

DOUBLE SIDED

Decision No. C 162/2001

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references pursuant to Clause 14 of the First Schedule of the Act

BETWEEN LAKES DISTRICT RURAL
LANDOWNERS SOCIETY
INCORPORATED

(RMA 1402/98)

AND WAKATIPU ENVIRONMENTAL
SOCIETY INC

(RMA 1043/98; 1394/98; 1165/98)

AND ANNE PINCKNEY

(RMA: 1329/98)

AND CLARK FORTUNE McDONALD

(RMA: 1405/98)

Referrers

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson

Environment Commissioner R Grigg

Environment Commissioner R S Tasker

IN CHAMBERS at CHRISTCHURCH

(Final submissions received 10 September 2001)



**FOURTH DECISION RE PART 5 OF THE
QUEENSTOWN LAKES DISTRICT PLAN**

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Schedule AA: Amended Part 5 of revised plan



[A] Introduction

The earlier decisions

[1] The Court issued its first decision¹ on Part 5 (inter alia) of the revised Queenstown-Lakes District Plan (“the revised plan”) on 6 November 2000. To its second decision² dated 21 May 2001 on Part 5 of the revised plan of the Queenstown Lakes District Council (“the QLDC”) the Court attached amended Part 5 objectives policies and rules as Schedule A. The Court also reserved leave for the parties to make submissions on various issues. This decision arises out of that leave and the submissions that followed. Two further matters have already been dealt with: an urgent application was made to resolve a matter about residential building platforms; a hearing held and a third decision was issued on 21 June 2001³. As to the issue of Appendix 8 there was a preliminary jurisdictional issue raised by the Upper Clutha Environmental Society Inc (“UCESI”) on which the Court issued a decision⁴ on 11 June 2001.

[2] This fourth decision on Part 5 of the revised plan follows written submissions from the parties under paragraph [86](1)(a) and (b) of decision C75/2001. The submissions received were:

- From Mr J Veint dated 10 June 2001;
- From UCESI dated 24 June 2001;
- From Mr Parker for various section 271A and 274 parties dated 3 July 2001;
- From Mr Goldsmith for various section 271A and 274 parties dated 4 July 2001;
- From Mr Marquet for the QLDC dated 27 July 2001;
- From Mr Goldsmith (supplementary submissions) dated 27 July 2001;
- From UCESI (reply) received 10 August 2001;
- From Mr Goldsmith (re indigenous vegetation) dated 5 September 2001;

¹ (First) Decision C186/2000.
² (Second) Decision C75/2001.
³ (Third) Decision C100/2001.
⁴ Decision C92/2001 (on Part 4 of the revised plan).



- From Mr Todd (re farm buildings) for various section 271A parties received 7 September 2001;
- From Mr Todd (general reply) received 10 September 2001.

The Issues

[3] In its submissions UCESI raised a number of issues about defining boundaries between (inter alia) outstanding natural landscapes and other landscapes. The issue whether boundaries should be defined between visual amenity landscapes (“VAL”) and other rural landscapes has been resolved by the decision on Part 4 referred to above.⁵ A related issue – as to whether there should be a category of outstanding natural landscapes (Inner Upper Clutha) – by analogy with those of the Wakatipu basin – is to be resolved in other proceedings relating to Part 4 of the revised plan. Finally, in relation to UCESI, we deal with the wording of Appendix 8 to the revised plan below.

[4] The issues raised by the parties, other than UCESI, in their submissions in respect of Part 5 of the revised plan are:

- (1) Do the assessment criteria breach a principle that there should not be a subjective definition of discretionary activities?
- (2) Is comparison with alternative sites ultra vires the consent authority when assessing an application for resource consent?
- (3) What is the formula for applying the assessment criteria?
- (4) What are the appropriate appendix 8 amendments to give effect to Decision C75/2001?
- (5) Should clustering of residential development be provided for?
- (6) Should farm buildings be a controlled or a discretionary activity?
- (7) Does “the private view” amendment over-emphasise private views?
- (8) Whether all outstanding natural features (“ONF”) in the district should have discretionary activity assessment criteria identical to those for the outstanding natural landscapes (“ONL”) of the Inner Wakatipu basin?



The final issue is to record:

- (9) minor corrections (noted in Schedule AA to this decision).

Background

[5] The submissions made for the council (by Mr Marquet) and for various section 271A and 274 parties (by Mr Goldsmith supported by Mr Todd) are of real concern to the Court, because at this late stage in the proceedings they seek to raise wide-ranging concerns about the rules in Part 5 in respect of:

- (a) the Court's jurisdiction to amend (by adding to) the rules in Part 5 of the revised plan;
- (b) section 32 compliance;
- (c) the substantive merits of the rules.

[6] As for (c): we are *functus officio* in respect of the substantive merits of the rules in Part 5 of the revised plan. Our reasons in the first and second decisions on that Part will have to speak for themselves. We consider issues (a) and (b) separately below. However in case these issues go further we first summarise some of the complex background to these cases.

[7] The QLDC notified its proposed plan under the Resource Management Act ("the Act" or "the RMA") in 1995 ("the 1995 plan"). We have spent very little time with the 1995 plan because its rural provisions were changed completely in the amended proposed plan ("the revised plan") which was notified, after submissions to and hearings by the QLDC, in 1998. The revised plan was notable in three ways:

- (1) its brevity compared with the 1995 plan;
- (2) the vapidness of its district-wide objectives and policies in respect of landscape issues, in particular the failure to identify, let alone manage the outstanding natural landscapes and features of the district;
- (3) the fact that most of the district's land area was lumped into a "rural general" zone - similar to those found elsewhere in farming districts in



New Zealand - with very little or no guidance as to how to achieve the purpose of the Act in respect of the landscapes of the district.

[8] In particular the revised plan (before the Court's decisions on references) did not adequately recognise or anticipate that in some parts of the district – especially, but not exclusively, the Wakatipu basin between Queenstown and Arrowtown - most rural land appears to be far more valuable or, at least, sought after for residential subdivision and development than for farming. The Court records suggest that, excluding the possibility of further development in the existing so-called “Rural Living” zones,⁶ there are (or have been since 1995) appeals under section 120 or references under the First Schedule to the Act seeking resource consents or zoning rights for 1000 or more allotments in the Wakatipu basin alone⁷. In addition there were other references in which zone changes were sought from rural general to specific “rural-living” type zones - in relation to the Millbrook resort (near Arrowtown) and by Fordyce Farms Ltd (RMA 1370/98) along Littles Road - that may or may not result in further residential development.

[9] In the Queenstown landscape decisions - *Wakatipu Environmental Society Inc and Others v Queenstown Lakes District Council*⁸ - on the district-wide objectives and policies in Part 4 of the revised plan the Court set amended objectives and policies for landscapes in the district after first recognising that one of the key issues in any particular location is to ascertain whether or not it is part of an outstanding natural landscape (or feature).

[10] Turning to these proceedings on Part 5 of the revised plan:

- The Wakatipu Environmental Society Inc (“WEST”) in RMA 1394/98 sought that residential development be:
 - (a) non-complying in what were described as “Areas of Landscape Importance” in the 1995 plan – very loosely corresponding to outstanding natural landscapes and features;

⁶ Defined in Part 8 of the revised plan (examples in the Wakatipu basin are located at Dalefield and Lake Hayes North).

⁷ The figures are skewed by several very large proposals (e.g. one below Ladies Mile for over 400 allotments and another at Bendemeer, east of Lake Hayes for over 50).

⁸ C180/99; C74/2000.



- (b) non-complying for subdivision into lots of less than 20 hectares; and discretionary above that figure.
- The Lakes District Rural Landowners Society Inc (in RMA 1402/98) sought that residential subdivision be discretionary for lots of 10 hectares or less throughout the rural general zone;
 - The Council argued for a 4 hectare minimum lot size in the rural general zone.

[11] In the first and second decisions on Part 5 of the revised plan we were persuaded that since landscape and nature conservation values were very important but also varied from location to location that residential subdivision and development should be discretionary activities in the rural general zone. In the second decision on Part 5 we also recognised that the revised plan gave some protection to the rural amenities of people who already reside in the rural general zone.

[12] There is a limit to how much more residential development the rural areas of the Wakatipu basin can absorb without affecting landscape and rural amenities - as we have stated in our earlier decisions. Each new residential subdivision and development has both direct and cumulative effects. The proposed rules attempt to allow for some limited further subdivision and residential development while avoiding remedying or mitigating the adverse effects, especially the cumulative effects. Nor should it be forgotten that in addition to the important landscapes of the district, all the land in issue in these proceedings is zoned rural and that "rural amenities" are protected by the objectives and policies of Part 5 of the revised plan as we discussed in the second decision on that part.

[13] The background as set out above is relevant to the main jurisdictional challenge. That is based on the fact that some of the assessment matters⁹ for the discretionary activities (subdivision and residential development) are stated as tests which must be met, rather than as criteria to weigh (for the reasons given in the second decision). We deal with the legalities shortly, but record here that it was Mr Goldsmith and/or Mr Todd's witness Mr J A Brown who, when giving evidence that discretionary activities could ensure adequate management of the landscape laid some emphasis on the criteria

⁹ In Schedule A to decision C75/2001.



as tests that had to be satisfied¹⁰. We accept that Mr Brown's criteria were to apply to the outstanding natural landscapes of the Wakatipu basin rather than visual amenity landscapes. Further while initially he described the criteria as "tests" they are worded as guidelines. However later in the same passage he changes his view, apparently. If there were jurisdictional doubts about that procedure then Mr Goldsmith and/or Mr Todd had a duty to the Court in the hearings in 2000 to raise those doubts about the legality of their own witness' suggested tests or criteria.

[14] There is a similar point in relation to the section 32 issues now raised by Mr Goldsmith. The Court has, in the course of argument, repeatedly stated its concern about the costs of making all subdivision and residential development (in the rural general zone) discretionary activities. One of our reasons for that, in addition to the lack of certainty for landowners and applicants, was the costs to landowners of obtaining resource consent. Despite that it was urged on us quite forcefully by Messrs Todd and Goldsmith prior to the first decision¹¹ that the discretionary path was the method to use. Accordingly we are uncomfortable with the objections to the discretionary assessment matters now being made under section 32 on grounds of excessive compliance costs. It is in our view far too late to raise that point now. Equally it is too late for the QLDC to suggest that a 4 hectare minimum for subdivision be reinstated as Mr Marquet suggested.

[15] At all points in what follows we bear in mind that the first and second decisions are on the substantive merits. We cannot now reconsider those issues, despite some of the submissions of counsel which seem to invite us to do so. All we can do in this decision is to consider first, the jurisdictional points which have now (belatedly) been raised and secondly, consider any suggested amendments to the rules of Part 5 within the spirit and intent of the earlier decisions. The two jurisdictional issues are dealt with in Parts [B] and [C] of this decision. In Part [D] we consider the submissions on proposed amendments to the rules of Part 5 of the revised plan. Part [E] sets out our orders and ancillary directions.



¹⁰ See the quotations from his evidence and our conclusion at para [29] of the first decision [C186/2000].

¹¹ Decision C186/2000.

terms” in para (c) of the definition) when it comes to the decision as to which of the final two categories – discretionary or non-complying - the activity falls into. Section 105(4) reinforces this point.

[40] When a farmer or other landowner thinks of subdividing and building a residence on their land in the Wakatipu basin (or on an outstanding natural feature anywhere) they are not so concerned with whether the building is described as “*discretionary*” or “*non-complying*”. They wish to know first whether they need to apply for a resource consent (with the attendant cost) and secondly whether the application will be notified (with the potential escalation of costs that implies).

[41] In our view the primary classification of building as a discretionary activity remains valid. The conditions of proposed rule 5.4, while they may give a discretion to the Council to recategorise the activity from discretionary to non-complying, are not beyond the Council’s powers.

[42] We hold that:

- (1) the “tests” in the assessment criteria which use the formula “*the Council must be satisfied that ...*” are *terms* within the meaning of paragraph (c) of the definition of “discretionary activity” in section 3 of the Act and that they apply to the discretionary activity of constructing buildings; and
- (2) the tests are not part of the definition; and
- (3) the tests do not invalidate the definition of the discretionary activity of “building” by importing a subjective element.

[C] *The legality of the alternative sites criterion*

The issues

[43] For convenience we cite the particular assessment matter which is challenged as altered by the Court in the second decision⁴³. It reads⁴⁴:

⁴³ Decision C75/2001 [Schedule A pp.28-29].

⁴⁴ Rule 5.4.2.2(3)(c)(v) in Schedule A to Decision C75/2001.



(c) *Form and Density of Development*

In considering the appropriateness of the form and density of development the following matters shall be taken into account whether and to what extent:

- (i) *there is the opportunity to utilise existing natural topography to ensure that development is located where it is not highly visible when viewed from public places;*
- (ii) *opportunity has been taken to aggregate built development to utilise common access ways including pedestrian linkages, services and open space (ie. open space held in one title whether jointly or otherwise);*
- (iii) *development is concentrated in areas with a higher potential to absorb development while retaining areas which are more sensitive in their natural or arcadian pastoral state;*
- (iv) *The proposed development, if it is visible, does not introduce densities which reflect those characteristic of urban areas.*
- (v) *If a proposed residential building platform is not located inside existing development (being two or more houses each not more than 50 metres from the nearest point of the residential building platform) then on any application for resource consent and subject to all the other criteria, the suitability of all possible sites:*
 - (a) *within a 500 metre radius of the centre of the building platform, whether or not:*
 - (i) *subdivision and/or development is contemplated on those sites;*
 - (ii) *the relevant land is within the applicant's ownership; and*
 - (b) *within a 1,100 metre radius of the centre of the building platform if any owner or occupier of land within that area wishes possible future development on that alternative site(s) to be taken into account as a significant improvement on the proposal being considered by the Council*
 - *must be taken into account.*
- (vi) *recognition that if high densities are achieved on any allotment that may in fact preclude residential development and/or subdivision on neighbouring land because the adverse cumulative effects would be unacceptably large.*
[our emphasis]



This issue relates to (v) alone (“the radius criterion”). The radius criterion is supported by WESI, UCESI and Mr Parker’s clients but opposed by the Council and Messrs Goldsmith’s and Todd’s clients.

[44] The questions raised by the parties about the radius criterion are:

- (a) Is it ultra vires as being too subjective?
- (b) Is it too vague to be valid?
- (c) Does it pass the section 32 tests?

[45] Before we turn to answer those questions, there is one other matter we should resolve. In his submission received in July 2001 Mr Goldsmith expressed concern at the statement in decision C75/2001⁴⁵:

Indeed at other points in their argument during these hearings both Mr Goldsmith and Mr Todd argued that “first come, first served” was the correct approach.

[46] In his submissions of 4 July 2001 Mr Goldsmith wished to record:

- i. *To the best of Counsel’s recollection Counsel at no stage made a submission endorsing or supporting the “first come, first served” principle. If anything, Counsel’s submissions had a contrary flavour.*
- ii. *While accepting fully the Court’s observation that the RMA can result in a “first come, first served” outcome – particularly in relation to “cumulative development” issues – Counsel would consider that to be, in some circumstances, a consequential environmental outcome rather than a desirable principle.*
- iii. *Rural amenity issues in particular involve a balancing exercise between the reasonable expectations of individuals on the one hand and, on the other hand, the reasonable expectations of other landowners (in terms of*



⁴⁵

Paragraph [31].

section 9) and the needs of the community (in terms of the efficient use and development of land as a natural and physical resource).

- iv. To the extent that C75/2001 may be read as endorsing "first come, first served" as a desirable principle – which is possibly how paragraph 31 may be read (and Counsel is unclear whether the last sentence of paragraph 31 is intended to endorse/support that principle or the contrary) – Counsel would express a concern.

[47] We acknowledge that counsel's written submissions did not refer in so many words to the "first come, first served" principle. Nor were those words used by counsel in oral argument. However when in oral argument prior to the first decision, the presiding Judge put to Mr Todd the scenario of a landowner applying for a resource consent to subdivide and build in the Wakatipu basin that might preclude a neighbour from later obtaining a similar consent (even though the neighbour's site might be more acceptable under the RMA) because the second proposal would then lead to cumulative over-domestication, Mr Todd's trenchant reply was: "*That's tough*". The Court took that as being equivalent to adoption of the "first come, first served" principle.

[48] Whether we were correct or not in our understanding of counsel's position we cannot, despite Mr Goldsmith's submissions to the contrary, see his continued opposition to the radius criterion other than as a stand by his clients in support of a qualified first come first served principle at least to the extent that they wish to preclude consideration of alternative sites.

The purpose and scheme of the RMA

[49] As to its legality of the radius criterion we start in Part II with the purpose of the Act: the promotion of sustainable management. In these circumstances that means⁴⁶ managing the development and use of visual amenity landscapes in a way which enables people who can afford to live in Wakatipu basin to provide for their wellbeing while⁴⁷:



⁴⁶

Section 5(2) of the RMA.

⁴⁷

Section 5(2)(a) and (c) of the RMA.

(a) *sustaining the potential of [the landscape] ... to meet the reasonably foreseeable needs of future generations; and*

...

(b) *Avoiding, remedying or mitigating any adverse effects of activities on the environment.*

There is no conflict between the radius criterion and the purpose of the Act, since the rule is designed both to meet the needs of present and future generations to enjoy the rural landscape of the basin and to avoid, remedy or mitigate cumulative adverse effects of domestication of the landscape. In fundamental terms there is no problem with the radius criterion.

[50] Part III provides various duties and restrictions on any person in respect of land, water and air use (or discharge). The position in respect of land differs from discharges to air and water in that any person may use their land⁴⁸ as they wish unless a rule in a plan controls that (or, given such a rule exists) that a resource consent is obtained. The problem when considering alternative sites or methods is that they may not be on land owned occupied or otherwise controlled by an applicant for resource consent. In that case what is the point of considering alternatives since the alternatives may be totally academic as far as an applicant is concerned. Further consideration of alternatives is redolent of the 'direct and control'⁴⁹ ethos of the TCPA. Under the RMA it is difficult to see how a rule directing consideration of alternatives could pass the cost/benefit and other tests of section 32 of the Act in the absence of section 5(a) and (b) or section 6 matters or particularly powerful section 7 considerations (for example as to amenities).

[51] In Part IV of the RMA the functions of a territorial authority (such as the Council) include⁵⁰:

...

(a) *The establishment, implementation, and review of objectives, policies, and methods to achieve integrated management of the effects of the*

⁴⁸ Section 5(9)(1) of the RMA.
⁴⁹ Section 4 TCPA.
⁵⁰ Section 31 of the RMA.



use, development, or protection of land and associated natural and physical resources of the district:

(b) The control of any actual or potential effects of the use, development, or protection of land ... transportation of hazardous substances:

(c) The control of subdivision of land:

...

[52] When it is remembered that effects are defined⁵¹ to include cumulative effects we consider that the combination of Parts II and IV of the Act and in particular the specific sections we have referred to means that two of the Council's functions are to avoid, remedy or mitigate the adverse cumulative effects of activities upon the landscapes of the district, and to integrate the development and use of those landscapes. In certain cases this may allow a plan to direct the consideration of alternative sites or methods.

[53] In Part V of the Act, one of the methods by which a territorial authority is to carry out its functions (so as to achieve the purpose of the Act) is in the preparation of the obligatory district plan.⁵² A district plan must contain objectives, policies and methods of implementation⁵³ (amongst other things). The latter may include rules which may apply throughout the district or make different provisions for different parts of a district⁵⁴. In our view this last is the authority for the preparation of zoning maps which show what effects (or activities) are allowed in various parts (zones) of the district. It is of course not essential to have zones, but it is a permissible technique. It is important to recognise that zones presuppose that a territorial authority has made some decisions (preferably backed up by a section 32 analysis) that certain activities (or kinds of effects) are better in some locations than in others. In the case of the revised plan there is a decision that the rural general zone is primarily for rural activities.

[54] Turning to Part VI of the RMA which deals with the subject of resource consents this provides that:



51

Section 3 of the RMA.

52

Sections 73 and 74 of the RMA.

53

Section 75 of the RMA.

54

Section 76(4) of the RMA.

- (1) any person⁵⁵ may apply for a resource consent (i.e. the right is not confined to owners or occupiers of the resource involved);
- (2) an applicant for a resource consent needs to file with the consent authority an assessment of environmental effects ("AEE")⁵⁶ which must be prepared in accordance with the Fourth Schedule;
- (3) Where it is likely that an activity will result in any significant adverse effect on the environment, the AEE should include:⁵⁷

a description of any possible alternative locations or methods for undertaking the activity:
- (4) Further if the territorial authority is of the opinion that any significant adverse effect may occur as a result of a proposed activity then the Council may require⁵⁸ an explanation of "*any possible alternative locations or methods for undertaking the activity ...*"

[55] Despite those provisions there is nothing in the matters to be considered by a consent authority⁵⁹ expressly stating that it must consider alternatives. By contrast a territorial authority must look at alternatives when considering a requirement under section 171 of the Act. There is in our view a simple explanation for the difference: a requirement does not necessarily occur as part of the integrated management in a plan, but may be simply thrust into it. Nor is there any need for an AEE in the case of a requirement. So it would be wrong to read the procedures for a requirement as implying that no consideration of alternatives is needed in the consideration of a resource consent application.

[56] When considering a resource consent application the existence of alternative locations or methods is a matter to be considered under section 104(1)(i) of the Act ("other matters") in the absence of discussion of the issue in the plan being considered. But where the plan does discuss alternatives then the issue arises under section 104(1)(c) of the Act.

⁵⁵ Section 88(1) of the RMA.
⁵⁶ Section 88(4)(b) of the RMA.
⁵⁷ Fourth Schedule para 1(b) of the RMA.
⁵⁸ Section 92(2) of the RMA.
⁵⁹ Section 104 of the RMA.



Relevant cases

[57] There is a decision of the Court of Appeal which we drew to the parties attention: *Fleetwing Farms Ltd v Marlborough District Council*⁶⁰. Some, through the submissions of Mr Goldsmith, relied on this case as authority for the proposition that a consent authority cannot consider alternatives. The Court of Appeal stated⁶¹:

Section 102 is concerned with joint hearings by consent authorities where applications for resource consent have been made to 2 or more consent authorities. Section 103 is concerned with combined hearings where 2 or more applications for consent in relation to the same proposal have been made to a consent authority. Significantly, both sections are confined to application involving a single applicant (see for example s102(1)(b) and s103(1)(b). That is consistent with the approach taken by the legislature in ss104 and 105. Clearly the statute requires each applicant's application or applications to be determined on their own merits. It does not allow for a comparative assessment of competing claims to the same resource.

The conclusion that the statute requires the council to judge each case on its merits also accords with the primacy attached to s5. If the relevant statutory criteria infused with the underlying objective of sustainable management are met in a particular case there is nothing in the Act to warrant refusing an application on the ground that another applicant would or might meet a higher standard than the Act specifies.

Further, the statutory scheme requires the council to focus on that consideration and determination of each application so as to meet the prescriptive and tight timetable. In each case the council must advance the application through to the point of public notification and then plan for the hearing and determination of the application so as to meet the statutory time-limits. It is, we think, implicit that if another applicant applies for a similar resource consent while the first



⁶⁰ [1997] 3 NZLR 257; [1997] NZRMA 385.
⁶¹ [1997] 3 NZLR 257 at 264.

application remains undecided, that does not justify comparing one against the other and failing to give a timely decision on the first application on its merits and without regard to the other (Our emphases).

[58] In *Fleetwing* the Court of Appeal then concluded that when two applicants for a coastal permit applied in respect of the same area (and volume) of water that each application should be considered on its merits, and that the consent authority had a duty to decide which application had priority.

[59] Relying on *Fleetwing* Mr Goldsmith submitted:

- a. *The radius [criterion] essentially creates a situation which mandates a comparative assessment between more than one applicant (comprising the actual applicant plus a number of hypothetical other applicants) for what is potentially the same resource (on the assumption that the only reason for the comparison is that one might succeed and one might fail).*
- b. *If there were two actual consent applications (rather than one application site being compared against other hypothetical development sites) an approach involving comparison of the merits of the two applications would not be permitted under *Fleetwing*.*
- c. *It would be bizarre if such a comparative exercise were permitted when there is only a second hypothetical application where it would not be permitted if there were a second actual application.*
- d. *The radius [criterion] is essentially contrary to the Court of Appeals' determination on this issue in *Fleetwing*.*
- e. *While the radius criterion approach may be considered by the Court to be a desirable method of addressing the issue of cumulative effect, *Fleetwing* does not allow it.*

[60] *Fleetwing* can be distinguished on three grounds:

- (1) it is concerned with the situation where two actual applications deal with exactly the same resource; and



- (2) there were no rules (that we know of) in any relevant plan as to alternative locations or methods; and
- (3) we are not suggesting, in these proceedings, a higher test than the Act requires. The criterion we are proposing is one of an unseverable set that we regard as the minimum which might just, possibly, achieve the purpose of the Act.

The first point is important because the question of cumulative effects was unlikely to arise: at the most only one application for the site would be successful since it appears that the applications were mutually exclusive⁶². The second and third points mean that *Fleetwing*, while very persuasive, is not actually binding on us in these proceedings because it can be distinguished.

[61] In the situation contemplated by the radius criterion there is the potential for cumulative effects. If an application is granted - in part because there is no other development in that particular rural area - that obviously complicates the issues when another site in a neighbouring location is considered. We emphasise it is not a question of meeting a higher standard than the RMA requires, but of appropriate use in the really limited landscape resource (especially of visual amenity landscape in the Wakatipu basin) within the district.

[62] Another potential restriction on consideration of alternative locations is raised by the decision of the Court in *Cullen v Kaipara District Council*⁶³ which concerned an application for resource consent to build and use a driveway over a piece of land ("Lot 7") to serve 7 properties on the Kaipara harbour. The appellants claimed that a better solution was to formalise access over another lot ("Lot 17") which was in fact controlled by the appellants and over which access had been formed. The Environment Court referred to *Fleetwing* and stated⁶⁴:

⁶² We note that section 12 of the Act contemplates that that is not always the case for coastal permits i.e. that two or more may be able to coexist in the same waterspace.

⁶³ Decision A15/99.

⁶⁴ Decision A15/99 at para 26.



... The importance placed by the Court of Appeal on a consent authority considering each resource consent application on its own merits is just as applicable to the case where (as here) there is only one resource consent application.

[63] We respectfully consider that statement needs to be qualified. The Court in *Cullen* did not consider Parts II (except to discuss section 7(b)) III or IV of the Act. It did refer to the Fourth Schedule to the Act, but stated that the requirement of an AEE to look at alternatives⁶⁵:

[B]y its own terms ... does not apply to the consideration of resource consent applications by a consent authority.

[64] Bearing in mind the power of the Council to make further inquiries about alternatives in section 92 (discussed above) we respectfully consider that Parliament has not imposed the duty on an applicant for resource consent, nor given the power to a consent authority without reason. The inference is that alternative locations or methods may - perhaps in some cases, should - be considered by a consent authority.

[65] The power to consider alternatives has to be exercised with real caution – especially in the absence of guidance in a district plan – but it does exist. As a hypothesis let us put the *Cullen* situation in the Wakatipu basin and add a scenario where Lot 7 proposed access was over a highly visible hillside, but the Lot 17 formed access was (even though in different ownership) in a hidden gully. In our view it must be wrong under the RMA to say that as a matter of jurisdiction one cannot consider the formed Lot 17 access. Failure to negotiate a reasonable solution to obtain legal rights of access (if Lot 17's owner holds out for an unreasonable sum) would be a powerful consideration on the merits. But in our view, in some circumstances where important resource management issues are raised, the consent authority should look at alternatives even if they are not within the capacity of the applicant to arrange. The fact that an applicant does not have the capacity would often mean that the alternatives would be



⁶⁵

A15/99 para 31.

practically irrelevant. That is not necessarily so in exceptional circumstances such as might be found to exist in the Wakatipu basin. However, all we have to do in this decision is to decide whether consideration of alternatives is not automatically irrelevant as a matter of jurisdiction.

[66] Interestingly in *Cullen's* case the operative district plan did contain a relevant rule making the formation of the driveway a discretionary activity. The Council's exercise of discretion was limited to⁶⁶ (relevantly):

The environmental effects related to compliance with the standards and whether alternate building designs or layouts or methods of earthworks and vegetation clearance provide a better means of avoiding or mitigating environmental effects. [our emphasis]

The Court continued⁶⁷:

36. *If the interpretation advanced for the appellants is correct, the reference in item (iii) to alternative designs, layouts, or methods would extend to alternatives involving the use or development of resources beyond the applicant's capability to carry out. It would expose applicants to opposition on hypothetical bases dependent on dealing with their adversaries for use of the adversaries' resources.*
37. *If the interpretation advanced for the respondent is correct, the reference to alternative designs, layouts or methods would be confined to those within the applicant's capability, using the natural and physical resources the subject of the resource consent application.*
38. *We consider that the key to selecting the correct interpretation is to prefer that which is consistent with the statutory scheme of considering applications on their own merits. The District Council should be taken to have intended that its district plan, made under the Resource Management Act, would be consistent with the scheme of that Act. Accordingly we hold that the correct interpretation of Rule 13.2.7 is to limit the scope of the*

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Decision A15/99 at para 34.

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Decision A15/99 at paras 36-39.



alternatives under item (iii) to those capable of being carried out within the capability of the applicant within the natural and physical resources the subject of the application.

39. *In this case the alternative access across Lot 17 is not within the capability of the applicants, who do not have right of way over that land; and it is beyond the natural and physical resources of Lot 7 which are the subject of the resource consent application.*

[67] We respectfully disagree with the Environment Court's interpretation because in *Cullen* it has only examined the issue in the context of sections 88, 104 and 105 – ignoring, in our view, both section 92(2) and the wider scheme of the RMA.

[68] We respectfully prefer the approach of Principal Planning Judge Sheppard (as he then was) in *Transpower NZ Ltd v Rodney District Council*⁶⁸. He was concerned with appeals against refusal of a resource consent for extension of a high-tension transmission line. The opponents of the proposal wished to have the Planning Tribunal consider an alternative route. Transpower argued as a preliminary point that evidence as to the alternative route was inadmissible. The learned Judge referred to Clause 1(b) of the Fourth Schedule to the Act, and to section 92(2)(a) and then concluded:⁶⁹

... the provisions in the Act about alternative locations and methods are stated in the widest possible terms.

There ought to be some limit to what is raised as alternative locations and methods, but except in extreme cases it is difficult to prescribe that limit in advance of the substantive hearing of the proceedings. Opponents who raise alternatives that are too remote or outlandish might expect to be ordered to meet the costs of the applicant in investigating and responding to them.

However with the limited knowledge I have about this case I do not find that a possible transmission line route that deviates from the existing line before its ending but reaches the same destination at Foundry Road is necessarily to be

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Decision A56/94.

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Decision A56/94 page 2.



rejected from falling within the class of "any possible alternative locations or methods for undertaking the activity". It is clear that alternatives only fall for consideration if it is found likely that the activity would result in any significant adverse effect on the environment. A finding on that can only be made after the evidence has been heard, so for the present purpose I assume (without finding) that the threshold will be passed.

We read this decision as affirming that the question of alternatives is one of the practical and substantial merits, not a question of jurisdiction.

[69] We have considered whether we should ask for submissions on the recent decisions of the Court of Appeal in *Dye v Auckland Regional Council and Another*⁷⁰ and *Arrigato Investments Ltd and Another v Auckland Regional Council and Others*⁷¹. However, given that those cases relate to resource consents not the legality of proposed plan provisions, and that there is some urgency to resolve the rules of Part 5 of the revised plan, we have concluded it is preferable simply to refer to the decisions ourselves and see if there is anything in them which might affect our conclusions as to vires.

[70] The most relevant passage appears to be in *Dye*⁷²:

[44] The [High Court] Judge was of the view that it was necessary for the Environment Court [on considering applications for resource consent] to carry out what he described as an area-wide assessment with input from all relevant areas of expertise. He said that the increase in population density resulting from all like proposals might have adverse effects which were quite unforeseen when the matter was looked at from the point of view of an individual site.

[45] In order to be able to hold that the Environment Court's failure to make the Judge's "area wide assessment" amounted to an error of law, the Judge must have been of the view that what had been omitted was a mandatory requirement.

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CA86/01, 11 September 2001 (Judgment delivered by Tipping J.)

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CA84/01, 11 September 2001 (Judgment delivered by Tipping J.)

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CA86/01, 11 September 2001 (Judgment delivered by Tipping J. paras 44-46).



We cannot accept that proposition. The correct approach to the concept of effects, as described in our earlier discussion, does not make it mandatory to adopt the sort of exercise the Judge had in mind. Nor does s104(1)(d) have that consequence, the more so in the light of the Environment Court's conclusion, which we have held not to have been erroneous in law, that the proposed subdivision was not contrary to the objectives and policies of the plan. There are good policy reasons why such an inquiry as that contemplated by the Judge should not be regarded as mandatory in present circumstances. Compliance with the manifold requirements of the Resource Management Act is already complicated and expensive enough as it is; some would say too complicated and expensive. To require applicants for consent to non-complying activities to entertain, on a mandatory basis, an area-wide inquiry to deal with all the possible future implications of the granting of the particular consent, would impose very considerable additional burdens on all concerned. It would also be a rather speculative exercise.

[46] We are reinforced in the view we take by the following passage from the decision of the Environment Court in Wellington Regional Council (Bulkwater) v Seafresh NZ Ltd (unreported decision no. W03/98):

For our part, we cannot see any rush of applications for resource consents for abstraction but if there were and if they were of significance, then each would need to be considered on its merits. We do not accept that the RMA allows us to arbitrarily refuse an application for a resource consent on the basis that hypothetical applicants may appear and be granted consents based on a grant of this consent without further examination of the capacity of the resource. It is our opinion that the 1993 amendment to the RMA by including the word "environment" in s104(1)(a) clearly intended to restrict the word "effect" (which was previously unqualified). This brought s104 into line with s105(2)(b)(i) relating to adverse effects on the environment. That evinced a deliberate legislative intent and it is our opinion that to now attempt to define the word "effect" in s3 as referring to conjectural future actions by persons unknown who are not even parties to proceedings is stretching the intention of Parliament beyond that intended by this Act. The



word "effect" has now the s104 qualification that it must be "on the environment". Furthermore, to even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dike to be breached without evincing any further interest and control, merely because it has granted one consent.

[71] The differences between the radius criterion in these proceedings and the High Court Judge's "area wide assessment" – not accepted by the Court of Appeal in *Dye* – are obvious:

- (1) the radius criterion is a specific method to be identified in the revised plan whereas the *Dye* assessment was implied (erroneously) by the High Court from the provisions of the Act and to be applied (apparently) to the assessment of a resource consent;
- (2) the invalid assessment in *Dye* was either district or "area" wide, whereas the radius criterion is, by definition, limited to a circle of diameter 2.2 kilometres;
- (3) in the radius criterion not "all the possible future implications of the granting of the particular "consent" are to be considered – which is what concerned the Court of Appeal in *Dye* - but only certain identified implications relating to landscape qualities and amenities.

[72] Further the Court of Appeal in *Dye* did not state that it is ultra vires to impose a method of implementation like the radius criterion in a plan under the Act. At the most it held that an area-wide assessment is not required by the RMA in the absence of rules on the issue. Arguably the reason for that part of the decision in *Dye* was⁷³:

We do not consider that the facts of the present case were such that the Environment Court erred in law by not specifically addressing that sort of issue.



[73] The decision of the Environment Court (referred to and quoted by the Court of Appeal in *Dye) Wellington Regional Council (Bulkwater) v Seafresh NZ Ltd*⁷⁴ is perhaps even more relevant to these proceedings if only by contrasting metaphor. The concerns of the Wakatipu Environmental Society (on landscape grounds) and Mr Parker's clients (on landscape and amenity grounds) are that the "dikes" (i.e. the plans) protecting the rural landscapes of the Wakatipu basin from a flood of residential development have been breached in many places. We have found those concerns to be real. Accordingly, it is proper in our view (and substantively justified by our first and second decisions on Part 5) to put in place a method of implementation such as the radius criterion.

Is the radius criterion too vague to be valid?

[74] Mr Marquet, for the Council, raised several other jurisdictional problems with the radius criterion. First he submitted that the language of the proposed criterion is too uncertain. In general terms we do not think that can lead to invalidity since in the vocabulary of "landscapes" and "discretionary activities" – both necessarily fuzzy-edged concepts - there is inevitably considerable uncertainty. Turning to the detail:

- (1) We consider that the phrase "the sustainability of all possible sites" can be brought closer to the language of the Act by substituting the phrase: "*... the existence of alternative locations or methods ...*"
- (2) Mr Marquet criticised the qualifying clause in the radius criterion (v)(a) which begins "whether or not ..." but since that clause is simply to ensure irrelevant considerations are not taken into account we cannot see it does any harm, and may do some good in guiding readers in the right direction.
- (3) In the radius criterion (v)(b), the phrase "*... wishes possible future development on that alternative site(s) to be taken into account ...*" was "of the utmost concern" to Mr Marquet. The offending words "*... possible future development on ...*" can simply be deleted. However it



⁷⁴ (unreported) Decision W03/98.

