

ORIGINAL

Decision No. C 190/2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of references under clause 14 of the first
schedule to the Act

AND an application under section 293 of the Act

BETWEEN WAKATIPU ENVIRONMENTAL
SOCIETY INCORPORATED

(RMA 1165/98 and RMA 1394/98)

Appellant

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson (sitting alone under section 279 of the Act)

IN CHAMBERS at CHRISTCHURCH

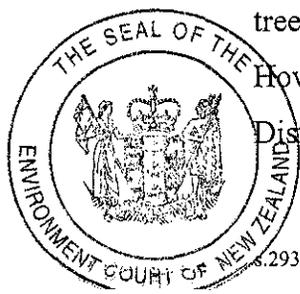
DECISION AS TO SECTION 293 APPLICATION

(RE: EXOTIC/WILDING TREES)

Background

[1] Wilding trees are spreading across parts of the Queenstown Lakes District. "Wilding" is the term used for the natural regeneration or seedling spread of exotic trees, occurring in unintended locations and not managed for forestry production.

How to deal with existing wilding conifers is the subject of the Queenstown Lakes District Council's ("the Council") non-statutory document *The Wakatipu Wilding*



Conifer Strategy (“the wilding strategy”) that was adopted by the Council on 1 June 2004.

[2] How to avoid seed sources for future potential wildings is the subject of this decision. The Council applied to the Court to amend its proposed District Plan (“the revised plan”) for the purpose of controlling the planting of trees recognised as having the potential for wilding. The application was made under section 293 of the Resource Management Act (“the RMA” or “the Act”) in accordance with orders made by the Court on 24 October 2003.

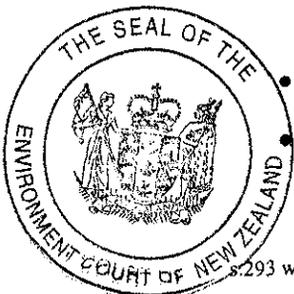
[3] The orders of the Court specified that the Council was to publicly notify the application and ask for submissions from interested parties. The Council notified the application and received 8 submissions that were forwarded to the Court on 18 December 2003. Submissions were received from:

- Ernslaw One Limited;
- Glenorchy Community Association;
- Garry Bradshaw;
- Elizabeth Cruickshank;
- Wrightson Forestry Services;
- New Zealand Institute of Forestry Incorporated;
- Neil Clayton; and
- Lakes Landcare Group Incorporated (LLGI”).

All of the submissions supported the purpose of the provisions but questioned the precise wording.

[4] On Tuesday 6 July 2004 the Court convened a pre-hearing conference. All the above listed submitters (along with other parties and interested persons connected with RMA 1165/98 and RMA 1394/98) were sent notice of the pre-hearing conference. However, the only appearances made were for:

- the Council;
- the Wakatipu Environmental Society Incorporated (“WEST”) as referrer;



- LLGI;
- Mr. J Veint; and
- the Glenorchy Community Association Incorporated.

A timetable was made for the exchange of evidence in order to progress the matter to a hearing, with the date of 30 August 2004 set aside for the hearing.

[5] On the dates set for the exchange of evidence only the Council and LLGI provided any evidence. In subsequent correspondence with the Council, LLGI accepted the proposed rules and assessment matters provided that the following was included at the appropriate place in the plan:

Consent applications under site standard 5.3.5.1(viii) will not be publicly notified unless special circumstances exist.

The Council accepted that this inclusion was appropriate.

[6] Having lodged all the exchanged evidence with the Court, and in light of the absence of any evidence in support of the remainder of the submissions, the Council submitted, in a memorandum of counsel dated 26 August 2004, that this decision could be made on the papers before the Court. The memorandum was handed to the Court when the application was called for hearing on 30 August 2004 (a notice of hearing having been issued). No other appearances were made when the matter was called and there was (understandably) no opposition to the request for a decision on the papers. Accordingly, I hold that the request is appropriate and make this decision on that basis.

Consideration

[7] Section 293 of the RMA gives the Environment Court limited powers to consider proposals to amend plans in ways that might fall outside the scope of an appeal (formerly a *reference*) to the plan. Section 293 states:



293. Environment Court may order change to policy statements and plans

- (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.
- (2) If on the hearing of any such appeal or inquiry, the Environment Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed change or revocation, it may adjourn the hearing until such time as interested parties can be heard.
- (3) [concerns process for notification]

...

[8] Section 293 serves an important function. It allows issues that have been recognised - following the focused investigation afforded by the appeal process – as significant and requiring attention, to be addressed in an efficient way that retains the transparency of process required under the RMA.

[9] It is a power that should be used cautiously and sparingly¹ and, as recently determined by the High Court², any broadened relief should be capable of being related back to the relief sought in the original reference/appeal.

[10] In its reference WESI requested (amongst other things) controls on tree planting in 'Areas of Landscape Importance'. Areas of landscape Importance were identified in the proposed plan as notified in 1995 and had been removed from the revised plan after decisions on submissions. WESI sought their reinstatement and, as consequent relief, controls on tree planting within those areas.

[11] The difficulty the Court was faced with here is that it was recognised by the parties during the initial hearings of the WESI reference that there was a concern to have some controls on tree plantings, in order to control the spread of wildings, on a district wide basis, that is, not just within the Areas of Landscape Importance. The broadening of the scope to apply control methods within the wider district was the reason for this section 293 application.



¹ *Vivid Holdings Limited (Re an application)* (1999) 5 ELRNZ 264, [1999] NZRMA 467
² *Hamilton City Council v NZ Historic Places Trust/Pouhere Taonga & Hayes paddock Residents Association* CIV-2004-284-801

[12] While there is no evidence in opposition to the modifications now proposed, I will briefly summarise the evidence received. The purpose of this is to be satisfied that there is a substantive basis for the proposed modifications, including that there has been some form of section 32 analysis of the appropriateness of the proposals. However, there has been implied acceptance of the modifications by the parties who have declined to take the opportunity to present any alternative views to the Court.

The evidence

[13] The Council supplied briefs of evidence from three witnesses:

- Ms Jane Kidson (a landscape architect);
- Ms Alyson Schuler (a policy planner); and
- Ms Dawn Palmer (an ecologist).

[14] Ms Kidson's evidence is that, in landscape terms, the spread of wildings requires control. She emphasises the importance of being able to consider the matters contained in the proposed modifications to gauge the likelihood that wilding spread will occur in any given location³. In Ms Kidson's opinion, forestry blocks have a greater potential impact on landscapes owing to the more vigorous nature of the species associated with commercial forestry⁴ and the way that trees disguise the underlying topography and enclose a landscape⁵.

[15] Ms Kidson also lists the objectives and policies currently in the plan which are relevant to (and might require) controls on wilding spread⁶. Her conclusion is that the proposed modifications are consistent with those objectives and policies. It is noted that one of those policies (policy 16 of objective 4.2.5) specifically relates to the control of wilding spread.

[16] Ms Schuler's evidence includes reasoning as to why it is considered that a discretionary regime to control wilding spread is considered the most appropriate.



³ Para 11, evidence of Ms Kidson.

⁴ Para 16, *ibid.*

⁵ Para 18, *ibid.*

⁶ Para 10, *ibid.*

The most important elements appear to be the flexibility of such a regime and the fact that greater control (through the ability to decline) is possible, where required.

[17] Ms Schuler describes the process and considerations that have lead to the current proposal including:

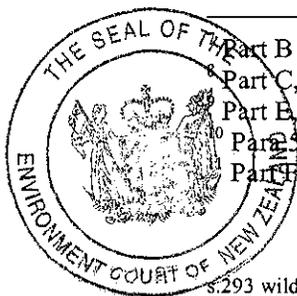
- 1) the evolution of the plan and the references that raised issues relating to tree planting (those by WESI)⁷;
- 2) other relevant provisions in the plan and other relevant plans relating to tree planting⁸;
- 3) further public consultation; and
- 4) the section 293 application.

[18] Ms Schuler includes analysis of the various regulatory and non-regulatory methods that were considered by the Council in developing the proposed modifications to the plan⁹. Her conclusion¹⁰ is that:

...a discretionary activity resource consent is the most appropriate way of ensuring that all applications are adequately assessed, and tree planting of wilding species only occurs where the effects can be mitigated or are less than minor.

[19] Ms Schuler also analyses the submissions received as part of the section 293 process¹¹. In general there is support for the control of wilding species in the district. Where differences are noted they tend to relate to the inclusion/exclusion of specific species or the imposition of a harsher (e.g prohibited activity) or more lenient (e.g. controlled activity) approach. Some submissions are noted as being outside the scope of the section 293 application where they relate to existing trees.

[20] Ms Schuler agrees with the submission of LLGI that applications for these discretionary resource consents be non-notified unless special circumstances exist.



Part B of evidence of Ms Schuler.
 Part C, ibid
 Part B, ibid.
 Para 9, ibid.
 Part C, ibid.

This agreement is reflected in the Council's acceptance of the LLGI proposed additional provision.

[21] While supporting a discretionary regime, Ms Schuler also notes and supports the role of non-regulatory methods in addition to the proposed modifications to the plan.

[22] Ms Palmer is a co-author of the wilding strategy, which was also mentioned in the evidence of both Ms Kidson and Ms Schuler. Ms Palmer's evidence highlights some specific issues raised by wilding spread and includes a table that shows the current distribution of wilding trees in the district¹².

[23] Specific adverse effects from wildings that Ms Palmer mentions include:

- 1) threats to New Zealand Falcon¹³ nesting areas;
- 2) threats to scenic reserves such as the Ben Lomond scenic reserve; and
- 3) threats to shrub species, in particular *Olearia lineata*, and the native or endemic moths which rely on them to complete part of their life-cycle.

[24] Ms Palmer also comments on the interrelationship between the plan and the efforts of the Otago Regional Council ("ORC") to manage pests (including pest tree species). Specific further mention is also made of the initiatives identified in the wilding strategy for the control of wilding spread. These include advocacy to encourage existing owners of wilding prone plants to replace them when possible and the identification of the resource consent process as the appropriate time to control further plantings of wilding prone species.

[25] In summary Ms Palmer supports the proposed modifications to the plan as a means for the Council to control new plantings so that they occur in a manner not likely to exacerbate the existing situation, minimise the potential creation of further



¹² Para 11, table 1, evidence of Ms Dawn Palmer.
¹³ *Falco novaeseelandiae* "eastern".

sources of wilding trees and thereby avoid additional threats to the district's natural values.

Conclusions and Orders

[26] From the evidence I have concluded that the proposed modifications to the proposed and now part-operative Queenstown Lakes District Plan are the most appropriate means (in accordance with section 32) of controlling the future potential for wilding spread of conifers in the district. There is no doubt that the control of wilding spread is an issue that should be addressed in the plan and the modifications proposed include the relevant factors that the Council needs to consider in this regard.

[27] The additional modification proposed by LLGI, that applications for such consents be non-notified unless special circumstances exist, is also appropriate due to the technical nature of the considerations. The acceptance of the LLGI modification by the Council recognises that notification in all circumstances would create an undue burden on landowners wishing to embark on limited tree planting on their land.

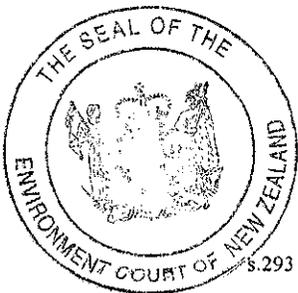
[28] Accordingly, having considered the memorandum of counsel for the Queenstown Lakes District Council dated 26 August 2004, the submissions received as a result of the public notification of the section 293 application, the evidence lodged in support of the proposed modifications and the absence of evidence opposing those proposals, the Court **ORDERS** that the Queenstown Lakes District Council modify its part-operative District Plan in the manner set out below:

- (a) Insert the following additional Site Standard into Part 5 of the Plan:

5.3.5.1(xiii) Planting of tree species with wilding potential

There shall be no planting of the following tree species:

- *Contorta or lodgepole pine (Pinus contorta)*
- *Scots pine (Pinus sylestris)*
- *Douglas fir (Pseudotsuga menziesii)*



- *European larch (Larix decidua)*
- *Corsican pine (Pinus nigra)*
- *Radiata Pine (Pinus Radiata)*

- (b) Insert at page 5/27 the following additional assessment matters for the planting of tree species with wilding potential:

5.4.2.3(xxviii) Site Standard – Planting of tree species with wilding potential

- (1) *In considering whether the proposed planting has the potential to cause wilding spread, the following matters shall be taken into account:*

- (a) *The location of the site, having particular regard to slope and the exposure to wind;*
- (b) *The surrounding land use, having particular regard to the intensity of land use, the existing vegetation cover, and stocking rate;*
- (c) *The ecological and landscape values of surrounding land, particularly land located down-wind from the proposed site.*

- (2) *In considering whether the proposed planting will cause adverse effects on landscape values, the following matters shall be taken into account:*

- (a) *The existing character of the surrounding landscape, having particular regard to whether it has an open character at present;*
- (b) *The potential for the planting to block important views from roads and other public places;*
- (c) *The proximity of the planting to neighbouring properties, and the potential to shade and/or block views from neighbouring residences.*

- (c) Insert the following method (e) in Part 4.2.5 of the Plan:



(e) *To provide guidelines on the prevention and control of wilding species within the District.*

(d) Insert the following clause as (f) 5.3.4 Non-Notification of Applications to the Plan:

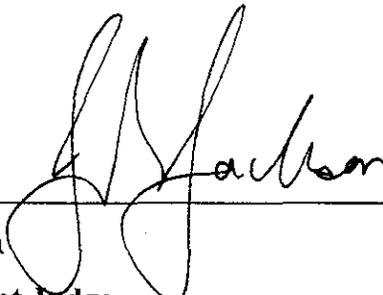
(f) *Consent applications under site standard 5.3.5.1(xiii) will not be publicly notified unless special circumstances exist.*

[29] RMA 1165/98 and RMA 1394/94, as they refer to tree planting, are otherwise dismissed. Any remaining issues on those references will be dealt with in due course.

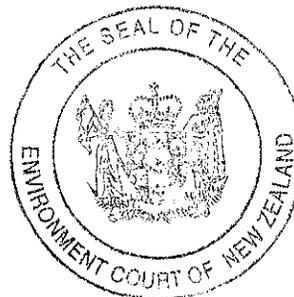
[30] There is no order as to costs.

[31] There is however one further matter that I consider should be recorded. One further issue relating to tree planting, and identified in decision C180/99, remains to be resolved. It relates to the wording of policy 1.17, which is intended to implement objective 1 of Part 4.1.4 of the revised plan. Decision C180/99 noted that the wording of that policy – encouraging the retention and planting of trees and their maintenance – appears to support the protection of existing wilding trees. That appearance should be dispelled and it is the understanding of the Court that the Council intends to amend the wording of policy 1.17 at some future date. It would be desirable if this issue was resolved sooner rather than later.

DATED at CHRISTCHURCH 15 December 2004



 J R Jackson
 Environment Judge



Issued: 16 DEC 2004