

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2024] NZEnvC 176

IN THE MATTER

of the Resource Management Act

1991 AND

an appeal under s120 of the Act

BETWEEN

WAIMARINO QUEENSTOWN
LIMITED (AS SUCCESSOR TO)
B PROPERTY GROUP LIMITED

(ENV-2023-CHC-1)

Appellant

AND

QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner C J
Wilkinson Environment Commissioner J
T Baines

Hearing: at Queenstown on 29, 30 April 2024 and 1, 2 May 2024
site visit on 29 April 2024

Appearances: B Matheson and H Mahon for the appellant
M E Davenport for the respondent
G M Todd for Bob's Cove – Punatapu Community
Trust B Farrell in person

Last case event: 31 May 2024

Date of Decision: 23 July 2024

Date of Issue: 23 July 2024

INTERIM DECISION OF THE ENVIRONMENT COURT



INTERIM DECISION

- A: Consent is granted, subject to a final set of conditions to the satisfaction of the court.
- B: The appellant is to produce a further set of conditions addressing issues raised in the decision as to the use of the application under s221(3). The amended conditions are to be filed by 2 August 2024.
- C: The Council and Community Trust will be given the opportunity to make submissions on those conditions by 16 August 2024.
- D: The court will make the final decision as to the conditions on the papers.

REASONS

[1] This is a decision on an appeal against a decision to decline consent to construct and operate a visitor accommodation lodge at 59 Tui Drive, Bob's Cove, Queenstown.

Original proposal

[2] The visitor accommodation proposal (the proposal) that was the subject of the first instance decision included 24 standalone villas; owner's residence (which can be divided into four internal villas); manager's quarters, reception area, restaurant, sauna, yoga studio and distillery. Twelve of the villas (referred to as the premium villas) would have kitchen facilities.

[3] The original proposal included a subdivision component. Separate freehold titles were sought for each of the villas and for each of the communal facilities.

[4] Resource consent was also sought for earthworks and landscaping and to vary a condition requiring an existing consent notice under s221(3) of the Act. The proposal was declined consent by a panel of commissioners ('the Panel').

[5] Following mediation, and prior to an exchange of evidence, the proposal was refined, with the result that the Council supported a grant of consent.

[6] The proposal was further amended prior to and during the hearing. The details of these amendments are explained further on in this decision.

The parties and their witnesses

[7] The original application and ensuing appeal had been filed by the B Property Group Ltd. Subsequently, as owner of the site, and successor to that entity, Waimarino Queenstown Ltd ('the appellant') took over prosecution of the appeal.

[8] For the appellant, we heard evidence from:

- (a) Mr Andrew McIntosh, sole director of Waimarino Queenstown Ltd;
- (b) Mr Craig Woodcock (surveyor);
- (c) Mr David Rider (infrastructure);
- (d) Ms Dawn Palmer (ecology);
- (e) Mr Jan Hammer (arborist);
- (f) Mr Jason Bartlett (traffic);
- (g) Mr Jon Farren (acoustic);
- (h) Mr Peter Marment (architecture);
- (i) Mr Steve Skelton (landscape);
- (j) Mr Jason Blair (visual simulations);
- (k) Mr John Edmonds (planning); and
- (l) Mr Blake Hoger, Mr Mark Wikstrom and Brent and Sally O'Donohue – residents of Bob's Cove.

[9] The Council called evidence from:

- (a) Ms Yvonne Pflüger (landscape); and
- (b) Ms Alana Standish (planning).

[10] A number of original submitters joined the appeal under s274, the majority of whom were opposed to a grant of consent. Although some withdrew before the hearing, the remaining parties formed an incorporated body, the Bob's Cove- Punatapu Community Trust ('Community Trust'). The Community Trust was opposed to the proposal and supported the first instance decision to decline consent.

[11] The Community Trust called evidence from:

- (a) Mr Ben Espie (landscape);
- (b) Mr Carey Vivian (planning); and
- (c) Ms Carolin Friese (a trustee of the Bob's Cove-Punatapu Community Trust).

[12] Mr Ben Farrell, a s274 party, supported the proposal although he took no active role in the court hearing. However, his support for the proposal was qualified; his s274 party notice stated that the residents of the community "... should be allowed to access the site and use the facilities, as this will provide a benefit to the local community, reinforce its compatibility with the Glen Tui subdivision ...".

[13] During the hearing, the appellant reached agreement with Mr Farrell and proposed that the restaurant, sauna, spa and yoga studio could be used by up to eight Bob's Cove residents, but only when there is an equivalent number of vacancies at the accommodation facility. This would operate under a membership arrangement.

The site and environs

[14] Bob's Cove is a rural living community located approximately 12km west of Queenstown on the Glenorchy-Queenstown Road. The site comprises two lots that are amalgamated into one parcel of land (which we refer to as Lot 100 and Sec 1) with a total site area of 18,086m² ('the site').

[15] The site is partly covered in bush although the central part of the site is largely clear. The site is elevated approximately 14m above the lake, with a setback of 105m from the beach at Bob's Cove.

[16] The site falls consistently from east to west, down to a grassed reserve area on the frontage of the lake. The reserve is managed by the Department of Conservation (DoC).

[17] A recreation reserve (also managed by DoC) comprising an established beech forest joins the site to the south. The reserve contains an established network of walking tracks which attract high levels of recreational use.

[18] An incised gully runs the length of the northern boundary and contains mature Mountain Beech, whereas north of that gully and to east of the site is the emerging Glentui Heights subdivision.

District plan zoning

[19] The site has a split-zoning under the Proposed District Plan ('PDP'). Lot 100 is within the southern corner of the rural residential Bob's Cove sub-zone ('BCSZ'), whereas Sec 1, adjoining the southern site boundary, is within a Rural Residential zone ('RRZ').

[20] The RRZ and adjoining DoC reserve on the southern side of the site is within an Outstanding Natural Landscape ('ONL'), which encompasses land extending to Sunshine Bay. However, the BCSZ and RRZ are included as exceptions to the ONL provisions under Policy 6.3.1.1.

[21] The site is also subject to a Wāhi Tūpuna overlay under the PDP.¹

[22] The site and the wider BCSZ has a complex zoning and extensive consent

¹ PDP, Chapter 39.6, Schedule of Wāhi Tūpuna, Number 16, Punatapu (Bob's Cove and surrounds).

history, which (unusually) must be considered in the administration of its provisions. The BCSZ does not include a masterplan depicting how the zone is to be developed, although the policy framework is reasonably prescriptive as to the character outcomes for the zone.

[23] Although we consider the PDP provisions further on in this decision, it is worth noting that the intended character for the BCSZ is achieved by a requirement of at least 75% of the zone being identified as “undomesticated area” and 25% of the zone as “development land” (which we refer to as the BCSZ character outcomes).

[24] No buildings are able to be constructed within the undomesticated area and of that, 50% is to be planted (and maintained) in a closed canopy of indigenous vegetation.

[25] However, and this is the unusual and (we consider) inefficient feature of the BCSZ; the rules leave the identification of these important areas to the subdivision resource consent process, particularly as it was apparent that the Council had not been monitoring these specific outcomes since the first subdivision consent was granted in 2006.

[26] The undomesticated and development areas, once identified, are to be protected by way of a consent notice registered against the title to the lots authorised by the subdivision consent. That protection is intended to be for the benefit of all lot holders *and* the Council (see r 27.7.3, and corresponding land use rr 22.5.26, and 22.5.27.²

[27] A further relevant method in the achievement of the intended character outcomes is the density rule. This prescribes a maximum average density of

² Rule 22.5.26 states that where areas have not been identified as part of the previous subdivision they are to be identified and given effect to by way of a covenant as part of any land use consent application.

residential units which is to be not more than 1 per 4,000m² net site area calculated over the total area of the zone. However, this density rule does not apply to visitor accommodation.

[28] The site was created by the 2006 subdivision under which that part of the subdivision on the southern side of Glenorchy-Queenstown Road is referred to as the Glentui Heights land. Access to all of this land is through a single shared access point referred to as the drive which extends 620m from the Glenorchy- Queenstown Road to a cul-de-sac head that provides a crossing into the site.

The Council's decision

[29] The original proposal also included a restaurant, sauna, yoga studio and distillery referred to as communal facilities for the visitors, none of which would be open to the public.

[30] The planner reporting to the Panel had initially recommended refusing a grant of consent, although by the conclusion of the hearing that recommendation was amended to one of support for a grant of consent, on the basis that the proposed conditions addressed issues of concern to the planner.

[31] In the evaluation of the landscape effects of the proposal, the Panel considered that the identification of domesticated and undomesticated areas were a key factor, noting that RM130174 had established those “at least insofar as that resource consent was concerned”.

[32] However, the Panel did not accept the proposition that these areas needed to be permanently fixed and could not be changed by a different proposal. The Panel considered that new domesticated and undomesticated areas on the site could be established – “otherwise the Plan provisions would have the effect of creating a prohibited activity status for all but an initial resource consent”.

[33] That said, the Panel found that fundamentally the proposal would not have

a rural residential character or be compatible with one. When viewed from the lake and public trails, within which context the proposal, or parts of it would be frequently visible, the proposal would have a character closer to high density residential development, with multiple horizontal rows stacked vertically one atop the other.

[34] The Panel compared the proposal with the type of development generally anticipated being detached buildings, generally one or two storeys in height, and separated from other buildings not just horizontally but vertically by open space and vegetation.

[35] The Panel otherwise acknowledged the effort taken by the appellant to design the proposal to a high standard of visual design quality, noting that an activity of the sort proposed by the appellant is not something that is inherently unacceptable, including the various proposed ancillary functions. However, it was the visual effect of vertically stacking the villas and buildings lined in horizontal rows that was the main problem, in terms of the policy requirement to maintain a rural residential character.

[36] The Panel found that neither of the s104D gateways were passed such that the application had to be declined.

The amended proposal before the court

[37] As foreshadowed earlier, after the Council decision, the proposal was amended by a slight repositioning of 11 of the villas, to address the visual effects associated with the vertical stacking of the development, that being one of the reasons for the Panel's decision to decline. The appellant proposed additional amenity planting and cascading of the rooftop planting to assist in breaking up the visual effects of the vertically stacked buildings.

[38] After the Council hearing, the appellant obtained an affected party approval from Glentui Heights Ltd approving the shared use of the drive for the proposed

non-residential use which had also been a reason for the Panel's decision to decline.

[39] These amendments were notified to the court and to the parties, in December 2023 following a telephone conference at which the court was told that the Council would not be defending the Panel's decision. Counsel advised the court that it was satisfied that these amendments were sufficient to overcome the Panel's concerns with the proposal.

[40] In support of that changed position, the Council called evidence from Ms Pflüger (landscape architect) and Ms Standish (planner). Ms Standish was requested to consider the amended proposal in February 2024, after the decision had been made not to defend the Panel's decision. At that point Ms Standish quite properly recognised that she would need an assessment from an expert on landscape issues, which she considered were critical issues. Ms Pflüger was then approached and asked for her expert opinion.

[41] Concerns were raised by the Community Trust as to the basis for the Council's decision to decline to uphold its own decision.³ For the court's part, we have a measure of disquiet with the decision of any council not to defend its own first instance decision, particularly where the case involves important policy issues and is made without the involvement of relevant experts, as appears to have occurred on this occasion. However, this is not a matter we need to say anything more about in this decision; enough has been said about a council's obligation in *Second Star Ltd v Queenstown Lakes District Council*.⁴

[42] It suffices to note that additional, and more consequential amendments were made to the proposal after the exchange of evidence-in-chief and during the

³ Mr Todd had sought to establish who had made that decision, although an objection was raised to that question.

⁴ *Second Star Ltd v Queenstown Lakes District Council* [2024] NZEnvC 129.

court hearing, notably:

- (a) removal of the subdivision component of the proposal and a related condition prohibiting any future consideration of subdivision for at least 45 years;
- (b) deletion of five proposed buildings (villas 2b, 3d, 4c and 5a;⁵ and the building intended (initially) to accommodate a distillery then re-purposed as a guest lounge);
- (c) removal of villa 4c allows for retention of several mature beech trees whereas removal of all four villas has resulted in more vegetation generally whilst breaking visibility of the built form;⁶
- (d) reduction in the size of villa decking and the size of the porte cochère adjacent to the reception building;
- (e) additional covenanted areas associated with the extent of the development areas and protection of planting on the undomesticated areas of land;
- (f) reduction in size of the manager's residence; and
- (g) a commitment to progressively clear the exotic and pest vegetation species between the site and the foreshore and replant in a manner described in a Foreshore Vegetation Enhancement Plan. The objective of this condition is to allow a transition to native vegetation while maintaining screening of the development.

[43] The removal of the subdivision component of the proposal is considered to be a material amendment because:

- (a) the definition of the site boundaries impacts on the calculation of the site coverage percentage for each of the buildings;
- (b) the original proposal was to create 27 titles potentially all in separate ownership with many of them being between 106m² and 158m².

⁵ Two of which appear to be premium villas.

⁶ Skelton, NOE at 78 and 79.

These lot sizes are significantly smaller than the lot sizes provided for in the BCSZ which are to achieve a zone-wide average of 4000m²;

- (c) this amendment in particular results in the proposal better aligning with the planning outcomes for the zone, in contrast to the amended proposal announced to the parties on 23 December 2023;⁷ and
- (d) despite the subdivision not presenting any obvious on-site manifestation, the layout of the cadastral boundaries of sites within the BCSZ has planning implications. The resulting density would be quite out of kilter with the density contemplated by the BCSZ provisions. Our position on this is not tempered by the fact that the density rule is only intended to apply to residential activities.

[44] The deletion of five of the original buildings is a further material amendment, for reasons not limited to overall intensity of development. The deletion results in a corresponding increase in the extent of the planted undomesticated area. That planting will further achieve visual screening of the buildings.

The communal facilities

[45] The communal facilities comprise a restaurant, yoga studio and a day spa. The yoga and day spa buildings collectively are 93m² which includes linking structure between the two buildings. The yoga studio contains a 19.7m² deck area to the west. These facilities would only be used by guests staying on site, although one of the submitters sought that the restaurant be available for a small, and select group of residents of the wider community, which we address further on in this decision.

[46] The restaurant would be required to close external doors by 8 pm unless noise monitoring in accordance with proposed conditions demonstrates that this

⁷ Despite the Council's support for that amended proposal in its evidence-in-chief.

is not necessary to achieve prescribed limits, in which case the external doors would be closed by 10 pm. External loudspeakers to the restaurant would be switched off at 8 pm.

Visual Amenity

[47] The built form of the villas is deliberately small in scale. Low, flat green roofs have been used to assist in blending the buildings with the surrounding vegetation. Buildings will be clad in dark stained timber.

Tree protection and transplantation

[48] Construction would require some vegetation removal including of mature beech trees and lancewoods. Mr Hammer provided advice on the feasibility of transplanting some of these existing trees. His evidence recommends tree protection measures that would be put in place during construction which would be achieved through the implementation of a site-specific tree protection management plan to be certified by the Council as a condition of consent. He recommended a methodology for determining tree protection zones and structural root protection zones that should also be incorporated.

[49] A plan submitted with the appellant's closing submissions identifies 62 beech trees to be removed, with eight of those to be transplanted, 40 lancewoods to be removed, with 39 of those to be transplanted.⁸ A second plan shows the location of the transplanted trees.⁹

⁸ Prepared by Patch and dated 31 May 2024.

⁹ Prepared by Patch and dated 31 May 2024.

History of subdivision consents within the BCSZ

RM050664 – 2006

[50] The first subdivision of land under the BCSZ provisions was granted in 2006. That authorised the creation of 106 lots across the zone on the basis of a “Bob’s Cove Land Use Plan” (‘BCLUP’) which master-planned the entire zone. The BCLUP (along with the accompanying subdivision plan) identified a development area, a buildable area, and an undomesticated area in each lot.

[51] The BCLUP further identified two large areas of undeveloped open space grass land either side of Glenorchy-Queenstown Road, and areas of revegetated native bush, complying with the requirement of the then applicable BCSZ provisions.

[52] This open space area is intended to contribute to the 75% zone-wide undomesticated area requirement, while also serving the purpose of allowing the 4,000m² zone-wide average lot size to be achieved across the zone.

[53] The provision of that large open space area has enabled the creation of much smaller lots for rural residential living. This area was intended to be protected by a consent notice although that has not (yet) occurred. However, its retention as the open space component of the undomesticated area requirement is critical to the achievement of the BCSZ character outcomes.

[54] Land on the northern side of the Glenorchy-Queenstown Road has been developed, although on the southern side, including land referred to as the Glentui Heights subdivision, full development has not yet happened.

[55] The 2006 subdivision consent allowed the creation of 35 lots on the southern side of Glenorchy-Queenstown Road, including one of the lots within the subject site, Lot 100.

RM130174

[56] The layout of the 35 approved lots was refined by a further subdivision in 2013, being RM130174, that authorised the creation of the 35 lots to be constructed in eight stages. Of these, 32 were for residential purposes, including Lot 100, where three development areas were identified. A land use consent was sought in relation to buildings on some of the lots, excluding Lot 100.

[57] Relevantly, RM130174 identified the undomesticated areas comprising 78.3% of the zone, of which 50.4% would comprise a mix of retained vegetation and areas to be planted in indigenous vegetation. Planting has not yet been undertaken on all of the lots, including on Lot 100, as the subdivision consent conditions require preparation of a further landscape plan(s) when resource consent is sought for the dwellings to be established in the development areas identified on each of the lots.

[58] Conditions also relate to the location of development and buildable areas¹⁰ within each of the lots, and importantly the areas where development is not to occur (in the undomesticated areas).

Consent notice conditions

[59] Ongoing conditions intended to be the subject of the consent notice are separately identified in conditions, recognising that the subdivision is to be staged. Conditions relevant to this proceeding commence at Condition 32 (for specified lots, including Lot 100). Conditions 32 (a) and (c) pertaining to building controls require registration of a consent notice with ongoing restrictions that:

- (a) buildings and structures to be located within the development areas are to be identified as a covenant area on the survey plan;
and
 - (b) that no domestic activities are permitted within the undomesticated
-

¹⁰ Only development areas are required to be identified under the BCSZ.

areas identified in similar manner.

[60] Consent Notice 10521522.10 has been registered on all existing lots created by RM130174, including Lot 100, giving effect to r 22.5.26. Relevant consent notice conditions commence at sub-para i) of conditions listed in Consent Notice 10521522.10 produced to the court.

[61] Areas of vegetation to be protected are depicted on the approved landscape plans, which includes areas described as the “protected tree covenant areas”. We have not been able to ascertain whether the tree protection covenant areas were in fact connected to the r 22.5.26 requirement or whether the protection was justified due to the trees’ ecological values.

[62] A reading of the officer reports indicated that r 22.5.26 was not central to the identification of trees to be protected. As to that, we further note that some of the protected trees within these tree protection covenant areas are contained within the boundaries of some of the development areas, including in relation to Lot 100.¹¹

[63] It is also apparent that the Ecological Management and Maintenance Specification Plan (‘EMMP’) is intended as the principal method by which the tree protection objectives in Condition 28 of RM130174 are to be achieved and implemented.

[64] We will return to consider the consent notice conditions, as these are relevant in our consideration of the s221(3) application.

Subsequent subdivision consents

[65] A variation to RM130174 was granted in 2015. That allowed for Lot 100 to be created as a separate saleable stage. The resource consent decision amended

¹¹ RM130174 approved plans (common bundle at 214 and 219).

various RM130174 conditions, including an amendment to Condition 32.

[66] Further subdivision consents have been issued for the wider Glentui Heights subdivision, most recently in October 2021. That consent increased the overall number of lots able to be created on the southern side of Glenorchy- Queenstown Road to 43 lots, including Lot 100, identifying development areas within each of the lots, although the three development areas approved for Lot 100 were unchanged.

[67] All subdivisions were granted on the basis of a subdivision layout found to be consistent with the nature of development anticipated by provisions of the BCSZ, for rural residential living in particular.

[68] RM130174 was granted on the basis that the subdivision layout complied with the average lot size of at least 4,000m², albeit within an increased density of lots compared to the lots to the east and south.¹² Each lot was intended to accommodate a dwelling(s) that being the predominant activity (along with rural) provided for in the BCSZ.¹³

Section 1 – land swap

[69] Section 1 results from a subdivision approved by the Council in 2018. The site then formed part of the recreational reserve managed by DoC and was zoned rural. However, this land was the subject of a land swap arrangement, in furtherance of which, the site was rezoned RRZ under the new PDP which was underway when the subdivision consent was being considered.

[70] The resulting subdivision consent identified an area described as a rural amenity area comprising 1,442m² within which a dwelling would be located, with

¹² See s42A report in bundle.

¹³ See Objective 22.2.2.

the remainder to comprise new or retained indigenous vegetation.

[71] Conditions provided that access would be in the form of a sealed driveway from the turning head of Glentui Drive extending through Sec 1, which would be shared with adjoining Lot 100. The driveway would serve each of the residential dwellings in the three development areas in addition to the residential dwelling allowed under the RRZ.

[72] The 2018 consent was varied by a decision on a further application in April 2022. That required the amalgamation of Lot 100 with Sec 1, which occurred in May 2022. Although resource consent was granted that would allow the de- amalgamation, if resource consent for this proposal is granted the land would continue to be held in one parcel. The subdivision consent permitting de- amalgamation would be surrendered.

[73] A variation allowed staging which was simply to avoid the need to seal the road down to Sec 1 and then potentially have to rip that back up again if the current consent was granted.¹⁴

[74] We note that during the hearing an issue arose as to whether the 6m height limits for buildings within the BCSZ should also apply to the buildings on Sec 1 as a result of the consent notice that is or should have been registered under RM180302, as the height limit within the RRZ is otherwise 8m.

[75] Mr Edmonds disagreed with that interpretation, although that is not an issue we are required to resolve. It suffices to note that Sec 1 will remain amalgamated with Lot 100, with the result that it will become subject to a requirement for the consent notice to be registered against each lot.

[76] The owner's residence and six of the villas (in whole or predominantly) will

¹⁴ Edmonds, NOE at 179.

be contained within Sec 1.

Provenance and identification of development and undomesticated areas

[77] At the court's direction, the planners for the appellant and the Council prepared and filed a joint supplementary statement of evidence responding to the court's enquiries as to the identification of undomesticated area/s and development areas approved under the historical consents.

[78] The court was greatly assisted by the efforts of Mr Edmonds, the planner for the appellant, in producing the information, and for the assistance of Ms Standish. As Ms Standish acknowledged at the hearing, to present the information sought by the court was quite a large undertaking, involving interrogation of all past subdivision consent applications, decisions, including stamped approved plans, and subsequent variations.¹⁵

[79] The BCSZ had been introduced into the Operative District Plan ('ODP') following the issuance of a consent order from the Environment Court in 2003, resolving an appeal by the Wakatipu Environmental Society Inc. That zone was carried over (more or less) into the PDP. The purpose of the zone was described in the 2003 consent order as to provide an opportunity for integrated and comprehensive development while maintaining and enhancing the ecological values of the native flora and fauna of the area and protecting the scenic values of the Glenorchy-Queenstown Road and Lake Wakatipu.

[80] The principal method to achieve this outcome involved the division of the zone into development areas and undomesticated areas, referred to earlier in discussing the history of subdivision consents. These areas had been defined in the ODP as:

¹⁵ Ms Standish stated that a table or spreadsheet or some running record of this information would be helpful, although that is not an exercise that has been undertaken within the Council.

Development Area

... include[s] all that land used for:

- a. Buildings;
- b. Outdoor living areas;
- c. Pathways and accessways, but excluding the main access way leading from the Glenorchy-Queenstown Road to the development areas;
- d. Private garden; and
- e. Mown grass surfaces but excluding large areas of commonly owned mown pasture or grazed areas which are to be used for recreational purposes.

Undomesticated Area

... all other land not included in the definition of “Development Area” shall be deemed to be “Undomesticated Area”.

[81] The joint statement from Ms Standish and Mr Edmonds explains that the development and undomesticated areas were first identified as part of RM050664. They were refined by a subdivision consent granted in 2013 (RM130174), and later in 2017 (RM160849) after which the areas have remained mostly unchanged.

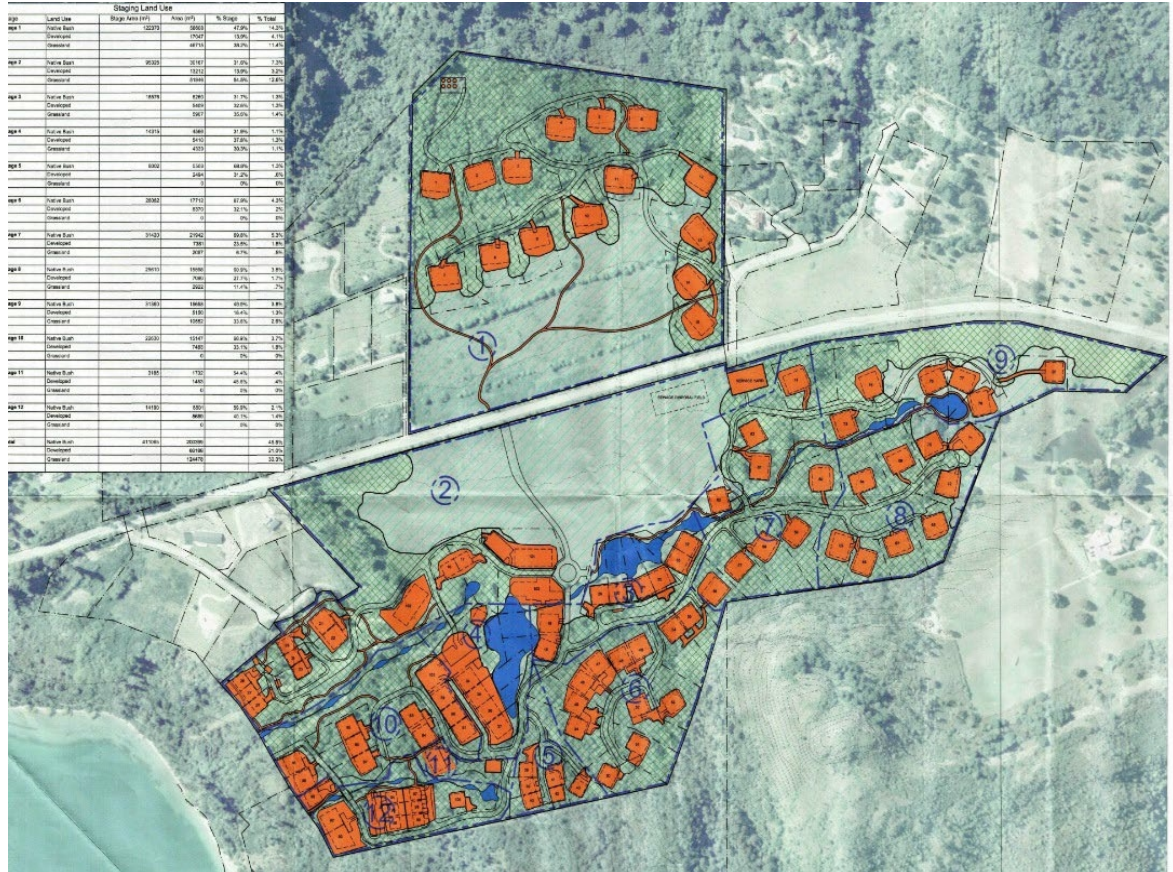
[82] The 2003 consent order inserted policies into the ODP, the purpose of which was to describe the key characteristics of the zone that were to be maintained as follows:

Ensure that an area of open space is retained in the foreground of the buildings and that this remains generally free of vegetation that would otherwise disrupt the open pastoral character of the area and the views of the lake and mountains beyond.

Although it is recognised that buildings will be visible from public places and from adjoining properties, the buildings shall be set amongst the trees in such a manner so as to not dominate the existing and proposed pattern of vegetation.

[83] We accept that the open space area to be retained in the foreground of buildings referred to is that which is in the centre of the sub-zone straddling the Glenorchy-Queenstown Road. Moreover the mature vegetation around the edges

of the zone, together with that large open space pastoral area in the centre, comprises the existing pattern of vegetation at the time the consent order was issued.



[84] Figure 1: Approved subdivision plan from resource consent RM050664: Source Edmonds, Exhibit B3. We have earlier mentioned that another important method for achieving the BCSZ outcomes is the average minimum lot size for residential activity of 4,000m².

[85] Although we questioned witnesses on whether the subdivisions that have occurred since 2005 have consistently achieved that average, and how the density calculations have been made, we were not able to obtain a definitive answer to those questions. There are many lots that are considerably smaller than 4,000m². We assume that the area of the central open space area that is intended to be protected by way of consent notice has been used to achieve the average, which is an assumption also made by Ms Standish.

Statutory considerations

[86] Sections 104 and 104D contain the relevant statutory criteria for our evaluation of a non-complying activity.

[87] Although resource consent is required under many of the district plan rules, overall non-complying activity status derives from the location of parts of 11 of the buildings extending outside the boundary of development areas and into the undomesticated area approved under RM130174.¹⁶

[88] As a non-complying activity, consent may only be granted if we are satisfied that either the adverse effects of the activity on the environment will be minor; or the application is for an activity that will not be contrary to the objectives and policies of the relevant plan/s, these being referred to as the s104D gateway tests.

[89] In our approach to the s104D gateways, we must consider all potential adverse effects, and not only those pertaining to elements that trigger non-complying activity status, and similarly, in relation to the policy gateway.

[90] While it is appropriate to consider the extent to which each adverse effect is mitigated, the first gateway test is whether the adverse effects, as proposed to be remedied and/or mitigated, and taken as a whole, are no more than minor. This holistic approach has been stated in *Waipapa Bay Protection Society Inc v Ariki Tahi Sugarloaf Wharf Ltd*:¹⁷

[108] Evaluation of whether there will be “no more than minor” adverse effects requires a holistic assessment looking over the entire application and the range of effects, not individual effects. This means that some effects may individually be more than minor, such as visual amenity from certain properties, but the overall conclusion across the range of effects may be that the effects are no more than minor. In assessing the degree of effect, regard must be had to the ameliorating

¹⁶ Under r 22.5.25.

¹⁷ *Waipapa Bay Protection Society Inc v Ariki Tahi Sugarloaf Wharf Ltd* [2023] NZHC 3379.

effect of conditions.

(footnotes omitted)

[91] In undertaking our evaluation under the second gateway, we are required to undertake a “fair appraisal of the objectives and policies read as a whole”.¹⁸ If satisfied that (at least) one of the s104D gateway tests is passed, we are required to make an evaluative assessment of the application under s104.¹⁹

[92] A core debate between the planners and landscape architects is whether the appellant’s proposal to establish multiple small buildings across the site, which would be surrounded by indigenous vegetation, better responds to the surrounding environment and better achieves the BCSZ objectives and policies than four large dwellings and associated curtilage including open areas of grass.

The permitted baseline

[93] At the Council hearing, it was common ground between the parties that there is no permitted baseline, as further resource consent would be required for earthworks throughout the zone. A resource consent will also be required for the clearance of vegetation, at least on Lot 100.²⁰

[94] However, the appellant’s counsel contended that, relying on case law, the anticipated future environment is a relevant baseline against which to compare the effects of the proposal. As to that, the Panel’s decision records that the RRZ and BCSZ provisions were said to provide an indicator as to what can be expected to form part of the future anticipated environment, including visitor accommodation, both on the subject site and neighbouring sites.

[95] Essentially, the same position was taken at the hearing before the court. In

¹⁸ *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26 at [79].

¹⁹ Although often relevant s104 matters will be identified before applying the gateway tests.

²⁰ Land use consent was granted alongside the subdivision for some of the lots in 2013.

closing submissions, the appellant expanded on this anticipated environment construct, describing that as including:

- (a) anticipated development within the four development areas created by the 2013 subdivision consent;
 - (b) the RRZ and BCSZ zone standards for residential development in each of these development areas, noting that the BCSZ permits a residential building up to 6m in height with a maximum ground floor area of 500m², and at a net site area coverage of 15%;
- which together form the baseline environment against which the effects of the proposal are to be assessed, for the purposes of s104(1)(a).

[96] We further understood the appellant’s argument to be that the permitted baseline can be applied to aspects of a proposal that fully complies with standards (for instance, bulk and location rules) even if the proposal is not fully permitted (because the visitor accommodation activity to be conducted within the buildings is a discretionary activity).

[97] We do not entirely agree with the appellant’s approach to the permitted baseline. Section 104(2) affords the decision-maker a discretion to disregard the adverse effect of an activity for which consent is sought, if the plan or a national environmental standard permits an *activity* with that effect. However, no statutory discretion exists in relation to the adverse effects associated with a so-called anticipated development baseline as explained by the appellant.

[98] A rule for a permitted activity (such as a height limit) cannot be considered in isolation, least of all as an ‘activity’ in this s104(2) context. That “hybrid concept” has been roundly rejected in the RMA context, including by the High Court in *Aley v North Shore City Council*,²¹ citing the longstanding authority in *Locke*

²¹ *Aley v North Shore City Council* [1999] 1 NZLR 365 (HC).

*v Avon Motor Lodge Ltd.*²²

[99] In this situation we acknowledge that the subdivision consents have all been granted to facilitate residential development in accordance with the BCSZ standards. However, despite the fact that a residential dwelling is given permitted activity status, we were told that a resource consent would be required for the construction of a dwelling on many, possibly on all, of the lots created under RM130174, including on Lot 100. This is due to the limits on earthworks and potentially for the removal of indigenous vegetation as well.²³ Accordingly, as residential activity on Lot 100 is not wholly permitted, we decline to apply a permitted baseline.

[100] It is also irrelevant in the s104(2) context that there are existing subdivision consents identifying development areas that are likely to be implemented elsewhere within the zone. In *Queenstown Lakes District Council v Hawthorn Estate Ltd* (‘Hawthorn’) the Court of Appeal (‘CA’) had taken care to identify the difference between the constructs of the ‘permitted baseline’ and the ‘existing/receiving environment’, (which embraces the future state of the environment):²⁴

[65] It is as well to remember what the “permitted baseline” concept is designed to achieve. In essence, its purpose is to isolate, and make irrelevant, effects of activities on the environment that are permitted by a district plan, or have already been consented to. Such effects cannot then be taken into account when assessing the effects of a particular resource consent application. As Tipping J said in *Arrigato* at [29]:

Thus, if the activity permitted by the plan will create some adverse effect on the environment, that adverse effect does not count in the ss 104 and 105 assessments. It is part of the permitted baseline in the sense that it is deemed to be already affecting the environment or, if you like, it is not a

²² *Locke v Avon Motor Lodge Ltd* (1973) 5 NZTPA 17 (SC).

²³ Under r 33.5.3 which limits clearance of more than 50m² of indigenous or regenerating forest greater than 3m high; and/or of diverse indigenous shrubland (comprising three or more species). ²⁴ *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424

(CA).

relevant adverse effect. The consequence is that only other or further adverse effects emanating from the proposal under consideration are brought to account.

[66] Where it applies, therefore, the “permitted baseline” analysis removes certain effects from consideration under s 104(1)(a) of the Act. That idea is very different, conceptually, from the issue of whether the receiving environment (beyond the subject site) to be considered under s 104(1)(a), can include the future environment. The previous decisions of this Court do not decide or even comment on that issue.

[101] As reiterated in a number of High Court decisions,²⁵ the oft cited paragraph [84] from *Hawthorn*, which was addressing the future state of the environment (where effects have to be accounted for and not discounted) should not be applied to circumstances beyond those that were before the CA, which did not include application of the permitted baseline.²⁶

[102] That said, we acknowledge that under the relevant policy framework, comparison *must* be drawn with the form of residential development described as “anticipated” within the RRZ and BCSZ policies, with reference to the standards applying to this permitted activity, within the context of our evaluation under ss 104(1)(b) and 104D(1)(b).

[103] In that policy context we are required to make that comparison, whether or not there are existing consents likely to be implemented for residential activity, within the zone and on Lot 100. In our effects-based evaluation, it would also be wrong to evaluate the proposal against a receiving environment that did not consider the type of rural residential development provided for under the as yet unimplemented consents, even where further consents for ancillary activity such

²⁵ Including *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815.

²⁶ Including *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [84].

as earthworks and/or vegetation removal may be needed.²⁷

[104] The reality is that the historical subdivision consents have identified development areas where residential development is able to occur. This development area identification is a key method in the implementation of the BCSZ character provisions.

[105] Although evidence for the Community Trust is that development should not be assumed within these development areas or in the proposed Rural Living Amenity Area identified on Sec 1, we consider that it is entirely realistic to assume that a residential dwelling will be able to be located somewhere within these relatively large areas, noting that they do not serve the same function as a simple building platform.

[106] Accordingly, we proceed on the basis that realistic anticipated development on Lot 100 would be as described by Mr Espie, namely up to four dwellings occupying a footprint of up to 500m² and at a maximum height of 6m.

Approach to s221(3) application

[107] Section 221 states:

221 Territorial authority to issue a consent notice

- (1) Where a subdivision consent is granted subject to a condition to be complied with on a continuing basis by the subdividing owner and subsequent owners after the deposit of a survey plan (not being a condition in respect of which a bond is required to be entered into by the subdividing owner, or a completion certificate is capable of being or has been issued), the territorial authority shall, for the purposes of section 224, issue a consent notice specifying any such condition.
- (2) Every consent notice must be signed by a person authorised by the territorial authority to sign consent notices.

²⁷ This approach was endorsed in the High Court decision in *Frost v Queenstown Lakes District Council* [2021] NZHC 1474 at [68].

- (3) At any time after the deposit of the survey plan,—
 - (a) the owner may apply to a territorial authority to vary or cancel any condition specified in a consent notice:
 - (b) the territorial authority may review any condition specified in a consent notice and vary or cancel the condition.
- (3A) Sections 88 to 121 and 127(4) to 132 apply, with all necessary modifications, in relation to an application made or review conducted under subsection (3).
- (4) Every consent notice shall be deemed—
 - (a) to be an instrument creating an interest in the land within the meaning of section 51 of the Land Transfer Act 2017, and may be registered accordingly; and
 - (b) to be a covenant running with the land when registered under the Land Transfer Act 2017, and shall, notwithstanding anything to the contrary in section 103 of the Land Transfer Act 2017, bind all subsequent owners of the land.
- (5) Where a consent notice has been registered under the Land Transfer Act 2017 and any condition in that notice has been varied or cancelled after an application or review under subsection (3) or has expired, the Registrar- General of Land shall, if he or she is satisfied that any condition in that notice has been so varied or cancelled or has expired, make an entry in the register and on any relevant instrument of title noting that the consent notice has been varied or cancelled or has expired, and the condition in the consent notice shall take effect as so varied or cease to have any effect, as the case may be.

[108] We have taken guidance from a number of decisions as to the approach to be taken to an application under s221(3), including whether the application should be bundled where it forms part of and is connected to another resource consent application, as it is in this case.

[109] We have first considered the Environment Court decision in *Foster v Rodney District Council* (*'Foster'*),²⁸ where the court had to consider the statutory amendment in 2005 that was for the purpose of overcoming the effect of the Court of Appeal

²⁸ *Foster v Rodney District Council* [2010] NZRMA 159 (EnvC).

decision in *Kapiti Environmental Action Inc v Frandi*.²⁹

[110] *Foster* concerned an appeal against a decision to decline to grant consent for a non-complying subdivision, although in order to be able to grant consent for the subdivision the court had to also consider the application of s221(3). In reading the court's decision it appears that the s221(3) application was bundled with the non-complying subdivision, although that is not entirely clear.

[111] However, in *Green v Auckland Council*,³⁰ the court notes that applications made under s221(3) clearly trigger a s104 consideration as specified in s221(3A). As to that, the court went on to state that it is a matter of common sense that an application for a variation of a consent notice necessarily entails an examination of the condition which is to be varied.

[112] Although the court was reluctant to lay down any firm rules for the process of a consent notice variation application, it observed that the discretionary planning evaluation under s104 should sensibly consider the reasons for the imposition of the condition, and by way of comparison, evaluate the environmental impact of the change.³¹

[113] In this case the consent notice conditions pertaining to the BCSZ area requirements are for the purpose of implementing important policies applying to the character outcomes for that zone. For this reason, we consider it appropriate that the applications as a whole should be bundled. This means we should apply the s104D gateways to our consideration of the s221(3) application alongside the resource consent for the visitor accommodation application.

[114] We further note that decisions on s221(3) applications have consistently taken the approach that identification of the reasons for, or circumstances relevant

²⁹ *Kapiti Environmental Action Inc v Frandi* (2003) 9 ELRNZ 235.

³⁰ *Green v Auckland Council* [2013] NZHC 2364.

³¹ *Green v Auckland Council* [2013] NZHC 2364 at [128] and [129].

to the imposition of the consent notice conditions, are a relevant first consideration and secondly, as to whether the circumstances justifying those conditions have changed, despite the absence of a statutory requirement for such a comparison under s221(3).³²

[115] In *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council*

(‘*Ballantyne*’),³³ the High Court observed that consent notices:

... should only be altered when there is a material change in circumstances (such as a rezoning through a plan change process), which means the consent notice condition no longer achieves, but rather obstructs, the sustainable management purposes of the RMA.

[116] *Ballantyne* emphasised that the statement made by the Environment Court in the decision under appeal, that the consent notice was easily amended, was not a reasonable assumption to have made.

[117] Mr Matheson submitted that *Ballantyne* should be treated with caution, as s221(3A) does not impose any mandatory statutory threshold requirement, there is no longer a requirement to establish a change of circumstance in order to vary/cancel a resource consent condition.

[118] Counsel submitted that more weight could be placed on the reasons for the consent notice requirement if, for example, the condition is to protect a view out over somebody’s property. In this instance, we were told that all surrounding neighbours have given their written approval to this proposal and the s274 objectors live up to 1km away.

[119] However, we see no reason to treat the High Court decision in *Ballantyne* with any caution at all. In fact we are bound to follow the same approach. Moreover, *Ballantyne* records the approach consistently applied by the courts,

³² *Green v Auckland Council* [2013] NZHC 2364.

³³ *Ballantyne Barker Holdings Ltd v Queenstown Lakes District Council* [2019] NZHC 2844 at [45].

where an application has been made under s221(3).

[120] That is the approach that we intend to take here. Indeed, the argument in favour of that approach is quite compelling in this context, given that the somewhat unorthodox framework of the BCSZ, relies almost entirely on the consent notice conditions resulting from a subdivision consent, as the method for achieving the intended character outcomes of the BCSZ.

[121] We further disagree with the appellant's contention that the approval of surrounding neighbours to this proposal, while being relevant, warrants ignoring the circumstances in which the consent notice was first imposed, those being matters of wider public interest, unlike the view shaft scenario referred to in the Council's submission.

The changes proposed by the current s221(3) application

[122] Changes proposed to the consent notice conditions incorporate:

- (a) a redefinition of the development areas within Lot 100.³⁴ The development areas now comprise a single area comprising 36% of the site. Redefinition of the development areas has resulted in a central spine running through the site with nodes off each side tightly circumscribing the intended footprint for each of the buildings;
- (b) an increase in the extent of the undomesticated area to 64% of the site which is a 15% increase; and
- (c) an increase in the extent of vegetation cover within the undomesticated area such that almost 100% of that area would eventually comprise closed canopy indigenous vegetation to be protected.

[123] Although the appellant contends that the third of these changes will exceed

³⁴ Which, if consent is granted, would eliminate non-compliance with r 22.5.25.

minimum zone requirements of 50%, this is a zone-wide requirement not site-wide. The percentages cited to the court resulting from the latest amendments appear to be restricted to Lot 100. However, we accept that the proposal involves a material increase in the extent of closed canopy vegetation within an undomesticated area compared to that approved by the underlying subdivision. That could only improve upon the overall outcome for the zone.

[124] For Lot 100, RM130174 identified:

- (a) 0.723ha of development areas;
- (b) 0.744ha or 50.6% of the site comprising an undomesticated area; and
- (c) 70.1% of that undomesticated area comprising closed canopy vegetation.

Reasons for s221(3) amendments

[125] In opening submissions, the appellant contends that the following two circumstances justify an amendment to the consent notice conditions:

- (a) the change from a proposed three lot subdivision on Lot 100 to a single integrated visitor accommodation activity within multiple villas;
- (b) the land swap with DoC and integration of Sec 1 with Lot 100.

[126] We accept that these are the reasons that give rise to this application, however, consideration of the justification for an amendment to the consent notice conditions should focus on the continuing application of the BCSZ framework, and not to features of the proposal which give rise to the application under s221(3).

[127] There has been *no* relevant change in the BCSZ framework. However, that does not necessarily lead to the result that amendments proposed to the consent notice conditions (relating to the BCSZ character outcomes) detract from the ongoing integrity of the BCSZ; indeed, the opposite is true on the basis of our analysis of the changes to be made.

[128] The effect of approving the s221(3) application is that the reason for non-complying status applying to the proposal, due to parts of some of the buildings being outside of the approved development areas, would disappear; the outline of the new development area would incorporate all the buildings in their entirety.

[129] Sec 1 is to remain amalgamated with Lot 100. It is proposed to be integrated into the development/vegetation management regime that is proposed for Lot 100, insofar as that is to be covered by the consent notice conditions as proposed to be amended.

Observations on changes

[130] The latest changes depicted in closing submissions are a significant improvement on those proposed in the original application. As we earlier observed, the tree protection covenant areas first identified as comprising the undomesticated areas, captured quite small non-contiguous areas of vegetation.

[131] These smaller areas are situated within a much larger area that is now proposed as a protected undomesticated area to be covered in a closed canopy of indigenous vegetation. The rationale for the original selection of the trees to be contained within the tree protection covenant areas, which occurred in 2013, appears to the court to be unconnected to the BCSZ character requirements.

[132] On the court's reading of the amended consent notice conditions filed after the hearing, conditions pertaining to Lot 100 are to be severed from all conditions pertaining to the BCSZ character requirements. Lot 100 (and Sec 1) would be subject to management under its own EMMP to be finalised prior to the building consent being obtained for the visitor accommodation buildings. However, there is nothing to link the EMMP with conditions of the subdivision consent that relate to the BCSZ character outcomes.

[133] Accordingly, if the consent notice condition proposed for Lot 100 is to

be severed from conditions imposed by all earlier subdivision consent decisions, it

must have a complete and coherent set of conditions such that it creates ongoing obligations in relation to the BCSZ character outcomes, and on terms that are transparent to the public at large and to the Council who has the responsibility of monitoring and enforcing compliance with its district plan. We are not convinced that subdivision consents have been issued on terms that are sufficiently transparent in their linkage to the BCSZ provisions.

[134] Conditions requiring preparation and certification of the EMMP should state the management plan's purpose, being to ensure the ongoing maintenance and preservation of the vegetation within the undomesticated area to meet the BCSZ character outcomes. A summary of the topics to be included in the plan should also be specified in the conditions. Such conditions cannot go so far as to provide arbitral power to the Council in respect of the content of a management plan, which should be set out in the conditions of consent including in relation to ongoing maintenance of the planting.

[135] As we have not seen any of the existing management plans, we have no knowledge as to whether they are intended to operate in this manner, nor of the ease with which some or all of the provisions of the EMMP can be changed or with what scrutiny from the Council.

[136] This management plan should be distinct from other plans that are proposed in the conditions of consent that relate to one-off/short-term obligations, for instance, the erosion and sediment control plan and the environment management plan that is proposed during construction of the proposal. These obligations are not ongoing and cannot be included in a consent notice.

[137] Moreover, the final set of proposed conditions lodged with the appellant's closing submissions contain a set of 'covenant conditions' purporting to achieve that ongoing protection, although they are referred to as 'covenant conditions' as opposed to 'consent notice' conditions.

[138] This would mean that they would not have to be amended following the s221(3) (or any other RMA) process. The draft conditions propose a range of obligations including a no further subdivision restriction that would apply for a period of 45 years from the registration of the covenant.

[139] The court considers that the consent notice mechanism *must* be used to protect the BCSZ character requirements. It is not clear to the court why every subdivision consent since 2005 has used the consent notice mechanism and yet that is no longer proposed.

[140] Use of the consent notice is not precluded for the reason that the subdivision is no longer part of the current proposal. The s221(3) application is to amend an *existing* registered consent notice.

[141] Finally, the consent notice changes are for the purpose of facilitating this proposal. Registration of the amended consent notice *must* occur before works on the site commence. That is not what the appellant has proposed in its draft conditions.

[142] We now turn to our statutory evaluation.

Assessment of effects

[143] Written affected party approval was obtained from a number of persons who own properties along Glentui Drive (seven properties in total), although they are not immediately contiguous neighbours. However, we are required to set aside any adverse effects of the proposal on these persons.

[144] In this regard, we note that the potential adverse effects that are most in contention are not what we would describe as neighbour-to-neighbour issues; more fundamentally, they impact on the amenity values and character of the BCSZ as a whole, which are values to be enjoyed by all residents of the zone, regardless of their proximity to the site or the proposal.

[145] The exception to that relates to the potential effects associated with the additional traffic movements along Glentui Drive from the intersection with the Glenorchy-Queenstown Road, which we will return to.

[146] Although there were three residents who had joined under s274, and who gave evidence in support of the proposal, many more of the residents were in opposition, notably those who were members of the Community Trust who had lodged individual submissions to the original proposal.

Landscape

Visual effects

[147] The landscape architects assessed the proposal for the purpose of considering effects on:

- (a) the landscape values of the adjoining ONL;
- (b) the rural living character and amenity values of the BCSZ.

[148] As to the second of these considerations in particular, visibility of the proposal was considered from six agreed viewpoints, although those from the lake shore, recreation tracks, lookout and surface of the lake were agreed to be the more relevant viewpoints, given the proposal's orientation towards the west.

Visual simulations

[149] Visual simulations were prepared for the appellant by Mr Blair depicting the proposal from each of these agreed viewpoints at the time of planting; after five years of vegetation growth and then after ten years, at which point the planting

is expected to be established.³⁵

[150] The visual simulations also depicted what was referred to as an ‘alternative development’ scenario, representing the type of development that is anticipated under the BCSZ. The buildings were indicative only. They were not based on any scaled architectural plans or designs.

[151] However, Mr Blair explained that the buildings on Lot 100 are less than the 500m² permissible footprint; meet the 6m height limit and comply with permissible exterior building surfaces and colours. The dwellings are also located within the development areas on Lot 100 identified in RM130174, in a location that achieves retention of existing and protected mountain beech trees.

[152] We note that the development areas are much larger than a building platform typically required to be identified through the subdivision consent process under the PDP. The development area is not intended to perform the same function. Accordingly, a dwelling could be located anywhere within the development areas identified for Lot 100. The visual simulations of the alternative development have to be considered as illustrative only of one permissible anticipated development within that lot.

[153] The dwellings depicted in the alternative development simulations are also all homogenous in their design and appearance. None of the simulations contain the accoutrements that might be expected to be found within the curtilage area of a dwelling, including features such as swimming pools, amenity planting and manicured lawns.

³⁵ These were reproduced in Mr Blair’s rebuttal evidence with amendments responding to the evidence of Mr Espie. These amended simulations did not depict removal of the five buildings, despite the removal of four of these being communicated prior to the exchange of the appellant’s rebuttal.

The expert assessments

[154] Mr Skelton addresses all agreed viewpoints, although in his rebuttal he notes that only two are in contention; the Kiln location west of the site and the elevated Picnic Point viewpoint. However, he comments that he and Mr Espie are only “one degree” apart in their assessment of visual effects at each of these locations.

[155] Mr Skelton attributes their divergent assessments to differing positions on:

- (a) the existing character of the landscape;
- (b) the difference in the effects of anticipated development and those of the proposal.

[156] At a broad scale, Mr Espie and Mr Skelton are agreed as to the description of the Bob’s Cove landscape, although there are areas where Mr Skelton and Mr Espie disagree.

[157] Mr Skelton notes that rural living development is widespread across the Bob’s Cove landscape and further rural living development is anticipated under the BCSZ and RRZ. Much of the rural living development anticipated by the zoning is not currently built, including on Lot 100 and the adjoining four lots to the north. This gives the impression that much of this western and southern part of the BCSZ and RRZ is open and natural in character, although this will inevitably change as further development occurs.

[158] All experts acknowledge the existence of the series of public DoC-administered tracks, including the Bob’s Cove ‘Nature Walk’ loop track near the northern shores of Bob’s Cove, and the lime kilns and jetty track culminating at a significant and memorable viewpoint on the loop track.

[159] Mr Skelton notes that the Bob’s Cove lake and foreshore area can be active with beachgoers, swimmers, hikers and boaties, observing that the Spirit of

Queenstown vessel visits the cove regularly as part of a tourist activity. Overall he considers that the Bob's Cove landscape is part of a highly valued rural living and natural landscape between the more urban settled landscapes toward Queenstown to the east and more natural and open landscapes towards Glenorchy to the west.

[160] As to the more immediate Bob's Cove area, the extent of modification is evident in the presence of buildings, statues, roads, a large playground, parking areas, trails, signs, streetlights and rural amenity planting. Mr Skelton disagrees with Mr Espie's description of the area as being wild, secluded, serene and peaceful.

[161] Mr Skelton further considers that Mr Espie's reference to the flats as being developed for rural living is a simplistic assessment of the extent of development that has occurred, and which will continue under the unimplemented Glentui Heights subdivision consents.

[162] As to Mr Espie's comparison with anticipated development, Mr Skelton is dismissive of Mr Espie's comparison with the outcomes anticipated by the rural living type of development provided for within the BCSZ. Mr Skelton describes the anticipated development as comprising "a hodgepodge of 4 different building typologies and landscape treatments", noting that they could all be constructed at different times.³⁶

[163] In comparison, he describes the proposal as a comprehensive development that is cohesive in its design, and which appropriately responds to the landscape's attributes and values, natural character and visual amenity values.

[164] Mr Skelton's assessment of visibility varies from very low to low-moderate at worst, which is his assessment of visibility from the Bob's Cove foreshore area during construction and before planting has established. He considers that this

³⁶ Although that comment was not directed at the alternative development depicted in the visual simulations.

impact would reduce to very low within five to ten years of tree growth. At the key viewpoints his assessment is that there would be low adverse effects on visual amenity.

Mr Espie

[165] Mr Espie considered the extent of visibility from each of the agreed locations, although he also identified others where there would be some visibility of the proposal. His evidence compared the visual effects of the proposal to what he described as a “realistic rural living outcome across the site”.

[166] Mr Espie considered that the adverse effects from parts of the lake surface would be generally of a low-moderate degree, but of a moderate degree closer to the shore.

[167] Mr Espie considers that the stepped layout of the proposed development would mean that the lake-facing glazed facades of the many buildings would be seen directly from the waters of the cove. He notes that in Mr Blair’s images depicting the proposal from the Picnic Point viewpoint, the sun is behind the site to the north-east which means that the lake-facing façades of all the buildings are in shadow.

[168] He notes that the proposed development will look quite different when the sun is to the west or south-west, with sunlight falling on the façades, noting the façade length of each of the buildings comprising the restaurant, owner’s residence, yoga studio and distillery.³⁷ The appearance would be quite different when inside lights are on, particularly in the mornings and longer evenings.

[169] From locations within the public land in the vicinity of the Bridle Track to the west of the cove, and from locations within the public land to the immediate

³⁷ Although the distillery turned guesthouse has now been removed from the proposal it was the smallest of these buildings singled out by Mr Espie.

west of the site, Mr Espie considered that the effects would be low to moderate, although in the latter viewpoint, the adverse effects would reduce to low as on-site vegetation matures.

[170] However, east of the Kiln location and close to the western boundary of the site, which is well inside the public land, he considers that the density of built forms, continuity of the presence of people, noise and activity would be obvious and different to that of a rural living neighbourhood. In his opinion, the visual density of the many buildings within the subject site would convey an intensity of occupation over the site that is considerably more than the rural living lots nearby. This would equate to an adverse effect on the amenity of an observer in this public location, that he describes as at least moderate.

[171] However, Mr Espie accepted that visibility of the development on the site from some other aspects would not be too dissimilar to that of anticipated development, albeit at a different configuration from that depicted on the images of the alternative development presented to the court.

[172] He explains that Bob's Cove is valued as a pleasant, serene rural living neighbourhood. These attributes will be adversely affected, even if visibility of the buildings is disregarded. In his opinion, the busyness; intensity of occupation; built density; lot sizes and the nature of the activity (visitor and hospitality) would detract from the manner in which the Bob's Cove landscape is valued.

Ms Pflüger

[173] However, Ms Pflüger undertook a review of Mr Skelton's assessment and on the key areas of difference her assessment was more aligned with, although not entirely the same as, that of Mr Espie.

[174] She agrees that visual effects would be low from a number of the agreed viewpoints, although views of the proposal would be gained from the open grassed area to the west of the site, from a distance of around 65m. She notes that this

area of the foreshore has high public usage.

[175] She considers that the visual effects of the buildings, particularly those towards the western property boundary, would be moderate initially, although that would reduce to low as planting establishes after five years, and to very low after ten years. However, she considers that similar visual effects would result from the development enabled under the existing subdivision consent, which could also be located close to the western property boundary.

[176] Ms Pflüger notes that visually, the difference between the proposal and the residential dwellings depicted as the alternative development may only be detected from the mid-distance viewpoints on the lake and on the lake shore and elevated viewpoints where the majority of the site can be seen.

[177] Ms Pflüger considers that the proposal will be seen almost in its entirety from the jetty before internal planting matures, although from this location the proposal would be viewed in the modified context of the existing dwellings along Fisherman's Lane, where the buildings would be viewed as a small component of the view in the mid-distance.

[178] She considers that the proposed planting would reduce the "stacking effect" of the proposal and overall perception of the built development would be reduced to low over time. Compared to the alternative development, Ms Pflüger considers that the proposal would lead to a lower visual effect than would be the case with fewer buildings set within open manicured lawns which is provided for under the BCSZ.

[179] Ms Pflüger generally agrees with Mr Skelton that large parts of the development would be screened by vegetation comprising high stature trees on the DoC reserve between the jetty viewpoint and the site, although Ms Pflüger states that if that vegetation was not in place, the effects during construction would be at least moderate.

[180] From Picnic Point, Ms Pflüger notes that a large part of the Bob's Cove visual catchment and the lake can be gained from this viewpoint. She considers that the development would be a relatively small component of the overall view as the proposal would be seen together with the existing buildings along Fisherman's Lane in the foreground and the majority of the wider Glentui Heights subdivision.

[181] Ms Pflüger agrees with Mr Skelton that there would be low visual effects from the buildings once vegetation matures, although during construction the earthworks' and vegetation removal would be the most conspicuous from this elevated viewpoint. Visual effects would be low to moderate during construction. Screening from planted vegetation would take longer to be achieved at this location compared to from the lower lying viewpoints, although visual effects would reduce to low after five to ten years.

[182] She considers that the proposal would lead to an appreciable difference in the perception of the site before the planting matures. However, the extent of proposed planting, coupled with the comprehensively designed nature and density of development, would not lead to unanticipated adverse effects on the landscape character from these viewpoints, given its context in the wider landscape, and adjacent to the existing rural residential dwellings.

[183] She notes that the alternative development enabled by the existing subdivision consents would lead to a similar outcome to the existing dwellings along Fisherman's Lane, with low visual adverse effects on the existing amenity. Her assessment from the surface of the lake at mid and long distance views resulted in a similar assessment.

[184] Ms Pflüger notes that the proposal relies quite heavily on screening vegetation located beyond the boundaries of the site before proposed planting within the site matures after five to ten years, including the 65m wide buffer to the lake shore and the vegetation along the lakeside of Glenorchy-Queenstown Road which curtails the majority of use to the site when approaching from the west, both

areas of vegetation being managed by DoC.

[185] Ms Pflüger comments on the proposal to implement construction and landscaping in stages, with works commencing on the western lower lying terraces of the land, with planting associated with the buildings on the terraces to be implemented within three months of completion of construction. Ms Pflüger supports a condition to ensure that planting is implemented as soon as possible for each stage without the risk of damage through ongoing construction.

[186] The landscape effects of the proposal and the otherwise anticipated residential development would be very similar in her opinion. Ms Pflüger considers that the site can absorb the visitor accommodation development at the proposed density in light of the characteristics outlined above and given that the proposed design and planting will blend into the surroundings.

Effects on landscape values of adjoining ONL

[187] Mr Skelton considers that the proposal is for a development which is cohesive and comprehensive, which would appear recessive within and subservient to the values of the wider landscape, including the adjoining ONL. The design incorporates recessive coloured buildings set within a frame of indigenous vegetation.

[188] In his opinion, the effects on the wider landscape are appropriately managed through the building design and landscape treatments which would perpetuate a naturalistic character and appropriately address the landscape values of the adjacent ONL.

[189] Ms Pflüger observes that the site is different to other parts of the Glentui Heights subdivision due to its location adjacent to the ONL. In general, she agrees with Mr Skelton's assessment and comments that the incorporation of smaller built forms set amongst existing proposed vegetation responds to the physical and aesthetic values provided by the forest clad ONL adjacent to it.

[190] In her opinion, the proposal would detract to a lower degree from the ONL values than larger buildings set within manicured open space grounds that are found in other parts of the Glentui Heights development, and on that basis, she considers that the proposal is appropriate and acceptable in this location despite its proximity to the ONL.

[191] Mr Espie's evidence is that overall the proposal would adversely affect landscape values to a moderate level, as the proposal does not sit comfortably with the relevant landscape related PDP provisions.

[192] Being an Exception Zone, Mr Espie considers that anticipated development would take the form of a consistent and cohesive spacious rural living neighbourhood. He considers that the proposal is 'discordant' with that pattern and given its location, the values of the ONL will not be protected.

Effects on amenity values and quality of the environment

[193] Mr Skelton considers that the proposal would result in a better outcome for the zone, although Mr Espie considers it to be at odds with the rural living pattern. He considers that the development would be recognisable as something quite different from the rural living development (consisting of well-spaced residential buildings) that currently characterises the Cove Flat area.

[194] Ms Pflüger considers that the proposal could have the potential to detract from the amenity if it visually dominated the Bob's Cove visual catchment and noted that this had been the conclusion of the Panel which declined consent.

[195] She agreed with the Panel that the proposal could be viewed as one larger multi-storey building and thus be visually dominant from short and mid distance views. However, she is supportive of the proposal for high stature vegetation around, in front of and behind the villas which would mitigate this effect.

[196] While the proposal is within the anticipated site coverage, and the character

and design of the buildings may be perceived as similar to that which is enabled under the existing subdivision consents and site zoning, the number of buildings cannot, in her opinion, be considered entirely commensurate with the anticipated development under the BCSZ.

[197] Ms Pflüger considers that the rearrangement of the buildings to address the Panel's concern about stacking is inconsequential, although the development under the now proposed design would build upon the existing and emerging character of the area due to the incorporation of additional planting around the buildings. She acknowledges that there would be some cumulative effects although these would be localised and not significant.

[198] Ms Pflüger acknowledges that there would be moderate adverse visual and landscape character effects with the removal of vegetation within the development area during construction activity, but that these effects would be temporary and would be mitigated once planting reaches 3-5m in height. She agrees that the beech trees would take around five years to reach this height.

[199] Ms Pflüger supports incorporation of the proposed methodology of the transplanting of trees outlined by Mr Hammer. She further recommends that a condition be imposed requiring deceased plants to be replaced within 12 months and within the next growing season (i.e. autumn or spring).

[200] She notes that eight trees (in addition to the eight that are to be transplanted) will be stored onsite so that they could be used as mature replacements for transplanted trees that do not thrive, and in order to ensure that the planting is successful. Ms Pflüger supports changes to the conditions requiring monitoring³⁸ of planting success and provision of methodology for determining the health of all trees and all other planting recommended by Ms Standish.

³⁸ Monitoring should occur yearly for the first three years, then three yearly with results provided to the Council.

[201] Ms Pflüger also refers to the vegetation in the dry northern gully of the site which is proposed to be part of a vegetation enhancement and protection covenant area which, in her opinion, provides containment, screening and context in which the recessively coloured buildings can be visually absorbed.

Our consideration

[202] When considering the potential adverse visual effects of the proposal we agree that it would be appropriate to contemplate that given the site's location it is reasonable to expect that four large standalone houses, along with all the ancillary residential accoutrements, would be built on the site maximising their views of the lake. Such dwellings would quite probably be constructed to the full allowable footprint. We further agree that to maximise the lake views, the dwellings would likely have large areas of glass along the frontage which would likely be positioned towards the west.

[203] In this regard, on our site visit we had observed two quite large dwellings, which we understood were close to the full allowable footprint, in locations on Fisherman's Lane. One had a fully glazed frontage running parallel to the frontage of the lake. We acknowledge that these two dwellings were in the RRZ, a portion of which intrudes into the BCSZ along the lake front. However, aside from the height limit the standards for dwellings are the same in each zone. These dwellings are visible from many of the agreed viewpoints, particularly from the elevated position at Picnic Point. Despite having a different underlying zoning, these dwellings contribute to the overall character of the BCSZ and are indicative of the kinds of rural residential development that can be expected to occur in a setting such as Bob's Cove.

[204] We further note that many of the dwellings (including one of the two we have mentioned) contain an open space area of manicured lawn in front of the dwellings making them more visible from the elevated viewing points on the walking track and at Picnic Point, in particular. Indeed this type of development

is anticipated by Policy 22.2.5.2. At this juncture we should add that because this is not a feature of the current proposal, that does not mean that the proposal is contrary to this policy, although we deal with that when considering the second of the threshold tests in s104D.

[205] We find that some of the potential visual effects of the proposal would be more than minor in the short term; that is, until new and relocated planting has reached growth rates sufficient to provide visual mitigation of the development, which could take between five and ten years, at which point the level of adverse visual effects of the proposal would reduce to minor or less than that.

[206] We further note that the adverse visual effects will lessen incrementally each season with growth of the trees. If a short-term view is taken of the adverse effects before the maturity of the ameliorating effect of the mitigation planting, the first of the s104D threshold tests would not be met in relation to the visual effects of the proposal.

[207] However, looking at all other potential adverse effects, (that is, excluding the short-term visual effects on rural character and visibility of the development), and accounting for all proposed mitigation measures, we consider that this test is readily met. We note that the development would be barely visible from other dwellings established within the zone. Moreover, the adverse effects on all immediate neighbouring landowners, who have provided a written approval to the proposal, have to be ignored.

[208] In making these findings, we have preferred the evidence of Mr Skelton and Ms Pflüger to that of Mr Espie. We find that Mr Espie has adopted a 'residents' perspective', while Mr Skelton and Ms Pflüger have reflected a broader perspective (of residents and visitors).

[209] The evidence suggests that Bob's Cove is a notable visitor destination already – by boat or on land. However, existing residents will no doubt experience the more peaceful times.

[210] Moreover, our findings recognise that some important modifications to the proposal before the court have been offered up by the appellant during and since the hearing, notably:

- (a) the removal of the subdivision component of the proposal and a related condition prohibiting any future consideration of subdivision for at least 45 years;
- (b) the deletion of five proposed buildings;
- (c) additional covenanted areas associated with undomesticated areas of land;
- (d) a commitment to progressively clear the exotic and pest vegetation species between the site and the foreshore and replant in a manner described in a Foreshore Vegetation Enhancement Plan. The objective of this condition is to allow a transition to native vegetation while maintaining screening of the development.

[211] Overall, the court finds that the modified proposal will not result in more than minor adverse landscape and amenity effects, certainly once newly planted vegetation becomes established.

[212] We acknowledge that there will be temporary effects associated with construction of this development, including tree and plant removal and relocation. However, that is to be expected. We are satisfied that the management plans proposed by the appellant will provide for adequate management and mitigation of the effects associated with construction of the project.

Effects on users of easement area

[213] In his cross examination of Mr Edmonds, Mr Todd questioned whether any consideration had been given to the effects of the proposal on users of a walkway provided for by way of an easement for the benefit of landowners/occupiers within the Glentui Heights subdivision. This issue has a bearing on the amenity values.

[214] The easement commences north of the Glenorchy-Queenstown Road, running south through the open space area straddling that road, before diverging in two directions, one of which traverses the northern boundary of Lot 100 between the adjoining five lots to the north before concluding at the recreation reserve along the lake frontage.

[215] Mr Edmonds considers that from a visibility perspective, users of the walkway will not be affected by the proposed lodge buildings as these would be separated by a stand of mature beech trees in the order of 20 x 20m in area, that would provide visual screening. He further notes that the lodge buildings would be oriented towards the lake and not to the walkway.

[216] On the basis of the evidence of Mr Edmonds, we find that the effects on users of the easement would be no more than minor.

Ecology

[217] Ms Palmer gave evidence as to the ecological values on the site focusing on values within the vegetation covenant areas ('VCAs') identified under the consent notice, which she assessed to be moderately high to very high. Values outside of these areas were considered to be low to moderately high.

[218] Ms Palmer was asked to assess the effects associated with the loss of indigenous vegetation that would be required to enable development and make recommendations as to the mitigation measures that ought to be employed, including the protection of the areas of vegetation within the VCAs, the transplanting of identified trees, and replacement planting with large grade mountain beech trees and amenity planting.

[219] Her initial engagement in 2021 had focused on the consideration of the effects of the proposal on the mature beech trees, including those within the VCAs, in particular those that were more than 6m tall and had a diameter at breast height ('DBH') of 200mm or more. That was the threshold determined to be of

relevance in the consent notice conditions resulting from RM130174.

[220] However, her involvement subsequently expanded. Ms Palmer explains that in 2024 she undertook re-measurements of trees that had been measured in November 2021 and again in January 2022. This was for the purpose of identifying trees that had grown into the threshold criteria of 200mm DBH. That additional data was also used to assist in the calculation of the tree root protection zone and the identification of plants that could be transplanted within the site.

[221] Her evidence describes the site as including reasonably contiguous mature and diverse regenerating beech forest with emergent eucalyptus and an understorey of manuka shrubland and broadleaf beech forest associated species. The mid-portion of the site has individual trees and clusters of beech trees surrounded by a mixture of native and introduced vegetation.

[222] Her evidence estimates the cover of indigenous vegetation to be 13,415m², which is an increase on that calculated in 2022 which was approximately 8,865m², although the increase is attributed to a more liberal inclusion of vegetation that is a mixture of indigenous and introduced vegetation.

[223] She describes the vegetation as reasonably contiguous although it provides a fragmented margin to the regenerating manuka shrubland and beech forest prevalent within the Bob's Cove recreation reserve noting that the reserve on the western boundary of the site is vegetated by a high proportion of introduced weeds and is dominated in places by broom and hawthorn.

[224] She describes the gully as comprising overstorey dominated by a mixture of mountain beech and blue gum, with some red beech, hawthorn and manuka with an understorey that is reasonably diverse and variously includes beech forest associated species.

[225] The gully vegetation extending through the northern portion of the site supports the most intact and diverse areas of indigenous vegetation present

on

site.

[226] She notes that the footprint of the development area is generally contained within the existing clearer portion of the site and along the margin of the regenerating and maturing beech forest to the north and southwest, and includes an area that has a stone chip sealed access road along the southern boundary with the Bob's Cove recreation reserve.

[227] The proposal would see a reduction in mature beech forest along the margins and existing communities within the VCAs, and although a discernible change would occur, the underlying composition and character of vegetation would be retained. In her opinion, after mitigation has been implemented and the plantings have established the ecological function, pattern and processes of the site and its contribution to the surrounding habitats would remain with little change overall.

[228] Her evidence contained quite precise calculations of the total built area, circulation surface, vegetation covenant area, retained vegetation area, proposed vegetation (indigenous amenity planting), and a (small) area of lawn, although the latest plans, in which five buildings are removed, mean that the calculations are no longer accurate. We note that after her evidence had been prepared, the extent of the undomesticated area was increased to approximately 9,300m², all of which is now to be planted and maintained in closed canopy cover.

[229] Ms Palmer recounts her experience of monitoring annual incremental growth of beech trees and problem species at a wind exposed and drought prone site within the Whakatipu Basin, and accounting for the soil variability at the subject site and its comparatively sheltered location, Ms Palmer anticipates that mountain beech trees would grow between 0.4 and 1m per annum, although those growth rates could be exceeded.

[230] Although these were questioned by the witnesses for the Community Trust, and by Ms Pflüger, in her rebuttal statement Ms Palmer explained why she

continued to hold a high level of confidence that her stated estimates of annual growth rates could be achieved at the proposed site.³⁹

[231] On her advice, Mr Blair had prepared his visual simulation based on incremental growth rate of 1m for the beech trees and 0.25m for lancewoods and other vegetation. She supports incorporation of the rooftop planting⁴⁰ into the building design, together with the landscape planting between them, as these measures further incorporate indigenous vegetation into the site footprint.

[232] Ms Palmer considers the potential for localised and temporary displacement of avifauna during construction and site establishment, although in her opinion birds will adjust to the presence of the development and changes to the vegetation within and surrounding it once established.

[233] However, she expressed a concern that birds could be at risk of collision with a large west facing windows of the buildings. To mitigate that risk, UV films could be used on the windows which could be incorporated during the detailed design phase and in her opinion, that risk could be responded to if the adverse effect eventuates.

[234] Her overall assessment was that there would be positive effects with the provisions of the VCAs and with the protection of areas within the footprint, together with the removal of invasive weeds from the site and adjoining DoC reserve, although that work would be subject to DoC's approval.

[235] She supported contributions to the implementation of the Waimarino Lodge Bob's Cove Predator Removal Support Plan which had been volunteered by the appellant.

³⁹ Palmer rebuttal at [8].

⁴⁰ Despite being in the form of anthropocentric planting, which, as she states, some indigenous gardens that provide habitat are. Palmer rebuttal at [23].

[236] In her rebuttal she recommended amendments to the proposed conditions to increase certainty associated with the contribution to be made by the appellant to the local predator control efforts. We note that this recommendation has been incorporated into the proposed conditions which require a \$50,000 contribution in the first year, and \$30,000 annually thereafter, until such time as the predator control measures within Bob's Cove are no longer needed.⁴¹

[237] Such funds would be payable on trust to the Wakatipu Wildlife Trust on the basis of a Predator Control Plan being submitted to and certified by the Council. Appended to the evidence of Ms Palmer (who is also a trustee of the Wakatipu Wildlife Trust) was a "Bobs Cove Predator Removal Support Plan" to form the basis for the Predator Control Plan.

[238] The second volunteered condition supported by Ms Palmer requires a covenant to be entered into, subject to the agreement of DoC, to progressively clear the exotic and pest vegetation species between the site and the foreshore and replant in native species as described in a Foreshore Vegetation Enhancement Plan, with the objective of allowing a transition to native vegetation while maintaining screening of the development.

[239] Ms Palmer advised that there were discussions with DoC for the 2022 proceedings about the potential to undertake some weed control on the DoC reserve, however, DoC declined to participate at the time.

[240] Ms Palmer notes in her rebuttal evidence that Mr Vivian agrees that the residual ecological effects of the proposal after mitigation will or should be minor, or no more than minor.⁴²

⁴¹ The goal being to achieve predator free status in the Wakatipu Region by 2050.

⁴² Palmer rebuttal at [4], [27] and [28].

Our consideration

[241] We agree with Ms Palmer's assessment. There will be positive effects associated with the planting, including on biodiversity values.

[242] There is little doubt in the court's mind that undertaking predator control will protect the wildlife and regenerating vegetation both within the site and the broader surrounding areas.⁴³

[243] The court considers that not only is the volunteered pest control funding and indigenous vegetation replanting a substantial boost to environmental outcomes, such measures will also serve to enhance the aspirations of the existing Bob's Cove community.

Earthworks

[244] The form, scale and location of the proposed earthworks has been influenced by the design of the villas and site topography. Villa placement is designed to achieve privacy between units while being influenced by the position of existing trees and vegetation. Amendments were made to the earthworks' plans after the exchange of evidence-in-chief, and this was addressed in the rebuttal statement of Mr Edmonds. That resulted in a reduction in the earthworks' volume bringing it within that stated in the original application.

[245] With the exception of earthworks to be undertaken on Sec 1, the majority would occur in parts of the site that have already been cleared or which are used for access purposes. While levels of the more open parts of the site would be modified, the underlying pattern, shape and relief of the landform would generally remain.

[246] Mr Edmonds also referred to rules in the PDP which provide exclusions

⁴³ Palmer at [102(b)].

from four of the earthworks' rules where works are associated with subdivision, including where the site is within a Wāhi Tūpuna area. However, Mr Edmonds notes that as the subdivision component has now been removed and those exemptions no longer apply.

[247] However, restricted discretionary consent was always required because the earthworks' contiguous area exceeds 2,500m² where the slope of the land exceeds 10°, the total area over which earthworks will occur being 7,117m². Resource consent is also sought in terms of the height of cut and fill rule. Mr Edmonds states that works will be managed so that no more than 2,500m² of the site is ever exposed at one time, that being one of the earthworks' standards.

Our consideration

[248] Aside from the potential for cultural effects associated with the earthworks' activities, this element was not the focus of the opposition from the Community Trust, and on the basis of the appellant's evidence, we accept that the effects associated with earthworks, on conditions proposed, would be no more than minor, including the cultural effects associated with the earthworks, an issue we intend to come back to.

Traffic and parking

[249] Mr Bartlett addressed the transport related effects associated with the proposal, including the potential effects on the surrounding transport network and on-site transport infrastructure (vehicle access and parking). He considered the conditions proposed by the appellant, although his evidence included recommendations for amendments/additions which would serve the purpose of providing technical guidance for the overall detailed design of the following transport related features:

- (a) the main vehicle crossing from the cul-de-sac turning area of Glentui Drive;

- (b) the internal spine access to the accommodation units and associated facilities;
- (c) the minor internal accesses which tee-off the internal spine access;
- (d) the on-site car parking design and formation;
- (e) the provision of lighting for carpark areas and on-site pedestrian access;
- (f) an advice note to guide the design and ongoing management of unsealed access, manoeuvring and parking areas;
- (g) a review condition for the purpose of ensuring adequacy of on-site transport infrastructure.

[250] In his rebuttal evidence Mr Bartlett responded to the evidence of Ms Standish who had made comment on some of the recommended conditions, including those taking guidance from the Queenstown Lakes District Council Land Development and Subdivision Code of Practice ('the QLDC Code of Practice'). Ms Standish preferred that these conditions not be included as the application of the QLDC Code of Practice is best dealt with through the engineering acceptance stage after the subdivision consent has been granted.

[251] We cannot agree with Ms Standish on this issue. It is inappropriate to leave discretion to the engineers who are involved in the engineering acceptance stage as to the nature and extent of works to be undertaken, in preference to addressing that in the subdivision and/or land use consent conditions. The QLDC Code of Practice states that where provisions have not been incorporated into the district plan,⁴⁴ they are intended to function as a technical guidance in the drafting of conditions.

[252] Mr Bartlett further responded to the evidence of Mr Vivian refuting his contention that the proposal might result in a noticeable traffic flow increase on Tui Drive, exceeding the design traffic flow. Mr Bartlett reiterated his opinion that

⁴⁴ 2020 Queenstown Lakes District Council Land Development and Subdivision Code of Practice at [1.3.1].

Tui Drive has been designed to a standard that can accommodate the potential consented traffic flow and the increased traffic flow resulting from the proposal.

[253] Mr Vivian's evidence identified other breaches associated with the design aspects of the parking and access, although in Mr Bartlett's opinion these are appropriately managed through the proposed consent conditions.

[254] Mr Vivian had also noted a breach of the minimum sight distance rule for the vehicle crossing at the cul-de-sac end of Tui Drive, although his opinion is that this would not have any adverse effects on safety or efficiency of the vehicle crossing based on the anticipated traffic flows and the reduced operating speed of Tui Drive at this location.

Our consideration

[255] On the basis of Mr Bartlett's evidence, we accept that any adverse transport effects can be appropriately minimised or mitigated by design and management through the proposed conditions, such that the potential adverse effects are less than minor.

Archaeology

[256] Sec 1 is within a heritage overlay, described in the PDP as 'Lime Kilns and Manager's Residence Bobs Cove', which is listed in the Chapter 26 inventory of Archaeological Sites as #708. There is also a potential Māori oven site nearby which is also recorded in the PDP as an archaeological site (identified as site E41/14). Restricted discretionary consent is sought for modification of an archaeological site.

[257] Expert archaeological advice was sought in preparing the application from Origin Consultants, who had also undertaken a site visit. The resulting review states that the likelihood of encountering archaeological material on the site is very low. An accidental discovery protocol is included within the proposed conditions.

An archaeological authority will also be required under Heritage New Zealand Pouhere Taonga Act 2014.

Our consideration

[258] Mr Edmonds considers the archaeological effects to be less than minor. We agree with that assessment.

Noise

[259] Mr Farren undertook an assessment of the operational and construction noise associated with the proposal. His evidence addresses the potential for noise generation from the guest facilities, which at the time of the calculations he had undertaken included the distillery as well as the restaurant, spa and yoga studio.

[260] His calculations confirm that noise emissions will comply with the permitted activity daytime noise limit at the adjacent RRZ site boundary. His calculations assumed that the glazed doors to the restaurant and distillery, (which is no longer part of the proposal) would be fully opened thereby providing negligible deduction from sound generated inside. His calculations also assumed that outdoor loudspeakers at the restaurant would be playing music at background levels of 65 dB LAeq at 1m, which he described as a conservative operational scenario that was unlikely to occur.

[261] Due to the elevated existing ambient noise environment in the area at 8 pm, he considered that the shoulder noise limit of 45 dB LAeq between 8 pm and 10 pm would achieve an acceptable noise environment for adjacent residential sites, but to comply with this limit his calculations indicated that the external doors to both the restaurant and distillery would need to be closed. Outdoor areas could remain occupied because of the relatively small number of patrons that could be located there. Outdoor loudspeakers will also need to be turned off at 8 pm.

[262] His recommendations have been carried forward into the conditions

proposed by the appellant, including the requirement for an operational noise management plan to assist the transition from a daytime to night-time noise environment. He attached a draft of a plan to his evidence. During construction he recommended that the site be managed under a construction noise and vibration management plan so as to achieve compliance with standards referred to in the PDP at r 36.5.13, which are based upon the New Zealand Standard NZS 6803:1999 Acoustics-Construction noise.

[263] His evidence makes further recommendations for amendments to the conditions then proposed, including deletion of the requirement to measure noise levels when the outdoor areas are at 80% capacity or greater, which in his opinion would be very difficult or potentially impossible to comply with.

Our consideration

[264] On the basis of Mr Farren's evidence we find that noise effects of the proposal will be less than minor.

Cultural effects

[265] The adverse cultural effects of the proposal had been a reason for the Panel to decline consent. As noted in the Panel's decision, the site is part of a wider area that has been identified as a Wāhi Tūpuna area, the purpose of which is to ensure the management of potential threats to manawhenua values. The PDP states that the Punatapu Wāhi Tūpuna was used as a nohoaka⁴⁵ or staging post for manawhenua ancestors who travelled up and down Whakatipu Waimaori (Lake Wakatipu). This Wāhi Tūpuna is one of 45 identified across the district.

⁴⁵ A term which is explained in the PDP as a network of seasonal settlements. Ngāi Tahu were based largely on the coast in permanent settlements, and travelled inland on a seasonal basis. Iwi history shows, through place names and whakapapa, continuous occupation of a network of seasonal settlements, which were distributed along the main river systems from the source lakes to the sea.

[266] A written submission was lodged to the original application from Hokonui Rūnanga and although further written comments were tabled before the Council hearing, Hokonui Rūnanga did not appear. Their submission explained concerns about the effects of the proposal on a sensitive, culturally significant area and wider cultural landscape which includes Whakatipu-waimaori and Puke-tapu. The submitter had relied on the adverse recommendation in the s42A report from Mr Denney who was opposed to the proposal for tree removal, although the submitter also noted a lack of information on earthworks.

[267] The Panel had found that there would be more than minor adverse landscape effects, at least during an interim period. The Panel also found that the proposal would not complement or be acceptably sensitive within the landscape setting and when viewed from the lake. On the basis of those findings the Panel considered that there would be more than minor adverse effects on cultural values.

[268] Before the court, the appellant's failure to adequately address the cultural effects of the proposal was raised by the Community Trust.

[269] We gleaned from the Council's legal submissions and the evidence of its planner that it was for manawhenua to participate formally in the submission process on a notified application, and to provide evidence explaining how the cultural values would be adversely affected by a proposal within a Wāhi Tūpuna. Ms Standish did not consider that the Hokonui Rūnanga, (through its representation by Aukaha Ltd) had provided sufficient evidence explaining the adverse effects on the cultural values, an observation we say more about further on.

[270] Cultural values were considered in the evidence-in-chief of Mr Edmonds in the context of the earthworks in particular. Mr Edmonds explains that the Wāhi Tūpuna extends 5km along the foreshore of Lake Wakatipu from Wilson's Bay to the western end of Bob's Cove.

[271] The PDP identifies potential threats to this Wāhi Tūpuna area as including

earthworks and subdivision and development. Mr Edmonds acknowledged that all subdivisions within a Wāhi Tūpuna area require restricted discretionary activity consent, and the original proposal sought that consent. However, as the subdivision component has been removed, he stated that the only rule remaining of relevance to the proposal is the earthworks' rule giving restricted discretionary status to volumes exceeding 10m³.

[272] Mr Edmonds spoke to the consultation that occurred with Aukaha Ltd and Te Ao Mārama. He explained that he had further participated in an online discussion with representatives of Aukaha Ltd (on behalf of the Rūnanga) on 18 April 2024 in the preparation of his rebuttal evidence, to whom he explained that the design of the proposal had been modified several times to reduce the potential adverse effects. He advised of the (then) most recent amendments involving the removal of four villas, increase in the number of mature trees to be retained, reduction in the scale and extent of earthworks and removal of the subdivision component.

[273] Mr Edmonds further explained the proposed conditions include requirements for the cultural monitoring of earthworks' activities, cultural induction for all contractors and an accidental discovery protocol. The conditions, which are included with the closing submissions, would allow for someone to be on site to monitor earthworks' activities and cover their costs of doing so. That consultation was inconclusive.

Our consideration

[274] Because the Rūnanga did not join the appeal as a s274 party for the purpose of expanding further on its concerns with the proposal, we accept that the appellant has focused on what it is able to do to continue to engage with manawhenua concerning the proposal.

[275] We further accept that Mr Edmonds has undertaken consultation with a Rūnanga representative prior to the hearing. We accept that the landscape and

ecological outcomes of this amended proposal improve upon those which had been considered by the Panel. We also note that the volume and area of earthworks since the proposal was first notified have been significantly reduced.

[276] In closing submissions, Mr Matheson referred to the Environment Court decision on the Port of Tauranga dredging proposal, where the court explained that in some cases development may be able to proceed if effects were appropriately managed, even where manawhenua never agreed to this occurring, stating that:

283. Faced with development within a Wāhi Tūpuna area, it is understandable that mana whenua may never agree to it occurring. Nonetheless, development may still be able to proceed if effects are appropriately managed. This was summarised in the Environment Court’s decision in the Port of Tauranga dredging decision (*Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council*):⁴⁶

[298] On balance, taking into account those developments, we all conclude that the proposed conditions offered by the Port during the closing of its case and as varied in this decision, adequately avoid, mitigate or remedy all these cultural effects. We accept that the appellant’s view of Mauao and Te Awanui as their tipuna or ancestors, and they cannot as a matter of tikanga, ever agree to the Port’s application. But, and as a number of cases including *Whangamata Māori Committee v Waikato Regional Council* indicate, the provisions of Part 2 of the Act dealing with Māori interests were well founded in the evidence, give no veto power over developments under the Act. Rather, these interests must be balanced against other matters in Part 2 and the over-riding purpose of the Act under Section 5 to promote the sustainable management of natural and physical resources.

284. This approach was endorsed on appeal to the High Court, noting “This analysis is exactly what the Act requires. There is no error”.⁴⁷

285. In the absence of probative evidence from mana whenua on whether there

⁴⁶ *Te Runanga o Ngai Te Rangi Iwi Trust v Bay of Plenty Regional Council* [2011] NZEnvC 402 at [289].

⁴⁷ *Ngāti Ruahine v Bay of Plenty Regional Council* [2012] NZHC 2407 at [75].

are any significant remaining effects of the Proposal, and without the opportunity to have that evidence tested in Court, respectfully, the Court cannot accept uncritically the original submission of the rūnaka that there remain significant adverse cultural effects because that would amount to the conferring of a veto right upon mana whenua. Taken to its extreme, and given the extent of the Wahi Tupunua, [sic] the rūnaka could lodge a submission opposing any proposal seeking consent because there is greater than 10m³ of earthworks, and then expect that consent must be declined.

[277] We agree with these submissions. We find that the adverse cultural effects would be no more than minor.

Our consideration

Finding on first gateway

[278] We find that the adverse effects, as proposed to be remedied and/or mitigated, and taken as a whole, are no more than minor. Accordingly, this first s104D gateway is surmounted.

Objectives and Policies

Chapter 3

[279] Several of the Chapter 3 provisions were referred to by the parties. However, many of these are for the purpose of plan development, that is, they provide direction for the development of the more detailed provisions contained elsewhere in the district plan in relation to the Strategic Issues.

[280] Some are of potential relevance for the purpose of plan administration, including in the determination of a resource consent application, particularly in providing guidance on what the related objectives and policies in other chapters are seeking to achieve in relation to the Strategic Issues. However, none are particularly relevant to the determination of the appeal.

Chapter 6

[281] Chapter 6 objectives and policies were considered by the parties. The more relevant provisions are Objective 6.3.2. and its implementing policies.

[282] Policy 6.3.2.7 in particular was addressed by the landscape architects given the site's proximity to the ONL encompassing the adjoining reserve land. This policy is to:

ensure that subdivision and development in the Outstanding Natural Landscapes and Rural Character Landscapes in proximity to an Outstanding Natural Feature or Outstanding Natural Landscape does not compromise the landscape values of that Outstanding Natural Feature or Outstanding Natural Landscape.

Chapter 22

[283] The objectives and policies of greater relevance to the proposal are contained in Chapter 22, including in relation to the adjoining ONL values.

[284] The overarching objective is 22.2.1, pursuant to which:

Rural living opportunities are enabled in areas that can absorb development, on the basis that the density, scale and form of development:

- (a) Protects the landscape values of the District's Outstanding Natural Features and Outstanding Natural Landscapes;
- (b) Maintains the landscape character and maintains or enhances the visual amenity values of the District's Rural Character Landscapes.

[285] That objective is implemented by (relevantly):

- (a) Policy 22.2.1.2 which states – set density and building coverage standards in order to maintain rural living character and the amenity values of landscapes; and
- (b) Policy 22.2.1.4 which is to “[m]anage anticipated activities that are

located in proximity to Outstanding Natural Features or Outstanding Natural Landscapes so that they do not compromise the landscape values of that Feature or Landscape.⁴⁸

[286] We construe reference in Policy 22.2.1.4 to ‘anticipated activities’ as relating to the *predominant* land uses within the RRZ and Rural Lifestyle Zone, being rural and residential activities as provided for by Objective 22.2.2.

[287] As we observe further on, we consider that a consistent approach ought to be taken to this phrase in our interpretation of this Chapter 22 policy framework. Accordingly, we proceed on the basis that under the RRZ and BCSZ provisions, in this policy context, development that is anticipated does *not* include visitor accommodation, contrary to the appellant’s submissions.⁴⁹

[288] As foreshadowed, Objective 22.2.2 is that the predominant land uses within the RRZ and Rural Lifestyle Zone are rural and residential activities.

[289] Of the five implementing policies, those of relevance are:

- (a) Policy 22.2.2.1 which is to “[e]nable residential and farming activities in both zones, and provide for community and visitor accommodation activities which, in terms of location, scale and type, are compatible with and enhance the predominant activities of the relevant zone”;⁵⁰
- (b) Policy 22.2.2.3 which is to “[d]iscourage commercial, community and other non-residential activities, including restaurants, visitor accommodation and industrial activities that would diminish amenity values and the quality and character of the rural living environment”; and

⁴⁸ The buildings are managed by the standards in Table 2 rules in 22.5 of Chapter 22.

⁴⁹ For the very same reason, we consider that reference to the phrase “to the extent anticipated by that Exception Zone” in Strategic Objective 3.2.5.4 must be approached in the same way.

⁵⁰ We assume that the second reference to community in this policy is an error.

- (c) Policy 22.2.2.4 which is that “[t]he bulk, scale and intensity of buildings used for visitor accommodation, residential visitor accommodation and homestay activities are to be commensurate with the anticipated development of the zone and surrounding residential activities”.

[290] For completeness, we note that residential visitor accommodation and homestays in conjunction with residential units are to be enabled by Policy 22.2.2.5.

[291] This policy suite is a combination of plan development and plan determination provisions. Policy 22.2.2.1 is the former, being implemented by rules within the RRZ and BCSZ enabling residential and farming activities and home occupation activities as permitted activities. Residential visitor accommodation, which is subject to a separate definition, and homestays are also provided for as a permitted activity, although visitor accommodation is a discretionary activity.

[292] These policies focus on those attributes of visitor accommodation that should be enabled (i.e. in terms of location, scale and type so as to be compatible with and enhance the predominant activities of the relevant zone) and those that should be discouraged (i.e. those that would diminish amenity values and the quality and character of the rural living environment).

[293] In this regard, particular attention needs to be paid to the attributes of ‘bulk, scale and intensity’ of any visitor accommodation proposal, and whether these attributes are “commensurate with the anticipated development of the zone and surrounding residential activities”.

[294] It is in the context of Policy 22.2.2.4 in particular that the flaw in the appellant’s argument as to what is *anticipated* within the BCSZ is exposed; it would be illogical to consider whether the bulk, scale and intensity of a proposal from visitor accommodation is commensurate with the same type of activity.

[295] The BCSZ has its own two objectives:

- (a) Objective 22.2.5 – Residential Development is comprehensively-planned with ample open space and a predominance of indigenous vegetation throughout the zone; and
- (b) Objective 22.2.6 – The ecological and amenity values of the Bob’s Cove Rural Residential zone are maintained and enhanced.

[296] These are implemented by the following policies (respectively):

- (a) Policy 22.2.5.1 – to ensure that at least 75% of the zone is retained as undomesticated area and at least 50% of this area is established and maintained in indigenous species such that total indigenous vegetation cover is maintained over that area;
- (b) Policy 22.2.5.2 – to ensure there is open space in front of buildings that remains generally free of vegetation to avoid disrupting the open pastoral character of the area and the lake and mountain views;
- (c) Policy 22.2.6.1 – to ensure views of Lake Wakatipu and the surrounding landforms from the Glenorchy-Queenstown Road are retained through appropriate landscaping and the retention of view shafts; and
- (d) Policy 22.2.6.2 – to ensure the ecological and amenity values of Bob’s Cove are retained and, where possible, enhanced through:
 - (i) appropriate landscaping using native plants;
 - (ii) restricting the use of exotic plants;
 - (iii) removing wilding species;
 - (iv) providing guidance on the design and colour of buildings;
 - (v) maintaining view shafts from the Queenstown-Glenorchy Road.

[297] As to Objective 22.2.5 and implementing Policy 22.2.5.1, in particular, we accept that:

- (a) the BCSZ was comprehensively planned by the 2006 subdivision consent which identified development areas and undomesticated areas across the entire zone in accordance with the BCSZ rules;
- (b) the “ample open space” referred to in this objective is the open space pastoral area centred either side of Glenorchy-Queenstown Road, (comprising approximately 13ha);
- (c) the predominance of indigenous vegetation around the edges of the zone includes the existing vegetation within Lot 100, which, when compared to many other lots within the zone, including those more centrally located, is heavily vegetated;
- (d) the intention of the policies is to protect views over the open space pastoral area from Glenorchy-Queenstown Road travelling adjacent to the Glentui Heights subdivision, and of the mountains and the lake; and
- (e) Policy 22.2.5.2 does not direct that all residential development must have open space in front of the buildings, unless that is for the purpose of preventing disruption of pastoral character of the area and the lake and mountain views.

[298] We were referred to relevant provisions on indigenous vegetation and biodiversity, on earthworks and in relation to Wāhi Tupuna in Chapter 39, the latter being the only other chapter we intend to refer to. We have given all relevant provisions a fair appraisal as we are required to do.

[299] As to the Chapter 39 provisions, we note in particular:

- (a) Objective 39.2.1 – that Manawhenua values, within identified Wāhi Tūpuna areas, are recognised and provided for;
- (b) Policy 39.2.1.3 – within identified Wāhi Tūpuna areas:
 - (i) avoid significant adverse effects on Manawhenua values and avoid, remedy or mitigate other adverse effects on Manawhenua values from subdivision, use and development listed as a

potential threat in Schedule 39.6.;

- (c) Policy 39.2.1.4 – encourage early consultation with Manawhenua when appropriate to understand the effects of any activity on Manawhenua values in an identified Wāhi Tūpuna area.

The evidence

[300] Ms Pflüger identified all relevant objectives and policies and for the purpose of considering the same, she helpfully grouped her assessment under topics, all of which in broad terms, address the potential effects of the proposal earlier identified under s104(1)(a):

- (a) whether the values of the adjacent ONL would be protected;
- (b) whether the development would diminish amenity values or the quality and character of the environment;
- (c) whether the bulk, scale and intensity of buildings is commensurate with the anticipated development in the zone and surrounding residential activities;
- (d) the appropriateness of the landscaping and development to retain or enhance the amenity values of the BCSZ area.

[301] For the purpose of our s104(1)(b) and s104D evaluations, we have used this grouping.

Whether ONL values are compromised

[302] This question addresses Objective 22.2.1(a), and more relevantly, Policy 22.2.1.4.

[303] We accept the assessment undertaken by Mr Skelton and Ms Pflüger as to the effects of the proposal on adjoining ONL values. On that basis, we find that the proposal is consistent with these provisions.

Whether amenity values, quality and character of the environment are maintained/not diminished?

[304] This question addresses Objective 22.2.1(b) and Policy 22.2.2.3.

[305] As to these, Mr Edmonds describes the Bob's Cove area as having a high level of amenity as a result of the relatively low density of housing, generous section sizes, physical separation from Queenstown and immediate access to the recreational attributes of the lake, walking trails and views of outstanding landscapes. While being a popular tourist destination it is relatively tranquil.

[306] He confirmed that residential amenity is not restricted to visual effects and would encompass privacy, nuisance, quietness and general community cohesion and wellbeing, all of which influenced his assessment as to the suitability of the proposal in the intended location. We agree with his broader interpretation of the concept of amenity, bearing in mind that the PDP definition of Amenity refers both to 'natural and physical qualities and characteristics' and to 'cultural and recreational attributes'.

[307] Mr Edmonds does not consider that the proposal would diminish the area's values and qualities given its discrete setting that is not visible from any other property in Bob's Cove. He stated that the only indication of the activity to other residents in Bob's Cove would be the movement of traffic along Glenorchy- Queenstown Road which is estimated to be up to 180 vehicle movements per day through the Glentui Drive intersection.

[308] He notes that the site is only accessible over a private right-of-way and there are no pedestrian easements for public passage through the site, and the closest walking track in the recreation reserve to the south of the site is the 12 Mile to Bob's Cove trail that follows the lake margin. The track is no closer than 100m to the west of the site along the edge of Bob's Cove.

[309] He further notes the restrictions on the use of communal guest facilities.

[310] In his opinion, the proposal would not diminish the amenity values, or the quality and character of the rural living environment at Bob's Cove.

[311] Mr Espie considers that the proposal *would* diminish amenity values as perceived from surrounding locations and would also diminish the quality and character of the rural living environment.

Is the bulk, scale and density/intensity commensurate/compatible with anticipated development?

[312] This question is relevant in the context of Policies 22.2.2.1 and 22.2.2.4. For the purpose of Policy 22.2.2.4, we interpret the term "commensurate with" as meaning "corresponding in degree, amount, or size"; or "proportionate to", and not "the same as".⁵¹

[313] We have referred to Mr Edmonds' assessment in light of Policy 22.2.2.1.

[314] Mr Edmonds states that the predominant activity within the Bob's Cove neighbourhood is residential, which is typically presented as detached dwellings and a variety of architectural styles, on generous sized sections some of which also contain a residential flat. He compares this form of development to that of the proposal which is designed as a series of small cottage scale buildings that have a domestic scale and character, which he considers are compatible with the residential character of the zone.

[315] In the context of Policy 22.2.2.4, Mr Edmonds considers that the policy intends to discourage single monolithic structures or traditional hotel buildings from establishing in these zones. He considers that the bulk, scale and intensity of buildings to be used for visitor accommodation is commensurate with anticipated development in the zone, noting that a reasonable alternative is the development of four houses.

⁵¹ Collins Concise Dictionary Plus.

[316] In answer to questions in cross-examination, Mr Edmonds acknowledged that the proposal is of a greater scale and intensity than is anticipated for the zone and his written evidence-in-chief states that the proposal is thus contrary to Policy

22.2.2.4. However, he emphasised that his evidence had also referred to mitigating factors such as the reasonably discrete location in the south-west corner of the zone, comparatively removed from the established residential properties, the landscaping around the buildings, and subdued building design.

[317] Moreover, in his answers to Mr Todd, he stated that the removal of some of the buildings and consequential retention of more of the mature beech trees meant that the proposal was “probably more at a level of being inconsistent with that policy rather than contrary to it”.

[318] Ms Standish agreed with Ms Pflüger’s opinion that the proposal is not commensurate, as in being *the same as*, what is anticipated within the zone.⁵² However, relying on Ms Pflüger’s assessment, she considers that the effects with mitigation are not so different so as to be unanticipated and on that basis, she considers that the proposal is inconsistent with this policy, albeit not contrary to it.

[319] We note that the evidence of Ms Standish and Ms Pflüger was written prior to the amendments made in the appellant’s rebuttal evidence and again, at the hearing.

[320] In addressing this policy, and from a planning perspective, Mr Vivian expressed disagreement with Ms Pflüger’s finding that the character and design of buildings may be perceived to be similar to the development anticipated under the subdivision consents and zoning. In his opinion, the difference in character and design is very apparent in Mr Blair’s photo simulations. However, he agreed with

⁵² Ms Pflüger treated the phrase “commensurate with” as being “suitable in amount or quality compared to something else; matching in degree”, a meaning taken from the

Cambridge dictionary.

Ms Pflüger's statement that the number of buildings within the site cannot be considered entirely commensurate with the anticipated development under the plan which would allow four separate dwellings.

[321] Mr Vivian refers to the enablement of residential visitor accommodation and homestays and Policy 22.2.2.5 which in his opinion, give some guidance as to the location, scale and type of visitor accommodation that is appropriate within the zone, noting that this anticipates something significantly less than what is proposed.

[322] However, residential visitor accommodation is excluded from the definition of visitor accommodation and as earlier mentioned, this activity is the subject of its own enabling policy within the BCSZ. Because this activity must be carried out *with* a residential unit,⁵³ unlike visitor accommodation, the comparison between these two types of activities is unhelpful in this policy context. We consider that the relevant comparison is with rural residential development anticipated as the (relevant) predominant activity within the zone.

[323] Mr Espie considers that the scale and intensity of the built form across the site will not be commensurate with the anticipated development nor with surrounding residential activities. Although his evidence was written prior to the removal of five buildings, Mr Espie states that the later amendments did not cause him to alter his assessment.

Findings on second gateway

[324] As we earlier note, our evaluation of the proposal in light of all relevant objectives and policies is dependent upon our effects-based findings. Rather than repeating the same we will rely on what we have recorded on our findings under

⁵³ Under the PDP residential visitor accommodation means the use of a residential unit including a residential flat by paying guests where the length of stay by any guest is less than 90 nights. The definition excludes visitor accommodation and homestays.

s104(1)(a) set out earlier in this decision, unless the particular provision requires further consideration.

[325] In closing submissions, Mr Matheson submitted that at worst the proposal could be found to be contrary to only two policies, being Policy 39.2.1.3(a) and Policy 22.2.5.2. We find that it is not *contrary* to either of these policies, or any other Chapter 22 provisions.

[326] We consider that greater tension is raised with Policy 22.2.2.4. This is because the built form is not the same as that anticipated residential development within the BCSZ, and/or the RRZ, whereby in each of the three development areas on Lot 100, and on the rural amenity area depicted on Sec 1, development could comprise a single residential dwelling with a footprint of up to 500m², a single residential flat (up to 70m²) with each residential dwelling, and no limit on accessory buildings, such as a sleep out, garage, garden shed, glasshouse, or swimming pool (for instance).

[327] However, that policy requires that the bulk, scale and intensity of development be commensurate with, but not the same as the form of residential development anticipated within the zone. Accordingly, although the building numbers would not be commensurate (as in corresponding in number), the size of the villas, but not the manager's residence, and restaurant, are considerably smaller while appearing domestic in their design. Density of built development, as indicated by overall compliance with the 15% site coverage requirement is, however, commensurate with anticipated development within the BCSZ.

[328] Although the appellant has argued that there is no limit on the number of ancillary buildings associated with a residential dwelling located within the development lots, these buildings must also comply with the site coverage rule, which provides another method of limiting building numbers, depending on lot size.

[329] Considering the bulk, scale and intensity of the development in the round,

(including density, as determined by the site coverage rule) we find that while not being entirely consistent with Policy 22.2.2.4, the proposal is not contrary to it in the sense of being repugnant.

[330] Realistically, it is to be expected that the form of development intended to accommodate visitor accommodation will be different from that which is intended for purely residential use, or, we add, for residential visitor accommodation.⁵⁴ That is reflected in the discretionary activity status given to visitor accommodation activity within each of these zones.

[331] The bottom line is that amenity values, quality and character of this area is not to be diminished by the establishment of this proposal. On the basis of the evidence of Ms Pflüger, Mr Skelton and Mr Edmonds, we find that this diminishment will not occur as a result of this proposal.

[332] We should add that we are likely to have come to the opposite conclusion on the basis of the proposal that was described in the appellant's evidence-in-chief, despite that form of the proposal garnering the Council's support. We are inclined to agree with Ms Pflüger's observation that realignment of the villas to avoid the stacked row appearance of buildings was an inconsequential amendment, on its own.

[333] We also note that the proposed design of the buildings (relatively small sizes, recessive colours, living roofs) and their proximity to undomesticated areas of closed-canopy indigenous vegetation is sympathetic to and may even enhance the existing vegetation cover on Lot 100, when compared to the three larger residential dwellings and associated curtilages previously consented.

[334] We further find that the proposal would not compromise landscape values of the adjoining ONL and accordingly we find that the proposal is not contrary to

⁵⁴ Which must be provided with a residential unit.

Policy 6.3.2.7.

[335] There are no other objectives or policies where sufficient tension is raised by this proposal, least of all to an extent that justifies a finding that the second gateway test is not passed, including those concerning cultural values.

[336] Ms Palmer's evidence had also given comprehensive consideration to the relevant policy framework within the National Policy Statement for Indigenous Biodiversity and Chapter 33 of the PDP in relation to biodiversity values. Although this assessment was the subject of challenge by Mr Vivian, we agree with Ms Palmer's evaluation. We find that the proposal will assist in the enhancement of biodiversity on the site in the context of all relevant policies, notably Policy 33.2.1.9 of the PDP.

[337] Accordingly, we find that the proposal meets the second of the s104D gateways having given these provisions a fair appraisal. The proposal is not entirely consistent with all relevant provisions, although it is not contrary to any of them.

[338] In the exercise of our overall discretion, we find that resource consent is able to be granted.

Precedent effect

[339] For the Community Trust, Mr Todd argued that a grant of consent to this proposal could create a potential precedent given the vacant sites immediately adjoining the subject site to the north. He expanded on this by stating that "... trees could be grown on that site and left for a number of years and then somebody comes back and says, I want to have a lodge".

[340] The potential for a similar development on the adjoining site was addressed in the evidence of Ms Friese. This witness presented a plan laying out a similar development proposal over the land to the north of the gully that is yet to be developed under RM130174. However, that land does not

contain the same

indigenous vegetation coverage as Lot 100, large parts of which contain nearly contiguous indigenous vegetation cover, comprising beech trees between 40 and 60 years old.

[341] The potential for an approval for this development to create a precedent for a future development proposal in a number of years once trees have grown on the adjoining land, is fanciful in the court's view.

[342] Moreover, any later application for visitor accommodation would have to account for the cumulative adverse effects on the amenity values, quality and character of the BCSZ arising from another visitor accommodation activity. Whereas it is not the court's role to undertake that assessment, it may well yield a different finding as to its effects.

Further comments on conditions

[343] As we had indicated to the parties, as we have decided that resource consent can be granted, we intend to provide further opportunity for comment on the conditions proposed by the appellant.

[344] However, we are not yet satisfied with the conditions submitted with the appellant's closing submissions for reasons explained earlier in this decision, specifically in relation to the consent notice conditions, although we have additional comments.

[345] Related to the comments made in relation to the s221(3) changes, and in relation to the EMMP in particular, we note that Condition 59 sets out the purpose and content of the EMMP in detail, noting that it is to include "the Existing Vegetation Plan, the Retained Vegetation Plan, Proposed Vegetation Plan and the Construction and Landscaping Staging Plan". Condition 59 f and h refer to the Vegetation Covenant Area.

[346] The court appreciates that there will be a need for a series of management

plans for the planting/transplanting of vegetation during construction, although it would be preferable if the various plans referred to could be combined into a single plan.

[347] That should *not* be the same as the plan which will operate in perpetuity by the conditions of the amended consent notice. As to that, the VCA should encompass the entire undomesticated area – given that it is proposed to be fully covered in closed canopy indigenous vegetation.

[348] This covenant area should *not* include the planting within the development areas. This planting should be the subject of ongoing protection by some other means.

[349] Similarly, in relation to the predator and weed control measures presently incorporated in the EMMP, these do not relate to the land comprised within the undomesticated area.

Use of communal facilities

[350] The amended proposal set out in the appellant’s opening submissions⁵⁵ states:

The restaurant, guest lounge, sauna, spa and yoga studio shall only be for the use of either guests staying on site or, in relation to the restaurant, yoga studio and spa, four (4) memberships of 2 local Bob’s Cove residents per membership, for use only at times there is equivalent vacancy at the accommodation.

[351] As Mr Matheson explained in his closing submissions,⁵⁶ it arose from a suggestion made by Mr Farrell, a s274 party in support. With respect to the Lodge proposal “It’s specifically limited to a certain number of memberships. That was

⁵⁵ At [117] and [118].

⁵⁶ NOE at 40, lines 22-32.

put forward in good faith as a way of recognising that it's in the community".

[352] In terms of effects assessments, this raises questions about potential effects on amenity values. To put this in the context of our decision-making, as explained (at [143] above), "we note that the potential adverse effects that are most in contention are not what we would describe as neighbour-to-neighbour issues; more fundamentally, they impact on the amenity values and character of the BCSZ as a whole, which are values to be enjoyed by all residents of the zone, regardless of their proximity to the site or the proposal".⁵⁷

[353] Furthermore, as explained by Mr Edmonds,⁵⁸ residential amenity and community cohesion were factored into his thinking "as to the suitability of the location of this activity".

[354] Two issues were raised for our consideration, namely:

- (a) The issue of scope,⁵⁹ since this condition was not part of the proposal available for submitters' consideration; and
- (b) The absence of evidence on social effects, bearing in mind the relevant principles of the Act – s5(2) – and the relevance of amenity values in the context of Policy 22.2.2.3.

[355] While the amendment is likely to be beyond the scope of the original application, we need not expand on our reasons for this opinion. That is because we consider that there are merit reasons associated with the social effects of this amendment that militate against our acceptance of this condition.

[356] From a planner's perspective, when distinguishing the concept of residential amenity from the concept of visual amenity that is generally adopted in

⁵⁷ Our emphasis added.

⁵⁸ NOE at 223, lines 21-22.

⁵⁹ Issue raised by Mr Todd – NOE at 219, lines 30-34.

landscape assessments, Mr Edmonds helpfully provided us with an interpretation that aligns in a meaningful way with the wording used in s5 RMA, stating:⁶⁰

I believe residential amenity is much wider than that. It would include things like privacy, nuisance and quietness is a factor, and just general community cohesion and wellbeing.

[357] However, with respect to the particular aspect of the proposal represented by Condition 4, he acknowledged that the potential social effect on the community of Bob's Cove that might arise as a result of the limited, exclusive membership arrangement represented by Condition 4, was not a risk that he had considered.⁶¹

[358] Furthermore, in his opinion as a planner, he acknowledged⁶² that "it might be a private effect between parties, but I'm not sure if that [is] an effect that you would need to be considering".

[359] We do not accept this dismissal of a potential effect that has been acknowledged conceptually but ignored in the statutory assessment. Indeed, no expert with relevant expertise in social effects' assessment was called in this case.

[360] It is clear to us, from the distribution throughout the Bob's Cove community⁶³ of those who support the proposal with their affected party approvals and those who oppose the proposal with their involvement as s274 parties (and their associated costs to be involved in this appeal process), that considerable disagreement exists within the community of landowners at Bob's Cove.

[361] At the very least, this points to the potential for social tensions and the loss of social cohesion. The potential significance of Condition 4 is that it might well

⁶⁰ NOE at 223, lines 19-21.

⁶¹ NOE at 222, lines 23-26.

⁶² NOE at 222, lines 29-31.

⁶³ Edmonds Appendix 11, map of section 274 parties and Affected Party Approval parties.

accentuate, and indeed perpetuate, such tensions by granting certain privileges to some but not to others.

[362] While we do not find this to be a determinative issue for the proposal as a whole, nevertheless, we do not support the inclusion of Condition 4 in any final consent.

Volunteered predator and weed control measures

[363] We have earlier stated our support for each of these measures, in terms of the positive biodiversity outcomes that would result. However, implementation of the Predator Control Plan through the Wakatipu Wildlife Trust and/or working with other residents of the Bob's Cove community who are currently undertaking predator control work.

[364] The court cannot assume that the Wakatipu Wildlife Trust will continue in existence, or for that matter, that any other persons or organisations will become involved in predator control works in the Bob's Cove area. The clear intention of the appellant is to contribute to predator control in the Bob's Cove area.

[365] That initiative is supported by the court.

[366] Accordingly, the appellant is invited to reconsider the wording of the condition to ensure that its intentions are not inadvertently defeated or unable to be achieved through the mechanism of the Wakatipu Wildlife Trust.


[367] As to the volunteered weed control on the DoC reserve, the court cannot assume (or require) that DoC agrees to enter into an agreement and/or a covenant with the appellant to secure its efforts in the weed control/replanting measures proposed on the DoC reserve.

[368] In the context of the court's decision making and consideration of the overall sustainable management purpose of the Act, these volunteered consent

conditions were not by themselves determinative of the overall outcome, although they are a factor in our consideration of the consentability of the overall package.

[369] Accordingly, the appellant is asked to consider how these issues can be addressed in their amended conditions to be filed with the court.

For the court



P A Steven
Environment Judge

