

IN THE MATTER of the Resource Management Act 1991
AND
IN THE MATTER of Proposed Plan Change 13 to the
Mackenzie District Plan

**SUBMISSIONS OF COUNSEL FOR FOUNTAINBLUE LIMITED, SOUTHERN
SERENITY LIMITED AND PUKAKI TOURISM HOLDINGS PARTNERSHIP**

INTRODUCTION

1. Fountainblue Limited, Southern Serenity Limited and Pukaki Tourism Holdings Partnership have lodged joint submissions against Plan Change 13. For convenience they will be collectively referred to as Fountainblue.
2. Fountainblue is the owner of Pukaki Downs Station, a substantial station of over 3500ha on the south western shore of Lake Pukaki.
3. The original submission contained a comprehensive challenge to PC 13. However, as is the nature of these things, it sought relief on a cascade model in descending order of preference as follows:
 - 3.1. Withdraw PC 13 on the basis that it is flawed and is not the most appropriate way to achieve the purpose of the Act;
 - 3.2. Establish a new "eco-tourism" sub-zone on Fountainblue's Pukaki Downs property;
 - 3.3. Amend the Manuka Terrace rural residential zone to include the (pending) Fountainblue "rural-residential" subdivision consent; and
 - 3.4. Establish an approved building node around the existing homestead cluster on Pukaki Downs.
4. With the exception of the request for a node (which officers accept was an omission), the officer report summarily rejects all aspects of the relief sought.
5. In summary, the case for Fountainblue is that:
 - 5.1. It maintains its primary position that PC 13 should be withdrawn;
 - 5.2. It's secondary position is that if it does remain (in part or in full), it should be amended to introduce the new eco-tourism spot zone, the amended rural residential zone, and the new node on Pukaki Downs.
6. In support of its case it is calling evidence from:
 - 6.1. Mr Allan Tibby, a director of Fountainblue;

- 6.2. Mr Warren Hoy, an expert in sustainable tourism;
 - 6.3. Dr Mike Steven, a landscape architect; and
 - 6.4. Mr Carey Vivian, a planner.
7. Dr Steven and Mr Carey have already either presented or tabled detailed (Part A) evidence on the case for withdrawing the PC. For the purposes of this hearing, the evidence focuses on the specific relief sought. As such, the Part A evidence is briefly summarised only.

PRIMARY CASE - WITHDRAWING PC 13

8. Fountainblue, along with a number of other submitters, seeks the withdrawal of PC 13. The common reason is that PC 13 seeks to introduce restrictive provisions to protect the Mackenzie Basin as an outstanding natural landscape; this is based on a landscape assessment identifying the entire basin as an ONL; the landscape assessment is fundamentally flawed; the PC fails to properly balance the various competing elements required to achieve the sustainable management purpose of the Act; and consequently PC 13 is not and cannot be the most appropriate way to achieve the purpose of the Act.

Statutory framework

9. The starting point is the statutory framework within the Act for plan changes. This will be familiar to the Panel.
10. The Plan Change was prepared and notified by the Council and as such falls to be assessed under the provisions of Part 1 of the First Schedule to the Act. The Council must give a decision on submissions under clause 10 which may include consequential alterations arising out of submissions.
11. The Panel will be familiar with the functions of a district council under section 31 and the discretion to change the District Plan under sections 73 and 74. These provide that the Plan Change must be in accordance with its functions, the provisions of Part 2, and its duties under section 32.¹
12. The requirements for an evaluation under section 32(3) are recognised as the threshold tests for a Plan Change. These require the local authority to examine:
- 12.1. The extent to which each objective is the most appropriate way to achieve the purpose of the Act (section 32(3)(a)); and
 - 12.2. Whether, having regard to their efficiency and effectiveness, the policies, rules or other methods are the most appropriate for achieving the objectives (section 32(3)(b)).
13. The District Plan has only reasonably recently been made operate (2004). Notwithstanding this, PC 13 is one of those rare things – a plan change that makes comprehensive changes to the Plan in the nature of a “second thoughts” approach. As such it makes significant changes to the objectives

¹ The Council must carry out a further evaluation under section 32(3) before making its decision on submissions under clause 10.

framework, and then introduces a suite of new policies, zones and rules to achieve this.

14. As a consequence, it requires an assessment under both threshold tests in section 32(3). This requires a 2 stage approach whereby the Council must be satisfied that:
 - 14.1. First, the objectives are the most appropriate way to achieve the purpose of the Act; and
 - 14.2. Second, the policies and rules (including zones), are the most appropriate means of achieving the objectives (having regard to the efficiency and effectiveness).
15. The threshold tests therefore reflect the top down, hierarchical structure of plans. In terms of the introduction of the new test of "most appropriate", the Environment Court has held that "this test is indistinguishable from better."²
16. It follows that, to a large extent the section 32 evaluation turns on the first threshold test. If the Panel is not satisfied that the objectives are the most appropriate way or best way of achieving the purpose of the Act, then it is not in a position to approve it.
17. The adequacy of the section 32 landscape assessment and the identification of the Basin as an ONL lies at the heart of this issue.

First Threshold Test – Objectives

18. The new objectives are set out in the notified PC document and summarised, where relevant, in the Part A evidence of Dr Steven and Mr Carey.
19. It is evident from even a cursory examination of the notified PC that it is founded on the identification of the Mackenzie Basin as an outstanding natural landscape. For example:
 - 19.1. The "Purpose" states:

"The primary purpose of this Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision development and use. To achieve this, greater acknowledgement of outstanding natural landscapes and features within the District is provided through the objectives, policies and rules, particularly as they apply to the Mackenzie Basin. The landscape assessment of the Mackenzie Basin recently undertaken, which also draws on previous assessments, acknowledges the outstanding natural landscape values of the Basin."

(My underlining)
 - 19.2. Objective 3A Outstanding landscapes provides:

"To protect and sustain the outstanding natural landscapes and features of the District for present and future generations;"

(My underlining)

² *Bates Others v Selwyn District Council* (Decision C7/06) and *Suburban Estates Ltd v Christchurch City Council* (Decision C317/01)

19.3. Objective 3B Landscape values provides:

"Protection of the natural character of the landscape and margins of lakes, rivers and wetlands and of the natural processes and elements that contribute to the Districts overall character and amenity."

(My underlining)

20. These objectives give rise to the suite of policies and rules including Policy 3A "Recognition of Mackenzie Basin" which provides:

"To recognise of the Mackenzie Basin as an outstanding natural landscape and through the Mackenzie Basin sub-zone within the Rural Zone, to protect the Basin from inappropriate subdivision, use and development."

(My underlining)

21. The inescapable conclusion from all of this is that PC 13 lives and dies on the recognition of the Mackenzie Basin in its entirety as an outstanding natural landscape under section 6(b). If that conclusion is flawed, then the whole plan change falls over.

Part 2 matters

22. The first threshold test requires the objectives to be the most appropriate way to achieve the purpose of the Act.
23. The single purpose of the Act is the sustainable management of natural and physical resources as defined in section 5. This calls for a broad overall judgement of the various elements of section 5 and the competing interests within the concept of sustainable management. Of particular relevance, it requires management of natural and physical resources in a way that "enables people and communities to provide for their social economic, and cultural wellbeing and for their health and safety".
24. The matters listed in subsections (2)(a), (b) and (c) must be balanced so as to enable this overall purpose to be achieved.
25. It is therefore necessary to weigh all relevant matters so as to achieve the purpose of the Act.³
26. By contrast, PC 13 is firmly fixed on protecting the Mackenzie Basin as "an outstanding natural landscape." The protection of outstanding natural landscapes is a matter of national importance under section 6(b). There is no dispute that section 6 matters represent factors that contribute to the evaluation under section 5.⁴ However, it is now almost trite law that the section 6 matters are subordinate to the section 5 purpose of promoting sustainable management.⁵
27. In this context there are two fundamental challenges to PC 13:
- 27.1. The landscape assessment is flawed; and

³ See *Ministry of Conservation v Western Bay of Plenty District Council* (Decision 71/01), *Environmental Defence Society v Mangonui County Council* [1982] 2 NZLR 257

⁴ *Roves Bay Society Inc. v Northland Regional Council* (Decision C126/02).

⁵ *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70 (HC).

- 27.2. It fails to properly balance all relevant considerations under section 5.

Landscape assessment

28. The adequacy of the section 32 reports and particularly the landscape assessment has been addressed in detail in the evidence of Dr Steven and Mr Carey heard last week. In summary, their evidence is that:
- 28.1. The landscape assessment is directed at evaluating landscape significance in terms of section 6(b);
- 28.2. It is seriously flawed and fails to apply the accepted principles for a rigorous and technically sound landscape assessment;
- 28.3. As such, it fails to meet the criteria for reliability, validity and sensitivity;
- 28.4. Instead, the assessment is based on the findings of a regional rather than district assessment – being the Canterbury Regional Landscape Study (1993).
- 28.5. As a consequence, the assessment falls far short of the requirements for a district landscape assessment of the kind prescribed in leading cases such as *Wakatipu*⁶ and, more recently, in *Briggs*.⁷
- 28.6. To make matters worse, the landscape assessment does not even conclude that the Basin is an ONL. It instead concludes that it is an "outstanding working landscape." This is not a section 6(b) matter yet the section 32 report re-interprets it as such.

Section 5 balancing considerations

29. To compound matters, the section 32 reports and the structure of PC 13 fails to properly weigh the various elements of sustainable management in section 5. For example:
- 29.1. It does not attempt to assess the effects of the sub-zone on the social, cultural and economic wellbeing of the communities of the Basin including high country farmers;
- 29.2. It fails to properly recognise the economic vulnerability of the farming community and the impacts of further planning restrictions on their ability to diversify;
- 29.3. It does not recognise the impact of tenure review (both on farm income and also on protecting landscape values); and
- 29.4. It introduces a restrictive planning regime which is a blunt tool lacking in sophistication and providing no flexibility in future land use management. For example, it is directed at protecting the landscape of the Basin from "inappropriate development" but there

⁶ *Wakatipu Environmental Society Inc. v QLDC* [2000] NZRMA S9

⁷ *Briggs and Ors v Christchurch City Council* (Decision C45/2008)

is no meaningful analysis of what forms of development may be appropriate.

30. These defects all come back to the emphasis placed on the protection of the Basin as an outstanding natural landscape and illustrate the failure to ensure that the section 6(b) matters remain subordinate to the broad purpose of the Act in section 5.

Second threshold test

31. It is submitted that the hierarchical structure of section 32(2) and district plans, is such that the fundamental flaws in the objective framework are fatal and consideration of the second threshold test is unnecessary.

Outcome

32. For the reasons given, Fountainblue says PC 13 is fundamentally flawed and fails to satisfy the first threshold tests by a wide margin. The *Briggs* decision is the blue print for the requirements for an adequate district landscape assessment seeking to evaluate the merits of large areas as an outstanding natural landscape. It is submitted that the Council assessment does not and will not withstand testing of this kind. As such, given the district wide implications of the Plan Change, it is submitted that the Council should withdraw PC 13 and undertake a comprehensive and reliable landscape assessment of the kind that will inevitably be required if the changes are to become operative.

SECONDARY CASE - SPECIFIC RELIEF

33. If PC 13 is to remain in some form, then the specific relief sought by Fountainblue is directed at the establishment of an eco-tourism sub-zone at Pukaki Downs, and recognition of its rural residential subdivision. These both reflect Fountainblue's aspirations for sustainable, high quality tourist and "eco-villa" developments. The point being that whilst it has major concerns with the validity of the Plan Change – it nonetheless shares Council's goal of maintaining and improving the visual amenity of the area and is willing to invest significant capital in doing so.
34. As such, it is submitted that despite everything, the specific relief sought by Fountainblue is entirely compatible with the broad outcomes sought to be achieved by Council.

Pukaki Downs Tourism Zone

35. The submission seeks a tourism area/spot zone on Pukaki Downs. In support of this relief, Mr Carey has prepared draft plan provisions for a "Pukaki Downs Tourism" sub-zone including relevant objectives, policies and rules.
36. As is common with spot zones for specific types of activity, the proposed zone is based on an outline development plan approach and detailed assessment criteria. This enables the policy goals to be achieved at a detailed level through the resource consent process.

37. The proposal zone is based on the proposition that sustainable tourism is compatible with the visual amenity of the District. It is a constructive and positive response to the criticism already levelled at PC 13 and its blunt-edged approach to protecting landscape values.
38. The evidence for Fountainblue is focused on the proposed zone.
39. Mr Tibby is a director of Fountainblue. He will explain that like most high country stations, Pukaki Downs is financially vulnerable. It has endured the tenure review process which halved the size of the station. It is subject to major pest management issues including rabbits and wilding pines, along with topsoil erosion. The pest management issues will cost many millions of dollars just to being under some level of control. Perseverance with extensive pastoralism is therefore financially unsustainable.
40. However, Mr Tibby and the Fountainblue directors are passionate about maintaining and enhancing the visual beauty of the area and the potential for sustainable tourism to maintain these visual qualities while enabling the economic wellbeing of the District.
41. Mr Warren Hoy is a tourism consultant with particular expertise in sustainable tourism. He will explain the main elements of the NZ Tourism Strategy and its emphasise on sustainable tourism based on a high quality, high yield (low volume) approach. He explains why the Mackenzie District is a poor performer in the tourism market in terms of average per night stays and spend per tourist, and why sustainable tourism represents a major opportunity for the District to become a future leader within the tourism sector.
42. Dr Steven notes that the Lake Pukaki – Tasman Valley area is one of the grandest landscapes in New Zealand in terms of scale. As such, it has a high capacity to absorb development. His evidence is that an assessment of appropriate built form within sensitive or important landscapes is based on a combination of location, design and scale relationships. The requirement is to ensure that built form remains subordinate to its landscape context. As such, he suggests there are many circumstances where design and scale relationships are more important than invisibility when integrating buildings into the landscape. With that said, he considers the landscape and landforms of western Lake Pukaki provide many opportunities to render developments largely invisible.
43. In this context Dr Steven suggests that PC 13 is based on an assumption of the types of development within the Basin (being an emphasis on rural-residential subdivision). There is no analysis of what is “inappropriate development”.
44. Finally, Mr Carey discusses the planning rationale for the proposed Tourism zone. He discusses the policy planning merits of the proposal and relevant section 32 considerations. As discussed earlier, he has prepared a comprehensive Appendix setting out draft provisions for the proposed zone.
45. Fountainblue's case is that sustainable tourism can be an appropriate form of development in parts of the Mackenzie Basin and should be recognised as such.

Rural residential zone

46. Fountainblue also seeks an extension to the rural residential zones proposed in PC 13 to reflect a subdivision application for its land at Pukaki Downs. The application was lodged some time ago and is classified as a controlled activity. As such, it must be granted. The application is for 49 lots to form part of a low impact "eco-village".
47. The submission therefore requests an amendment to the Plan to properly recognise the development. This is discussed in the evidence of Mr Tibby, Dr Steven and Mr Carey.

Nodes

48. The notified plan change failed to identify the existing homestead cluster on Pukaki Downs as a node. The mistake has been accepted in the officer reports but their recommended node is inadequate. This is discussed in the evidence of Mr Tibby and Mr Carey.

SCOPE OF RELIEF SOUGHT

49. The officer report recommends that the submission on the rural residential zone be rejected on the basis that it is beyond the scope of PC 13 due to its separation from the Manuka Terrace Rural Residential Zone.
50. As a Council initiated plan change, PC 13 is to be processed under Part 1 of the First Schedule. Clause 6 provides:

"Making submissions – any person, including the local authority in its own area, may, in the prescribe forms, make a submission to the relevant local authority on a proposed policy statement or plan that is publicly notified under clause 5."

(My underlining)

51. There is now a long line of authority on the permissible scope of submissions on both plan reviews and variations and plan changes under the First Schedule. More recent cases have considered the meaning of "on" in clause 6. However, the starting point is that the issue of whether amendments are reasonably and fairly raised in a submission on a plan change is usually "a question of degree to be judged by the terms of the proposed change and of the content of the submissions".⁸
52. The leading authority on the issue of what "on" a variation means in the context of clause 6, is the decision of *Clearwater Resort Limited v Christchurch City Council*⁹. This dealt with the permissible scope of submissions and references on Variation 52 of the Proposed City Plan. The variation amended policy 6.3.7 to make it clear that it was to discourage urban residential development and other noise sensitive activities within the 50dBA noise contour. Related changes were made to the explanation and reasons. The submission at issue challenged the accuracy and validity of the noise contour lines.

⁸ *Countdown Property Limited v Dunedin City Council* [1994] NZRMA 145

⁹ High Court Christchurch, AP 34/02, Young J, 14 March 2003

53. The issue for the High Court to determine was whether challenges to the location of the noise contour lines were “on” Variation 52. In doing so it considered what the test for determining whether a submission is “on” a variation in clause 6 should be. It rejected an argument by Clearwater that “on” should be treated as meaning “in connection with”. It considered this to be too broad an approach that risked unnecessarily opening up for relitigation aspects of the plan which had previously been past the point of challenge.
54. Instead the High Court set out two tests for assessing whether a submission can be fairly and reasonably “on” a variation or plan change.¹⁰ In *Avon Hotel Ltd v Christchurch City Council*¹¹, Judge Jackson held that in fact *Clearwater* also established a third criterion or test.
55. When brought together, these three tests are as follows:
- 55.1. A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
- 55.2. But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those affected, this is a powerful consideration against any argument that the submission is truly “on” the variation.¹²
- 55.3. [That the submission should not] open ... up for re-litigation aspects of the Plan which had previously ... passed the point of challenge.
56. In the context of its consideration, the Court in *Avon Hotel* also suggested that the application of these tests may differ depending on the extent to which the variation or plan change changes the status quo. It suggested some involve a narrow “correction” variation (such at the *Avon Hotel* situation which amended a recession plan rule within the Avon loop) while others are a “second thoughts” – type variation or plan change where a Council may have notified very wide and significant changes to the plan. This same issue also arose in a more recent decision of Judge Jackson in *Sloan v Christchurch City Council*¹³.
57. It follows that the caselaw requires consideration of the three tests set out in *Clearwater* with particular regard to the extent to which the plan change alters the status quo.
58. In the present case, PC 13 can only be described as what Judge Jackson called a “second thoughts” plan change where the Council has notified very wide and significant changes to the plan.
59. The extent to which the plan change alters the status quo is substantial. It is difficult to bring to mind more significant changes that could reasonably have been made. It is submitted that in this context, the specific relief sought by Fountainblue (being both the tourist zone and the amendments to the rural residential zone) is “on” the Plan Change. The relief fits within a continuum

¹⁰ See paragraph [66] of the decision.

¹¹ Decision C42/2007.

¹² High Court, Christchurch, AP 34/02, Young J, 14 March 2003 at para [66].

¹³ Decision C82/2007 (see for example paragraphs [24] – [26], and paragraph [46]).

between the status quo and the notified changes. Given the wide issues raised by PC 13 and the high level of public awareness and participation, no person could be said to be prejudiced by the submission or otherwise deprived of an opportunity to participate.

OUTCOME

60. Fountainblue's secondary case therefore seeks the specific relief requested in the original submission.

Witnesses

1. Mr Allan Tibby, a director of Fountainblue;
2. Mr Warren Hoy, an expert in sustainable tourism;
3. Dr Mike Steven, a landscape architect; and
4. Mr Carey Vivian, a planner.

A J Prebble

10 September 2008