

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Plan Change 13 to the operative Mackenzie District Plan: establishing a new Mackenzie Basin sub-zone within the existing Rural zone, to provide greater protection of landscape values from inappropriate subdivision, use and development.

**LEGAL SUBMISSIONS ON BEHALF OF THE ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW ZEALAND**

Dated : 11 September 2008

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INTRODUCTION

1. This hearing concerns proposed Plan Change 13 to the operative Mackenzie District Plan. The primary purpose of the Plan Change is to provide greater protection of the landscape values of the Mackenzie Basin from inappropriate subdivision, use and development.
2. Forest and Bird supports the Plan Change, and the District Council's foresight in identifying limits for development before planning creep and cumulative effects become unacceptable.
3. The South Canterbury branch of the Royal Forest and Bird Protection Society made written submissions to the Mackenzie District Council, dated 6 April 2008. Ms Mary Wallace, of Blakely Wallace Associates in Arrowtown, has been engaged to provide evidence on landscape matters at this hearing.

SUMMARY OF FOREST & BIRD'S CASE

4. Forest & Bird supports the Plan Change, and the principle that residential use and subdivision should be limited to either existing towns, or to existing 'nodes of development' usually associated with homesteads, as has historically been the case in the Mackenzie Basin.
5. We submit that arguments about definitions of outstanding landscape should not get in the way of a sensible attempt to bring some strategic planning and control to building and subdivision activities in the Basin.
6. In the event that parties call for a further landscape assessment, Forest and Bird suggests that interim rules be introduced, pending the completion of such a study.
7. In the meantime, agreement could still be reached on objectives, and policies, as these are not contingent on final delineation of the pink sub-areas in Appendix R.
8. We can take some guidance from the Banks Peninsula decision (C45/2008), which grappled with the same issues of subdivision and building controls in outstanding 'working' landscape areas.

9. I will discuss legal issues, and Ms Wallace will look at the proposed changes in more detail.

LEGAL ISSUES

- Definition of outstanding landscape
- The real issue at this hearing is not **whether** the suggested variation will give effect to the Act — in my submission it will —, but whether the policies and rules **as currently framed** (especially Policy 3G and Appendix R) will give effect to the Regional Policy Statement and the purpose of the Act. (Sections 5 and 6)
- Does the proposed variation (especially the proposed objectives) give effect to superior planning documents, specifically the Canterbury Regional Policy Statement. Ms Wallace will drill deeper into whether the policies and rules will in turn achieve these objectives.

Defining outstanding natural landscape

10. As was pointed out by the Court (at paragraph 123) in the Banks Peninsula case, which heard the evidence of seven landscape witnesses, there appear to be as many opinions as to what represents outstanding natural landscapes as there are experts. The Court reminded itself of what was said in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* (C180/1999 at para 99).
11. *Usually an outstanding natural landscape should be so obvious (in general Terms) that there is no need for expert analysis.*
12. From anywhere in the Mackenzie Basin, this statement makes sense. It is self-evident that one is in an outstanding natural landscape. The difficulty comes, it seems, in describing why that is so.
13. Dr Steven has taken issue with Mr Densem's (2007) study, and its 'uncritical' adoption of the *Canterbury Regional Landscape Study*, along with its precursor, the 1992 Boffa Miskell study, *Landscape change in the Mackenzie / Waitaki Basins*.
14. I admit to sharing some of Dr Densem's concerns about some of the more nebulous assessment criteria such as "vividness, intactness, and coherence", which were used in the original Boffa Miskell study, and carried through into

subsequent assessments. Nonetheless, we believe that the Canterbury Regional Landscape Study correctly identified the Mackenzie Basin as an outstanding natural landscape, even if the supporting reasoning was poorly explained.

15. We note that Dr Steven's Australian framework (in his Appendix A) — which uses 'natural heritage, aesthetic and community-held values' to assess landscape significance— seems also to capture the modified-Pigeon Bay values. We look to the landscape professionals to reach agreement on a robust method of assessing landscape significance in New Zealand.

Part 2 of the RMA

16. Dr Steven is concerned that *"a landscape aesthetic based upon uninformed notions of naturalness and "values" will ignore and over-ride very significant issues relating to the sustainable management of natural and physical resources, as referred to in s.5 of the RMA."*
17. Forest and Bird does not dispute that the Mackenzie Basin is a working environment, and clearly, section 5 of the Act enables people and communities to provide for their social, economic and cultural wellbeing. However we remind the panel that the definition of sustainability does not stop there.
18. Section 5 (2a,b and c) goes on to add to the above: **while** sustaining resources for future generations, safeguarding ecosystems, and avoiding , remedying, or mitigating any adverse effects of activities on the environment.
19. It is these effects, as discussed in the Canterbury Regional Policy Statement, that Variation 13 seeks to control, and which Mackenzie District Council is compelled to "give effect to", pursuant to the 2005 amendment to the RMA.
20. With the 2005 amendment, section 75 (3c) of the RMA now says that a District Plan *must give effect to* any Regional Policy Statement, rather than merely *not being inconsistent* with it.

EFFECTS

21. We are not sure why opponents of this proposal find it so alarming. For example, to make non-farm buildings non-complying outside of identified or approved nodes would not seem to be any impediment to existing or contemplated farming activities, even including diversified farming activities such as visitor accommodation.
22. On the other hand, the effects on the environment from uncontrolled subdivision are obvious; problems with poorly co-ordinated water supply, sewage, waste disposal, loss of vegetation, and unsightly buildings and access roads to name a few.
23. There is a useful discussion in Chapter 20.4 (2) of the RPS about what constitutes regionally significant 'Effects.' Of these, 20.4.2(a) (b) (f) and (g) are particularly relevant :
- (a) Whether there is likely to be substantial modification of identified values, including substantial damage, loss, restoration or enhancement;
 - (b) Whether any effects are likely to be long term;
 - (f) Whether any effects are of widespread public concern within the region;
 - (g) Whether any effects which although minor, short term or infrequent, become material when taken cumulatively, including whether any effects are potentially of high probability, or, if potentially of low probability, have a high potential impact;
24. Clearly the effects that would result from uncontrolled subdivision in the Basin would qualify as regionally significant effects, and we see no reason why the situation should be different at District level.
25. Even if it is disputed that a regionally outstanding landscape (as per criteria in Chapter 20.4 of the Canterbury Regional Policy Statement) is also outstanding at District level, we do not believe a distinction can be made for 'effects' being different at District level.

ASSESSMENT OF THE PROPOSED VARIATION

26. In the recent Banks Peninsula decision (C45/2008) — which also considered delineation issues for outstanding natural landscapes in a rural zone — the Environment Court discussed various principles for the assessment of rules, at page 11 and onwards.
27. The Court considered the principles from *Eldamos Investments Ltd v Gisborne District Council* (Env W47/2005), which had been used in the recent case of *Sloan and Ors v Christchurch City Council* (C3/2008). The Banks Peninsula case re-stated the principles which were considered to apply in that case, and I submit that these principles also apply in the present case. [At page 12, paragraph 26 (c) of the Banks Peninsula decision]:
28. *A policy, rule or method can be considered against the purpose found in the objectives and policies in the Plan. Where the objectives and policies are challenged, these will need to be judged against superior documents, including any relevant regional plan, policy statements, national standards or policy statements. Nevertheless the Court recognises that the provisions in all plans do not always fit neatly together and we regard the policies and objectives of a plan through the filter of Part 2 of the RMA when necessary.*
29. In our view, suggested Objectives and Policies in Variation 13 compare well with what is outlined in the RPS, and in turn can provide a solid foundation for suggested Rules to be measured against.
30. In the Sloan decision at paragraph 25(4), the Environment Court expanded on how a policy or rule should be evaluated, using the Eldamos principles:
- A policy, rule or other method in a plan is to be evaluated by whether :*
- *It is the **most appropriate way** to achieve the policies and objectives of the plan (section 32 3b). To this end we would add that in a case such as this, it is the more appropriate or better way.*
 - *It assists the territorial authority to carry out its functions in order to achieve the purpose of the Act (section 72)*
 - *It is in accordance with Part 2 (section 74(1))*
 - *If a rule, it achieves the objectives and policies of the plan (section 76 (1b))*

31. Much of this hearing turns on the question of whether the proposed Variation is an appropriate response to matters raised in the RPS. Ms Wallace will speak to this.

RELEVANT PROVISIONS OF THE RPS

32. The Canterbury Regional Policy Statement contains important landscape policy, and the various District Plans are the mechanism relied on to implement this policy. Mackenzie District Council's proposed Variation 13 will implement Chapter 8, Objective 2, Policy 3, of the RPS, in line with other districts elsewhere in the region.
33. Chapter 8: Landscape, Ecology and Heritage, in the Canterbury Regional Policy Statement, at p107, sets out the relevant issues, objectives and policies concerning landscape matters, which the District Plan must give effect to.
34. Issue 1: Adverse effects of the use, development, and protection of natural and physical resources on the integrity, distinctive characteristics, and contribution to a regional sense of identity of, amongst others, natural features and landscapes including their cultural, amenity and recreational values.
35. Objective 2: Protection or enhancement of the natural features and landscapes that contribute to Canterbury's distinctive character and sense of identity, including their associated ecological, cultural, recreational and amenity values.
36. Principal Reasons : So that the value to the Canterbury region of its characteristic natural features and landscapes will be retained or increased.
37. Policy 3: Natural features and landscapes that meet the relevant criteria of sub-chapter 20.4(1) should be protected from adverse effects of the use, development, or protection of natural and physical resources, and their enhancement should be promoted. Activities that may have adverse effects include those involving the clearance or modification of areas of indigenous vegetation (particularly tall tussock), earthworks, alteration to landforms, tree planting, or the erection of structures. The particular sensitivity of these natural features and landscapes to regionally significant adverse effects in terms of sub-chapter 20.4(2) should be reflected in the provisions of district plans in the region.

38. The RPS goes on to say, in a discussion of methods, that District councils in the preparation, variation, or review of their district plans, should consider provisions to protect and enhance natural features and landscapes under Policy 3. This is given more impetus by section 75(3c) of the RMA.

CONCLUSION

39. The Canterbury Regional Policy Statement recognises that development may occur, and seeks to address the tensions between enablement and protection. That the RPS expresses the intent of the RMA is not in doubt. What the panel must decide is whether Variation 13 is an appropriate response to the issues identified in the RPS, and is workable under Part 2 of the Resource Management Act.

Fiona Mackenzie

Lawyer for Forest & Bird

9 June, 2008