

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2024] NZEnvC 87

IN THE MATTER

of the Resource Management Act 1991

AND

an appeal under cl 14 of Schedule 1 of
the Act

BETWEEN

WATERFALL PARK
DEVELOPMENTS LIMITED

(ENV-2019-CHC-90)

Appellant

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge J J M Hassan
Environment Commissioner M C G Mabin

Hearing: In Chambers

Last case event: 21 December 2023

Date of Decision: 22 April 2024

Date of Issue: 22 April 2024

SECOND DECISION OF THE ENVIRONMENT COURT
Stage 2: Topic 31 – Ayrburn

A: Directions are made for supplementary submissions on the final wording of Obj 27.3.25 and a new Pol 27.3.25.11 to replace r 27.2.xx.2(i) for the purposes of final determination of whether Modified WBRAZ or WBRAZ is the most appropriate zoning outcome.



- B: Subject to A, determinations are made to enable QLDC to prepare a full set of provisions for any Modified WBRAZ outcome (subject to the court making a final determination on whether that is the most appropriate zoning outcome).
- C: Costs are reserved and a timetable is directed.

REASONS

Introduction

[1] This decision is on Topic 31 in Stage 2 of the review of the Queenstown Lakes District Plan ('PDP'). It concerns an appeal by Waterfall Park Developments Limited ('WPDL') against decisions by Queenstown Lakes District Council ('QLDC') in relation to the PDP.¹

[2] WPDL owns land at 343 Arrowtown Lake Hayes Road ('Site'). Its appeal sought an extension to the mapped boundaries of the Arrowtown Urban Growth Boundary ('Arrowtown UGB') towards and including part of the Site, and change to the zoning of the Site from Wakatipu Basin Rural Amenity Zone ('WBRAZ') to a mix of zonings.²

[3] WPDL's relief was opposed by QLDC. Various aspects were opposed by the s274 parties to the appeal. Those s274 parties included James and Rebecca Hadley ('Hadleys').

Interim decision

[4] In an interim decision, the court finally determined some aspects of the

¹ ENV-2019-CHC-90.

² As discussed in *Waterfall Park Developments Ltd v Queenstown Lakes District Council* [2023] NZEnvC 207 ('interim decision').

appeal to the effect that:

- (a) the Arrowtown UGB is to remain unchanged; and
- (b) Waterfall Park Zone is confirmed for the portion of the Site known as Ayrburn Domain, subject to the various provisions specified in that decision (with associated directions for QLDC to update the PDP, including the planning maps and the mapped boundaries of LCU 23 and LCU 8 in PDP Sch 24.8).

[5] The balance of the Site is known as Ayrburn Farm. For this part, the interim decision rejected some of the zoning options put forward, leaving for determination whether the most appropriate zoning outcome should be either WBRAZ or WBRAZ subject to some modifications as discussed in the decision ('Modified WBRAZ'). The interim decision included directions for WPDL to file a memorandum to advise whether or not it wished to pursue a Modified WBRAZ option for Ayrburn Farm.³

WPDL's preference for modified WBRAZ and responses to directions

[6] WPDL advised the court that it would pursue the Modified WBRAZ option.⁴ The court made timetable directions, according to which:⁵

- (a) WPDL submitted a memorandum dated 17 November 2023 including its preferred provisions ('17 November version') and explaining that there is agreement on most aspects;⁶
- (b) QLDC and the Hadleys filed submissions in response to confined aspects of those provisions; and
- (c) WPDL replied to those submissions by memorandum dated

³ Interim decision at [140(a)].

⁴ WPDL memorandum dated 10 October 2023.

⁵ Email direction dated 12 October 2023. Leave was granted for all parties to file submissions.

⁶ WPDL memorandum dated 17 November 2023 at [13].

8 December 2023 which included an updated set of provision ('8 December version').

WPDL's Modified WBRAZ proposal

[7] WPDL's Modified WBRAZ proposal centres on an 'Ayrburn Farm Structure Plan' to be included in PDP Section 27.13. It denotes various Activity Areas in respect of which related activity classes, standards and other rules for subdivision, development and land use apply through Chs 27 and 24. These are the Tree Protection Riparian Planting, Open Space ('OS') and two Residential 'Activity Areas'. The structure plan also depicts relevant features for the purposes of related controls, including Mill Creek and an ephemeral tributary, Ayr Avenue and a proposed 'Pasture Line' for the Christine's Hill parts of Ayrburn Farm.

[8] There is an associated bespoke Ayrburn Farm Obj 27.3.25:

Subdivision that provides for limited rural living while having particular regard to maintaining or enhancing landscape, ecological and water quality values.

[9] That is accompanied by associated Ayrburn Farm policies 27.3.25.1 – 27.3.25.10 reflecting various intentions for subdivision and development outcomes. Only one is in contention, namely:

27.3.25.2 Protect the open space values of Christine's Hill and the rural values of the paddocks adjoining Arrowtown-Lake Hayes Road.

[10] Those provisions are materially in the same format proposed by Mr J Brown in his rebuttal evidence.⁷

[11] According to the structure plan approach, WPDL proposes a number of 'Location Specific Rules' for subdivision and development at Ayrburn Farm.

⁷ WPDL memorandum dated 17 November 2023 at [5].

These are in an amended PDP Section 27.7.⁸

[12] Within areas denoted Residential on the structure plan, the lot size standards for a restricted discretionary activity subdivision are 6,000m² minimum and 1 ha average. Within areas denoted Open Space, the WBRAZ default minimum of 80 ha (under r 27.6.1) applies, such that subdivision will typically default to non-complying. Subdivision is also non-complying across Ayrburn Farm if:

- (a) it is not consistent with the structure plan (r 27.7.xx.1);
- (b) specified prior enabling works are not undertaken, pertaining to indigenous riparian planting of Mill Creek and the ephemeral stream margins and stock exclusion (r 27.7.xx.1); or
- (c) the subdivision is not subject to all of a specified ten sets of controls as consent notice conditions (rr 27.7.xx.2, 27.7.xx.3).

[13] Rules for subdivision consent notice conditions prescribe prohibitions, limits and controls pertaining to:

- (a) permissible plantings in the Open Space area, in r 27.7.xx.2 as follows ((b) being in contention):
 - (a) No vegetation other than pasture grass, crops or grapevines shall be planted within any Activity Area OS provided that this control does not apply to planting to maintain or replace trees and landscaping areas along Ayr Avenue:
 - (b) No vegetation other than pasture grass shall be planted within Activity Area OS adjoining the northern boundary of Ayrburn which adjoins the Millbrook Zone (Christine's Hill) above the Pasture Line shown on the Ayrburn Structure Plan.

⁸ Interim decision at [140(a)].

- (b) tree protection in the Tree Protection Area and the ongoing maintenance of landscape plantings;
- (c) building in the Open Space area, wastewater discharge, fertiliser usage, commercial livestock and vehicle access; and
- (d) the following (r 27.2.xx.2(i)) the wording of which is in contention:

The Activity Area OS areas shall be managed in a consistent and integrated manner.

[14] The Hadleys dispute the addition of a so-termed 'Pasture Line' in the structure plan and associated rules. Mr Goldsmith explains the intention of this set of provisions. We understand it is in order that the slopes of Christine's Hill be maintained in pasture grass. Any crops or grapevines would be confined to the lower-level OS Activity Areas (where pasture is also allowed).⁹

[15] The controls for tree protection in the Tree Protection Area include various specified exemptions. One is that trees west of Mill Creek can be removed or trimmed if "identified in a Written Approval provided by the adjoining landowner directly south of the trees to be removed or trimmed". Mr Goldsmith advises that this reflects an equivalent (currently operative) ongoing condition of consent imposed under the Ayr Avenue consent RM171280.¹⁰

[16] There are no requirements for the provision of public walking and cycling trails. WPDL submits that none is warranted, in that these matters can be addressed separately, including in consultation with the Queenstown Trails Trust.¹¹

[17] Nor are any building height controls specified. Mr Goldsmith submits that it is sufficient to rely on the existing WBRAZ building height controls. He points out that, while the interim decision precludes residential development on the higher plateau areas, it makes no reference to any concern about building heights

⁹ WPDL memorandum dated 17 November 2023 at [9].

¹⁰ WPDL memorandum dated 17 November 2023 at [10].

¹¹ WPDL memorandum dated 17 November 2023 at [7].

within the proposed Residential Activity Areas.¹²

[18] Some location-specific controls are replicated in rr 24.4.26 and 24.4.27 for inclusion in Ch 24. That is so as to ensure these controls take effect from the date the court issues its final decision (rather than not coming into force until a subdivision consent is obtained under Ch 27 PDP).¹³

[19] Subject to seeking to respond to the court's findings in the interim decision, WPDL's provisions closely align with the evidence of Mr J Brown.

Consequential change proposed to Sch 24.8: Landscape Character Units

[20] Mr Goldsmith draws the court's attention to a potential consequential amendment to Sch 24.8: Landscape Character Units. In the relevant unit, LCU 8: Speargrass Flat, the "capability to absorb additional development" is identified as 'Low'. Counsel questions whether that should be amended to reflect the court's interim decision that the capacity of two defined pockets of Ayrburn Farm for rural living development is 'Moderate'.¹⁴ As Mr Goldsmith explains, those pockets of higher capability (or landscape capacity) are now denoted as Residential Activity Areas in its proposed structure plan. WPDL proposes that the notation in Sch 24.8 be amended along the lines of:¹⁵

Moderate – within the Residential Activity Areas shown on the Ayrburn Farm Structure Plan in section 27.13.

Statutory framework and legal principles

[21] We make our determinations according to the statutory framework and

¹² WPDL memorandum dated 17 November 2023 at [11].

¹³ WPDL memorandum dated 17 November 2023 at [6].

¹⁴ Interim decision at [116], [126].

¹⁵ WPDL memorandum dated 17 November 2023 at [12].

legal principles we set out in the interim decision.¹⁶

[22] In addition, as to the consequential change that WPDL proposes the court make to Sch 24.8, jurisdictional scope in an appeal extends to the making of incidental and consequential alterations to the relief sought.¹⁷ We test that in part by reference to whether there is a real risk that persons affected by the change would be denied effective opportunity to participate.¹⁸

Outstanding issues

[23] Parties raise some confined issues in response to WPDL’s 17 November version provisions.

Hadley

[24] In proposed Pol 27.3.25.2, the Hadleys suggest that the words “and the Countryside Trail” be added after “Christine’s Hill”. The Hadleys submit that the additional words are a better reflection of the court’s findings on the values specified in Sch 24.8. They submit that, if the policy is inconsistent with the schedule values, that might be construed as implying some deliberate difference in meaning (that is, an intention to exclude the Countryside Trail).¹⁹

[25] As for proposed r 27.2.xx.2(i), the Hadleys submit there is a live question about how to achieve the intended outcome in circumstances where the Open Space land is subdivided into multiple ownerships and each owner wishes to carry out different rural lifestyle activities. They are particularly concerned about outcomes for the land to the west of Mill Creek. To address this concern, they

¹⁶ Interim decision at [22], [23], Annexure 1.

¹⁷ *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145; *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111, at [51].

¹⁸ *Cleanwater Resort Ltd v Christchurch City Council*, HC Christchurch, AP 34/02, 14 March 2003 at [66].

¹⁹ Hadleys memorandum dated 24 November 2023 at [4(a)].

seek the addition of the following rule:²⁰

27.7.xx.2 (j) The Activity Area OS west of Mill Creek shall be held in one record of title.

[26] As for proposed r 27.7.xx.2(b), the Hadleys note that the so-termed Pasture Line provisions do not appear to respond to the court’s findings in the interim decision. They are concerned about potential future arguments about landscape character differences within the Open Space areas.²¹

QLDC

[27] QLDC’s only substantive concern is as to the drafting of Pol 27.3.25.2.²² QLDC refers to the court’s findings in the interim decision concerning views from the Countryside Trail (at least in terms of public places).²³ Mr Wakefield points out that those findings informed the spatial location of the Residential Activity Areas that the court approved. Particularly for any non-complying subdivision, QLDC submits that clear policy direction would be important to protect open space values.²⁴ QLDC considers the Hadleys’ proposed changes to Pol 27.3.25.2 somewhat misdirected in that the Countryside Trail itself does not have open space values. To better identify the importance of the area surrounding the Trail and views from the Trail, QLDC proposes that the policy be reworded:²⁵

Protect the open space values of Christine’s Hill and Ayrburn, including when viewed from the Countryside Trail where it is a public place, and the rural values of the paddocks adjoining Arrowtown-Lake Hayes Road.

²⁰ Hadleys memorandum dated 24 November 2023 at [4(b)].

²¹ Hadleys memorandum dated 24 November 2023 at [4(c)].

²² QLDC is neutral in relation to the other matters identified by the Hadleys.

²³ QLDC memorandum dated 1 December 2023 at [5].

²⁴ QLDC memorandum dated 1 December 2023 at [6].

²⁵ QLDC memorandum dated 1 December 2023 at [8]-[9].

WPDL

[28] In its reply submissions, WPDL opposes the amendments sought to Pol 27.3.25.2 as unnecessary and misdirected.²⁶ Mr Goldsmith suggests an alternative could be to replace reference to “Christine’s Hill” with “Ayrburn”.²⁷

[29] WPDL explains that the Pasture Line and rules were proposed to help give effect to the first part of Pol 27.3.25.2 which reads “Protect the open space values of Christine’s Hill ...”. However, it would not have difficulty in deleting these provisions if the court did not find them appropriate.

[30] WPDL opposes the Hadleys’ proposed new r 27.7.xx.2 (j), submitting the choice of approach to achieving a desired consistent and integrated management outcome is better left to the subdivision consent process.²⁸

Evaluation

[31] Our evaluation is with reference to WPDL’s 8 December version. Unless we specify otherwise, we find those provisions appropriate in response to our findings in the interim decision concerning Ayrburn Farm. In light of the findings in our interim decision, we take confidence from the fact that there are only confined points of difference between parties, with one exception: Obj 27.3.35.

Obj 27.3.35

[32] Whilst this objective would sit in Ch 27, it pertains only to subdivision at Ayrburn Farm within the WBRAZ. Hence, it is important that it does not confuse the clarity of the objective and is consistent with the drafting of WBRAZ Objs 24.2.1 – 24.2.5.

²⁶ WPDL memorandum dated 8 December 2023 at [9]-[11].

²⁷ WPDL memorandum dated 8 December 2023 at [8].

²⁸ WPDL memorandum dated 8 December 2023 at [15].

[33] The words “having particular regard to” render the provision less clear and their purpose is not explained in submissions.

[34] Furthermore, the drafting is materially more permissive of development than Obj 24.2.5 is as follows (our emphasis):

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

[35] In that regard, the drafting does not reflect the findings in the interim decision that Precinct zoning is not appropriate, especially in view of the landscape character and visual amenity values.

[36] If the court is to find a Modified WBRAZ outcome appropriate, this objective must be revised to properly reflect our findings. Subject to any final submissions, the court’s provisional view is that the objective should read as follows:

Subdivision that provides for limited rural living, provided landscape character, visual amenity values and ecological and water quality values are maintained or enhanced.

[37] On landscape character and visual amenity values, that drafting brings the objective closer to Obj 24.2.5 (the further restriction in the word “limited” reflecting an intentionally less permissive regime). Whilst it also encompasses ecological and water quality values in the same way, the evidential findings concerning the relationship of the Site to water quality outcomes for Lake Hayes catchment justify that.

Pol 27.3.25.2

[38] We find the most appropriate expression of this policy is that proposed by QLDC, namely:

Protect the open space values of Christine's Hill and Ayrburn, including when viewed from the Countryside Trail where it is a public place, and the rural values of the paddocks adjoining Arrowtown-Lake Hayes Road.

[39] Reference to both Christine's Hill and Ayrburn are helpful as both have significant associated open space values. Whilst singling out the Countryside Trail as a viewpoint is relatively prescriptive, doing so helps achieve the PDP's intentions. That is given the importance of that viewpoint as revealed in the evidence and as reflected in the findings in the interim decision. In essence, viewpoints from the relevant section of the Trail are significant in terms of the landscape character of not only LCU 8 but the Basin more generally. It is therefore efficient, in terms of assisting to achieve the PDP's intentions concerning the WBRAZ, to give this policy direction for the purposes of later consenting processes.

Other location-specific policies

[40] We find the remaining proposed Pols 27.3.25.1 and 27.3.25.3 – 27.3.25.10 as included in the 8 December version, as part of the Modified WBRAZ option, most appropriate for achieving relevant PDP objectives. That finding is informed by the findings in the interim decision.

The Pasture Line provisions

[41] Although the Pasture Line provisions were not expressly raised in the interim decision, we find they are consistent with the decision's relevant findings. The provisions help give effect to the first part of Pol 27.3.25.2 and bring further clarity to the design intentions for Ayrburn Farm according to the WBRAZ's objectives and policies (including as modified by this decision). We reflected on whether this was overly prescriptive, but also on the fact that WPDL volunteers this refinement. Therefore, we confirm this aspect of the Ayrburn Structure Plan and the associated r 27.7.xx.2 (b) as an appropriate addition.

Rule 27.7.xx.2 (i) and proposed r 27.7.xx.2 (j)

[42] WPDL’s proposed r 27.7.xx.2 (i) is inherently uncertain and, hence, unsuitable either as a form of consent notice condition or for specification as a standard for the purposes of triggering non-complying activity status. On the other hand, the Hadleys’ proposal that it be supplemented with a new rule 27.7.xx.2 (j) is also problematic in being unduly prescriptive. We bear in mind that subdivision in the OS will generally be a non-complying activity. As such, it will be scrutinised according to the WBRAZ objectives and policies, including as they would be supplemented for Ayrburn Farm under WPDL’s proposed provisions.

[43] Activity management, even of types of permissible vegetative cover, are central to WPDL’s proposed structure planning approach to Ayrburn Farm. However, some matters of detail are better left to consent authority discretion rather than in the form of activity classification or consent notice rules. We find that to be the case for proposed r 27.7.xx.2 (i). Insofar as there is any resource management value in activities being managed in a “consistent” and “integrated” way (e.g. over time and/or by various new landowners), that can be considered at the consenting stage subject to appropriate policy guidance. Hence, we find that a suitably worded policy would be more appropriate than r 27.7.xx.2 (i). Subject to any supplementary submissions, our provisional wording of this policy as follows:

27.3.25.11 Provide for consistent and integrated management of the Activity Area OS.

[44] Therefore, we find that proposed r 27.7.xx.2 (i) will not be included as part of a Modified WBRAZ outcome and we reserve determination of whether that outcome should include an appropriate policy such as we have provisionally proposed.

Lack of provision for public walking and cycling trails and building heights

[45] On the matter of the lack of provision for public walking and cycling tracks, the interim decision acknowledges that such “enhancements” are not essential to support a finding in favour of a WBRAZ zoning outcome.²⁹ We accept Mr Goldsmith’s submission that these matters can be left to consideration at the consenting stage or to negotiation or discussion, if pursued.

[46] It is sufficient that we confirm our finding that nothing is required by way of further policy or other directives in the PDP on these matters. We find that is also the case for building height matters.

Consequential change to Sch 24.8

[47] The consequential changes sought to LCU 8 in Sch 24.8 are comfortably within jurisdictional scope. That is because the relief in the appeal gave ample notice that enhanced development capacity for Ayrburn Farm was pursued beyond what the PDP LCU 8 signals as Low. The change sought reflects our findings on the evidence in the interim decision. The choice of wording proposed by Mr Goldsmith is also appropriate, ie:

Moderate – within the Residential Activity Areas shown on the Ayrburn Farm Structure Plan in section 27.13.

[48] Therefore, we find this consequential change will be made as part of the Modified WBRAZ option.

Conclusion and directions

[49] With the exception of proposed Obj 27.3.25, the 8 December version soundly reflects the findings in the interim decision concerning a Modified

²⁹ Interim decision at [132].

WBRAZ zoning outcome. That is subject to the change we make to Pol 27.3.25.2 and the deletion of proposed r 27.7.xx.2 (i) and its possible replacement with a policy such as we propose. It is also subject to our finding that the proposed change to Sch 24.8 LCU 8 is to be made also as part of any Modified WBRAZ outcome.

[50] Our directions allow for supplementary final submissions on the reserved matters. In the meantime, we must also leave reserved our final determination of whether the appeal outcome will be Modified WBRAZ or unmodified WBRAZ.

[51] It is therefore **directed** that:

- (a) **within 15 working days** of this decision, any party seeking to make supplementary submissions on the wording of Obj 27.3.25 and/or possible Pol 27.3.25.11 must file a *short* memorandum for those purposes including tracked change drafting. If no parties seek to make submissions on those provisions, it can be anticipated that a Modified WBRAZ outcome including those provisions will be confirmed;
- (b) the court will then issue a further decision that determines whether the zoning outcome will be WBRAZ or Modified WBRAZ and giving any associated directions for QLDC to provide a final set of updated provisions for the court's approval (including any maps) for the purposes of making any update to the PDP.

Costs

[52] The Hadleys and QLDC seek a costs timetable. It is premature to lock this in prior to the court making its final determination concerning the most appropriate zoning outcome. Nevertheless, subject to any further or amended directions, at this stage it is directed:

- (a) any application for costs shall be made within **14 days** of the date of the next decision as signalled in direction [51](b);
- (b) any opposition is to be filed within a further **7 days**; and
- (c) any reply is to be lodged within a further **7 days**.

Leave reserved

[53] Leave is reserved to any party to seek further or amended directions by memorandum filed **within 15 working days of this decision**.

Minor corrections and clarifications to the interim decision

[54] As Mr Goldsmith correctly points out, the interim decision confuses east and west in some places. At [125](b), that is with respect to positioning with regard to Arrowtown Lake Hayes Road. At [125](d), it is with reference to Mill Creek floodplain. Furthermore, at [31], 'Fig 2' should read Fig 4. Nothing substantially flows from these errors.

For the court



J J M Hassan
Environment Judge

