IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

Decision No. [2023] NZEnvC 265

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under s120 of the Act
BETWEEN	GIBBSTON VINES LIMITED
	(ENV-2018-CHC-8)
	Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL
	Respondent

Court:	Environment Judge J J M Hassan Deputy Environment Commissioner G Paine Special Advisor W R Howie
Hearing:	In Chambers at Christchurch
Last case event:	15 February 2023
Date of Decision:	7 December 2023
Date of Issue:	7 December 2023

INTERIM DECISION

A: Subject to a satisfactory response to directions, the Modified Proposal satisfies all necessary requirements for consent.

B: Directions are made for the purposes of responses on matters at [92].

C: Costs are reserved, pending determination or other resolution of the High Court appeal.

REASONS

Introduction

[1] This proceeding concerns an appeal by Gibbston Vines Limited ('GVL') against a decision by Queenstown Lakes District Council ('QLDC') declining subdivision and land use consents. The consents were sought by GVL to enable a seven-lot residential subdivision and associated development of land ('the Site') at 2404 Gibbston Highway ('SH6') ('Proposal'). The Site is approximately 8.9 ha in area and is on the western side of the SH6/Gibbston Back Road junction at the eastern end of the Gibbston Valley. The Site is within the Gibbston Character Zone ('GCZ') of the proposed Queenstown Lakes District Plan ('PDP'). It has been used as a vineyard, but has remained unutilised for several years.

Procedural background

[2] The court has issued two interim decisions on the appeal to date. The first was issued on 2 July 2019 ('First Decision').[1] It did not finally determine the appeal but made various findings concerning the Proposal and granted leave to GVL to seek modifications to address the court's findings. The second decision was issued on 8 March 2021 ('Second Decision').[2] It declined consent to proposed Lots 2-7 of the Proposal but left reserved the capacity to grant consent to a two-lot subdivision of the Site.

[3] On 11 February 2022, GVL took up that opportunity, giving notice that it sought a two-lot subdivision consent subject to a set of proposed conditions

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1 [2019] NZEnvC 115.

2 [2021] NZEnvC 23.

('Modified Proposal'). That is despite having appealed the Second Decision together with our decision declining GVL's application for a rehearing. However, parties agree and we are satisfied that, notwithstanding the High Court appeals, we can determine the appeal with respect to the Modified Proposal. It is understood that those appeals are set down to be heard together on 26 February 2023.[3]

The Modified Proposal

[4] As is discussed in the First and Second Decisions, the original Proposal sought both subdivision and related land use development consents. It proposed detailed conditions on a range of matters including as to earthworks and landscaping, protection and enhancement of a watercourse and noise and other reverse sensitivity issues. Some of those proposed conditions were designed to work in tandem with associated consent notices and covenants to be carried onto titles.

[5] As noted, the Modified Proposal is confined to seeking a two-lot subdivision consent within the meaning of s87(b) RMA:[4]

(a) Lot 1 would be approximately 4.9 ha[5] in area and roughly 'L' shaped with frontages to SH6 and Gibbston Back Road; and

(b) Lot 2 would be approximately 3.9 ha[6] in area, rectangular in shape and nestled between Lot 1 and the neighbouring Brennan Wines and Lanes Vineyard properties to the south and west.

[6] The Modified Proposal leaves aside all matters concerning future development of the Site to be addressed through any consenting processes as may

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3 Memorandum of counsel for QLDC dated 13 February 2023 at [9]. Memorandum of counsel on behalf of GVL in relation to the National Policy Statement for Highly Productive Land Guide to implementation dated 13 February 2023.

4 Resource Management Act 1991.

5 More precisely, specified in the Modified Proposal to be approximately 49,353 m^2.

6 More precisely, specified in the Modified Proposal to be approximately 39,387 m^2.

be pursued in future. It does not include any residential building platforms or the commercial building platform that had been proposed at the corner of SH6 and Gibbston Back Road.[7] Counsel inform us that GVL applied for a separate land use consent for construction of a winery building on Lot 1.[8] That is not before the court for determination.

[7] The Modified Proposal includes the confined set of subdivision conditions set out in Annexure 1. These include relatively standard conditions to undertake the Modified Proposal according to specified plans, grant and reserve specified easements and make prior payment of administrative charges. They also include s221 RMA 'consent notice' conditions to:

(a) prohibit access directly to or from SH6 for Lot 1;
(b) specify that future lot owners bear the responsibility of providing any required servicing and infrastructure for both Lots 1 and 2; and
(c) prohibit Lot 1 from being "used solely for residential purposes, except for residential activity which is ancillary to commercial activities undertaken on Lot 1".

The Modified Proposal is a non-complying activity

[8] It is not a matter of dispute that the Modified Proposal is a non-complying activity under r 27.5.28 because it does not comply with the PDP's standards related to servicing and infrastructure, in particular:[9]

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7 Decision of QLDC on RM170201 dated 14 February 2018, as attached to the notice of appeal.

8 Memorandum of counsel for GVL dated 11 February 2022, at [18] and [19].

9 Memorandum of counsel for QLDC dated 25 February 2022, at [31]. While that rule refers to "the standards related to servicing and infrastructure under Rule 27.7.33", that is to be read as referring to the standards under r 27.7.34 headed "Standards related to servicing and infrastructure". It cannot sensibly intend to refer to r 27.7.33 as that does not pertain to servicing and infrastructure but rather residential subdivision of sites less than 450 m^2 in the Lower Density Suburban Residential Zone.

(a) r 27.7.34.3 that:

> Where no communal owned and operated water supply exists, all lots other than lots for access, roads, utilities and reserves, shall be provided with a potable water supply of at least 1000 litres per day per lot.

(b) r 27.7.34.4 that:

> Electricity reticulation must be provided to all allotments in new subdivisions (other than lots for access, roads, utilities and reserves).

(c) r 27.7.34.5 that:

> Telecommunication services must be available to all allotments in new subdivisions in the Rural Zone, Gibbston Character Zone and Rural Lifestyle Zone (other than lots for access, roads, utilities and reserves).

There is jurisdictional scope to consider the Modified Proposal

[9] As we read the various memoranda, QLDC does not seek to challenge the Modified Proposal on the basis of jurisdictional scope.

[10] An appeal may be lodged against the whole or part of a decision of a consent authority.[10] An appeal cannot widen the scope of the original application put before the consenting authority. In considering scope, it is necessary to consider the extent of the amendments and their impact, if any. In particular the amendments should not increase the scale or intensity of the activity significantly or alter the character or effects of the proposal.[11]

[11] The Modified Proposal is for the subdivision of the same Site as the original Proposal. As compared to the original Proposal, it would allow for fewer and larger lots and not enable associated land use development. We find it would not significantly alter the character and nature of effects, including for those who gave written approval to the original Proposal or any other person.

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10 Section 120 RMA.

11 *Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 136 at [39].

[12] Therefore, we find there is jurisdictional scope for consideration of the Modified Proposal in determination of the appeal.

Statutory framework and principles

[13] As provided for under the Natural and Built Environment Act 2023 ('NBEA'), we are to determine the appeal in accordance with the RMA as it continues in force in all relevant respects.[12]

General powers, duties and discretion

[14] As we set out in the First Decision, for the purposes of determining the appeal, we have the same power, duty and discretion as QLDC's independent hearing commissioners had concerning the appealed decision. We may grant or refuse the consents sought and impose conditions in any grant.[13]

Non-complying activity implications

[15] The application was for a discretionary activity at the stage it was considered by the first instance independent commissioners on behalf of QLDC.[14] That was also the activity status of the Proposal at the stage of the First and Second Decisions. As we have noted, the Modified Proposal is a non-complying activity. Therefore, the threshold test in s104D RMA must be passed as a pre-requisite to evaluating the Modified Proposal on its merits under s104. Under s104D, consent must be declined unless we find:

(a) the adverse effects of the Modified Proposal on the environment (other than any effect to which s104(3)(a)(ii) applies) will be minor; or

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12 NBEA , s2 and Sch 1, cl 17 and cl 72(2).

13 [2019] NZEnvC 115 at [12], [13], RMA, ss 290, 108.

14 Decision of QLDC on RM170201 dated 14 February 2018, as attached to the notice of appeal.

(b) the application is for an activity that will not be contrary to the objectives and policies of the PDP.[15]

[16] As specified in s104D, s104(2) RMA applies to a determination as to whether that threshold test is satisfied. In essence, in forming an opinion as to the adverse effects for the purposes of s104D(1)(a), we may disregard an adverse effect of the activity on the environment if the PDP permits an activity with that effect.

[17] The non-complying activity status of the Modified Proposal brings into greater significance the PDP objectives and policies as to infrastructure and servicing. That is particularly insofar as the above-noted standards that trigger non-complying status assist to achieve or implement them (ss 75, 76 RMA). Given the significance of these provisions, we set them out in Annexure 2 for reference.

Consideration of the Modified Proposal under s104

[18] If we find the Modified Proposal passes the s104D threshold, we are to consider it, subject to pt 2 RMA, according to the various matters in s104. Of most significance are:

(a) any actual or potential effects on the environment of allowing the Modified Proposal;[16]
(b) relevant provisions of the PDP;[17] and
(c) relevant provisions of the National Policy Statement – Highly Productive Land 2022 ('NPS-HPL').[18]

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15 There is no relevant operative district plan in respect of the Modified Proposal in that in all relevant respects the operative district plan is superseded by the PDP.

16 In terms of s104(1)(a), RMA.

17 In terms of s104(1)(b)(vi), on the basis that the PDP has materially superseded the operative district plan.

18 In terms of s104(1)(b)(iii). As the First and Second Decisions also reflect, there are no other relevant national policy statements and the New Zealand Coastal Policy Statement 2010 does not apply.

Approach in regard to written approvals

[19] For the purposes of ss 104D and 104, the RMA specifies that a consent authority must not have regard to any effect on a person who has given written approval to the application.[19] As the First and Second Decisions explain, written approvals were obtained from various persons for those purposes. Counsel do not explain whether those written approvals have been confirmed as extending to the Modified Proposal. On that basis, we make all findings on the basis that they do not and hence without qualifying our consideration of differences as between the original Proposal and the Modified Proposal. We record, however, that this does not materially impact our findings on any matters.

Matters for consideration that are not significant

[20] We have regard to any "relevant provisions of" a regional policy statement and any proposed regional policy statement (s104(1)(b)). However, it is not a matter of dispute and we find on the evidence that the PDP materially gives effect to the partially operative Otago Regional Policy Statement 2019 and is not inconsistent with the proposed Otago Regional Policy Statement 2021. As such, we are satisfied we do not need to report separate findings on those policy instruments.

[21] We have regard to the appealed decision (s290A).[20] However, as we have explained, the Modified Proposal materially differs from what was the subject of that decision declining consent to the original Proposal. This decision follows the findings in the First and Second Decisions on the evidence heard in these *de novo* appeal processes. As such, we do not accord the findings in the appealed decision significant weight.

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19 RMA, ss 104(3)(a)(ii), 104D(1)(a).

20 As is required by the RMA, s290A.

Provisions of the NPS-HPL are relevant to our consideration of the Modified Proposal

[22] It is not a matter of dispute that we must have regard to the NPS-HPL as the Site is deemed highly productive land under cl 3.5(7). That is because it is not disputed and we find that:

(a) the Site includes LUC 3 land within the meaning of the NPS-HPL; and

(b) the GCZ is a form of General Rural zoning as defined in standard 8 of the National Planning Standards 2019 (in terms of the nearest equivalent zone test in NPS-HPL cl 1.3(4)(b)). That interpretation is on our reading of the GCZ Zone Purpose in 23.1, Objs 23.2.1 and 23.2.2 and their implementing policies (including Pols 23.2.1.1-4) and rules (including rr 23.4.1 and 23.4.14). It is materially consistent with the analysis and observations in *Wakatipu Equities Ltd v Queenstown Lakes District Council*.[21]

Issues as to the interpretation of the NPS-HPL

[23] The NPS-HPL is divided into four parts – Part 1: Preliminary provisions, Part 2: Objectives and Policies, Part 3: Implementation, and Part 4: Timing.

[24] In Part 2, cl 2.1 specifies the following objective:

> Highly productive land is protected for use in land-based primary production, both now and for future generations.

[25] Clause 2.2, include the following policies of relevance for our purposes:

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21 *Wakatipu Equities Ltd v Queenstown Lakes District Council* [2023] NZEnvC 188, in particular at [10]-[15], [17]-[20], [40]-[46].

> **Policy 1**: Highly productive land is recognised as a resource with finite characteristics and long-term values for land-based primary production.
>
> **Policy 2**: The identification and management of highly productive land is undertaken in an integrated way that considers the interactions with freshwater management and urban development.
>
> **Policy 4**: The use of highly productive land for land-based primary production is prioritised and supported.
>
> **Policy 7**: The subdivision of highly productive land is avoided, except as provided in this National Policy Statement.
>
> **Policy 8**: Highly productive land is protected from inappropriate use and development.
>
> **Policy 9**: Reverse sensitivity effects are managed so as not to constrain land-based primary production activities on highly productive land.

[26] On the interpretation of Pol 7, counsel for QLDC refer to observations in the Supreme Court decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*[22] to the effect that "avoid", as used in the NZCPS, has its ordinary meaning of "not allow" or "prevent the occurrence of".[23] Counsel for QLDC submit that it is "commonly accepted that post *King Salmon*", "avoid" in a policy context means to "not allow".[24]

[27] Furthermore, QLDC interprets Policies 1 – 7 as a "starting point" and Part 3 (particularly cl 3.8) of the NPS-HPL as going on to set out how the policies are to be achieved.[25]

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22 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 ['*King Salmon*'].

23 *King Salmon*, above n 22, at [96].

24 Memorandum of counsel for QLDC dated 27 January 2023, at [14].

25 Memorandum of counsel for QLDC dated 27 January 2023, at [14].

[28] Cl 3.8 relevantly reads:[26]

> **3.8 Avoiding subdivision of highly productive land**
>
> (1) Territorial authorities must avoid the subdivision of highly productive land unless one of the following applies to the subdivision, and the measures in subclause (2) are applied:
>
> (a) the applicant demonstrates that the proposed lots will retain the overall productive capacity of the subject land over the long term.
>
> …
>
> (2) Territorial authorities must take measures to ensure that any subdivision of highly productive land:
>
> (a) avoids if possible, or otherwise mitigates, any potential cumulative loss of the availability and productive capacity of highly productive land in their district; and
>
> (b) avoids if possible, or otherwise mitigates, any actual or potential reverse sensitivity effects on surrounding land-based primary production activities.
>
> …
>
> (4) Territorial authorities must include objectives, policies, and rules in their district plans to give effect to this clause.

[29] Counsel for QLDC submit that the Modified Proposal would conflict with cl 3.8 in that it has not been demonstrated that the proposed lots would retain the overall productive capacity of the subject land over the long term.[27]

[30] "Productive capacity" is relevantly defined in NPS-HPL cl 1.3 as follows:

> **productive capacity**, in relation to land, means the ability of the land to support land-based primary production over the long term, based on an assessment of:
>
> (a) physical characteristics (such as soil type, properties, and versatility); and
>
> (b) legal constraints (such as consent notices, local authority covenants, and easements); and

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26 We note there are companion directives to territorial authorities in Provision 3.9 as to "Protecting highly productive land from inappropriate use and development". We do not need to set those out as we agree with counsel that the most significant one is Provision 3.8 in that it pertains to subdivision proposals.

27 Memorandum of counsel on behalf of the QLDC dated 27 January 2023.

(c) the size and shape of existing and proposed land parcels.

[31] Counsel for GVL submit that the Modified Proposal does not affect the productive capacity of the land *per se*, noting that the court has already made determinations of the economic viability of grape growing.[28]

[32] As for the relative weighting to be given to directions under the NPS-HPL and the PDP, QLDC submits that directives under the NPS-HPL should be preferred where there is a conflict as the PDP has not yet been updated to give effect to the NPS-HPL.[29]

Evaluation

[33] As we have discussed, we must have regard to the provisions of both the NPS-HPL and the PDP, in the sense that we give the provisions genuine attention and thought.[30]

[34] The NPS-HPL and the PDP are both 'secondary legislation' for the purposes of the Legislation Act 2019 ('LA'). We are to ascertain the meaning of their provisions from their text and in the light of their respective purposes and contexts.[31]

[35] We are guided in our approach to the interpretation of the NPS-HPL and the PDP by the Supreme Court decision in *Port Otago Limited v Environmental Defence Society Incorporated.*[32] It discusses and relevantly endorses findings in the Supreme Court decision in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd.* Although *Port Otago* concerned the interpretation of the New Zealand Coastal

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28 Memorandum of counsel for GVL dated 13 February 2023, at [16], [20].

29 Memorandum of counsel for QLDC dated 27 January 2023, at [11].

30 Memorandum of counsel for QLDC dated 27 January 2023, at [8], referring to *Foodstuffs (South Island) Limited v Christchurch City Council* [1999] NZRMA 481 (HC).

31 Legislation Act 2019, s10(1).

32 *Port Otago Limited v Environmental Defence Society Incorporated* [2023] NZSC 112 ['*Port Otago*']. The court respectfully acknowledges the recent passing of Len Andersen KC, counsel for Port Otago in this case.

Policy Statement 2010, the principles it enunciates extend to the consideration of policy directives as are given in other RMA instruments.

[36] The fact that the PDP has not yet been updated to give effect to the NPS-HPL is relevant to the weight we ascribe to any policy directives in the instruments that are in conflict. However, on our consideration of each instrument, we do not identify any material conflicts. For the reasons that follow, we find QLDC's submissions are premised on a misinterpretation of the NPS-HPL.

[37] The structure of the NPS-HPL whereby objectives and policies are set out in Part 2 and various implementation directives are set out in Part 3 reflects s45A RMA as to the contents of a national policy statement ('NPS'):

(a) s45A(1) prescribes that a NPS *must* state objectives and policies for matters of national significance that are relevant to achieving the purpose of the RMA; and
(b) s45A(2) provides that, additionally, a NPS may also state various other things including matters that local authorities are required to achieve or provide for in policy statements and plans (s45(2)(c)).

[38] Reflecting those mandatory and discretionary matters:

(a) Part 2 of the NPS-HPL accords with the mandate in s45A(1). It specifies the NPS-HPL objective (in cl 2.1) and associated policies (in cl 2.2); whereas
(b) Part 3 accords with the discretion given by s45A(2). It is confined in its purposes to prescribing directions to local authorities. Applying the purposive and contextual approach to interpretation discussed in *Port Otago*, the Part 3 provisions reflect "the background of the relevant circumstances" in which the NPS-HPL provisions are intended to and will operate.[33] That background includes the related

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33 *Port Otago* at [60].

> functions of regional councils and territorial authorities, including in their planning authority capacities, as specified in ss 30 and 31 and related RMA provisions.

[39] While it is broadly the case that directives in Part 3 give directions concerning how the policies are to be achieved, important qualifiers to that are that the directives are:

(a) non-exhaustive; and
(b) confined to local authorities only (or territorial authorities or regional councils as particular clauses prescribe).

[40] That is plain from the purpose specified in cl 3.1 Outline of Part (our emphasis):

> This Part sets out a non-exhaustive list of things **that local authorities must do** to give effect to the objective and policies of this National Policy Statement, but nothing in this Part limits the general obligation under the Act to give effect to that objective and those policies.

[41] Some of the directives pertain to both regional and territorial authorities (cls 3.2, 3.3, 3.5). Some pertain solely to regional councils (cl 3.4). Others, including cl 3.8, pertain solely to territorial authorities (also cls 3.6, and 3.7 and cls 3.9-3.13).

[42] As we discuss under 'Statutory framework and principles', the court is conferred with the same power, duty, and discretion in respect of a decision appealed against as the person against whose decision the appeal is brought. That does not operate to extend the compass of the directives in Part 3 NPS-HPL to the court for the purposes of the determination of the appeal. Rather, it is confined only to the consent authority power, duty and discretion available for the purposes of the first instance consent determination, subject to the further constraints of the court's appellate function.

[43] We acknowledge that, in theory, having regard to the NPS-HPL could encompass consideration of whether grant of consent could significantly impede a territorial authority or regional council from giving effect to the NPS-HPL.

[44] However, in terms of the directive in cl 3.8 that territorial authorities avoid the subdivision of highly productive land unless certain pre-requisites are met, QLDC is *functus officio* with respect to the application before the court. Hence, any decision the court makes to grant consent to the Modified Proposal cannot impact on the capacity of QLDC to give effect to the NPS-HPL. That is the case whether or not GVL demonstrates that:[34]

> … the proposed lots will retain the overall productive capacity of the subject land over the long term.

[45] Hence, we find nothing in Part 3 (including in cl 3.8(1)) of the NPS-HPL to count against granting consent to the Modified Proposal.

[46] Turning to the policies in Part 2 of the NPS-HPL, we consider "how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have".[35]

[47] Policy 7 is an avoidance policy. However, its direction to not allow subdivision would only capture the Modified Proposal insofar as we find it is not "provided in" the NPS-HPL. In terms of the statutory purpose of the NPS-HPL in the context of our consideration of the appeal, that provision is in the extent that the granting of consent to the Modified Proposal would not conflict with the intentions of the NPS-HPL, particularly as expressed through the objective in cl 2.1 and associated policies in cl 2.2.

[48] Pol 8 allows for some discretion in how "protection" and "inappropriate"

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34 National Policy Statement – Highly Productive Land 2022, cl 3.8(1)(a).

35 *Port Otago* at [61], [62].

are read. We interpret "inappropriate" with reference to the objective in cl 2.1. In essence, Pol 8 seeks to avoid subdivision that results in a loss of the capacity of highly productive land to be used in land-based primary production.

[49] Policy 9 allows for comparatively greater discretionary judgment. The direction given is as to the management of reverse sensitivity effects, allowing for consideration of the various available means of doing so, including through consent conditions. In effect, it directs that such management must be effective for the purposes of not constraining land-based primary production activities.

Evaluation of the Modified Proposal for the purposes of ss 104D and 104

Submissions

QLDC

[50] Counsel for QLDC point out that the Modified Proposal is "very different" from what was earlier considered, at the first instance application stage in earlier hearings with respect to the appeal. They explain that QLDC's overall concern is both that the Modified Proposal has not been adequately assessed and that it is in any case inappropriate by reference to the PDP's objectives and policies and the NPS-HPL.[36]

[51] Insofar as GVL has not identified a use for Lot 2 (beyond permitted farming activities), counsel submit that the effects of the Modified Proposal cannot be properly considered. Counsel submit that the Modified Proposal would result in fragmentation of the Site, limiting its future production potential in conflict with PDP Pol 23.2.2.1.[37] On this aspect, counsel refer to the court's finding on the

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36 Memorandum of counsel for QLDC dated 23 April 2021, at [10]-[30]; memorandum of counsel for QLDC dated 25 February 2022, at [13]-[38]; memorandum of counsel for GVL dated 13 February 2023.

37 Memorandum of counsel for QLDC dated 25 February 2022, at [20]-[24].

evidence that:[38]

> a prudent and informed investor would be unlikely to redevelop the Site as a standalone commercial vineyard for the growing and selling of grapes in the foreseeable future.

[52] In view of that finding, counsel submit that the inference to be drawn is that "it appears unlikely that proposed Lot 2 (which is only a portion of the original Site) will be developed as a vineyard or perhaps for any rural productive use". Added to that, counsel note GVL's acknowledgement that it is unlikely that the Site would be used for productive purposes beyond the short term. As such, counsel submit that the Modified Proposal would negatively affect the productive potential of the Site.[39]

[53] Counsel record that, if it is GVL's intention that Lot 2 be used in due course for residential purposes, that would greatly concern QLDC.[40]

[54] QLDC is, in particular, concerned that the Modified Proposal would remove all substantive conditions that GVL had previously proposed, including as to landscaping and servicing.

[55] In regard to servicing, counsel point out that, as the Modified Proposal is not a boundary adjustment subdivision, it does not come within the exceptions specified in PDP Pol 27.2.1.7.[41] Counsel submit that neither of the proposed lots is supported by "adequate service infrastructure", pointing out that PDP Pols 27.2.5.6-27.2.5.18 are directive in their aim to "ensure infrastructure and services such as water, wastewater, stormwater, access, energy supply and telecommunications are considered and provided for at the subdivision application

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38 Memorandum of counsel for QLDC dated 25 February 2022, at [21], [22], referring to [2019] NZEnvC 115 at [77].

39 Memorandum of counsel for QLDC dated 25 February 2022, at [23].

40 Memorandum of counsel for QLDC dated 25 February 2022, at [25]-[27].

41 Memorandum of counsel for QLDC dated 25 February 2022, at [29].

stage".[42]

[56] Moreover, counsel note that subdivision of the Site is not needed to enable what GVL may seek as to establishment of a commercial building platform and enablement of its proposed winery building.[43]

GVL

[57] In a memorandum of 4 March 2022, counsel for GVL explain that, in putting forward the Modified Proposal, GVL had understood the Second Decision to signal that the court found that a two-lot subdivision of the Site could, in principle, be confirmed. They explain that the decision to pursue a simple subdivision consent and leave commercial development of Lot 1 aside was made in light of QLDC's in-principle opposition to any subdivision.[44] Counsel further point out that any subsequent commercial use of Lot 1 would require a controlled activity resource consent, at the very least (if compliant with all standards).[45] Furthermore, any use of Lot 1 beyond what is permitted (farming, viticulture, livestock) would require a separate land use consent application. Matters concerning the building platform, access, servicing, infrastructure, landscaping and design that were initially the subject of proposed consent notice controls would fall within the scope of the controlled activity rule for a winery building (r 23.4.15).

[58] Hence, counsel submit that it would be inappropriate, unnecessary and inefficient to have any of these matters continue to be the subject of proposed conditions for the Modified Proposal.[46] That informed the ultimate decision to seek simply "a stripped-down set of conditions for the subdivision consent" that

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42 Memorandum of counsel for QLDC dated 25 February 2022, at [28].

43 Memorandum of counsel for QLDC dated 23 April 2021, at [10]-[30]; memorandum of counsel for QLDC dated 25 February 2022, at [13](c).

44 Memorandum of counsel for GVL dated 4 March 2022.

45 Memorandum of counsel for GVL dated 9 December 2022, at [4].

46 Memorandum of counsel for GVL dated 9 December 2022, at [4]-[6].

counsel explain:[47]

> still restrict residential use of the site, but … remove the other matters previously volunteered to enable a holistic assessment of the full development proposal of the residential lots.

[59] Counsel reiterate that matters as to landscape, design controls, servicing, access will be "fully addressed through the assessment of the winery consent application currently on hold with the Council".[48]

We can make necessary findings on the Modified Proposal

[60] The Modified Proposal materially differs from the original Proposal in the fact that it is a non-complying activity (rather than discretionary). Apart from the fact that this requires the s104D consentability threshold to be met, this change is significant in terms of whether the grant of consent would offend PDP integrity.

[61] In addition, the various changes in reconfiguring the proposal to a simple two-lot subdivision, without identification of an associated development purpose, gives rise to different environmental considerations. Primarily, that arises from the fact that matters that were originally proposed to be controlled by the subdivision and land use consents at issue in the appeal (e.g. earthworks, building platforms, landscaping, activity effects' controls) are left aside to be addressed if and when any future consent(s) for development is or are pursued. Insofar as these changes are not measurable as adverse effects of the Modified Proposal, they remain for consideration under s104, RMA. An aspect of this is in our consideration of the provisions of the PDP and, as a related matter, whether the Modified Proposal would assist or hinder realisation of the PDP's intentions.

[62] A further significant change with the Modified Proposal, relevant to our consideration of it under s104, is in the proposed new consent conditions. One

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47 Memorandum of counsel for GVL dated 9 December 2022, at [8].

48 Memorandum of counsel for GVL dated 9 December 2022, at [8].

issue this change raises is whether the minimalist control approach proposed is appropriate for addressing the effects of the Modified Proposal and any implications it presents in terms of the PDP's intentions. A related issue is whether the proposed new consent notice conditions are efficacious and appropriate. We bear in mind that, under s221 RMA, consent notice conditions can be revisited to be changed or removed by application determined as a deemed discretionary activity (s221, RMA).

[63] GVL has not sought to adduce supplementary evidence on the Modified Proposal. Instead, all matters are addressed by submission through memoranda and on the papers. Nevertheless, we are satisfied that we can make all necessary findings on the Modified Proposal, including with respect to ss 104D and 104, on the basis of:

(a) the findings in the First and Second Decisions;
(b) the evidence before the court and the court's familiarity, from its site visits, of associated matters; and
(c) counsels' submissions including as to the consideration and interpretation of relevant PDP and NPS-HPL provisions.

The Modified Proposal would give rise to only minor adverse effects

[64] We find on the evidence that the Modified Proposal would give rise to only minor adverse effects on the environment.

[65] "Effect" includes the classes of "potential effect" as are specified in s3 RMA. As a matter of discretion, we can disregard an adverse effect if the PDP permits an activity with that effect.[49] On that basis, we set aside any effects of the continuance on the Site of permitted farming activities, including viticulture.[50]

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49 RMA, ss 3, 104D(2), 104(2).
50 PDP Ch 23, r 23.4.1.

[66] Whilst QLDC's concerns about any potential residential development of the Site are noted, we do not treat that risk as an adverse effect of the Modified Proposal. Under a scenario whereby a subdivision enabled later development of the Site to proceed that would otherwise be regulated by the PDP, such risks could conceivably be accounted for as a potential adverse effect for the purposes of ss 104D and 104, RMA. However, QLDC does not suggest that would arise here and nor do we find it would realistically arise on our analysis of the PDP.

[67] Without approved building platforms, any construction or use of a residential or other building (other than a winery or farm building) would be a discretionary activity (under rr 23.4.8–23.4.10). That activity class would allow for the consideration of the range of relevant effects, including as may arise from the Modified Proposal's lack of provision for infrastructure and servicing. To that extent, therefore, the Modified Proposal would not give rise to any potential adverse effects as may be associated with any subsequent residential or similar development of the Site.

[68] In the case of wineries and farm buildings, it is at least theoretically possible that the creation of two lots would enable greater opportunity for such development, in addition to what is already the subject of a land use consent application for Lot 1. In particular, as we understand r 23.4.15, such a development would be a controlled activity provided that it complies with specified standards. Those standards that pertain to building dimensions and setbacks would appear to allow for potential further development, for example on the new Lot 2, of this kind as a controlled activity. While this is a theoretical risk of the Modified Proposal, we do not account for it as a potential adverse effect for the purposes of ss 104D and 104 because we have no evidence before us that it is even in contemplation. In any case, were such a development to be proposed in future, the matters for control would allow for consideration of a range of matters including as to landscaping, access, earthworks and the provision of water supply, sewage treatment and disposal.

[69] In the fact that the Modified Proposal does not make provision for infrastructure and services, but leaves these matters to be addressed in the context of any later development requiring resource consent, we find there is a potential loss of economic efficiency. That is both in potentially greater transaction costs that would be imposed on future owner(s) of the Site and, potentially, some loss of efficiency in infrastructure that serves others in the community. In the absence of direct evidence on these matters, we are left to make inference about them. We infer that such costs would be largely internalised to those for whose benefit the infrastructure and services are in due course provided. That is in the sense that this would be either on commercial or cost-recovery terms, depending on the providers concerned. The proposed consent notice condition 4.b reinforces this expectation.

[70] For those reasons, we find that the Modified Proposal would give rise to no more than minor adverse effects on the environment. As a further measure of what we class as 'minor', we find the economic costs we have identified:

(a) do not render the Modified Proposal contrary to the PDP's relevant objectives and policies as we next discuss; and
(b) do not involve any identifiable transference of costs to anyone other than those who would stand to benefit from the Modified Proposal and any development of the Site that may later ensue.

The Modified Proposal is not contrary to the PDP's objective and policies

[71] The Modified Proposal does not offend any of the relevant PDP objectives and policies on sustaining the life-supporting capacity of soils (Obj 23.2.2, Pols 23.2.2.1-23.2.2.4). That is given the findings in the Second Decision as to the lack of Melanic soils on the Site. If anything, the Modified Proposal has less significance in terms of those policy intentions in the fact that it does not involve earthworks. Legal fragmentation of the Site through the capacity to create different records of title for Lots 1 and 2 may render the Site somewhat less able

to Obj 23.2.1 and related policies. However, that is from the present relatively poor economic viability starting point evident in the fact that the Site has been unproductive for many years. In any case, the fact that the Modified Proposal does not assist these intentions of the PDP does not render it contrary to PDP's objectives and policies (including these provisions) in the sense of being repugnant or opposed to them.[51]

[72] Therefore, we find that the Modified Proposal is not contrary to any of the objectives and policies in Ch 23 GCZ.

[73] The Modified Proposal does not assist and, to an extent, impedes the implementation of Obj 27.2.5 and Pols 27.2.5.7-27.2.5.16. That impediment arises in the fact that the Modified Proposal does not make provision for infrastructure and services. However, we find that the subdivision of the Site, as proposed, would not materially compromise the capacity to fulfil the intentions of those provisions in the context of any future development of the Site. In light of the evidence and our Site visits, we find that there would remain ample capacity on each lot to make such provision. Furthermore, the activity classifications and standards that would govern any development of the Site that would require such infrastructure and services would allow for full consideration of these provisions so as to assist to fulfil their intentions. Again, that is reinforced by proposed consent notice condition 4.b.

[74] Therefore, whilst the Modified Proposal is somewhat inconsistent with the intentions of these provisions, we find it would not be contrary to them.

[75] In all other respects, the Modified Proposal either does not engage with PDP objectives and policies or is not contrary to them.

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51 *Atkinson v North Shore City Council* [2010] NZEnvC 260 at [53], referring to *Monowai Properties Ltd v Rodney District Council* ENV Wellington A215/03, 12 December 2003.

[76] For those reasons, we find that the Modified Proposal is not contrary to the PDP's objectives and policies.

The s104D threshold is satisfied

[77] The s104D threshold is, therefore, satisfied and we now discuss our further findings on the merits.

Granting consent is not contrary to the intentions of the NPS-HPL

[78] We find that the Modified Proposal does not impede implementation of Pol 1, in cl 2.2 NPS-HPL.

[79] That is in part because we find the Site has no Melanic Soils and, in view of that and its relatively small size, has relatively limited long-term value for land-based primary production. That is the case whether or not the Site is subdivided in accordance with the Modified Proposal. Furthermore, we find that the Modified Proposal does not have any identifiable impact on recognition of other highly productive land as a resource with finite characteristics and long-term values for land-based primary production. In particular, that is because it does not involve any associated development aspects that could give rise to such effects.

[80] We find that the Modified Proposal impedes to a minor extent the capacity of Otago Regional Council and QLDC to:

(a) manage highly productive land in an integrated way that considers the interactions with freshwater management and urban development;
(b) map and include LUC 3 land in the RPS or the PDP or equivalent; and
(c) prioritise and support the use of LUC 3 land for land-based primary production.

[81] The impediment is in the fact that the Modified Proposal would allow for the creation of separate records of title and associated ownership changes. Subdivision makes it comparatively less likely that the Site could in future be integrally managed (whether following amalgamation of titles or other operating arrangements) with any other LUC 1, 2 or 3 land in productive use in the vicinity.

[82] To the same extent, inherently the Modified Proposal limits the capacity to protect highly productive land. However, given the minor adverse effect that the Modified Proposal has, including in regard to the life-supporting capacity of soils, we find that the Modified Proposal is not inappropriate use and development in the sense intended by Pol 8. Hence, it is not inconsistent with that policy.

[83] To that minor extent, the Modified Proposal does not assist in giving effect to Pols 2–4 and Pol 8 in cl 2.2.

[84] Pols 5 and 6 in cl 2.2 do not arise in that this is not a rezoning appeal. Pol 9 is not impacted by the Modified Proposal as it does not involve any component giving rise to reverse sensitivity effects.

[85] Pol 7, i.e. that the subdivision of highly productive land is avoided, except as provided in the NPS-HPL, would only be impacted were we to find the Modified Proposal impedes the NPS-HPL's relevant intentions. We do not find that to be the case.

[86] The Modified Proposal would, to the extent we have discussed, reduce the extent to which land of the Site is likely to be able to be used in future for land-based primary production. However , as noted, that is in a context in which it has not been so used for a number of years and the evidence reveals it does not include Melanic Soils. In essence, the Modified Proposal renders unlikely any future arrangement whereby the Site may become part of such production. Therefore, we find that the Modified Proposal would not offend the objective in cl 2.1.

[87] For those reasons, we find that, whilst the Modified Proposal would not assist the intentions of the NPS-HPL, it would not materially impede them either. In particular, it would not significantly impede the capacity of Otago Regional Council or QLDC to give effect to the NPS-HPL.

Adverse effects would be minor and any positive effects limited

[88] For the reasons we set out, we find all adverse effects of the Modified Proposal no more than minor in the sense that, on the basis of the few conditions proposed, none provides any impediment to the grant of consent. In making those findings, we apply our analysis of s104D matters. That includes our decision to set aside any adverse effects of permitted farming activities including of viticulture. On the other hand, aside from enabling to a small extent an enhanced capacity to use and develop the Site, we do not identify any material positive effects of the Modified Proposal.

PDP provisions are neither supportive nor against consent

[89] The findings we set out concerning s104D matters apply to our consideration of the PDP provisions for the purposes of s104. In summary, we find that the PDP's objectives, policies and other provisions in essence do not give direction either for or against the grant of consent to the Modified Proposal.

Granting consent would not undermine the integrity of the PDP

[90] Notwithstanding that the Modified Proposal is for a non-complying activity, we find granting consent would not undermine the integrity of the PDP. That is partly because we find the Modified Proposal would have no more than minor adverse effects and not be contrary to the PDP's objectives and policies.

[91] As we have noted, we find lack of provision for infrastructure and servicing is not consistent with the PDP's intentions. However, that inconsistency is not of such a nature or scale as may harm public confidence in the PDP's consistent

administration or its integrity. Rather, it is in the context of enabling a two-lot subdivision that allows for the proper response to those intentions at any development stage where there would be an associated need for infrastructure and servicing.

Consideration of the proposed conditions

[92] Apart from seeking decline of consent to the Modified Proposal, QLDC does not offer submissions on the particulars of what GVL proposes by way of conditions. Whilst the proposed conditions are minimalistic, we find they are sufficiently fit for purpose subject to some minor clarifications that can be readily addressed in response to directions. Particular technical deficiencies or uncertainties we identify are as follows:

(a) Condition 1 refers to "development" but the Modified Proposal is, as we have described, a simple subdivision. "Development" is to be replaced with "subdivision";

(b) the associated plans, as described, need to accompany an updated final and complete version of the consent for the court's final approval as being in accordance with our findings herein;

(c) Condition 3 refers to necessary easements, requiring that these be as shown in the Memorandum of Easements attached to the Survey Plan and be duly granted or reserved. The court needs to understand what is intended, including whether we need to sight and approve them. Sighting and approval is needed if this refers to easements for the purposes of the consent;

(d) Condition 4.a, as to access to SH6, presently applies only to Lot 1, whereas Lot 2 also has frontage to SH6, a limited access road. This matter is not addressed in submissions, nor are we aware it is addressed in evidence. The court's present assumption is that GVL's intention is that this condition also applies to Lot 2. If that is the case, the condition needs to be corrected. If not, the court will need a clear

and sufficient understanding of why any exception is provided for Lot 2 (and if that is intended assistance on whether the present drafting reflects this).

Overall evaluation of the Modified Proposal subject to pt 2, RMA

[93] Subject to those qualifications concerning the finalisation of conditions, we find nothing in pt 2 that would count significantly against granting consent to the Modified Proposal on appropriate conditions. In the circumstances, we find that granting consent on conditions best assists to achieve the RMA purpose. That is because, on the evidence, we find:

(a) none of the principles or directives in ss 6–8 is offended, given that the Modified Proposal is confined to a simple subdivision leaving any development as may be sought in future for consideration, in associated future consenting processes, by reference to applicable PDP provisions as well as any other applicable RMA instrument(s) (including the NPS-HPL);

(b) the promotion of sustainable management, according to the definition in s5, would not be impeded and would, to a limited extent be assisted by grant of consent to the Modified Proposal. That is to the extent that it would assist to enable people to provide for their economic well-being by facilitating the two-lot subdivision of the Site and hence facilitate better use of the associated land resource.

Outcome and directions

[94] Subject to satisfactory response to the following directions, the Modified Proposal satisfies all necessary requirements for consent.

[95] It is directed that the parties are to confer and, **within 10 working days of the date of this decision**, file a joint memorandum for the purposes of the court's final decision:

(a) proposing a directions timetable to provide responses to the matters in [92]; or

(b) responses to those matters suitable for the court's final decision.

[96] The issue of costs is reserved. It can be dealt with once the High Court appeals have been determined. Unless otherwise directed, any application is to be made **within 20 working days** of that determination (or of any prior withdrawal of those appeals).

[97] Leave is reserved to any party, following consultation, to seek further (or amended) directions.

For the court

J J M Hassan
Environment Judge

Annexure 1

Conditions as proposed by GVL

General

1. That the development must be undertaken/carried out in accordance with the plans:

   - Lots 1 and 2 being a proposed subdivision of Section 5, Block III Kawarau SD, Job: 11069, Drawing No. 001, Rev. E and dated 10.02.22;

   stamped as approved on XXXXX

2. This consent shall not be exercised and no work or activity associated with it may be commenced or continued until the following charges have been paid in full: all charges fixed in accordance with section 36(1) of the Resource Management Act 1991 and any finalised, additional charges under section 36(3) of the Act.

To be completed before Council approval of the Survey Plan

3. Prior to the Council signing the Survey Plan pursuant to Section 223 of the Resource Management Act 1991, the consent holder shall complete the following:

   (a) All necessary easements shall be shown in the Memorandum of Easements attached to the Survey Plan and shall be duly granted or reserved. This shall include all necessary rights of way easements resultant from the boundary adjustment.

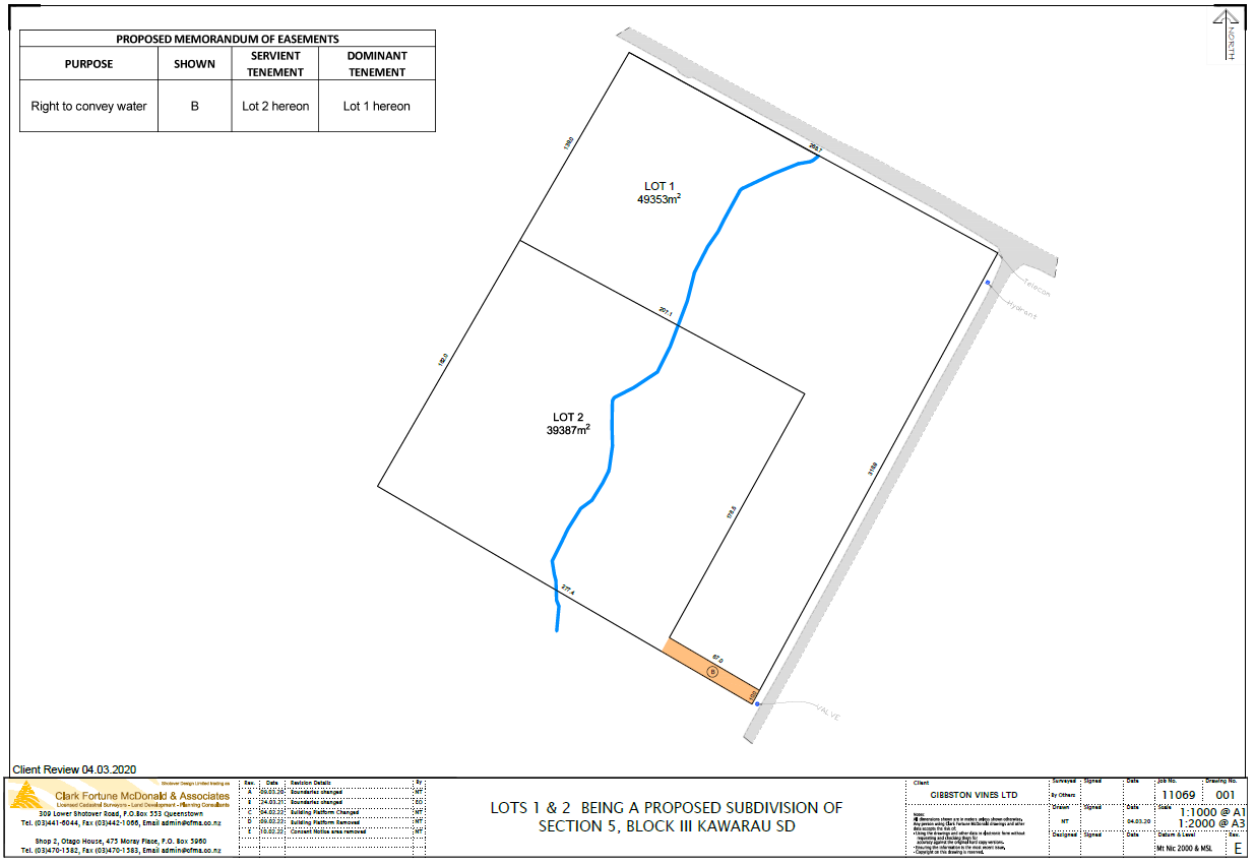
Ongoing Conditions/Consent Notices

4. The following conditions of the consent shall be complied with in perpetuity and shall be registered on the relevant Titles by way of Consent Notice pursuant to s221 of the Act:

   a. Lot 1 shall not gain access direct to or from Gibbston Highway (SH6).

   b. Lots 1 and 2 have not been provided with services and infrastructure. Any required servicing and infrastructure for Lots 1 and 2 is the responsibility of the future Lot owner(s).

   c Lot 1 is not to be used solely for residential purposes, except for residential activity which is ancillary to commercial activities undertaken on Lot 1.



Annexure 2

Relevant PDP objectives and policies as to infrastructure and services

Obj 27.2.5

Infrastructure and services are provided to new subdivisions and developments.

Policies

Water:

27.2.5.7

Ensure water supplies are of a sufficient capacity, including fire fighting requirements, and of a potable standard, for the anticipated land uses on each lot or development.

27.2.5.8

Encourage the efficient and sustainable use of potable water by acknowledging that the Council's reticulated potable water supply may be restricted to provide primarily for households' living and sanitation needs and that water supply for activities such as irrigation and gardening may be expected to be obtained from other sources.

27.2.5.10

Ensure appropriate water supply, design and installation by having regard to:

a. the availability, quantity, quality and security of the supply of water to the lots being created;

b. water supplies for fire fighting purposes;

c. the standard of water supply systems installed in subdivisions, and the

adequacy of existing supply systems outside the subdivision;

d. any initiatives proposed to reduce water demand and water use.

Stormwater

27.2.5.11

Ensure appropriate stormwater design and management by having regard to:

a. any viable alternative designs for stormwater management that minimise run-off and recognises stormwater as a resource through re-use in open space and landscape areas;

b. the capacity of existing and proposed stormwater systems;

c. the method, design and construction of the stormwater collection, reticulation and disposal systems, including connections to public reticulated stormwater systems;

d. the location, scale and construction of stormwater infrastructure;

e. the effectiveness of any methods proposed for the collection, reticulation and disposal of stormwater run-off, including opportunities to maintain and enhance water quality through the control of water-borne contaminants, litter and sediments, and the control of peak flow.

27.2.5.12

Encourage subdivision design that includes the joint use of stormwater and flood management networks with open spaces and pedestrian/cycling transport corridors and recreational opportunities where these opportunities arise and will maintain the natural character and ecological values of wetlands and waterways.

Wastewater

27.2.5.13

Treat and dispose of sewage in a manner that:

a. maintain public health;

b. avoids adverse effects on the environment in the first instance; and

c. where adverse effects on the environment cannot be reasonably avoided, mitigates those effects to the extent practicable.

27.2.5.14

Ensure appropriate sewage treatment and disposal by having regard to:

a. the method of sewage treatment and disposal;

b. the capacity of, and impacts on, the existing reticulated sewage treatment and disposal system;

c. the location, capacity, construction and environmental effects of the proposed sewage treatment and disposal system.

27.2.5.15

Ensure that the design and provision of any necessary infrastructure at the time of subdivision takes into account the requirements of future development on land in the vicinity.

Energy Supply and Telecommunications

27.2.5.16

Ensure adequate provision is made for the supply and installation of reticulated energy, including street lighting, and communication facilities for the anticipated

land uses while:

a. providing flexibility to cater for advances in telecommunication and computer media technology, particularly in remote locations;

b. ensure the method of reticulation is appropriate for the visual amenity and landscape values of the area by generally requiring services are underground, and in the context of rural environments where this may not be practicable, infrastructure is sited in a manner that minimises visual effects on the receiving environment;

c. generally require connections to electricity supply and telecommunications systems to the boundary of the net area of the lot, other than lots for access, roads, utilities and reserves.