

**DECISION OF THE QUEENSTOWN LAKES DISTRICT COUNCIL**

**RESOURCE MANAGEMENT ACT 1991**

<b>Applicant:</b>	<b>Woodlot Properties Limited</b>
<b>RM reference:</b>	RM161063
<b>Location:</b>	Moorhill Road, Wakatipu Basin
<b>Proposal:</b>	To undertake a two lot subdivision and establish a building platform within each lot
<b>Legal Description:</b>	Lot 2 Deposited Plan 475388, Lot 9 Deposited Plan 483357. Lot 24 and 26 Deposited Plan 493649, held in Computer Freehold Register 720320
<b>Zoning:</b>	Rural General
<b>Activity Status:</b>	Discretionary
<b>Notification:</b>	7 December 2016
<b>Commissioner:</b>	Commissioners Jan Caunter and Bob Nixon
<b>Date Issued:</b>	4 May 2017
<b>Decision:</b>	<b>Consent is REFUSED</b>

**IN THE MATTER**

of the Resource Management Act 1991

**AND**

**IN THE MATTER**

of an Application to the **QUEENSTOWN  
LAKES DISTRICT COUNCIL BY  
WOODLOT PROPERTIES LTD** to  
undertake a two lot subdivision at Moorhill  
Rd, Wakatipu Basin and establish a  
building platform within each lot

**(RM161063)**

**DECISION OF QUEENSTOWN LAKES DISTRICT COUNCIL HEARING COMMISSIONERS  
JAN CAUNTER AND BOB NIXON APPOINTED PURSUANT TO SECTION 34A OF THE  
ACT**

**Hearing Date:** Tuesday, 11 April 2017 in Queenstown

**Appearances for the Applicant:** Ms Jayne Macdonald, Legal Counsel  
 Ms Jennifer Carter, Planning Consultant  
 Mr Stephen Skelton, Consultant Landscape Architect

**Appearances for the QLDC** Mr Kenny Macdonald, Planner  
 Mr Richard Denney, Landscape Architect  
 Mr Warren Vermaas, Engineer (report only)

A letter from Mitchell Daysh on behalf of Queenstown Airport Company was also tabled at the hearing.

The Commissioners undertook a site visit on the morning of 11 April.

### **Abbreviations**

Woodlot Properties Ltd	“the applicant”
Queenstown Lakes District Council	“the Council”
The Operative Queenstown Lakes District Plan	“the ODP”
The Proposed Queenstown Lakes District Plan	“the PDP”
Resource Management Act 1991	“the Act”

### **Introduction**

1. This is an application to undertake a two-lot subdivision and to establish a residential building platform within each lot. Earthworks are required to create access to each of the building platforms off an existing right of way, and to create flat building platforms which will be excavated into the sloping terrain. Excess fill will be used as mitigation mounding.
2. The complex background to this application assumes considerable significance in this case. The site is contained within the Littles Stream subdivision. This is served by a new private road called Moorhill Road which in turn is off Littles Road south east of Arthur’s Point. The land containing the application site is located in an area of rolling terrain between Littles Road and the Shotover River. There are number of existing dwellings and consented

dwelling sites within the lower part of the subdivision. The site and its surrounds have also been subject to earlier resource consent applications, the most recent of which was RM140712 in 2014.

3. This 2014 application was declined, and subsequently appealed. This was later resolved by consent order whereby three residential building platforms off Fitzpatrick Road were approved (five having been sought), but not the subdivision of Lot 24 and the erection of two building platforms thereon. The proposed establishment of the two building platforms was the basis for RM140712 being originally declined. The hillside containing the application site is almost entirely bare pastoral grassland, and is highly visible from a corner when travelling east along Littles Road.

4. Importantly, Ms Carter's evidence for the applicant stated that:

"In summary, this application is very similar to RM140712 in that the location of the platforms and their access is unchanged"<sup>1</sup>.

5. This application is being advanced on the basis that, in contrast to the situation with RM140712, the proposed two dwellings would not be visible from Littles Road and one would be screened by native 'scrubland' vegetation. The proposed building platforms would be reduced in area from approximately 800 and 500m<sup>2</sup>, to 372 and 371m<sup>2</sup> respectively.

### **The Proposal**

6. The application is described in section 2 of the AEE and was not disputed by the Council. As noted previously, the subdivision background is very complex, and the current proposal is to subdivide one saleable property (Lot 26 DP 493649 which is to be amalgamated with Lots 2 DP 475338, Lot 9 DP 483357 and Lot 24 DP 493649 and one certificate of title) into two new allotments (Lots 26 and 27) and one balance lot, resulting in three saleable properties. Key elements of the proposal are outlined below:

- (a) The creation of two new lots:

- Lot 26 would be 3.407ha in area with a residential building platform (BP 1) of 372m<sup>2</sup> in area, a 1920m<sup>2</sup> curtilage area, RL of 426.0m and a maximum building height of 4.5m above RL. This lot will contain a 4 bedroom house with attached double garage, living area, kitchen and dining area, bathroom, WC, and an en suite;

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<sup>1</sup> Evidence of Jennifer Carter, paragraph 2.10

- Lot 27 would be 3.7365 ha in area with a 371m<sup>2</sup> building platform, a 1447m<sup>2</sup> curtilage area, RL of 425.6m and a maximum building height of 4.5m above RL. This lot will contain the same living features as Lot 26.

(b) Amalgamate Lot 24 with Lot 2 DP475558;

(c) A number of building and landscape design controls regarding height, external materials and colours, curtilage area, plant species, fencing, lighting and land use outside of curtilage areas;

(d) Earthworks to form each residential building platform and earth mounding adjacent to platforms and access drives;

(e) Cancellation of Consent Notices 7626056.5, 9046165.7, 9728145.15, 10121633.10 and 10262467.7.

### **Notification and submissions**

7. The application was publicly notified on 7 December 2016 and drew two submissions, both of which are neutral. Heritage New Zealand sought the inclusion of an advice note relating to archaeological material on any consent granted. Queenstown Airport Corporation drew attention to the need of the applicant to gain approval from it as a Requiring Authority under section 176 of the RMA.
8. There were no late submissions.

### **The District Plan and resource consents required**

9. The site is zoned Rural General under the ODP. The purpose of the Rural General zone is stated at page 5-9 of the ODP as being to manage activities so they can be carried out in a way that:
  - Protects and enhances natural conservation and landscape values;
  - Sustains the life supporting capacity of the soil and vegetation;
  - Maintains acceptable living and working conditions and amenity for residents of and visitors to the Zone and
  - Ensures a wide range of outdoor recreational opportunities remain viable within the Zone.

10. The relevant provisions of the ODP that require consideration can be found at Chapter 4 (District Wide), Chapter 5 (Rural Areas) and Chapter 15 (Subdivision, Development and Financial Contributions).
11. There was some disagreement between the applicant and the Council as to the activity status of the resource consents required. The applicant's AEE listed the following:

*Rule 5.7.3.2* – the erection of the proposed buildings within a building platform approved by resource consent is a *controlled activity*.

*Rule 5.7.3.3(b)* – the identification of a residential building platform of not less than 70m<sup>2</sup> in area and not greater than 1000m<sup>2</sup> in area. Both building platforms fall within this range, and consent is required under this rule as a *discretionary activity*.

*Rule 15.2.3.3(iv)* – all subdivision and location of buildings in the Rural General Zone shall be a Discretionary Activity, except any subdivision of land zoned Rural General pursuant to Rule 15.2.3.3(vii) Kiromoko Block-Wanaka). This exception is not relevant here. Consent is required under this rule as a *discretionary activity*.

*Rule 22.3.2.3 Earthworks* – the maximum height of fill shall not exceed 2 metres. The proposed height of fill for BP 1 will be 3.3m, and for BP 2 will be 2.7m. In addition, Table 22.1 limits the maximum amount of earthworks within any 12 month consecutive period to 1000m<sup>3</sup>. The applicant proposes a total of 8805m<sup>3</sup> of cut and fill, and consent is required under this rule as a *restricted discretionary activity*.

*Section 221 RMA* – cancellation is sought by the applicant of consent notice (ah) imposed through RM140712, which prohibited any further subdivision of Lot 24. The applicant now wishes to proceed with further subdivision of this lot. Additionally, the applicant sought that all consent notices said to be no longer relevant be cancelled in order to 'tidy up' the title. Consent is required as a *discretionary activity*.

*National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health ("the NES")* – The applicant was of the opinion that no consent was required under the NES as the activity did not pose a risk to human health and was, in the applicant's opinion, a permitted activity.

12. Turning to the subject of disagreement relating to activity status between the Council and the applicant, Mr Macdonald considered that discretionary activity consent is required for the proposed buildings pursuant to Rule 5.3.3.3(i)(a). This provides that the construction of a new building is a discretionary activity “..... *except any building authorised pursuant to Rule 5.3.3.2(i)*”.
13. Rule 5.3.3.2 lists controlled activities, and provides under clause (i)(b) for “*the construction of any new building contained within the residential building platform approved by resource consent*”. From this, it is quite clear that the construction of buildings on any existing approved building platform would be a controlled activity. In this case however, the building platform is being applied for simultaneously, and has not yet been “approved by resource consent”. Given that simultaneous application is being made for both the building platform and buildings thereon, the activity should be treated as a discretionary activity. Accordingly, we consider that the Council is correct, and consent is required as a *discretionary activity*.
14. Mr Macdonald considered that the earthworks have to be assessed as a controlled activity given they are part of the proposed subdivision, but the applicant stated that they form part of the land use consent. This being the case, we consider that this part of the application requires consent as a *restricted discretionary activity* pursuant to Rule 22.3.23 (a).
15. Mr Macdonald, consistent with the cautious approach adopted by the Council in respect to these matters, stated that the application requires consent as a discretionary activity under the NES as no Detailed Site Investigation had been undertaken. The Council maintained that it needed to be demonstrated that any contaminants are at or below background concentrations, and that the land subject to the application could be a *HAIL* site. We consider that the activity does not require consent under regulation 8(4) of the NES. The Preliminary Site Investigation provided concludes it is highly unlikely there will be a risk to human health if the activity proceeds and it includes a relevant site plan.
16. Finally, the consent notices referred to earlier would require cancellation or amendment if this application were to proceed, because they either prevent subdivision of all or part of Lot 24 to create the two new lots 26 and 27 being sought through this application, or duplicate controls over the development of land contained within those lots. This complex situation has been exacerbated by previous and current overlapping resubdivision exercises undertaken or proposed by the applicant.

17. Consent Notices 7626056.5 and 9046165.7 require the replacement of existing development controls, which propose new controls specific to Lots 26 and 27. Consent Notice 9728145.15 provides that any future buildings be inside the residential building platforms shown on DP 475388. Consent Notices 10121633.10 and 10262467.7 provide that Lot 24 DP 489082 not be subdivided further. Development controls specified relate to a maximum building height of 5m above existing ground level, exterior cladding of buildings and design controls, the retention in perpetuity of the location of an existing shearing shed and farm utility shed, and the use of land outside marked curtilage areas being restricted to pastoral use only, with planting outside the marked curtilage areas being restricted to that shown on the approved structural landscaping plan.
18. Overall, we conclude that the application requires assessment as a discretionary activity.

#### **Relevant Statutory Provisions**

19. This application must be considered in terms of Sections 104 and 104B of the Act.
20. Subject to Part 2 of the Act, Section 104 sets out those matters to be considered by the consent authority when considering a resource consent application. The following statutory provisions are relevant:

*“(a) Any actual and potential effects on the environment of allowing the activity; and*

*(b) Any relevant provisions of:*

- (i) a national environmental standard:*
- (ii) other regulations:*
- (iii) a national policy statement:*
- (iv) a New Zealand coastal policy statement:*
- (v) a regional policy statement or proposed regional policy statement:*
- (vi) a plan or proposed plan; and*



*(c) any other matters the consent authority considers relevant and reasonably necessary to determine the application.”*

Following assessment under Section 104, the application must be considered under Section 104B of the Act, which states:

*“After considering an application for a resource consent for a discretionary activity or non-complying activity, a consent authority-*

*(a) may grant or refuse the application; and*

*(b) if it grants the application, may impose conditions under section 108.”*

21. Sections 108 and 220 empower us to impose conditions on land use and subdivision consents respectively.
22. Section 104(3)(b) requires that we have no regard to effects on people who have given written approvals to the application. No persons have provided written approvals in this instance.

### **Submissions and Evidence**

23. Evidence for this hearing was pre-circulated. The applicant's experts all provided a summary of their evidence at the hearing. We have read all the material, and the following is a brief outline of the submissions and evidence presented. The summary does not detail all matters advanced at the hearing, but captures the key elements of what we were told.

#### *For the applicant*

24. Ms Macdonald presented brief legal submissions addressing the differences between this application and the RM140712 application, the differences in opinion between Mr Denney and Mr Skelton on landscape effects, the relevance of future applications to vary any consent granted and the cancellation of the consent notices. Ms Macdonald did not consider the possibility of future applications to vary a consent lay within our jurisdiction. She disagreed with the Council's approach to the application to vary a covenant and consent notice. Finally, Ms Macdonald addressed the legal difference in cumulative and precedent effects, submitting that no precedent arose here.
25. Both witnesses for the applicant were not involved in earlier applications, but it was clear that differentiating the visual effects under the current application, compared to the earlier unsuccessful application to provide two building

platforms on the site, was pivotal to the applicant's current application under RM161063.

26. Ms Carter explained that the locations of the building platforms under the earlier RM140712 application were still considered appropriate. However, the applicant now proposed the following changes:
  - the use of native shrubland vegetation to screen the two dwelling sites;
  - the use of specific house designs, with an increase in proposed height;
  - increasing curtilage areas to better accommodate residential activity.
27. While the curtilage area had been increased, the building platforms had been reduced in size. The objective of this new approach was to ensure that the two dwellings were not visible from Littles Road.<sup>2</sup>
28. A major theme of Ms Carter's evidence was that the site was classified as VAL not ONL. She noted that with respect to the latter, the emphasis in the ODP was section 6 RMA matters and the protection of such landscapes from inappropriate use and development. By contrast, she referenced Section 4 of the ODP, noting that landscapes within a VAL 'wore a cloak of human activity', and 'enabling alternative forms of development where there are direct environmental benefits'. She contended that the emphasis within a VAL was that the effects of subdivision use and development were to be "managed".<sup>3</sup>
29. She emphasised that it was inappropriate to penalise an application because a future landowner may seek to alter a building platform or remove design controls, an issue emphasised in Mr Denney's report. She said that any subsequent changes were a matter to be addressed on their merits through a future resource consent application. As a final point, she was critical of Mr Denney's landscape assessment on behalf of the Council and its use of the term 'distraction' in the context of alleged effects on public and private views.
30. Mr Skelton elaborated in more detail on the proposed new building platforms to illustrate how the current application differed from that previously applied for under RM140712. He noted that BP 1 on proposed Lot 26 would be 503m<sup>2</sup> smaller, and that BP 2 on Lot 27 would be 129m<sup>2</sup> smaller and both platforms irregular in shape. Although it was proposed that the allowable height limit for each future dwelling be increased by 0.5m, additional controls were to be placed on the height of domestic planting so that no ornamental trees were

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<sup>2</sup> Evidence of Jennifer Carter, paragraph 2.8

<sup>3</sup> Evidence of Jennifer Carter, paragraph 5.4

visible from outside the site. Cut depth for BP 1 was to be reduced by 0.4m and the fill depth reduced by 1.7m; in the case of BP 2, the cut depth has been reduced by 0.9m and the fill depth reduced by 1.5m.

31. The screen planting of grey shrubland species was to apply to BP1 only, and was argued to form a link to the presence of such natural vegetation beyond the Kwarau River to the west. An important point that Mr Skelton sought to emphasise was an increase in the residential curtilage area to provide a more 'liveable' area in response to concerns expressed by Mr Denney that excessively restrictive conditions volunteered on a consent could trigger subsequent requests by the eventual owner to amend development controls.
32. He maintained that the suite of development controls would ensure that neither dwelling would be visible from Littles Road.

*For the Council*

33. Mr Macdonald's section 42A report recommended that consent be declined for reasons including:
  - The adverse effects of the activity will be more than minor due to the proposal resulting in over-domestication of a Visual Amenity Landscape and the significant effects on the landscape character and visual and rural amenity;
  - The proposal is contrary to the relevant objectives and policies of the District Plan due to its significant detrimental effects on a Visual Amenity Landscape and rural amenity;
  - The proposal does not promote sustainable management in terms of Part 2 of the Act.
34. Mr Denney conceded that *"the scale and nature of the development would be relatively small in the broader landscape"*.<sup>4</sup> He noted that the proposed earthworks would modify the landscape significantly but within a relatively contained area, and the 'burrowing' of building platforms with perimeter mounding would screen the proposed dwellings. However, he maintained that the proposed development controls would be very restrictive in terms of future development, and based on previous experience with development in the Little Stream subdivision, would likely lead to subsequent applications to remove or vary such conditions.

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<sup>4</sup> Evidence of Richard Denney, paragraph 10

35. He also contended that proposed earthworks and domestic activity associated with the dwellings would signal the presence of residential development. While he agreed that such development was already present in the vicinity, he considered that this particular site was more exposed and elevated, with less capacity to absorb change.
36. The report of Mr Vermaas established that satisfactory vehicular access and services could be provided to the two sites and the proposed dwellings thereon.

*The applicant's right of reply*

37. The wording of the no subdivision covenant under Consent Notice 762056.5 was clarified in reply submissions. Ms Macdonald submitted there was legal jurisdiction to cancel land covenant 10121633.12 as the covenant had been imposed through a land use consent and could be varied or cancelled under section 127 of the Act. She noted that the VAL assessment matter 'Form and Density(iii)' referred to development being concentrated in areas with higher potential to absorb development.
38. Ms Macdonald referred us to Mr Skelton's opinion that the indigenous planting proposed was a positive effect and noted the planting served no mitigation screening role and could be removed from the proposal in the event we preferred Mr Denney's evidence on this point over Mr Skelton's. Visibility of the curtilage areas was addressed, as was the Council's concern about the extent of the building platform and any future application to change it. Ms Macdonald confirmed the applicant has sought to rezone all of its land to Rural Lifestyle through the proposed district plan process. Ms Carter's assessment of the Otago Regional Policy Statement provisions was attached to the reply submissions.

**The 'permitted baseline'**

39. The erection of dwellings or the subdivision of land within the Rural General Zone, and certainly on the site of this application, is not a permitted activity, and accordingly the permitted baseline has very limited application. Mr Macdonald's report notes that earthworks up to a volume of 1000m<sup>3</sup> are permitted within any 12 month period, which provides little assistance to the assessment of this application.

## **Assessment of actual and potential effects on the environment**

### *Landscape effects*

40. The site is located in a Visual Amenity Landscape (VAL). The landscape of the site and its surrounds are of an open pastoral character. We were struck by the pastoral openness of the part of the site in which the two building platforms are proposed to be located, particularly when viewed from Littles Road.
41. The landscape character changes between Fitzpatrick Basin to the north and the Littles Stream catchment to the south, with the northern ridge of the hill of the applicant's land generally separating these two landscapes. The Fitzpatrick Basin comprises rolling open terrain with a prominence of shelterbelts, hedgerows and dwellings, giving the impression of a domesticated landscape. The applicant's site to the south is part of the undulating pastoral landscape of the Wakatipu Basin and is a prominent part of the Littles Stream catchment. This part of the landscape contains some built form, such as driveways, sheds and parked vehicles, and some temporary stockpiling of building materials on sites that are currently subject to construction. Generally, dwellings are tucked into the landscape to not be prominent. As Mr Denney noted, a new dwelling on Lot 8 is visible from Littles Rd and highly visible from Crown land adjacent to the Shotover River. The mitigation planting on that lot is yet to establish but is apparently intended to screen the dwelling from Littles Road.
42. We accept that the applicant has endeavoured to address some of the points raised by the Commissioners in their decision on application RM140712. However, while the building platforms now proposed are smaller than proposed for RM140712, each lot is proposed to also include a substantial curtilage area, which can be expected to include domestic activity such as sheds (which could include utility sheds), domestic gardens, parked cars, play equipment and other normal features of domestic living. The total area of potential domestic development (building platform and curtilage) now proposed under this application is 2292m<sup>2</sup> for Lot 26 and 1818m<sup>2</sup> for Lot 27.
43. Mr Skelton's evidence was that the additional curtilage area would continue to contain domestic effects. Mr Denney did not agree.
44. Mr Skelton stated in his evidence that the reason for increasing the height of each dwelling by half a metre was "to accommodate the proposed dwelling"

and reference was made to a specific house design for each lot.<sup>5</sup> The applicant's reason for increasing the curtilage area was stated as to "allow for a more 'liveable' area."<sup>6</sup> We explored the concept of "liveability" with Mr Skelton in questioning. He described it as providing the dwellings with more sunlight and views, with the dwellings being well contained and with a high level of amenity.

45. While the applicant's landscape assessment has focused on endeavouring to achieve invisibility of buildings (dwellings) from Littles Road and ensuring that the building platforms do not breach a skyline or ridgeline as viewed from public places, the assessment and the visuals provided in support of it do not sufficiently address the domestic effects of the curtilage areas.
46. Mr Skelton produced a number of visual simulations which show the building platforms and the proposed mounding, using a wireframe technique. We were provided with a "perspective view" which included an outline of the building envelope for the dwelling, cut and fill, access, earthworks platforms and the surrounding terrain. The proposed curtilage area was marked as a dotted line on the site plan. However, the simulations did not provide us with a more comprehensive visual assessment, such as a photomontage, showing the dwellings and the curtilage areas in the open and pastoral landscape. It would have been helpful to have had a before and after photomontage showing these perspectives.
47. The VAL section of the Operative District Plan requires us to have regard to five assessment matters, which we now address.

*Effects on natural and pastoral character*

48. While the scale and nature of the development would be relatively small in the wider environment, we agree with Mr Denney that the development will cause adverse effects on the natural and pastoral character of this landscape. This arises from:
  - the proposed mitigation planting and mounding which will bring an element of domestication to this open landscape;
  - the effects from the curtilage area which could include unrestricted domestic activities such as parked and moving vehicles, stored trailers,

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<sup>5</sup> Evidence Stephen Skelton, table on page 4

<sup>6</sup> Evidence Stephen Skelton, table on page 4

fencing, smoke, lights, water tanks, domestic structures, materials storage, domestic planting, domestic noise and access drives;

- the close proximity of the two buildings areas to each other, more akin to a rural residential development;
- the modification to the landscape from the earthworks required to sink and conceal the dwellings into the landscape.

49. In her reply submissions, Ms Macdonald stated:<sup>7</sup>

*“With regard to the visibility of curtilage areas and domestic effect, each curtilage area has been designed to prevent the spill of domestic effects by visually containing them within the topography. Similar to each site’s building platforms, the topography which surrounds the site will screen domestic activities from Littles Road views.”*

50. We disagree. We have not found evidence from the applicant demonstrating the significant curtilage areas will be contained within the topography and no reference was made to such evidence in submissions. As we have noted above, the visual simulations do not show this mitigating effect. Our impression on site was that the building platforms would be sunk into the topography, but the curtilage areas would struggle to be contained within the topography because of their size.

51. Our assessment is that the development will result in adverse effects on the natural and pastoral landscape, that cannot be avoided, remedied or mitigated.

*Visibility of development*

52. Mr Denney and Mr Skelton agreed that the dwellings would not be visible from Littles Road, given they are sunk into the landform and further screened by mounding. However, earthworks and access ways will be visible. As we have also noted above, the curtilage area will be visible. Mr Denney was also of the view that there would be some visibility of one of the lots from Crown land adjacent to the Shotover River.

53. The applicant accepted that the two lots would be visible to surrounding properties, but to a limited extent.

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<sup>7</sup> Reply submissions paragraph 6(a)

54. Mr Denney was of the opinion that the earthworks required to site the proposed building platforms amounted to a high level of modification to the landscape, due to the limited existing confining elements of the landscape to absorb the development. He described the platform areas as pits. Mr Skelton disagreed, preferring to call the sunk platform areas “pockets”. He was of the opinion that the level of modification was moderate.
55. Our assessment is that the dwellings are likely to be only marginally visible from public places. However, the curtilage areas are not the subject of mitigation and will be visible. We consider the degree of modification to the landscape to be moderate.

*Form and density of development*

56. Mr Skelton’s assessment was that the two lots proposed were quite different to the more dense subdivision found in the Fitzpatrick Basin and that the proposed development maintained the rural character of the site. Mr Denny did not agree, finding that there was limited opportunity to use existing topography on the site to ensure the development was not highly visible when viewed from public places. He noted again his concern about effects from access ways and pointed us to a level of density that would follow from this development, should consent be granted.
57. We find that the development will increase density of development in this area. We agree that it is not the same level of density as the nearby Fitzpatrick Basin. The form of the development overall is of concern, given the modifications required, the effects from the extensive curtilage areas and the lack of ability for the landscape to readily absorb the development.

*Cumulative effects of development on the landscape*

58. The applicant’s approach to this assessment matter appeared to confuse cumulative and precedent effects. Paragraph 4.28 of the landscape assessment explicitly cross referenced one effect with the other, but was nevertheless relied on by Ms Carter in her planning assessment.<sup>8</sup> Mr Macdonald’s planning report suffered from the same problem, referencing Mr Denney’s discussion of cumulative effects in a discussion of precedent effects.
59. We agree with Ms Macdonald’s submissions on the meaning of a cumulative effect, as follows:

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<sup>8</sup> AEE section 9.1.5



*“A cumulative effect is concerned with something that will occur, rather than something that may occur. A cumulative effect relates to a gradual build-up of consequences as a combination of effects and does not include a precedent effect.”*

60. Mr Denney considered this development would add further intensification, domestication and degradation to the environment in which it sits, and go beyond the vicinity’s ability to absorb further change. He also noted that the distinguishing factors between this landscape catchment and the Fitzpatrick Basin catchment would be diffused, meaning the more open and natural Arcadian pastoral character of the Littles Steam catchment would be more openly influenced by the Fitzpatrick Basin rural living character nearby.
61. We agree with Mr Denney. While the two catchments are separated by a hill, this development would move the level of development on the Littles Stream side of the hill to a more dense form, with little ability to mitigate the effects using natural landforms. Unlike other sites in the Littles Road catchment, this site could not sustain plantings to hide dwellings, as the plantings would be out of character with the open, pastoral character currently in place. We note here the applicant’s offer to remove the plantings as they did not offer any form of mitigation.<sup>9</sup>
62. As referred to above, Mr Denney also noted his concerns about the feasibility and liveability of the building platforms proposed, and past tendencies for landowners to seek to change building platforms that have been consented by the Council to better suit their living aspirations. His report referenced five examples in the past two years of landowners obtaining resource consent to build a dwelling outside of an approved building platform, all of these on the applicant’s land.
63. While any future activity is outside our jurisdiction, we are required to consider the cumulative effects of this proposal in the landscape overall, and the management of the design controls put forward by the applicant in support of its application. Mr Denney’s concern was that past applications to change building platforms had resulted in the effects of those changes not being assessed cumulatively. The potential for future landowners to apply to change the location of building platforms appears to us to undermine the integrity and intent of the resource consent granted, at which time the cumulative effects of the entire application are considered.

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<sup>9</sup> Reply submissions paragraph 5(b)

64. We acknowledge the positive efforts the applicant has gone to in addressing our concerns about future applications. In her reply submissions, Ms Macdonald suggested any future change be limited to 10% of the building platform size and that this be protected by way of a private covenant with the Council. She also suggested the conditions include an advice note signalling any such change would require a resource consent.<sup>10</sup> Had we decided to grant consent, these mechanisms could have been helpful.

*Rural amenities*

65. The applicant was of the view that the existing rural amenity would not be affected as the landscape will remain as pastoral. Proposed design controls, such as fencing, are intended to maintain traditional rural elements. Mr Denney's concern was that this development did not follow other developments previously consented, where more elevated and exposed pastoral lots had been retained in their natural state, with building platforms being located on the flats and in vegetated areas. He considered the more rural living scale of development proposed here would be inappropriate in this landscape context.
66. We agree with Mr Denney. The current rural amenity enjoyed by the public, looking at elevated pastoral land, would be adversely affected if this development proceeded.
67. Overall, we are of the view that the landscape effects are likely to be considerable. We disagree with Ms Carter's opinion that the key issue concerns visibility. We consider the key issue to be absorption. Our assessment is that this development cannot be absorbed into this landscape.

*Infrastructure*

68. There was no disagreement between the applicant and the Council on infrastructure. The Council accepted that Moorhill Road could accommodate two additional lots and could be upgraded and extended in line with the applicant's plans.
69. The Council also accepted the applicant's reports addressing water, effluent disposal, stormwater, power and communications. A number of conditions were recommended to address these matters.

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<sup>10</sup> Reply submissions paragraph 7

### *Earthworks*

70. Earthworks are required to achieve flat building platforms and to create mounding as part of the landscape mitigation. The intention of the mounding is to ensure minimal visibility of platforms from outside the site. We were told that the driveway alignments have also been designed to blend into the site's existing contours. The applicant was of the view that the site benefits from existing contours and the mounding would appear natural upon its completion. No earthworks would be carried out in close proximity to external site boundaries, other than those required for access way formation.
71. Mr Denney was of the opinion that the proposed earthworks would be unsympathetic to the natural landform, that the proposed mitigation works would be excessive proportional to the development and that the bunding proposed along the access ways would enhance unnatural lineal forms in the landscape. However, he conceded that the lineal impact would not have a major impact and acknowledged that earthworks would be small in scale, would occur in lower parts of the terrain, and that the bunding would be a small element in the landscape overall. He was of the opinion that the works proposed took into account the sensitivity of the open exposed landscape through locating works within the natural depression of the undulating terrain, but was less sensitively addressed in views from Crown land across the river. Overall, he considered the proposed earthworks were inconsistent with the character of the surrounding landscape, but were of a sufficiently small scale to not be a prominent change to the broader landform.
72. We find that the earthworks proposed will not cause a prominent change to the broader landform of the site and that the effects are no more than minor.

### *Traffic generation and vehicle movements*

73. There was no dispute between the applicant and the Council that Moorhill Road can accommodate a further two lots and that the additional two dwellings will not raise any significant adverse effects. We find the effects of traffic and vehicle movements to be minor.

### *Contaminated soils*

74. We were provided with a report from Davis Consulting Group which examined the site's past land uses and any extent of contamination. This report was the same report tabled in support of the RM141012 application. The report concluded that there is unlikely to be a risk to human health from the previous

agricultural activities and the use of offal pits on the site. On the basis of this report, we accept that the risk to human health is low.

#### *Lot amalgamation*

75. The proposed amalgamation of Lot 24 DP 493649 with Lot 2 DP475338 will have no significant effects.

### **Objectives and policies**

#### *Objectives and Policies of the relevant district plans*

76. The objectives and policies within both the ODP, and the extent to which it has weight, the PDP with respect to landscape matters, assume complete primacy in the consideration of this application. This assessment will make reference to those provisions which are of direct relevance.

#### **The ODP**

77. Objective 4.2.5 is a general overarching provision which requires that subdivision, use and development be undertaken in a manner which avoids remedies or mitigates adverse effects on the landscape and visual amenity values. More specifically, in terms of 'future development', Policies 1(a) and 1(b) read as follows:

*“(a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.*

*(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detracting from landscape and visual amenity values.”*

78. The Objective and Policy 1(a) provide only limited guidance given their somewhat general nature. However we consider that Policy 1(b) has direct relevance to this application. While the hillside containing the application site is but one part of an immediate area which already contains a number of existing dwellings or approved dwelling sites, it is highly prominent from Littles Road, such that the visual presence of any residential dwellings and/or their curtilage will be much more obvious than is the case with present levels of development in the immediate area. While we accept that 'managed' development within parts of the VAL is entirely appropriate, the application site is one which has particular sensitivity to change.

79. With specific reference to Visual Amenity Landscapes (VAL), policies 4(a) and (b) state as follows:

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

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

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

80. Littles Road, particularly approaching from the north, is elevated above, or directly faces land forming part of the subdivision which has developed in the area. The application site is particularly prominent, as it forms a more dominant visual component of the evolving subdivision than other sites located at a lower level or closer to the river. We again acknowledge the considerable thought and effort that has been put into attempts to screen the two sites through taking advantage of natural undulations on the landscape, but we consider that when the proposed dwellings and the much larger curtilage areas are taken together, there is likely to be a significant adverse effect on this “highly visible” landscape.

81. We consider that the amount of effort that has to be put into concealment is in itself indicative that the application site is inherently unsuitable for sighting residential dwellings.

82. Policy 8 (Avoiding Cumulative Degradation) states:

*“In applying the policies above the Council’s policy is:*

*(a) to ensure that the density of subdivision and development does not increase to a point where the benefits of further planting and building are outweighed by the adverse effects on landscape values of over domestication of the landscape.*

*(b) to encourage comprehensive and sympathetic development of rural areas.”*

83. With reference to Policy 8, we accept that the building platforms have been designed to blend in with the landscape as much as possible. However, the curtilage areas have not, and will contain considerable domestic activity. The

planting and mounding proposed will over-domesticate the landscape. We agree with Mr Denney's concern that the environment has maintained a balance of smaller and larger lots and a retention of more exposed larger pastoral lots above the smaller lots associated building platforms on the flats and in vegetated gullies. This proposal does not achieve that outcome.

84. We have concluded that the development of two dwellings and their curtilage areas on Lots 26 and 27 would represent a 'tipping point', whereby the character of the immediate area would change in a manner to resemble that of the Fitzpatrick Basin area further to the east. In contrast, we consider that in the absence of this proposed development, a tipping point has not yet been reached in the Little Stream subdivision, as existing development to date is integrated into less visually sensitive parts of the local environment.
85. Policy 9 addresses structures. It requires the preservation of the visual coherence of ONLs and VALs through various means.
86. Policy 17 encourages land use in a manner which minimises adverse effects on the open character and visual coherence of the landscape.
87. With respect to these two policies, we consider that development on the two lots concerned, taking account of the extent of the curtilage areas and the dwellings, would undermine the visual coherence of this component of the VAL. We note the strong wording in Policy 9 through its reference to "preservation". We are of the view that this policy cannot be satisfied because the location of the building platforms is in a sensitive part of the VAL and will signal additional domestication in this landscape.
88. We have concluded that the site does not have the ability to absorb the proposed development without detracting from landscape and visual amenity values in this VAL. While the experts agreed that the building platforms would not be visible from Littles Road, the curtilage areas will be clearly visible. Mitigation is proposed to address the adverse effects of the building platforms, but that mitigation does not address the sizeable curtilage areas. We do not consider the proposal will mitigate the loss of, or enhance, the natural character of the site. The natural character of the site is open and pastoral and extensive in area. The proposed plantings in this landscape will draw attention to the site's use as a residential and domestic activity. It will not improve the site's natural character.
89. Policy 17 (Land Use) cannot be met, given the effects of the curtilage areas and the lack of mitigation to address these, along with the overall impact of

the development on the open character and visual coherence of the landscape.

90. Chapter 5 addresses rural areas. The most relevant plan provisions here are Objective 1 Character and Landscape Value and Objective 3 Rural Amenity and associated policies.

91. Policy 1.1 requires that the district wide landscape objectives and policies be considered with respect to proposals for subdivision use and development in the Rural General Zone, supported by Policy 1.6.

92. Policy 1.7 states:

*“Preserve the visual coherence of the landscape by ensuring all structures are to be located in areas with the potential to absorb change”.*

Policy 1.8 states:

*“Avoid remedy or mitigate the adverse effects of the location of structures and water tanks on skylines, ridges, hills and prominent slopes.”*

93. We addressed this matter earlier in our decision and reiterate our concern that this prominent slope has little capacity to absorb change. Parts of the VAL, such as the more intensely subdivided Fitzpatrick Basin further to the east, present a more developed rural character which we consider has greater capacity to absorb change, such that dwellings – and their curtilage areas – can be absorbed even where they are visible, as the environment is less sensitive to change. The application site, even if the dwellings are able to be screened, has little ability to absorb further change without unreasonably restricting development within the curtilage area, or imposing conditions which would be unrealistic.

94. Objective 3 ‘Rural Amenity’ requires that adverse effects on rural amenity be avoided, remedied or mitigated. It is supported by three relevant policies (3.1 – 3.3), which are directed at ensuring a wide range of rural land uses can occur in the zone without loss of rural amenity values, avoiding, remedying or mitigating the adverse effects of activities located in rural areas, and residential dwelling setbacks from boundaries so as to avoid or mitigate adverse effects of activities on neighbours. We consider the objective and policies to be partly met. Rural activities are likely to continue undisturbed, but rural amenity would be adversely affected.

95. Chapter 15 concerns subdivision. Objective 1 relates to servicing of developments, and we are satisfied on the evidence that adequate provision can be made for access and servicing arrangements for the proposed two lots. Objective 5 'Amenity Protection' and accompanying Policy 5.2 respectively state as follows:

*"The maintenance or enhancement of the amenities of the built environment through the subdivision and development process."*

*"To ensure subdivision patterns and the location, size and dimensions of lots in rural areas will not lead to a pattern of land uses, which will adversely affect landscape, visual, cultural or other amenity values".* .

96. The accompanying policies also address matters relating to the provision of services and access and we are satisfied that the provision of such services can be achieved satisfactorily.
97. The density of subdivision and the allotment sizes proposed are not in themselves inconsistent with the character of the area. However the further subdivision of this prominent hillslope with the creation of two constituent dwellings and their curtilage would in our view adversely affect landscape, visual, and amenity values.
98. We have addressed the impact of the works associated with the development in our discussion of earthworks. The earthworks themselves will not cause more than minor effects, but the accessways (and the use of them) will intrude into this otherwise open landscape.

### **The PDP**

99. The proposed district plan has retained the Rural zone for this site but has changed the landscape classification from VAL to Rural Landscape (RLC).
100. Chapter 6 outlines the Council's objectives and policies on landscapes, continuing the theme in the ODP of protecting some landscapes, including Rural landscapes, from inappropriate subdivision and development. Adverse cumulative effects on landscape character and amenity values caused by incremental subdivision and development are to be avoided. Subdivision and development is not to degrade landscape character and diminish visual amenity values of the RLC.
101. Chapter 21, Rural, requires that subdivision and development in areas that are identified as unsuitable for development be avoided.



102. In the AEE, Ms Carter referred to a study being undertaken by the Council to ascertain future planning of the Wakatipu Basin. No reference was made to this study in submissions or evidence and we have taken no account of it.
103. As we have already said, we consider the proposal cannot be absorbed into this landscape. It will result in adverse effects on the open character and visual coherence of the landscape, which cannot be mitigated by landscaping and design controls.
104. Little weight can be placed on the proposed plan given its stage of the process. The PDP has been the subject of submissions and some hearings, but no decisions have been released.

### **The Regional Policy Statement**

105. We are required to take account of the Otago Regional Policy Statement ("ORPS") in our assessment. There is both an operative and proposed ORPS, the latter document being the Decisions Version notified by the Otago Regional Council on 1 October 2016.
106. We agree with Ms Carter and Mr Macdonald that the relevant sections of the operative ORPS are Part 5: Land and Part 9: Built Environment. The relevant sections of the proposed ORPS are Section 1 and Section 3.
107. Objective 5.4.1 of the operative ORPS addresses land in the region and seeks to promote the sustainable management of Otago's land resources in order to maintain and enhance the primary productive capacity and life-supporting capacity of land resources, and to meet the present and reasonably foreseeable needs of the region's people and communities. Objective 5.4.2 seeks that degradation of Otago's natural and physical resources resulting from activities using the land resource be avoided, remedied or mitigated. Supporting policies refer to the maintenance and enhancement of Otago's land resource through avoiding, remedying or mitigating adverse effects of activities which have the potential to cause a number of adverse effects to that land resource.
108. Objective 9.4.1 sets out a number of objectives for the built environment, including conserving and enhancing environmental and landscape quality within Otago's built environment. Policies 9.5.4(c) and (d)(vi) respectively require the minimisation of the adverse effects of urban development and settlement, including structures, on Otago's environment through avoiding,

remedying or mitigating, amongst other things, the visual intrusion and a reduction in landscape qualities and on amenity values.

109. Policy 9.5.5 requires the maintenance and, where possible, enhancement, of the quality of life for people and communities within the region's built environment through a number of means.
110. We consider the proposal does not generally meet these objectives and policies. The development will not maintain or enhance the productive value of this land and will degrade the natural and physical resource. We do not consider this development to be an urban development, but find that it does constitute a form of settlement, the adverse effects of which cannot be avoided, remedied or mitigated.
111. Objective 1 of the proposed ORPS provides for the recognition for the integrated management of natural and physical resources to support the wellbeing of people and communities in Otago.
112. Policy 1.1.1 includes a number of means by which this should be achieved, including:  
  
*“(b) Taking into account the impacts of management of one resource on the values of another, or on the environment;*  
  
*(c) Recognising that resource may extend beyond the immediate, or directly adjacent, area of interest;”*
113. Policy 1.1.3 requires that the social and cultural wellbeing and health and safety of Otago's people and communities are provided for when undertaking the subdivision, use, development and protection of the region's natural and physical resources.
114. Policy 3.2.6 requires the management of highly valued natural features, landscapes and seascapes, requiring that these be protected or enhanced by a variety of means, including:  
  
*“(a) Avoiding significant adverse effects on those values which contribute to the high value of the natural feature, landscape or seascape;*  
  
*(b) Avoiding, remedying or mitigating other adverse effects.”*
115. The ORPS raises the same or similar matters as contained within the operative and proposed District Plan with respect to landscape and natural

features. We consider this proposal breaches the operative and proposed ORPS objectives and policies.

### **Cumulative effects**

116. We have addressed cumulative landscape effects in our discussion of landscape effects above. We consider this proposal to raise adverse cumulative effects.

### **Precedent effects**

117. We are concerned that this proposal will set a precedent for others to follow. While we acknowledge the efforts the applicant has gone to in reducing the size of its building platforms, we do not accept that the very extensive curtilage areas have been addressed. These curtilage areas are some 4 times larger than the intended building platforms. As we have said, this proposed development also conflicts with the developments in the area to date that have tended to maintain more exposed pastoral areas. We consider that precedent effects do arise.

### **Positive effects**

118. Other than the provision of two rural dwellings for prospective occupiers, we find that no positive effects arise from this development proposal. We do not agree with Mr Skelton that the planting is a positive effect. It creates its own level of domestication in an open and pastoral landscape.

### **Consent Notices**

119. We described earlier in this decision the part of the application seeking to cancel consent notices. The consent notices set out an important record of the complex consenting history of this site, and the intent behind the various consents granted. Ms Macdonald noted in her opening submissions that it is important to ask why consent conditions were imposed and what mitigating effect they had, and that such conditions may be “a fundamental part of the activity for which consent is sought that a subsequent application to vary or delete these conditions can mean the underlying consent, and any “existing environment” type considerations are fundamentally affected such that one might have to go back and consider the whole matter afresh.”<sup>11</sup>

120. We regard many of the previous conditions to have been fundamentally important to the granting of earlier consents, in particular the conditions

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<sup>11</sup> Opening submissions of Ms Macdonald, paragraph 17

prohibiting further subdivision. The applicant's attempt to come back for a second time seeking to subdivide a lot subject to a previous prohibition on subdivision appears to us to be somewhat disingenuous. In saying that, we acknowledge and appreciate the efforts the applicant's counsel and experts have gone to in endeavouring to address the RM140712 decision. We do not agree with Ms Macdonald's submission that the condition prohibiting the further subdivision of Lot 24 can be fairly described as having "little mitigating effect and was a "nice to have" on the part of the Council" in resolving the applicant's appeal on RM140712.<sup>12</sup> Nor do we accept the submission that a no further subdivision condition would not be a fundamental part of the activity and that the previous condition would not have been granted without it.<sup>13</sup> No evidence was put forward in support of such a submission. We note that the experts for the applicant in the RM140712 application did not give evidence at this hearing.

121. Ms Macdonald challenged the Council's opinion that there is no legal jurisdiction to vary a condition contained in a covenant under section 108(1)(d) of the Act. Section 108(1)(d) provides a Council with the legal power to impose a condition requiring a covenant be entered into on a land use consent, but the same section of the Act explicitly excludes that legal power on subdivision consents. A consent notice may form part of a subdivision consent through section 221 of the Act.
122. Section 220 sets out the types of conditions that may apply to subdivision consents, and cross refers to section 108 through the opening words of section 220(1) "Without limiting section 108 or any provision in this Part".
123. Section 127 provides for an application to be made to vary or cancel consent conditions. It includes an important exception for subdivision consents, as follows:

*"(1) The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to the following:*

*(a) the holder of a subdivision consent must apply under this section for a change or cancellation of the consent before the deposit of the survey plan (and must apply under section 221 for a variation or cancellation of a consent notice after the deposit of the survey plan); ..."* (our emphasis)

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<sup>12</sup> At paragraph 18

<sup>13</sup> At paragraph 19

124. The opening words of section 127(1) refer to “the change or cancellation of a condition of the consent”. There is no limitation on the timing of this application. This applies to land use consents generally. In contrast, section 127(1)(a) explicitly applies to a subdivision consent and has timing requirements.
125. In her reply submissions, Ms Macdonald provided a copy of the Deed of Covenant which was imposed through decision RM130444. This confirmed that the covenant was imposed under a land use consent. The first part of section 127(1) therefore applies, meaning the covenant can be varied or cancelled.
126. The application to cancel a consent notice has been correctly made under section 221(3) of the Act.<sup>14</sup> Appendix C to the application set out the details of each consent notice. All consent notices were put in place pursuant to section 221 of the Act, as various subdivision consents were processed and granted by either the Council or the Environment Court. Section 127(1)(a) applies to this part of the application.
127. As we have decided to decline consent, nothing turns on this.

## **Part 2 Resource Management Act 1991**

128. The section 42A report has referred us to Part 2 of the Act. We have not considered it necessary to assess this application against Part 2 in light of the recent High Court decision *RJ Davidson v Marlborough District Council*.<sup>15</sup> Our understanding of that decision is that a Part 2 assessment is not required unless the governing plan contains some invalidity, incompleteness or ambiguity. We find the relevant plans are not subject to those caveats. The relevant provisions of those plans have already given substance to the principles in Part 2 of the Act.

## **Determination**

129. Consent is sought to undertake a two-lot subdivision and to establish a residential building platform within each lot, with associated earthworks and landscaping.
130. Overall, the application was assessed as a discretionary activity under sections 104 and 104B of the Act.

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<sup>14</sup> AEE page 27

<sup>15</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52

131. For the reasons set out in this decision, consent is REFUSED.

Dated at Queenstown this 4<sup>th</sup> day of May 2017

A handwritten signature in blue ink, appearing to read 'J Caunter', is written over a faint, light blue rectangular background.

Jan Caunter

For the Hearings Commission