BEFORE THE ENVIRONMENT COURT

Decision No. [2013] NZEnvC 156

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of an appeal pursuant to clause 14 of the First Schedule to the Act

BETWEEN COOK ADAM TRUSTEES LIMITED & R MONK

(ENV-2011-CHC-006)

Appellants

AND QUEENSTOWN LAKES DISTRICT COUNCIL

Respondent

Court: Environment Judge J R Jackson (sitting alone under section 309 of the Act)

Hearing: In Chambers at Christchurch
(Final submissions received 14 June 2013)

Written submissions received from:
I M Gordon for the appellants
J E Macdonald for the Queenstown Lakes District Council
John M Hanan for himself (section 274 party)
E Hanan for herself (section 274 party)
D Hanan for himself (section 274 party)
S H N Stamers-Smith for Arrowtown Village Association (section 274 party)
Judith M Hanan for herself

Date of Decision: 10 July 2013.

Date of Issue: 10 July 2013.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

DECISION AS TO JURISDICTION

A: Under section 313 of the Resource Management Act 1991 the Environment Court declares that the court has jurisdiction to hear and determine the appellants' Notice of Appeal on Plan Change 39, and in particular, that the relief now sought by the appellants as set out in the affidavits of B Espie and J B Edmonds dated 10 May 2013 is fairly and reasonably within the triangle of possible outcomes constituted by the notified Plan Change 39, the submissions on the plan change, and the operative district plan (to the extent it deals with the same resources and issues), and thus potentially open to the court to insert in the Queenstown Lakes District Plan with further amendments (if any) that may also held to be within jurisdiction.

B: All issues about the Environment Court's jurisdiction under section 293 of the Act are adjourned.

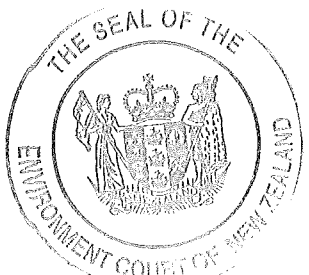
C: Any application that I should recuse myself must be by notice of motion, stating grounds, lodged and served by 9 August 2013.

D: Under section 279(1)(a) and (d) I direct that the parties must follow this timetable for the lodging and service of evidence:

- 30 August 2013: all evidence-in-chief from the appellants must be served on the other parties;
- 20 September 2013: all evidence-in-chief from the Queenstown Lakes District Council must be served;
- 11 October 2013: all evidence-in-chief from section 274 parties must be served;
- 25 October 2013: any rebuttal evidence from the appellants must be served;
- 1 November 2013: the Queenstown Lakes District Council shall lodge four copies of all evidence with the Registrar of the Environment Court in Christchurch.

E: At the same time as they comply with the directions in Order D, each party must serve four (4) extra copies of its evidence with the Queenstown Lakes District Council (for lodging with the Registrar in due course).

F: Costs are reserved.



REASONS

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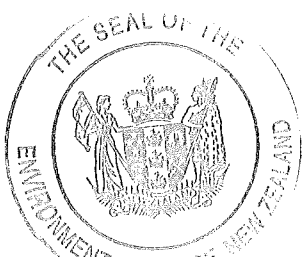
1. Introduction

1.1 Arrowtown South

[1] Arrowtown South is the subject of a private plan change — numbered as Plan Change 39 by the Queenstown Lakes District Council and here shortened to "PC39". The issue for preliminary determination is "Are the amendments sought to be made by the appellants since they lodged their appeal within the jurisdiction of the Environment Court?"

[2] The appellants, Cook Adam Trustees Ltd and R Monk, own land near Arrowtown between McDonnell Road to the west and Centennial Avenue to the east. Their appeal concerns an area of approximately 31 hectares of land (including their land) which is bounded by the Arrowtown urban area to the north, by the Arrowtown Golf Course to the south, McDonnell Road to the west and Centennial Avenue to the



east. This area, which contains nine land titles in different ownerships, is called "Arrowtown South" by the appellants[1], so I will adopt that usage.

1.2 The application for a declaration

[3] The appellants have lodged affidavits by Mr B Espie, a landscape architect, and by Mr J B Edmonds, a planner, describing a reduced version of PC39 which the appellants say they wish to pursue in their appeal. In reliance on those affidavits, the appellants have applied for a declaration that the more limited relief now sought by them is still within the scope of PC39 and of the appeal and thus within the jurisdiction of the court. The declaration is opposed by various members of the Hanan family (identified below) and the Arrowtown Village Association ("the AVA"), all of whom are section 274 parties in the substantive proceeding except Ms Judith M Hanan. The Queenstown Lakes District Council takes a more ambivalent approach.

[4] The appellants rely on section 310 of the Resource Management Act 1991 ("the RMA" or "the Act"). That enables the court to declare the existence or extent of any function, power, right, or duty under the Act. The appellants submit that gives the court jurisdiction to hear and determine an appeal which seeks relief expressed in the alternative.

2. The plan changes relating to Arrowtown

2.1 The three recent plan changes (PC29, PC30, PC39)

[5] How far the village of Arrowtown should extend into the country to the south and west has been debated for decades. In recent years, three proposed plan changes to the operative district plan of the Queenstown Lakes District Council addressed the issue either generally or specifically. They were:

- PC30 which introduced some objectives and policies as to urban extensions within the district;
- PC29 which attempted to settle an urban growth boundary ("UGB") to the south of Arrowtown;
- PC39 which was a private plan change promoted by the appellants in those proceedings which sought a special zoning to allow urban densities of subdivision and residential development to the south of Arrowtown.

[6] PC30 was resolved by agreement by all parties and added some objectives and policies to Chapter 4 of the district plan. These are relevant and I will refer to them shortly.

[7] The relevant appeals on PC29 — about the appropriate urban growth boundary to the south of Arrowtown — were resolved by the Environment Court in *Monk v*

[1] Who own the greater area in Arrowtown South.

Queenstown Lakes District Council[2] in a decision issued on 4 February 2013. In that decision the court largely confirmed the council's decision as to the location of the UGB except for a small extension along McDonnell Road[3]. However, the court added[4]:

> Finally, we reiterate (with PC39 in mind) that a soft edge to the southern boundary of Arrowtown does not have to be within the urban growth boundary. Indeed, given the rather wide landscape provisions and high densities of the Residential Zones it seems preferable to us that most of the land within Arrow South be outside the urban growth boundary. As hinted above, at least one of the court contemplates that some subdivision and development (but not at residential or urban scales) might be desirable in the remainder of Arrow South, but is unsure as to whether that should be under the current Rural General rules, or whether it would be better as a Rural Living or Rural Residential or other special (Rural) zone or a combination of those.

[8] PC39 is of course, the subject of these proceedings. I set out its history in a little more detail next.

2.2 The history of PC39 (Arrowtown South)

[9] PC39 was initiated in September 2009 when the appellants requested the council to make a plan change (creating a "special zone" for Arrowtown South) to the operative district plan under clause 21 of the First Schedule to the RMA. The council accepted the request as Plan Change 39 on 24 November 2009.

[10] The proposed objectives and policies for Arrowtown South in PC39 were:

> Objective 1:
> To provide for residential activities in a way and at a rate that ensures a comprehensive and sustainable pattern of development is achieved.
>
> Policies:
> 1.1 To provide for development within the Arrowtown South Special Zone that
> - creates legible residential neighbourhood areas
> - integrates with the existing character and sense of place in Arrowtown
> - creates a network of open spaces that contribute to the amenity and distinctiveness of neighbourhoods
> - demonstrates high quality urban design
> - defines and enhances the urban boundary of Arrowtown and the contribution of the Zone to the arrival and departure experience
> - identifies, protects and, where appropriate, adapts and enhances, any items, structures or features of archaeological, historic or cultural significance
> - adopts a Structure Plan that identifies a number of different Neighbourhood Areas, enabling a varied residential density across the zone, and to ensure development occurs in accordance with that Plan.
>
> 1.2 To provide for local residents' day-to-day conveniences and create a legible core within the Zone comprising a cluster of small scale commercial activities complementary to the existing Arrowtown commercial centre.
>
> 1.3 To ensure infrastructure is available to support the development of land, prior to its release for development, without adversely impacting upon existing levels of service in the Arrowtown area.

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2 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.
3 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12 at para [113].
4 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12 at para [116].

Objective 2:
To manage and enhance the physical features, communal landscapes and amenity values of the Zone.

Policies:
2.1 To ensure that development within the Arrowtown South Special Zone
- recognises and responds to the topography of the Zone
- protects and enhances biodiversity and natural values where appropriate
- protects the form and shape of the underlying landform
- promotes sustainable stormwater design to ensure maximum discharge to ground through the use of green roads, swales edges and soak pits.

[11] The plan change was duly notified by the council. The public notification by the council stated:

> The purpose of the plan change is:
>
> > To rezone approximately 30 hectares of Rural General zoned land, located to the south of Arrowtown, to a new residential Arrowtown South Special zone. The development will be located between Centennial Avenue and McDonnell Road, will adjoin the Arrowtown Low Density Residential Zone along its northern boundary and the Arrowtown Golf Course to its south. The proposed changes to the Operative Queenstown Lakes District Plan will include new provisions within Section 12 that will provide for a special residential zone and provisions for a small commercial village precinct.

[12] There were hundreds of submissions on PC39, including one by the appellants[5]. The council's summary of decisions requested by submissions shows that about 500 submissions simply opposed PC39 completely and about 100 supported it equally baldly. Other submissions were more nuanced and I now examine these as summarised by the council[6].

[13] The submission[7] by D and K Te Paa was to partly support PC39 and requested:

> Require the proponents of PC39 to undertake a comprehensive and proper Section 32 analysis in accordance with the sound resource management principals and practices as adopted by the Council on previous plan changes.
>
> Amend PC39 for the following reasons:
>
> Adverse traffic, landscape, infrastructure and amenity effects.
>
> Inconsistency in whole or part with Objectives and Policies of Otago Regional Policy Statement, Kai Tahu Otago Natural Resource Management Plan, PC 29, PC 24, PC 30, Queenstown Lakes District Plan and Arrowtown Community Plan.
>
> Plan Change does not represent sustainable management in its current form.
>
> Amend PC30 with all consequential relief necessary to give effect to the relief sought.

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5 Notice of Appeal para 2 [Environment Court document 1].

6 Obtained by the Registrar from the council and admissible (as a public document) under section 276(1)(a) RMA.

7 QLDC Reference 39/496/1: see Summary of submissions [Environment Court document 3].

[14] A submission by Residential Communities Ltd[8] opposed the whole plan change and sought:

> Undertake a comprehensive and proper section 32 analysis in accordance with the principles and practice adopted by the Council on previous plan changes.
>
> The PC does not represent sustainable management.
>
> The PC does not remedy or mitigate effects on the environment, including the adverse traffic, landscape, visual, and amenity effects, adverse effects from earthworks and infrastructure effects.
>
> PC39 does not provide sufficient open space and recreational opportunities.
>
> The changes proposed by way of the objectives, policies and rules are not the most appropriate means of achieving the purpose of the Act or the most appropriate means of exercising the Council's functions in respect of efficiency and effectiveness relative to other means.
>
> Amend PC39 in accordance with the submissions above.
>
> Amend PC39 with all consequential relief necessary to give effect to the relief sought above.

[15] A submission by P Hamell[9] conditionally opposed the whole plan change "unless the following changes were made":

1. Reduce the number of residential units proposed.
2. 20m buffer zone provided along boundary of Arrowtown golf course.
3. A public park or play area provided at the start of the development at the town end of McDonnell Road.

[16] The Arrowtown Village Association neither supported nor opposed the plan change[10].

[17] Finally the council itself lodged a submission[11] which opposed the plan change unless:

1. It is consistent with Councils decision on Plan Change 29 and Plan Change 30.
2. It results in go[o]d resource management outcomes in respect to urban design, open space and recreation networks, transportation networks and connectivity, infrastructure provision and stormwater and landscape and heritage protection.
3. It generally aligns with the Arrowtown Guidelines.
4. It generally aligns with Arrowtown's Community Plan notwithstanding the decision on PC29.
5. It ensures provision of appropriate amounts of affordable and community housing consistent with the eventual decision on PC 24.

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8 QLDC Reference 39/484/1: see Summary of submissions [Environment Court document 3].
9 QLDC reference 39/441/1 [Environment Court document 3].
10 QLDC reference 39/404/1 [Environment Court document 3].
11 QLDC reference 39/482/1 [Environment Court document 3].

[18] After a hearing, Commissioners for the council refused PC39 in a decision notified on 10 November 2010. The appellants lodged an appeal with the Registrar of the Environment Court on 13 January 2011. The Notice of Appeal seeks alternative relief:

> **Relief Requested**
>
> 7. That PC39 be granted as applied for, **or** be granted, with such modifications to the structure plan as are necessary to remedy or mitigate any adverse effects arising. (Emphasis added).
>
> **Alternative Relief**
>
> 8. The Appellants further, or in the alternative request such other additional, amended, consequential and/or alternative changes to the PC39 provisions as are considered necessary or appropriate to address the issues and concerns raised by the respondent or other parties to this appeal.

[19] A number of submitters lodged notices of interest in the appeal under section 274 of the RMA. They include:

- John M Hanan
- Dame Elizabeth Hanan
- D Hanan
  (collectively "the Hanan family")
- The Arrowtown Village Association Inc.

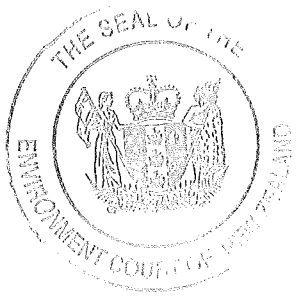
Although Ms Judith M Hanan has made submissions on the application I am considering, the Registrar advises me that the court file does not contain a notice under section 274 from her.

[20] During most of the prehearing stages of the appeal it was contemplated by the parties and the court that the hearings on the PC39 appeal would take place at the same time as the hearing on PC29 (the urban boundary). That made sense because the appeals concerned the same area of land, the same parties were involved, and the issues were related.

[21] However not long before the hearing, the council and the appellants came to an agreement between themselves that the hearings should be split. The section 274 parties strongly opposed that course. However, the court ruled, with some recorded reluctance, that PC29 should be heard first, accepting assurances from counsel along the lines that that procedure would be more efficient because if the urban boundary did not move under PC29 then the appeal on PC39 would be withdrawn.

2.3 Proposed amendments to PC39

[22] As described briefly above, the appellants now wish to pursue an amended version of PC39. This appears to be, at least in part, a result of reflection on the



outcome in the Environment Court's decision in *Monk v Queenstown Lakes District Council*[12]. There the Environment Court decided that the urban boundary should move south but only a relatively small distance — not the full distance and extent sought in that proceeding. Another effect of *Monk*[13] was to amend some of the relevant part 4 (district-wide) objectives and policies which affect urban growth around Arrowtown. These now read (relevantly, and subject to final confirmation by the court after correction of typographical mistakes)[14]:

> (4.9.3) 7.5 To avoid sporadic and/or ad hoc urban development in the rural area generally and to strongly discourage urban extensions in the rural areas beyond the Urban Growth Boundaries.
>
> ...
>
> (4.9.3) 7.12 To limit the growth of Arrowtown so that:
> 7.12.1 adverse effects of development outside the Arrowtown Urban Growth Boundary are avoided;
> 7.12.2 the character and identity of the settlement, and its setting within the landscape is preserved or enhanced.
>
> (4.9.3) 7.13 To ensure that the development within the Arrowtown Urban Growth Boundary provides:
> 7.13.1 an urban form that is sympathetic to the character of Arrowtown, including its scale, density, layout and legibility in accordance with the Arrowtown Design Guidelines 2006;
> 7.13.2 a designed urban edge with landscaped gateways that promote or enhance the containment of the town within the landscape, where the development abuts the urban boundary for Arrowtown;
> 7.13.3 for Feehley's Hill and land along the margins of Bush Creek and the Arrow River to be retained as reserve areas as part of Arrowtown's recreation and amenity resource.
>
> (4.9.3) 7.14 To recognise the importance of the open space pattern that is created by the interconnections between the golf course and other Rural General land.

[23] Because the UGL as settled in *Monk* did not extend over the whole of Arrowtown South, the new urban growth objectives and policies in Chapter 4 of the district plan pose difficulties for the appellants in this appeal about PC39. Faced with those difficulties they propose to amend the PC39 Special Zone so that:

- inside the new UGL is urban density housing; and
- outside the UGL is Rural-Residential so as to not to offend Chapter 4.9.3 of the district plan.

[24] The appellants no longer seek anywhere near 226 residences in Arrowtown South. Prompted by the final paragraph in *Monk*[15] (quoted above) they have now put forward amended objectives, policies and rules and an alternative structure plan for the area. The supporting affidavits lodged for the appellants from Mr B Espie, and from Mr

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12 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.
13 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.
14 PC30 p X-1 as amended by *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.
15 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.

J B Edmonds describe a much diminished Plan Change 39 which reduces the building density from 226 dwellings to:

- 19 urban residential allotments (with some scope for further subdivision) inside the amended UGL on McDonnell Road, and
- 23 rural residential allotments (including one existing dwelling).

Other features of the revised structure plan include[16]:

- protection of the escarpment face;
- protection of the stream with setbacks and "scope"[17] for fencing;
- provision of walking and biking connections including along part of the stream and up the escarpment face;
- appropriate landscaping including tree planting, and planting of the scarp;
- minimal internal roads and access/crossing points.

The appellants submit that the reduction in density of the amended PC39, together with the retention of open, unmodified space, remedies or mitigates the adverse effects of urbanisation identified by the court in the PC29 decision.

[25] When they received the appellants' amended concept the section 274 parties advised that in their view the relief now sought is not within the jurisdiction of the court. To resolve that issue the appellants lodged their application for a declaration. The appellants submit that the relief is within jurisdiction because it is "... genuinely a subset of that which was originally sought" (referring to *re Vivid Holdings Ltd*[18]). The appellants' position on jurisdiction is supported, with some qualifications, by the submissions from the Queenstown Lakes District Council. The Hanan family still maintain that the proposed relief is beyond jurisdiction. The Arrowtown Village Residents Association has lodged submissions to similar effect. All parties agree that this jurisdictional issue can be dealt with on the papers.

2.4 The scheme of the district plan

[26] PC39 in either its notified form or as now proposed to be amended by the appellants must be considered in the context of the operative district plan. There are five relevant "sections" (which I will call "chapters" to avoid confusion with provisions in the RMA) in the district plan. These are:

16 B Espie, affidavit dated 9 May 2013.
17 I put quotes around the "scope" for fencing because I did not understand what the deponents mean.
18 *re Vivid Holdings Ltd* [1999] 5 ELRNZ 264 at 272.

- Chapter 4 (District Wide Issues)
- Chapter 5 (Rural Areas)

...

- Chapter 7 (Residential Areas)
- Chapter 8 (Rural Living Areas)

...

- Chapter 12 (Special Zones)

Notified PC39 proposed to move the zoning from Rural General (i.e. a Rural Area covered by Chapter 5) to a Special Zone (under Chapter 12) not to "urban" (i.e. a Residential Area, covered by Chapter 7).

[27] I note also that in relation to residential activities, Chapter 8 provides for "Rural-lifestyle" and "Rural-Residential" Zones — collectively "Rural Living Areas" — as intermediate options between Rural General and Residential Zones. The introductory statement for the Rural Living Areas Rules states[19]:

> The purpose of Rural-lifestyle and Rural-Residential Zones is to provide for low density residential opportunities as an alternative to the suburban living areas of the District.
>
> The Rural-lifestyle Zone recognises that in some locations low density rural living development is appropriate. Subdivision rules are aimed at creating a diversity of allotment sizes which may be utilized for a diversity of rural and/or residential activities. The imposition of a minimum and average allotment size is to protect the character and viability of the zone, as well as adjoining rural activities.
>
> The Rural Residential Zone is anticipated to be characterized by low density residential areas with ample open space, landscaping and with minimal adverse environmental effects experienced by residents. Rural activities are not likely to remain a major use of land in the Rural Residential Zone or a necessary part of the rural residential environment.
>
> ...

3. Is an amended PC39 within jurisdiction?

3.1 The legal test

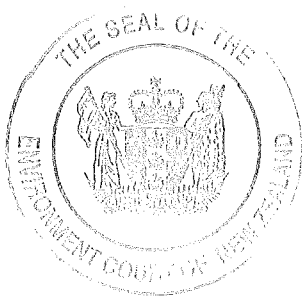
[28] How far can a decision diverge from a submission or appeal? In *Countdown Properties (Northlands) Ltd v Dunedin City Council*[20] the Full Court wrote of submissions[21]:

> ... The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change.

It also observed that:

> Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that councils need scope to deal with the realities of the situation. To take a legalistic view that a council can only accept or reject the

19 QLDP para 8.2 [p 8-6].
20 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 165.
21 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 166.



> relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision.

[29] In *Royal Forest and Bird Protection Society Inc v Southland District Council*[22], Panckhurst J wrote:

> ... [T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

In *General Distributors v Waipa District Court*[23] Wylie J stated that:

> One of the underlying purposes of the notification/submission/further submission process is to ensure that all are sufficiently informed about what is proposed. Otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness.

[30] Bearing in mind that submissions on a plan change often seek to maintain the status quo (i.e. the operative district plan) or something between it and the plan change, the effect of those authorities appears to be that, in relation to a plan change, relief that fairly and reasonably falls in the union of three sets of possibilities:

- the plan change; and
- the operative district plan ... to the extent it deals with the resources, the subject of, and the issues raised in respect of them, by the plan change;
- submissions on the plan change (but noting that this set is limited to submissions which are "on" the plan change: *Clearwater Resort Ltd v Christchurch City Council*[24])

— is within the jurisdiction of the court to consider on an appeal (modifying the conclusion in *re Vivid Holdings Ltd*[25] since that case was about a new plan, whereas this is about a plan change). On that approach the relief sought by an amended PC39 would need to be generally somewhere between the existing Rural General Zoning of Arrowtown South and the Special Zone sought by PC39 as notified.

[31] There are still some unanswered questions about the limits of a local authority's power to make consequential changes. For example if an objective and related policies are amended (within jurisdiction because the relief was sought in a submission), then does the local authority have the power to amend the rules which give effect to the policies even if not specifically raised in submissions? I do not have to decide that here. That issue should be considered for specific policies and rules at the substantive hearing.

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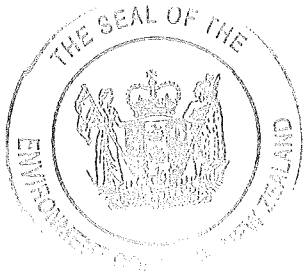
22 *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 at 413.

23 *General Distributors v Waipa District Court* 15 ELRNZ 59 (HC) at [55].

24 *Clearwater Resort Ltd v Christchurch City Council* HC, Christchurch, AP 34/02 14 March 2003.

25 *re Vivid Holdings Ltd* [1999] NZRMA 467 at [19].



I also note that, if this issue arises in a hearing before the Environment Court, it may have the extra powers conferred by section 293 of the RMA.

3.2 The arguments about jurisdiction

Are the appellants barred by an earlier agreement?

[32] There is a preliminary argument. Various members of the Hanan family submitted that the appellants cannot pursue any relief in this appeal because they had already agreed not to. They relied on the statement made by Mr Gordon, counsel for the appellants, here and in *Monk* is found in his opening submissions in *Monk*[26]:

> PC39 is a private plan change for the Arrowtown South land area, and is currently on hold. It seeks to re-zone Arrowtown South from Rural General to a new residential zone with capacity for approximately 226 new dwellings, distributed between 17 separate neighbourhoods under a proposed structure plan. PC39 has progressed through Council hearings and is on appeal, but the appeal has been put on hold pending the determination of this appeal. That is on the basis that if the UGB ultimately does not include Arrowtown South, it is agreed that the appeal on PC39 is to be withdrawn[4] [Footnote [4] reads: Such that the Council decision declining PC39 would stand.] following which the appellant will re-evaluate his options.

Relying on that statement Mr John Hanan and Dame Elizabeth Hanan submitted that it would be beyond the court's powers to consider making alterations beyond the urban growth boundary as now set in the *Monk* decision.

[33] Mr John Hanan relied on the equitable principle of promissory estoppel. He related this to what he described as "... the assurance given by Mr Gordon for the appellant when he assured the court that PC39 would be withdrawn upon the urban boundary under PC29 being finalised". I note that the Environment Court has very limited jurisdiction in respect to questions of equitable estoppel. As Randerson J held in *Springs Promotions Ltd v Springs Stadium Residents Association*[27] "... the application of private law doctrines in the field of resource management law is generally inappropriate ...". He subsequently qualified this by adding[28]:

> ... that my conclusions are directed to the application of common law or equitable principles in relation to substantive rights. It is well established that procedural rights may be waived in certain circumstances. Section 281 of the Act makes specific provision for waiver of rights of that kind. And, in the course of litigation, a party may be bound by an unequivocal election between two inconsistent courses of action: see *Spencer Bower Estoppel by Representation* above at XIII 1.12. The application of equitable doctrines in that context may be viewed (as with *Moro [v Te Kohanga Reo Trust*[29]*]* as an exception justified as being necessary to give effect to the legislation by enabling the Environment Court to operative effectively.

[34] So agreements between parties or undertakings to the court about procedures are not irrelevant. The court is assiduous to ensure that such agreements or undertakings about proceedings are honoured. However, to be enforced any agreement or

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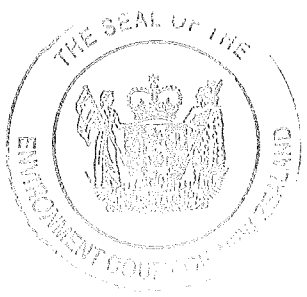
26 Para 12 of Mr Gordon's Submissions in *Monk v QLDC*: [Environment Court document 18 in that proceeding].

27 *Springs Promotions Ltd v Springs Stadium Residents Association* (2005) 12 ELRNZ 130 at [79].

28 *Springs Promotions Ltd v Springs Stadium Residents Association* (2005) 12 ELRNZ 130 at [84].

29 *Moro v Te Kohanga Reo Trust* (1996) 2 ELRNZ 290, [1996] NZRMA 556.



undertaking must be direct and unambiguous. If an outcome is not fully and unambiguously contemplated by an agreement or undertaking then the latter cannot be enforced.

[35] I find that, in making the agreement described by Mr Gordon, the appellants and the council were contemplating an either/or scenario: either Arrowtown South would be included in the UGL or it would not. Clearly they did not envisage that part might be included (which is what happened). In these circumstances I do not consider the appellants are bound to withdraw PC39 particularly since it was not tied in with the urban growth boundary concept introduced by PC29 in the first place.

[36] I accept that the section 274 parties have some justification for feeling aggrieved with the course of action suggested by the appellants and council and adopted by the court since they are now faced with a further hearing when everything could have been dealt with at once. However that is not relevant to the court's jurisdiction. It may be relevant in other ways, e.g. as to costs.

Is the amended PC39 reasonably and fairly raised in any submissions?

[37] Ms Judith Hanan submitted that the amended PC39 "... is a completely different concept ..." and "... moves towards extending Arrowtown South by another means". I hold that the appellants' new proposal is not a completely different concept in that it proposes comprehensive development with some residential units. The density and location of development is designed (it appears) to fall short of being residential so that Arrowtown South would not be urbanised. However, Ms Hanan is correct to raise the spectre of further future subdivision. That suggests volunteering of no-subdivision covenants might be an important issue if I find that the court has jurisdiction to consider the amended PC39. Mr John Hanan advanced a number of arguments as to why the amended proposal for PC39 is not within jurisdiction. First he considered the scale and intensity of the amended proposal. He was distracted in this by a number of irrelevant considerations. He wrote:

> ... that the appellants' sale brochure indicated 215 houses compared to the 23 now proposed and the 12 likely inside the new urban boundary [total 35] so the intensity appears less.

The correct comparison is between the 35 now proposed as a maximum number of residences and the figure on the supporting documents for PC39 as notified — not a sales brochure (which is not in evidence). PC39 referred to "... up to 226 residential units ... and a small commercial area ...". On that basis the 35 possible new dwellings is considerably smaller in quantitative scale than (only about 17% of) the notified proposal.

[38] Mr Hanan then referred to evidence given in the PC29 hearing about possible house numbers inside an Urban Growth limit which might include Arrowtown South. That evidence is irrelevant to the question of the court's jurisdiction on PC39.

[39] He next submitted there was a likelihood of new objections. He did not cite any direct authority for that proposition although he referred to an article on amending resource consent applications after notification[30] which in turn referred to *Haslam v Selwyn District Council*[31]. That decision was at least doubted in *Countdown Properties (Northlands) Ltd v Dunedin City Council*[32] where the Full Court wrote[33]:

> The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in *Haslam v Selwyn District Council* (1993) 2 NZRMA 628. The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

I respectfully follow *Countdown* (although I have never been sure that the Planning Tribunal in *Haslam* actually said what the Full Court said it did).

[40] Mr John Hanan moved on to a different question: "How different is the new plan from the original?" In his view it is "obvious that the new plan is vastly different". I find that is not correct: the new plan is fairly and reasonably somewhere between a Rural-General Zoning and a Living Zoning both in quantity and in quality. It is still, as contemplated by the notified PC39, a (proposed) special zone.

[41] Mr Hanan then wrote that "... we are personally aware that many have been incensed to find something regarded as finished off is not so ...". That is not very helpful to the court. For all I know the owners of the land subject to PC29 and PC39 were incensed that the court did not include their land within the UGL. Intemperate and un-considered comments are often made about proceedings in the court. Any such views are irrelevant considerations. Mr Hanan also complained that parties are wearied by the litigation. Yet his desired outcome — to make the landowners of Arrowtown South start again — will increase the burden on everyone by adding a further council hearing.

Did the decision in Monk predetermine the outcome of the appeal on PC39?

[42] Finally Mr Hanan respectfully wrote that he finds the last paragraph ([116]) of *Monk*:

> ... unconscionable where it is stated "We reiterate (with PC39 in mind) that a soft edge to the Southern boundary of Arrowtown does not have to be within the urban growth boundary". ... And so on to "it would be better as a rural residential or other rural zone or a combination of these."

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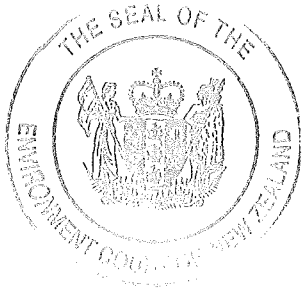
30 P Maw "*Amending a resource consent application post-notification*" Lawlink publication May 2006, updated 2010.

31 *Haslam v Selwyn District Council* (1993) 2 NZRMA 628.

32 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

33 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 166-167.



That is a partial quotation and therefore misleading. I have already quoted the full final paragraph from *Monk* earlier in this decision. It is not a determination as Mr Hanan's partial selection from it suggests. His selective quotation omitted the words "contemplate", "might", "unsure", "whether ... or whether", all of which denote uncertainty as between the existing Rural General Zoning (which allows residential subdivision and building as a discretionary activity) or a possible other special zoning allowing "some subdivision and development".

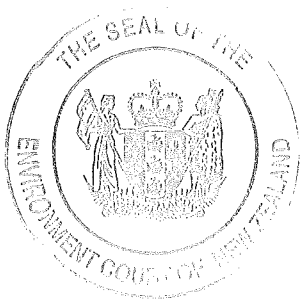
[43] The trenchant submission by Dame Elizabeth Hanan that paragraph 116 of the *Monk* decision is "... pure speculation and lacking evidential proof[,] ... open discussion and questioning" is only partly correct. I accept that there has not yet been open discussion and questioning of the amended PC39. That is the point of a hearing in future — and it is what the court contemplated should be left open for precisely such questioning. However, Dame Elizabeth is wrong that the court's tentative suggestion was pure speculation. The court had heard some evidence on lower density of housing on Arrowtown South so it was entitled to draw some conclusions based on that evidence. The court also had the benefit of site inspections and was concerned that there are (potentially nationally important) ecological considerations that have not yet been examined.

[44] In the final paragraph in *Monk*[34] the court bore in mind that it is not purely an adversarial court, but also has some inquisitorial functions. Time and money would be wasted if the court could not suggest some possible reasonable options to the parties where the existing evidence suggested to the court that there were approaches worth exploring. That is particularly so where, as here, potentially important ecological considerations (the stream running through the Arrowtown South land appears to be a running sore, and the wetland just upstream of the Arrowtown Golf Course sadly degraded) may not yet have been fully and appropriately weighed as part of the appropriate future sustainable management of the natural and physical resources of Arrowtown South.

3.3 Overall assessment of fairness and reasonableness

[45] The members of the Hanan family and the Arrowtown Village Association have overlooked that PC39 is for a plan change which seeks a special zoning under Chapter 12 of the district plan. There are two important aspects to that: first it is a new zoning which is sought, so references to the need for resource consents[35] are at least premature; secondly, the rezoning sought is not a Chapter 7 residential areas zone.

[46] Further the submissions quoted earlier show that some submitters wished the number of residential units to be reduced[36] and for the plan change to comply with the



34 *Monk v Queenstown Lakes District Council* [2013] NZEnvC 12.
35 See Mr D Hanan's submissions at para 2 [Environment Court document 5.10].
36 QLDC reference 39/441/1 (P Hamell) [Environment Court document 3].

provisions of the earlier plan changes 29 and 30[37]. Consequently it is within jurisdiction for the appellants to argue for an amended PC39 in an attempt to reconcile the plan change with those submissions.

[47] That is a generic assessment of the amended plan change, but of course each provision will need to be assessed individually (to the extent necessary) under section 32. That means that one of the primary matters for the court to consider on a substantive hearing of the appeal on PC39 would be to compare:

(a) the status quo (i.e. a Rural General Zoning) of the Arrowtown South land with
(b) the PC39 proposal; or
(c) the submissions on PC39; or
(d) something in between (a), (b) and (c)

— in the light of the relevant tests under the RMA for preparation of plan changes. In particular, as set out in *High Country Rosehip Orchards Limited v Mackenzie District Council*[38], that requires:

> ...
> 8. ... Each proposed objective in [the] ... plan ... change ... is to **be evaluated** by the extent to which it is the most appropriate way to achieve the purpose of the Act;
> 9. The policies ... to **implement** the objectives, and the rules (if any) ... to **implement** the policies[39];
> 10. [Examination of] Each proposed policy or method (including each rule) ..., **having regard to its efficiency and effectiveness**, as to whether it is the most appropriate method for achieving the objectives[40] of the district plan:
> (a) **taking into account:**
> (i) the benefits and costs of the proposed policies and methods (including rules); and
> (ii) the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or other methods[41]; ...
> ...

The ultimate issue for the substantive hearing would be which of the options (a) to (d) above better achieves, in respect to <u>each</u> objective, policy and rule, the purpose of the RMA when examined under those statutory tests.

[48] Clearly the issue as to whether a different structure plan as contemplated by the amended PC39 is within the scope of the appeal is not simply a matter of scale. The character and intensity of the effects of the amended structure plan are also relevant. If the effects are not fairly and reasonably of the same general character and of the same or less intensity than the parameters set by the proposed change (or the status quo) then the

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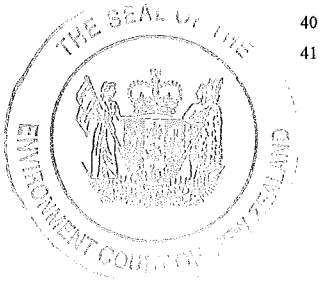
37 QLDC reference 39/482/1 (QLDC) [Environment Court document 3].
38 *High Country Rosehip Orchards Limited v Mackenzie District Council* Decision [2011] NZEnvC 387 at [19].
39 Sections 5(1)(b) and (c) of the Act (also section 76(1)).
40 Section 32(3)(a) of the Act.
41 Section 32(4) of the Act.



proposal may be beyond jurisdiction. This bears on the point raised for the AVA by Mr Stamers-Smith. He submitted that the amended PC39 "... bears little or no reference on similarity to the publicly notified PC39 ... [and] will allow the [a]ppellants to proceed without further public (or indeed QLDC) ... input". The latter points are incorrect. There can be public input from the Hanan family and from the AVA because they are section 274 parties (as shown by their involvement in this decision). There will not be the opportunity for involvement by other members of the public, but does that matter in this particular situation?

[49] The test as set out in *Countdown Properties (Northlands) Ltd v Dunedin City Council*[42] is that the amended PC39 must be "fairly and reasonably" within what was contemplated by the notified PC39. I consider (many) fewer houses than stated in notified PC39 is still fairly and reasonably within scope. The proposed effects of the new structure plan are still the effects of new dwellings. They are also of less urban intensity than proposed by PC39, but less rural than the existing Rural-General Zoning. If the appellants had proposed to pursue a business zoning then that would not be within the boundaries of PC39.

[50] So potential submitters at the time of notification are not now prejudiced by what is proposed. There is always room for compromise within the framework of the outer limits set by the existing plan on one hand and the proposed plan change on the other and they should have contemplated that when reading the council's summary of submissions.

[51] Nor do the Hanan family's concerns about the late splitting of hearings go to jurisdiction. They have not lost their chance to be heard on PC39, merely the opportunity for a contemporaneous hearing of PC39 with PC29.

4. Conclusions

4.1 Result

In the end I hold that what is now sought is generally within jurisdiction. PC39 originally requested the "rezoning" of the Arrowtown South land "for urban use" as a special zone. What is now sought by amended PC39 is some kind of "rural residential" or "rural lifestyle" use[43]. That is somewhere between the existing rural general zoning and an urban zoning such as the "Residential" zones in the district plan. Such a substantive outcome is, I hold, within the range of potential outcomes that could fairly and reasonably be given after a hearing of the appeal on PC39. In coming to that conclusion, I emphasise that I am making no determination on the merits whatsoever.

[52] Having said that, I should refer to three other matters that may be relevant to the CP39 hearing. First, any possible development of Arrowtown South is not simply a

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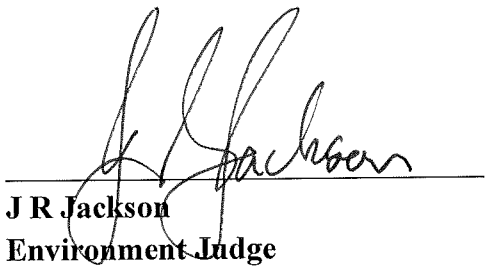
42 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.

43 These are two intermediate zones in the Queenstown Lakes District Plan. They are included in the "Rural" Chapter 5 of the district plan.

landscape and amenities case (important though those matters are). Apart from any other factors I am not at present aware of, it should also be about ecological improvement of the stream and wetland that run through the area. All parties will need to bear that in mind as they prepare for the substantive hearing. Secondly, the area covered by the plan change is all of Arrowtown South as described in the notified PC39. It is not open for the appellants to exclude the small-holdings which they do not own from the court's consideration. They may of course, seek to maintain the small-holders' land as Rural-General, although I foresee problems with that. Thirdly, looking at Mr Espie's structure plan the court may need evidence that the proposed residential allotments along McDonnell Road are not simply very spacious suburban subdivisions with a tendency to subsequent infill. That would have precisely the adverse effects that the section 274 parties fear.

4.2 Recusal?

[53] Finally, Mr John M Hanan has suggested in his submissions that I should disqualify myself based on my remarks in the *Monk* (PC29) decision. At first sight I see no need to do so for the reasons discussed in part 3.2 of this decision. If Mr Hanan or any other person wishes to pursue the recusal issue they should lodge and serve a formal application.



J R Jackson
Environment Judge

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