

Before the Queenstown Lakes District  
Council

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In the matter of           The Resource Management Act 1991

And

In the matter of           Proposed District Plan – Stage 2 – Wakatipu Basin – Hearing  
Stream 14

Submission 526 by Michaela Meehan

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**LEGAL SUBMISSIONS for**

Michaela Meehan

Dated 11 July 2018

S526 – Meehan – T14 – Goldsmith W – Legal Submissions

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## **Introduction**

- 1 These Submissions are presented on behalf of Submitter 526 Michaela Meehan who seeks the relocation of a short section of Outstanding Natural Landscape (ONL) boundary at the northern end of the Wakatipu Basin ridge formation known as 'Northridge' which runs along the southern side of, and above, Malaghans Road. Accordingly these Submissions address the basis upon which the reconsideration of an ONL boundary should be approached.

## **ONL Boundary Reconsideration**

- 2 It is accepted that the starting point for many of the ONL boundaries as shown on the publicly notified planning maps are boundaries which have previously been determined by the Environment Court. That starting point must therefore carry considerable weight.
- 3 However I submit that that starting point is not necessarily the finishing point. The Environment Court is not perfect. In many cases there was a lack of fine-grained analysis when the ONL boundaries were determined. Relevant factors may have been overlooked at the time. The passing of time, and in particular ongoing development, may have changed the underlying factual basis. Any or all of those factors might result in a situation where relocation of an ONL boundary is appropriate.
- 4 I submit that the process of reconsidering an ONL boundary should comprise a four step process, as follows:
  - a. Consideration of some of the principles which underpin the determination of an ONL;
  - b. Consideration of the decision which determined the ONL boundary in question, with particular attention to the extent or otherwise of fine-grained analysis of the section of ONL boundary under challenge;
  - c. Consideration of whether there are any factors which might suggest the Court did not get the determination right in the first place, with particular reference to any factors which should have been taken into account and were not taken into account;
  - d. Consideration of any factors which have arisen since the ONL boundary was determined and which might justify reconsideration of the location of the ONL boundary in question, such as additional development.

## Principles

5 I do not intend to address this issue in detail, as the principles which underpin the determination of an ONL will be familiar to members of the Panel. However I do consider it to be worthwhile to remind the Panel of some important elements which came out of the Court's seminal decision C180/99<sup>1</sup>.

6 At paragraph 82 of C180/99 the Court stated:

“82. The word ‘outstanding’ means:

- “conspicuous, eminent, especially because of excellence”;
- “remarkable in”;

*As Mr Marquet pointed out, the Remarkables (mountains) are, by definition, outstanding. The Court observed in Munro v Waitaki District Council that a landscape may be magnificent without being outstanding. New Zealand is full of beautiful or picturesque landscapes which are not necessarily outstanding natural landscapes.”*

7 The following excerpts from the following paragraphs addressed the context of the required assessment:

“83. A subsidiary issue is whether an outstanding natural landscape has to be assessed on a district, regional or national basis ...

84. ... Thus if section 6(b) is being considered by a regional council then that authority has to consider section 6(b) on a regional basis. Similarly a district council must consider what is outstanding within its district ...

85. We agree: what is outstanding can in our view only be assessed – in relation to a district plan – on a district-wide basis because some of the district's landscapes are the only immediate comparison that the territorial authority has. In the end of course, this is an ill-defined restriction, since our ‘mental’ view of landscapes is conditioned by our memories of other real and imaginary landscapes in the district and elsewhere, and by pictures and photographs and verbal descriptions of them and other landscapes.

86. The local approach is consistent with an identification of particular places: the unique landscapes of the given district ...”.

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<sup>1</sup> *Wakatipu Environmental Society Inc and Ors v Queenstown Lakes District Council* Decision No. C180/99

8 At paragraph 99 the Court stated:

*“... ascertaining an area of outstanding natural landscape should not (normally) require experts. Usually an outstanding natural landscape should be so obvious (in general terms) that there is no need for expert analysis ...”.*

9 C180/99 also commented on the issue of foregrounds. In paragraph 105 the Court stated:

*“... The answer to the question of where the Outstanding Natural Landscapes and features end is not a technical one. It is a robust practical decision based on the importance of foregrounds in (views of) landscape. We do not consider this over-emphasises the pictorial aspects of landscape, merely uses them as a determinative tool.”*

10 Against the background of those excerpts of C180/99 I record the advice given to the District Plan Review (DPR) Hearing Panel (differently constituted) to the effect that 96.97% of the total area of the Queenstown Lakes District is classified as ONL or ONF<sup>2</sup>.

11 I invite the Panel to consider the apparent disconnect between the principle that ONL's should be 'outstanding' and 'eminent' within this district and the fact that 96.97% of the district is classified as ONL. Against that factual background I submit that, in any determination of a challenged ONL boundary, the ONL 'bar' should be set relatively high.

12 To put the previous point another way, where there is a case where a section of ONL boundary is genuinely challenged, and where the answer to the challenge is not reasonably obvious, I submit that the default outcome for an area of land subject to the challenge should be non-ONL rather than ONL. I cannot point to any case law which supports that proposition. However I submit that it is a proposition which flows reasonably and naturally from C180/99 and the factual 96.97% ONL classification within the district.

13 I submit that the above proposition can find support in sections 5-7 of the Act. The overall purpose of the Act contains the well-known 'enabling' and 'protection' elements which must be balanced in order to achieve an outcome which will enable people and communities to provide for their social, economic, and cultural wellbeing. The level of protection applied to ONL's is stringent, and if anything is becoming more stringent than in the past. The challenges to achieving consent for virtually any form of land use or development within ONL's are well known. The district must provide for its communities and its people. Having 96.97% of

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<sup>2</sup> Memorandum of Counsel for the QLDC providing Requested Further Information, dated 18 March 2016

the district classified as ONL creates significant constraints on the use of land. I submit that that general situation supports the proposition that, where a section of ONL boundary is being genuinely challenged, the ONL 'bar' should be set relatively high.

- 14 The first case in this district which followed C180/99, in terms of a specific case addressing a challenge to the Court's initial indicative C180/99 ONL boundaries, was C169/2000<sup>3</sup>. Paragraph 10 of that judgment established the basis for the subsequent series of cases which resolved a series of challenges to the Court's original indicative ONL boundaries. I believe it is worth setting out, and considering, that paragraph in full:

*"[10] In our view there are four circumstances that suggest that the topographical lines should give way to a recognition of the realities of situation. The first is that there are (due, it appears, to earlier resource consents granted by the Council) two houses up by the line of poplars as we described earlier. Indeed there is a third house site also on the lower slopes of the land although that has not yet been built on. All three houses (if a third is built) would be within the outstanding natural landscape, as Mr Evatt assesses it. Certainly the presence of houses does not automatically disqualify a landscape from being an outstanding natural landscape, but it is a factor to be considered. Secondly the land's naturalness has also been reduced by the fact that it is sown in exotic (green) grasses, and most of the trees on it – most notably the poplars – are exotic and deciduous. The third aspect for us to consider is that immediately to the east of the site is Mr Broomfield's land. That contains some rural residential subdivision already. Indeed it transpired at the hearing that the Council has approved further subdivision of that land although it had omitted to inform Mr Evatt of that when he prepared his evidence. Fourthly if we take all those matters into account, and the need for a practical boundary between the outstanding natural landscape and the visual amenity landscape – not just across the referrer's land but also across adjacent properties on Ferry Hill – we consider the change of slope at the row of poplars is the place to draw the line. Consequently both the site and some land above 400m asl falls into the visual amenity landscape. We now turn to ascertain the relevant objectives and policies of the amended plan as they apply to the land."*

- 15 Since that case the determination of virtually every ONL boundary by the Environment Court, in the series of decisions which followed that case, has been based upon a boundary informed by one or more of the following five factors:

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<sup>3</sup> *J S Waterston v QLDC* Decision No. 169/2000

- a. A distinctive topographical change;
- b. A distinctive change in vegetation, or a distinctive line of vegetation;
- c. Existence or otherwise of development (existing or consented);
- d. Artificial features in the landscape, such as an obvious line caused by a water race;
- e. A degree of pragmatism, particularly where it is necessary to connect sections of landscape boundary running across areas where there are no such distinct factors present.

16 I now address the other three considerations in relation to the section of ONL boundary under challenge. That section of ONL boundary is clearly identified on the photographs and plans which accompany Mr Baxter's landscape evidence for this hearing, with the existing ONL boundary under challenge identified by a red line and the proposed relocated ONL boundary identified by a yellow line.

#### **Original Environment Court decision**

17 The Environment Court decision which determined the ONL boundary being challenged in this hearing is Decision No C3/2002<sup>4</sup>. The decision dealt with ONL boundaries in the northwest corner of the Wakatipu Basin, extending over a reasonably large area of land. The detail of the decision is not particularly easy to follow, particularly if one only has black and white copies of the plans annexed to the decision. A copy of C3/2002 is annexed to these Submissions.

18 The only statements in that decision which appear to be relevant to the section of ONL boundary under challenge can be found in paragraph [38] as follows<sup>5</sup>:

*"[38] As to the exceptions, we think Mr Kruger is wrong:*

*(1) The Littles Stream ONL/VAL boundary should be moved westwards so that it is just to the east of the ridge-line. We have marked the line in red on Plan "3" annexed to this decision. That is because most of Littles Farm is too pastoral to be in an ONL, and it is part of the VAL surrounding the Fitzpatrick "bowl" on Littles Road.*

*(2) Similarly, while North Ridge is within ONL today, the fact that there are seven approved residential building platforms on which houses can be built as of right is a powerful factor against the*

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<sup>4</sup> *Wakatipu Environmental Society Inc and Robert Stewart v QLDC* Decision No C3/2002.

<sup>5</sup> *Ibid* at paragraph 38(1) and (2).

*ONL/VAL boundary being drawn so as to include North Ridge in the ONL.”*

- 19 Point (1) above relates to the southern part of the ONL boundary under challenge, being that part south of the ridgeline. Point (1) does not contain any explanation as to why that part of the line is located exactly where it is located, and there is no reference to any of the five factors detailed above.
- 20 Point (2) of the extract quoted above relates to the northern half of the section of ONL boundary under challenge, being that part north of the ridgeline. The ONL boundary was determined to exclude the seven approved residential building platforms so that none would be located within the ONL. However again there is no explanation of exactly why it was located in the position it was located, and there was no reference to any of the other four factors detailed above.
- 21 When one considers the decision as a whole leading up to paragraph 38 quoted above, there is no explanation as to why the ONL boundary was located along the red line shown on the plans attached to Mr Baxter’s evidence rather than the yellow line running along the top edge of the escarpment which would appear to be a relatively obvious demarcation line for a boundary between two landscapes.

**Other relevant factors at the time**

- 22 I note that the ONL boundary appears to have been incorrectly drawn, if one assumes that it was intended to be based upon subparagraph (2) of paragraph 38 of *C3/2002* quoted above. It appears clear that the Court intended to exclude the seven approved residential building platforms on North Ridge from the ONL. However if reference is made to Attachment A to Mr Baxter’s evidence for this hearing, the two blue dots located just west of the red line on the upper northern side of North Ridge, within the ONL, are two of the seven consented residential building platforms referred to in *C3/2002*. If one assumes that the Council’s ONL boundary faithfully reflects the Court’s ONL boundary then the Court appears to have drawn the boundary in the wrong location.

**Subsequent relevant factors**

- 23 The primary subsequent relevant factor is that, since *C3/2002*, three additional residential building platforms or houses have been consented within the ONL at the western end of North Ridge. Referring again to Mr Baxter’s Attachment A, those three building platforms are the westernmost blue dot and the two red dots. Given that the only factor identified by the Environment Court in *C3/2002* as being determinative of the ONL boundary was the existence of seven approved residential building platforms which the Court determined should be excluded from the ONL, I submit this factor is highly relevant to this challenge to the location of this section of the ONL boundary.

24 I also submit that the mere fact that three building platforms or houses have been consented, relatively close to each other, on an area of land currently classified as ONL, itself strongly suggests that the current ONL boundary is not correctly located.

### **Conclusion**

25 Taking all of the above into account, and referring to Mr Baxter's Attachments A to C, I submit that:

- a. This is an issue to be determined on the facts.
- b. The facts are obvious and do not require expert landscape analysis.
- c. The factual basis for the determination of the section of ONL boundary by the Environment Court in *C3/2002* is unclear and questionable. Apart from a determination to exclude consented development, there is no obvious 'on the ground' factor which justifies the location of the current ONL boundary.
- d. The upper edge of the escarpment, as shown by the yellow line on Mr Baxter's Attachment A, has always been, and remains, the obvious boundary based on a significant change in the characteristics of the landscapes either side of that line.
- e. In any event the current ONL boundary is incorrectly located if it was intended to be located excluding the then existing seven consented building platforms. Whether that is an error by the Court or by Council is not clear.
- f. The fact that three additional residential building platforms or houses have been consented within the ONL at the western end of North Ridge is a significant relevant factor.
- g. The ONL boundary should be located along the yellow line shown on Mr Baxter's Attachment A.

Warwick Peter Goldsmith  
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**Dated 11 July 2018**