape and ecology evidence, the court is not persuaded that there should be any change to the usual building height standards that apply within Large Lot Residential and Low Density Residential zoned areas in Wānaka.

[35] Hence, the court is not at this stage persuaded concerning the proposed new rules 11.5.1.2.c and 11.5.1.5.

11.5 – Standards – Building materials and colours – 11.5.10

[36] The planners proposed amendment to r 11.5.10 to refer to the Large Lot Residential Area at Sticky Forest would appear appropriate insofar as it goes.

11.5 – proposed new standard on retaining walls in the Sticky Forest Structure Plan

[37] Subject to hearing the planning evidence, the court does not presently see any issues arising from their proposed new rule 11.5.x on this matter. However, we reserve our findings on reference to 'no visibility beyond the site'.

Chapter 21 Rural Zone

Proposed new Pol 21.2.1.x

[38] The court presently sees no issues with this proposed policy insofar as it goes.

[39] In light of the landscape and ecology evidence, the court also envisages there may be value in acknowledging positive effects, including for ONL values, from production forest harvesting that removes a potential seed source for wilding pines.

Chapter 27 – Subdivision and Development

Proposed Objective 27.7.x

[40] The court needs to better understand why this addition to the PDP objectives and policies concerning ONLs and RCLs is warranted.

Proposed Pols 27.3.24.1 and 2

[41] The court's preliminary view is these policies are generally appropriate in light of the landscape and ecology evidence.

Pol 27.2.24.3

[42] The court's preliminary view is that this policy needs refinement to better focus on ONL values, not views per se.

Proposed Pols 27.3.24.4 and 5

[43] The court's preliminary view is that neither policy is justified on the landscape evidence given the structure plan would keep development well removed from the legible escarpments.

Proposed Pols 27.3.24.6 and 7

[44] The court's preliminary view is these are helpful policy additions on the basis of the landscape and ecology evidence.

27.7 – Location Specific Rules – amended r 27.7.1 and new RDA r 27.7.28A and NCA 7 27.7.28B

[45] The court's provisional view is that restricted discretionary activity ('RDA') is more appropriate than controlled activity classification for subdivision. That is in particular to ensure design accords with the proposed Sticky Forest structure planning principles and relevant intentions.

[46] Therefore, in terms of this point of difference between some planners and their associated drafting in the JWS – Planning 1, our provisional view is that:

(a) r 27.7.1 should be amended as illustrated to the effect that it does not apply to the Sticky Forest Structure Plan; and

(b) there should be an additional bespoke RDA rule for Sticky Forest Structure Plan (which we term 27.7.28A); however

(c) that bespoke rule needs significant refinement compared to what is presently offered in the JWS – Planning 1 proposed r 27.7.28.

[47] Our concerns about the present drafting include the following:

(a) there is no clear list of matters to which discretion is restricted. Furthermore there appears to be overreach in matters of control concerning esplanade provision, and insofar as pertains to recreation, matters of access and recreational cycling usage of what is private land that has for too long served such proxy purposes;

(b) as we have noted, we do not find justification for landscape sensitivity overlays in addition to the planting buffer and confined building restriction area as discussed;

(c) we are not yet persuaded as to any need to prescribe walking and cycling connections other than to a limited extent as may be proposed by the appellants.

[48] The court observes that, under provision 27.10, applications for restricted discretionary activities shall not require written approvals and shall not be notified or limited notified, subject to specified confined exceptions. We see no reason at this stage to depart from this approach.

[49] Where the structure plan is not complied with, subject to ensuring it is properly focused as discussed, the court presently favours non-complying status over discretionary. Perhaps this should be specified as an additional r 27.7.28B or equivalent (e.g. see r 27.7.28.2).

[50] As for r 27.7.29 we need to understand its justification and whether it is consistent with other residential zone controls. Therefore, we reserve our findings.

[51] On all other matters, the court's findings are reserved subject to testing of the planning evidence.

Annexure 5

Judge Hassan's questioning of Ms Steven

Transcript, pp 248 – 258

QUESTIONS FROM THE COURT: JUDGE HASSAN

Q. Thank you Ms Steven. I've just got a few I think remaining things, although there's an awful lot that's been covered. I think perhaps starting maybe with the viewpoint from Mount Iron. Now I did have my place marked and I wanted to just use it as a reference point. So if you go to that for a question which we'll not really rely on it too much but photoset 8 and I'll just count the photos in one. It's page 9 I think in the set and you'll know when you get there because it'll look like so. You'll see that…

A. I've got the very page open, yes.

Q. Yes, thank you, and I wanted to just for orientation purposes take you to the top photograph.

A. Yes.

Q. Just driving through Northlake's development. I took a drive through there and I drove west as far as I could go and I noticed as I drove west towards if you like, facing directly towards the landform you see there with the trees on the ridgeline more or less, that it's – you go up in elevation from where you start at the road. In other words there's two entrances into, well yes, there's two main entrances into Northlake. I'm talking about the one that is probably most western. [I]… went in through that entrance, drove in through that street network, and then turned left down one of the roads. I noticed some scrapers and stuff doing work at the end of a road, but do you know what I mean that when you go through that part of the street network, you go up in elevation reasonably significantly.

A. You mean as you're going through Northlake?

Q. Yes. You're climbing up. It's –

A. It is a gentle rise, yes.

Q. Yes a … gentle rise, and for instance I made a visual comparison with reference to Mount Iron when I did that. There's a place where the Court stopped when we looked at things on our site visit and there was a sign that we took photograph of that says: "Laurie's Way" and we thought that might be a good memento. So we took that photograph but actually when I look back across there I got the impression that I'm elevated higher than that, probably you won't know what I'm talking about, but you go up perhaps – you're not quite as high as the highest sight, dwellings that you see on that flank of Mount Iron

but you're up there, aren't you? You're up towards there somewhat?

A. Yes the highest – well at the moment the highest part of Northlake is that nearer ridge closer to Aubrey Road. Those back properties are quite elevated and you can drive around there and get quite an elevated view around. I don't think they'd be as high as the highest ones on Mount Iron though.

Q. No they wouldn't be as high as the highest ones but yes they're quite, yes relatively speaking they're relatively high [elevation]… – but, and then you go, you'll see the scrapers … at work and I presume the retirement village. Is that where that retirement village is going or?

A. If you're talking about, did you go up kind of like an avenue?

Q. Yes.

A. No that's not the retirement village. That's well over towards the outlet. In fact it's right on Outlet Road where that other develop[ment] is.

Q. But nevertheless if you notice there's a bit of development work going on beyond the –

A. Yeah that's gonna –

Q. – actual street network that's formed.

A. I think that's the new. That will be the entrance into the WFL or former Ellerbe Farm subdivision yeah.

Q. And that's slightly elevated even further isn't it? It should go –

A. Yes it is. It rises up right up towards the water tanks. Yep.

Q. And you start noticing the trees there as backdrop don't you, from that viewpoint?

A. Yes they're like a fringe across the sky – oh ridgeline, skyline.

Q. Just on this question of lake viewpoints, and the informal evidence of Michael the boat skipper. So I hear your answers before to Ms Scott. That's, thank you for that. Would you agree though that those viewpoints that we've got there are really not to be taken as identified places where people stop their boats and sit and look at the shoreline, but more as places within a transition zone of that waterway? In other words places where people are coming and going potentially in fairly significant numbers during the summer but nevertheless people tend to come and go through that area rather than put their boat in those sorts of localities.

A. That is probably mostly correct. I have observed people fishing quietly.

Q. Yes.

A. Just drifting around in that area.

Q. Yes, drifting around. Yes that sort of thing, yes.

A. Generally people don't just sit there and look at the view. No they're usually on the shoreline for that kind of behaviour.

Q. Yes, that's what I thought.

A. Yep.

Q. Okay. I think I've only got one other sort of question really. Did I hear you answer Mr Gordon that you didn't read Dr Terry Ryan's evidence?

A. No I didn't.

Q. You didn't read it?

A. No.

Q. I asked I think, I can't remember which of the witnesses, it might have been Ms Gilbert. It's this issue that does come up a little bit in a perrenial sense or from time to time at least, the foundation upon which a landscape expert determines the significance of the value and in particular an associative or a perception value, and I heard your answers before about working within your knowledge and expertise and trying to keep to that, but what I'm also picking up though is that there seems to be a weighting that may be applied in the minds of the different landscape experts we've heard about these values and am I right to understand these values that we talk about, perception values, associative values, are really an opinion and a proxy for the community that values these things or communities that value these things. It's a proxy opinion isn't it? It's an opinion informed by expert judgement in proxy for what the community is saying it values.

A. I think that would be a fair interpretation yes.

Q. All right, and that's where I've got a little bit of an issue because people and communities. Because we're not all – there are different eyes through which one sees the world in our communities.

A. Correct, mmm.

Q. And Dr Terry Ryan seems to talk about that. As one witness that seems to talk about that at least, and I quoted from his last that the summary statement he made at paragraph 5.10, and where he says in particular the last sentence: "For the appellants and the other descendants of the original recipients, this land in realising its economic potential is the only available way to answer that cry and the cry he was referring to was a …a reference back to a quote from Ngāi Tahu leader Tama Parata described in 1906 as Ngāi Tahu's cry to be provided with land. So it's within your field of expertise is it not as a landscape expert to read and consider and take account of primary evidence before a Court in which you are giving evidence when it comes to matters of associative value.

A. That is correct. This is a slightly unusual situation where the values we're talking about are of an economic nature which is not normally what we take into account, but it's difficult –

Q. Is not the view of a person from a boat an economic value as well?

A. I wouldn't describe it –

Q. Counted in –

A. – as an economic value.

Q. Well the person's bought a boat to go and have a look at the view. Doesn't that mean they ascribe a value to the view?

A. Well they might be in their … [case] – I wouldn't interpret it that way. I would interpret it more as a spiritual mental wellbeing –

Q. But an economist might.

A. They may well do that, yes Sir.

Q. So then you can't really assume the expertise of an economist in your last answer then, can you, about the value that Dr Ryan is referring to as an economic value. That would be an economist's opinion, wouldn't it?

A. Well what I'm trying to say is that normally when we, and I don't have a lot of experience in this field because of the nature of the projects I've been involved in, normally we're trying to protect tangata whenua values which might relate to natural character, indigenous species, water quality, that sort of thing –

Q. Well let's put it another way.

A. – rather than change it.

Q. The word "cry" is not an economic word is it?

A. No, that's comes from the heart, from the, yes.

Q. Right, it comes from the heart so Ngāi Tahu's cry to be provided with land is not an economic value in that sense, it's actually something much deeper than that, isn't it, in terms of associative values with this land?

A. It's difficult for me to address this Sir because it is getting outside, it's more of a…

Q. To make life a little bit easier I think it might well be answered this way – well it depends, I'll give you the opportunity to answer it. When you referred earlier to these, in your paragraph 15.6 you say "the key values are"?

A. Yes.

Q. Those words imply that this is a definitive list in your expert opinion of the values that are the key values so is there any qualification you now want to make to what you meant by those words? Did you mean what you said or do you mean something less than that?

A. No, I maintain that that's what I meant.

Q. So how can you say that when you are leaving aside evidence the Court itself has accepted, put to the Court by the parties by agreement, accepted onto the record, Court determination that it's accepted onto the record and accepted fully onto the record and it's evidence that relates to associative values is it not? Before the Court, before you as an expert witness so is your opinion actually more qualified than it's stated at 15.6 with those words?

A. I would find it difficult to alter my evidence in that paragraph having already stated that

I'm aware of the status of the land and what it, what it means.

Q. So I'll take it this way then. You don't place the value that others might place on the matters that Dr Ryan refers to in his evidence, is that fair?

A. Well it's not that I don't recognise, it's just –

Q. No, no, you don't place the same value on it, is that correct, am I right about that?

A. Not within my landscape expertise no.

Q. Does it fall within the purview of landscape analysis to consider Dr Ryan's evidence?

A. I should have read it I accept that.

Q. Does it fall within purview of landscape assessment to consider Dr Ryan's evidence?

A. How can I put this? It is definitely within the landscape architect assessor's purview to consider mana whenua values but this is a different case, this is a unique case and I think we all understand it's a very sensitive matter.

Q. Well every case is unique. This case is certainly sensitive but I come back to it *Te Tangi a te Manu*.

A. Well as I said before normally –

Q. It's intended to serve the people and communities of New Zealand landscape evidence, isn't it?

A. Yes, but as I said before normally when you are considering tangata whenua values, it actually relates to something that we're trying to protect. This isn't the case here.

Q. That's your reason and I understand your reason, I may not agree with it, but you've given a reason and I come back to the original question because I think you need to clarify it for me. You said you're not, don't think you should qualify 15.6, those are the key values as far as you're concerned, you acknowledge you didn't read Dr Ryan's evidence, but am I right to understand that you did apply a sifting approach to determine that effectively the values that others ascribe to this land that aren't in your list are not on your list because you've considered them and discount them, it's not of the value that they, that you would ascribe to that land?

A. Within respect of landscape values, yes.

Q. Even though you accept that within the discipline of landscape assessment it's relevant to consider the matters that Dr Ryan refers to?

A. As I said before those sorts of matters generally relate to something in the landscape that we're trying to protect.

Q. So you don't – it's not your understanding even though it may be the understanding of others in your same profession that it isn't to be discounted in the way you describe. For instance you say it's only in a protective sense that these things matter, why isn't it relevant in an enablement sense?

A. Because then we wouldn't be – I mean some of these values surely must – I mean I can't

speak for tangata whenua but they must have value to tangata whenua as well.

Q. All right can I ask this question. Say the Court grants consent to develop this land, re-zone it, do you think some people passing the lake in boats will be disappointed by what they see by way of a change from what they currently see now to what they see going forward, do you think they'll be disappointed?

A. Yes, I think they would be.

Q. Some would be?

A. Some would be.

Q. Now I'll put another hat on your head if you don't mind. Imagine the people in the boat have association with this land as it is now undeveloped, not in their hands, they're in the hands of the Crown, with a cloak of forest over the top and let's assume the Court decides to accept your evidence, not allowed to be developed to the extent that the appellants seek, to leave a large part of it undeveloped, all right, going forward. When they're sitting in their boat, do you think they would be disappointed by that or see that as protecting what they value by way of their associations with that land?

A. That's a very difficult question.

Q. So how would you answer that very difficult question because it's before the Court and it relates to the landscape assessment including a valuation of landscape values?

A. There's an assumption perhaps that the only value placed on the land is the redress value but as I said before and I cannot speak for tangata whenua but they may have other values as well which might include the values I've listed.

Q. But you don't know do you, you don't know?

A. No, I don't.

Q. Because you don't know and you didn't read the foundation evidence on this matter so you don't know that either?

A. But as you said before landscape evidence is kind of a proxy for community values and tangata whenua are part of the community.

Q. And tangata whenua are a community, these people are a community and the Act refers to people and communities in the plural in section 5, doesn't it?

A. Yes.

Q. So is there any further that I can – as I understand your opinion it goes like this. These are the key values in my expert opinion and I understand the law to mean that I should discount the associative values that Dr Ryan refers to because that's how I understand the law. That's what I took from your last answers. Am I correct about that? Just think about it for a minute.

A. That's a very difficult way to look at it.

Q. I'm just trying to understand your evidence Ms Steven.

A. My evidence is that when I do my assessments you do not take into account economic values of the land no matter who owns it.

Q. So we talked about economic before and we agreed that you're not an economist and I would ask you –

A. That's why I can't –

Q. – to avoid talking about the language of economics and come back to the question and you said: "We avoid doing this." Is it because that's what you understand the legal parameters of your role are, that you don't cross into these other – is that what you understand that that is the limit within which you look at things?

A. It's one of the limits, yes.

Q. The law and that's how you understand the legal position within which you're offering that opinion?

A. I'm struggling to understand this a little bit, what you actually mean?

Q. I'm just trying, I'm trying to understand your opinion Ms Steven and I think I just about need to leave it at that because I've asked you first whether you qualify your paragraph 15.6 with regard to the key values on reflection to be these are values I would identify, they're not necessarily the key values, I didn't read Dr Ryan's evidence, there might be other values and I haven't accounted for them but you didn't say that. You said "no these are the key values."

A. In my assessment, yes.

Q. Yes, and then I asked you why that was and you said because you don't consider economics and we discussed that. And then we talked about associative values and you've offered an opinion on associative values from people that view things from a boat, and I asked you whether: Well, what if the people viewing it from the boat have an association with this land which would see … [under-development], would they see that as "disappointing", and you were reluctant to offer opinions there. And you appeared to say because the Act is talking about "the community" as if it's all one community but it's not, is it? It's not. People and communities. So then I asked you whether it was because you understand the legal framework within which you are working limits your ability to look at these things and that's where we run into some difficulty because I don't know what your answer is. It's not clear to me what your answer is. Whether you felt it was beyond the proper role of your expertise, I think that's probably what you mean.

A. It is on the very fringe of my expertise. I don't feel I can go any further than simply acknowledging that this is a site of particular significance in a particular legal process.

Q. Yes, but you're not prepared to say, it seems, that you may not have considered all relevant values in your assessment of the key values. That's where I have some difficulty.

A. Well, as I said in an answer to a question earlier, I do accept the values set out in the

schedule which do cover mana whenua values.

Q. All right.

A. But I can't add to it.

Q. All right, well, thank you. Now just finally turning to that schedule because that's the last part of my question for you, I think, on this. And it relates to recreational values. And I appreciate you're not the author of this but you're one of various experts that have referred to it and relied on it to some extent but qualified it in other ways and I understand that. For instance, you'll see in 24 the mamae, the pain, generally felt by Kāi Tahu associated with the land disposition which is one of the things we've been discussing.

A. Yes.

Q. But 27, I've just highlighted: "Sticky Forest is valued as a single track mountain biking destination." Now do you agree that one of the reasons why one should be cautious about this as a point of reference for our findings is that if our findings are that that's not the future for this land, then this schedule becomes out of date, doesn't it?

A. Well, it's – I think it says Sticky Forest, I don't know whether it means just the land within Sticky Forest because you're probably aware the track network goes well beyond Sticky Forest into public reserve land.

Q. Yes, so it doesn't qualify this land out of it though, does it? And this land is within this ONL and it doesn't say "except for the land that's in question", no?

A. No, it doesn't distinguish.

Q. Right.

A. But if I was writing this, I would be careful about talking about the value of Sticky Forest as a legal title.

Q. Yes.

A. For any kind of public access because it is private land at the discretion of the owner.

Q. Yes, you made that comment before.

A. Yes.

Q. And I took that comment to mean that you, yourself, aren't trying to associate it in that way.

A. No.

Q. And, indeed, if the Court makes findings that would suggest this land should be zoned for urban purposes, which it seems, well, obviously there's a lot of evidence on that before the Court.

A. Mmm.

Q. Then there are implications for the description of what are described – well, it's headed: "Important recreational attributes and values", in this document, that that might have implications for it, mightn't it?

A. Yes.

Q. All right. Well, thank you very much for that. So we'll just see –

Annexure 6

The evidence

	Appellants	QLDC	AG	Kirimoko (s274 party)
Whakapapa,[185] Block history, Te Tiriti & Crown dealings	*Dr Terry Ryan,*[186] (BC)		*Monique Ahi King,*[187] (BC) *J Brent Parker,*[188] (SILNA research) (BC)	
Current forestry and agricultural land use potential	*Stuart Ford*,[189] agricultural resource economist (BC)		*Martin Watson*,[190] forestry management	
Transport network effects	*Tony Penny,*[191] transportation engineer (BC)			
Civil infrastructure	*John McCartney,*[192] civil engineer (BC)			
Ecology	*Glenn Davis,*[193] ecologist (rebuttal) (BC)			
Landscape (including supporting visual simulation)	*Nikki Smetham*,[194] landscape architect *Jason Blair,*[195] visual simulation	*Bridget Gilbert,*[197] landscape architect		*Anne Steven,*[199] landscape architect

185 Dr Ryan was the only witness as to whakapapa.
186 EIC dated 22 September 2022.
187 EIC dated 14 November 2022.
188 EIC dated 14 November 2022.
189 EIC dated 22 September 2022.
190 Rebuttal dated 20 December 2022 and email response to questions dated 15 December 2023.
191 EIC dated 22 September 2022.
192 EIC dated 22 September 2022.
193 Rebuttal dated 20 December 2022.
194 EIC dated 22 September 2022, rebuttal dated 20 December 2022.
195 EIC dated 22 September 2022.
197 EIC dated 17 October 2022 (revised 27 November 2023).
199 EIC dated 28 November 2022 (corrected 28 November 2023).

	Shannon Bray,[196] landscape architect	*(Braddyn)Brad Coombs,*[198] landscape architect (visual simulation and peer review)		
Planning (including evaluation & drafting)	*Dean Chrystal,*[200] planner	*(Victoria) Vicki Jones,*[201] planner	*Katrina Ellis,*[202] planner	*Graham Taylor,*[203] planner

196 EIC dated 22 September 2022, rebuttal dated 20 December 2022.

198 EIC dated 17 October 2022, rebuttal dated 20 December 2022.

200 EIC dated 22 September 2022, rebuttal dated 20 December 2022.

201 EIC dated 17 October 2022 (updated 5 December 2023), rebuttal 20 December 2022 (updated 5 December 2023).

202 EIC dated 14 November 2022 (updated 5 December 2023), rebuttal dated 20 December 2022.

203 EIC dated 28 November 2922 (updated 27 November 2023).