IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2021-425-000089
[2022] NZHC 2458

BETWEEN	THE CANYON VINEYARD LTD Appellant
AND	CENTRAL OTAGO DISTRICT COUNCIL First Respondent
AND	BENDIGO STATION LIMITED Second Respondent

Hearing: 24 August 2022

Appearances: L A Andersen KC and S Gaskell for Appellant
D J Anderson for First Respondent
P J Page and S R Peirce for Second Respondent

Judgment: 27 September 2022

JUDGMENT OF DOOGUE J

This judgment was delivered by me on 27 September 2022 at 11.15 am pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] This appeal concerns an Environment Court (EC) decision granting resource consent to Bendigo Station Ltd (Bendigo) to subdivide an area of land (subject site).[1]

[2] Bendigo's application was opposed by the appellant, The Canyon Vineyard Ltd (Canyon), who is the owner of adjoining land to the west of Bendigo.

[3] The EC heard the matter on 27 to 29 April and 13 July 2021 and subsequently issued two relevant decisions: the first dated 8 September 2021 (Interim Decision)[2] and the second dated 2 December 2021 (Final Decision).[3]

[4] The Interim Decision concerned an appeal against the decision of the Central Otago District Council (Council) granting subdivision and land use consent to Bendigo in respect of an amended proposal (the second revised proposal). The EC concluded that the consents could be granted "albeit for a slightly amended proposal".[4] The parties were directed to confer and file a set of draft final conditions, together with the relevant plans referred to in those conditions.

[5] After conferring with the Council, Bendigo filed a set of recommended final conditions and Canyon filed submissions commenting on those conditions.

[6] In the Final Decision, the EC held that Bendigo's recommended final conditions were appropriate. It rejected the amendments sought by Canyon on the ground that they were not addressed in the evidence given at the April and July hearings and therefore were outside the parameters of the findings made in the Interim Decision.

[7] Canyon now appeals both the Interim and Final Decisions.

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1 Pursuant to the Resource Management Act 1991.
2 *The Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 136 [Interim Decision].
3 *The Canyon Vineyard Ltd v Central Otago District Council* [2021] NZEnvC 187 [Final Decision].
4 Interim Decision, above n 2, at [189].

The properties

[8] Canyon and Bendigo's properties are located at the south of Bendigo Loop Road in Bendigo, Central Otago, on rugged, alpine tussock land with a gully running between the two properties.

Bendigo's property

[9] Bendigo's property forms part of Bendigo Station, a vast farming property encompassing much of Bendigo Terrace and parts of the western foothills of the Dunstan Range.

[10] The Dunstan Range is an area of Significant Natural Value (SN23) in the Central Otago Operative District Plan (Plan) and the Dunstan slopes, which Bendigo's property sits directly below, are classified under the Plan as an Outstanding Natural Landscape (ONL).

[11] The subject site sits entirely outside of the SN23 and ONL for the Dunstan Range. As a result, the subject site does not have the same level of protections afforded to those landscapes pursuant to s 6 of the Resource Management Act 1991 (Act).

[12] The subject site is classified as Other Rural Landscape (ORL) — a default categorisation for all sites in the Rural Resource Area that are not otherwise an ONL, Significant Amenity Landscape (SAL) or Significant Natural Area (SNA).

Canyon's property

[13] Canyon entered into an agreement to acquire the property from Bendigo in May 2002, which settled in September 2004. There are two lots. The first is a working vineyard. The second lot has obtained resource consent to allow it to be a cellar door, restaurant, and conference and function venue. A function centre (containing a restaurant) and a theatre have been built on the property.

[14] The panoramic views from Canyon can only be described as spectacular, looking out as they do in a northerly direction over the Cromwell Basin towards the Pisa Range.

[15] The function centre is the closest building to the proposed subdivision. To the left of the restaurant is the theatre, and to the left of the theatre is an undeveloped area of land called the "gathering site". Behind the function centre, theatre and "gathering site" is a sizeable car park.

[16] Mr Hayden Johnston, the director and shareholder of Canyon, described the property thus:

> 4. The natural schist landscape, extensive native vegetation, many species of reptile and native birdlife and outstanding views provide a feeling of remoteness and connection to the land that is incredibly moving for anyone who stands there. This whenua connects to my whakapapa in Murihiku and Otakou through the eyes of our fourth great grandmother Kuru Kuru and 800 years of thoughtful, purposeful kaitiaki whenua that I am humbled to be able to continue on this land.
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> …
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> 37. In summary The Canyon is a destination because of its remoteness and the attraction is largely the unequalled vista and its natural setting. This is why the multiple residential development would have such critical effects as it domesticates and damages the natural environment.

Background

[17] On 24 October 2019, the Council granted Bendigo subdivision and land use consent (subject to conditions) for its proposed development.

[18] Bendigo's original application had involved the subdivision of an area of land comprising 163.1207 hectares and was for the creation of 15 allotments (lots), some of which were to be amalgamated. Land use consent had initially been sought for dwellings on 10 of these lots, being Lots 2 and 4 to 12.

[19] By the time of the Council decision, Bendigo's application had been formally amended such that only 14 lots were to be created. Lots 1 and 3 contain existing vineyards and were to be retained as vineyards without dwellings.

[20] The Council decision was to grant:

(a) subdivision consent for the creation of 12 lots; and

(b) land use consent for a residential building platform on each of Lots 2, 4, 5, 6, 8, 9, 10 and 11.

[21] The Council decision records that the building platforms are intended to be located to ensure that visibility from public land is minimised. However, it found for some of the lots the buildings would have significant adverse visual effects. Accordingly, the decision was to approve Bendigo's application subject to deleting the proposal for dwellings on Lots 7 and 12.

[22] On 18 November 2019, Canyon appealed and sought a ruling that Lots 8, 9, 10 and 11 would have an unacceptable visual impact from the Canyon site, and that Lot 4 would have an unacceptable visual impact from the road and from the historic schoolhouse premises. Thus, the issue for the EC was whether, in light of those issues, subdivision and land use consents should be granted in relation to Lots 4 and 8 to 11 and, if so, on what conditions.

[23] The parties produced an agreed joint statement of facts and issues (JSFI) on 18 December 2020.

[24] After the appeal was filed, Bendigo made further revisions such that the second revised proposal entailed the following:

(a) subdivision of land bounded by Blue Mines Road into 14 lots;

(b) land use consent for the creation of residential building platforms on eight of the proposed lots;

(c) regenerative planting, comprising a minimum of 5,000 indigenous plants on Lot 13 pursuant to a structural landscape plan to be prepared by a suitably qualified ecologist in consultation with the Department of Conservation;

(d) additional planting, comprising a minimum of 500 indigenous plants on each of Lot 2, Lots 4 to 6, and Lots 8 to 11;

(e) earth mounding at the south-east boundary of Lot 13 adjacent to Blue Mines Road, such mounding to build up the existing low-lying ridge to provide screening;

(f) screen planting along the southern and eastern boundary of the subject site;

(g) a new accessway to be constructed on the subject site to provide access to the lots;

(h) deleted Lots 7 and 12 to be included in Lot 13, the balance lot; and

(i) Lots 14 and 15 to be amalgamated to form the residual title (Lot 15 contains the remnants of the schoolhouse ruins, comprising the schoolhouse chimney).

[25] Bendigo relied on the statement contained in the JSFI that the parties "do not raise any issues concerning the public landscape or amenity values or adverse effects on the environment" other than the unresolved issues specifically stated in the JSFI.

[26] Canyon argued that, due to the changes in the second revised proposal, Canyon ought not be confined to the issues raised in the notice of appeal as narrowed by the JFSI. Canyon contended the EC's consideration of the evidence could not be limited by the scope of an appeal to a different proposal. As the EC recorded:[5]

> [35] In any event, Canyon noted that the issues stated in the JSFI are not limited to the visual effects on the appellant, as paragraph 29 of the JSFI was not qualified by paragraph 30, which identified the 'key' issues but not the only issues. Mr Andersen submitted that the range of effects on Canyon include reverse sensitivity effects, and the effects of lighting from the uncontested dwellings, which would have to be accounted for in considering the cumulative visual effect of the contested dwellings on Lots 8–11.

5 Interim Decision, above n 2.

The Interim Decision

[27] In its Interim Decision the EC addressed the issue of scope raised by Canyon and found:[6]

> [39] In considering the scope issue, it is necessary to consider the extent of the amendments and their impact, if any, on Canyon. In particular, the amendments should not increase the scale or intensity of the activity or significantly alter the character or effects of the proposal.
>
> [40] We were advised that for the most part, the amendments made to the proposal are for the purpose of achieving better mitigation of the adverse visual effects of the dwellings when viewed from the Canyon site. We accept that characterisation.
>
> [41] Bendigo also now proposes the introduction of a fire-defensible separation distance between each of the dwellings and the planting proposed as visual mitigation. Although that was not a feature of the original proposal, no adverse effects arise from that proposal, at least none that affect Canyon in an adverse manner.
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> [42] Accordingly, as counsel for Bendigo submitted, the court has jurisdiction to consider the revised proposal. As that is within the scope of the original proposal, Canyon is bound by the terms of its opposition as expressed in its notice of appeal.
>
> [43] We find that the issues raised on appeal are succinctly stated in the JSFI. Although Canyon contends that the JSFI raises effects other than visual effects (such as reverse sensitivity) the expert evidence called by Canyon was limited to the evidence of Ms Lucas.
>
> [44] Mr Johnston did not explain his concerns around reverse sensitivity effects and nor was this issue addressed in the legal submissions on Canyon's behalf. Accordingly, the court intends to determine the appeal on the basis that the issues in contention are those that are set out in the JSFI, being limited to:
>
> - the visual effects of the development proposed on Lots 4 and 8–11; and
> - the implications of the effects of the proposal within the plan framework.
>
> (footnotes omitted)

[28] The EC also recorded that it was clear the evidence produced by Bendigo at the hearing in April 2021 was not sufficiently accurate to enable an evaluation of the visual effects of the proposal. The plans produced by Bendigo were not marked to

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66 Interim Decision, above n 2.

scale and the contours depicted on the plans contained a margin of error that "made them unreliable". The EC granted leave to Bendigo to adduce further evidence in the form of properly dimensioned plans capable of enabling an assessment of the visibility of the proposal.

[29] Bendigo filed an amended set of plans in June 2021. Three viewpoint locations were depicted on the plans. The EC observed:[7]

> These locations were considered to represent the worst-case scenario in terms of visibility from the Canyon site, due to a lack of intervening topographical features, buildings or plantings within these views.

[30] Of particular significance to this appeal, the EC also recognised that the amended plans did not depict the secondary mound originally shown on Lot 8. The EC recorded it understood that omission to be inadvertent and that "Bendigo intends that this be reinstated, and Mr Smith undertook his visual assessment on that basis."[8]

[31] Bendigo had also been asked to provide further particularisation of the condition addressing the requirement for a "simple gable roof" upon which much reliance had been placed by one of its witnesses, a Mr Smith, in his assessment of the visibility of the dwellings on the proposed lots.[9]

[32] The Interim Decision records that Mr Andersen submitted there was scope creep in relation to both the amendment to the mounds and with respect to the "simple gable roof form". The EC rejected this submission.

[33] The EC then turned to consider evidence concerning the viewpoints for visual assessment in light of the evidence provided at the reconvened hearing in July 2021, in particular that of Ms Lucas, a landscape architect, who gave evidence in support of Canyon.[10] Her evidence focused on the "gathering site", which was a reference to a

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7 Interim Decision, above n 2, at [56].

8 At [60].

9 Mr Smith is a Landscape architect who holds a Bachelor's degree in Landscape Architecture (with Honours). He is a Registered Member of the New Zealand Institute of Landscape Architects Inc (NZILA) and has been practicing as a landscape architect since 2012.

10 Ms Lucas is a landscape architect with a Master's degree in Landscape Architecture. She is a registered member of NZILA. She has been in practice as a landscape architect since 1979.

small mound located to the west of the function centre from where 360-degree views are obtained.

[34] In discussing the evidence concerning the "gathering site", the EC noted Mr Smith understood only a few people visited this site, that Mr Johnston did not mention it in his evidence and that it was not referred to anywhere on Canyon's website.

[35] The second viewpoint referred to by the EC is that from an office and storage room in the function centre which Mr Johnston uses for administrative activities.

[36] The EC recorded the differing opinions of the experts as to the significance of the views from this upstairs office. Contrast was made with views from within the restaurant and the courtyard area to the front of the building.

[37] The EC noted that Bendigo's experts sought to take "a balanced approach" in deciding which of the viewpoints were more significant than others. The EC contrasted this with Ms Lucas' approach, who considered that visibility of the building platforms from all 22 locations depicted were of equal importance. The EC concluded it "was not assisted by this approach".

[38] The EC then embarked on a discussion concerning the competing bases on which the assessment of the proposal's visual effects was undertaken by the parties' experts (Messrs Smith and Espie for Bendigo and the Council, respectively).[11] For a variety of reasons, the EC preferred the evidence of Bendigo and the Council's experts over and above that of Canyon's expert, Ms Lucas.

[39] The EC then referred to Objective 4.3.3 of the Plan, which deals with landscape and amenity values, as follows:

> **4.3.3 Objective – Landscape and Amenity Values**
>
> To maintain and where practicable enhance rural amenity values created by the open space, landscape, natural character and built environment values of

[11] Mr Espie holds the qualification of Bachelor of Landscape Architecture (with Honours) and is a Registered Member of the NZILA. He appears to have started in this field in or around 2001.

> the District's rural environment, and to maintain the open natural character of the hills and ranges.

[40] The EC referred to a number of policies where the objective is implemented.[12]

[41] The EC then commenced an analysis of Objective 4.3.3, concluding that it consists of two parts:

> (a) to maintain and where practicable enhance rural amenity values; and
>
> (b) to maintain the open natural character of the hills and ranges.

[42] The EC observed that its focus was on the first of these two parts because the second was not put in issue by Canyon on appeal.

[43] The EC commenced its discussion of the interface between Objective 4.4.3 and the implementing policies, 4.4.2 and 4.4.10, by reference to the decision of *Harris v Central Otago District Council*.[13] The EC said that in *Harris*:[14]

> [142] The court considered that on the issue of amenities, Objective 4.3.3 and implementing Policy 4.4.2 work together with the rural subdivision policy (Policy 4.4.10) where both subdivision and land use consents are sought. The court observed that the rural subdivision policy contemplates differences of degree in the adverse effects of subdivision, and that a decision on which of those is appropriate (avoid, remedy or mitigate) is driven by context.
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> [143] The second decision in *Doctors Flat Vineyard Ltd v Central Otago District Council* applied that approach to the same provisions.
>
> [144] Mr Espie took the *Harris* approach to mean that the objective is qualified by the policy, depending upon context, although this is not what we understood the court in *Harris* to have said in the decision. While we can agree with what the court did say about the relevance of context, we add that the objective should also guide the assessment in the context of this policy.
>
> [145] Accordingly, in deciding whether, for the purpose of Policy 4.4.2, adverse effects should be avoided, remedied or mitigated, the goal expressed in the objective must inform that assessment so that rural amenity values are maintained and where practicable, enhanced (relevantly).
>
> (footnotes omitted)

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12 Policy 4.4.2 (Landscape and Amenity Values); Policy 4.4.8 (Adverse Effects on the Amenity Values of Neighbouring Properties); and Policy 4.4.10 (Rural Subdivision and Development.

13 *Harris v Central Otago District Council* [2016] NZEnvC 183.

14 Interim Decision, above n 2.

[44] What directly follows is the EC's interpretation of the meaning of "to maintain":

> [146] Canyon and Bendigo contended that the objective does not require that existing rural amenity levels be protected in the manner sought by Canyon, and we agree with that submission.
>
> [147] The objective closely follows the language of s7(c) and in that context, the court has held that:
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> (a) the requirement to "maintain" allows a council to protect rather than preserve or enhance, and
>
> (b) to "protect" means to "keep safe from harm or injury" although it does not require prevention or prohibition.
>
> [148] Referring again to *Harris*, we draw further on the court's observations about the subdivision and land use policies on landscape and amenity, and in particular, the observation that:
>
> > [What] the policy does <u>not</u> say is that adverse effects should simply be avoided.
>
> (footnotes omitted)

[45] The EC then commenced a discussion entitled "what are the rural amenity values that are to be maintained?".

[46] First, the EC acknowledged that "amenity values are not quantifiable but are an intangible element of the environment". Second, the EC noted that "a person's view of their amenity is subjective and may be influenced by their feelings and opinions, including the strength of their attachment to the place".[15] Third, the EC acknowledged that the Plan provisions are useful to refer to in this context, "particularly if they address the outcomes intended for a zone".[16]

[47] With reference to Objective 4.3.3 and in considering amenity, the EC found it was relevant that the landscape category of the Bendigo site is ORL, as distinct from the Dunstan Range which is ONL, or other nearby landscape features that are classified as SAL and SN23.

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15 Interim Decision, above n 2, at [149], citing *Yaldhurst Quarries Joint Action Group v Christchurch City Council* [2017] NZEnvC 165.

16 At [150].

[48] The EC noted that, although not protected in a s 6(b) context, the landscape qualities of an ORL are recognised in the Plan as providing a significant contribution to the cultural and amenity values and environmental quality of this rural environment.[17]

[49] Notably the EC said:

> [155] We note that the Plan's description of the RU [Rural Resource Area] states that these qualities are enhanced by the "human made elements" which are stated as including the orchards and vineyards, and homesteads accompanied by stands of trees.
>
> (footnote omitted)

And:

> [158] To summarise, we approach the 'landscape and amenity' policy on the basis that:
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> - there are a number of actions for the management of the effects of land use activities and subdivision identified in paragraphs (a)–(h);
>
> - a decision as to which of these actions will be relevant will be influenced by the nature of the proposal; its context (including landscape categorisation) and the extent of any adverse effect on the open space, landscape, natural character and amenity values of the rural environment concerned;
>
> - however, the goal or objective of these management actions must inform that decision, this being "[t]o maintain and where practicable enhance rural amenity values created by the open space, landscape, natural character and built environment values of the District. …".
>
> (footnote omitted)

[50] In this context, the EC was critical of Ms Lucas, opining:

> [157] We doubt that the distinction was properly accounted for in the assessment undertaken by Ms Lucas, as her evidence made repeated reference to ONL values being affected by Bendigo's proposal.

[51] The EC then considered Policy 4.4.2 and observed:

> [161] Canyon is entitled to expect that any development on the adjoining Bendigo land will maintain, if not enhance, the rural amenity values

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[17] Section 4.6 (Principal Reasons for Adopting Objectives, Policies and Methods), cl 4.6.2 (Landscape and Amenity Values).

> experienced and enjoyed from the Function Centre site. These include values created by the open space, landscape, natural character, and built environment values of the rural location in which the land sits.
>
> [162] We must also consider whether the visual effects of the proposal would be compatible with the surrounding environment, including the visual amenity values experienced at Canyon. However, we agree with Mr Page that a visual change to the area does not automatically equate to an "inappropriate" proposal, or one that is incompatible with the surrounding environment.
>
> (footnote omitted)

[52] As to the meaning of compatibility, after reviewing the evidence and submissions the EC said:

> [168] We proceed on the basis that the policy requirement for development to be 'compatible with' as meaning to "co-exist in harmony"; "be homogenous with"; or "not be discordant with" the amenity values enjoyed by Canyon. If this is achieved, the rural amenity values of this rural environment will be maintained.

[53] The EC then summarised its evaluation of the visual effects of Bendigo's proposal:

> [175] With the exception of the dwellings on Lot 4, we agree with the assessments undertaken by Mr Smith and Mr Espie that the development proposed for Lots 8–11, with mitigation measures established, and maintained, will have only low to moderate effects on the visual amenity values reasonably anticipated for the Canyon Function Centre site.
>
> [176] We were satisfied that the evidence produced by Bendigo at the reconvened hearing in July, being based upon surveyed data, enabled a proper evaluation of the visibility of the development proposed on the Bendigo site, particularly on Lots 8–11. We gave little weight to the two viewshafts prepared by Lucas Associates (from the "gathering site" and the upstairs office), as the viewer's eyelevel for each was based upon estimates rather than using surveyed data points.
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> …
>
> [178] Moreover, we accept the evidence of Mr Smith and Mr Espie that the rural amenity values on the Canyon Function Centre site will be maintained and that the development proposed on Lots 8-11 will be compatible with the surrounding environment.
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> [179] Accordingly, we accept the evidence of Mr Smith and Mr Espie that the proposal would have adverse effects on the environment (in this case, visual effects) that are no more than minor thus meeting the first of the s104D gateway tests.

> [180] We further find that the proposal is not contrary to relevant objectives of the plan in the sense of being repugnant to or antagonistic to them, particularly Objective 4.3.3 and implementing Policies 4.4.2 and 4.4.8.

[54] The EC then reviewed the decision of the Council and found that the consents for Bendigo's proposal could be granted, albeit for a slightly amended proposal.

[55] Finally, in response to Mr Andersen's submission concerning anomalies resulting from the surveyed plans, the EC concluded that further consideration should be given to the "simple gable roof" definition.

[56] In summary, the Interim Decision declined the appeal, granted resource consent to Bendigo in respect of its second revised proposal and directed the parties to finalise the conditions of consent.

Events subsequent to the Interim Decision

[57] On 22 September 2021, after conferring with the Council, Bendigo filed a set of recommended final conditions.

[58] On 1 October 2021, Canyon filed comments on the conditions. Canyon's comments proposed extensive changes and additions to the conditions, including:

(a) exterior glazing height;

(b) interior lighting controls;

(c) no removal of existing vegetation or habitat from Lots 1 to15;

(d) banning grazing;

(e) ongoing pest control;

(f) continuing ecological reporting and maintenance;

(g) position and formation of mounds; and

(h) further clarification concerning any gable ridge.

[59] By Minute dated 12 October 2021, the EC directed the parties file and serve submissions in relation to:

(a) the implications of the High Court decision of *Environmental Protection Authority v BW Offshore Singapore Pte Ltd*[18] on the factors set out in *Development Finance Corporation of New Zealand Ltd v Bielby*;[19] and

(b) Canyon's proposed amendments to the conditions.

[60] Bendigo filed submissions on 27 October 2021 rejecting the majority of the changes sought. It submitted the amendments sought by Canyon were unsupported by the evidence, untested by the EC and were therefore outside the ambit of the Interim Decision.

[61] Bendigo did accept there should be a change to the condition concerning simple gable roof forms, and that an amendment should be made to reflect an oversight in the drawing reference concerning updated mounding locations.

[62] Aside from these two amendments, Bendigo and the Council submitted the recommended final conditions dealt with all the minor outstanding issues (the third revised proposal).

The EC's Final Decision

[63] On 2 December 2021, the EC issued a 13-paragraph Final Decision.

[64] The amendments sought by Canyon were rejected by the EC on the ground that they were not addressed in the evidence given at the hearings in April and July 2021.

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18 *Environmental Protection Authority v BW Offshore Singapore Pte Ltd* [2021] NZHC 2577, (2021) 23 ELRNZ 29.

19 *Development Finance Corporation of New Zealand Ltd v Bielby* [1991] 1 NZLR 587 (HC).

[65] Bendigo's conditions and plans were approved. The conditions and relevant plans referred to in those conditions were confirmed as in Annexure 1 to this judgment.

Grounds of appeal

[66] The grounds of appeal and errors alleged in Canyon's notice of appeal are extensive but can be refined to four issues, namely that the EC erred in:

(a) accepting the second revised proposal;

(b) finding that the second revised proposal was not contrary to objectives and policies of the Plan (for the purpose of s 104D(1)(b) of the Act);

(c) finding that the adverse effects of the second revised proposal were not more than minor; and

(d) rejecting Canyon's submissions on conditions.

Principles applicable to appeals to the High Court

Role of the High Court on appeal

[67] Appeals to this Court from the EC are not against the merits of the EC's decision. They are limited to questions of law only.[20]

[68] The High Court should only interfere with a decision of the EC where it is satisfied that the EC:[21]

- applied a wrong legal test; or
- came to a conclusion without evidence or one to which, on evidence, it could not reasonably have come; or
- took into account matters which it should not have taken into account; or
- failed to take into account matters which it should have taken into account.

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20 Resource Management Act, s 299.

21 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153.

[69] This Court has been careful to resist a re-examination of the merits of the case under the guise of a question of law.[22]

[70] The question of weight to be given to the assessment of relevant considerations (including, for example, the weight given to expert evidence it heard on a particular subject) is a matter for the EC as a specialist jurisdiction and is not for reconsideration by the High Court as a point of law.[23] In that regard, the High Court in *Guardians of Paku Bay Association Inc v Waikato Regional Council* said:[24]

> [33] The High Court has been ready to acknowledge the expertise of the Environment Court. It has accepted that the Environment Court's decisions will often depend on planning, logic and experience, and not necessarily evidence. As a result this Court will be slow to determine what are really planning questions, involving the application of planning principles to the factual circumstances of the case. No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise, and the weight to be attached to a particular planning policy will generally be for the Environment Court.

[71] The High Court must resist attempts by appellants to relitigate factual findings made by the EC:[25]

> [8] I accept, as the respondent submitted, that this Court must be vigilant in resisting attempts by litigants who are disappointed by Environment Court decisions to use appeals to the High Court to re-litigate factual findings made by the Environment Court. This Court can only intervene on factual findings where there is no evidence to support the Environment Court's decision or where the true and only reasonable conclusion on the evidence contradicts the Environment Court's decision.

[72] Where it is submitted that particular matters have not been dealt with directly in an EC decision, the High Court in *Contact Energy Ltd v Waikato Regional Council*

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22 *Guardians of Paku Bay Association Inc v Waikato Regional Council* [2012] 1 NZLR 271 (HC) at [31]-[32]; *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, [2021] NZRMA 303 at [10](c).

23 *Guardians of Paku Bay Association Inc*, above n 26, at [31], citing *Moriarty v North Shore City Council* [1994] NZRMA 433 (HC) at 437.

24 *Guardians of Paku Bay Association Inc v Waikato Regional Council*, above n 26 (footnotes omitted).

25 *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844 (footnotes omitted).

identified limits to what the (former) Planning Tribunal might be expected to record in relation to factual and legal issues.[26] Woodhouse J there observed:

> [64] Appeals purportedly on points of law not infrequently turn into a contention that the Tribunal did not refer in its decision to a matter of fact or of law in issue in the hearing. That, of itself, is not an error of law. This includes, for example, an absence of reference in the decision to evidence which may be in direct conflict with a conclusion expressly recorded, or evidence given at the hearing which might arguably indicate a conclusion different from that recorded by the Tribunal.
>
> [65] There is no obligation to record every finding on every piece of evidence. There is no obligation to make a finding of fact on every fact in issue, and generally speaking there is no obligation to make a finding of fact at all: see *Rodney District Council v Gould and Anor* (2006) NZRMA 217; *Auckland City Council v Wotherspoon* [1990] 1 NZLR 76 at 82-89. There is also no obligation on a Tribunal to record every part of its reasoning process on the facts or on the law, and notwithstanding the fact that the conclusions reached may involve unarticulated rejections of contentions of witnesses or submissions for parties on the law.

[73] This Court, in *Brial v Queenstown Lakes District Council*, held this principle applies equally to the EC and stated:[27]

> [46] An error of law, if established, must be material to one of the Court's ultimate determinations — an erroneous obiter dictum is not a material error of law.

First ground of appeal — the EC erred in accepting the second revised proposal

[74] This ground of appeal concerns the second revised proposal produced by Bendigo as directed by the EC. Canyon submitted the processes employed by the EC in the receipt, consideration and deliberation of the second revised proposal amount to a breach of natural justice.

Background

[75] The EC's reasons for requesting the updated survey information that led to changes in the second revised proposal is set out in its Minute of 10 May 2021:

> [1] At the conclusion of last week's hearing it became evident that the evidence produced by the applicant was not sufficiently accurate to enable an

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[26] *Contact Energy Ltd v Waikato Regional Council* (2007) 14 ELRNZ 128 (HC).

[27] *Brial v Queenstown Lakes District Council* [2021] NZHC 3609, (2021) 23 ELRNZ 529 at [45]-[46] (footnote omitted).

> evaluation of the visual effect of the development proposed, and hence to decide the appeal. This is because the plans produced were not marked to scale.
>
> [2] Mr Paige, for the applicant, sought leave to adduce further evidence, in particular to receive plans that are dimensioned and are capable of delivering the precision that the court (and the appellant) requires.
>
> [3] Leave was granted as the court needs that information to make a proper evaluation of the proposal in terms of its visual effects, both in relation to the dwellings, and curtilage areas and as to the mounds that are intended as mitigation (if not avoidance) of the visual effects, particularly when viewed from the appellant's land.
>
> …
>
> [7] Mr Page submits that there will only be a need for the court to reconvene in the event that the survey plans cause any of the witnesses to alter their assessment such that the visibility of the platforms and effects arising therefrom are more adverse than evaluated by the witnesses in evidence already given.
>
> [8] The applicant should note that the plans must identify the precise location of the mounds as they are intended to mitigate visual effects. The plans should also depict the curtilage areas and location of access ways into the site. …

[76] Canyon consented to leave being granted to adduce further evidence for this purpose.

[77] On 24 May 2021, Bendigo filed an affidavit by Mr Keith Sanford.[28] The affidavit comprised:

(a) dimensioned plans based on an updated ground survey on Lots 8 to 11 and areas around Canyon's function centre;

(b) proposed mitigation plans (with aerial imagery and without); and

(c) a cross-section profile from Viewpoint 18 on Canyon's property looking toward Lots 8 to 11, with three-dimensional perspectives identifying building envelopes.

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[28] Mr Sanford is a Licensed Cadastral Surveyor. He holds a Bachelor of Surveying and has over 10 years' experience in undertaking cadastral surveys.

[78] In response, Canyon two days later filed a memorandum submitting that the plans contained in Mr Sanford's affidavit were not in accord with the EC's directions in that:

(a) they contained significant changes to the application before the EC in that Mr Sanford had redesigned the proposed mitigation for all four of the ridgeline lots (Lots 8 to 11); and

(b) visibility was addressed from very limited viewpoints, with graphics and visibility shown for only one viewpoint.

[79] The effect of this, according to Canyon, was the necessity for new visibility assessments. Canyon sought a direction from the EC that Bendigo either:

(a) provide survey plans showing the visibility of the proposed houses on the basis of the mitigation in the application before the EC; or

(b) withdraw the application so the appeal could be allowed.

[80] Bendigo responded by way of memorandum the following day. It submitted that:

(a) the proposal for which resource consent was required (lot configuration and building platform locations, together with maximum building heights) remained unchanged;

(b) the question of what conditions were required under ss 108 and 221 of the Act to control the adverse effects of the proposal was always a live one for the EC to determine, and the fact that Bendigo accepted modification to the mitigation design was required did not raise any issue of scope;

(c) the purpose of expert conferencing was to discern whether if, in light of the new plans, the witnesses would change their assessment of visual

effects (including by providing additional viewpoints not already considered by the EC); and

(d) the application had no mounding at the time the appeal was filed, but the parties accepted the placement of mounds was within the scope of the application and therefore it followed that the movement of the proposed mounding must similarly be within scope.

[81] The EC, having considered both memoranda, issued a Minute on 28 May 2021. The relevant portion of that Minute reads:

> [3] The court accepts as plausible Bendigo's contention, that because of the inaccuracies in the original contour information, the mitigation package presented to the court did not achieve the outcomes advanced by the landscape expert engaged by Bendigo [Mr Smith].
>
> [4] However, having considered the nature of the amendments, it is possible that they are intended to improve the package of mitigation of the effects on the appellant, and if that is a partial reason for the amendments, Bendigo must be clear to the court and to the parties about that.
>
> [5] In the circumstances, the court considers that Bendigo should now produce a further brief of evidence from Mr Paul Smith:
>
> (a) introducing (and explaining) the new plans and identifying all changes to the proposal including but not limited to the location of the mounding;
>
> (b) setting out a new landscape assessment of the extent of visibility of the dwellings/curtilage areas from key viewpoints discussed throughout the hearing, in light of the amendments made to the proposal; and
>
> (c) identifying passages in original evidence-in-chief that are no longer reliable in light of the amendments made to its proposal.
>
> [6] Once that evidence has been served on other parties, the court directs that caucusing of the landscape experts proceeds as this may result in a further narrowing of the outstanding issues.
>
> [7] If there are issues to be resolved by the court, a hearing will have to be reconvened and evidence will be required from the Council and appellant on any outstanding issues. The court has time in the week of **12 July 2021**, and if that week is not suited to the parties, the next available hearing date is in the week of **30 August 2021**.

[8] The experts are to provide the court with a copy of their caucusing statement and that caucusing is to occur as soon as is reasonably practicable after the evidence from Mr Smith has been filed and served on the parties.

[9] If there are issues to be resolved in terms of the visibility of the proposal from any particular viewpoint from the Canyon property, these should be identified in that caucusing statement and the further brief/s of evidence from the Council and the appellant should be confined to addressing those issues.

[82] The EC accordingly directed that:

…

(a) Bendigo is to produce a further statement of evidence from its landscape architect Mr Paul Smith addressing matters listed in paragraph [4] of this Minute by **Friday 11 June 2021**;

(b) caucusing of the landscape witnesses for all parties is to occur as soon as practicable after receiving the evidence of Mr Smith and a statement is to be filed with the court in accordance with paragraph [8] of this Minute. Any statement of evidence from the appellant and/or respondent addressing outstanding issues is to be prepared and filed in court by **Friday 25 June 2021**, together with the caucusing statement; and

(c) parties are to advise the court by **Wednesday 30 June 2021** of their availability for a one day reconvened hearing in the weeks of **12 July 2021** and/or **30 August 2021**.

Canyon's submissions

[83] Canyon submitted the EC ought:

(a) not to have accepted the second revised proposal without an acknowledgement it significantly changed the first revised proposal;

(b) to have given the parties an opportunity to consider and provide evidence as to the effects of the second revised proposal in circumstances where it raised issues other than visibility (such as the shape and appropriateness of the siting of the mounds/bunds); and

(c) to have ruled the second revised proposal was outside the scope of the evidence agreed to be called at the conclusion of the April 2021 hearing.

[84] Canyon submitted these errors amounted to a breach of natural justice. In addition, Canyon submitted that its witness, Ms Lucas, was not able to test the updated estimates of visual effect because Bendigo would not allow access on to its property for that purpose.

Bendigo's case

[85] Bendigo submitted that a breach of natural justice can constitute an error of law,[29] but said that no breach of natural justice occurred in this case.

[86] First, Bendigo submitted that the processes directed by the EC for the receipt, consideration and deliberation of the second revised proposal (and other amended plans) were entirely orthodox and provided sufficient opportunities for Canyon to raise objections, seek further directions or be enabled the opportunity to produce further evidence.

[87] Second, Bendigo submitted that the EC is not strictly bound by the rules of law about evidence that apply to judicial proceedings as is set out in s 276 of the Act. This section relevantly provides:

> **276 Evidence**
>
> (1) The Environment Court may—
>
> (a) receive anything in evidence that it considers appropriate to receive; and
>
> (b) call for anything to be provided in evidence which it considers will assist it to make a decision or recommendation; and
>
> (c) call before it a person to give evidence who, in its opinion, will assist it in making a decision or recommendation.
>
> (1A) The Court may, whether or not the parties consent,—
>
> (a) accept evidence that was presented at a hearing held by the consent authority under section 39:
>
> (b) direct how evidence is to be given to the Court.

---

[29] *Kawarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343 at [45]. However, there are conflicting authorities on this point: see *Banora v Auckland Council* [2017] NZHC 3276 at [23].

> (2) The Environment Court is not bound by the rules of law about evidence that apply to judicial proceedings.
>
> …

[88] Bendigo submitted the EC was permitted to receive the second revised proposal in accordance with s 276, regardless of the consent given.

[89] Third, Bendigo said there was no prejudice in the EC accepting those plans on the basis that Canyon was given the opportunity to object to their receipt (and indeed did object to it), and otherwise had the options available to it to seek further case management directions as to the receipt of evidence, or continue its objection at the hearing.

Discussion

[90] The proposal for which resource consent is required (lot configuration, building platform locations and maximum building heights) was not substantially changed between the second revised proposal as it stood and the provision of updated plans after the April hearing.

[91] Opportunity was afforded by the EC for the landscape experts to confer on the assessment of the visual effects in light of the updated survey plans.

[92] The EC's Minute of 28 May 2021 is critical because it expressly states in an open-ended way that:

> [9] If there are issues to be resolved in terms of the visibility of the proposal from any particular viewpoint from the Canyon property, these should be identified in that caucusing statement and the further brief/s of evidence from the Council and the appellant should be confined to addressing those issues.

[93] The Minute is express recognition by the EC that if the landscape experts identify further issues in their conferencing (on the issue of the visual effects assessment) then they can only be addressed by way of a reconvened hearing. Those issues were indeed raised by Canyon's witness and a hearing was reconvened.

[94] Ample opportunity was provided to Canyon to change the course of the proceeding either by seeking the opportunity to file further evidence or disputing the ability for the EC to receive the second revised proposal (and further amended plans). Canyon did not do this. It cannot be said that Canyon's failure to seek other directions, such as leave to produce further evidence, is an error of law on behalf of the EC.

Second ground of appeal — the second revised proposal was contrary to the objectives and policies of the Plan for the purpose of s 104D(1)(b)

[95] Section 104D(1) of the Act provides that a consent authority may grant consent for a non-complying activity only if it is satisfied that either –

> …
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or
>
> (b) the application is for an activity that will not be contrary to the objectives and policies of—
>
> (i) the relevant plan, if there is a plan but no proposed plan in respect of the activity;
>
> …

[96] An activity is only required to meet one of the limbs under s 104D in order for it be considered under s 104. If it meets neither, then the activity cannot be granted consent.[30] In this case, the EC decided the activity met both s 104D limbs.[31]

[97] The starting point for consideration of s 104D(1)(b) is the objectives and policies of the Plan. The key objective at issue is Objective 4.3.3 which provides:

> **4.3.3 Objective - Landscape and Amenity Values**
>
> To maintain and where practicable enhance rural amenity values created by the open space, landscape, natural character and built environment values of the District's rural environment, and to maintain the open natural character of the hills and ranges.

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30 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [5].

31 Interim Decision, above n 2, at [179]–[180].

[98] Canyon referred to section 4.1 of the Rural Resource Area provisions of the Plan, which states:

> The amenity values of the rural environment are dominated by Central Otago's unique, semi-arid landscape of broad basins, separated by low mountain ranges with sparse vegetation, covered in tussock grassland and exotic pasture, and broken by schist rock outcrops. This landscape retains a high natural character and has significant scenic values and some of it is identified in this District Plan as an outstanding natural landscape or outstanding natural feature.

Canyon's submissions

[99] Canyon submitted that the EC erred in law by concluding that the second revised proposal passed the s 104D gateways, in that it was not contrary to the relevant objectives and policies of the Plan.

[100] Canyon's submitted the EC wrongly:

(a) omitted reference to the relevant policies of the Plan;

(b) misinterpreted the meaning of "maintain" for the purposes of Objective 4.3.3, because in this case the existing rural environment is not "maintained" or enhanced when its use is changed from "unspoilt rural to rural residential"; and

(c) read down the words "contrary to" by limiting their meaning to "being repugnant or antagonistic to", when "contrary to" means something much less than that.

The meaning of "maintain"

Canyon's submissions

[101] Canyon submitted that the consent ought not to have been granted in this case because if the words "to maintain" in Objective 4.3.3 are properly interpreted then the existing unspoilt rural environment would be maintained and not changed to a rural residential environment (comprising, for instance, multiple houses, curtilage, general domestic paraphernalia, and increased population and traffic movement).

[102] Canyon submitted that the meaning of "maintain" is case-specific and while it may not be an environmental bottom line it is close to it.

[103] Canyon relied on three authorities in advancing the proposition set out in the previous paragraph, namely: *Port Otago Ltd v Dunedin City Council*,[32] *The Outstanding Landscape Protection Society Inc v Hastings District Council*,[33] and *Harewood Gravels Co Ltd v Christchurch City Council.*[34] From those authorities, Canyon extracted the following definitions .

[104] In *Port Otago Ltd v Dunedin City Council*, the EC said:[35]

> ***Maintain*** on the other hand has meanings in The New Oxford Dictionary of English 1998 to '*cause or enable to continue, keep at the same level or rate, and keep in good condition*'. The Collins Concise Dictionary Plus 1990 meanings are to '*continue or retain, keep in existence, to keep in proper or good condition*'.

[105] In *The Outstanding Landscape Protection Society Inc v Hastings District Council*, the EC accepted that if there will be adverse effects on amenity values then those values will not be maintained:

> [90] [Section 7](c) *Maintenance and enhancement of amenity values*: *Amenity values* are defined in the RMA as: … *those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes*. There are those who find the sculptural form of these turbines attractive, and an appealing contrast to the landforms on which they stand. But … we accept that for most, there will be adverse effects on amenity values as presently seen or experienced from private and public spaces both close to and at a distance from the site. Overall, those collective values will not be *maintained* (if *maintained* is taken to mean, as the Concise Oxford has it, *... [kept] at the same level or rate*), and, still less, *enhanced*.
>
> (emphasis in original)

[106] In *Harewood Gravels Co Ltd v Christchurch City Council*, the High Court considered an appeal against a decision of the EC declining land use consent to establish a quarry near Christchurch Airport. The Christchurch District Plan contained

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32 *Port Otago v Dunedin City Council* EnvC Christchurch C4/02, 22 January 2002.

33 *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC).

34 *Harewood Gravels Company Ltd v Christchurch City Council* [2018] NZHC 3118.

35 *Port Otago v Dunedin City Council*, above n 38, at [41] (emphasis in original).

policies and objectives which required that the amenity values of the rural environment be maintained. The Court noted: "This is a case in which 'no change' *may* be what is needed to maintain amenity and meet the Policy."[36]

Bendigo's submissions

[107] Bendigo agreed with Canyon's submission that determining what is required "to maintain" in Objective 4.3.3 is case-specific.

[108] First, Bendigo submitted that rural environments can change and still "maintain" rural character and amenity values, relying on *Meridian Energy Ltd v Wellington City Council*.[37] That case concerned various resource consent applications for the construction and operation of a wind farm at Mill Creek, near Wellington. The EC held that, although the wind farm would not maintain the existing landscape and the site's particular form of rural character, that inquiry alone was not determinative of the issue, observing that "[t]here is no requirement in the RMA or the planning documents to freeze the landscape at a point in time".[38]

[109] Bendigo relied on *Meridian* for the proposition that the EC was entitled to grant consent despite changes being introduced into the environment.

[110] Second, Bendigo relied on *Todd v Queenstown Lakes District Council.*[39] That case was an appeal against the grant of a resource consent for a subdivision (with associated activities) of an approximately 8.45 ha block of land into two parcels of similar size in the Wakatipu Basin of the Queenstown Lakes District. The proposed district plan stipulated the purpose of the subject zone was to "maintain and enhance the character and amenity of the Wakatipu Basin", which was reflected in the proposed objectives. One of the landscape and rural amenity values at issue was the site's sense of openness. In considering competing evidence on this point, the Court held:

> [87] At that near view scale, we find that the proposal would change the present view across open pastoral land to a limited but acceptable extent. We do not entirely accept Mr Skelton's opinion that, despite the additional

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36 *Harewood Gravels Company Ltd v Christchurch City Council*, above n 40, at [320].
37 *Meridian Energy Ltd v Wellington City Council* [2011] NZEnvC 232.
38 At [230].
39 *Todd v Queenstown Lakes District Council* [2020] NZEnvC 205.

> dwellings, the site would retain its sense of openness. Rather, Mr Brown fairly observes that the proposed dwellings would sit "in the middle of" the site. *To that extent, the proposal would render the site less open tha[n] it currently is, as a matter of fact. However, several factors combine to satisfy us that the proposal sufficiently maintains openness in a way that is sympathetic to landform and effectively ensures absorption of this land use change*. …
>
> (footnote omitted and emphasis added)

[111] The Court then proceeded to list a range of factors about the site itself and the proposal that satisfied it openness would be sufficiently maintained, including: its natural attributes, existing pattern of development, landscape plantings, restoration and enhancement of the gully, and effective controls on buildings. Having considered those aspects, the Court concluded:

> [88] Overall, preferring Mr Skelton's evidence in relevant respects, we find the landscape and visual amenity effects of the proposal would be no more than minor. *Specifically, that is in the sense that the proposal will properly respect all relevant landscape values and at least maintain landscape and other amenity values* (and for the gully and stream, enhance those values).
>
> (emphasis added)

[112] This conclusion was upheld on appeal to the High Court (in *Brial v Queenstown Lakes District Council*)[40] and considered by the Court of Appeal as a reason for refusing leave for a second appeal.[41]

[113] Relying on *Todd* and *Brial*, Bendigo submitted that maintaining and/or enhancing landscape character and amenity values does not require retention of an open landscape. Bendigo submitted the policy framework in this case anticipates landscapes absorbing certain adverse effects of proposals while maintaining rural amenities.

[114] Insofar as Canyon relied on *Port Otago v Dunedin City Council*, Bendigo submitted the passage quoted at [104] above is obiter, given that case was instead addressing the meaning of "protect".[42] This is demonstrated by the difference in the language of the decision between its references to "protect" ("we adopt the … meaning of protect") and its references to "maintain" ("maintain on the other hand has meanings

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40 *Brial v Queenstown Lakes District Council*, above n 32.
41 *Brial v Queenstown Lakes District Council* [2022] NZCA 206 at [26].
42 *Port Otago v Dunedin City Council*, above n 38.

in The New Oxford Dictionary of ”). In this way the Court — in determining the meaning of “protect” — used a dictionary definition of “maintain” to distinguish the two words. It did not seek to authoritatively determine the meaning of “maintain” in the decision.

[115] Although the EC cited *Port Otago*,[43] Bendigo submitted it did so in the context of addressing competing submissions about the extent to which rural amenity is to be “protected” by Objective 4.3.3, that is, whether Canyon is entitled to an ‘unspoilt’ rural landscape. Of course, Objective 4.3.3 does not state that “protection” of the environment’s rural amenity values is required but requires the proposal “to maintain” them. Bendigo submitted that *Port Otago* can be distinguished and does not provide an authoritative definition of “maintain” as Canyon suggested.

[116] *The Outstanding Landscape Protection Society Inc v Hastings District Council* related to a proposal to construct and operate a 37-turbine wind farm in an ONL.[44] The EC there observed the proposed windfarm would have significant adverse effects on the environment that could not be adequately mitigated, let alone avoided or remedied, although this was not to say it was “contrary to” the objectives and policies of the Plan.[45]

[117] Bendigo submitted the passage cited by Canyon from *The Outstanding Landscape* at [105] above must be contextualised in that it was informed by an assessment utilising the overall broad judgment approach that has been dispensed with following *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*.[46] The quoted passage from *The Outstanding Landscape* was part of a discussion of matters under s 7 of the Act that “appear[ed] relevant”.[47] The EC in quoting the dictionary definition of “maintain” observed: “Overall, those collective values will not be *maintained* (if *maintained* is taken to mean, as the Concise Oxford has it …)”.[48]

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43 At [147](b).
44 *The Outstanding Landscape Protection Society Inc v Hastings District Council*, above n39.
45 At [28].
46 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
47 *The Outstanding Landscape Protection Society Inc v Hastings District Council*, above n 39, at [86].
48 At [90] (emphasis in original).

[118] In framing the 'definition' of maintain in this way, Bendigo highlighted that the EC used the qualifier "if" to clarify it was not making a determination as to its meaning. It also separated the definition from the EC by noting that it was the dictionary that took that perspective and not the EC itself.

[119] The passage relied on by Canyon from *The Outstanding Landscape* contrasts with the more recent authorities on the meaning of "to maintain", namely *Brial*.

[120] Bendigo further identified *Harewood Gravels Co Ltd v Christchurch City Council*, B was acknowledged to be a "tipping point" case even with the conditions of consent offered.[49] That is, Bendigo submitted the extent of the cumulative effects on the environment in *Harewood Gravels* went well beyond the visual impact of development at issue here and included impacts in relation to: noise, traffic, landform and soil, vegetation, views, and dust.

[121] Bendigo submitted the EC understood that a possible outcome of achieving Objective 4.3.3 may well have been to avoid all effects but recognised on the evidence that this was not such a case. The EC considered that such an approach is not essential and is informed by the nature of the proposal, its context and the extent of any adverse effect.[50] Accordingly, Bendigo submitted the EC did not err in its approach to the term "maintain" and was entitled to grant consent to a proposal that would introduce change to the landscape.

[122] Bendigo submitted that "to maintain" does not require that a landscape be frozen in time (*Meridian*)[51] and anticipates land use change in a way that can maintain amenity (*Brial*).[52]

[123] I note, despite Bendigo's submissions to the contrary, *Port Otago* does appear to provide a definition of "maintain" at [42], although it is correct that what was in issue was indeed the meaning of "protect".[53]

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49 *Harewood Gravels Company Ltd v Christchurch City Council*, above n 40, at [313].
50 Interim Decision, above n 31, at [158].
51 *Meridian Energy Ltd v Wellington City Council*, above n 44.
52 *Brial v Queenstown Lakes District Council*, above n 32.
53 *Port Otago v Dunedin City Council*, above n 38.

[124] In any event, that case is cited in the commentary to s 7 of the RMA as authority for the proposition that the requirement to maintain allows a council to protect rather than preserve or enhance, which means to "keep safe from harm or injury" and does not require prevention or prohibition. In my view this reinforces Bendigo's submission that Canyon is not entitled to "an unspoilt rural landscape".

[125] I conclude that the weight of recent authority supports Bendigo's submissions as summarised in [121]–[122]. No error arose in the EC's decision in this regard.

Meaning of "contrary to" the relevant objectives and policies

Canyon's submissions

[126] Canyon submitted that the EC erred by interpreting "contrary to" as being synonymous with "not being repugnant or antagonistic to".

[127] Canyon said in applying that definition the EC was acknowledging that the required rural amenities were not being maintained by the proposal, insofar as it was contrary to the rural amenity values but not so contrary as to be "repugnant or antagonistic" to them.

[128] This submission is, of course, to be viewed in the context of Canyon's submission that "to maintain" requires the continuation of an "unspoilt" or "undomesticated" rural environment.

Bendigo's submissions

[129] First, Bendigo relied on its submissions with respect to the term "to maintain", namely that "maintain" can encompass some changes to the landscape.

[130] Second, Bendigo submitted the meaning of "contrary to" for the purpose of s 104D(1)(b) was discussed in *New Zealand Rail Ltd v Marlborough District Council*.[54] There, the High Court considered "contrary to" contemplated that a proposal must be "opposed to in nature, different to or opposite … repugnant and

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54 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at [11].

antagonistic" to the relevant objectives and policies.[55] The EC's reference to those terms in the context of the s 104D second gateway in s 104D(1)(b) is entirely orthodox and consistent with that authority.[56]

[131] Third, Bendigo submitted that the reliance on that definition does not extend to a finding or acceptance by the EC that the proposal does not maintain rural amenity.

[132] Fourth, Bendigo submitted that there were two steps in considering the relevant objectives and policies:

(a) firstly, and for the purpose of s 104D(1)(b), to determine whether the proposal is "contrary to" the objectives and policies by considering whether the proposal is "opposed to in nature, different to or opposite … repugnant and antagonistic" to the key policies; and

(b) if the proposal is not contrary to those objectives and policies in that way, then the proposal falls to be considered under s 104, in which case the relevant provisions of a plan are matters to be had regard to (s 104(1)(b)).

[133] A detailed assessment of the relevant objectives and policies (in light of the evidence) is required for both assessments and that is, Bendigo submitted, what the EC undertook at [133]–[162] of the Interim Decision.

[134] Having first undertaken an extensive review of the evidence on the adverse effects of the proposal on rural amenity values and its visibility from various viewpoints — including the degree of effect, assumptions relied on and accuracy of survey information to inform those assessments — the EC then proceeded to review those effects in light of the relevant policy framework. In doing so, the EC made the following findings:

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55 At [11], applied in *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, (2021) 22 ELRNZ 478 at [24].

56 Interim Decision, above n 31, at [180].

(a) the key objective with respect to landscape and amenities in the Rural Resource Area was Objective 4.3.3;

(b) Objective 4.3.3 is implemented through a range of policies, including (but not limited to) Policies 4.4.2, 4.4.8 and 4.4.10;

(c) Objective 4.3.3 is split in two parts (as discussed at [41] above);

(d) Objective 4.3.3 should guide interpretation of the policies, such that the decision whether to avoid, remedy or mitigate adverse effects (for the purpose of Policy 4.4.2) must achieve the goal of Objective 4.3.3;

(e) Objective 4.3.3 does not require that existing rural amenity be protected in the manner sought by Canyon;

(f) Objective 4.3.3 does not say adverse effects should simply be avoided in toto;

(g) rural amenity values are not quantifiable, and the Plan's objectives and policies assist to inform what is an intended outcome in that regard; and

(h) rural amenity in an ORL includes the built environment, which, as recognised by the Introduction to the Rural Resource Area section of the Plan, can enhance an ORL's landscape qualities.

[135] I find for the reasons advanced by Bendigo that Canyon is not entitled to the maintenance of an unchanged or "unspoilt" rural landscape with no visible buildings from all parts of its property. That said, I am satisfied the EC properly interpreted and applied s 104D of the Act.

Third ground of appeal — the finding that the adverse effects of the second revised proposal were not more than minor

Meaning of "minor"

[136] The nature of the gateway test under s 104D(1)(a) — whether the Court is satisfied the adverse effects of the activity on the environment will be minor — was determined in *Saddle Views Estate Ltd v Dunedin City Council*.[57] There the EC conducted a review of relevant authorities on the meaning of the word "minor" in s 104D.[58]

[137] The EC in *Saddle Views Estate* favoured the view held in *Elderslie Park Ltd v Timaru District Council*, where Williamson J stated:[59]

> The word "minor" is not defined in the Resource Management Act. It means lesser or comparatively small in size or importance. Ultimately an assessment of what is minor must involve conclusions as to facts and the degree of effect. There can be no absolute yardstick or measure.

The decision as to significance of effects

[138] Here, the EC made the following relevant finding:[60]

> [179] Accordingly, we accept the evidence of Mr Smith and Mr Espie that the proposal would have adverse effects on the environment (in this case, visual effects) that are no more than minor thus meeting the first of the s 104D gateway tests.

[139] Canyon challenged the finding set out in the previous paragraph, and submitted:

(a) there is no proper basis for the finding that the visual effects are no more than minor; and

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57 *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243, [2015] NZRMA 1.
58 At [74]–[77].
59 At [74], citing *Elderslie Park Ltd v Timaru District Council* [1995] NZRMA 433 (HC) at 445-446.
60 Interim Decision, above n 2.

(b) the EC reached its conclusion as a consequence of a series of errors of law and made factual findings that either were totally unsupported by evidence or were contrary to the undisputed evidence.

This Court's approach

[140] Canyon's criticisms of the EC decision under this ground are extremely wide-ranging and highly detailed. In some respects they are impermissible as they offend against the principles on appeal against an EC decision as set out at [67]–[73] above.

[141] To reiterate, this Court must be careful to resist re-examination of the merits of the case under the guise of a "question of law".

[142] I shall address only those submissions I consider permissible at law or where I consider Canyon to have mischaracterised the evidence or the EC decision. I shall resist Canyon's invitation to relitigate a significant number of factual assessments the EC made.

Canyon's submissions

The EC erred in stating there was no evidence that future properties on the uncontested platforms could be seen from Canyon's property

[143] This submission fails for two reasons. First, it misstates the EC's actual finding which was:

> [28] This means that the dwellings proposed on the uncontested platforms would have to be accounted for in the assessment of effects, to the extent that any are seen in conjunction with the contested dwellings. However, there was no evidence from the landscape architects that they would all be seen in any one of the viewpoints that were considered.

[144] Second, on the evidence available to the EC this finding was open to it.

The EC failed to appreciate the significance of the "gathering site"

[145] Canyon's broad submission appears to be that the EC failed to appreciate the significance of the "gathering site" and did not consider the proposal's effects when viewed from this location.

[146] Canyon asserted these shortcomings concerning the "gathering site" were the result of three findings of fact made without an evidential basis as follows:

(a) the EC incorrectly stated that the "gathering site" was "not included in the original assessment as the landscape experts were not able to agree on whether to include it";[61]

(b) the EC incorrectly claimed the significance of the "gathering site" and its use was not mentioned by Mr Johnston in his evidence; and

(c) the EC incorrectly claimed the photographs on the Canyon website did not include photographs from the "gathering site" or any other location looking towards lots 8–11 for that matter.

[147] As to [146](a), I note Mr Andersen's cross-examination of Bendigo's expert, Mr Smith at the July 2021 hearing. The initial exchange between Messrs Andersen and Smith indicated that the "gathering site" was noted in the first joint witness statement for landscape dated 12 March 2021, but not in the original documents prepared prior to that. This state of affairs is consistent with what the EC stated in the first sentence of paragraph [80] of its Interim Decision.

[148] I note further the exchange between the EC and Mr Smith:

> Q. The gathering site was not identified as a viewpoint at that time?
>
> A. So we met onsite in January, prior to my original brief of evidence being produced. We went around the entire property, including the window, which I included as viewpoint 21. And then after doing all of those viewpoint locations, we were taken up onto the gathering site. And in my evidence I didn't include it. And it was after, from my understanding, Ms Lucas had raised it in her evidence where I hadn't.

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61 Interim Decision, above n 2, at [80].

> And then we agreed in the first March joint witness statement that it was of some importance. …

[149] Mr Smith's description of how the "gathering site" eventually came into the reckoning is consistent with what the EC states in the first sentence of paragraph [80] of its Interim Decision.

[150] As to the allegedly erroneous factual finding in [146](b), I note in Mr Johnston's highly meticulous brief of evidence he does not refer to the "gathering site" at all.

[151] As to [146](c)[146](c), the relevant portion of the Interim Decision provides:

> [82] We also note that the website for the Canyon Function Centre was introduced into evidence in cross-examination by Mr Page. The gallery of photographs published on the website illustrates various views from in and around the Function Centre buildings, although none were from the "gathering site", or from any other location looking towards proposed Lots 8–11, for that matter.

[152] I have reviewed Mr Johnston's evidence and Mr Page's cross-examination. These support the EC's finding at [82].

[153] Mr Johnston conceded that the gathering site had only been used once as part of Canyon's business but that he intended for it to be used more often in the future.

[154] Canyon submitted that the degree of use of any site is immaterial as the issue is the effect on amenities enjoyed by the property and not how many people enjoy them.

[155] Amenity is a human construct distinct from natural or ecological considerations. The extent to which people experience amenity values must go to the significance of the issue. Thus, I find the degree of use is material as the degree of use is a corollary of the importance of the amenity enjoyed. The two considerations are linked and require an assessment on the evidence as a matter of fact and degree. That is the basis upon which the experts undertook their assessments.

[156] In summary, limited evidence concerning views from the "gathering site" was before the EC and it was for the EC to give this matter such weight as it saw fit.

[157] Thus, I find none of these criticisms of the EC decision are valid. I also observe that even if one or more findings of fact were shown to not have an evidential basis, there is no explanation by Canyon as to how this would have been material to the EC's ultimate determination.

[158] No error of law arises — the consideration of the significance of the gathering site was an exercise in evaluation of the evidence for the EC.

The EC wrongly stated that the three viewpoints in the second revised proposal represented the "worst-case scenario"

[159] The submission that the EC erred in describing the viewpoints as reflecting the "worst-case scenario" mischaracterises the EC's assessment at [56] in the Interim Decision which states:

> [56] Three viewpoint locations were depicted on these plans. These locations were considered to represent the worst-case scenario in terms of visibility from the Canyon site, due to a lack of intervening topographical features, buildings or plantings within these views.

[160] In his affidavit of 11 June 2021, Mr Smith set out three reasons why Viewpoints 8, 16 and 18 had been chosen:

> (a) North to south, Viewpoints 8 and 16 are furthest from one another, illustrating the overall change in horizontal viewing angle within the Appellant's Property. Eye level for both viewpoints is above RL395, being similar to the eye height gained from the to the Canyon Building and its outdoor areas; and
>
> (b) The eye level and elevation at Viewpoint 18 is a good representation of the eye level and elevation gained from the other viewpoint locations around the Canyon Building and its outdoor areas. Eye level for Viewpoints 7 and 19 differ to these other areas as they are from slightly lower down areas, being RL 390.91 and 393.17, respectively.
>
> (c) From these viewpoints, the four building envelopes are not visually screened by any internal buildings or existing vegetation on the Appellant's Property.

[161] Bendigo and the Council submitted this comprised an evidential basis for the EC to state that the three viewpoint locations represented the "worst-case scenario" in terms of visibility from the Canyon site. I agree.

[162] Paragraph [56] of the Interim Decision was directed to the assessment of the viewpoints by Mr Smith in his evidence. There is nothing in that paragraph to suggest that the EC understood all experts to take that view. Indeed, the EC discussed at length the differences of opinions between the experts concerning viewpoints. The EC placed the greatest weight on Mr Smith's evidence. This is a matter of opinion within its specialist expertise.

[163] The EC was able to make this statement on the evidence before it, and no question of law arises therefrom.[62] In any event, there is no obligation on the EC to record every part of its reasoning process on the facts.[63]

[164] In summary, I find this is an attempt by Canyon to relitigate the findings made by the EC and there is no legitimate basis for appeal on this point.

The EC erred in law by narrowing its assessment to only visibility of the development rather than "visual impact"

[165] Canyon submitted the EC erred in law in limiting its consideration of the visual impact to the visibility of the proposal and thereby wrongly failed to consider the impact of the visible changes.

[166] The essence of this submission appears to be that the EC misinterpreted the reasons for appeal on the first page of Canyon's notice of appeal to the EC dated 18 November 2019, by reading these as simply referring to visibility of the development, rather than to a wider meaning of "visual impact" extending to visual amenity effects (such as the impact on the natural character of the landscape by placing earth mounds/bunds).

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62 *Guardians of Paku Bay Association Inc*, above n 26, at [33]: "No question of law arises from the expression by the Environment Court of its view on a matter of opinion within its specialist expertise". See also *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159, (2020) 22 ELRNZ 202 at [42].

63 *Contact Energy Ltd v Waikato Regional Council*, above n 30, at [65]; *Brial v Queenstown Lakes District Council*, above n 32, at [45].

[167] Canyon submitted the EC acknowledged that a landscape assessment must extend beyond visual amenity effects but did not then undertake its assessment on that basis.

[168] Canyon further submitted that in doing so the EC ignored Canyon's expert's assessment of the cultural and recreational attributes and historic associations forming part of a person's appreciation of the landscape.

[169] What this submission overlooks, however, is the interlocutory matters dealt with by the EC at [30]–[44] of its Interim Decision. In those paragraphs the EC deals with and resolves the matter of the scope of the issues to be addressed, as well as the extent of amendments made to the proposal by Bendigo and the impact, if any, on Canyon.

[170] It is tolerably clear that upon hearing from both counsel the EC decided that Bendigo's second revised proposal was within the scope of the original proposal and that Canyon was bound by the terms of its opposition as expressed in its notice of appeal. In this context, the EC was entitled to limit its inquiry in the manner it did, and no error arose on this ground.

The EC erred in law in failing to give proper consideration to kaitiakitanga

[171] Canyon submitted the EC made an error of law and breached its obligation under s 7(a) of the Act, which requires the EC to have particular regard to kaitiakitanga in relation to managing the use, development, and protection of natural and physical resources.[64] Further, Canyon submitted that the EC overlooked the only relevant evidence on this aspect of the case which was that of Mr Johnston.

[172] Mr Johnston is tangata whenua as a member of Ngāi Tahu. Ngāi Tahu are the iwi that section 3.2 of the Plan identifies as the iwi exercising mana whenua in the area (Kāi Tahu ki Otago) with the relevant iwi authority being Te Rūnanga o Ngāi Tahu. Canyon did not produce any independent expert evidence concerning these matters.

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64 "Kaitiakitanga" is defined in s 2(1) of the Act as "the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources; and includes the ethic of stewardship".

[173] The EC has recognised that the rūnanga are best placed to comment on the existence or magnitude of any adverse cultural effects and tangata whenua themselves (defined, for the purposes of the Act, as the iwi or hapū that holds mana whenua over the particular area) are best placed to explain their relationship with their ancestral waters, lands and sites of significance.[65]

[174] Thus, Mr Johnston's views as tangata whenua hold weight at first blush. I note, however, that when Mr Johnston purchased the land from Bendigo for his business he had agreed with the vendors, Mr and Mrs Perriam, that he would not oppose development on the Bendigo land.

[175] Because the contracting party was Mr Johnston in his personal capacity (with Canyon only being incorporated thereafter and taking title on the settlement date, and there being no evidence as to the circumstances of settlement), Canyon is not itself contractually bound by that agreement.[66] Nonetheless, Mr Johnston's entry into this agreement is directly inconsistent with the views he now expresses. In light of that evidence, it would have been important for Mr Johnston's two seemingly irreconcilable positions to have been resolved by reference to independent evidence that the kaitiakitanga required the land remain unspoilt. This lends weight to the fact that the EC chose not to rely on his evidence as to kaitiakitanga.

[176] In any event, even if an error of law arose through the EC's failure to have particular regard to kaitiakitanga, there was nothing before this Court to demonstrate that error was material to one of the EC's ultimate determinations.

[177] I conclude Canyon has not established an error of law on this ground.

The EC erred in its assessments of visibility and visual effects

[178] Canyon submitted the EC erred in its findings as to:

(a) the degree of visibility of future dwellings enabled by the proposal;

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65 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, (2020) 21 ELRNZ 911 at [277], citing *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75, [2012] NZRMA 363 at [10].

66 *The Canyon Vineyard Ltd v Central Otago District Council* [2022] NZHC 749.

(b) the degree of adverse visual effects as experienced from Canyon's property; and

(c) the visual effects of Lot 4 from both Blue Mines Road and the school site.

[179] The EC undertook its analysis of the visual effects of the second revised proposal from [70]–[132] of its Interim Decision, ultimately holding at [179] that the proposal would have adverse effects on the environment (in this case, visual effects) that were no more than minor.

[180] In making its finding, the EC accepted the assessments of Messrs Smith and Espie and rejected Ms Lucas's evidence.

[181] Canyon's submissions turn on the use by the landscape experts of what is termed the "seven-point scale" to assess visual effects. The use of this scale is addressed in the Interim Decision and relies on the New Zealand Institute of Landscape Architects' Best Practice Guide. Mr Smith's evidence goes further, to describe that the seven points along that scale correspond to the categories "less than minor", "minor", "more than minor" or "significant". Messrs Smith and Espie adopted this scale in their evidence, which the EC preferred.

[182] Canyon in effect submitted that a finding of "minor" effects (in terms of the seven-point scale) from a single viewpoint automatically results in the adverse effects of the activity being more than minor.

[183] Although such an assessment is necessary to understand the degree of effects of the activity, it is not to be conflated with the EC's obligations under s 104D(1)(a).

[184] The proper test is whether the adverse effects, as proposed to be remedied and/or mitigated, are more than minor taken as a whole.[67] The inquiry is not limited to fractured assessments from various singular viewpoints. It is therefore sufficient

[67] *Stokes v Christchurch City Council* [1999] NZRMA 409 (EnvC) at 434.

for the EC to take into account the evidence from various viewpoints as a whole in making its determination.

[185] Notwithstanding the disagreements between the experts on this issue and these not being directly referred to by the EC in its Interim Decision, the High Court can only intervene in such situations where the EC has come to a decision to which, on the evidence, it could not reasonably have come. Also, the weight to be given to the assessment of relevant considerations is for the EC and not for reconsideration by the High Court as a point of law.[68]

[186] The EC's analysis as to the visual effects of the second revised proposal from Canyon's property and subsequent finding that this would have adverse effects that are no more than minor is a decision to which, on the evidence, the EC could reasonably have come.

[187] While the EC may have given little or no weight to the disagreements between the experts that were referred to by Canyon in its submissions, this was for the EC alone to assess and is not for reconsideration by this Court as a point of law. I find there was no error of law.

The EC erred in overlooking that the amended survey plans did not include ridgeline information for Viewpoint 21

[188] While the amended survey plans and information did not include ridgeline information for Viewpoint 21 (upstairs and the "gathering site"), I note from [68]–[69] of the EC's Interim Decision that cross-sections of viewshafts from this viewpoint were before it in evidence, with the EC dealing with this in its analysis in [79]–[88].

[189] I find no error of law on this ground.

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[68] *Guardians of Paku Bay Association Inc*, above n 26, at [31]-[32]; *Brial v Queenstown Lakes District Council*, above n 32, at [43].

The EC erred because the visibility assessment did not proceed on a consideration of all domestication but rather just built forms on the building platforms

[190] This ground appears to be a repetition of the ground I have dealt with at [178] to [187]. This ground fails for the same reasons. I find no error of law.

The EC erred in its visibility assessment having regard to evidence concerning viewpoints and mounds/bunds

[191] Canyon submitted that the EC erred in finding the adverse effects of the proposal were no more than minor because it was not a reasonable conclusion having regard to the following evidence:

(a) Ms Lucas' evidence that all the proposed lots on the subject site would be visible from the Canyon site;

(b) the bunds only provide partial screening, none being fully screened;

(c) parts of Lots 8, 9, 10 and 11 can be seen from Viewpoint 18 (albeit Mr Smith later qualifying this evidence); and

(d) Ms Lucas' evidence of what can be seen from the "gathering site" and Viewpoint 21 (the upstairs window in the function centre).

[192] Each of the matters set out in the previous paragraph was before the EC in evidence. To the extent that one or more of these matters comprised relevant considerations, the weight to be given to the assessment of them was for the EC and not for reconsideration by this Court as a point of law.[69]

[193] The EC's analysis as to visual effects of the second revised proposal and subsequent finding that this would have adverse effects that are no more than minor is a decision to which, on the evidence, the EC could reasonably have come.

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[69] *Guardians of Paku Bay Association Inc*, above n 26, at [31]-[32]; *Brial v Queenstown Lakes District Council*, above n 32, at [43].

The EC erred in approving a plan that did not include the second mound on Lot 8

[194] Canyon submitted it was an error of law for the EC to approve a plan that did not include the second mound on Lot 8, including that it failed to require Bendigo to produce a plan on that basis before approving it. This issue is also raised with respect to Canyon's fourth ground of appeal.

[195] The omission of the second mound on Lot 8 was a consequence of the production of the updated survey information, in which the surveying firm that produced the plan observed that it was not required to screen views of the residential building platform on Lot 9. However, that assumption did not consider the secondary purpose of that mound which was to screen views of the driveway to Lot 8. The mound in question is discussed by the EC as follows:[70]

> [60] The amended plans did not depict the secondary mound originally shown on Lot 8, although we understand that removal of that was inadvertent. Bendigo intends that this be reinstated, and Mr Smith undertook his visual assessment on that basis.

[196] The notes of evidence also highlight the utility of the bund.

[197] On this appeal, Bendigo accepted that the mound ought to be shown on Lot 8 but that it is presently not there. However, Bendigo submitted such an omission is not an error of law that is appropriate for relief in this forum and is more appropriately addressed directly with the EC which, being empowered by the District Court Rules 2014, may correct an accidental slip or omission in a judgment or order.[71]

[198] In reliance on this power, the EC has previously amended clerical errors contained in its decisions, such as:

(a) in *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* to amend the incorrect legal

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70 Interim Decision, above n 2.

71 Resource Management Act, s 278; District Court Rules 2014, r 11.10; *National Investment Trust v Christchurch City Council* [2001] NZRMA 289.

descriptions of land that were contained within two of the orders made in the substantive judgment;[72] and

(b) in *Northport Ltd v Whangarei District Council* to correct four factual errors in the substantive judgment (in order to clarify but not alter the decision) relating to the area of land owned by a party, the extent of the application of the proposed rules sought, the description of a rail line, and the use of incorrect cardinal directions.[73]

[199] Owing to the clerical error of Bendigo's expert witnesses, the revised plans did not reflect intention of the EC in its Interim Decision to reinstate the second mound. Accordingly, these revised plans should be amended to reflect the proper meanings and intentions of the Interim Decision.

[200] To rectify this error, Bendigo offered to produce an updated plan that includes that second mound, and to file a joint memorandum to the EC alerting it of this issue and requesting that it rectify this error. That course should be adopted, and the jurisdiction of this Court need not be engaged.

The EC erred in law by unjustly criticising Ms Lucas' evidence

[201] No question of law arises from the expression by the EC of its view on matters of opinion within its specialist expertise.

The EC erred in that it "misrepresented" the evidence of Messrs Smith and Espie

[202] This submission is without merit. The EC's statement at [179] of its Interim Decision may be read as accepting the evidence of Messrs Smith and Espie, in satisfaction of the statutory test in s 104D(1)(a) of the Act.

[203] That is not to misrepresent Messrs Smith and Espies' evidence but is to reach a conclusion that the evidence satisfied the statutory test as to the adverse effects (in this case visual effects) of the proposal being no more than minor.

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72 *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2022] NZEnvC 13.

73 *Northport Ltd v Whangarei District Council* [2022] NZEnvC 10.

The EC's finding at [179] of its Interim Decision cannot be reconciled with its statement at [161] that Canyon is entitled to expect any development will maintain, if not enhance, the rural amenity enjoyed from its site

[204] Paragraph [179] of the EC's Interim Decision is not contrary to what it says at [161]. The EC's determination that the adverse effects would be no more than minor is consistent with the maintenance, if not enhancement, of rural amenity values experienced and enjoyed from the function centre site.

[205] In any event, there is no exposition by Canyon as to how this submission could lead to an error in law material to one of the EC's ultimate determinations.[74]

The EC's failure to take certain matters into account

[206] Broadly, Canyon submitted the EC did not take the following matters of evidence into account:

(a) neither of Messrs Smith nor Espie assessed the most significant views from the "gathering site" or Viewpoint 21;

(b) both Messrs Smith and Espie relied on screening mitigating the visual effects, when screening would take seven to 10 years to grow; and

(c) Mr Smith's evidence had assessed the effects from Lot 8 assuming the existence of a bund that the EC did not require be put in place.

[207] As to[206](a), it is apparent from [68]–[69] of the EC's Interim Decision that cross-sections of viewshafts from Viewpoint 21 were before it in evidence, with the EC then dealing with this in its analysis at [79]–[88].

[208] Canyon considered views from the "gathering site" were "the most significant views". The EC addressed the "gathering site" and upstairs mezzanine viewpoints in at [79]–[88] of its Interim Decision and downplayed the significance of these on the basis of an evidential analysis then undertaken and open to it.

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74 *Brial v Queenstown Lakes District Council*, above n 32, at [46].

[209] As to [206](b), I note:

(a) in [54] of Mr Smith's brief of evidence dated 28 January 2021, he gave evidence that native vegetation proposed with respect to the schoolhouse premises would take approximately five to seven years to mature to a height of three to four metres (the schoolhouse premises concerning visual amenity with respect to Lot 4 of the proposal only);

(b) in [7.26] of Mr Espie's brief of evidence dated 19 February 2021, he gave evidence generally as to the growth of vegetation, including on mounding to screen built forms on the contested lots visible from Canyon's property; and

(c) the period required to block visibility referred to by Mr Espie was "at least 5 or 6 years" in regard to the Lot 11 building platform.

[210] In any event, the length of time for screening vegetation to grow is a relevant consideration to which the EC may give such weight as it considers fit and is not for reconsideration by this Court as a point of law.[75]

[211] As to the matter raised in [206](c), I have previously dealt with this at [194] to [200].

EC erred in rejecting Ms Lucas' evidence as to viewshafts

[212] Canyon submitted the EC did not properly take into account and unfairly criticised Ms Lucas's evidence as to the viewshafts when it held:[76]

> We gave little weight to the two viewshafts prepared by Lucas Associates (from the "gathering site" and the upstairs office), as the viewer's eyelevel for each was based upon estimates rather than using surveyed data points.

[213] Bendigo was not required or obliged by the EC to prepare and circulate viewshafts from various locations. This information was provided to further assist the

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75 *Guardians of Paku Bay Association Inc*, above n 22, at [31]; *Brial v Queenstown Lakes District Council*, above n 32, at [43].

76 Interim Decision, above n 2, at [176].

EC. The EC's criticism of Bendigo's plans is addressed in its Interim Decision. The information required by the EC was updated plans marked to scale and with accurate contour information, which was satisfied.

[214] There is no clear evidence that Bendigo did not permit Ms Lucas onto the property to prepare additional information. In any event, even if that was clearly established then Canyon ought to have raised it as a matter between counsel and, failing agreement, with the EC. That did not happen.

[215] Canyon ought to have sought leave of the EC, as Bendigo did, to produce further surveyed information — particularly given that information could have been obtained by a site visit to Canyon's property.

[216] There are no issues of natural justice by the EC not taking initiative to seek Canyon's view on this. Canyon failed to seek leave of the EC but is now using its own tactical omission as an error of the EC.

[217] The evaluation of the visual effects of the proposal from Canyon's property is a matter within the EC's specialist expertise, with it being for the EC to assess and weigh competing evidence in this regard.[77]

[218] Referring to [176] of the EC's Interim Decision, there is nothing unreasonable about the EC preferring Bendigo's evidence as to visual effects to that of Canyon on the basis that Bendigo's evidence was grounded upon surveyed data while the Canyon's evidence was based only upon estimates.

The EC erred in granting consent for Lot 4

[219] Canyon submitted the EC in did not take account of the fact Mr Smith, Ms Lucas and Mr Espie all agreed the adverse visual effects on observers were moderate and that Mr Smith felt the adverse visual effects would reduce to a low degree (at most) once the proposed vegetation matures. Canyon submitted the adverse

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[77] *Guardians of Paku Bay Association Inc*., above n 22, at [31]–[33]; *Brial v Queenstown Lakes District Council*, above n 32, at [43]–[44].

visual effects in relation to Lot 4 were therefore more than minor and consents for Lot 4 should not have been granted.

[220] It is apparent from [125] of the EC's Interim Decision that it accepted Mr Smith's evidence to the effect that 500 native plants to be planted within Lot 4 prior to the construction of a dwelling would screen a future dwelling from the schoolhouse premises, once this planting had reached above two metres in height.

[221] I further note Mr Smith's evidence concerning the native plants to be planted within Lot 4 and a number of supplementary measures intended to enhance visual mitigation regarding the schoolhouse premises.

[222] It is apparent from [120]–[124] of the Interim Decision that the EC was satisfied with the steps proposed to provide visual mitigation of the dwelling on Lot 4 from Blue Mines Road.

[223] Accordingly, there was an evidential basis for the EC's conclusion that the adverse effects with respect to Lot 4 were no more than minor.

[224] The weight to be given to the assessment of relevant considerations concerning the visual effects of the dwelling on Lot 4 was for the EC and not for reconsideration by this Court as a point of law.[78]

Fourth ground of appeal — the rejection of Canyon's submissions on conditions

[225] In the Interim Decision, the EC directed Bendigo and the Council to confer and file a set of draft final conditions and granted leave to Canyon to file comments on those conditions. Canyon filed comments on the conditions, proposing changes and additions to the conditions, to which Bendigo then responded. In its Final Decision, the EC rejected the amendments sought by Canyon "on the grounds that they were not addressed in the evidence given at the hearing".[79] Canyon's fourth ground of appeal

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78 *Guardians of Paku Bay Association Inc*., above n 22, at [31]; *Brial v Queenstown Lakes District Council*, above n 32, at [43].

79 Final Decision, above n 3, at [11].

is that the EC rejected Canyon's submissions on the conditions out of hand without proper consideration, raising similar issues as to process as the first ground.

[226] First, referring to Bendigo's response to the EC's Minute of 12 October 2021, Canyon submitted that Bendigo had made further changes to the proposal so that it in effect became the third revised proposal. Canyon referred to the fact that Bendigo consulted with the Council concerning the proposed revised conditions but not with Canyon.

[227] Second, Canyon submitted that the third revised proposal is now so different to the first revised proposal which was considered by the Council in the initial granting of the resource consent that a fresh application for resource consent should be made.

[228] Third, Canyon submitted that the EC summarily rejected Canyon's submissions on the conditions and submitted that it was more likely than not that the EC had not read them and thereby had not considered them.

[229] Fourth, Canyon submitted that the EC's decision to reject Canyon's submissions outright was highly prejudicial to Canyon and constituted a breach of natural justice because:

(a) the EC's direction to "file and serve comments, if any" was broad and did not confine the scope of those comments to any particular matters;

(b) the EC has a duty to properly consider any submissions requested that are relevant;

(c) the amendments sought by Canyon were relevant and were based on the evidence called, as mitigation of effects was a key issue in the evidence and the submissions on conditions; and

(d) to the extent there was no evidential basis for Canyon's submissions on the conditions, this was because no opportunity was given to call evidence as to the changes in the third revised proposal.

[230] Bendigo submitted that Canyon's perceived prejudice is unfounded and arises from an incorrect reading of the EC's Interim Decision. Bendigo submitted that as soon as the EC declined Canyon's appeal that the opportunity to adduce further matters going to the merits of the case had ended. The Council concurred.

[231] Bendigo submitted that Order B of the Interim Decision simply required Bendigo to confer with the Council and file updated conditions and the relevant plans. The reason for this is made clear in the Interim Decision under the heading "Anomalies resulting from surveyed plans" but also as a result of amendments sought and agreed to in evidence, including:

(a) the requirement for a fire-defensible space around dwellings;

(b) updating references in conditions to corrected and updated plans; and

(c) amending the "simple gable roof" condition and providing accompanying explanation to the EC as required.

[232] Bendigo and the Council submitted this was an orthodox request of the EC to ensure it had a complete set of provisions available to it for final approval. However, it was acknowledged that in preparing the relevant plans Bendigo's experts omitted to include the second mound on Lot 8.

[233] By Order C of the Interim Decision the EC had permitted Canyon to submit "comments" on the draft final conditions. Bendigo submitted that the choice of wording on the EC's behalf was deliberate and reflected the finality of the proceeding, and that the Court had not afforded Canyon the right to reopen matters and make submissions thereon.

[234] The "submissions on the conditions" lodged by Canyon were extensive and mostly irrelevant given that the EC had already decided the case. It was unnecessary for the EC to reconsider its assessment in light of those submissions as the appeal had been declined and the consent granted. The permission to file comments was not a

further opportunity to make submissions on conditions that ought to have been raised by Canyon in legal submissions at the hearing.

[235] Finally, Bendigo and the Council submitted that none of the conditions were directed to changing any of the EC's substantive findings with respect to the proposal for which resource consent was required, namely lot configuration and building platform locations together with maximum building heights, all of which remained unchanged.

[236] I reject Canyon's submissions on this aspect of the case for the following reasons:

(a) Canyon did not raise objection to Bendigo and the Council seeking amendments to the conditions either in its evidence or at the hearings;

(b) as soon as the EC had declined the appeal on its merits the case had concluded;

(c) the seeking of comment on the recommended conditions was a courtesy afforded to consider form not substance, as matters of substance had already been determined; and

(d) just because the outcome as to Canyon's submissions was adverse does not mean that the EC did not consider the submissions.

[237] I find no evidence of breach of natural justice in this case.

Relief

[238] The appeal is dismissed.

[239] With respect to the reinstatement of the second mound on Lot 8, I direct that the parties confer and liaise with the EC to replace the approved plans with a plan that correctly identifies the second mound on that allotment.

[240] Costs shall follow the event and costs shall be awarded in favour of Bendigo and the Council on a 2B basis.

Doogue J

Solicitors:
Antony Hamel, Dunedin
Mactodd Lawyers, Queenstown
Gallaway Cook Allan Lawyers, Dunedin
CC:
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ANNEXURE 1

Subdivision

1. The subdivision shall be undertaken in accordance with the Proposed Subdivision of Lot 2 DP 523873, Drawing 01, Rev B, dated 21.09.21 and Proposed Mitigation Plan Lot 2 DP 523873, Rev B, Drawing 03, dated 21.9.21.
2. All subdivisional works shall comply with NZS 4404:2004 and the Council's July 2008 Addendum to NZS 4404:2004.
3. The right of way easements shown on the plan of subdivision (as amended to delete access to Lot 7 in terms of Condition 1) and any other easements required to protect access and/or access to services shall be duly granted or reserved. For the avoidance of doubt no right of way easement shall be created to permit Lots 1- 6 or 8-11 or Lot 13 to achieve access via Lot 14 to Bendigo Loop Road.
4. Prior to section 224(c) certification the carriageways within the right of ways that are to serve Lot 2, Lots 4-6 and Lots 8-11 shall be upgraded or constructed in accordance with NZS 4404:2004 and the Council's July 2008 Addendum as follows:

    a. Minimum 4.5 metre top width.
    b. Shallow trafficable side drains are allowable along generally level sections of carriageway.
    c. Rock armoured side water channels on steeper gradients (>10%).
    d. Well bound durable running course that is resistant to unravelling and provides good all weather traction.
    e. Suitably sized culverts located in watercourses as applicable.
    f. Access to individual lots (Lot 2, Lots 4-6 and Lots 8-11) to comply with Part 29 of the Council's Roading Policies, January 2015.
5. Prior to section 224(c) certification the consent holder shall provide entrances to Lots 1, 3 and 15 off Blue Mines Road to achieve compliance with Section 29 of the Council's Roading Policies January 2015.
6. Prior to section 224(c) certification the consent holder shall install a farm gate within Lot 14 adjacent to Lot 16 DP 324082 and Lot 17 DP 324082 that shall be fitted with a lock. The function of this gate is to prevent the owners of Lots 1-6, 8- 11 or Lot 13 achieving access to Bendigo Loop Road via Lot 14.

7. The owner of Lot 14 shall ensure that the gate referred to in Condition 6 is kept locked at all times except when in use for farm access purposes to ensure that the owners of Lots 1-6, 8-11 and Lot 13 are not able to achieve access to Bendigo Loop Road via Lot 14

Note: Condition 7 shall be subject to a consent notice that shall be registered on the record for title for Lot 14 and Lot 15 pursuant to section 221 of the Resource Management Act 1991.

8. At the time a residential activity (new dwelling) is constructed on Lot 2, Lots 4-6 and Lots 8-11 domestic water and fire fighting storage is to be provided by a standard 30,000 litre tank on Lot 2, Lots 4-6 and Lots 8-11. Of this total capacity, a minimum of 20,000 litres shall be maintained at all times as a static fire fighting reserve. Alternatively an 11,000 litre fire fighting reserve is to be made available to the building in association with a domestic sprinkler system installed in the building to an approved standard. A fire fighting connection is to be located within 90 metres of any proposed building on the site

In order to ensure that connections are compatible with Fire and Emergency New Zealand equipment the fittings are to comply with the following standards:

a. Either: 70 mm Instantaneous Couplings (Female) NZS 4505, or 100 mm Suction Coupling (Female) NZS 4505 (hose tail is to be the same diameter as the threaded coupling (e.g. 100 mm coupling has 100 mm hose tail) provided that the consent holder shall provide written confirmation from the Fire and Emergency New Zealand to the Chief Executive to confirm that the couplings are appropriate for fire fighting purposes.
b. The connection shall have a hardstand area adjacent to it to allow a Fire and Emergency New Zealand appliance to park on it. The hardstand area shall be located at the centre of a clear working space with a minimum width of 4.5 metres. Access shall be maintained at all times to the hardstand area.

Note: For more information on how to comply with Condition 8 above or

on how to provide for NZFS operational requirements refer to the New Zealand Fire Service Fire Fighting Water Supplies Code of Practice SNZ PAS 4509:2008. In particular, the following should be noted:

- *For more information on suction sources see Appendix B, SNZ PAS 4509:2008, Section B2;*
- *For more information on flooded sources see Appendix B, SNZ PAS 4509:2008, Section B3.*

9. Fire fighting water supply may be provided by means other than that provided for in Condition 8 above if the written approval of Fire and Emergency New Zealand is obtained for the proposed method.

10. The water tanks referred to in Condition 8 shall be buried or located such that they are not visible from outside the site and the water tanks shall be green, black or olive (green- brown) in colour.

Note: Conditions 8-10 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

11. Prior to section 224(c) certification an adequate domestic water supply shall be provided to the boundary of Lot 2, Lots 4-6 and Lots 8-11 from the School House Services Company water scheme that is to comply with the following:

    a. A bacteriological and chemical water test of the water supply sourced from a suitably qualified laboratory shall be provided prior to section 224(c) certification with an accompanying laboratory report highlighting any non- compliance with Maximum Allowable Values (MAV's) and Guideline Values (GV's) under the Drinking Water Standards for New Zealand 2005 (Revised 2008) and outlining appropriate means of remedial treatment.

    b. the consent holder shall provide the formal ownership, management and operational document to demonstrate the extent of supply, on-going provision of appropriate water quality, security of supply and daily water entitlement to each of Lot 2, Lots 4-6 and Lots 8-11; such entitlement to be a minimum daily allocation of 1,000 litres of potable

supply per day to Lot 2, Lots 4-6 and Lots 8-11.

c. A report from a suitably experienced person is to be provided by the consent holder to alert successors to available solutions and the likely impact of costs and operation of the water treatment process to reduce total hardness, iron and manganese to acceptable levels.

d. In the event that the consent holder chooses to treat the domestic water at the source of supply, such treatment shall provide domestic water in full compliance with the Drinking Water Standards for New Zealand 2005 (Revised 2008) including all maximum allowable values (MAV's) as detailed in the laboratory report. The installation of the treatment plant and satisfactory water quality testing is required prior to section 224(c) certification.

e. Documentation to be provided to the Chief Executive to confirm that the School House Services Company water scheme is registered with Public Health South (or that application has been made for such registration).

12. a. At the time a dwelling is erected on Lot 2, Lots 4-6 and Lots 8-11 point of use treatment shall be provided if such action is necessary to achieve full compliance with the Drinking Water Standards for New Zealand 2005 (Revised 2008) by means outlined in the laboratory report (provided in terms of Condition 11(a) above) or other solution acceptable to the Chief Executive. The water shall as a minimum requirement, achieve full compliance with all Maximum Allowable Values (MAV's) as detailed in the laboratory report and the consent holder or successor shall be aware of any exceedance of the Guideline Values (GV's) for which additional treatment is strongly recommended. The point of use treatment shall also be installed to reduce total hardness, iron and manganese to acceptable levels.

b. The consent holder or successor shall ensure that:

(i) The supplier of any treatment equipment shall provide a certificate from a suitably qualified person confirming that the system operated in accordance with the operating and maintenance procedures, will supply water suitable for human consumption in compliance with Drinking Water Standards for New Zealand 2005 (revised 2008).

(ii) A copy of the operating and maintenance instructions for any treatment equipment installed in terms of Condition 12(a) above and a copy of the suppliers certificate in terms of Condition 12(b)(i) above shall be lodged with the Chief Executive.

(iii) Any treatment equipment installed in terms of Condition 12(a) and Condition 12(b)(i) above shall be properly maintained and operated by the consent holder or successor.

(iv) The water test, laboratory report and total hardness, iron and manganese reduction report required in terms of Conditions 11(a) and (c) is drawn to the attention of the consent holder and successor.

Note: Condition 12 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

13. Prior to section 224(c) certification a separate water supply connection including water restrictor or meter and approved Acuflo toby valve and box shall be installed from the School House Services Company water scheme to the boundary of Lot 2, Lots 4-6 and Lots 8-11 such that the flow is controlled to the predetermined water allocation.

Note: As built records of the subdivision reticulation shall be provided to the Chief Executive

14. Prior to the presentation of the survey plan for section 223 approval the consent holder shall commission an On-Site Wastewater Disposal Report from a suitably experienced professional confirming the adequacy of Lot 2, Lots 4-6 and Lots 8-11 for on-site wastewater disposal consistent with Clause 5.5 of the Council's July 2008 Addendum to NZS 4404:2004.

15. At the time a dwelling is erected on Lot 2, Lots 4-6 and Lots 8-11 an on-site wastewater disposal system that complies with the requirements of AS/NZ 1547:2012 "On-site Domestic Wastewater Management" shall be designed by a suitably qualified professional and installed to serve the dwellings on Lot 2, Lots 4-6 and Lots 8-11.

16. A copy of the design and designer producer statement shall be supplied to the Chief Executive. The dwelling shall not be constructed until the design

and producer statement have been supplied to the Chief Executive.

17. The designer shall supervise the installation and construction of the system and shall provide a construction producer statement to the Chief Executive.

18. An operation and maintenance manual shall be provided to the owner of the system by the designer and a copy supplied to the Chief Executive. This manual shall include a maintenance schedule and an as-built of the system dimensioned in relation to the legal property boundaries. A code of compliance certificate for the dwelling and/or disposal system shall not be issued until the construction producer statement and a copy of the owner's maintenance and operating manual have been supplied to the Chief Executive. The maintenance and operating manual shall be transferred to each subsequent owner of the disposal system.

19. Disposal areas shall be located such that the maximum separation (in all instances greater than 50 metres) is obtained from any water course or any water supply bore.

Note: Conditions 15-19 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

20. It shall be the consent holder's responsibility to obtain the consent of the network utility provider as to the position of any new electricity services to serve Lot 2, Lots 4-6 and Lots 8-11. The consent holder shall be responsible for installing an operational connection to electricity services underground to the boundary of Lot 2, Lots 4-6 and Lots 8-11 prior to section 224(c) certification.

21. The consent holder shall supply evidence of the consent referred to in Condition 20 to the Chief Executive.

22. It shall be the responsibility of the consent holder to meet the costs associated with the installation of any new electricity reticulation provided in accordance with Condition 20 to serve Lot 2, Lots 4-6 and Lots 8-11.

23. Either:

    a. Prior to section 224(c) certification the consent holder shall install operational underground connections to telecommunication services to serve Lot 2, Lots 4- 6 and Lots 8-11; or

b. Lot 2, Lots 4-6 and Lots 8-11 will be reliant on other means of telecommunication services such as cellular, satellite or wifi connection and it shall be the responsibility of the consent holder or successor to establish any landline telecommunication services to serve Lot 2, Lots 4-6 and Lots 8-11 in future.

Note: Condition 23(b) shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991 in the event that operational landline connections are not provided for telecommunication services to Lot 2, Lots 4-6 and Lots 8-11 prior to section 224(c) certification.

24. It shall be the responsibility of the consent holder or successor to provide adequate electricity and telecommunication services to the land held in Lot 1 and Lot 3 as these services have not been provided at the time of subdivision to this land which is to be used for viticultural purposes.

Note: Condition 24 shall be subject to a consent notice that shall be registered on the record of titles for Lot 1 and Lot 3 pursuant to section 221 of the Resource Management Act 1991.

25. Payment of a reserves contribution of $9,550.00 (exclusive of goods and services tax) calculated in terms of Rule 15.6.1(1) of the Operative District Plan on the basis of ten new allotments (allowing a credit for the existing record of title).
26. The building platforms on Lot 2, Lots 4-6 and Lots 8-11 shown on the plan of subdivision shall be identified as residential building platforms on the survey plan presented for section 223 approval.
27. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall be located on the residential building platforms on Lot 2, Lots 4-6 and Lots 8-11 as identified on the survey plan.
28. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall have a maximum height of 6.0 metres above existing ground level as at 4 February 2019.

29. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall comply with Rule 4.7.6D(a)(i) – (iii) of the Operative Central Otago District Plan that relates to the materials to be used in building finishes and colours for exterior walls, accents and trim and roofs provided that:

a. Exterior paint colours shall be recessive with a maximum reflectivity values of 30% and shall be a matt finish; and
b. Stain colours shall be of a natural hue or black, rather than other colours; and
c. Roof cladding shall have a maximum reflectivity value of 20% or less and shall be dark recessive colours in the range of browns, greys – not black/ebony; and
d. Roof cladding shall be either Cedar shakes or shingles, metal roofing with standing seam profile, corrugate. Multi rib or trapezoidal roofing is not permitted.
e. Dwellings and accessory buildings shall be designed to have simple gable roof forms, with roof pitches in the range of 25 to 45 degrees.

Note: Simple gable roof forms are to consist of uniform horizontal lengths, peaks and pitches on both sides of the roof peak. This rule allows for multiple gable formations within each building platform.

30. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall utilise low intensity indirect light sources for all exterior lighting applications. Flood lighting or accent lighting is not permitted.

Note: Conditions 27-30 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

31. The curtilages on Lot 2, Lots 4-6 and Lots 8-11 shown on the plan of subdivision shall be identified as curtilages on the survey plan presented for section 223 approval with the areas of such curtilages to be specified on the survey plan.
32. All domestic landscaping and structures including but not limited to clotheslines, outdoor seating areas, external lighting, swimming pools, play structures, vehicle parking, pergolas and lawns shall be confined to

the curtilages on Lot 2, Lots 4-6 and Lots 8-11 as identified on the survey plan.

Note: Condition 32 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

33. Prior to section 224(c) certification the consent holder shall provide documentation to demonstrate that Lot 13 will be held in eight undivided one-eighth shares by the owners of Lot 2, Lots 4-6 and Lots 8-11 through an appropriate entity such as a limited liability company.

34. Pursuant to section 220(1)(b)(iii) of the Resource Management Act 1991:

"That Lot 14 hereon and Lot 15 hereon be held in the same record of title (see CSN Request)."

35. Provision shall be made via an easement over Lot 15 to permit public pedestrian and cycle access to the Bendigo School Site ruins and curtilage from Blue Mines Road.

36. Prior to section 224(c) certification the consent holder shall install a storey board, stone entranceway and such fencing as is necessary to protect Lot 15.

37. Prior to section 224(c) certification the consent holder shall lodge a Structural Landscape Plan that has been prepared by a suitably qualified ecologist in consultation with a suitably qualified landscape architect and the Director-General of Conservation; such Structural Landscape Plan shall provide for the regeneration of indigenous vegetation within Lot 13 as follows:

    a. Identify areas where native planting is to be planted on Lot 13; and
    b. Undertake an Ecological Survey to identify the areas of existing indigenous vegetation on Lots 1 to 15 hereon to be retained; and
    c. Describe the management regime required to achieve regeneration of indigenous vegetation on Lot 13; and
    d. Provide for the removal of exotic tree species with wilding propensity from Lots 1 to 15 hereon; and
    e. Establish native plantings on Lot 13 to comprise a minimum of 5,000 plants; and

f. Any native planting for screening purposes at the periphery of Lot 13 to be in naturalistic clumps of kanuka; and

g. The naturalistic clumps of kanuka planted for screening purposes shall be irrigated for the first 5 years to assist establishment of those plants; and

h. All native plants planted on Lot 13 shall be provided with rabbit protection guards; and

i. Wool mulch/ wool matting shall be installed for each plant;

j. Particular consideration shall be given to the appropriate placement and arrangement of plantings for the purpose of maximising visual mitigation of the building platform on Lot 4, when viewed from Blue Mines Road and the historic schoolhouse; and

k. Particular consideration shall be given to providing a more naturalistic appearance of native vegetation as to integrate the lineal vegetation along the western boundary line within Lots 8 – 11 and 13, when viewed from Lot 18 DP 324082; and

l. As part of the Structural Landscape Plan, a management strategy shall be prepared to address the retention and/or staged removal of any exotic vegetation with low wilding potential that is proposed to be retained for landscape or amenity purposes.

m. The Structural Landscape Plan shall be accompanied by certification from the Council's Planning Manager that the Structural Landscape Plan complies with this condition.

38. Prior to section 224(c) certification the consent holder shall establish native plantings on Lot 13 in accordance with the Structural Landscape Plan including the provision of irrigation and rabbit protection guards; and the consent holder shall remove all exotic trees with wilding propensity from Lot 13.

39. Prior to section 224(c) certification the consent holder shall establish native plantings on Lot 2, Lots 4-6 and Lots 8-11 in accordance with a planting plan prepared by a suitably qualified ecologist, with input from a suitably qualified landscape architect as follows:

a. Identify areas where native plantings are to be planted on Lot 2, Lots 4-6 and Lots 8-11; and

b. The native plantings shall consist of 500 native plants on each of Lot 2, Lots 4- 6 and Lots 8-11; and

c. Any native planting for screening purposes at the periphery of Lots 8-11 to be in naturalistic clumps of kanuka; and

d. The naturalistic clumps of kanuka planted for screening purposes on Lots 8- 11 shall be irrigated for the first 5 years to assist establishment of those plants; and

e. All native plants to be planted on Lot 2, Lots 4-6 and Lots 8-11 shall be provided with rabbit protection guards.

f. Wool mulch/ wool matting shall be installed for each plant.

g. Particular consideration shall be given to the appropriate placement and arrangement of plantings for the purpose of maximising visual mitigation of the building platform on Lot 4, when viewed from Blue Mines Road and the historic schoolhouse.

h. Particular consideration shall be given to providing a more naturalistic appearance of native vegetation as to integrate the lineal vegetation along the western boundary line within Lots 8 – 11 and 13, when viewed from Lot 18 DP 324082.

40. The native plantings established in accordance with Condition 38 shall be maintained by the owner(s) of Lot 13 (being the owners of Lots 1-6 and Lots 8-11). Any such native plants that die or are lost to disease shall be replaced in the first available planting season following such loss.

41. No exotic tree species with wilding propensity shall be planted on Lots 1-6, Lots 8- 11 and Lot 13.

42. Any native plants to be planted on Lots 1-6, Lots 8-11 and Lot 13 shall be selected from the species identified as the most ecologically appropriate native species for planting at Bendigo as listed in the correspondence from Cees Bevers, Ecologist, of Landpro Limited dated 23 September 2019 that was presented at the hearing; provided that such plantings shall exclude manuka and shall involve the planting of trees and shrubs comprising locally sourced genetic material (from within the Dunstan Ecological District).

Note: Conditions 40 - 42 shall be subject to a consent notice that shall be registered on the record of titles for Lots 1-6, Lots 8-11 and Lot 13 pursuant to section 221 of the Resource Management Act 1991.

43. The native plantings established in accordance with Condition 39 shall be maintained by the owners of Lot 2, Lots 4-6 and Lots 8-11. Any such native plants that die or are lost to disease shall be replanted in the first available planting season following such loss.

Note: Condition 43 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

44. Prior to section 224(c) certification the consent holder shall undertake mounding at the south-east boundary of Lot 13 adjacent to Blue Mines Road as shown on the plan of subdivision; such mounding to build up the existing low lying ridge with any associated mounding to provide screening of the building platforms on Lots 8-11 as viewed from Blue Mines Road. The mounding required in terms of this condition shall be vegetated consistent with the vegetation in the immediate vicinity.

45. The vegetation established on the mounding provided in accordance with Condition 44 shall be maintained by the owner(s) of Lot 13 (being the owners of Lots 1-6 and Lots 8- 11).

Note: Condition 45 shall be subject to a consent notice that shall be registered on the record of titles for Lots 1-6, Lots 8-11 and Lot 13 pursuant to section 221 of the Resource Management Act 1991.

46. Prior to section 224(c) certification the consent holder shall provide an Archaeological Assessment from a suitably qualified person relating to any archaeological features and values present on the site.

47. The consent holder shall ensure that any earthworks associated with the creation of residential building platforms and associated works (including access) do not adversely affect any archaeological features and values identified in the Archaeological Assessment, unless an archaeological authority has been granted by Heritage New Zealand Pouhere Taonga. The consent holder shall adopt the Heritage New Zealand Pouhere Taonga Archaeological Discovery Protocol that is attached to the Heritage New Zealand Pouhere Taonga submission on RC 190040.

<u>Note:</u> It is noted that the consent holder and Heritage New Zealand Pouhere Taonga have agreed that:

a. *As the residential building platforms on Lots 4, 5 and 6 will require an access driveway and services trench to cross an identified water race that the access and services trench will cross the water race at the same point. A culvert is to be placed within the water race where the access and services trench crosses; and each end of the culvert is to be finished with stacked schist, to make a feature of the water race; and*
b. *All identified mine shafts are to be protected by way of grating permanently placed over the top of these features to stop persons from falling down into these features and to protect these features from further degradation; and*
c. *Earthworks are to be restricted to the 25m x 25m residential building platforms and curtilage areas shown on the plan of subdivision; and*
d. *The right of way that provides access to Lots 2, 4, 5 and 6 coincides with the location of an old dray road/track. An archaeological authority will need to be applied for with respect to upgrading of the carriageway and the excavation of a services trench within the right of way.*

48. The owner(s) of Lots 1-6 and Lots 8-11 is/are aware of and will take all reasonable and appropriate steps to advise all purchasers, lessees, licensees or tenants, or any other user coming to use having an interest in Lots 1-6 and Lots 8-11 or any part thereof:

a. The proximity of adjoining pastoral farming, viticultural and horticultural properties.
b. The usual incidences of pastoral farming, viticulture and horticulture including (but without limitation), stock handling, haymaking (through the night), spraying (including spraying of pesticides), rabbit control (by use of helicopters, poisoning and night shooting), deer stag roaring, 24 hour overhead irrigation, harvesting, frost fighting (including wind machines, helicopters, heat pots and sprinklers), land cultivation and associated dust and noise, audible bird scaring, crop netting, use of machinery and traffic movement associated with

crop harvesting, all of which may have consequences beyond the boundaries of the proximate rural pastoral farming, viticulture or horticulture properties.

49. All new boundary fences on Lot 1 and Lot 3 and any fences around or on the curtilage areas of Lot 2, Lots 4-6 and Lots 8-11 shall be post – and wire with rabbit fencing.

Note: All new boundary fences on Lot 1 and Lot 3 and any fences around or on the curtilage areas of Lot 2, Lots 4-6 and Lots 8-11 shall be post – and wire with rabbit fencing.

50. There shall be no new boundary fences on Lot 2, Lots 4-6 and Lots 8-11.

Note: Condition 50 shall be subject to a consent notice that shall be registered on the record of titles for Lot 2, Lots 4-6 and Lots 8-11 pursuant to section 221 of the Resource Management Act 1991.

51. All land use activities including any new buildings/structures, earthworks, fences and any operation of mobile plant and/or persons working near exposed line parts on Lot 3 shall comply with the New Zealand Electrical Code of Practice for Electrical Safe Distances (NZECP 34:2001).

Note: Condition 51 shall be subject to a consent notice that shall be registered on the record of title for Lot 3 pursuant to section 221 of the Resource Management Act 1991.

52. There shall be no subdivision of Lot 14 and Lot 15.

Note: Condition 52 shall be subject to a consent notice that shall be issued on the record of title for Lot 14 and Lot 15 pursuant to section 221 of the Resource Management Act 1991.

53. Prior to section 224(c) certification the consent holder shall undertake mounding and mitigation plantings within Lots 6-11 in accordance with the Proposed Subdivision of Lot 2 DP 523873, Drawing 01, Rev B, dated 21.09.21 and Proposed Mitigation Plan Lot 2 DP 523873, Rev B, Drawing 03, dated 21.9.21.

54. The vegetation established on the mounding provided in accordance with Condition 53 shall be maintained by the owner(s) of the respective lots in which it is located (being the owners of Lots 6-11).

Note: Condition 54 shall be subject to a consent notice that shall be registered on the record of title for Lot 6-11 pursuant to section 221 of the Resource Management Act 1991.

55. For the purpose of mitigating the potential severity of hazard caused by wildfire, the consent holder or successor shall ensure that a defendable space of no less than 20m from each side of the building platforms located on Lots 2, 4-6, and 8-11 is maintained at all times. Within the 20m defendable space any planted vegetation shall be low selected for its low flammability and shall be maintained in isolated clumps so as to provide opportunities to halt or slow the spread of fire.

Note: Condition 55 shall be subject to a consent notice that shall be registered on the record of title for Lot 6-11 pursuant to section 221 of the Resource Management Act 1991.

Notes:

1. *All charges incurred by the Council relating to the administration, inspection and supervision of conditions of subdivision consent shall be paid prior to section 224(c) certification.*
2. *A development contribution of $17,720.00 (exclusive of Goods and Services Tax) is payable for roading pursuant to the Council's Policy on Development and Financial Contributions contained in the Long Term Community Plan. Payment is due upon application under the Resource Management Act 1991 for certification pursuant to section 224(c). The Council may withhold a certificate under section 224(c) of the Resource Management Act 1991 if the required Development and Financial Contributions have not been paid, pursuant to section 208 of the Local Government Act 2002 and Section 15.5.1 of the Operative District Plan.*
3. *Any trees or vegetation planted shall comply with the Electricity (Hazards from Trees) Regulations 2003 or any subsequent revision of the regulations.*

4. *Please be advised that Transpower NZ Ltd has a right to access its existing assets under s23 of the Electricity Act 1992. Any development must not preclude or obstruct this right of access. It is an offence under s163(f) Electricity Act 1992 to intentionally obstruct any person in the performance of any duty or in doing any work that the person has the lawful authority to do under s23 of the Electricity Act 1992.*

Land Use

1. This land use consent authorises residential building platforms on Lot 2, Lots 4-6 and Lots 8-11 as shown on the Proposed Subdivision of Lot 2 DP 523873 Rev B Drawing 01 and Proposed Mitigation Plan Lot 2 DP 523873 Rev B Drawing 03 dated 21.9.21.
2. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall be located on the residential building platforms on Lot 2, Lots 4-6 and Lots 8-11 as identified on the survey plan.
3. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall have a maximum height of 6.0 metres above existing ground level as at 4 February 2019.
4. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall comply with Rule 4.7.6D(a)(i) – (iii) of the Operative Central Otago District Plan that relates to the materials to be used in building finishes and colours for exterior walls, accents and trim and roofs provided that:

    a. Exterior paint colours shall be recessive with a maximum reflectivity values of 30% and shall be a matt finish; and
    b. Stain colours shall be of a natural hue or black, rather than other colours; and
    c. Roof cladding shall have a maximum reflectivity value of 20% or less and shall be dark recessive colours in the range of browns, greys – not black/ebony; and
    d. Roof cladding shall be either Cedar shakes or shingles, metal roofing with standing seam profile, corrugate. Multi rib or trapezoidal roofing is not permitted.
    e. Dwellings and accessory buildings shall be designed to have simple gable roof forms, with roof pitches in the range of 25 to 45 degrees.

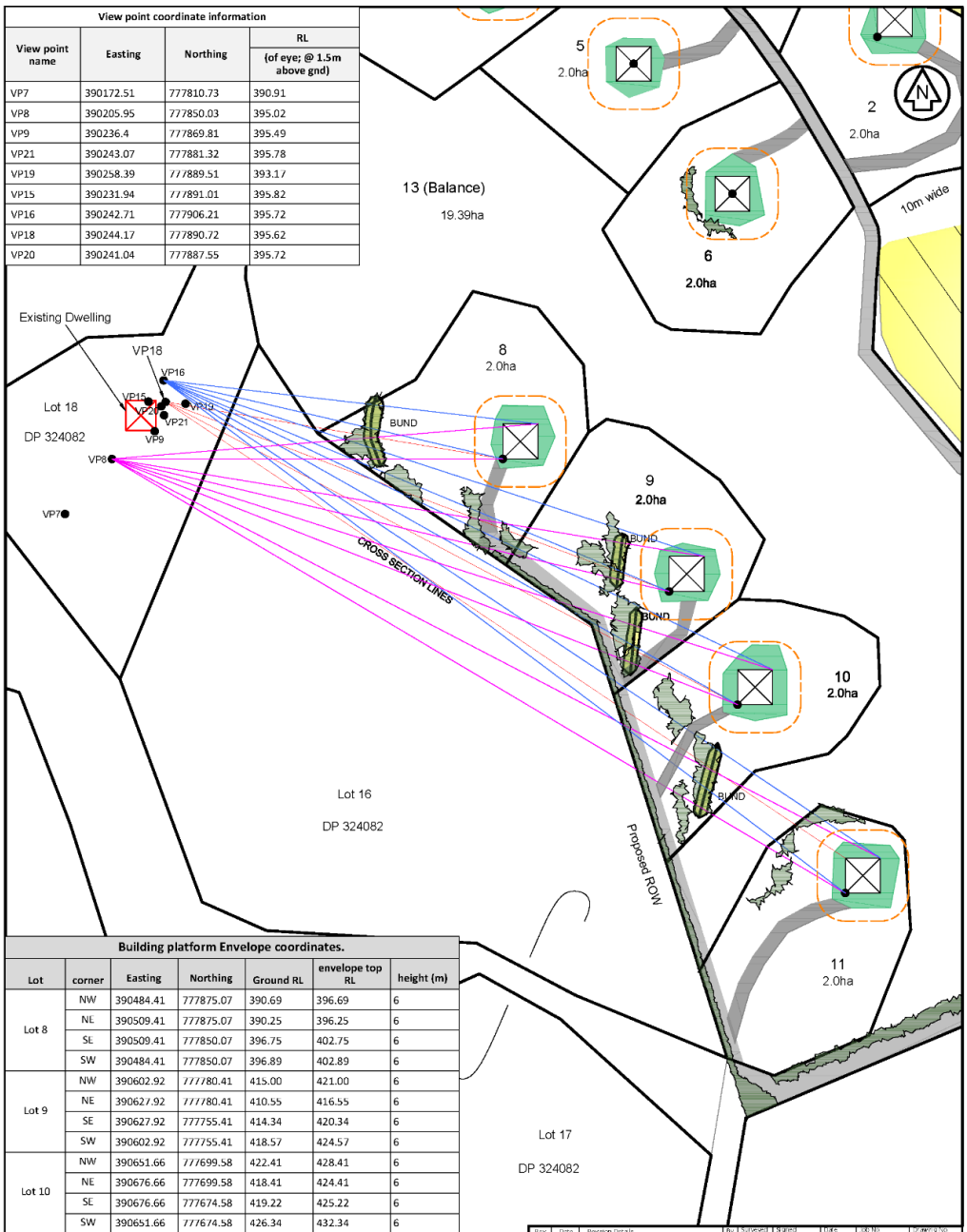
<u>Note</u>: Simple gable roof forms are to consist of uniform horizontal lengths, peaks and pitches on both sides of the roof peak. This rule allows for multiple gable formations within each building platform.

5. Any dwelling and accessory building on Lot 2, Lots 4-6 and Lots 8-11 shall utilise low intensity indirect light sources for all exterior lighting applications. Flood lighting or accent lighting is not permitted.
6. Pursuant to section 125(1) of the Resource Management Act 1991 this land use consent lapses 10 years after the date of commencement of this consent.
7. Unless it is otherwise specified in the conditions of this consent, compliance with any monitoring requirement imposed by this consent shall be at the consent holder's expense.
8. The consent holder shall pay to the Council all required administration charges fixed by the Council pursuant to section 36 of the Act in relation to:

    a. Administration, monitoring and inspection relating to this consent; and
    b. Charges authorised by regulations.

<u>Note:</u> Land use consent will be required to authorise residential activity on Lot 2, Lots 4-6 and Lots 8-11 pursuant to Rule 4.7.2(i) of the Operative District Plan.

View point coordinate information			
View point name	Easting	Northing	RL (of eye; @ 1.5m above gnd)
VP7	390172.51	777810.73	390.91
VP8	390205.95	777850.03	395.02
VP9	390236.4	777869.81	395.49
VP21	390243.07	777881.32	395.78
VP19	390258.39	777889.51	393.17
VP15	390231.94	777891.01	395.82
VP16	390242.71	777906.21	395.72
VP18	390244.17	777890.72	395.62
VP20	390241.04	777887.55	395.72



Building platform Envelope coordinates.						
Lot	corner	Easting	Northing	Ground RL	envelope top RL	height (m)
Lot 8	NW	390484.41	777875.07	390.69	396.69	6
	NE	390509.41	777875.07	390.25	396.25	6
	SE	390509.41	777850.07	396.75	402.75	6
	SW	390484.41	777850.07	396.89	402.89	6
Lot 9	NW	390602.92	777780.41	415.00	421.00	6
	NE	390627.92	777780.41	410.55	416.55	6
	SE	390627.92	777755.41	414.34	420.34	6
	SW	390602.92	777755.41	418.57	424.57	6
Lot 10	NW	390651.66	777699.58	422.41	428.41	6
	NE	390676.66	777699.58	418.41	424.41	6
	SE	390676.66	777674.58	419.22	425.22	6
	SW	390651.66	777674.58	426.34	432.34	6
Lot 11	NW	390728.45	777565.00	444.26	450.26	6
	NE	390753.45	777565.00	441.90	447.90	6
	SE	390753.45	777540.00	447.58	453.58	6
	SW	390728.45	777540.00	447.06	453.06	6

Rev	Date	Revision Details	By	Surveyed	Signed	Date	Job No	Drawing No
A	10.06.21	Update mitigation planting. Add NZ bund.	GT	JS		11.05.21	17215	03
		add corner names to coordinate table		Drawn	Signed	Date	Scale	
B	21.9.21	Lot 16 adjusted to include bund	SB	GT		19.05.21	1:2500@ A3	
				Designed	Signed	Date	Datum & Level	Rev
							LP2000	B

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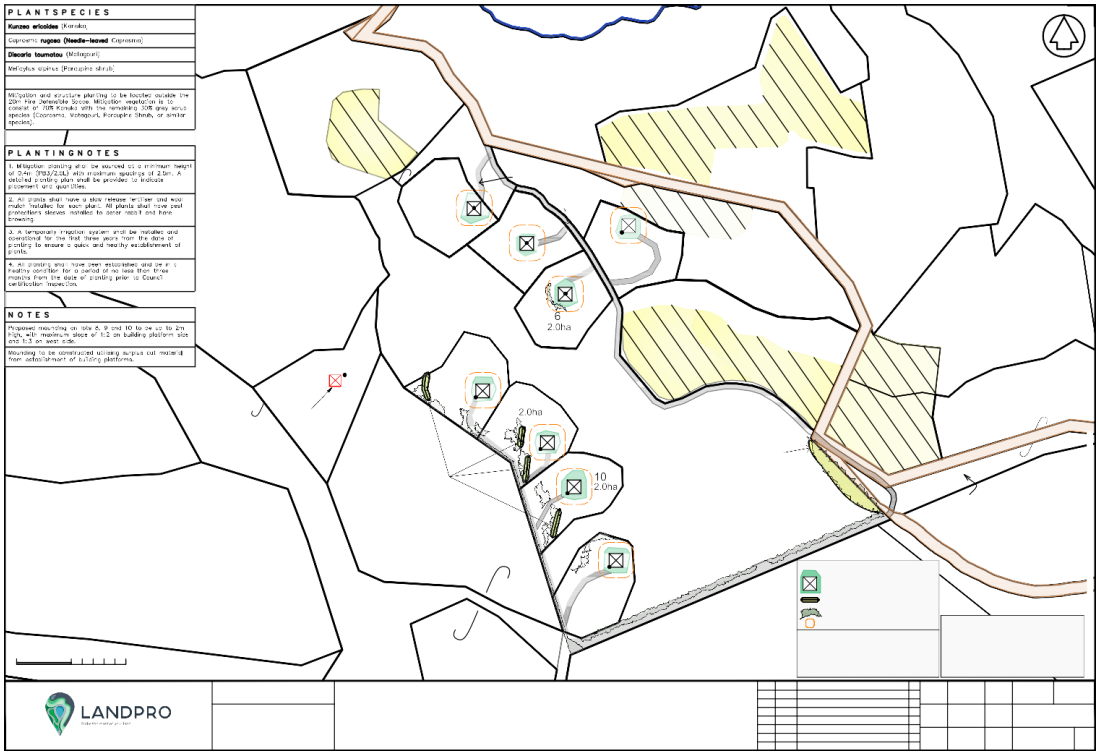
Client
Bendigo Station Ltd

NOTES
- All dimensions shown are in metres unless otherwise shown
- Copyright on this drawing is reserved
- Check any electronic data against the hardcopy plans to ensure it is the latest version
- This plan is not to be used as part of sale and purchase of this site. It is shown as an indicative plan only. Final dimensions and areas may vary on final survey

PROPOSED MITIGATION PLAN
LOT 2 DP 523873

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

L17215 - 14 Lot Subdivision - Bendigo Station\CAD\17215_ML_SCH_LI.dwg Plotted 21.09.2021


PLANTSPECIES
Kunzea ericoides (Kanuka)
Coprosma rugosa (Needle-leaved Coprosma)
Discaria toumatou (Matagouri)
Melicytus alpinus (Porcupine shrub)
Mitigation and structure planting to be located outside the 20m Fire Penetrable Space. Mitigation vegetation is to consist of 70% Kanuka with the remaining 30% grey scrub species (Coprosma, Matagouri, Porcupine Shrub, or similar species).
PLANTINGNOTES
1. Mitigation planting shall be sourced at a minimum height of 0.4m (PB3/2.0L) with maximum spacings of 2.5m. A detailed planting plan shall be provided to indicate placement and quantities.
2. All plants shall have a slow release fertiliser and weed mulch installed for each plant. All plants shall have pest protections sleeves installed to deter rabbit and hare browsing.
3. A temporary irrigation system shall be installed and operational for the first three years from the date of planting to ensure a quick and healthy establishment of plants.
4. All planting shall have been established and be in a healthy condition for a period of no less than three months from the date of planting prior to Council certification inspection.
NOTES
Proposed mounding on lots 8, 9 and 10 to be up to 2m high, with maximum slope of 1:2 on building platform side and 1:3 on west side.
Mounding to be constructed utilising surplus cut material from establishment of building platforms.
8
2.0ha
2.0ha
10
2.0ha
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