IN THE ENVIRONMENT COURT **ENV-2021-CHCH-0000**
AT CHRISTCHURH

UNDER THE	Resource Management Act 1991 ("**Act**")
IN THE MATTER OF	an appeal under Schedule 1, Clause 14(1), of the Act
BETWEEN	**GIBBSTON VALLEY STATION LIMITED**
	Appellant
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL**
	Respondent

NOTICE OF APPEAL BY GIBBSTON VALLEY STATION LIMITED (WĀHI TUPUNA)

18 MAY 2021

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Counsel instructed:

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TO: The Registrar
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CHRISTCHURCH
(Christine.McKee@justice.govt.nz)

AND TO: The Respondent
(dpappeals@gldc.govt.nz)

(NOTE: Service on submitters and further submitters is waived pursuant to the Environment Court's directions of 1 April 2020]

Notice of appeal

1. Gibbston Valley Station Limited ("**appellant**") appeals the following decision ("**Decision**"):

> Decisions on Chapter 39 Wāhi Tupuna, and related variations to Chapters 2, 12-16, 25-27, 29 and 30 of Stage 3 of the Queenstown Lakes District Proposed District Plan ("**PDP**").

Submission and further submission

2. The appellant made a submission on the PDP on or around 18 November 2019, referenced as #3350.

3. The appellant made a further submission on the PDP on or around 18 February 2020, referenced as #3457.

No prohibited trade competition purposes

4. The appellant is not a trade competitor for the purposes of Section 308D of the Act.

Timing / key dates

5. The Decision was made by the Queenstown Lakes District Council ("**Council**") on 18 March 2021, by way of ratification of the recommendations of the Recommendations of the Stage 3 Independent Hearing Panel ("**IHP**").

6. The appellant received notification of the Decision by email on 1 April 2021.

7. The Environment Court, by way of a minute dated 1 April 2021, confirmed that the appeal period ends on 18 May 2021 (with the s274 period ending 16 June 2021).

Decision / part of Decision appealed against

8. The appellant appeals:

   (a) The entirety of the Decision as it relates to the adoption of objectives, policies and rules relating to wāhi tupuna.

(b) In particular, those provisions which impose uncertainty, and an unnecessary and unreasonable burden on development of land, including land that has been identified as wāhi tupuna without out proper justification.

Reasons for the appeal

9. The reasons for the appeal are as follows.

Overview/ background

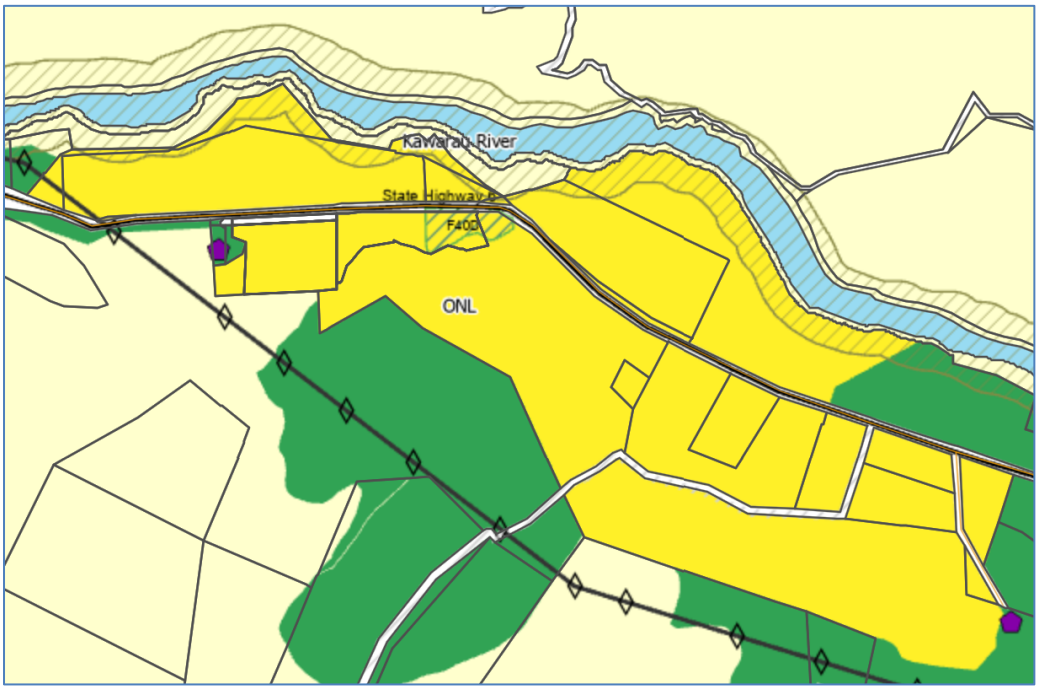
10. As recognised in the Decision, Chapter 39 is an entirely new chapter proposed for the PDP that had no comparable chapter in the ODP. Its stated purpose is "to assist in implementing the strategic direction set out in Chapter 5 Tangata Whenua in relation to providing for the kaitiakitanga of Kāi Tahu as Manawhenua in the district".[1]

11. The appellant has no issue with the PDP seeking to implement that strategic direction. The question is whether:

(a) Chapter 39 and the other wāhi tupuna provisions do so in a way that is "most appropriate" (and otherwise accords with the relevant statutory requirements) and does not inappropriately and unnecessarily impose process and/ or substantive hurdles to achieving use and development that is otherwise anticipated by the PDP; and

(b) The appropriateness of the boundaries of the wāhi tupuna overlay, which was often the subject of little or no evidence as to the detail of its location in any particular area.

12. The appellant is particularly affected by the wāhi tupuna overlay, as follows:



[1] Chapter 39.1

13. The land which the appellant has a primary interest in is the Gibbston Resort Zone, shown in yellow. The Gibbston Resort Zone was recently re-zoned through consent orders of the Court (dated 27 November 2019). Manawhenua were not involved in that process, but could of course have been involved, if they had wished to do so. Further detail is also shown on the following plan:

14. Table 39.6 identifies the relevant wāhi tupuna area for the Gibbston Resort Zone as follows (Decisions version):

#	Name	Description	Values	Potential threats
24.	Kawarau River	The Kawarau River was a traditional travel route that provided direct access between Whakatipu Waimāori (Lake Whakatipu) and Mata-au (the Clutha River). It is also recorded as a kāika mahika kai where weka, kākāpō, kea and tuna (eel) were gathered. Potiki-whata-rumaki-nao is the name for the former natural bridge over the Kawarau, which was a major crossing point. Other sites in the area: Te Wai o Koroiko, Ōterotu - Ōterotu is the traditional Māori name for the Kawarau Falls. Ōterotu is located at the	Ara tawhito, mahika kai, nohoaka, archaeological values.	a. New roads or additions/alterations to existing roads, vehicle tracks and driveways b. Buildings and structures c. Earthworks d. Subdivision and development e. Damming, activities affecting water quality f. Exotic species including wilding pines g. Commercial and commercial recreational activities

		outlet of Whakatipu-wai-māori		

15. The notified version of the wāhi tupuna provisions were uncertain in their effect, and had the risk of creating significant obligations and burdens on developers, which might not have been intended – and which were not necessary to achieve the objective of Chapter 39.

16. The Decisions version appears to significantly improve clarity and certainty of how Chapter 39 and the wāhi tupuna provisions in other chapters will be applied.

17. In particular, the provisions now appear to only "bite" where use or development occurs within a wāhi tupuna overlay – rather than in respect of any use or development on a site that might have a wāhi tupuna overlay identified on part of the site (but where the development or use is not occurring within the wāhi tupuna overlay itself). This needs to be clarified so that the intent, and effect, of the provisions are certain.

18. The issue arises from the amended objective, as well as the implementing policies that focus on the "identified wāhi tupuna areas": [2]

    (a) Objective 39.2.1: Manawhenua values *within* identified wāhi tūpuna areas are recognised and provided for.

    (b) Policy 39.2.1.1: Recognise that the following activities may have effects that are incompatible with Manawhenua values *where they occur within* identified wāhi tūpuna areas; ...

    (c) Policy 39.2.1.2: Recognise that the effects of activities may be incompatible with Manawhenua values when that activity is listed as a potential threat within an identified wāhi tūpuna area, as set out in Schedule 39.6.

    (d) Policy 29.2.13: *Within* identified wāhi tūpuna areas: ...

19. There is also less inference to be drawn from the Decisions version of the provisions on compulsory consultation with (if not approval of) manawhenua. This follows from Decisions version of Policy 39.2.14, advice note 39.3.2.1, and the relevant observations of the IHP, as follows:

    (a) Policy 39.2.14: *Encourage* consultation with Manawhenua as the most appropriate way for obtaining understanding of the effects of any activity on Manawhenua values in a wāhi tūpuna area.

    (b) Advice note 39.3.2.1: A resource consent application for an activity within an identified wāhi tūpuna area *may* require a cultural impact assessment as part of an Assessment of Environment Effects so that any adverse effects that the activity may have on Manawhenua values can be better understood.

    (c) Decision [188]-[189]:

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[2] Noting concerns that there was little or no detailed evidence as to the nature and extent of Manawhenua values, at least at the earlier stage of the drafting of the wāhi tupuna overlay, in addition to there being little or no evidence as to the location and extent of the wāhi tupuna overlay in any particular area.

> ... We do not consider that an applicant can be leveraged into undertaking consultation by the implicit threat that a cultural impact assessment might be required in the absence of consultation. Nor do we consider it appropriate to imply that a well-advised applicant might not wish to undertake a cultural impact assessment in an appropriate case.
>
> The obligation in the Fourth Schedule is to undertake an assessment of an activity's effects on the environment that, among other things, includes such detail as corresponds with the scale and significance of the effects that the activity may have on the environment. For an activity with potential cultural effects, then depending on the scale and significance of those effects, a cultural impact assessment might be desirable irrespective of whether consultation has occurred or not. *Similarly, if the scale and significance of effects of cultural values is comparatively minor, an applicant may be justified in neither undertaking consultation, nor undertaking a cultural impact assessment*.

20. The rules have also been clarified/ tightened up, or need to be interpreted in light of the changes to the Objective and Policies above, and explanation of the IHP, such that:

    (a) The appellant does not have a major interest in farm buildings, and so does not comment on these rules 39.4.1-39.4.3.

    (b) In respect of other buildings, Rule 39.4.4 and 39.4.5 now only applies to proposed buildings:

        (i) within an identified wāhi tupuna area (ie not within a site that contains a wāhi tupuna area but the building is not proposed in that area); and

        (ii) within specified zones that do not include the Gibbston Resort Zone (and less than 20m, or 30m, from a wetland, river or lake).

    (c) In respect of the earthworks rules it is clear that consent is only required for:

        (i) earthworks over 10m3 for new roads "located within Wāhi Tūpuna areas outside the urban environment where roads have been identified as a potential threat to Manawhenua values" require RDA consent under Rule 25.5.7;

        (ii) any earthworks exceeding 10m3 within specified wāhi tupuna areas identified in Schedule 39.6 require RDA consent under Rule 25.5.10.A.1; and

        (iii) any earthworks within wāhi tupua areas not specifically identified in Rule 25.5.10A.1 over 10m3 within 20m of the bed of any wetland, river, or lake (and other requirements, of less interest to the appellant) also require RDA consent under Rule 25.5.10A[3]; and

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[3] Noting that earthworks for the planting of indigenous species are exempt.

(iv) notwithstanding the above rules, exemption b(ii) permits more than one earthworks activity not exceeding the maximum volume of 10m³ on the same site within any consecutive 12 month period, provided that each earthworks activity is located at least 400m from any other earthworks activity subject to 25.5.10A.2.b and 25.5.10A.2.c (as otherwise applicable).

(d) Further, the earthworks rules as they relate to waterbodies are unclear. Earthworks Rule 25.5.19 which is deemed operative, restricts earthworks undertaken within 10m of the bed of water, or any drain or water race that flows to a lake to 5m3 in any 12 month period. While Rule 25.5.10A.1 restricts earthworks within 20m of any wetland, river or lake to 10m3 (subject to the permitted exceptions in b(ii)).

(e) Also in respect of earthworks, the matters of discretion available associated with Rule 25.5.19 include matters of interest to iwi (Matter of discretion 25.7.1.6) and Assessment Matters 25.8.71 to 28.7.4 are relevant to manawhuena values.

(f) In respect of subdivision, it is also not clear that where the subdivision is to occur "within a wāhi tupuna area" – "outside of the urban environment, where subdivision is a potential threat as set out in Schedule 39.6", that requires RDA consent under Rule 27.5xx [sic]. It should be clear that where a subdivision occurs and the creation of any new lot is entirely outside the wāhi tupuna area, then no wāhi tupuna consent requirement is triggered. There could also be an exemption provided for boundary adjustment.

(g) In each case, discretion is restricted to effects on Manawhenua values.

21. As the appellant understands it:

(a) if it seeks consent that avoids any of the identified triggers within any area of land identified as a wāhi tupuna area (even if use or development is proposed on land on the same site or title), then its proposal will not require any additional consents under the wāhi tupuna provisions; and

(b) if use or development (including subdivision) is to occur within any area of land identified as a wāhi tupuna area, then it is:

(i) only the above activities identified at [xx] that will trigger a consent requirement;

(ii) any consent requirement will be RDA only;

(iii) the matter reserved for discretion is limited to effects on Manawhenua values; and

(iv) consultation with Manawhenua is not mandatory, and Manawhenua will only be notified if the statutory tests for notification are met (even if not consulted).

22. If this understanding is correct, then the appellant's original concerns are likely to be largely addressed, with the exception being the duplication and inconsistent approach to managing the effects of earthworks in proximity to waterbodies and the need to achieve greater clarity in respect of subdivision.

23. However this appeal has been filed to preserve the appellant's position pending confirmation of this understanding; and/or to ensure that this understanding is achieved through the wāhi tupuna provisions of the PDP.

24. To the extent that the provisions do not achieve this, or otherwise fully address the concerns expressed in the appellant's original submissions, the appellant seeks to pursue its appeal, for the reasons stated below, in addition to the reasons given in its original submissions.

General reasons for the appeal

25. The general reasons for this appeal are that the Decision generally, and particularly in respect of land that the appellant owns or otherwise has an interest in:

(a) fails to promote sustainable management of resources, including the enabling of people and communities to provide for their social and economic well-being, and will not achieve the section 5 purpose of the Act;

(b) fails to promote the efficient use and development of the land, a matter to have particular regard to under section 7(b) of the Act;

(c) in respect of land that is anticipated by its zoning for use and development:

(i) fails to achieve or implement the relevant district-wide objectives and policies of the PDP that supported that zoning;

(ii) fails to achieve or implement the relevant objectives and policies of the zone in question; and/ or

(iii) otherwise to support and/or is otherwise inconsistent with achieving the land use outcomes anticipated by the relevant zoning;

(d) fails to achieve the functions of the Council under section 31 of integrated management of the effects of the use and development of land and physical resources;

(e) fails to meet the requirements of section 32;

(f) is procedurally unfair and inefficient.

26. In contrast, granting the appeal will generally, and particularly in in respect of land that the appellant owns or otherwise has an interest in will achieve all of the matters/ outcomes or otherwise address the issues identified above in paragraph [25] immediately above.

Relief sought

27. The appellant seeks the following relief:

(a) For jurisdictional purposes, deletion of all wāhi tupuna provision in their current form. (This is to enable the widest possible scope for resolving the issues raised by the appellant.)

(b) Confirmation of the understandings identified above at [16]-[21] are met.

(c) If not, or issues arise in the Council's implementation of the Decisions version of the wāhi tupuna provisions, then the relief identified in (d)-(g) below in particular is pursued:

(d) The Council, and any others defending the current wāhi tupuna provisions, provide further evidence generally and particularly in respect of land that the appellant owns or otherwise has an interest in, to identify:

(i) the values sought to be protected in each identified wāhi tupuna location;

(ii) the interrelationship of those values with the relevant land, including its zoning, and existing or past development and disturbance;

(iii) how the wāhi tupuna provisions can be amended or otherwise refined in light of that evidence;

(e) The deletion, amendment or other refinement to address the concerns raised by the appellant (including alternative ways of achieving some outcomes sought).

(f) In respect of mapping, where appropriate aligning any wāhi tupuna overlay with cadastral, zoning, or other boundaries, such as marginal strips, where there is no compelling evidence to extend the wāhi tupuna overlay beyond those boundaries (particularly if only by a small margin).

(g) In respect of any wāhi tupuna rule triggers for consent requirements, ensure that:

(i) the requirements will only be triggered if subdivision, use or development is proposed within the mapped wāhi tupuna overlay area (ie development on the balance of a site which does not trespass into the wāhi tupuna overlay will not trigger the rule requirements);

(ii) the permitted standards for earthworks within a wahi tupuna overlay required by Rule 25.5.19A.1, in proximity to a waterbody are amended so that are consistent with, and no more onerous than what is provided for in Rule 25.5.19 and the relevant assessment matters 25.8.7 .

(iii) consent status is RDA only;

(iv) discretion is restricted to effects on Manawhenua values; and

(v) consultation with Manawhenua is not mandatory, and Manawhenua will only be notified if the statutory tests for notification are met (even if not consulted).

(h) Any other additional or consequential relief to the PDP, including but not limited to, the maps, issues, objectives, policies, rules, discretions, assessment criteria and explanations to fully address the concerns raised by the appellant in this appeal as well as its original submissions

(i) Costs.

Alternative dispute resolution

28. The appellant agrees to participate in mediation or other alternative dispute resolution of the proceeding.

Attachments

29. The following documents are attached to this notice.

(a) a copy of the appellant's original submission; and

(b) a copy of the appellant's further submission; and

(c) a copy of the Decision.

[The Environment Court has waived the requirement to serve submitters and further submitters, and so no list of submitters to be served is required to be filed with this notice. It has also waived the "advice to recipients" requirement, and so that advice is omitted from the notice to the appeal.]

DATED 18 May 2021

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J D K Gardner-Hopkins
Counsel for the appellant

The appellant's address for service is C/- James Gardner-Hopkins, Barrister, PO Box 25-160, Wellington 6011.

Documents for service on the Applicant may be sent to that address for service or may be emailed to james@jghbarrister.com. Service by email is preferred, with receipt confirmed by return email.

Attachment 1 - the appellant's submission

Attachment 2 - the appellant's further submission

Attachment 3 - the Decision