



DECISION OF THE QUEENSTOWN LAKES DISTRICT COUNCIL

RESOURCE MANAGEMENT ACT 1991

Applicants:	A Hey, P Dennison and S Grant
RM reference:	RM170041
Location:	259 Arrowtown Lake Hayes Road, Wakatipu
Proposal:	Consent is sought to undertake an eight lot subdivision and to identify six new residential building platforms.
Type of Consent:	Subdivision and land use
Legal Description:	Lot 1 Deposited Plan 448144 held on Computer Freehold Register 566674 and Lot 9 Deposited Plan 12678
Zoning:	Rural Residential (North of Lake Hayes) (Operative District Plan) Rural Residential (North of Lake Hayes) (Proposed District Plan)
Activity Status:	Restricted Discretionary
Limited Notification:	3 May 2017
Commissioners:	Commissioners Jan Caunter and Dr Lee Beattie
Date:	29 January 2018
Decision:	CONSENT IS REFUSED

UNDER THE RESOURCE MANAGEMENT ACT 1991

IN THE MATTER OF an application by A Hey, P Dennison and S Grant to an eight lot subdivision consent and associated land use consent for the identification of six residential building platforms.

Council File: RM170041

DECISION OF QUEENSTOWN LAKES DISTRICT COUNCIL HEARING COMMISSIONERS J CAUNTER AND DR L BEATTIE, APPOINTED PURSUANT TO SECTION 34A OF THE ACT

THE PROPOSAL

1. We have been given delegated authority by the Queenstown Lakes District Council ("the Council") under section 34A of the Resource Management Act 1991 ("the Act") to hear and determine the application by A Hey, P Dennison and S Grant ("the Applicants") and, if granted, to impose conditions of consent.
2. The Applicants seek resource consent (as amended) for an eight lot subdivision consent and associated land use consent for the identification of six residential building platforms.
3. A summary of the proposal follows:¹
 - Lot 1 – 1.0080ha, retain existing dwelling
 - Lot 2 – a Local Purpose Reserve either side of Mill Creek to be vested in Council (5,300 m²)
 - Lot 4 – 4000m², identify new residential building platform of 648m²
 - Lot 5 – 4,221m², identify new residential building platform of 565m²
 - Lot 6 – 4,200m², identify new residential building platform of 549m²
 - Lot 7 – 4,230m², identify new residential building platform of 560m²
 - Lot 8 – 4,255m², identify new residential building platform of 638m²
 - Lot 9 – 4,306m², identify new residential building platform of 725m²
 - Lot average: 5,074m²
4. Vehicle access is proposed via an existing Right of Way (ROW) from Rutherford Road. Initially concerns were raised over the number of lots able to be served via this access way. However, this was addressed through the application process and no parties (including the Council) have now raised this issue. As a result, we have proceeded on the basis that vehicle access is available via Rutherford Road.
5. The application as initially lodged sought nine lots. However, the proposal has been amended a number of times, beginning with an amendment received on 21 March 2017,

¹ As amended and detailed through Appendix A of the Applicants' Right of Reply dated 14 November 2017

reducing the number of lots from 9 to 8 (with all lots over a net lot size of 4000m²) and narrowing of the proposed access ROW within proposed Lot 9 DP 12678.

6. The application was further amended through the course of the Hearing to comply with the relevant Queenstown Lakes District Plan ("District Plan") vehicle access standards.
7. As part of the Applicants' Right of Reply, the proposed lots boundaries were slightly altered in size and location (retaining a minimum site area of 4,000m²). In essence, the final amendments achieved compliance with the internal building platform setback of 15 metres and thereby removed the need for land use consent for this breach. We are of the view that the proposed changes made throughout are within the scope of the of the application as notified.
8. These amendments essentially reduced our consideration to that of one of density, the question being whether the 8 lots and associated 6 building platforms were appropriate in this location. As will be evident later in this decision, we have also briefly addressed earthworks.

SITE DESCRIPTION

9. A description of the site and receiving environment within which the application sits can be found in the Applicant's AEE. We note that the descriptions generally accord with our impressions from our visits to the site and surrounding area.

NOTIFICATION AND SUBMISSIONS

10. The application was limited notified on 3 May 2017 with submissions closing on 31 May 2017. The summary of submissions in the section 42A report noted that submissions in opposition were received from Scott and Monica Carran, Roy Moore (on behalf of Heather Moore and Szigetvary Trustees Services Limited), Stephen and Linda Jarvis and Roy and Gudrun Sommerville. In summary, the following issues were raised in these submissions:
 - The residential building platform and the design of Lot 9 would result in a dwelling on a hill
 - Proposed density of the development
 - The Dennisons are not involved and are selling off part of their land
 - Breach of internal 15m setbacks
 - Effects on wildlife arising from proposed lots 3, 4 and 9
 - Pollution from fires
 - Flooding on adjoining properties
 - Effects of the access road.
11. No written approvals or evidence of consultation were provided with the application or addressed in the evidence.

PRELIMINARY PROCEDURAL MATTERS

12. A hearing to consider the application was first convened on 16 August 2017. A day before the hearing, the Applicants indicated to the Council under section 91A of the Act

that they wished to put the application on hold. A hearing was then rescheduled for 13 October 2017 in Queenstown.

13. At the time the hearing was requested to be put on hold, the Applicants also raised concerns about an alleged change in position by Mr Norwood, the Council's reporting landscape architect. The Applicants sought leave to call landscape evidence. We issued a Minute dated 22 August 2017 granting leave for such evidence to be filed and also provided an opportunity for the Council staff to provide any Addendum Reports resulting from this evidence, along with a date for any submitters to lodge expert landscape evidence in response.

THE HEARING

14. A hearing was held on 13 October 2017. In attendance were:
- (a) The Applicants, represented by Ms Vanessa Robb (legal counsel), Ms Erica Gilchrist (landscape architect), Mr Tim Dennis (engineer) and Ms Ella Hardman (planner);
 - (b) Mr John Edmonds (planner) and Mr Steve Skelton (landscape architect) (experts for submitters listed below in (c))
 - (c) Mr Scott Carran, Mr Steve Jarvis and Mr Roy Sommerville (submitters);
 - (d) Council's reporting staff and administrative support – Ms Wendy Baker (planner), Mr Andrew Norwood (landscape architect), Mr Warren Vermaas (by email) and Ms Charlotte Evans (hearing secretary).
15. We had the benefit of a section 42A report and an Addendum to that report prepared by Council's reporting planner, Ms Baker. Based upon her assessment of the application, Ms Baker recommended as follows:

Section 42A report dated 25 July 2017:

"That subject to new or additional evidence being presented at the Hearing, the application be GRANTED pursuant to section 104 of the Resource Management Act 1991 (the RMA).

My recommendation is subject to the following three points being achieved/ volunteered and also subject to the conditions set out in the attachment being imposed:

- An amended landscape plan is submitted which includes planting to soften the cut and dwelling on proposed Lot 9; and
- A height restriction of 5.0m from existing ground level is volunteered in relation to the future dwelling on Lot 9; and
- A condition is volunteered agreeing to fund the signage and vegetation removal required to improve the safety of Rutherford Road

In summary the reasons for my recommendation are that:

- The adverse effects of the proposal will be minor. The effects of the increased density and regular shape and design of the subdivision will not be significantly different from that which could result from a succession of controlled activity applications.
- The most adversely affected property will be the Carran property at 251B Lake

Hayes-Arrowtown Road which will be dominated to a significant extent by the cut for the drive and the future dwelling on the RBP on Lot 9. An amended landscape plan and reduced height of the future dwelling will mitigate and avoid this effect to the extent that it is reduced to minor.

- The proposal is consistent with the objectives and policies of the District and Regional Plans applicable to the zone.”

Addendum Report dated 15 September 2017

“That subject to new or additional evidence being presented at the Hearing, the application be GRANTED IN PART pursuant to Section 104 of the Resource Management Act 1991 (the RMA).

My recommendation is subject to the following three points being achieved/ volunteered and also subject to the conditions set out in the attachment being imposed:

- A condition is volunteered agreeing to fund the signage and vegetation removal required to improve the safety of Rutherford Road

In summary the reasons for my recommendation are that:

- With the exception of a future dwelling on proposed Lot 9, the adverse effects of the proposal will be minor. The effects of the increased density and regular shape and design of the subdivision will not be significantly different from that which could result from a succession of controlled activity applications.
- A future dwelling on Lot 9 is likely to breach the line and form of the land and is located on a slope that is prominent in the context of this location. This could result in unacceptable visual, character and amenity outcomes.
- The proposal is consistent with the majority of the objectives and policies of the District and Regional Plans applicable to the zone. However it is inconsistent with the policy in the ODP seeking to avoid locating dwellings on prominent slopes.”

Ms Baker’s Addendum Report noted that receipt of topographic information had resulted in Mr Norwood changing his opinion on proposed Lot 9.

16. In a final oral report to us at the hearing, having heard the evidence, Ms Baker commented on the Applicants’ final conditions and recommended that Lot 9 be refused.

SITE VISIT

17. We undertook a site visit on the afternoon of 12 October 2017. This included a visit to the Carran property and we thank the Carrans for the opportunity to visit their site. We also considered the proposal from a number of public and private locations, including from Arrowtown – Lake Hayes Road and the access way servicing Lots 2 and 3 DP 386972.

THE DISTRICT PLAN AND RESOURCE CONSENTS REQUIRED

18. The AEE, the s42A report and the Section 42A Addendum Report identified the resource consents that were initially required. However, as discussed above the application has been amended. In light of those amendments, we consider the following consents are now required:

Land use consent:

- (i) A **restricted discretionary** resource consent pursuant to Rule 14.2.2.3(ii) as the proposed access is not wide enough to achieve the standard specified in 14.2.4.1(vi) and would require mitigation through consent conditions. Council's discretion is limited to these matters.²
- (ii) A **restricted discretionary** activity pursuant to Rule 22.3.2.3(a) as the proposal breaches site standard 22.3.3(i) in relation to the volume of earthworks. Council's discretion is limited to this matter.³

Subdivision consent:

- (iii) A **restricted discretionary** activity pursuant to Rule 15.2.6.2 as the proposal breaches site standard 15.2.6.2(iv) requiring the average lot size to be 8000m². The average lot size proposed is 5074m². Council's discretion is limited to this matter. This was the subject of much evidence and debate at the hearing. We discuss this further below.

19. In writing her report, Ms Baker considered controlled activity consent was required under Rule 15.2.3.2(b).⁴ She later advised in response to questioning from Commissioner Beattie that it was not relevant. Ms Hardman appeared to indicate that she agreed with Ms Baker's initial approach in paragraph 18 of her Summary/rebuttal evidence but then did not list the consent required under this head in Appendix C to this statement of evidence. In her Right of Reply, Ms Robb included reference to Rule 15.2.3.2(b).⁵ We do not agree that consent is required under Rule 15.2.3.6(b) or that Rule 15.2.3.6(b) is even relevant. The subdivision does not satisfy site standard 15.2.6.2(iv) and it is that rule that must be considered. It cannot therefore be processed as a controlled activity under Rule 15.2.3.2(b).
20. As we have already noted, the Applicants amended the application to remove the breach of the internal setback rule. That consent is no longer required.
21. In his final advice to us, Mr Vermaas confirmed that he was satisfied that the new proposed access road gradient provided by the Applicants complied with NZS:4404 and that no retaining walls would be required. It therefore appears that no consent is required under Rule 14.2.2.3(ii). Mr Vermaas did make it clear that if consent was to be granted, he would like to see conditions requiring safety barriers on the access road or that conditions be amended to require this to be considered in final design requirements. It was not entirely clear to us from the final comments received from officers that consent was required under Rule 14.2.2.3(ii) for a breach of Site Standard 14.2.4.2(iv) relating to

² A point raised by E Hardman in her summary and rebuttal evidence at paragraph 18

³ There was a difference between the Applicants and the Council on this point. The Applicants considered no consent was required. Mr Vermaas advised us that this rule was technically breached. We have therefore included this consent requirement.

⁴ First section 42A report of W Baker page 6 of the Agenda; Summary and rebuttal evidence of E Hardman paragraph 18

⁵ Robb, Right of Reply, paragraph 58(c)(v)

sight distances from the vehicle access, or that consent was required under Rule 14.2.2.3(ii) for a breach of site standard 14.2.4.2(iv) relating to road drainage. Both consents were listed in Ms Hardman's Summary/rebuttal statement Appendix C.

22. Council notified the Proposed District Plan on 26 August 2015. None of the rules in Stage 1 of the district plan review with immediate legal effect are applicable to this proposal.
23. Since the hearing, the Council has notified a variation to its Proposed District Plan ("the Variation") which is relevant to our assessment. We invited submissions on this topic from all parties and asked that submissions be lodged by 11 December 2017. We note that the activity status remains restricted discretionary under the Variation. However, we acknowledge that the activity status would have also been protected pursuant to s.87A of the Act.
24. We note that the activity status for this application was not agreed between the planners. We have addressed this matter under a separate heading below.
25. The Applicants made enquiries with both the Council and Otago Regional Council regarding the classification of the site. The site is not identified as a HAIL site. Therefore, no consent is required under the National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health (NES).

ACTIVITY STATUS

26. The planners did not agree on the proposal's activity status, with Ms Hardman (for the Applicants) and Ms Baker (for the Council) holding the view that the application was a Restricted Discretionary Activity. Mr Edmonds (for submitters) was of a different view and believed that the application should be assessed as a full Discretionary Activity. In essence, the disagreement related to the interpretation of the Operative District Plan's Rule 15.2.2.3 (i) (Discretionary Subdivision Activities). The rule states:

Any subdivision which complies with all the Zone Subdivision Standards but does not comply with any one or more Site Subdivision Standards shall be a Discretionary Subdivision application, with the exercise of the Council's discretion limited to the matter(s) subject to that standard.

27. In this case the proposed subdivision met all the relevant Zone Subdivision Standards but failed to meet Site Standard 15.2.6.2(iv) of achieving a lot average of 8,000m² or larger throughout the proposed subdivision. It was Ms Hardman's view that a breach of Site Standard 15.2.6.2(iv) was a Restricted Discretionary Activity, relying on the words "*with the exercise of the Council's discretion limited to the matter(s) subject to that standard*". She noted that none of the Site Standards in Part 15 of the Operative District Plan include a specific list of matters to which Council's discretion is limited. The relevant matter was the breach of the site standard, namely, the average lot density. Ms Baker agreed with this approach, describing Mr Edmonds' interpretation as "perverse".
28. In her Right of Reply, Ms Robb provided us with her suggested step by step guide to addressing this matter and in doing so referred us to the High Court decision in Ayrburn Farm Estates v QLDC where this matter had been considered.⁶ Relying on Ayrburn, she submitted the application should be assessed as a Restricted Discretionary Activity and we could consider matters beyond those listed in 15.2.6.4(i), but not in our decision of whether to grant or decline consent. Any consideration that went beyond the assessment matters in 15.2.6.4 would need to be limited to the effects generated by the

⁶ Robb, right of reply at paragraphs 51 to 58, Ayrburn Farm Estates Limited v QLDC [2012] NZHC 735

Site Standard breach⁷. In this case, that is the breach of the reduction in the average lot standard of 8,000m² through the proposed subdivision.

29. Mr Edmonds took a different view, stating that as the application was listed as full Discretionary activity under Rule 15.2.2.3(i) our discretion was not limited to the matters set out in 15.2.6.4(i) and the application should be assessed as a full Discretionary activity.
30. The preamble to Section 15.2.6.4 of the District Plan states:

In considering whether or not to grant consent or impose conditions in respect to lot sizes and dimensions, the Council shall have regard to, but not be limited by, the following matters.
31. It then goes on to state a range of assessment matters. This leaves us in the difficult position where it appears that we *shall have regard to* these assessment matters but we are *not limited by* them. This would create an open ended Restricted Discretionary Activity, which by the Act's definition, should not be possible. We raised this point with both Ms Hardman and Ms Baker, who were in agreement and acknowledged our concerns, but were still of the view that the application was a Restricted Discretionary Activity. They considered our assessment of the proposal could go beyond those matters listed in 15.2.6.4(i), but should be confined to the effects generated from the proposal. It is our understanding that the Council has administered these provisions in this way in the past and it was common practice to do so in the District.
32. We accept this proposition and our decision is based on the proposal being assessed as a Restricted Discretionary Activity. However, for the Council's benefit, and to avoid any further confusion, we respectfully suggest the rule and associated assessment matters be carefully reviewed through the Proposed District Plan process. The provisions are not as clear as they should be.

ASSESSMENT OF DENSITY PROVISIONS

33. We now set out our view regarding the assessment of the application and the District Plan's intended density for the zone. It was common ground between Ms Hardman and Ms Baker, and also addressed by Ms Robb in her legal submissions, that the Rural Residential Zone anticipated density is one dwelling per 4,000m². That then appeared to be the starting point for their assessment, noting that in their view, significant development could occur as a controlled activity. This approach appeared to be based on a perceived conflict between the subdivision and land use provisions in Chapters 8 and 15.
34. We do not accept this proposition. This application includes both land use and subdivision components. It is necessary to look first to the subdivision controls, and then to the land use controls, should the subdivision be approved.
35. The subdivision density requirements are outlined in Chapter 15. Site Standard 15.2.6.2(iv) sets the lot average for land zoned Rural Residential at the North end of Lake Hayes, in which this site sits, as **not less than** 8000m². A breach of this site standard triggers a Restricted Discretionary Activity consent, which has been applied for here. This is a very specific requirement for this sub-zone.
36. The Zone Subdivision Standards in 15.2.6.3(i)(a) specify a **minimum lot area** of 4000m² for land zoned Rural Residential (excluding Rural Residential sub-zone at Bob's Cove).

⁷ Robb, Right of Reply at paragraph 58 (c) iii

A breach of this zone standard is a non-complying activity.

37. Our interpretation of the Chapter 15 site and zone standards referred to is that the specific must override the general. We acknowledge that Chapter 15 of the Operative District Plan is difficult to interpret and has many unsatisfactory and confusing cross-references. It must be read as a whole. In our view, the density of any subdivision in the North Lake Hayes sub-zone is clearly controlled through site standard 15.2.6.2(iv). A Rural Residential zoned site located outside the North Lake Hayes sub-zone, that is not controlled by a specific site standard in this way, could rely on the 4000m² minimum lot area zone standard specified in Zone Standard 15.2.6.3(i)(a).
38. The two controls do slightly different things. Site standard 15.2.6.2(iv) addresses the lot average (density). Rule 15.2.6.3(i)(a) specifies the minimum net area of the lots to be created by the subdivision overall.
39. The relevant **land use** residential density site standard in Chapter 8 is 8.2.4.1(vi), which specifies particular controls for the North Lakes Hayes sub-zone. These are disjunctive. They state the following densities relevant to this sub-zone:⁸
- (a) for allotments less than 8000m² in size, there shall be only one residential unit;
 - (b) for allotments equal to or greater than 8000m² there shall be no more than 1 residential unit per 4000m², on average.
40. We agree with Mr Edmonds that it is not appropriate to create a link between the land use rules in Chapter 8 and the clear subdivision rules in Chapter 15 as the Applicants and the Council have sought to do. This creates the false impression that Chapter 8 dictates the subdivision outcome for the zone. That is not the case. The intended subdivision outcomes are achieved through Chapter 15.
41. In our view, the subdivision rules must be considered before the land use rules. This application must pass the subdivision threshold before the land use component becomes relevant. We have commenced our assessment at Rule 15.2.6.3(iv).
42. Overall, we do not accept that 4,000m² is the 'default position' for lot size. A lot average of 8,000m² is to be achieved through subdivision and that specific standard must take precedence. Of course, an applicant may apply to the Council to breach that standard, as the Applicants have done here.
43. In the event we are incorrect in our interpretation, we wish to make it clear that we do not consider the proposed density of the subdivision to be appropriate in this sub-zone and that forms the primary basis of our decision to decline this application.

RELEVANT STATUTORY PROVISIONS

44. This application must be considered in terms of Sections 104, 104C, 106, 108 and 220 of the Resource Management Act 1991 ("the" Act).
45. 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. Considerations of relevance to this application are:
- a) *any actual and potential effects on the environment of allowing the activity; and*

⁸ We have not quoted subparagraphs (c) and (d) of this site standard as they relate to another area of the District, despite being listed under a site standard applying to the North Lake Hayes sub-zone.

- (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.*

46. If consent is able to be granted pursuant to Section 104, the application must be considered under Section 104C of the Act. Section 104C states:

- (1) When considering an application for a resource consent for a restricted discretionary activity, a consent authority must consider only those matters over which –*
 - (a) a discretion is restricted in national environmental standards or other regulations:*
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.*
- (2) The consent authority may grant or refuse the application.*
- (3) However, if it grants the application, the consent authority may impose conditions under section 108 only for those matters over which –*
 - (a) a discretion is restricted in national environmental standards or other regulations:*
 - (b) it has restricted the exercise of its discretion in its plan or proposed plan.*

47. Section 104(3)(b) requires that we have no regard to effects on people who have given written approvals to the application.
48. Section 106 of the Act provides that a consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that the land is or is likely to be subject to, or is likely to accelerate material damage from natural hazards, or where sufficient provision for legal and physical access to each allotment has not been made.
49. Sections 108 and 220 empower us to impose conditions on subdivision consents.

SUMMARY OF SUBMISSIONS AND EVIDENCE HEARD

50. Pre-circulated expert evidence was received from the Applicants and submitters. The submitters appearing in person presented oral and written evidence at the hearing.

Applicants

- **Ms Robb** presented opening legal submissions addressing the relevance and weight to be given to the Proposed District Plan, the RMA Amendment Act 2017, changes to the application since it was lodged, issues arising from the section 42A report, submissions, issues raised in expert evidence for the submitters and Part 2 of the Act.
- In summary, Ms Robb particularly addressed the specifics of the Rural Residential zone and submitted that the assessment matters for controlled activities in Chapter 8 were not relevant to our decision whether to grant consent,

but would be relevant to the imposition of conditions.⁹ She noted that the Proposed District Plan as notified had included the same Rural Residential Subzone – North of Lakes Hayes for the subject site and included a different density standard. One submitter had sought that the Operative District Plan standard of 8000m² be reinstated into the subzone. The Council's report has recommended the reinsertion of the 8000m² average into the Proposed District Plan. This was subject to an opposing submission.¹⁰ Ms Robb submitted that the rural living zones in the Proposed District Plan do not present a significant policy shift from the Operative District Plan and little weight should be given to the Proposed District Plan objectives and policies given no decisions have been released on the Proposed District Plan as yet (in particular, the Council's recommendation about increasing the average density rule to 8000m²).¹¹

- Ms Robb disagreed with Mr Edmonds' approach to the interpretation of the restricted discretionary activity rule applying to subdivision (15.2.6.2(iv)) and referred us to case law in support of her submissions. She also criticised Mr Edmonds' approach to the assessment matters in Chapter 15.
- In terms of Part 2, Ms Robb submitted there was no need for us to consider Part 2, relying on the decision in RJ Davidson, which said there was no need for a decision maker to have regard to Part 2 when determining a resource consent application unless there were aspects of the Operative District Plan that were incomplete, uncertain or invalid.¹² Ms Robb noted that this decision was under appeal. Alternate submissions were made in the event we did not accept this submission.
- **Ms Gilchrist** presented landscape evidence. She set out the Rural Residential characteristics of this sub-zone and noted that Mill Creek was the only significant feature on or neighbouring the site. The site did not contain, or adjoin, any Outstanding Natural Features or Landscapes. Ms Gilchrist noted that 25% of the site would be retained as unmodified on Lot 1. She did not consider that Lot 9 would break the skyline or ridgeline and was of the opinion that the development was not located on a prominent slope. She stated that effects could be mitigated by the landscape plan and were appropriate in this context.
- Ms Gilchrist considered any potential adverse and landscape and visual effects to be no more than minor because (in summary):
 - The proposal will extend and employ existing rural-residential patterns and reinforce the rural-residential character of the area;
 - The landscape change will be comprehensively managed by design;
 - The proposal is appropriate within the site and not contrary to what might be expected for the site;
 - Potential adverse effects have been avoided or mitigated;

⁹ Ayrburn Farm Estates Limited v QLDC [2011] NZEnvC 98 and [2012] NZHC 735

¹⁰ Robb opening legal submissions paragraphs 27-29

¹¹ We note that this part of the Proposed District Plan has been overtaken by the Variation. The Variation proposes a minimum 6000m²/ average of 1 ha for this sub-zone through Chapter 24, which seeks to amend Rule 27.5.1 of the Proposed District Plan.

¹² RJ Davidson Family Trust v Marlborough District Council [2017] NZHC 52

- Positive effects include the native planting and habitat creation alongside Mill Creek and throughout the development, the removal of wilding pine and weeds and willows, greater expression of the landform in Lot 9 and wider views to the surrounding ONF and ONL backdrops.

Ms Gilchrist set out the numerous points of difference between herself and Mr Skelton.

- **Mr Dennis** did not present written evidence but was available to answer questions.
- **Ms Hardman** summarised her written evidence and produced a set of proposed conditions and a set of updated plans. She set out a comprehensive response to Mr Edmonds' evidence, noting she did not agree that the site should be considered in its eastern and western portions but should be assessed as a whole.

Submitters

- **Mr Carran** gave oral evidence. He owns and resides at a property to the immediate south of the proposed development and is particularly close to proposed Lot 9. Mr Carran questioned why the 8000m² average lot size was not met by this proposal, albeit acknowledging that the subdivision he has bought into is also less than the 8000m² average lot size.¹³ He noted that the Dennison property that would result if this application was granted, namely future Lot 1, had been included in the total area of land from which the averaging was derived. He noted that he and his family live on the northern side of their property and directly face the development site. Lot 9 is immediately in front of their site. The site already has access from Arrowtown-Lake Hayes Road and using that access point would have less impact on neighbours and was already partly formed. He considered the road and the house on Lot 9 would not be screened through the mitigation planting proposed, expressing the view that a house on Lot 9 would need to be subject to earthworks or be a pole house design, given the steep terrain. It was clear that Lot 9 and the overall density of the development were the main concerns.
- **Mr Jarvis** is also a neighbour to the Applicants' site. He produced a number of photographs showing flooding on the site, telling us the flooding on the property also flows onto the Jarvis property. Mr Jarvis purchased his property 8 years ago and was of the view that the site should only accommodate 3 lots, to be consistent with neighbouring development. He noted the proposed planting will be in a hollow and higher than the property on which he resides to the south. He did not think the growth rates would be achieved.
- **Mr Sommerville** is a neighbour to the north. He has owned his property since 2005. He has relied on the current minimum average lot size of 8000m² in his anticipation of what could occur on the Applicants' site and considered this proposal to be too dense. He told us the average size of the lots in the subdivision into which he purchased (being 3 lots) was 7000m². The proposed access road would affect his peace and tranquillity. He was also concerned about Lot 9. He told us in questioning that his living area was to the north. He

¹³ Mr Edmonds confirmed at paragraphs 6 and 7 of his evidence that the Carran property is 5544m² in area, the Moore property (vacant) is 5417m² in area and the Jarvis property 12,374m² in area.

has tried growing trees on his boundary with the Applicants' site and told us that nothing has worked – it was “frost horror”.

- **Mr Skelton** gave landscape evidence for the submitters and summarised his pre-exchanged evidence. He considered the site to be part of the “Lake Hayes basin” landscape which is said to be a mix of landscape characters, ranging from the lake’s natural character to what Mr Skelton called the “peri-urban” type character of the Low Density Residential zone in this vicinity.¹⁴ He considered Lot 9 to be a prominent slope as described in the Operative District Plan. Mr Skelton had many concerns about Ms Gilchrist’s landscape assessment and her proposed planting plan, and considered the development to be too dense. We have addressed Mr Skelton’s evidence in more detail in our discussion of landscape effects.
- **Mr Edmonds** summarised his pre-exchanged planning evidence and produced new information concerning the interpretation of relevant rules in the Operative District Plan. We addressed this earlier in our decision. Mr Edmonds also sought to introduce new information which alleged Mill Creek was a wetland as that term is defined in the Act. We did not accept this new evidence as the Applicants had no opportunity to respond to it. Mr Edmonds accepted that the North Lake Hayes subzone provided for a diverse range of lot sizes and that there was room for some additional residential capacity. He considered that three lots were anticipated at the western end of the Applicants’ land in an area of 25,000m² in total. This would enable lots of around 8000m² as the sub-zone anticipated. Lot 1 would be the parent lot.

Council Officers

- **Mr Norwood** provided two brief written landscape reports to us. In his first report he agreed with the AEE submitted with the application and the addendum dated 21 March, other than Lot 9. It was his opinion that the proposal would create a density consistent with the character and amenity of the surrounding rural residential landscape. Regarding Lot 9, he noted that this lot sat at the top of an escarpment at the western end of the subject site and that a future dwelling here would be visually prominent and dominant if built to the maximum zone height of 8.0m. He recommended a maximum height restriction of 5.0m above existing ground level. He also had some suggestions around mitigation for the proposed access way, now that it was on the southern boundary.
- Mr Norwood’s Addendum Report responded to the landscape evidence of Ms Gilchrist. He did not consider the landscape effect of Lots 4-8 would be significant and was of the opinion that the density would not adversely affect the rural amenity of the surrounding landscape because the subject site was not widely visible from outside the site and some residential development was expected there. His opinion on Lot 9 was that the mitigation proposed would have little effect. The new access and associated design was an improvement. Mr Norwood was of the opinion that the escarpment on which Lot 9 would be located was a prominent slope.
- Mr Vermaas provided an engineering report and an Addendum Report dated 13 September 2017, along with a further email to Ms Baker about outstanding

¹⁴ Evidence of Stephen Skelton paragraph 8

matters. These reports are addressed later in this decision in our discussion of environmental effects.

- **Ms Baker** also provided two written reports. We outlined above Ms Baker's recommendations.

APPLICANTS' RIGHT OF REPLY

51. We received the Applicants' Right of Reply on 14 November 2017.
52. In her Reply, Ms Robb noted the amendments to the application to remove the breach of the 15 metre separation distance between the proposed building platforms. This involved altering the lot sizes, building platform sizes and locations of the proposed internal boundaries. These are shown on Southern Land's Plan T4060_S1 (Rev E) dated 13 March 2017.
53. Ms Robb offered a range of new conditions to address issues raised during the hearing, including:
- Ensuring that the future building height on proposed Lot 9 would not exceed 5 metres above natural ground level.
 - A requirement that planting plan objectives and methods were to be provided as part of the conditions of consent, with inclusion and use of a range of faster growing species to mitigate the impacts of the adjacent properties.
 - Requiring that planting be undertaken on proposed Lot 9 before the construction of a future building on Lot 9 and that this planting would be required to soften and largely screen the future building from neighbouring lots, especially the Carran's property.
 - Ensure light spill from the lighting of the access way would not exceed one metre.
 - Providing a consent notice preventing any further subdivision on any of the proposed new lots.
54. Ms Robb sought the removal of a range of earthworks and engineering conditions, with the rationale provided in Ms Hardman's rebuttal evidence as to why these were no longer required.
55. Ms Robb then addressed a number of the issues raised by the submitters including the requirements for the 8,000m² average on the adjoining lots. Ms Robb set out why Ms Gilchrist's evidence should be favoured over that of Mr Skelton and Mr Norwood on landscape matters and made a similar analysis of the planning evidence, reinforcing Ms Baker's view that the application was finely balanced and in light of the evidence of Ms Hardman consent could be granted, subject to the appropriate conditions of consent.
56. As noted above, Ms Robb provided us with a four step decision making framework for addressing the application, its status and what we could consider. We do not accept her argument that we should not consider the relevant objectives and policies of Chapter 8 of the District Plan.¹⁵ We address that point elsewhere in our decision.

¹⁵ Robb Right of Reply paragraph 58 D (v)

57. Finally, Ms Robb reminded us that the actual design and appearance of the future dwellings would be subject to a Controlled Activity consent application where these issues could be addressed and submitted that the proposal should be granted consent.

RELEVANT PLAN PROVISIONS

The Operative District Plan

58. The relevant provisions of the Operative District Plan that require consideration can be found in Chapter 4 (District Wide), Chapter 8 (Rural Living and Rural Residential Areas) Chapter 15 (Subdivision, Development and Financial Contributions) and Chapter 22 (Earthworks).

The Proposed District Plan

59. The relevant provisions of the Proposed District Plan that require consideration are Chapters 6 (Landscapes), 21 (Rural zone) and 27 (Subdivision and Development). The site is zoned Rural Lifestyle under the Proposed District Plan and has retained that zoning under the Variation.
60. Section 86[b](1) of the RMA states a rule in a proposed plan has legal effect only once a decision on submissions relating to the rule is made and publicly notified. An exemption to this is section 86[b](3) in which case a rule has immediate legal effect in certain circumstances including if the rule protects or relates to water, air or soil.
61. Stage 1 of the Proposed District Plan was notified on 26 August 2015. Pursuant to Section 86[b](3) of the RMA, a number of rules that protect or relate to water have immediate legal effect. None of these rules are relevant to this application, and by extension we therefore conclude that there are no rules in Stage 1 of the PDP that are relevant to our consideration of this application.
62. The Variation already referred to was notified on 23 November 2017. In our Fourth Minute dated 23 November 2017 we sought the views of all parties on the question of whether any of the rules contained in the Variation had immediate legal effect. It was agreed by all the parties that none of the Variation's rules had immediate legal effect. We agree with this assessment and no further consideration of these rules has been undertaken.

Operative Regional Policy Statement

63. The relevant objectives and policies are in Part 5 Land, Part 6 Water and Part 9 Built Environment.

Proposed Regional Policy Statement

64. The Proposed Regional Policy Statement was notified on 23 May 2015 and decisions were notified on 1 October 2016. Appeals have been lodged with the Environment Court, covering a wide range of topics.
65. The relevant objectives and policies are found in Chapters 1, 3 and 5. These generally align with the Operative Regional Policy Statement.

Summary of planning assessment

66. Our planning assessment involves the following considerations:

- The application is for a Restricted Discretionary Activity and our consideration is not limited to those matters listed in section 15.2.6.4(i). However, we accept that we are limited to consideration of the effects generated by the Site Standard breach, that being a subdivision application with a range of proposed lots which do not achieve the 8,000m² average lot size. The relevant assessment matters contained in 15.2.6.4(i) are set out below:
 - a) *Whether the lot is of sufficient area and dimensions to effectively fulfil the intended purpose or land use, having regard to the relevant standards for land uses in the zone.*
 - b) *Whether the lot is of sufficient size, given the nature of the intended development and site factors and characteristics, for on-site disposal of sewage, stormwater or other wastes to avoid adverse environmental effects beyond the boundaries of the lot.*
 - c) *Whether the proposed lot is of a suitable slope to enable its safe and effective use for its anticipated purpose or land use, having regard to the relevant standards for land uses in the Zone.*
 - d) *The relationship of the proposed lots and their compatibility with the pattern of the adjoining subdivision and land use activities, and access.*
 - e) *Whether the lot is to be amalgamated and included in the same Certificate of Title with an adjoining parcel of land.*
 - f) *Whether there is the opportunity to enable the protection or restoration of a listed or non-listed heritage item or site which is considered to be of sufficient merit for its preservation or protection to be promoted in the context of a particular development.*
 - g) *In the Rural Residential zone at the north of Lake Hayes, whether and to what extent there is the opportunity to protect or restore wetland areas in order to assist in reducing the volume of nutrients entering Mill Creek and Lake Hayes.*

.....

- Assessment Matter 15.2.6.4(1)(i) then states a further matter:

With regard to proposals that breach one or more zone standard(s), whether and the extent to which the proposal will facilitate the provision of a range of Residential Activity that contributes to housing affordability in the District.

- The objectives and policies of Chapter 8 of the District Plan are relevant to our consideration of the proposal. We refer to the *Methods* Section and explanation contained in Chapter 8, where it states:

Rural living objectives and associated policies will be implemented through a number of methods including:

l) District Plan

(c) Provision of District wide rules on matters of subdivision, and transport as they relate to rural living development.

- In our view, it is appropriate to take into consideration the Subdivision Chapter's standards, especially those which relate to minimum and average lot sizes which form part of the District Plan's Methods to achieve the intended policy (objectives and policies) outcome for the Rural Residential Zone. That is, the subdivision lot sizes standards are one of the District Plan's methods to achieve the intended planning outcomes for the Rural Residential Zone. As a result, we find that objectives 1, 2 and 3 (with their relevant supporting policies) are relevant to our consideration of the proposal.
- The objective and supporting policies at 4.2.5 are relevant to our consideration, as they set out the strategic direction for the landscape and visual amenity issues for the district.
- Objectives 1, 2 and 5, with their supporting relevant policies set out in Chapter 15, are relevant to our consideration of the proposal.

67. In terms of the Proposed District Plan and the Variation we find that little weight can be given to these future planning documents.

PERMITTED BASELINE, EXISTING ENVIRONMENT AND RECEIVING ENVIRONMENT

68. Under section 104(2) of the Act, we have the discretion to take into account the permitted baseline.

69. Permitted activities in the Rural Residential zone are limited to:

- Farming activities
- Viticulture and wine-making activities
- Horticulture activities;
- A fence under 2m high
- Earthworks up to 400m² within one consecutive 12 month period complying with the relevant site standards
- Planting.

70. We consider the permitted baseline to be of limited assistance in this case.

71. The site is open and has a rural character at present. At its eastern end is an existing dwelling owned by the Dennisons which lies adjacent to the Arrowtown-Lake Hayes Road. The land here slopes down toward Mill Creek and across to a wooded area containing mainly willow trees. The site then travels further west across a flat pastured area until it meets a sharp scarp at the western end of the site.

72. To the north and south are various residential dwellings and rural residential sites which display elements of rural residential character including trees, fences, driveways, some native plantings and ancillary structures. The north includes a large part of land vested as Council Local Purpose Reserve- Esplanade, adjacent to Mill Creek. To the south, two dwellings have been constructed and a third is able to be developed for rural

residential purposes. To the west, atop the western scarp, are five consented building platforms.

73. We found the vicinity of the site to be very attractive, featuring prominent plantings and gardens. It was not rural, but more rural-residential in character. We agree with Mr Skelton's description of this environment.

ASSESSMENT OF ACTUAL AND POTENTIAL EFFECTS ON THE ENVIRONMENT

Landscape effects

74. The differences in opinion between Mr Skelton and Ms Gilchrist related to:
- (i) The level of anticipated development on the site;
 - (ii) The level of adverse effect on the existing rural residential amenity;
 - (iii) Whether the proposal will represent a rural residential character;
 - (iv) Whether the proposal will extend existing landscape patterns;
 - (v) The level of adverse visual effects experienced from private places;
 - (vi) The level of public views into the site;
 - (vii) Whether the proposed building platform on Lot 9 would break the skyline or ridgeline as viewed from both private and public spaces.
75. Ms Gilchrist attached a detailed landscape assessment to her evidence in chief given the application as notified had not included a landscape assessment. Ms Gilchrist was of the opinion that the proposal was consistent with the landscape assessment matters for development in the North Lake Hayes subzone and that it could be readily integrated and absorbed into the landscape setting. She considered this level of development to be anticipated development. Concerns about landscape character and amenity could be addressed through the landscape plan and conditions. The proposal would result in a number of positive landscape effects and no more than minor landscape effects.
76. Mr Skelton noted the North Lakes Hayes sub-zone's special character recognised in the Operative District Plan, which he considered displayed a park-like, rural character consisting of mature exotic trees, large areas of open spaces and rural residential development. In his opinion, the sub-zone contains a moderate to high ratio of open space to built form. The sub-zone sought a diversity of lot sizes, amenity and riparian planting and large setbacks from roads and internal boundaries. He considered Mill Creek to be a significant part of this landscape. He noted the open and rural character of the site as it currently looks and fairly stated his view that it was anticipated the land would be developed in a form, pattern and manner which is consistent with the landscape's park-like, rural residential character. He was of the opinion that maintaining a sense of spaciousness in this zone was important and that this was achieved through a physical separation of built development. He was particularly concerned about views of Lot 9 from the Mill Creek Local Purpose Reserve – Esplanade and did not consider these could be mitigated.
77. Ms Gilchrist did not agree with Mr Skelton's description of the "parklike character" but did say that she and Mr Skelton agreed that the following elements were typically present in a rural residential character area – large trees, fences, driveways, patches of native

plantings and ancillary structures, 8m maximum height limit on buildings, ornamental trees, lawns, and large homes.

78. Mr Skelton was heavily critical of Ms Gilchrist's landscape assessment. In summary, he noted the landscape plan as presented with Ms Gilchrist's evidence did not show the level of mitigation she had proposed in the text of her evidence and in some cases the planting to be undertaken was unclear. Building platforms shown on her visual diagrams were not accurate. The building platforms would not be staggered but would in Mr Skelton's opinion, be lineal (see below). Mr Skelton criticised Figure 4 and cross sections presented with Ms Gilchrist's evidence, going so far as to call them misleading. Ms Gilchrist endeavoured to respond to these criticisms in her summary/ rebuttal statement dated 13 October 2017.
79. It was Mr Skelton's opinion that the density proposed through this development was not anticipated, nor were the visual effects of increased built form. He considered this development to be of a peri-urban nature dominated by the built form. The visual permeability of the landscape would be further impacted by dense plantings to create privacy to the lots.
80. He was critical of the lineal form proposed for Lots 4-8 and when questioned on this, did not consider a more staggered effect would achieve a different result. Ms Gilchrist did not agree with Mr Skelton's assessment on this point. It was her opinion that "the perspective of views, changes in topography, and the varied rural-residential backdrop" would mean the building platforms looked more staggered.¹⁶
81. Mr Skelton was of the opinion that the building platform and access way on Lot 9 would degrade the natural values of the western scarp and diminish its relationship with Mill Creek. He noted that the site was not visible from many public roads but that the Mill Creek Local Purpose Reserve – Esplanade was a public space. The proposed building platform on Lot 9 would create adverse visual effects on that public space and on private residential spaces also.¹⁷
82. Mr Skelton sought more detail in the planting plan, noting the planting list included in Ms Gilchrist's summary and rebuttal statement was a good start but that other species could be included, such as western red cedar. He noted the difficulty in planting on Lot 9 unless the trees were retained. Overall, it was his opinion that the proposal would have a moderate adverse effect on landscape character and a low to high adverse effect on visual amenity as experienced from different places within the immediate area (in the latter case, having considered both private properties and parts of the Mill Creek Local Purpose Reserve - Esplanade).¹⁸
83. We outlined Mr Norwood's opinions earlier in this decision. We note that his opinion on the effects of density were based on his understanding of the degree of residential development that could be expected on the site (which we disagree with) and the fact that in his opinion, Lots 4-8 development were not widely visible outside the site. We consider his assessment failed to properly consider the effects on immediate neighbours, who would see these lots and experience a more dense living environment, regardless of the screening proposed. Amenity is more than simply visibility.
84. We make the following findings on landscape effects:

¹⁶ Summary and rebuttal evidence of Erica Gilchrist paragraph 10.11

¹⁷ Evidence of Stephen Skelton paragraphs 35 and 36

¹⁸ Evidence of Stephen Skelton paragraph 36

- i. We agree with Mr Skelton that this particular area has a parklike character and do not consider that opinion is inconsistent with his opinion that this is a rural residential area containing many of the characteristics referred to by Ms Gilchrist. It was clear to us on our site visit that the North Lake Hayes subzone has its own special characteristics which are quite different to other areas of land zoned rural residential in the district.
- ii. We do not consider the subject site to have a high degree of pastoral character.
- iii. Ms Gilchrist's assessment was founded on her understanding of the level of anticipated development that could be expected for the subject site. We do not agree with that assessment.
- iv. We consider the development of Lots 4-8 will be lineal in nature and therefore prefer Mr Skelton's evidence on this topic.
- v. As set out above, the starting point for the anticipated level of subdivision/development must be derived from the 8000m² minimum average lot size, not the 4000m² put forward by Ms Gilchrist and the Applicants' other witnesses, and by Ms Baker. As we have noted earlier in our decision, we do not accept the suggestion that 10 lots of 4000m² is anticipated on this site and that this forms any sort of baseline for what this proposal should be measured against. In our view, as the site is 4.0519 ha in size, dividing this area to achieve an 8,000m² lot average would provide for 5 lots. This, in our view, is the starting point.
- vi. Of the 5 lots, we acknowledge that one of these lots would most likely be the local purpose reserve on either side of Mills Creek. We consider that level of development to be appropriate. It would maintain the level of openness and parklike character described by Mr Skelton and would ensure that the levels of residential amenity enjoyed by neighbours are maintained. Moreover, subdivision at this level would achieve the District Plan's policy approach for the Rural Residential Zone.
- vii. Lot 9 is located on a prominent slope and its effects cannot be mitigated. Even if we had decided that Lots 1 to 8 were acceptable in planning terms, we would have refused consent for development on proposed Lot 9.
- viii. While the access road travelling from the western end of the property along the southern boundary of the subject site has been shortened and moved further north, we are of the view that it will cause adverse effects on the neighbours to the south that cannot be appropriately avoided, remedied or mitigated. An alternative access, from Arrowtown-Lake Hayes Road would be more appropriate. This would utilise an existing access way and would ensure that many of the effects of passing traffic were absorbed by one of the Applicants, Mr Dennison, instead of being absorbed by his neighbours.
- ix. We were not satisfied on the evidence provided to us that there was no need for an earthworks consent given the steepness of the proposed access way (see discussion below).

- x. We do not consider there will be adverse landscape effects from Lots 5-8 on the esplanade reserve along Mill Creek. However, Lot 4 is very close to Mill Creek and would adversely affect the esplanade reserve. Lot 9 is high in the landscape and will cause adverse visual effects on this public area and especially on the Carran and Jarvis properties.

85. We comment at the end of our decision on our overall view of the proposal and possible redesign.

Servicing, access and traffic

86. Mr Bartlett provided a traffic assessment for the Applicants. He did not give evidence.

87. Mr Vermaas reviewed this assessment and noted that he had some safety concerns about the use of the existing road into the west of the site but also noted that these could be addressed if this application was approved.. This involved installing a curve warning sign and advisory speed of 25km/hr and removing vegetation up to the road boundary on the inside of the same tight curve to improve driver visibility.

88. Mr Vermaas noted the access off Rutherford Road was in general accordance with Council's E1 standard but that the development and its additional lots would normally require an upgrade to an E2 standard, being a 5.5m sealed formed width with a 9m legal width which would allow 2 movement lanes. However, such upgrading would leave insufficient space to place shared services and road drainage. Mr Vermaas recommended that the road remain at E1 standard but recommended that extra passing bays at 50m intervals be provided. Mr Vermaas had no concerns about the vehicle crossings proposed.

89. Mr Vermaas noted the Applicants' proposal for earthworks (as notified) on the access way as requiring 400m² cut and 375m³ fill with a total volume of 775m³. He noted the earthworks required along the southern boundary of Lots 4-9 involved a steep slope and that this would be a "technical breach" of Rule 22.3.3(ii)(b). This differed to the Applicant's position that no consent was required for earthworks, Mr Dennis stating orally at the hearing that the access road would be battered not retained, but would still only require no more than 400m³ of earthworks. Mr Vermaas was satisfied there would no adverse effects of earthworks on the Carran property to the south. In his Addendum Report, Mr Vermaas sought evidence of the proposed gradient for the access way, noting that he had not seen any evidence that the proposed access road gradient of 15.28% could be achieved over the distance required. He noted the final design would be a matter of discussion with Council engineers. In his final advice, he confirmed the new proposed gradient proposed by the Applicants complied with NZS:4404 but sought conditions around the road access.

90. Mr Vermaas also questioned how the 1.5m landscaped strip along the site's southern boundary would interact with the easement in gross. In response, Ms Hardman noted a response from the Applicants' engineer, Mr Dennis, had confirmed the services would be installed along the southern side of the site and would be aligned to avoid plantings and other obstructions. He was of the view that it was likely the sewer and water mains would be placed on the northern side of the access road and the easement would be of sufficient width to ensure all services were within the easement.¹⁹

¹⁹ Rebuttal evidence of Ella Hardman paragraph 39

91. The distance between Lots 4-9 and Mill Creek was noted. Mr Vermaas had no concerns about any runoff, noting appropriate containment measures could be used to prevent surface water contaminating Mill Creek.
92. As will be evident from our discussion of landscape effects, we consider there are traffic effects on neighbours from the proposed access road. We are not satisfied that the earthworks required for this access road have been properly considered. We do not consider this to be a matter to be left to the final design stage, given the ability for the access road to be provided is essential to this proposal proceeding, and the impact it might cause on immediate neighbours is clearly relevant.
93. We are satisfied that the use of Rutherford Rd to the site boundary would have been satisfactory, subject to consent conditions improving that part of the access, had we decided to grant consent. However, we consider the more appropriate access to be from Arrowtown-Lakes Hayes Road.

Natural hazards

94. Geoconsulting Limited provided a report as part of the further information requested from the Applicants. This highlighted the area was prone to flooding and liquefaction. Engineering would be required for all foundation design. The report recommended that further investigations would be necessary to determine the level of natural hazard threat and the ground improvement techniques required.
95. A geotechnical report focused on the extent of the natural hazards present and provided comment on foundation design.
96. David Hamilton & Associates Ltd provided a report on the flood hazard from Mill Creek. Minimum floor levels were recommended for each building platform on Lots 4-6 to counter the flooding hazard.
97. Mr Vermaas accepted these technical reports but initially noted that building platforms should be raised rather than simply stating in conditions that the floor levels would be raised. This would enable curtilage areas around the dwellings to also be protected. Mr Vermaas noted in his final comments to us that “the required building platforms all have to be raised by approximately 1m from their current levels.”²⁰ This was relevant to earthworks being completed prior to section 224c certification.
98. Ms Robb drew our attention to a previous agreement between the Applicants and Mr Vermaas regarding the fill conditions. Mr Vermaas agreed the condition could be amended so that it only required the finished floor level rather than the entire building platform to achieve the minimum height proposed.²¹ At the hearing, Ms Baker confirmed that she supported that position.
99. We accept there are no significant natural hazards on site and the hazards that do exist could have been mitigated through appropriate design and consent conditions had consent been granted.

²⁰ Email W Vermaas to W Baker, provided to us at the hearing on 13 October 2017

²¹ E Mail dated 28 July 2017

Infrastructure

- 100. Mr Vermaas noted that the proposed lots are located within Council reticulated scheme boundaries for sewer and water services. He was satisfied that the development could be appropriately serviced subject to some recommended conditions.
- 101. Telecommunications and electricity services can be provided to the subdivision.
- 102. On the basis of this advice, we are satisfied that appropriate services can be provided to the subdivision in accordance with the Council's standards. Conditions of consent could have addressed these matters.

Earthworks

- 103. We have noted above the extent of earthworks apparently required for the access way. We did not receive adequate evidence on the extent of earthworks required for the building platforms. Overall, we were not satisfied with the evidence on earthworks. Had we been inclined to grant consent, we would have requested this information.

Assessment Matters General

Nature Conservation Values

- 104. Section 8.3.2(i) of the Operative District Plan sets out the nature conservation values for this sub-zone. These requirement an assessment of whether and the extent to which the proposed development will result in adverse effects on water qualities, fisheries and other wildlife values, how these will be avoided, remedied or mitigated, and any opportunities for the protection and enhancement of the water quality of Mill Creek, the wetland area and Lake Hayes through the creation of new wetland areas and the fencing off of areas close to Mill Creek.
- 105. Mr Edmonds' evidence was that "The Plan anticipates a more careful layout and design, including consideration of impacts on adjoining sites. It also anticipates that wetland restoration will be identified and proposals for the management of riparian margins identified."²² This statement was made with reference to other plan provisions as well as 8.3.2(i). We do not consider 8.3.2(i) is directed at neighbours to the development. We consider the first part of the provision is directed at water quality, fisheries and other wildlife values. The second part of the provision is directed at the protection of Mill Creek's water quality and any opportunity to provide protection and re-vegetation of riparian margins of the Creek if fenced off, along with the opportunity to create wetland areas. The Applicant has offered to protect the local purpose reserve either side of Mill Creek. That has some nature conservation benefit.

Assessment Matters Subdivision

- 106. Mr Edmonds referred us to Section 15.2.3.6 which sets out subdivision assessment matters that apply to a number of zones, including this sub-zone. This requires an assessment of whether the subdivision, the location of building platforms and the proposed development maintain and enhance a number of factors including rural character; landscape values; heritage values; visual amenity; life supporting capacity of soils, vegetation and water; infrastructure, traffic access and safety; public access to and along lakes and rivers; the extent to which the subdivision, building platforms and proposed development may adversely affect adjoining land uses; matters concerned

²² Evidence of John Edmonds paragraph 48

with potable water supply, reticulated sewerage or on-site sewage disposal; and natural hazards.

107. Ms Robb submitted that these assessment matters do not apply, as the opening words of the plan provision make it clear that these do not apply to matters in which the Council has restricted its discretion. The relevant assessment matters are those related to the site standard breached, namely 15.2.6.4. We agree with that interpretation and have taken no account of the assessment matters in 15.2.6.3.

Assessment Matters Site Standard: 8,000m² average lot size

108. Section 15.2.6.4(i) of the operative District Plan sets out the relevant assessment for the Site Standard, addressing average lot density within the Rural Residential Zone. We referred to these earlier in our decision. We find that Assessment Matters 15.2.6.4(i)(e), (f) and (i) are not relevant to the consideration of this application as the proposal does not seek to provide any affordable housing, protect any heritage items, involve lot amalgamations, or involve any other Zone or Site infringements. We accept that the proposal meets Assessment Matter 15.2.6.4(i)(b) and that the wastewater and stormwater issues have been addressed, and can be accommodated without adverse effects on the receiving environment.
109. This leaves Assessment Matters 15.2.6.4(i)(a), (c), (d) and (g) as relevant matters for consideration. As we have shown through our assessment above we find that the proposal fails to meet Assessment Matters 15.2.6.4(i)(a), (c) and (d). We find that the 8 lot subdivision at the densities proposed fails to provide sufficient land area to meet the intended purpose of the Rural Residential Zone. We also find that the proposed form of subdivision is incompatible with the surrounding and adjacent pattern of subdivision in the North Lake Hayes Rural Residential Zone. We do not consider the proposal satisfies Assessment Matter 15.2.6.4(i)(g).

Cumulative effects

110. We consider the proposal would raise adverse cumulative effects. The landscape does not have the ability to absorb the additional lots and future dwellings. We consider the proposal to be too dense.

Positive Effects

111. The positive effects arising from the proposal are the financial benefit to the Applicants of subdividing the land and the protection of local purpose reserve either side of Mills Creek.

Summary of effects

112. Overall, having considered the evidence pre-circulated and presented at the hearing, the application and supporting reports, the submissions and the additional evidence provided subsequent to the hearing, and the Council's reports, we consider the proposal raises adverse environmental effects that cannot be avoided, remedied or mitigated.

OBJECTIVES AND POLICIES OF THE RELEVANT DISTRICT PLANS

113. We have considered the assessments of the objectives and policies of the relevant district plans as set out in the Application, the section 42A report and the evidence. This section of our decision will make reference to those provisions of direct relevance.
114. The Operative District Plan and Proposed District Plan apply. However, little weight can be placed on the Proposed District Plan and the Variation given their respective stages in the process. As we have already noted, the hearings on Stage 1 of the Proposed District Plan are now complete but no decisions have been issued as yet that are relevant to this application. The Variation was notified by the Council on 23 November 2017 and overrode some parts of the Proposed District Plan. To date no hearing on the Variation provisions have taken place. It was common ground for all the parties that little weight can be placed on the Proposed District Plan and the Variation.

115. There was considerable disagreement between the planning experts as to whether the proposal was consistent with the relevant objectives and policies. In essence, relying on the assessments of Mr Norwood and Mr Vermaas, Ms Baker was of the opinion that the proposal was consistent with all of the relevant policies in the Operative District Plan apart from the inclusion of proposed Lot 9. As considered above, the application was further amended through the Applicants' Right of Reply to reduce the size of the building platform for proposed Lot 9, and to ensure the future building height would not exceed 5 metres. Increased landscaping was also proposed. As Ms Baker was on annual leave, Ms Standish, a senior and experienced Council Planner, provided us with her view that the amendments would now make proposed Lot 9 acceptable.
116. Based on the views of Ms Gilchrist and Mr Dennis, Ms Hardman was of the view that that the proposal was consistent with all of the relevant policies in the Operative District Plan, the Proposed District Plan and the Variation. Mr Edmonds took a different view, stating that while the proposal to provide the local purpose reserve either side of Mills Creek was consistent with the District Plan policy approaches contained in Chapters 4, 8 and 15, the remaining elements of the proposal were contrary to the District Plan policy approach for subdivision and development in the Rural Residential Zone.
117. We find that in terms of the Operative District Plan:
- i. The provision of local purpose reserve either side of Mill Creek is consistent with District Plan policy approaches and a positive aspect of the proposal.
 - ii. Based on the evidence of Mr Skelton, Mr Edmonds and the provisions of the Operative District Plan, the proposal is inconsistent with the District Plan's policy (objectives and policies) approach for the Rural Residential Zone.
 - iii. In particular (but not limited to) Chapter 4's objective 1 and its supporting policies 1 and 8, and Chapter 8's objective 2 and its supporting policies 2.2 and 2.3, the proposal seeks a level of residential development which has not avoided, remedied or mitigated its adverse effects on the Rural Residential amenity of the local received environment and upon the adjacent properties.
118. We find that, while little weight can be placed on Proposed District Plan and the Variation, the proposal is contrary to the policy approach expressed in these future planning documents.
119. Overall, we find that the proposal is inconsistent with the relevant objectives and policies of the Operative District Plan, the Proposed District Plan and the Variation.

OBJECTIVES AND POLICIES OF THE RELEVANT REGIONAL PLANS

120. We are required to take account of the Otago Regional Policy Statement ("ORPS") in our assessment. As noted earlier in this decision, there is both an operative and proposed ORPS. Less weight may be accorded to the proposed ORPS given the breadth of appeals.
121. We outlined the relevant provisions of both plans earlier in this decision. Broadly, they seek to protect the landscape from inappropriate subdivision and to protect water quality. Objective 4.1 and its supporting policy 5.3.1 are particularly relevant here. Objective 4.1 requires the risk of natural hazards to be minimised. The location of the building

platforms, being away from Mill Creek and with raised building platforms, will mitigate the flooding risk. Policy 5.3.1 requires management of activities in rural areas to support the region's economy and communities. This proposal will not result in the loss of significant soils or result in reverse sensitivity effects as the rural land is not currently productive.

122. Ms Hardman and Ms Baker were of the opinion that the proposal meets the relevant objectives and policies of the regional policy statements. Mr Edmonds did not express a view on the ORPS.
123. While the ORPS is a higher level document designed to guide planning throughout the region as a whole, it does seek to protect landscape values and prevent inappropriate subdivision and development. As a result, based on our finding on the District Plan assessment, we find that the proposal is inconsistent with the ORPS.

OTHER MATTERS

Precedent

124. The proposal is for a restricted discretionary activity. We do not consider precedent to be relevant.

Subdivision (s.106)

125. A consent authority may refuse to grant a subdivision consent, or may grant a subdivision consent subject to conditions, if it considers that the land is or is likely to be subject to, or is likely to accelerate material damage from natural hazards, or where sufficient provision for legal and physical access to each allotment has not been made. As we have already noted, there is no risk from natural hazards on this site that cannot be mitigated against. Consent can therefore be granted under section 106 of the Act.

SECTION 104 and 104C ASSESSMENT

126. Under sections 104 and 104C, we have reached the view that the development raises actual and potential landscape effects on the environment that cannot be addressed through consent conditions. The proposal is inconsistent with relevant provisions of the district and regional planning instruments. We do not consider precedent to be relevant. Consent could have been granted under section 106 of the Act.

PART 2 MATTERS

127. There is currently a conflict in the case law as to whether it is necessary to consider a proposal against Part 2 of the Act. In RJ Davidson v Marlborough District Council²³ the High Court decided that a Part 2 assessment is not required unless the governing plan contains some invalidity, incompleteness or ambiguity. We understand this decision has been appealed to the Court of Appeal and a decision is awaited.
128. A different approach has been taken in Turners & Growers Horticulture v Far North District Council,²⁴ where a separate division of the High Court has decided that Part 2 continues to apply, at least in plan change hearings.

²³ R J Davidson Family Trust v Marlborough District Council [2017] NZHC 52

²⁴ Turners & Growers Horticulture v Far North District Council [2017] NZHC 764

129. In Envirofume Limited v Bay of Plenty Regional Council²⁵, the Environment Court has confirmed that Part 2 is still relevant to resource consents for three reasons:
- As an overview or check that the purpose of the Act and Part 2 issues are properly covered and clear;
 - To focus decision makers on the overall purpose of the consent in question; and
 - To act as a check that the planning documents have recognised, provided for, or given effect to the Act and other documents in the planning hierarchy.
130. Following the Davidson approach, we find the Operative District Plan and the operative ORPS are not subject to the three caveats of invalidity, incompleteness or ambiguity. The relevant provisions of those plans have already given substance to the principles in Part 2 of the Act.
131. Decisions on the Proposed District Plan, other than a decision on Millbrook, are not yet available. The notified version of the Proposed District Plan on which we must rely has not yet been tested as to whether it gives effect to Part 2 of the Act. The proposed ORPS has been the subject of decisions, but these have been subject to challenge through the appeal process.
132. For completeness, given the inconsistent approach of the High Court at the time of writing this decision, and in light of the Environment Court's approach in Envirofume, we have considered Part 2. Our assessment of the application is that the purpose of the Act is not achieved through this proposal.
133. The evidence is that no Outstanding Natural Feature will be adversely affected by this development. The proposal therefore meets section 6(b) of the Act.
134. Section 6(d) is met. The proposal will not restrict access along Mill Creek.
135. Section 6(h) requires us to consider the management of significant risks from natural hazards. The evidence is that there are no significant natural hazard risks and that the risks that are present can be met by consent conditions.
136. We do not consider the proposal will enable the efficient use and development of natural and physical resources under section 7(b). Nor do we consider the proposal will maintain and enhance amenity values under section 7(c) or maintain and enhance the quality of the environment under section 7(f).
137. There are no section 8 matters of relevance.
138. For the reasons set out in this decision, we do not consider the application to satisfy the relevant matters in Part 2 of the Act.

DETERMINATION

139. Consent is sought for an eight lot subdivision consent and associated land use consent for the identification of six residential building platforms.

²⁵ Envirofume Limited v Bay of Plenty Regional Council [2017] NZEnvC 12 at paragraphs 142 and 143

140. Overall, the activity was assessed as a restricted discretionary activity under sections 104 and 104C of the Act.
141. For the benefit of the parties, we stress that some form of development is anticipated for this site and the neighbours should not expect the land to remain undeveloped into the future. The submitters made it clear that they understood this and accepted some form of development was anticipated. As we have noted in this decision, the Operative District Plan anticipates development at a density comprising an average of 8000m². We acknowledge an application may be made to breach that density requirement, as the Applicants have done.
142. We consider this development to be far too dense and have reached the view that it is inappropriate for this site in its current form. In our consideration of this proposal, we thought about which of the 8 lots proposed would be the most appropriate. It was clear to us that:
- Lot 1 could proceed as the parent lot without causing adverse effects on neighbours.
 - Lot 2 could proceed, given the benefit it brings to Mill Creek and the protection of the public reserve.
 - Lot 3 has already been deleted and is not relevant.
 - Lots 4-8 would need to be revisited in order to assess which of those lots would be appropriate given the Operative District Plan's anticipated density for this site. We have noted in this decision our concern about Lot 4's location near Mill Creek and its effect on the esplanade reserve.
 - Lot 9 has no merit. It is too prominent and the effects of that lot, even as amended, cannot be appropriately mitigated.
143. We have declined the entire application rather than grant it in part so as to enable the Applicants to consider this decision and how any development on the site might be redesigned so as to better satisfy the anticipated density. We do not consider any redesign to be our responsibility.
144. As will be evident from our discussion of the access road, we consider access would be more appropriate from the Arrowtown-Lake Hayes Road and that should be factored into any redesign.
145. The Act seeks to avoid, remedy and mitigate adverse effects associated with developments. We do not consider that the adverse effects of this application can be appropriately avoided, remedied or mitigated, and have determined that the proposal is inconsistent with the relevant planning instruments.. It does not satisfy Part 2 of the Act.
146. Accordingly, we determine that consent is REFUSED.

Dated at Queenstown this 29th day of January 2018.



Jan Caunter (Chair)

For the Hearings Commission