IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2021-425-4
[2021] NZHC 3609

UNDER	the Resource Management Act 1991
IN THE MATTER	of an appeal under s 299 of the Act
BETWEEN	MICHAEL CAMERON BRIAL AND EMILY JANE O'NEIL BRIAL Appellants
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	S AND S BLACKLER and SLOPE HILL FARM TRUSTEE LIMITED Interested Party

Hearing: 23 September 2021

Appearances: J G Miles QC and A R C Hawkins for Appellants
M G Wakefield and Z T Burton for Respondents
P E M Walker and V J Robb for Interested Party

Judgment: 22 December 2021

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 22 December 2021 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] This appeal concerns a proposed two-lot subdivision on Slopehill Road, Wakatipu Basin (Basin) in rural Queenstown (the site). The applicants for resource consent, the Blacklers,[1] own the site as trustees.

[2] The Queenstown Lake District Council (QLDC), by delegation to a Commissioner, granted resource consent for a two-lot subdivision and associated activities at the site (Council Decision).[2] The Council Decision was the subject of an appeal to the Environment Court (Court) by neighbours on two adjoining properties — Michael and Emily Brial (the Brials) and Graeme and Jane Todd and John Troon (the Todds).

[3] For reasons relating to COVID-19 restrictions, the Court did not initially deal with the appeal in its entirety. Instead the Court directed that there would be an interim hearing to determine community-scale issues (whether the proposal had unacceptable effects on landscape values and rural amenity values and is contrary to related objects and policies) and would leave aside for the time being the various other grounds of appeal concerning how the proposal would impact on the Brials and Todds more directly as neighbours.[3]

[4] By its interim decision (the Judgment) the Court concluded the proposal, on the matters addressed by the decision, satisfies the requirements of the Resource Management Act 1991 (RMA).

This appeal

[5] The Brials appeal against the whole of the Judgment. They assert the Court made three errors of law. They seek an order referring the Judgment back to the Court for reconsideration.

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1 Previously the applicants were S and S Blackler, B and K Blackler, and Trustees BFT Ltd.

2 The Council Decision was made by Commissioner Wendy Baker under delegated authority pursuant to s 34A Resource Management Act 1991 (RMA) on 19 June 2019.

3 *Todd v Queenstown Lakes District Council* [2020] NZEnvC 205 [Judgment] at [2].

Grounds of appeal

[6] For the appeal hearing, Mr Miles QC (for the Brials) reframed the three grounds of appeal as follows:

Ground 1

A failure to construe or apply ch 24 (and specifically Policy 24.2.1.1) of the Proposed Queenstown Lakes District Plan (PDP) in accordance with requirements recognised by case law, being:

(a) a failure to recognise the primacy of Policy 24.2.1.1 as a bottom line; and

(b) applying the discredited "overall balance" (or "overall judgment") approach.

Ground 2

A failure to give any or any adequate consideration to a number of relevant policies in both the Operative Queenstown Lakes District Plan (ODP) and the PDP.

Ground 3

A failure to give any consideration to the relevant law and issues that need to be addressed in determining whether a consent notice should be removed.

Background

The site and environs

[7] The site and its environs are described in the Judgment.[4]

[8] The site is 8.4453 ha in area on generally undulating and terraced rural land. A steep-sided gully runs through it.

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4 Judgment, above n 3, at [3]–[7].

[9] The site sits below the northwest flanks of Slope Hill, some 800 m from its peak. Slope Hill itself (some 625 m above sea level and 220 m above surrounding foothills), is an Outstanding Natural Feature (ONF) under the ODP. The site itself is not within the Slope Hill ONF.

[10] The site is within the "Rural General" zoning for the Wakatipu Basin under the ODP. Under the PDP that zoning will be replaced by a bespoke Wakatipu Basin Rural Amenity Zone (WBRAZ) with stringent controls on subdivision and development. The variation derives from the Wakatipu Basin Land Use Planning Study (2017) (2017 Study).

[11] As a consequence of the 2017 Study, the PDP maps the Basin into several landscape character units (LCUs) whose values are described in sch 24 to the PDP. The site sits within LCU 11 (Slope Hill foothills), an area of some 566 ha.

[12] Access to the site is via Slopehill Road, approximately 500 m from Lower Shotover Road. Slopehill Road itself connects to the popular Queenstown Trail "Countryside Ride" cycling and pedestrian trail.

[13] Most properties in the vicinity are rural residential homesteads, ranging between 1 to 10 ha in area.

[14] The Brials' property (at 212 Lower Shotover Road) is situated to the south of the site.

The Blacklers' proposal for the site

[15] The Blacklers' proposal is described in the Judgment:[5]

> [8] The site would be subdivided into two allotments, each with an identified building platform. Lot 1 of some 4.08 ha would be to the west of the gully. Lot 2 of some 4.3557 ha would encompass the remainder of the site, including the gully and shared accessway. That accessway from Slopehill Road would run along the present driveway alignment before splitting to provide a separate branch to Lot 2.

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5 Judgment, above n 3 (footnotes omitted).

[9] Earthworks are designed to mimic the existing natural landform patterns. Residential building platforms would be positioned on the middle and lower slopes of the site some 182m and 282m from the road and 75m and 109m from neighbours. Each platform would have a 1,000m^2 curtilage area within which all domestic landscaping and structures would be confined. These areas are identified on the subdivision plan. Building coverage would be restricted to 45% of each curtilage area (i.e. 450m^2). Building height would be limited to 6m. Buildings would be recessively clad and coloured. An existing consent notice (936464.2) imposed as part of an earlier resource consent would be cancelled. It limits the number and positioning of any future dwellings on the site.

[10] To further assist visual absorption, the proposed landscape plan includes dense planting of indigenous vegetation along the finished slopes behind the building platforms. The planting design also includes medium stature shrubs and a hornbeam hedge south of the proposed Lot 2 building platform. Other groups of rural character trees are proposed on the periphery of the site and south of the Lot 1 building platform. Pin Oaks would form an avenue to the building platforms, although some of these have been removed from the plan to avoid interference with the outlook and views enjoyed from the Brial property. To provide screening for the Brial property against vehicle movement and headlight spill, the planting plan includes Hornbeam hedging along parts of the accessway. All planting on site would be required to be implemented following completion of the earthworks and prior to deposit of the survey plan for title under s 224(c), RMA. The gully would be subject to an environmental management plan for eradication of weeds, planting of appropriate indigenous riparian species and prevention of grazing.

(Footnotes omitted)

Statutory framework

[16] It is common ground that the proposal is a discretionary activity. It is discretionary under the ODP and non-complying under the PDP. As explained in the Judgment, the application remains a discretionary activity pursuant to s 88A RMA because the Blacklers applied for resource consent before the QLDC's notification of its decisions on Stage 2 of the Plan Review (which incorporates ch 24).[6]

[17] Under ss 104C and 108 RMA, the Court (and the Commissioner previously) had power to grant or refuse the consents sought and to impose conditions on any grant. Under ss 221 and 290 RMA, the Court also had power to cancel the consent notice affecting the site.

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6 At [11], fn 24.

[18] Section 104 RMA requires the consent authority (subject to pt 2 RMA) to have regard to a number of matters including:[7]

(a) the proposals' potential effects on the environment; and

(b) relevant provisions of the ODP and PDP.

[19] Part 2 of the RMA identifies the purpose of and principles of the RMA. Those include:

> **6 Matters of national importance**
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> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
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> …
>
> (b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
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> …
>
> **7 Other matters**
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> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> …
>
> (c) the maintenance and enhancement of amenity values;
>
> …

[20] It is common ground on this appeal that ss 6(b) and 7(c) were in play on the Blacklers' proposal — s 6(b) because of the site's proximity to the Slope Hill ONF and s 7(c) because the site is in an area recognised by both the ODP and the PDP as having related landscape and visual amenity values. In particular, the site is within the Visual Amenity Landscape (VAL) overlay under the ODP and within LCU 11 under the PDP.

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7 RMA, s 104(1)(a) and (b)(v).

The PDP's 80 ha minimum net site area regime

[21] Under the ODP's Rural General Zone and related subdivision controls there is no minimum allotment size.

[22] By contrast, minimum lot size controls are central to the design of the PDP's ch 24 for the Basin.

[23] The background to those controls lies (as explained by the Court)[8] in the fact that the Basin (despite having the rural zoning and VAL overlay under the ODP) has experienced significant incremental subdivision and development over several decades. In ch 24.1 of the PDP, the zone purpose for the Basin includes the following explanations:

> The purpose of the Zone is to maintain and enhance the character and amenity of the Wakatipu Basin. Schedule 24.8 divides the Wakatipu Basin into 23 Landscape Character Units. The Landscape Character Units are a tool to assist identification of the particular landscape character and amenity values sought to be maintained and enhanced. Controls on the location, nature and visual effects of buildings are used to provide a flexible and design led response to those values.
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> …
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> While the Rural Amenity Zone does not contain Outstanding Natural Features or Landscapes, it is a distinctive and high amenity value landscape located adjacent to, or nearby to, Outstanding Natural Features and Landscapes. There are no specific setback rules for development adjacent to Outstanding Natural Features or Landscapes. However, all buildings except small farm buildings and subdivision require resource consent to ensure that inappropriate buildings and/or subdivision does not occur adjacent to those features and landscapes. …

[24] The next section of ch 24 sets out the objectives and policies. Objective 24.2.1 (reflecting the zone purpose) is to maintain or enhance the landscape character and visual amenity values in the WBRAZ. As described by the Court, minimum lot size controls for subdivision are central to that purpose (the controls arising also through ch 27 (Subdivision & Development)).[9]

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8 Judgment, above n 3, at [18].

9 Judgment, above n 3, at [19].

[25] Different controls are imposed for sites within an area denoted the "Wakatipu Basin Lifestyle Precinct" (Precinct) versus sites within the WBRAZ outside of the Precinct. It was common ground here, as noted in the Court's judgment, that the comparatively less restrictive controls for the Precinct reflect the greater risk that subdivision outside the Precinct poses for landscapes, including ONF/Ls that border the Basin.[10]

[26] In the Precinct, under the PDP, the minimum site area for subdivision is 6000 m^2 with a one hectare site average, before a non-complying consent requirement is triggered. Objective 24.2.5 of the PDP provides that:

> Rural living opportunities in the Precinct are enabled, provided landscape character and visual amenity values are maintained or enhanced.

[27] The policy associated with Objective 24.2.5 (contained in Policies 24.2.5.1 – 24.2.5.6) may be summarised as indicating that the Precinct has the potential to absorb rural living and other development while still achieving the overall purpose of ch 24 (as compared to the WBRAZ which is less enabling of development).

[28] The subject site is outside the Precinct.

[29] The site area policy applying to sites outside the Precinct is Policy 24.2.1.1:

> Require an 80 hectare minimum net site area be maintained within the Wakatipu Basin Rural Amenity Zone outside of the Precinct.[11]

[30] For the many sites in the Basin (outside the Precinct) that are already less than 80 ha in area, any subdivision would inherently conflict with Policy 24.2.1.1.

[31] Chapter 27 has complementary requirements in relation to subdivision size. Under r 27.6 (Rules – Standards for Minimum Lot Areas), r 27.6.1 specifies:

> No lots to be created by subdivision, including balance lots, shall have a net site area or where specified, an average net site area less than the minimum specified.

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10 Judgment, above n 3, at [20] — ONF/L refers to Outstanding Natural Features and/or Outstanding Natural Landscapes.

11 "Net area" is defined in ch 2 of the PDP.

[32] Rule 27.5.19 specifies a subdivision that does not comply with that 80 ha minimum lot standard is a non-complying activity. As explained above (at [16]), that rule is inapplicable in this case by reason of the timing of lodgement of the consent application, which resulted in this proposal being for a discretionary activity.

Weight accorded to the PDP's 80 ha regime

[33] It is common ground here that the Court was correct to give significant weight to the shift in policy reflected in the PDP's 80 ha minimum net site area regime.[12] In that respect the Court differed from the Commissioner who afforded the key provisions in the PDP little weight on account of the stage the PDP process had reached.[13]

The Environment Court's Judgment

[34] The Court, having traced the development of the PDP (including through the undertaking of the 2017 Study), recognised the 80 ha minimum lot size under Policy 24.2.1.1 is central to the purpose of maintaining or enhancing the landscape character and visual amenity values of the WBRAZ.[14]

[35] The Court noted, at least for the (many) sites in the Basin that are already less than 80 ha, any subdivision would inherently conflict with Policy 24.2.1.1.[15] That said, the Court recognised, in relation to the Blacklers' proposal the subdivision is a discretionary activity (as identified at [32] above).

[36] The Court identified the relevant "Rules – Standards" under ch 24.5 of the PDP and observed:

> [27] Those controls further reflect a policy intention to maintain and enhance the character and amenity of the Wakatipu Basin. The overall emphasis is on stopping any further decay of those landscape values and, indeed, to achieve some remediation on the status quo.

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12 Judgment, above n 3, at [41].
13 Decision of Queenstown Lakes District Council on Subdivision Proposal, 19 June 2019, at [45]–[48].
14 Judgment, above n 3, at [17] and [19].
15 At [23].

[37] In relation to the non-complying activity status of the proposal, the Court stated:

> [29] The assignment of non-complying activity status to subdivisions that would result in lots with a net area less than 80 ha does not make such subdivision inherently unconsentable. However, that activity classification in conjunction with Policy 24.2.1.1 effectively demands, as a prerequisite to consentability, that the subdivision would at least protect any ONL or ONF values and maintain, if not enhance, other landscape and rural amenity values.
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> [30] That is because the combined effect of Obj 24.2.1 and Policy 24.2.1.1 is that any non-complying subdivision would be capable of negotiating the threshold test in s 104D only if it can demonstrate that it would meet the requirements of s 104D(1)(a), i.e.:
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> > the adverse effects of the activity on the environment … will be minor.
>
> [31] Being satisfied that a proposal would not degrade ONF/L values or relevant [LCU] landscapes or rural amenity values would be necessary given the purpose of Ch 24 as expressed in the 24.1 Zone Purpose, and expressed through Obj 24.2.1 and Policy 24.2.1.1 and related objectives and policies.

[38] Similarly, later in the Judgment the Court recognised given the purpose of ch 24 of the PDP, the importance of applying ch 24's policy intentions in regard to minimum lot sizes is overwhelming.[16]

[39] The Court then recognised, given the fundamental importance of Policy 24.2.1.1 to the design purpose of ch 24,[17] that the Court was required to closely scrutinise the proposal:

> [33] The close scrutiny that Ch 24 demands of subdivisions that do not maintain an 80 ha minimum lot size would extend to matters such as the suitability or otherwise of their location, their scale, intensity and design. It would extend also to consideration of the cumulative effect of granting the subdivision.
>
> [34] In addition to being satisfied the subdivision was consentable in those terms, it can be expected that close attention would also be paid to whether granting consent would uphold or undermine the integrity of the Wakatipu Basin Rural Amenity Zone.

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16 Judgment, above n 3, at [40].
17 At [32].

Appeals to the High Court

[40] The Brials as parties to the proceeding before the Environment Court were entitled to appeal on a question of law to this Court.[18] Insofar as an Environment Court decision is on the merits (not involving a question of law), the decision is final.[19]

[41] In *Countdown Properties (Northlands) Ltd v Dunedin City Council*, this Court identified the principles on which its appellate powers are exercised under the RMA, recording:[20]

> … we note that this Court will interfere with decisions of the Tribunal only if it considers that the Tribunal:
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> - applied a wrong legal test; or
> - came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
> - took into account matters which it should not have taken into account; or
> - failed to take into account matters which it should have taken into account.

[42] The High Court recognises and respects the specialist nature of the Environment Court. Thus, in *Countdown Properties (Northlands) Ltd*, this Court observed:[21]

> … the Tribunal should be given some latitude in reaching findings of fact within its areas of expertise …

[43] In *Guardians of Paku Bay Association Inc v Waikato Regional Council*, (*Guardians of Paku Bay*), Wylie J expanded upon the respective roles of the Environment Court and the High Court in relation to their decision-making:[22]

> [31] Relief ought not to be granted unless an identified error of law has materially affected the Environment Court's decision. The Environment Court is the sole decision maker responsible for the balancing process required under

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18 RMA, s 299(1).

19 Section 295.

20 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153. See also *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52].

21 *Countdown Properties (Northlands) Ltd v Dunedin City Council,* above n 20, at 153.

22 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) (footnotes omitted).

> the Act, and that process is an integral part of the consideration of resource management consents under s 104. The weight to be given to the assessment of relevant considerations is for the Environment Court and is not for reconsideration by this Court as a point of law.
>
> [32] It was also common ground that the Court must be vigilant in resisting attempts by litigants disappointed by Environment Court decisions to use appeals to the High Court in an endeavour to re-litigate factual findings made by the Environment Court. This Court can only intervene in such situations where the Environment Court has come to a decision to which, on the evidence, it could not reasonably have come. This can be described as a situation in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with and contradictory to the determination, or as one in which the true and only reasonable conclusion contradicts the determination. It is trite law however that the sufficiency of evidence, rather than the want of it, cannot amount to a point of law.

[44] In *Guardians of Paku Bay*, Wylie J then went on to recognise the Environment Court's particular expertise in relation to the application of planning principles to the facts of a case:[23]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.
>
> (Footnotes omitted)

[45] Consistently with the approach I have identified, this Court in *Contact Energy Ltd v Waikato Regional Council* identified limits to what the (former) Planning Tribunal might be expected to record in relation to factual and legal issues.[24] There, Woodhouse J observed:

> [64] Appeals purportedly on points of law not infrequently turn into a contention that the Tribunal did not refer in its decision to a matter of fact or of law in issue in the hearing. That, of itself, is not an error of law. This includes, for example, an absence of reference in the decision to evidence which may be in direct conflict with a conclusion expressly recorded, or evidence given at the hearing which might arguably indicate a conclusion different from that recorded by the Tribunal.

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23 See also *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 at [42].

24 *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC).

> [65] There is no obligation to record every finding on every piece of evidence. There is no obligation to make a finding of fact on every fact in issue, and generally speaking there is no obligation to make a finding of fact at all: see *Rodney District Council v Gould and Anor* (2006) NZRMA 217; *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 at 82-89. There is also no obligation on a Tribunal to record every part of its reasoning process on the facts or on the law, and notwithstanding the fact that the conclusions reached may involve unarticulated rejections of contentions of witnesses or submissions for parties on the law.

These observations, in relation to the former Planning Tribunal, apply equally to the Environment Court.

[46] An error of law, if established, must be material to one of the Court's ultimate determinations — an erroneous obiter dictum is not a material error of law.[25]

[47] Finally, on appeals from the Environment Court to this Court, the appellant bears the onus of establishing an error of law.[26]

The interpretation and application of planning documents

[48] The general principles as to the interpretation of planning documents (consistently with those applying to other instruments) require consideration of:[27]

(a) the text of the relevant provision;

(b) the purpose of the provision;

(c) the context and scheme of the plan;

(d) the history of the plan;

(e) the purpose and scheme of the RMA; and

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25 *Orewa Land Ltd v Auckland Council* (2011) 16 ELRNZ 417 (HC) at [8], citing *Nicholls v Papakura District Court* [1998] NZRMA 233 (HC) at 235; and *Lyttelton Port Company Ltd v Canterbury Regional Council* [2002] NZRMA 102 (HC) at [43].

26 *Smith v Takapuna City Council* (1988) 13 NZTPA 156 (HC).

27 *Brownlee v Christchurch City Council* [2001] NZRMA 639 (EnvC) at [25], cited with approval in *Mount Field Ltd v Queenstown Lakes District Council* HC Invercargill CIV-2007-425-700, 31 October 2008 at [37].

(f) any other permissible guides to meaning (including common law principles or presumptions of statutory interpretation).

[49] Following the judgment of the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd (King Salmon),* it is now recognised that more specific or directive provisions, particularly those which set "environmental bottom lines", may warrant greater weight.[28] The dangers of the decision-maker adopting an "overall judgment" or "overall balance" approach were identified in the judgment of the majority, given by Arnold J, in their discussion of the application of the New Zealand Coastal Policy Statement (NZCPS):[29]

> … when other provisions in the NZCPS are considered, it is apparent that the various objectives and policies are expressed in deliberately different ways. Some policies give decision-makers more flexibility or are less prescriptive than others. They identify matters that councils should "take account of" or "take into account", "have (particular) regard to", "consider", "recognise", "promote" or "encourage"; use expressions such as "as far as practicable", "where practicable", and "where practicable and reasonable"; refer to taking "all practicable steps" or to there being "no practicable alternative methods". Policy 3 requires councils to adopt the precautionary approach, but naturally enough the implementation of that approach is addressed only generally; policy 27 suggests a range of strategies. Obviously policies formulated along these lines leave councils with considerable flexibility and scope for choice. By contrast, other policies are expressed in more specific and directive terms, such as policies 13, 15, 23 (dealing with the discharge of contaminants) and 29. These differences matter. One of the dangers of the "overall judgment" approach is that it is likely to minimise their significance.
>
> (Footnotes omitted)

[50] On the facts, the Supreme Court found the Board of Inquiry, in granting a plan change, had erred by balancing all relevant interests (in other words, by taking an overall judgment approach), and thereby failing to give effect to the strongly worded directives in the governing policies.[30]

[51] Relevantly to this case, there are then two aspects to the approach to be taken by the decision-maker, namely the approach to assessing resource consent applications

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28 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZLR 593 [*King Salmon*].

29 *King Salmon*, above n 28, at [127].

30 At [153]–[154].

for a non-complying activity and the approach to weighting relevant provisions under s 104 RMA.

Non-complying activities

[52] The Court of Appeal considered the principles relating to non-complying activity status in its contemporaneous 2002 decisions in *Arrigato Investments Ltd v Auckland Regional Council* (*Arrigato)*[31] and *Dye v Auckland Regional Council (Dye).*[32] Tipping J, delivering the judgment of the Court of Appeal in *Dye*, explained the correct approach to be taken under the precursor to s 104D(1)(b) RMA:[33]

> [25] In summary, the Environment Court was fully mindful of the basic thrust of the relevant objectives and policies which was to confine rural residential activities to the designated areas. The Court considered that the objectives and policies allowed for the possibility, albeit limited, that such activities might nevertheless appropriately be allowed to occur outside the designated areas and in the general rural part of the district. Whether a particular application which would necessarily be for a non-complying activity was appropriate, would obviously depend on its particular combination of circumstances. It is implicit in its approach that the Environment Court did not see the relevant objectives and policies as precluding altogether developments not falling within a designated area. The objectives and policies themselves recognised that some wider development might be appropriate. If the Court found a particular proposal to be appropriate, it could not be said to be contrary to the objectives and policies on the basis that it was outside the particular controls which were designed to implement them. We are unable to conclude that in approaching the matter in that way the Environment Court misunderstood or misinterpreted the objectives and policies. The view which the Court took was open to it on a fair appraisal of the objectives and policies read as a whole and, in reaching its view, the Court committed no error of law.

[53] In *Arrigato*, in which Tipping J also delivered the judgment of the Court, it was observed:[34]

> [17] We are also of the view that the Judge may not have fully factored into his thinking the point that Arrigato's application was for consent to a non-complying activity. *Such an activity is, by reason of its nature, unlikely to find direct support from any specific provision of the plan.* The Act provides for a spectrum of activities ranging from the prohibited to the permitted. In between are non-complying,

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31 *Arrigato Investments Ltd v Auckland Regional Council* [2002] 1 NZLR 323 (CA) [*Arrigato*].
32 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) [*Dye*].
33 *Dye,* above n 32.
34 *Arrigato,* above n 31.

> discretionary and controlled activities. There is a clear conceptual difference between a prohibited activity and a non-complying one. Consent may be granted for the latter but not for the former. …
>
> (Emphasis added)

[54] The observation of the Court of Appeal which I have emphasised in the above passage from *Arrigato* was echoed in the Environment Court's Judgment when it recorded:

> [32] Given the clear direction in Policy 24.2.1.1, non-complying subdivisions would generally struggle to satisfy the alternative threshold test in s 104D(1)(b), i.e. that the proposed activity would not be contrary to relevant objectives and policies. Policy 24.2.1.1 can be expected to have such influence given its fundamental importance to the design purpose of Ch 24.

Weighting of plan provisions

[55] The correct weight to be given to plan provisions flows from the provisions themselves, both their terms and their context.

[56] In *R J Davidson Family Trust v Marlborough District Council* (*R J Davidson*), a decision post-dating *King Salmon*, the Court of Appeal confirmed that when a consent authority is required to assess the merits of an application against the relevant objectives and policies in a plan "[w]hat is required is what Tipping J referred to [in *Dye*] as 'a fair appraisal of the objectives and policies read as a whole.'"[35]

Appellants' submissions (Ground 1)

[57] By their first ground of appeal, the Brials contend that the Court failed to construe or apply Policy 24.2.1.1 in accordance with the requirements recognised by the Supreme Court in *King Salmon* and by the Court of Appeal in *R J Davidson*, because the Court failed to recognise the policy's primacy as a bottom line and applied the discredited overall balance approach.

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[35] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [73], citing *Dye,* above n 32, at [25]. See also *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 at [28].

[58] Mr Miles referred to *King Salmon*, *R J Davidson* and this Court's most recent decision in *Tauranga Environmental Protection Society Inc v Tauranga City Council and Transpower New Zealand Ltd* (*Transpower*).[36]

[59] Mr Miles referred to two particular passages in the judgment of Palmer J in *Transpower*:

> [79] The Supreme Court's decision in *EDS v King Salmon*, and the Court of Appeal's decision in *RJ Davidson*, requires decision-makers to focus on the text and purpose of the legal instruments made under the RMA. A decision-maker considering a plan change application must identify the relevant policies and pay careful attention to the way they are expressed. As with any legal instrument, the text of the instrument may dictate the result. Where policies pull in different directions, their interpretation should be subjected to "close attention" to their expression. Where there is doubt after that, recourse to pt 2 is required. The same approach, of carefully interpreting the meaning and text of the relevant policies, is required in applying them to consent applications, for the same reasons. …
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> …
>
> [93] Specific decisions depend on the application of the hierarchy of planning instruments. Accordingly, the RMA envisages that planning documents may (or may not) contain "environmental bottom lines" that may determine the outcome of an application. This illustrates why it is important to focus on, and apply, the text of the planning instruments rather than simply mentioning them and reaching some "overall judgment".
>
> (footnotes omitted)

[60] As Mr Miles observed, this Court concluded in *Transpower* that the Environment Court had failed sufficiently to analyse, engage with and apply the relevant policies of the regional plan and, by adopting an overall judgment approach, had erred in law.[37]

[61] Mr Miles noted the case law requiring careful attention to the relevant policies and avoidance of "overall judgment" occurs in the context of the s 104D(1)(b) RMA threshold of "not … contrary to the objectives and policies" of the relevant (proposed) plan. That applies to application for resource consent for non-complying activities but this Court has confirmed the case law also assists in the context of a discretionary

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[36] *Tauranga Environmental Protection Society Inc v Tauranga City Council and Transpower New Zealand Ltd* [2021] NZHC 1201, [2021] NZRMA 492 [*Transpower*].

[37] At [118].

activity application. On this point, Mr Miles referred to *Stirling v Christchurch City Council*.[38] In that case, Chisholm J recognised that the case law (including as to the weight to be attached to s 104(1) matters) is of assistance where an application for a non-complying activity has passed through the s 104D "gateway".[39]

[62] Mr Miles referred also to cases in which (he suggested) the Court found the failure of a proposal to achieve an objective or policy was sufficient for it to run counter to the plan as a whole.[40] He said the High Court has confirmed the inappropriateness of using broader objectives to balance out important qualifiers of the relevant objectives and policies in order to reach a conclusion on the objectives and policies of the plan as a whole.[41]

[63] Mr Miles submitted plan integrity issues arise. He observed that plan integrity relates to the correct interpretation and application of plan provisions to give the public confidence that the provisions will be consistently administered and therefore operate as intended. Plan integrity may be affected through a clash between a proposal and key provisions or intentions of a plan where further applications will follow.[42] Plan integrity may be considered by the consent authority under s 104(1)(b)(vi) and s 104(1)(c) RMA.

[64] Mr Miles observed that integrity considerations for "newly minted plans" may assume greater importance because the plan provisions have not become dated or been overtaken by other circumstances.[43] He referred also to observations of the Environment Court that, where there is a clear planning strategy in a proposed plan (such as the PDP), the strategy should be challenged through the proposed plan process rather than by way of a resource consent application.[44]

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38 *Stirling v Christchurch City Council* (2011) 16 ELRNZ 798 (HC).
39 At [49]–[51] and [53]–[56].
40 *Akaroa Civic Trust v Christchurch City Council* [2010] NZEnvC 110. See also *Man O'War Station Ltd v Auckland City Council* [2010] NZEnvC 248 (appealed but not affecting this point in *Man O'War Station Ltd v Auckland Regional Council* [2011] NZRMA 235 (HC)).
41 *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815, [2013] NZRMA 239.
42 *Rodney District Council v Gould* (2004) 11 ELRNZ 165 (HC).
43 *Ahuareka Trustees (No 2) Ltd v Auckland* Council [2017] NZEnvC 205 at [116].
44 *Charles v Tasman District Court* EnvC W144/96, 17 October 1996; *Shell NZ Ltd v Auckland City Council* EnvC W158/96, 19 November 1996 at 20.

[65] Mr Miles referred also to the importance of the precedential effect of consent decisions, as recognised in the same body of case law.[45] Such a precedent effect may be considered under s 104(1)(c) RMA.

[66] Turning to the Blacklers' proposal, Mr Miles submitted the Court had failed to appreciate the significance of the language of Policy 24.2.1.1 (set out at [29] above). In particular, Mr Miles identified the verb "require" as prescriptive, directive and specific providing no discretion or flexibility as to how the policy is to be achieved. Mr Miles submitted 80 ha as the minimum lot size thereby became an obligatory bottom line.

[67] Mr Miles submitted that approach is also required to meet the purpose of the policy, the WBRAZ having been identified generally as having "low" capacity for additional subdivision. He argued existing landscape character and amenity values are required to be maintained and enhanced by firmly recognising that lack of capacity.

[68] Mr Miles submitted the Court's failure to appreciate the significance of the language of Policy 24.2.1.1 is reflected in the Court's omission of the key word "require" in its framing of issues at [15] of the Judgment (where the Court asked "how does the PDP's policy that 'an 80 hectare minimum net site area be maintained within the [WBRAZ] bear on consideration of the proposal?").

[69] Mr Miles submitted the Court erred by dismissing the conflict of the proposal with Policy 24.2.1.1. He added this also meant the Court wrongly failed to take into account the precedential implications of a grant of consent.

Submissions for QLDC

[70] Mr Wakefield, for the QLDC, submitted the Court had not erred in its interpretation and weighting of Policy 24.2.1.1. In particular, he rejected the suggestion Policy 24.2.1.1 effectively sets an "obligatory bottom line" with no subdivision of sites under 80 ha. If an absolute bar on such subdivision exists the non-complying activity status provided under chs 24 and 27 would mean no subdivision

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[45] For instance, *Rodney District Court v Gould*, above n 42.

proposal (for a lot of less than 80 ha) could ever be put forward. Mr Wakefield submitted the Court's conclusion that Policy 24.2.1.1 "does not condemn" such a proposal was correct as a matter of law.[46]

[71] Mr Wakefield gave his reasons for that conclusion (summarised):

(a) the environmental "bottom line" in ch 24 is provided not by Policy 24.2.1.1 itself but by Objective 24.2.1 which requires the maintenance or enhancement of landscape character and visual amenity values;

(b) Objective 24.2.1 is implemented by Policy 24.2.1.1, as recognised in the Judgment at [43] and Annexure A;

(c) the objective and the policy taken together provide a pathway for non-complying activities (albeit one that is discouraged by the policies);

(d) although a direct conflict exists between a subdivision of a lot smaller than 80 ha and Policy 24.2.1.1 such a subdivision can be sought as a non-complying activity and the breach of the lot size requirement is therefore not fatal;

(e) the potential for some additional development on land zoned as WBRAZ is contemplated within sch 24.8 (as recognised in the Judgment at [18]) through express reference to "constraints" and "opportunities and benefits" associated with additional development; and

(f) the fact there are within the WBRAZ areas rated as having "moderate" or even "high" capability rating (as against the "very low" or "low" in this area), indicates that all situations can be tested and assessed through the non-complying status.

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46 Judgment, above n 3, at [91].

[72] Against this background, Mr Wakefield submitted the Court had correctly concluded the proposal was not condemned by being contrary to Policy 24.2.1.1. Rather, the weight to be afforded to the relevant provisions of the planning document became a matter for assessment by the Court in its specialist capacity.

[73] Mr Wakefield further noted there was expert evidence before the Court in support of its approach. For instance, the planning witness Ms Knight accepted the policies "all but preclude development that will otherwise adversely affect the landscape character and visual amenity of the District". In other words, exceptions are not entirely excluded.

Submissions for the Blacklers

[74] Ms Walker, for the Blacklers, adopted a similar position to Mr Wakefield.

[75] She referred to the numerous passages in the Judgment in which the Court recognised the requirements under Policy 24.2.1.1. She rejected the suggestion in Mr Miles' submissions that the Court had overlooked the "requirement" aspect of Policy 24.2.1.1. Whereas Mr Miles identified the Court's formulation of the issues (at [15(a)] of the Judgment) without including the word "require", the Court in fact set out (at [21] of the Judgment) the full provisions of Policy 24.2.1.1 and observed that is the policy applying to the site.

[76] Ms Walker referred to points in the Court's discussion where it is clear that the Court was also alert to the conflict of the Blacklers' proposal with Policy 24.2.1.1.[47] Ms Walker noted the Court had also heard evidence from the experts — including Ms Leith, a planner, who deposed the proposed Blackers' proposal is contrary to the policy.

[77] In Ms Walker's submission, once the Court had correctly understood Policy 24.2.1.1, its obligation under s 104(1)(b)(vi) RMA was to "have regard to" the PDP.

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[47] Examples including that the subdivision "would inherently conflict with Policy 24.2.1.1" (at [23]), and the "clear direction in Pol 24.2.1.1" (at [32]).

That level of consideration was explained by Venning J in *Progressive Enterprises v North Shore City Council* (*Progressive Enterprises*) thus:[48]

> [15] The requirement for the Environment Court to have regard to the relevant provision is a requirement to give genuine attention and thought to the matters identified in s 104, but it need not necessarily accept those provisions. To "have regard to" does not require the Court to "give effect to": *Foodstuffs (South Island) Limited v Christchurch City Council* [1999] NZRMA 481, 487.

[78] Ms Walker cited *Crater Lakes Park Ltd v Rotorua District Council* as an example of a case in which a non-complying activity (therefore subject to the threshold test under s 104D RMA) was granted consent notwithstanding that the application was "inconsistent with a number of important objectives and policies" as the Court found it was not contrary to them.[49]

[79] Ms Walker also referred to the Court's decision in *Akaroa Civic Trust v Christchurch City Council* (*Akaroa Civic Trust*), the case cited by Mr Miles as containing the Environment Court's recognition that (although rarely) there may be cases where if a proposal does not achieve a certain objective or policy that of itself is sufficient for it to run counter to the plan as a whole.[50] Ms Walker observed that, in *Akaroa Civic Trust*, the proposal in fact passed the s 104D gateway test and was therefore not a "rare" situation. She submitted the present case is similarly not a "rare" situation as there are a number of policies giving effect to Objective 24.2.1 and to the maintenance or enhancement of the natural character and visual amenity in the WBRAZ.

[80] Ms Walker noted, in the recent judgment in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency*, the High Court emphasised (in rejecting a suggestion that "environmental bottom lines" stood in the way of a proposal) that the "relevant plan provisions must all be considered comprehensively and, where possible, appropriately reconciled".[51]

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48 *Progressive Enterprises v North Shore City Council* HC Auckland CIV-2008-485-2584, 25 February 2009 [*Progressive Enterprises*]. See also *Young v Queenstown Lakes District Council* [2014] NZHC 414, (2014) 18 ELRNZ 1 at [43].

49 *Crater Lakes Park Ltd v Rotorua District Council* EnvC A126/09, 2 December 2009 at [171].

50 *Akaroa Civic Trust v Christchurch City Council*, above n 40 at [74].

51 *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency,* above n 35, at [30].

[81] Ms Walker made submissions similar to those of Mr Wakefield in relation to the weighting given to Policy 24.2.1.1 by the Court.

[82] In relation to the Brials' suggestion that the Court had been wrong in its conclusion about the integrity of the PDP and precedential effect, Ms Walker submitted the Court clearly had considered the implications of granting consent for both these factors.[52]

[83] Ms Walker submitted this is simply a case in which the Court reached a different conclusion to that argued by the appellants.

Discussion

[84] Under the planning regime that applied to them, the Blacklers were entitled to seek consent for their non-complying activity through the threshold requirements of s 104D RMA and then through the Court's consideration under s 104 RMA.

[85] Once the Court was satisfied the threshold requirement under s 104D(1)(a) RMA (that the adverse effects of the activity on the environment would be minor) was satisfied, the Court turned to consider the proposal as a discretionary activity under s 104 RMA. Policy 24.2.1.1 of the PDP was a provision to which the Court had to have regard. As indicated by this Court's judgment in *Progressive Enterprises*, that did not require the Court to give effect to Policy 24.2.1.1 by refusing to consider the proposal further.[53] Rather, the Court had to give serious consideration to the nature of the requirement under the PDP and its importance in the context of the relevant objectives and other policies. It is clear it did so.

[86] The theme of the appellants' case in this regard — that Policy 24.2.1.1 was not accorded its proper importance — cannot stand alongside the detailed reasoning in the Judgment. The Court clearly identified the shift in policy reflected in the 80 ha minimum lot size regime,[54] finding it to be of "overwhelming" importance when considering whether (in departing from the approach taken by the Commissioner) to

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52 Referring to the Judgment, above n 3, at [41] and [92].
53 *Progressive Enterprises*, above n 48, at [15].
54 Judgment, above n 3, at [41].

attach significant weight to the shift in policy.[55] The Court recognised the "clear direction" in Policy 24.2.1.1,[56] that a subdivision of lots less than 80 ha would "inherently conflict with Policy 24.2.1.1"[57], and the fact non-complying subdivisions would therefore generally struggle to satisfy the alternative threshold test in s 104D(1)(b) RMA, (whereby the proposed activity must not be contrary to relevant objectives and policies).[58]

[87] That said, once the Court was satisfied the threshold test under s 104D(1)(a) RMA was satisfied, it became a matter for the Court in its consideration of the discretion under s 104 to assess the weight to be given to Policy 24.2.1.1 (when "having regard to it"). Nothing in this step-by-step analysis under the decision-making regime required the Court to treat Policy 24.2.1.1 as a bottom line whereby a failure to meet the requirement constituted a bar to any further consideration of the proposal.

[88] The test which the Court here formulated was in these terms, and appropriately reflected the legal requirements upon the Court:

> [41] For those reasons, we give significant weight to the shift in policy reflected in the PDP's 80 ha minimum net site area regime. In essence, that means that we fully test the proposal for compatibility or otherwise with all PDP objectives and policies and ascribe contrary ODP objectives and policies relatively little weight or influence. In a relative sense, we find that weighting should prefer the policy intentions of the PDP over those of the ODP. That includes being satisfied that, on its own and in a cumulative effects sense:
>
> (a) the site would not be adjacent to the Slope Hill ONF and the proposal would protect the associated landscape values;
>
> (b) the proposal would at least maintain the particular landscape character and amenity values of LCU 11; and
>
> (c) in those and other respects, granting consent would maintain the integrity of the Ch 24 zone purpose.

[89] As is evident from that approach, the Court also thereby considered the integrity of the PDP and (implicitly) the need to have regard to precedential effect.

[90] The appellants' first question will be answered "no".

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55 At [40].
56 At [32].
57 At [23].
58 At [32].

Ground 2: a failure to give any or any adequate consideration to a number of relevant policies in both the ODP and the PDP

The law — the consideration of s 104(1) RMA matters

[91] Section 104(1)(b)(vi) RMA requires the consent authority to have regard to any relevant provisions of a plan or proposed plan.

[92] As noted above, and recognised in *Progressive Enterprises*, the term "shall have regard to" is not to be elevated to "shall give effect to".[59]

[93] The correct approach, as explained by John Hansen J in *Foodstuffs (South Island) Ltd v Christchurch City Council* (*Foodstuffs*) is in these terms:[60]

> The requirement for the decision maker is to give genuine attention and thought to the matters set out in s.104, but they must not necessarily be accepted.

[94] In *Foodstuffs*, the Judge found it pertinent to note the Court had attached to some matters "little weight" which is different from "no weight".[61]

[95] The case law recognises the Court's obligation to provide a proper explanation for the basis of its conclusions and its findings on the key issues raised — formulated in a way, as described by Muir J in *Housing New Zealand Corporation v Auckland Council*, which "meaningfully weighs or evaluates the respective parties' positions" on those key issues.[62] The High Court will allow an appeal, for error of law, where the Environment Court's judgment does not provide the parties with a clear disposition one way or the other.[63]

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59 *Progressive Enterprises*, above n 48 at [15], citing *Foodstuffs (South Island) Ltd v Christchurch City Council* HC Christchurch AP 27/98, 17 February 1999 [*Foodstuffs*] at 9.

60 *Foodstuffs*, above n 59, at 9.

61 At 10.

62 *Housing New Zealand Corp v Auckland Council* [2018] NZHC 288, (2018) 20 ELRNZ 441 at [25].

63 At [27]; *Tranz Rail Ltd v Wellington City Council* [1999] NZRMA 296 (HC) at 304.

[96] The requirement for proper explanation of reasoning does not, however, call for discussion of marginal, let alone immaterial, objectives or policies. Such was recognised in *Rodney District Council v Gould* (*Gould*) where Cooper J stated:[64]

> The Environment Court is not obliged to refer in its decision to every objective or policy of a district plan which might be of marginal relevance to its decision. Such is the complexity and some would say prolixity of such plans that to impose so strict a requirement would be unworkable, and would serve no useful purpose. It is enough if the main reasons which have led the Environment Court to reach a particular conclusion are set out, and that was done in the present case.

[97] As recognised by Venning J in *Progressive Enterprises* (with reference to *Gould*):[65]

> [17] It is settled that the Environment Court is not required to expressly set out and construe all allegedly relevant provisions of the planning documents to satisfy the requirement that it give genuine attention and thought to them. A thematic approach is acceptable: *Auckland Regional Council v Living Earth Limited* [2008] NZCA 349 at [45]; *Rodney District Council v Gould* [2006] NZRMA 217 at [32].

[98] Consistently with these observations, the High Court ultimately determines if the Environment Court, whether or not it has referred expressly to particular plan provisions, has considered those provisions and weighed them.[66]

Appellants' submissions

[99] Ms Hawkins addressed the appellants' submissions in relation to this ground of appeal. She submitted the Court had failed to comply with s 104(1)(b)(vi) RMA by not having regard to all relevant the provisions of the PDP (and ODP).

[100] Ms Hawkins presented these submissions in the alternative to the appellants' contention as to Policy 24.2.1.1 trumping any proposal for a lot smaller than 80 ha. Given my previous finding as to the first ground of appeal, it is necessary to consider this alternative ground.

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64 *Rodney District Council v Gould*, above n 42, at [32]. See also at [33], approving the approach taken in *O'Shea v Auckland City Council* [2002] NZRMA 117 (EnvC) at [79]–[81].

65 *Progressive Enterprises*, above n 48, at [17].

66 *Duggan v Auckland Council* [2017] NZHC 1540, (2017) 20 ELRNZ 31 at [79].

[101] Ms Hawkins acknowledged the Court had before the interim hearing confined that hearing to community scale issues (as reflected at [2] of the Judgment). That left for later consideration the various other grounds of appeal concerning how the Blacklers' proposal would impact on the Brials and the Todds more directly as neighbours.

[102] Ms Hawkins noted the planners (Ms Panther-Knight, Ms Leith and Mr Woodford) gave evidence in relation to a number of provisions in both the ODP and the PDP. Following expert conferencing, they provided a second joint witness statement dated 2 June 2020 in response to the Court's request for an agreed set of provisions the planners considered to be significant to the determination of the landscape and visual amenity issues.

[103] Ms Hawkins referred to the discussion in the Judgment of the "planning framework for the assessment of effects", where the Court introduced its discussion thus:[67]

> [42] The planning experts identified relevant ODP and PDP objectives, policies and assessment matters. We have considered those provisions but focus on those that give relevant direction on the matters in issue. These are summarised in the Annexure. Our evaluation of the proposal with reference to them is at [90]–[92]. …
>
> (Footnote omitted)

[104] In that part of the discussion, the Court included in a footnote the following explanation of the ODP and PDP provisions which the Court intended to address as relevant:[68]

> These are as set out in the statements of evidence of Amanda Leith (called by Blackler), Kay Panther Knight (called by Brial) and Andrew Woodford (called by QLDC) and related expert conferencing statements. In particular, we refer to their additional JWS – Planning dated 2 June 2020. For the ODP, these include provisions in sections 4 (District Wide), and 5 (Rural Area). Other ODP provisions in sections 15 (Subdivision & Development), and 22 (Earthworks) are not directly relevant to landscape and visual matters and are not addressed in this interim decision. For the PDP, these include Chapters 3 (Strategic Directions), 6 (Landscape and Rural Character), 24 (Wakatipu Basin), 25 (Earthworks) and 27 (Subdivision and Development).

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67 Judgment, above n 3.
68 Judgment, above n 3, at [42] fn 37.

[105] The Annexure, in which the Court set out its summary of ODP and PDP objectives, policies and assessment matters, is reproduced as the Annexure to this Judgment.

[106] From [44] of the Judgment, the Court referred to the evidence of the landscape experts (Messrs Brown and Skelton) before observing that it was unnecessary for the Court to traverse the analysis of the ODP and PDP provisions and the related conclusions of the planning witnesses as their divergent opinions on those provisions were founded on the landscape experts' opinions.[69] The Court recorded that its conclusions on those provisions drew from the Court's own evidential findings.

[107] The Court then (from [73] of the Judgment) set out its findings as to visibility and relevant landscape values before turning to its findings in relation to ODP and PDP objectives and policies which the Court set out in these terms:

> ***Findings in relation to ODP and PDP objectives and policies***
>
> [90] It follows that we are satisfied that the proposal is properly compatible with all relevant ODP and PDP objectives and policies. Our findings are:
>
> **ODP**

Provisions	*Findings*
Obj 4.2.5	Accords with and assists to achieve
Pol 1	Accords with and assists to achieve
Pol 2	Does not conflict with
Pol 3	Does not conflict with
Pol 4	Accords with and assists to achieve
Pol 5	Accords with and assists to achieve
Pol 8	Accords with and assists to achieve
Ch 5 Obj 1	Does not conflict with
Pols 1.4, 1.6 and 1.7	Accords with and assists to achieve

> **PDP**

Provisions	*Description*

[69] At [71].

Strategic Direction Ch 3 Objectives	
Obj 3.2.5.1	Does not conflict with
Pol 3.3.23	Does not conflict with
Pol 3.3.24	Does not conflict with
Ch 24 Wakatipu Basin	
Obj 24.2.1	Accords with and assists to achieve
Implementing policies	
Pol 24.2.1.1	In conflict with
Pol 24.2.1.2	Does not conflict with
Pol 24.2.1.3	Accords with and assists to achieve
Pol 24.2.1.4	Accords with and assists to achieve
Pol 24.2.1.5	Does not conflict with
Pol 24.2.1.11	Does not conflict with

Conflict with Pol 24.2.1.1 is not significant

[91] The proposal, seeking subdivision of a site already well less than 80 ha in area, inherently cannot accord with Pol 24.2.1.1. However, in the design of Ch 24, as we have discussed, that does not condemn the proposal. Rather, it allows for the proposal to be consented subject to it proving satisfactory in terms of the matters addressed in this interim decision.

Plan integrity

[92] On that basis we find that granting consent would not impact on the integrity of Ch 24 or the PDP as a whole. As such, it does not pose any precedent risk.

[108] In Ms Hawkins' submission, the Court entirely relied on the findings it made as to the effects of the proposal when finding it compatible with objectives and policies under the ODP and PDP. She submitted the Court's brief review of requirements under s 104(1) RMA did not meet the requirement to clearly consider and make determinations in relation to relevant plan provisions. In her submission, there was no detailed engagement with all the key objectives and policies.

[109] Ms Hawkins set out a list of objectives and policies which were not mentioned by the Environment Court despite having been identified by the planning witnesses in the joint witness statement as objectives and policies of significance.

[110] Ms Hawkins identified three chapters of the PDP in relation to which she submitted the required level of analysis is missing from the Judgment: chs 3, 25 and 27.

Chapter 3 of the PDP

[111] Chapter 3 of the PDP (at ch 3.1) sets out the "over-arching strategic direction for the management of growth, land use and development in a manner that ensures sustainable management of the Queenstown Lakes District's special qualities".

[112] By their joint witness statement, the planning experts had identified three objectives and four policies as material, disagreeing as to whether the proposal was consistent or inconsistent with them, and giving conflicting evidence in that regard.

[113] Ms Hawkins submitted the Court had failed to give substantive consideration or assessment to these differences.

Chapters 25 and 27 of the PDP

[114] Ms Hawkins submitted the Court similarly failed to give consideration to issues arising under ch 25 (Earthworks) and ch 27 (Subdivision and Development) of the PDP, observing the relevant provisions in those chapters were not mentioned at all in the Judgment.

[115] Ms Hawkins further submitted that, to the extent the Court considered the objectives and policies, its only assessment lay in the "yes/no" exercise in the table in [90] of the Judgment (above at [107]). While Ms Hawkins acknowledged the Court had relied on its findings as to environmental effects, she submitted it did not necessarily follow that a conclusion on effects would lead to the same conclusion in relation to objectives and policies. She cited *Stone v Hastings District Council* as an

instance where an activity, although its effects were found to be minor, was found to be contrary to specified policies and objectives in the relevant plan.[70]

[116] Ms Hawkins submitted the Court failed to take the necessary next step of considering the language of the relevant objectives and policies in explaining why, or why not, the proposal was compatible with them.

Submissions of QLDC

[117] Mr Wakefield noted that the context in which the Court gave its interim decision was the determination of community scale issues. The Court was entitled to limit its assessment to the provisions of more relevance to those community scale issues.

[118] Mr Wakefield submitted from the Court's discussion (at [42] of the Judgment — above at [103]–[104] it is clear the Court had identified what the planning experts considered to be significant provisions. Mr Wakefield submitted it is equally clear that the Court did not assess all those provisions because its "focus [was] on those that give relevant direction on the matters in issue".[71]

[119] In Mr Wakefield's submission, the summary of findings (at [90] of the Judgment) combined with the Annexure indicates that the Court properly honed in on those provisions that provide direction to community scale issues. Provisions identified by the witnesses had been triaged and the Court then provided descriptions to explain why certain provisions were considered relevant.

[120] Mr Wakefield observed the Court's discussion of the evidence leading up to its summary provides the clear link to the findings there set out. Mr Wakefield referred to two examples:

(a) the findings (at [88]) that the landscape and visual amenity effects of the proposal would be no more than minor and that the proposal would properly respect all relevant landscape values and at least maintain

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70 *Stone v Hastings District Council* [2019] NZEnvC 101.
71 Judgment, above n 3, at [42].

landscape and other amenity values — those findings provide the reasoning for the conclusion the proposal was compatible with objective 24.2.1 and Policy 24.2.1.3; and

(b) the finding (at [85]) that the proposal would have no adverse effect on the outstanding visual or character values of the (Slope Hill) ONF is directly related to the Court's finding on objective 3.2.5.1 and Policy 24.2.1.5. As the Court explained: "We now set out our related findings on those before returning to the landscape evidence".[72]

Submissions for the Blacklers

[121] For the Blacklers, Ms Walker observed that counsel for the appellants, while positing there had been no consideration of relevant provisions of ch 3 (and no mention of relevant provisions of ch 25 and ch 27), had not identified specific objectives or policies that had been ignored or not taken into account.

[122] Mr Walker referred to this Court's observation in *Progressive Enterprises* that the Environment Court was "not required to refer to every objective and policy of marginal relevance".[73]

[123] Ms Walker submitted it is clear from the Judgment, particularly at [42], the Court was aware of the relevant objectives and policies that applied to the proposal as a whole. The Court there noted its consideration of those provisions as identified by the planning experts but, exercising its expertise, focused on those it considered gave relevant direction on the matters in issue. In Ms Walker's submission, that was clearly a reference to the community scale issues.

[124] In Ms Walker's submission, the evaluation of findings in relation to the provisions of ch 3 of the PDP are appropriately set out at [90] of the Judgment (with an accurate summary of the objectives, policies and assessment matters included in the Annexure).

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72 Judgment, above n 3, at [85].
73 *Progressive Enterprises*, above n 48, at [27].

[125] Ms Walker submitted an extended examination of objectives and policies or detail not considered by the Court to be relevant also has to be viewed in the context of what is feasible, a matter put into perspective by the length of the written evidence of the witnesses (96 pages in all from Ms Leith and 81 pages from Ms Knight). Ms Walker submitted the extent of identification and explanation of relevant objectives and policies was appropriate.

Discussion

[126] It is clear the Environment Court did not overlook any of the provisions of the ODP or PDP that the experts had identified as of significance. It is equally clear that, by reason of the confining of the interim hearing to issues of community scale, the Court identified and discussed those matters which it found relevant to that range of issues. The findings stated at [90] of the Judgment were expressed to follow from the preceding discussion and analysis. They represent a logical but succinct way of stating the Court's findings. They do not reflect an unreasoned "yes/no" approach as suggested for the appellants. The significant discussions in relation to the PDP (relating to chs 3 and 24) are each dealt with and the conclusions explained. While the planning witnesses had referred also to chs 25 and 27 it is evident from the Judgment that the Court did not find them to require separate analysis. Counsel for the appellants did not point to any particular objective or policy within either of those chapters which could materially have affected, let alone altered, the interim decision.

[127] The second question on appeal will be answered "No".

Ground 3 — a failure to give any consideration to the relevant law and issues that need to be addressed in determining whether a consent notice should be removed

Removal of consent notices — the legal regime

[128] The consent notice affecting the site (consent 936464.2) was registered pursuant to s 221 RMA (in turn pursuant to resource consent RM960353). It limited the site to having only one dwelling.

[129] The territorial authority (and subsequently, on appeal, the Environment Court) had the power under s 221(3) RMA to review the condition as to the site having only

one dwelling house, and to vary or cancel that condition. As part of the proposal, the Blacklers applied for cancellation or variation.

[130] Under s 221(3A) RMA, the Blacklers' application was essentially to be treated the same as an application to vary or cancel a consent condition (ss 88–121 and ss 127(4)–132 RMA applying). Accordingly, s 104 RMA applied and the decision-maker had to have regard to the effects on the environment and to the relevant planning documents.

[131] Counsel referred to two decisions of this Court: *Green v Auckland Council*[74] and *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council.*[75] The latter cites with approval the Environment Court's earlier decision in *Foster v Rodney District Council*.[76] The Courts in those cases did not purport to exhaustively state the considerations that apply on an application for variation or cancellation of a consent notice. Considerations which those cases suggest are likely to be relevant include:

(a) the circumstances in which the condition was imposed, having regard to the original site and the reasons for the consent conditions;

(b) the environmental values the consent notice sought to protect and a comparative evaluation of the environmental impact which would result from cancellation or variation of the consent notice;

(c) any pertinent general purposes of the RMA as identified in pt 2 RMA; and

(d) whether there has been a material change of circumstances (such as rezoning) which renders the consent notice of no value or means that it obstructs the sustainable management purpose of the RMA.

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74 *Green v Auckland Council* [2013] NZHC 2364, (2013) 17 ELRNZ 737, [2014] NZRMA 1 at [128]–[129].

75 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844, (2019) 21 ELRNZ 428 at [42]–[46].

76 *Foster v Rodney District Council* [2010] NZRMA 159 (EnvC) at [9].

Submissions for the appellants

[132] Mr Miles submitted the Court failed to have regard to the relevant considerations relating to removal or variation of the consent notice. In particular, he argued the Court failed to have regard to the landscape character and amenity values which the consent notice served to protect.

[133] Mr Miles acknowledged the Court referred to the application for cancellation at three points in the Judgment, including in para [1] (in the footnote in particular) where the proposal was identified as involving the cancellation of the consent notice.[77]

[134] Mr Miles submitted that, notwithstanding those references to the consent notice, the Court had failed to give substantive consideration to the matters to be considered before a consent notice may be varied or cancelled. He suggested the Court had simply overlooked the consent notice.

[135] Mr Miles submitted that the Court failed to have regard to evidence relating to the values the consent notice sought to protect and also failed to have regard to the fact that the consent notice is consistent with the policy shift under the PDP (restricting subdivision under 80 ha in the WBRAZ). Mr Miles submitted that the purpose of the consent notice is more relevant today than it was when imposed in 1996.

Submissions for QLDC and the Blacklers

[136] Mr Wakefield and Ms Walker made complementary submissions in relation to the consent notice. It was noted the 1996 decision had been made without opposition from any of the neighbouring properties and nothing in the consent notice or the 1996 decision identifies the purpose of the consent notice. They submitted the purpose inferred for the appellants is therefore based on assumption. Counsel referred to problems in relation to the interpretation of the consent notice, as recognised by the expert planning witnesses.

[137] Counsel noted the Judgment contains clear reference to the application for cancellation and to the Court's jurisdiction under s 221 RMA in relation to

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[77] Judgment, above n 3, at [1] fn 3, [9] and [11].

cancellation. Counsel observed the Judgment necessarily contained the assessment of landscape capacity and cumulative effects required to determine the community scale issues that were the subject-matter of the interim hearing. Counsel noted it could be expected the Court would address the specifics of the proposal, including cancellation of the consent order, when it came to the final hearing when the local level issues would be addressed.

Discussion

[138] It is clear the Environment Court properly understood the proposal to include an application for cancellation (or variation) of the consent order and that the consideration of that arose under s 221 RMA.

[139] It is equally clear, when the judgment is read as a whole, that (contrary to the appellants' assertion) the Court did not simply overlook the consent notice. Instead, through the directed focus on community scale issues, the Court deferred the determination of the cancellation application to the final hearing stage. Such was implicit in the Court's observation that:[78]

> This interim decision determines those community scale issues, leaving aside at this stage the various other grounds of appeal concerning how the proposal would impact on the appellants more directly as neighbours.

[140] In taking that approach, the Court did not disregard the landscape character and amenity values of the WBRAZ or the effects the proposal would have. Those considerations affecting both the resource consent and the consent notice cancellation, that overlap in terms of community scale, were the subject of detailed consideration in the Judgment. The Court did not err by failing to address the issues that need to be addressed (as between neighbours) in relation to the cancellation of the consent notice. Community level issues have been addressed. To the extent the proposal (including the consent notice cancellation) would impact more directly on the Blacklers' neighbours, that was always (under the Court's pre-hearing directions) a matter to be considered and determined at the Court's final hearing.

[141] The third question on appeal will be answered "no".

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78 Judgment, above n 3, at [2].

Outcome

[142] Each of the three questions raised by the appellants is accordingly answered "no".

Costs

[143] The appellants are to pay to each of the Queenstown Lakes District Council and the Blacklers the costs (on a 2B basis)[79] and disbursements to be fixed by the Registrar (with no certificate for second counsel).

Osborne J

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Anderson Lloyd, Dunedin
Counsel: P E M Walker, Pip Walker Environment Law, Dunedin

Copy to: Queenstown Lakes District Council, Queenstown

[79] High Court Rules 2016, *Ross SC* 14.3(1) and 14.5(2).

ANNEXURE A

Annexure

Summary of ODP and PDP objectives, policies and assessment matters

ODP

Provisions	*Description*
Obj 4.2.5	subdivision, use and development avoids, remedies or mitigates adverse effects of subdivision use and development on landscape and visual amenity values
Implementing policies	
Pol 1	directs to avoid, remedy or mitigate effects of development and/or subdivision in areas where landscape and visual amenity values are vulnerable to degradation, and to encourage development/subdivision in areas that have greater potential to absorb change. Seeks to ensure development/subdivision harmonises with local topography;
Pol 2	directs to maintain present openness where ONF/Ls[65] have an open character and to recognise and provide for the protection of naturalness and enhance the amenity of views of ONF/Ls from public roads; seeks to avoid subdivision/development where ONLs have little or no capacity to absorb change and allow for limited subdivision/development where there is higher absorption capacity;
Pol 3	directs to avoid subdivision/development on ONF/Ls of the Wakatipu Basin unless the effects on landscape values and natural character and visual amenity values are only minor. Specifies such outcomes are important for buildings and structures and associated roading, the importance of avoiding cumulative deterioration, the importance of protecting and enhancing naturalness and enhancing views from public places and roads. Directs to maintain openness where ONF/Ls have present open character and to remedy and mitigate past inappropriate subdivision/development;
Pol 4	directs that adverse effects of subdivision and development are avoided, remedied, or mitigated in VALs that are highly visible from public areas and visible from public roads. It also requires mitigation of loss of or enhancement of natural character by appropriate planting and landscaping;
Pol 5	directs that subdivision be avoided in the vicinity of ONFs including Slope Hill, unless it will not result in adverse effects that are no more than minor on landscape values, natural character, and visual amenity values;
Pol 8	directs that in applying inter alia Pols 1, 4, and 5 the density of subdivision does not lead to over domestication of the landscape.
Ch 5 Obj 1	to protect character and landscape value by promoting sustainable development and controlling adverse effects of inappropriate activities
Implementing policies	
Pols 1.4 - 1.7	seek to ensure activities occur where the character of the rural area will not be adversely impacted, adverse effects on the District's landscapes are avoided, remedied or mitigated, and the visual coherence of the landscape is preserved.

65 Outstanding Natural Features and Outstanding Natural Landscapes.

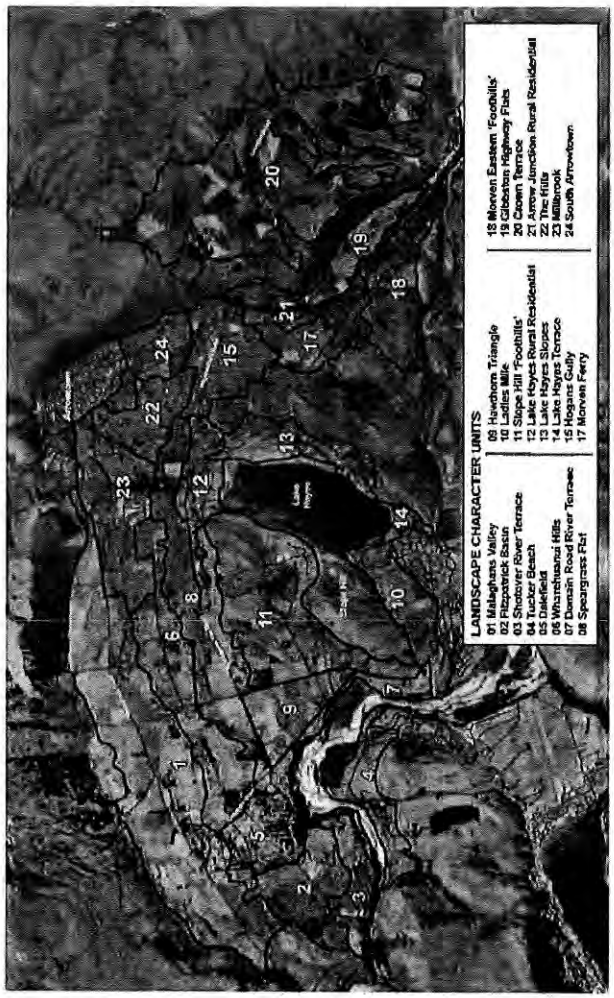
Assessment matters and other rules	
R 5.4.2	related assessment matters direct that assessment be as to: (a) effects on natural and pastoral character; (b) visibility of development; (c) form and density of development; (d) cumulative effects of development on the landscape; and (e) rural amenities.

PDP

Provisions	*Description*
Strategic Direction Ch 3 Objectives	
Obj 3.2.5.1	refers to landscape and visual amenity values in relation to ONLs and ONFs.
Implementing policies	
Pol 3.3.23	seeks to identify areas that cannot absorb further change and avoid residential development there.
Pol 3.3.24	seeks to ensure cumulative effects of subdivision and development do not result in areas losing their rural character.
Ch 24 Wakatipu Basin	
Obj 24.2.1	seeks to maintain or enhance landscape character and visual amenity values in the Wakatipu Basin Rural Amenity Zone.
Implementing policies	
Pol 24.2.1.1	requires a minimum net site area of 80 ha be maintained within the Wakatipu Basin Rural Amenity Zone outside of the Precinct.
Pol 24.2.1.2	seeks to ensure subdivision and development is designed to minimise inappropriate modification to the natural landform.
Pol 24.2.1.3	seeks to ensure subdivision and development maintains or enhances landscape character and visual amenity values identified in PDP Sch 24.8 Landscape Character Units.
Pol 24.2.1.4	seeks to maintain or enhance landscape character and visual amenity values associated with the Rural Amenity Zone inter alia by the control of the colour, scale, form, coverage, location (including setbacks from boundaries) and height of buildings and associated infrastructure, vegetation and landscape elements.
Pol 24.2.1.5	requires buildings to be located and designed so they do not compromise the landscape and amenity values and natural character of an ONF or ONL that are adjacent or where the building is in the foreground of views from a public road or reserve of the ONF or ONL.
Pol 24.2.1.11	provides for activities whose built form is subservient to natural landscape elements and that, in areas Schedule 24.8 identifies as having a sense of openness and spaciousness, maintain those qualities.

24.8 Schedule 24.8 Landscape Character Units

Extracts of Map showing all LCUs and Table for LCU 11: Slope Hill 'Foothills'



24.8 Schedule 24.8 Landscape Character Units

Landscape Character Unit	11: Slope Hill 'Foothills'
Landform patterns	Elevated and complex patterning of hills ranging from moderate to steeply sloping in places. Elevated hummock pattern throughout central portion with remnant kettle lakes.
Vegetation patterns	Exotic shelterbelts, woodlots, remnant gully vegetation, and exotic amenity plantings around older rural residential dwellings. Predominantly grazed grass although smaller lots tends to be mown.
Hydrology	Numerous streams, ponds and localised wet areas.
Proximity to ONL/ONF	Adjoins Slope Hill/Lake Hayes ONF.
Adjoins Slope Hill/Lake Hayes ONF.	North: Ridgeline crest. East: Ridgeline crest/ONF. South: Toe of Slope Hill ONF. West: Lower Shotover Road.
Land use	Mix of rural and rural residential.
Settlement patterns	Dwellings generally located to enjoy long-range basin and mountain views. Older rural residential development tends to be well integrated by planting and/or localised landform patterns. Newer rural residential is considerably more exposed, with buildings sited to exploit landform screening (where possible). Clustered development evident in places. Numerous consented but unbuilt platforms (43). Typical lot sizes: evenly distributed mix. One property 100-500ha range, another 50-100ha. Balance typically shared lots or 4-10ha range.
Proximity to key route	Located away from key vehicular route.
Heritage features	No heritage buildings/features identified in PDP
Recreation features	A Council walkway/cycleway runs along Slope Hill Road (forms part of the Queenstown Trail 'Countryside Ride')
Infrastructure features	Reticulated water, sewer and stormwater in places
Existing zoning	PDP: Western slopes overlooking Hawthorn Triangle: Rural Lifestyle (no defensible edges). Balance of the unit: Rural.
Visibility/prominence	Visibility varies across the landscape unit. The elevated nature of the unit and its location adjacent a flat plain on its western side means that this part of the area is visually prominent. The steep hillslopes and escarpment faces edging Speargrass Flat to the north and Lake Hayes to the east, together with Slope Hill itself, serve to limit visibility of the balance of the unit from the wider basin landscape.
Views	Key views relate to the open vistas available from parts of Hawthorn Triangle environs to the western portion of the unit. The unit affords attractive long-range views out over the basin to the surrounding ONL mountain setting as well as open views of the nearby Slope Hill ONF from some public locations.

Enclosure/openness	A variable sense of openness and enclosure. The older and more established rural residential development throughout the elevated slopes on the western side of the unit are reasonably enclosed, despite their elevation. Throughout the central and eastern areas, landform provides containment at a macro scale.
Complexity	Generally, a relatively complex unit due to the landform patterning. Vegetation patterns add to the complexity in places.
Coherence	The coordination of landform and vegetation patterns in places (associated with gully plantings), contributes a degree of landscape coherence. Elsewhere the discordant vegetation and landform patterning means that there is a limited perception of landscape coherence.
Naturalness	A variable sense of naturalness, largely dependent on how well buildings are integrated into the landscape. The large number of consented but unbuilt platforms suggest that a perception of naturalness could reduce appreciably in time.
Sense of Place	Generally, the area reads as a mixed rural and rural residential landscape. The elevated portions of the area read as a rural residential landscape 'at, or very near, its limit'. The lower-lying stream valley area to the east remains largely undeveloped, and functions as somewhat of a 'foil' for the more intensive rural residential landscape associated with the surrounding elevated slopes.
Potential landscape issues and constraints associated with additional development	DoC ownership of part of low lying stream valley to the east. Drainage in places (e.g. low-lying stream valley to east). Potential visibility of development throughout western hillslopes in particular. Importance of the western slopes as a contrasting and highly attractive backdrop to the intensive patterning throughout the Hawthorne Triangle, particularly in views from within the triangle. Importance of existing open views to Slope Hill. Proximity of popular walkway/cycleway route. Environment Court history suggest that the capacity has been fully exploited in most parts of the LCU.
Potential landscape opportunities and benefits associated with additional development	Riparian restoration potential. Large-scaled lots suggest potential for subdivision. Improved landscape legibility via gully and steep slope planting.
Environmental characteristics and visual amenity values to be maintained and enhanced	Landform pattern. Careful integration of buildings with landform and planting. Set back of buildings from ridgeline crests to north and east of unit. Retention of existing open views to Slope Hill.
Capability to absorb additional development	Low