BEFORE THE ENVIRONMENT COURT

Decision No. [2015] NZEnvC 196

IN THE MATTER	of the Resource Management Act 1991
AND	of an appeal pursuant to Clause 14 of the First Schedule of the Act
BETWEEN	APPEALING WANAKA INCORPORATED (ENV-2014-CHC-46) Appellant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Respondent
AND	NORTHLAKE INVESTMENTS LIMITED Applicant

Court:	Environment Judge J R Jackson Environment Commissioner J R Mills Environment Commissioner A C E Leijnen
Hearing:	In Chambers at Christchurch
Date of Decision:	17 November 2015
Date of Issue:	17 November 2015

FINAL DECISION

A: Under section 293 of the Resource Management Act 1991 the Environment Court confirms that the Queenstown Lakes District Council must amend the Queenstown Lakes District Plan by inserting:

(i) The Northlake Structure Plan, dated 30 September 2015 as attached and marked Appendix A;

(ii) The Amended Northlake Special Zone objectives, policies and rules as attached and marked Appendix B;

(iii) An addition to the "Appendix A3 Schedule of Protected Trees – Wanaka" in the operative district plan, as attached and marked Appendix C.

B: By consent costs are to lie where they fall.

REASONS

Introduction

[1] This decision first resolves questions about rules protecting trees (inter alia) in a potential extension to Wanaka township within the Queenstown Lakes District, then confirms other changes to the rules, and finally briefly considers the court's powers on an appeal on a plan (change). Those issues arise in an appeal by Appealing Wanaka Incorporated ("AWI") against a decision of the Queenstown Lakes District Council approving Plan Change 45, which proposes the residential development of a large area between the town of Wanaka and the Clutha River.

[2] By interim decision[1], dated 21 August 2015, this court generally approved Plan Change 45 ("PC45") – subject to some changes – and directed the Queenstown Lakes District Council to prepare changes to the "Amended Structure Plan" (part of PC45) as indicated in the 'Reasons' section of the decision unless any party indicated by 30 September 2015 that they wished to call evidence on the issue. Leave was reserved for AWI to advise the court whether it wished to continue with any of its *ultra vires* allegations. The parties were directed to confer on the court's powers to amend PC45 and on the matters of detail raised in the 'Reasons' section.

[3] Counsel for Northlake Investments Limited ("Northlake") has lodged submissions, dated 30 September 2015. Northlake informs the court that AWI has elected not to continue with any of the *ultra vires* allegations and that it wishes to take

[1] [2015] NZEnvC 139.

no further part in the proceeding. Northlake has conferred with the Council and the submissions it has lodged represent the agreed position between Northlake and the Council. No party seeks costs[2].

[4] The Council has lodged a memorandum, dated 9 October 2015, confirming that it is in full agreement with the various amendments that have been made. The Council agrees with Northlake that all of the outstanding issues raised by the court have been addressed and the amendments give full effect to the court's interim decision.

Amendments to the Northlake Structure Plan

[5] First, as a preliminary point, we will confirm the Northlake Structure Plan[3] annexed to this decision marked "A". We explain the changes between this and annexure "C" to the Interim Decision in the following paragraphs.

[6] The interim decision[4] proposed the protection of patches of kanuka and native shrubs on Allenby Farm Limited's property. The Structure Plan has been amended and those patches of kanuka and native shrubs are shown as TPA 1 and TPA 2[5]. The court also proposed that the road be relocated to the south of the kanuka and native shrubs. The indicative required walkway/cycle link has been relocated slightly to avoid TPA2. The parties informed the court that no amendment was necessary in relation to roading because there is no indicative or required roading link shown within Activity Area ("AA") B1 because no such roading link is required within AA B1 to provide access to any other landowner's land[6].

[7] The interim decision[7] suggested an amendment to Activity Area ("AA") C4 and the adjoining AA E3 (both as shown on Annexure "C" to the Interim Decision) to include an additional area (part of the gully) within the AA E3 Building Restriction Area. AA E3 has been enlarged to include that additional area which the court suggested

2 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [2].
3 This plan was attached to Mr Goldsmith's submissions dated 30 September 2015 and requires no further changes.
4 [2015] NZEnvC 139, p89 at [216].
5 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [5].
6 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [6].
7 [2015] NZEnvC 139, p89 at [217] (a).

should be subject to the Building Restriction Area overlay[8]. Further we recommended that former AA C4 should form part of AA E3 because of its natural attributes[9]. That amendment has been made to the Structure Plan[10] and, as a consequence, former AA C5 is now renumbered as AA C4.

[8] We also proposed[11] that the land to the east of the gully in AA B5 should have minimum zoning size lots of 4,000m² to protect the visual amenities of the elevated houses to the south of Aubrey Road. This suggestion has been given effect to by shifting the boundary between AA E3 and (the new) AA C4[12] to reduce the area of AA B5 and increase the area of AA C4 (because AA C4 is already subject to a minimum lot size 4,000m² requirement).

[9] We put forward the idea of a walking track[13] from the northwestern high point on the site which overlooks the public reserve and camping area at the start of the Clutha River down the ridge parallel to the Clutha River to connect the two walking/cycling links shown on the Structure Plan. That additional walking/cycling track link is now detailed in the amended Structure Plan[14]. The court suggested that this additional walking track link may not be suitable for mountain bikes because of potential erosion problems. However, the parties advise that it would be difficult to implement any such restriction. There is extensive mountain bike use of the Sticky Forest land which adjoins the Northlake Special Zone on its western side. Many of the mountain bikers would undoubtedly seek to use this new track regardless of any purported restriction and there are practical difficulties with devices intended to exclude bikes. Northlake says the practical response is to ensure that the track is sufficiently wide and robust to accommodate mountain bikers and walkers[15]. We accept that.

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8 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [7].
9 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [11].
10 Because of this change the former AA C4 has vanished and the former AA C5 is now AA C4.
11 [2015] NZEnvC139, P89 at [217](b).
12 Because the former AA C4 has gone, what was AA C5 is now AA C4.
13 [2015] NZEnvC139, P90 at [218].
14 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [9].
15 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [10].

Legality of the tree protection rules

[10] Section 76(4B) of the Act states that there must be no blanket rules about the felling of trees in any urban environment. In its interim decision[16] the court asked whether the proposed areas[17] and rules for tree protection comply with section 76 (4B).

[11] Sections 76(4A) and (4B) of the Act[18] — some of the more difficult (and arguably inconsistent with Part 2) provisions of the RMA — provide:

> (4A) A rule may prohibit or restrict the felling, trimming, damaging, or removal of a tree or trees on a single urban environment allotment only if, in a schedule to the plan,—
>
> (a) the tree or trees are described; and
>
> (b) the allotment is specifically identified by street address or legal description of the land, or both.
>
> (4B) A rule may prohibit or restrict the felling, trimming, damaging, or removal of trees on 2 or more urban environment allotments only if—
>
> (a) the allotments are adjacent to each other; and
>
> (b) the trees on the allotments together form a group of trees; and
>
> (c) in a schedule to the plan,—
>
> (i) the group of trees is described; and
>
> (ii) the allotments are specifically identified by street address or legal description of the land, or both.

[12] Relevant to the interpretation of sections 76(4A) and (4B) is a new definition of "urban environment allotment" which was inserted by the 2013 Amendment Act and which is only applicable for the purposes of these sections. That definition is set out in section 76(4C) and is as follows:

> (4C) In subsections (4A) and (4B),—
>
> **group of trees** means a cluster, grove, or line of trees
>
> **urban environment allotment** or **allotment** means an allotment within the meaning of section 218—
>
> (a) that is no greater than 4 000 m^2; and

16 [2015] NZEnvC 139 at [221].

17 See the areas marked "TPA" on the Northlake Structure Plan.

18 Inserted by the Resource Management (Simplifying and Streamlining) Amendment Act 2009 and amended by the Resource Management Amendment Act 2013.

(b) that is connected to a reticulated water supply system and a reticulated sewerage system; and

(c) on which there is a building used for industrial or commercial purposes or as a dwellinghouse; and

(d) that is not reserve (within the meaning of section 2(1) of the Reserves Act 1977) or subject to a conservation management plan or conservation management strategy prepared in accordance with the Conservation Act 1987 or the Reserves Act 1977.

[13] To address the concerns raised by the court the following amendments have been made[19]:

(a) four separate Tree Protection Areas have been identified on the amended Structure Plan (TPA 1, TPA 2, TPA 3, TPA 4) to enable more specific identification by way of description and by way of legal title identification;

(b) Appendix A3 of the Operative Queenstown Lakes District Plan already contains an Inventory of Protected Features concerning heritage buildings and heritage trees which are identified in different tables or schedules. The parties propose that an additional schedule (Appendix 3 to this decision) be added entitled "Protected Trees – Wanaka;"

(c) each separate Tree Protection Area is described in the new Schedule by reference to the specific species of trees within that Tree Protection Area which are to be protected;

(d) the legal description of the land contained in each individual Tree Protection Area is identified in the Schedule;

(e) Objective 2, Policy 2.1, last bullet point on page 12.X – 2 has been amended to include reference to "…landscape or ecological feature…"

(f) Objective 4, Policy 4.4 on page 12.X – 3 has been amended to include specific reference to "…within TPA3 and TPA 4…"

(g) Rule 12.x.4.2.iii on page 12.X – 5 in the Northlake Plan Provisions has been amended to include specific reference to the new Schedule and to include a reference to retaining and enhancing indigenous ecological values;

19 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [16].

(h) Rule 12.X.4.5x on page 12.X – 7 in the Northlake Provisions has been amended to include specific reference to the new Schedule.

[14] For the purpose of the new Schedule the relevant trees have been identified. Counsel commissioned Ms Anne Steven of Wanaka, an experienced landscape architect, to visit the PC45 site and to provide a description of the tree species within the four Tree Protection Areas. Ms Steven produced the plan attached to this decision as Appendix D identifying the species within the four Tree Protection Areas. As Ms Steven is well known to the court (and the court had carried out a site visit) the court is satisfied with the information provided by Ms Steven. Counsel did not consider it necessary to further complicate the District Plan by including the plan in Appendix D as a formal part of the PC45 Plan provisions and nor do we.

[15] Mr Goldsmith submitted that the amendments made to the plan provisions comply with sections 76(4A) and (4B) because[20]:

(a) section 76(4A) and (4B) require that the relevant "tree or trees" or "group of trees" be described. No method of description is described. It is submitted that the description must be such that the relevant tree of trees or group of trees can be clearly identified by reference to the District Plan so that there can be no doubt which tree or trees or group of trees are being referred to. The collective description of a group of trees in a schedule (which will be included in the District Plan), provided it gives sufficient clarity to landowners, complies with sections 76(4A) and (4B);

(b) the trees to be protected are now clearly identified by species (Schedule in Appendix C) and by location (identified on the Structure Plan and in the Schedule in Appendix C);

(c) each of the legal allotments which contains a TPA and which is described in the Schedule in Appendix C is (currently) more than 4,000m². Therefore the rules, referring to the Structure Plan do not, at present, contravene sections 76(4A) or (4B).

[20] Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [20]-[22].

[16] However, counsel also responsibly submitted that that is not the end of the matter since each individual large allotment described in the Schedule in Appendix C will ultimately be subdivided. It is likely that all of the trees intended to be protected will end up within individual allotments which are smaller than 4,000m² and which fall within the definition of "urban environment allotment." Mr Goldsmith perspicaciously wrote that the question to be asked is "whether subsequent subdivision will result in the proposed tree protections rules not complying with sections 76(4A) or (4B)?"

[17] When a later subdivision occurs the relevant legal descriptions will change. Each existing large allotment will be subdivided into a number of smaller allotments, with an allotment number and a DP number different from that contained in the Schedule in Appendix C. Counsel submitted that it cannot have been intended by the legislature that protection of the trees would vanish simply as a consequence of a mechanical survey exercise involving the subdivision of one large lot into a number of smaller lots[21]. Despite the amendments to section 76, territorial authorities still have a requirement to protect areas of significant indigenous vegetation and significant habitats of indigenous fauna pursuant to section 6(c) of the Act and to maintain indigenous biological diversity. This has been taken into account in the wording of Appendix C and has been addressed by using the following formula in the table of legal descriptions to be inserted in the district plan:

> Lot__DP__ (which includes the future legal description of any subdivided part of that lot which contains any part of Tree Protection Area TPA__, including any lot which qualifies as an urban environment allotment under s76(4C) of the Act.

[18] It is submitted that the formula falls within the requirements of section 76(4B)(c)(ii) in that "the allotments are specifically identified by…legal description of the land". Counsel understands that section 76(4A) and (4B) were inserted into the RMA to address a concern held by Parliament about the practice of District Councils seeking to prevent the removal of trees (without first obtaining a resource consent) by use of blanket rules which generically referred to trees of a certain size and/or species without first going through the exercise of identifying specific trees or groups of trees which should be protected for specific reasons. Counsel argues it was envisaged that

[21] Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [27].

local authorities could still protect trees in urban areas that had been identified as part of a group (for example, by way of Schedule to a Plan). This understanding is supported by the commentary of the Local Government and Environment Select Committee's reading of the Resource Management Reform Bill 2012. Counsel also refers to a decision of the Environment Court on an application for declaration, where one of the court's recommendations was that all trees in a class within defined characteristics in a defined areas or zone would be sufficient to comply with the identification provisions requirements[22]. Further amendments in 2013 amended this approach and also added the definition of "urban environment allotment".[23]

[19] It is submitted that the need to identify the legal description or street address in the District Plan is to ensure that councils specifically assess trees for protection, justify that protection and can accurately identify the properties that are subject to that protection. It is argued that that objective can be achieved in this case and that subdivision of a lot – which will always result in a new legal description – should not render such District Plan rules of no effect[24]. Further, interpreting section 76(4B) with a rigid adherence to the words of the section would not be consistent with the requirements of the Interpretation Act 1999, in particular section 5(1) which states "the meaning of an enactment must be ascertained from its text and in the light of its purpose". Sections 5(2) and (3) are also relevant as they state that indications such as the analysis and explanatory material of the enactment are also relevant to ascertaining the enactment's meaning[25].

[20] We gratefully accept counsel's unopposed submissions and proposed solution and are satisfied that the proposed TPAs and rules comply with sections 76(4A) and (4B) of the RMA. It occurs to us that there may be another reinforcing option open to the Council as consent authority. At the time of subdivision a consent notice might be registered on the title for any new allotments (< than 4,000m^2) alerting current and future property owners to the presence of the TPAs and their requirements.

22 *Re Auckland Council* [2011] NZRMA 546; (2011) 17 ELRNZ 433.
23 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [31]-[33].
24 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [34].
25 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [35].

Other changes to the rules

Restricted Discretionary Residential Activity rule

[21] In the interim decision the court queried[26] the apparent disjunction between permitted activity consent status for residential buildings and restricted discretionary activity consent status for residential activities. The court was concerned that some categories of buildings appear permitted or controlled activities but the actual residential activity which will occupy them requires restricted discretionary consent. Thus the criteria which would be invoked to assess a residential activity will not necessarily be applied at the development of the building stage. This could mean that remnant stands of native planting are removed as only the TPA and Area E are protected and this outcome might not implement Objective 4 and Policy 4.2 of PC45.

[22] The rule which the court was concerned about was proposed rule 12.X.4.3.i. This rule was put forward in response to a decision issued by another division of the Environment Court during the course of PC45. In *Queenstown Airport Corporation v Queenstown Lakes District Council*[27] the court held that the Outline Development Plan ("ODP") process used elsewhere in the Queenstown Lakes District Plan is *ultra vires* because the relevant ODP rules can determine the consent status of an activity. It was held that the consent status of an activity must be specified in the District Plan and cannot change as a result of a grant of consent. The court's ruling raised a number of issues. The first is that it is generally desirable that the owner of a standard residential lot can build a standard residential dwelling without having to incur the costs and inconvenience of a consent process, provided the normal standards are complied with. Second, the ODP approach – so long as it is not used to determine activity status – has considerable merit because it requires a holistic approach to residential development of larger greenfields areas[28].

[23] Rule 12.X.4.3.i is the proposed solution to these issues since[29]:

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26 [2015] NZEnvC 139 at [222].

27 *Queenstown Airport Corporation v Queenstown Lakes District Council* [2014] NZEnvC 93 at [126]-[197].

28 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [37]-[39].

29 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [40].

(a) it enables and requires consideration of all of the restricted discretionary matters detailed in rule 12.X.4.3.i relevant to the proposed ODP being considered under that rule;

(b) this links through to subdivision rule 15.2.3.3(x) which applies restricted discretionary activity status to any subdivision where land use consent has previously been granted under rule 12.X.4.3;

(c) any residential subdivision or development defaults to fully discretionary activity consent status if consent has not already been obtained under rule 12.X.4.3;

(d) once that restricted discretionary activity consent (which will include a condition requiring compliance with an ODP) has been granted, the subsequent building of dwellings in accordance with the ODP approved as part of that consent is a permitted activity.

[24] With regard to the court's concern about remnant stands of native planting being removed, it is submitted that objective 4 and policy 4.2 are implemented by identification of the TPAs. At the moment all of that existing vegetation could be removed as a permitted activity. As soon as PC45 becomes operative that existing vegetation will be protected.

[25] One of the restricted discretionary assessment matters under rule 12.X.4.3.i and ii is "(h) Proposals to protect and enhance conservation values". That specific assessment matter relates directly to TPAs. Each TPA is part of a larger Activity Area. For example, when an application is made for consent under rule 12.X.4.3.i for residential activities (excluding buildings) in AA B1 one of the issues to be addressed is "proposals to protect and enhance conservation values" which will include protecting and enhancing the native bush within TPA 1 and TPA 2[30].

[26] Finally, from a practical perspective it is unlikely that any houses will be built until and unless subdivision has taken place and it is highly unlikely subdivision will take place until and unless a consent has been granted under rule 12.X.4.3. If there are any remnants of native bush which are not protected by a TPA and which still exist

30 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [44].

when application for consent under rule 12.X.4.3 is made the opportunity will arise for the Council to impose protection. For these reasons counsel submits that the current rule regime properly and adequately implements objective 4 and policy 4.2 of PC45.

[27] The court accepts counsel's comprehensive submissions.

One residential unit per site

[28] The court suggested[31] that the requirement for no more than one residential unit on a site may be counterproductive in terms of efficient site planning. Northlake accepts that point and the relevant rule has been deleted[32].

Underground structures

[29] The court expressed a concern[33] that the rule permitting an underground structure to be excluded from maximum building coverage may reduce planting opportunities. Counsel concedes he had overlooked the fact that the Council has recently amended the definition of "coverage" in the District Plan to only apply to buildings at ground level or above ground level. The exemption is no longer required in PC45 and it has been deleted from rule 12.X.6.2.v on page 12.X-15 of the Plan provisions.

Eastern Edge of the Zone

[30] The court suggested[34] that there could be a rule addressing the eastern external edge of the zone where planting could assist the definition of this urban edge. Counsel says this is covered by rule 12.X.6.1.x(c) on page 12.X-11 which requires, on any residential site adjoining the Hikuwai Conservation Area, 100 percent planting coverage within a 4 metre setback from the boundary with the Hikuwai Conservation Area.

Activity Areas E1 and E4 – pastoral state

[31] The court expressed concern that rule 12.X.6.2.xi requires AAE1 and AAE4 to be maintained in a pastoral state, stating that this would not protect trees or encourage additional enhancement planting. The wording has been amended as follows:

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31 [2015] NZEnvC 139, p91 at [222](b).

32 Previously rule 12.X.6.2.viii on page 12.X-16 of Closing Submissions Version Northlake Plan Provision dated 1 May 2015.

33 [2015] NZEnvC 139, p92 at [222](c).

34 [2015] NZEnvC 139, p92 at [222](d).

> In Activity Area E1 and Activity Area E4 existing trees, shall be retained and any additional enhancement planting, once established shall also be maintained except that this rule does not apply to wilding tree species (particularly those spreading from the adjoining land outside the zone to the west) which shall be removed.

[32] Counsel has correctly assumed that the court is not advocating the retention of the wilding trees currently spreading from Sticky Forest to the west.

Power to amend PC45

[33] The court asked the parties whether it had the power to make the necessary changes to PC45 or whether it would need to utilise the powers given under section 293, which give the court the ability to direct changes to a plan which are not otherwise within jurisdiction due to the scope of the appeal.

[34] Counsel submitted that the court has jurisdiction to makes the changes proposed in the interim decision for the following reasons[35]:

(a) PC45 involves the rezoning of land from Rural General to a mixed low and medium density urban zone. The requested rezoning was granted by the Council. The appeal by Appealing Wanaka sought cancellation of the Council's decision and reinstatement of the Rural General zoning. Any outcome which falls between the urban zoning requested and the Rural General zoning sought under appeal is prima facie within jurisdiction;

(b) in deciding whether or not to confirm the rezoning the court is required to ensure that the objectives, policies and rules of PC45 implement the existing objectives and policies of the operative District Plan;

(c) the changes requested or suggested by the court are all relatively minor and are all directed at achieving the objectives and policies of PC45 and so are within jurisdiction.

35 Submissions on behalf of Northlake Investments Limited, dated 30 September 2015, at [52].

[35] The extent to which the court's jurisdiction is extended by the content of a plan change was discussed by Fisher J in *Westfield (New Zealand) Ltd v Hamilton City Council*[36], where he said:

> [73] … I think it is implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> [74] Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of a reference. This is implicit in ss292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would *not* have been within the reasonable contemplation of those who saw the scope of the original reference.

We consider that remains the law despite subsequent amendments in 2005 to the First Schedule and section 293 of the Act. So we accept counsel's submissions and find that the changes to be made to PC45 can fairly be said to be foreseeable consequences of any changes directly proposed in the appeal.

[36] However, the ultimate question here is "what is the source of the court's power to make any changes (otherwise within jurisdiction) to a plan change as decided by the council?"

[37] The First Schedule is quite terse as to the court's powers in relation to appeals on a plan or plan change. Clause 15 simply states:

> **15 Hearing by the Environment Court**
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> (1) The Environment Court shall hold a public hearing into any provision or matter referred to it.
>
> (2) If the Environment Court, in a hearing into any provision of a proposed policy statement or plan (other than a proposed regional coastal plan), directs a local authority under section 293(1), the local authority must comply with the court's directions.

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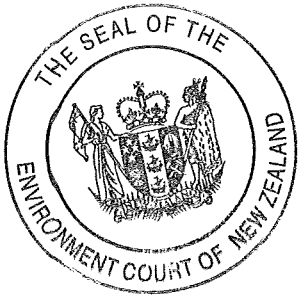
36 *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 at 574-595. "Reference" is easily able to be substituted with the words "plan appeal".

> (3) Where the court hears an appeal against a provision of a proposed regional coastal plan, that appeal is an inquiry and the court—
>
> (a) shall report its findings to the appellant, the local authority concerned, and the Minister of Conservation; and
>
> (b) may include a direction given under section 293(1) to the regional council to make modifications to, deletions from, or additions to, the proposed regional coastal plan.

In *Environmental Defence Society v Otorohanga District Council*[37] Judge Kirkpatrick simply summarised this as requiring that the Environment Court "… is to hold a hearing into the provision and make its own decision on that"[38]. However, with respect, it is not quite as simple as that. A closer reading of clause 15(2) suggests that the court's alternatives are either to refuse the appeal (and confirm the local authority's decision) or to give directions under section 293. The effect of the 2005 amendment to clause 15 is, at first sight, that the court cannot simply substitute its own decision. As Gendall J found or, rather, held in *Federated Farmers Inc v Mackenzie District Council*[39]:

> The jurisdiction is to direct that changes be made, not to make the changes and direct that they be implemented.

[38] When the local authority refers its proposed changes back to the Environment Court, the court may (or may not) "confirm" them. It is unclear whether this confirmation is under section 293 or, perhaps, under section 290 as "amend[ment] of the earlier local authority decision". We consider the former is more plausible because, while section 290 appears to be applicable to any appeal, it is qualified by subsection (4) which states that nothing in the section affects "any specific power or duty" of the court under (amongst other provisions) the RMA itself. It seems to us that the clause 15(2) and section 293 powers and duties are precisely such precise powers and duties. We consider, but do not have to decide, that the only direct power the court has on appeal is to confirm the council's decision (by rejecting the appeal) or to confirm changes under section 293 once the process in section 293(1) has been carried out.



37 *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 070 at [11].
38 *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 070 at [11].
39 *Federated Farmers Inc v Mackenzie District Council* [2015] NZRMA 52(HC) at [153].

Outcome

[39] It is recorded that Appealing Wanaka Incorporated does not wish to pursue any of its allegations of *ultra vires* against the Council.

[40] The court is satisfied with the submissions on behalf of the Council and Northlake that it has jurisdiction to make the changes to amend PC45 in the manner suggested by those parties.

[41] The Council's decision on PC45 and the attached amendments are confirmed, with the effect that the amended Structure Plan, the amended objectives, policies and rules and added Schedule (to go at the end of Appendix A3) must be inserted in the Queenstown Lakes District Plan. Also attached to this decision is a plan showing the Tree Protection Areas.

[42] The parties are agreed that costs are to lie where they fall.

For the court:

J R Jackson
Environment Judge

Attachments

A: Amended Northlake Special Zone Plan Provisions for the Queenstown Lakes District Plan

B: Northlake Structure Plan

C: Addition to "Appendix A3 Schedule of Protected Trees – Wanaka" in the operative district plan

D: Tree Protection Areas – Existing Vegetation Plan