

**DOUBLE SIDED**

**ORIGINAL**

Decision No C 22 /2003

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN RICHARD HENRY ESTATE LIMITED

(RMA 1060/00)

Appellant (and applicant)

AND SOUTHLAND DISTRICT COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (presiding)

Environment Commissioner C E Manning

Deputy Environment Commissioner R Grigg

HEARING at TE ANAU on 21, 22 and 23 January 2003

APPEARANCES

Mr G M Todd for Richard Henry Estate Ltd

Mr B J Slowley for Southland District Council

Ms C Lenihan for the Department of Conservation under section 271A of the Act

Mrs D E Bulling for herself and Mr S E Bulling under section 271A of the Act

Ms G Bell in person under section 271A of the Act

Mr R W H Willett in person under section 271A of the Act

Mr W T Keown in person under section 271A of the Act

INTERIM DECISION

*Background*

[1] This proceeding is about possible residential development close to the margins of Lake Te Anau in Southland District. It arises out of an appeal by a landowner, Richard



Henry Estate Ltd, under section 120 of the Resource Management Act 1991 ("the RMA" or "the Act").

[2] At the foot of Lake Te Anau there is a triangle of land ("the site") owned by Richard Henry Estate Ltd. The sides of the triangle are, first, State Highway 95 running south to Riverton; secondly, Golf Course Road; and thirdly, a paper road, partly formed parallel to the lake margins, but set back from them by about 100 metres. Between that paper road ("the Old Road") and the lake a walkway runs through manuka, rank grass, and bracken and connecting Te Anau township with the northern end of the Kepler Track. The walkway is used by 1,000s of people annually.

[3] The site contains 5 hectares and is divided into 4 features:

- (1) a top flat paddock at the intersection ("the apex") of State Highway 95 and Golf Course Road;
- (2) a section of morainic mounds about 40 metres from the apex;
- (3) a steep bank further away from the apex, which falls to -
- (4) a low terrace adjacent to the 'Old Road', closest to the lake.

The latter three features all run approximately parallel to the lake shore.

[4] The site is contained within the Scenic Resource Area of the Southland District. The district plan specifically states that the Scenic Resource Area is an outstanding landscape and significant natural resource under section 6 of the Act.

[5] Various tall eucalypts and what appear to be Tasmanian Blackwoods are planted around the Old Road and on features (3) and (4) of the site. These were planted by the Ministry of Works and Development under the supervision of Mr A R Petrie, a landscape architect who gave evidence to us. Whilst those trees indicate that the landscape is not pristine, they are beautiful as stated by Mr W T Keown, an artist who gave evidence, and we find they are part of the natural landscape. The land between the lake and the site and the site itself make an easy transition from the original qualities of the Fiordland National Park and Lake Te Anau to the farmland to the east of the site and the rural-residential land to the south of Golf Course Road.



[6] About 1.5 kilometres to the north of the site is Te Anau township: a visitor standing under the eucalypts of the edge of the lake at Te Anau township faces southwest. The length of the lake is to their right, and the beech-covered slopes of Mt Luxmore are in front of them. To their left the edge of the lake curves around to the foot of the lake and the control gates – clearly visible several kilometres away – which mark the start of the Waiau River. Some of the site is visible from part of the lake shore at the township.

[7] The introduced eucalypts on the edge of the lake and stretching around towards the control gates give it an unusual quality in New Zealand – a sense of kinship with an Australian landscape – as well as a strong sense of naturalness. The eucalypts were variously described as “gums” or “snow gums” but strictly they are neither. Some of the eucalypts along the lake edge are properly called “blue gums”<sup>1</sup> but there are no true snow gums in the area. Mr Petrie, the landscape architect called for the Council, confirmed he used the term ‘snow gum’ to describe various eucalypt species, such as Manna Gum<sup>2</sup>, which he said are not vulnerable to snow or frost.

### *The proposal*

[8] Richard Henry Estate is seeking consent to subdivide this land into 11 residential lots and a land use consent to establish dwellings and accessory buildings on 500m<sup>2</sup> building platforms on each allotment. It further proposes to create an allotment to contain four 22,500 litre water tanks for fire fighting purposes, and four further lots for roading and access purposes.

[9] The appellant proposes to mitigate the adverse effects of building on the site by conditions of consent which:

- restrict all buildings to specific building platforms;
- restrict the height of buildings on two sensitive sites to 5 metres;



<sup>1</sup> Although this term is used for a particular group of Eucalypts, not one species.

<sup>2</sup> *Eucalyptus viminalis*.

- limit the range of materials used in construction and colours used in finishing the buildings;
- retain a viewshaft of the lake;
- provide a structural planting plan including native beech and native scrub;
- set aside the area between the foot of the escarpment and the legal road as a regeneration area, except for the building platforms and accessways provided within it;
- limit exotic plantings in the regeneration area to the area of the building platforms;
- provide for reticulated service underground;
- provide roading constructed with grassed swales rather than kerbing, channelling and footpaths;
- limit fences, entrances and street furniture to raw materials.

*The status of the activity*

[10] The relevant statutory document in this case is the Southland District Plan, which became operative in full on 27 June 2001. The relevant rules to be applied in this case are found in section 4.5.4 of that document, part of the section dealing with the Scenic Resource Area.

[11] By rule SRA 3, all subdivision within the Scenic Resource Area is a discretionary activity.

[12] Rule SRA 1 provides that buildings and structures are controlled activities provided that they "...b) conform with the relevant rules and performance standards of section 4.1.4 .... Any proposal to exceed these limitations shall be considered as a discretionary activity."

[13] In section 4.1.4, Rule PRA 3(i) provides that residential activity is a permitted activity on the basis of either "One dwelling per certificate of title created prior to the date this plan was notified or one new dwelling not closer then 150 metres to any existing or proposed dwelling (a proposed dwelling being a dwelling for which a



resource consent or building consent has already been granted ...)". The land use proposed cannot comply with rule PRA3(i) and is therefore a discretionary activity.

[14] Both the subdivision and land use consent aspects of this proposal are discretionary activities. We are required therefore to have regard to the matters set out in section 104(1) of the RMA prior to exercising our discretion under section 105(1)(b) of the Act to grant or refuse consent.

[15] We consider the following matters relevant under section 104:

- Any effects on the environment of allowing the activity (section 104(1)(a) and (i));
- Any relevant objectives, policies, rules or other provisions of the Southland District plan (section 104(1)(d));
- Any other matters the consent authority considers relevant and reasonably necessary to determine the application (section 104(1)(i)).

#### *Permitted baseline test*

[16] From Mr Todd's cross examination of Mr Halligan, and from his submissions, it appeared that the permitted baseline would assume some significance in this case. Before considering the effects on the environment, we shall endeavour to establish a permitted baseline for this site. Mr Todd put to Mr Halligan the possibility that either a farm building restricted in bulk only by a height limit of 6 metres or a lodge in which the manager resided and subject to the same height limit could establish on the lower part of the site under the permitted baseline. For this Mr Todd relied on the proposition that controlled activities formed part of the permitted baseline.

[17] In *Arrigato Investments and Ors v Auckland Regional Council*<sup>3</sup>, the Court of Appeal had this to say of the permitted baseline:

<sup>3</sup> [2001] NZRMA 481 at paragraph 29.



*Thus the permitted baseline in the terms of Bayley as supplemented by Smith Chilcott Limited is the existing environment overlaid with such relevant activity (not being a fanciful activity) as is permitted by the plan. Thus if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the section 104 and 105 assessments.*

[18] In *Keystone Watch Group v Auckland City Council*, the Environment Court took the permitted baseline to include:

*the effects of an activity in the district plan, in respect of which the Council has limited the matters over which it has control<sup>4</sup>.*

However, in *Kalkmann v Thames Coromandel District Council* a decision of the Court differently composed did not include controlled activities, and held “as a matter of law, that hypothetical controlled activities are not within the permitted baseline.”<sup>5</sup>

[19] It is not necessary to resolve the question of controlled activities here. Mr Todd, rightly in our view, conceded that matters over which the Council had retained control could not come within the permitted baseline. Rule SRA 1 of the District Plan reserves control over “the effect that a structure or building may have on the landscape, any skyline or view”. We conclude therefore that while a lodge of some size or a farm building may be within the permitted baseline on the site as a whole, the consent authority is left with considerable control over its location on the property.

[20] At most the permitted baseline can include one dwelling, or more buildings accessory to rural activities, sited so as to mitigate possible adverse effects. In circumstances where the applicant contended that the site was not a viable economic farming unit, we consider any more than a limited number of farm buildings to be fanciful.



<sup>4</sup> A47/2002 paragraph 13, citing *King v Auckland City Council* [2000] NZRMA 145 at p157 and *Body Corporate v Auckland City Council*, [2000] NZRMA, 202 at p213.

<sup>5</sup> A152/2002 paragraph 102, citing *Wessim Partnership v Northshore City Council* A112/2002 paragraph 51.

*Section 104(1)(a) - Any actual or potential effects on the environment of allowing the activity.*

[21] We record that a number of matters were traversed in evidence which were largely uncontested, and ultimately had limited influence on the outcome of this case. The evidence of Mr W D Whitney, the planning witness called by the applicant, that traffic effects would be minor, and that the transfer of the memorial plaque to Richard Henry, the first settler in the vicinity, to a location closer to his original hut would have a positive effect on people's appreciation of heritage was not contested. The planning witness called by the Council, Mr B G Halligan, expressed concerns about the adequacy of information on services provided by the applicant to enable the Council to assess whether appropriate standards for sewage reticulation and stormwater disposal were met. Some details in this area were only provided at the hearing itself. But we consider such matters could be settled by negotiation between the parties, once the issue of the appropriateness of development had been resolved; if agreement could not be reached, the Court could determine such conditions after submission by the parties.

[22] In the end, the case turned on one central issue: whether and to what extent the site could absorb development without significant adverse effect on the natural and the visual qualities of the site itself and the surrounding environment.

[23] It was the applicant's case that:

- the environment which surrounds the site is already compromised;
- the topography of the land enables a number of building sites to be designated where buildings can be concealed from public view;
- in particular the views of Lake Te Anau and the National Park will not be compromised;
- the scheme plan and structural landscape plan drawn up by Bonisch Ltd<sup>6</sup> and attached to this decision as Appendices A and B will mitigate the effect of the buildings to a sufficient extent to make it reasonable to grant the consents sought.



<sup>6</sup> For convenience lot numbers referred to later in this decision refer to the lots shown on these plans.

[24] For its part the Council was not entirely opposed to subdivision of the site. Mr Halligan was particularly concerned about the effects of Lots 1-3 on the visual amenity of users of the walkway, and in a more general way about the proposed density of buildings on the upper part of the site. Mr Petrie, a landscape architect, also called by the respondent Council, did not support more than limited development *at the western end of the Top Paddock shown on the landscape plan as lots 4 and 5.*

***The site and its environs***

[25] Ms E J Kidson is a qualified landscape architect who has been working for the past three years providing assessments of resource consent applications for the Queenstown District Council. She described the landscape between Te Anau township and the Waiau River Control Gates as "*generally modified by human activity,*" noting the presence of the Yacht Club, the Department of Conservation, a wildlife centre and the golf course with clubrooms clearly visible from the lake. Mr Whitney drew our attention to the subdivisional possibilities of the Transitional Resource Area to the south of the site and also to the subdivision into lots of between 3 and 15 hectares which had already taken place in the Scenic Resource Area on William Stephen Road. He further noted the presence of a refuse transfer station with its entrance off State Highway 95 south-east of its intersection with Golf Course Road. He concluded that there is a mixture of land use activities and development in the northern portion of the Scenic Resource Area to the south of Lake Te Anau.

[26] Mr Petrie, a qualified landscape architect with thirty years experience much of it involved with the general locality was called by the respondent Council. He opined that the southern end of Lake Te Anau had a natural character. He told the Court that there are no structures along the edge of the lake between the Upper Waiau River Control structure and the Marakura Yacht Club on Steamers Beach, a distance of 3 kilometres, and that there were no built elements between the control structure and the wildlife park between the margins of the lake and public road for a distance of 2.5km.

[27] Mr Petrie also provided the most detailed description of the landform and its origins. The steep banks separating irregular terraces were evidence of ancient lake





levels as the glaciers retreated back to the fiords at the end of the last ice age; the hummocky ground was originally created by lateral moraines deposited during the glacial retreat; in the west of the site there is an abrupt drop to terminal moraine. Ms Kidson's evidence referring to the visibility of past glacial activity in the hummocky form of the top paddock corroborated the description of Mr Petrie. Ms Kidson was also of the view that the site contained a high level of naturalness.

[28] We find that the site does in fact possess a high level of naturalness which any development should properly respect. On the question of the surrounding environment, which the members of the Court visited on a site inspection, we prefer the evidence of Mr Petrie, including his judgement that the existing trees contribute significantly to the quality of the landscape. The structures and activities referred to in the evidence of Ms Kidson and Mr Whitney are indeed present but they are sufficiently distant from or topographically separated from the subject site that they do not impinge significantly on our perception of it.

*Topography and the concealment of buildings from public view*

[29] It was common ground that the deep cutting through which Golf Course Road passes adjacent to the site, and the location of State Highway 95 in a shallow cutting as it passes most of the site, when combined with the hummocky form of the top paddock, enables some sites to be located outside the view of public roads; the steep escarpment obscures these sites from the walkway and the lake. The land therefore appears to have the capacity to absorb some development in the top paddock. We would add that to avoid significant adverse effects development of building platforms should avoid violence to the expressive and legible natural features of the site.

*The viewshaft from State Highway 95*

[30] At present travellers north on State Highway 95 gain their first views of Lake Te Anau from a point just south of its intersection with Golf Course Road. The structural landscape plan provided by the applicant depicted a quadrilateral viewshaft area stretching from the intersection and located primarily on Lots 12 and 7 and marginally on Lots 6, 8 and 13. The applicants propose a condition of consent which will prevent



any building projecting into the viewshaft protection area. Ms Kidson was also of the view that the removal of Eucalyptus trees from the site area once beech and native scrub had reached maturity would improve views.

[31] If the longer sides of the quadrilateral viewshaft area proposed by Ms Kidson were projected to form a triangle, the apex of that triangle would be on farmland to the south-east of the intersection. In cross examination Mr Petrie indicated that a more appropriate position for that apex would be at a point on the state highway close to where a power pole is located, and that the protection area should have a wider conical shape. This would encompass the building platform proposed on Lot 12. We concur with Mr Petrie that his wider cone with its apex at the point he suggests would more appropriately protect significant views from State Highway 95.

*The ability of the structural planting plan to mitigate adverse effects*

[32] Ms Kidson's opinion was that while the subdivision will introduce built form into the environment which will detract from the naturalness of the site, this is counterbalanced by proposed plantings of native beech and by designating the terrace face as an area for the regeneration of native beech. She proposed that as the beech matured existing eucalypts might be removed, thus removing exotic elements from the landscape.

[33] The precise effect of the proposed vegetation could only be gleaned from her evidence by careful reading. She indicated that the location of dwellings would ensure that they would not be readily visible from the lake or walking track. However she indicated that the structural planting at the north of proposed Lots 1-3 and 4-9 would partially screen the proposed dwellings and integrate them into the environment. In cross-examination she emphasised that the purpose of the planting was to integrate rather than to screen the buildings.

[34] Mr Petrie questioned whether the planting proposed was a practical and feasible mitigation measure. He stated that beech trees would be difficult to establish on gravelly soils that were prone to dry out in summer and were exposed to prevailing



north-easterly winds. He acknowledged in cross-examination that his concerns were with the beech shown on the scarp face rather than on the lower terrace.

[35] For her part Ms Kidson acknowledged that the beech plantings would take 8-10 years to grow sufficiently to achieve their incorporating and partial screening function, and would need irrigation and wind protection. Mr Petrie argued that the beech trees shown on the northern side of each building platform would block out natural light. We also infer that the more quickly and higher the trees grow, the more they would block views of Lake Te Anau, which are clearly a valuable feature of the properties. There are few incentives for property owners to ensure the rapid success of the structural plantings.

[36] Mr Petrie opined that, in terms of Lots 1-3 with dwellings only partially screened from the walkway, users of the Te Anau walkway on passing the site would have the impression of coming to the edge of a built up area. It *"will generate the impression that the Te Anau walkway is not departing from a residential area, but sidling around it"*. We concur with this evaluation.

[37] Further, there is an important aspect of the case which we consider all the experts have rather overlooked. They have identified the effects of development on the site for users of the walkway, but they have not considered the effects of development on the amenities of users of the Old Road (such as Mr Keown) between the walkway and the site, indeed immediately adjacent to the lower terrace. From that road the proposed buildings on Lots 1, 2 and 3 will be only a few metres away. Such houses could not be described as enhancing the naturalness of the landscape. Indeed we find that there are also difficulties with some of the possible houses on the morainic mounds, since all the platforms are close to the top of the bank.

[38] Ms Kidson acknowledged that the introduction of built form into the environment would detract from the naturalness of the site. However, she believed that the plantings of native beech and the setting aside of the terrace face as an area for the regeneration of native beech would compensate for this to the extent that a significant adverse effect would not result. She conceded however that a site without the buildings which retained exotic elements in its vegetation would be more natural than a site with



buildings and only native vegetation. We note that Mr W T Keown, who paints on and near the site, indicated that the exotic elements in the landscape did not make it less valuable for him as an artist, and that gum trees had been a feature of the landscape to the south of Lake Te Anau since the time of the first settler, Richard Henry.

[39] There will be occasions when the revegetation of an area with indigenous species to the exclusion of exotics would balance the intrusion of built form into the landscape. However, in this case the eucalypts are an important element of the natural quality of the landscape. While we consider that some parts of the subdivisional proposal can remain without significant adverse effects, we do not believe that the mitigation measures proposed would reduce the effects of the proposal as a whole to the point where they are less than significant.

[40] We summarise our conclusion on the effects on the environment of allowing the activity as follows:

- the site and its surrounding environment possess a high degree of naturalness;
- suitable sites can be found on the top paddock where buildings will not have a significant adverse visual effect on the environment;
- the provision of a viewshaft can maintain significant views from State Highway 95 to Lake Te Anau; the siting of that viewshaft as proposed by Mr Petrie is to be preferred;
- building on proposed Lots 1-3 and 7 will have a significant effect on the perception of the area by users of the walkway which is insufficiently ameliorated by the structural planting plan.

[41] We find that when the permitted baseline established earlier in this decision is considered, the effects remain significant when compared with that.

[42] In view of the potential difficulties in establishing and growing beech trees on the northern side of building platforms, and in view of the potential to mitigate the adverse effect of building by careful choice of building platforms, we consider that



screening from the walkway, from the reserve area and Te Anau township should rely on use of the topography of the site rather than vegetation.

*Section 104(1)d - Any relevant objectives, policies, rules or other provisions of a plan or proposed plan*

[43] The Southland District Plan became operative in March 1999 as far as the majority of its provisions, including the Scenic Resource Area, are concerned. This is the only plan relevant to this application.

[44] The objectives and policies for the Scenic Resource Area are set out in section 4.5.3 of the District Plan. They are:

Objective SRA 1: To maintain the outstanding visual amenity provided by these areas;

policy SRA 1: to mitigate or avoid the adverse visual effects of buildings and structures in these areas;

policy SRA 2: to mitigate or avoid the adverse visual effects of vegetation in these areas:

policy SRA 3: to mitigate the adverse effects of intensive development in these areas.

Also relevant is the subdivisional policy Policy SUB 12, namely, "*to ensure that subdivision preserves natural values as far as practicable.*" The explanation of this policy states that some areas of the district are significant because of the visual diversity of their scenic attractions. One of these areas is the area situated on the west side of State Highway 95 between Lake Te Anau outlet and Manapouri township. The explanation continues:

*In the case of Te Anau the areas have high visual amenity providing uninterrupted views across open farmland to Lake Te Anau and Manapouri and the Fiordland National Park beyond ... . It is policy to ensure that buildings and structures to be erected in these localities do not detract from the landscape obscuring the outlook or view enjoyed by residents or tourists ... .*



[45] From our analysis of effects on the environment we have concluded that buildings on the platforms shown in Lots 1-3, Lot 7, and Lot 12 would reduce the visual amenity of the area, in the case of Lots 1-3 and 7 for users of the walking track, and in the case of Lot 12 for users of State Highway 95. In saying this of Lots 1-3 and 7, we do not dispute that development of these lots would leave views of Lake Te Anau and the National Park intact, as Mr Petrie acknowledged in cross-examination. Nevertheless, the buildings would be part of the visual experience of those walking the track, and would in our view detract from that experience. Policy SRA 1 would not support the grant of consent to the entire application, and in as far as the buildings are an element to be considered under objective SRA 1, the grant of consent would not be in accord with that objective.

[46] It was Ms Kidson's evidence that the eucalypts at present on the site had an adverse effect on the surrounding environment, and that their ultimate removal from the steep scarp would improve views of the Fiordland National Park from State Highway 95. Mr Petrie conceded that eucalypts, being taller than beech trees, had a greater ability to cause adverse effects on views, but noted that beeches were evergreen and were capable of obliterating views by the density of their foliage. He said that eucalypts on the other hand were a single trunk tree with a high canopy of leaves and branches. We accept that if the density of beech trees was controlled, policy SRA 2 may be furthered by the removal of the eucalypts. However the importance of this for our overall assessment may be tempered by the long association of eucalyptus trees with the area, going back to the first settler in the area, Richard Henry. The 'gums' have become part of the cultural landscape<sup>7</sup>.

[47] In terms of policy SRA 3, Mr Whitney gave his opinion that the proposed subdivision does not constitute intensive subdivision. When a plan has been fully prepared and become operative under the RMA, what constitutes intensive development must be decided with reference to what the rules of the plan allow. The relevant rule of the plan, Rule SRA 1, read in conjunction with Rule PRA 3(1)(a) requires either one

<sup>7</sup> For the contribution historic associations may make to the value of a landscape, see *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*, C180/99, [2000] NZRMA p59 paragraph 7.



dwelling per certificate of title created prior to the notification of the plan or a separation distance of 150 metres between dwellings. Even in those circumstances dwellings are a controlled activity.

[48] It was the evidence of Mr Halligan that, if the 150 metre separation distance was applied, at most 3 dwellings could be constructed on the site. He told us that separations between building platforms according to the scale provided with the scheme plan were between 20 and 75 metres. He considered that this development is more intensive than is envisaged for the Scenic Resource Area. We concur with that assessment.

[49] However that is not the end of the matter. The policy is to mitigate the adverse effects of intensive development. We take from that that if those effects can be mitigated, this policy would not be opposed to the grant of consent, but only when that is the case. In our discussion of effects we concluded that some building platforms could be provided on the upper portion of the site in such a way that there would be no substantial adverse effect on the environment. We consider therefore that Policy SRA 3 would support consent, but only for a limited number of the lots and building sites shown on the scheme plan.

[50] Policy SUB 12 requires the consent authority to ensure that subdivision preserves natural values as far as practicable. A note to the explanation and reasons of that policy refers to the provisions for the Scenic Resource Area and also to Rule SUB 3(J). This rule indicates that in assessing applications for the land between the Te Anau – Manapouri Road and the Waiau River greater emphasis is to be placed on:

- the need to preserve the visual amenity created by the backdrop of native bush;
- recognise the visual significance of the National Park;
- protect the open character of rural scenes;
- protect the natural character of the coast and the margins of rivers and lakes;
- recognise the intrusion that structures create in this landscape.



[51] We recognise that the suggested beech planting, in as much as it might be successful, would create part of the amenity recognised in the first of these criteria, and that an appropriate viewshaft can recognise the visual significance of the National Park. However we have also concluded that structures on a number of the proposed building sites would be intrusive even with the mitigation measures proposed.

[52] Taken as a whole we consider that the provisions of the plan would support a subdivision with some relaxation of the 150 metre separation rule, but that equally they would lend weight against the consent to the creation of lots with building platforms in the location of Lots 1-3, 7, 11 and 12.

*Section 104(1)(i) - Any other matters the consent authority considers relevant and reasonably necessary to determine the application*

[53] Ms Lenihan submitted and Mr Halligan stated in evidence that the provisions of the Fiordland National Park Management Plan 1991, and the revised draft plan 2002 were relevant to this application. The bed and waters of Lake Te Anau are part of the National Park. We accept the submission that the values of the National Park adjacent to the proposed subdivision are relevant to this application.

[54] One of the objectives of the Management Plan is to protect and maintain the natural shoreline and amenity values of the lake front. The Department intends to implement this policy by methods which include recommending to the Minister of Conservation that no new facility development be permitted along the Te Anau lake front.

[55] From this we conclude that a substantial owner of land adjacent to the application site is seeking to retain the open character of the lake front and is likely to act in support of the provisions of a local authority which seeks to do the same.

[56] We note that the Management Plan has an objective to manage the lake front in full co-operation with the agency responsible for the legal road and reserve areas adjoining the lake edge. The Department of Conservation and the District Council are unified in their approach to this application.





## Part II

[57] The matters to be considered under section 104(1) are subject to Part II of the RMA. Section 6 of the RMA requires those exercising functions under the Act to provide for as matters of national importance, (relevantly):

- (a) *The preservation of the natural character of ... lakes and rivers and their margins, and the protection of them from inappropriate subdivision use, and development:*
- (b) *The protection of outstanding natural features and landscapes from inappropriate subdivision use, and development:*

[58] The application site is separated from the margin of the lake by Crown Land and by Te Anau Domain, as well as by the legal road which fronts its north-western edge. Nevertheless the natural character of these areas means that development on the site has the potential to change people's perception of the lake and its margins. We accept that the subdivision will not be readily visible from the lake itself. However Mr Petrie indicated that the subdivision would be visible from Lakeshore Drive, north of its intersection with Mokoroa Street in Lake Te Anau township. He opined that the combined effects of chimney smoke, together with glints from windows and exterior cladding would make the subdivision detectable. We do not consider that these effects would change our perception of the lake margins as a whole from this viewpoint to any significant degree.

[59] Mr Todd submitted in opening that the land provided views to land of outstanding natural value but was not itself part of an outstanding natural landscape. The plan itself contradicts that submission. And so does the evidence. The site itself reveals previous lake levels and the results of previous glacial activity, which we infer gives the site intrinsic scientific interest, expressiveness and legibility<sup>8</sup>. We are also mindful of Mr Petrie's concern that the site should not be isolated from its setting at the southern end of Lake Te Anau. It is part of a wider landscape which has outstanding

<sup>8</sup> For the importance of these qualities in a landscape see *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* C180/99 2000 NZRMA 59 paragraph 7



natural value, and activity on this land should not detract from the qualities of that wider landscape.

[60] That is not the end of the matter. Section 6(b) of the RMA does not protect outstanding landscapes from all subdivision, use and development but only from that which is inappropriate. We consider that development becomes inappropriate when it diminishes in any significant way the outstanding natural landscape or the reasonable person's perception of it. In this case we find that grant of consent as applied for would be intrusive on the outstanding natural landscape, but that a limited number of carefully sited lots could be provided without any more than minimal adverse effects.

[61] The implications for the applicant's proposal are:

- (1) The platforms for Lots 1-3 are too close to the walkway and to the Old Road, and will reduce the naturalness of this nationally important landscape very significantly even if the planting proposal is successful;
- (2) A house on the platform for Lot 6 would also be too visible from below. However, there may be scope for another house if:
  - (a) its platform is not in the view shaft
  - (b) any building is not visible from the walkway or the Old Road.
- (3) The platform for Lot 7 would permit a house which would loom far too large on the crest of the bank, at its lowest point. This is unacceptable;
- (4) Lots 8, 9, 4 and 5 are acceptable provided the buildings are sited so that they cannot be seen from the walkway. The platforms for Lots 8-9 may be seen if the eucalypts die or are removed so they should be moved back into the mounds;
- (5) The view shaft concept has some merit, so selected eucalypts should be felled. We note that it might be desirable to leave some in place at the sides of the shaft (or even 1 or 2 in it) to add some depth to the view;
- (6) Lots 11 and 12 are very obtrusive. Lot 12 is in the view shaft proposed by Ms Kidson. We accept Mr Petrie's evidence that the shaft should be wider. With some concern we accept that Lot 11 may just be acceptable since it is closest to the rural – residential lots on the south side of Golf Course Road.



[62] We accept that there are no other section 6 matters which weigh against this application, as was stated in the evidence of Mr Whitney.

[63] Section 6 matters are not to be provided for simply in themselves, but "*in achieving the purpose of the [RM] Act.*"<sup>9</sup> The purpose of the Act as set out and defined in section 5 is "*to promote the sustainable management of natural and physical resources*" which is further defined in section 5(2). Consent would enable Richard Henry Estate and its shareholders to provide for their economic and social well being, and it would do the same for prospective purchasers by giving them access to outstanding sites overlooking Lake Te Anau. But full consent would not adequately "avoid, remedy or mitigate adverse effects of the activities" on an outstanding natural landscape, nor would it sustain the potential of the landscape resource to meet the reasonably foreseeable needs of future generations. Applying a broad overall judgement therefore, we conclude that the purpose of the Act would not be served by granting consent as applied for.

[64] Mr Slowley submitted that if the Court should find as we do, we should simply refuse consent and allow the applicant company, if it wished, to apply to the primary consent authority for consent for a lesser number of lots. However, because considerable time has elapsed and considerable resources have been expended in advancing thus far, we consider it appropriate to grant consent to what is in accordance with the RMA.

### *Outcome*

[65] The outcome is that we are agreed that there is scope for limited development on the site. Clearly this needs to be an interim decision. The appellant will need to redraw the subdivision on the basis of the building sites permitted in paragraph [61]. This will obviously mean changes to lot boundaries, to the subdivisional roading pattern and to other infrastructural requirements. The parties are invited to agree conditions of consent on the basis outlined. These conditions will also need to be such as to preclude any



<sup>9</sup> See *Mahuta v Waikato Regional Council* A091/98 at paragraph 229.

domestication of the scarp face and lower terrace. In the event that the parties fail to agree conditions they will be determined by the Court.

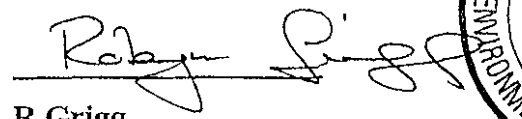
[66] The question of costs is reserved. Our preliminary view however is that the issues in this case were properly brought before the Court and that an award of costs to any party is therefore inappropriate.

**DATED** at CHRISTCHURCH 10 MARCH 2003

**For the Court:**

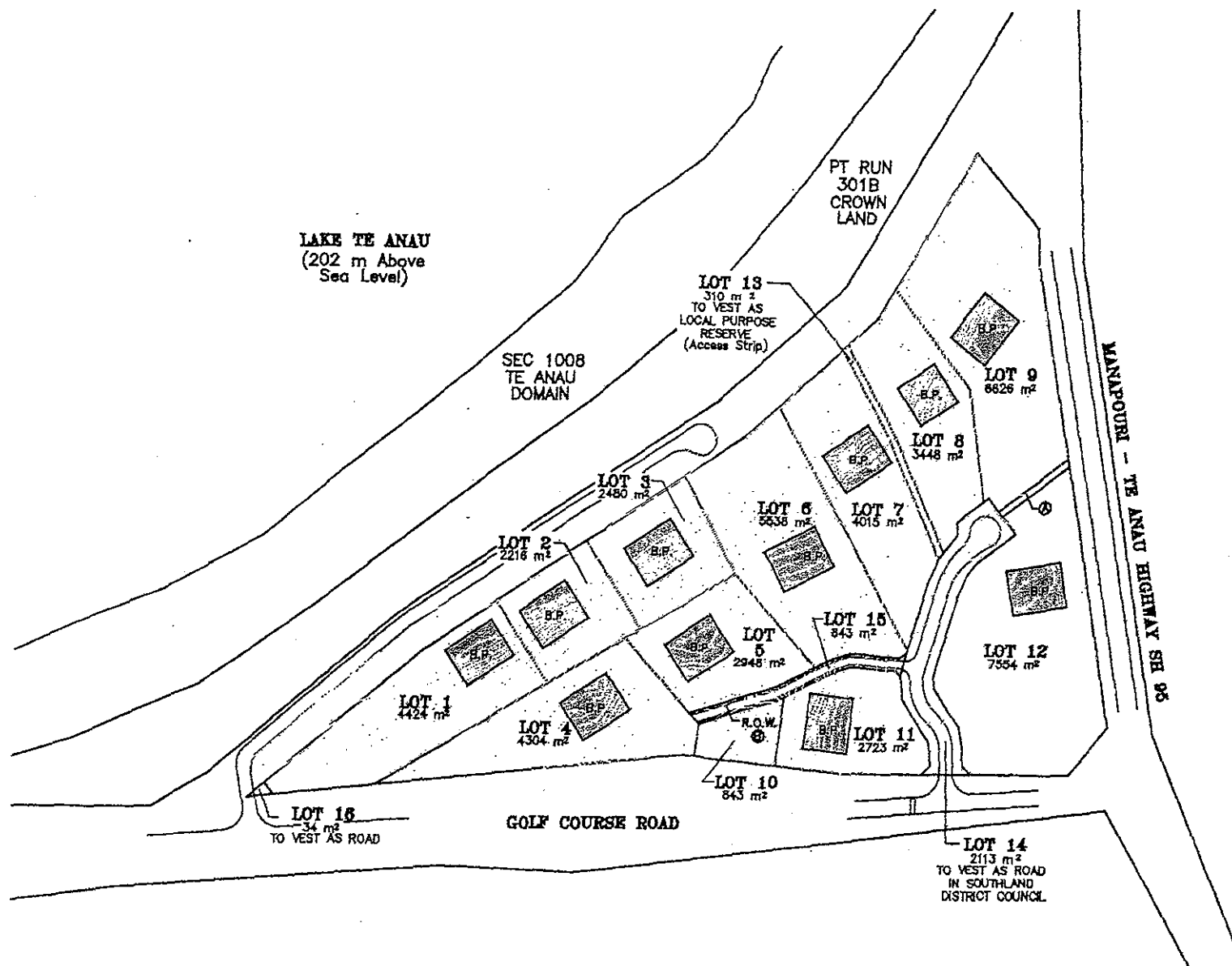
  
C E Manning  
Environment Commissioner



  
R Grigg  
Deputy Environment Commissioner



Issued:<sup>10</sup> 10 MAR 2003



#### SCHEDULE OF BUILDING PLATFORMS

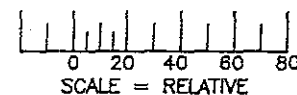
LOT NUMBER	BUILDING PLATFORM SIZE (Meters)	FRESHED FLOOR LEVEL	MAXIMUM BUILDING HEIGHT
LOT 1	19 X 25	217.00	223.00
LOT 2	30 X 25	217.00	223.00
LOT 3	30 X 25	217.00	223.00
LOT 4	20 X 25	228.82	234.82
LOT 5	20 X 25	230.58	236.58
LOT 6	20 X 25	231.85	237.85
LOT 7	20 X 25	226.05	231.05
LOT 8	20 X 25	225.48	231.48
LOT 9	20 X 25	230.81	236.81
LOT 11	20 X 25	231.00	237.00
LOT 12	20 X 25	230.82	236.82

#### MEMORANDUM OF EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
RIGHT OF WAY RIGHT TO CONVEY WATER, ELECTRICITY & TELECOMMUNICATIONS	⊙	LOT 15	LOTS 4 - 6 & 10

#### MEMORANDUM OF EASEMENTS IN GROSS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
RIGHT TO CONVEY SEWAGE & WATER	⊙	LOT 12	SOUTHLAND DISTRICT COUNCIL



SCALE 1 : 1000 AT A1  
1 : 2000 AT A3

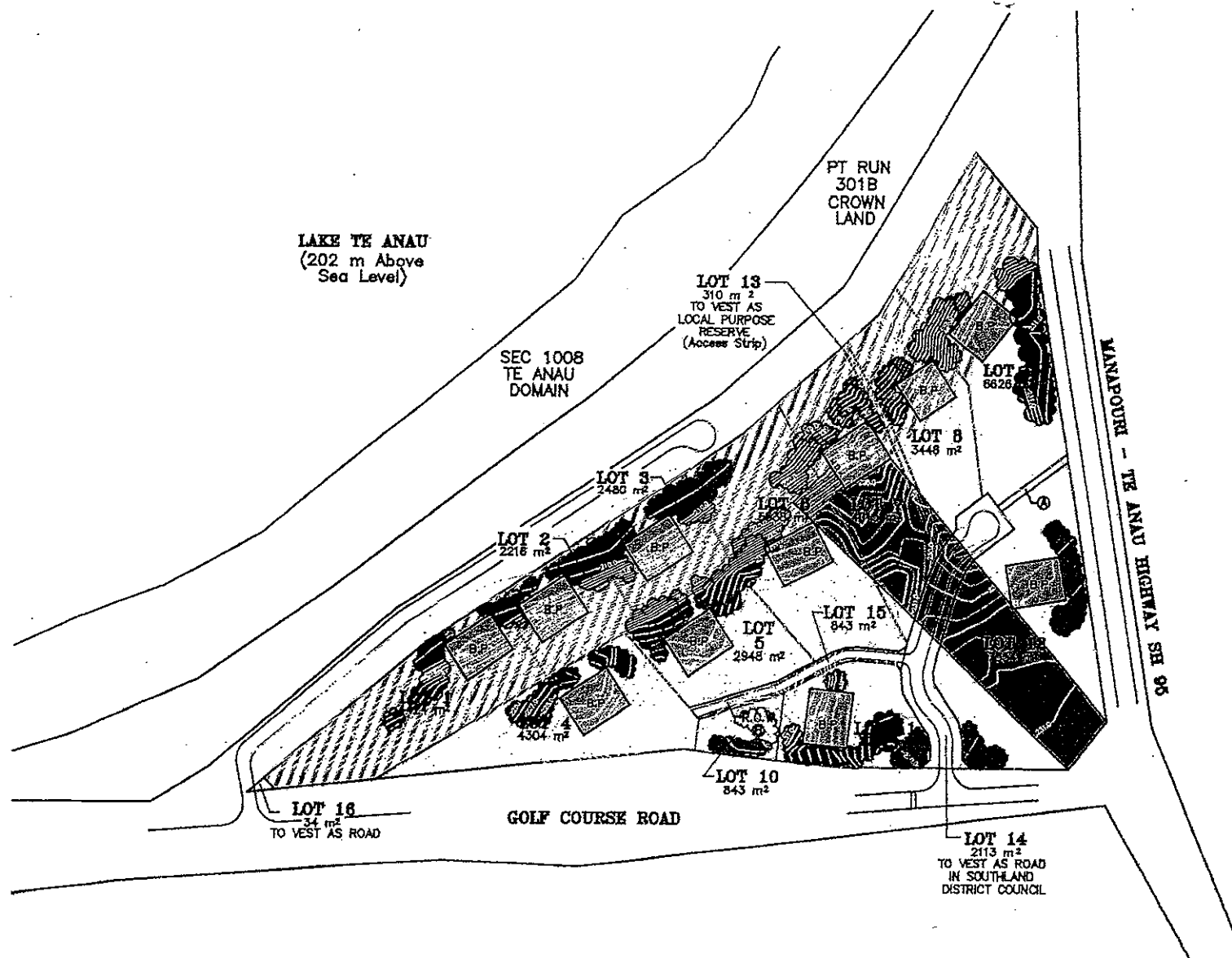
#### SCHEME PLAN

NOEL BONISCH Limited  
REGISTERED SURVEYORS  
12 DON STREET / P.O. BOX 1262  
PHONE 06-656 2546  
INVERCARGILL, N.Z.

NZMS D43  
COMPRISED IN CT 9C/349

PROPOSED SUBDIVISION OF  
SECTION 1 SO 11684  
BLOCK I MANAPOURI SURVEY DISTRICT

Surveyed G.J.G., R.B.W., M.L.J.  
Checked  
Date 16th January 2003  
Job No 1791/1791topoa



#### SCHEDULE OF BUILDING PLATFORMS

LOT NUMBER	BUILDING PLATFORM SIZE (M <sup>2</sup> )	FINISHED FLOOR LEVEL	MAXIMUM BUILDING HEIGHT
LOT 1	18 X 25	217.00	223.00
LOT 2	20 X 25	217.00	223.00
LOT 3	20 X 25	217.00	223.00
LOT 4	20 X 25	228.82	234.82
LOT 5	20 X 25	230.59	236.59
LOT 6	20 X 25	231.55	237.55
LOT 7	20 X 25	230.06	231.06
LOT 8	20 X 20	228.44	231.44
LOT 9	20 X 25	230.81	236.81
LOT 11	20 X 25	231.00	237.00
LOT 12	20 X 25	230.82	236.82

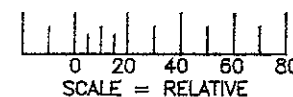
#### MEMORANDUM OF EASEMENTS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
RIGHT OF WAY RIGHT TO CONVEY WATER, ELECTRICITY & TELECOMMUNICATIONS	①	LOT 10	LOTS 4 - 6 & 10

#### MEMORANDUM OF EASEMENTS IN GROSS

PURPOSE	SHOWN	SERVIENT TENEMENT	DOMINANT TENEMENT
RIGHT TO CONVEY SEWAGE & WATER	①	LOT 12	SOUTHLAND DISTRICT COUNCIL

- REGENERATION AREA
- STRUCTURAL PLANTING NATIVE BEECH
- STRUCTURAL PLANTING NATIVE SCRUB
- VIEWSHAFT PROTECTION AREA



SCALE 1 : 1000 AT A1  
1 : 2000 AT A3

#### SCHEME PLAN

NOEL BONISCH Limited  
REGISTERED SURVEYORS  
12 BON STREET, P.O. BOX 1842  
PHONE 03-258 2546  
INVERCARGILL, N.Z.

NZMS D43  
COMPRISED IN CT 9C/349

#### STRUCTURAL LANDSCAPE PLAN

Surveyed  
Checked  
Date 18 January 2003  
Job No 1791/1791topoa