

ORIGINAL

Decision No. C 153 /2004

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of a reference pursuant to Clause 14 of the
First Schedule and an application under section
293 of the Act

BETWEEN WAKATIPU ENVIRONMENTAL SOCIETY
INCORPORATED

(RMA 1394/98)

Referrer

AND QUEENSTOWN LAKES DISTRICT
COUNCIL

Respondent

BEFORE THE ENVIRONMENT COURT

Environment Judge J R Jackson

Environment Commissioner C E Manning

Environment Commissioner R Grigg

Hearing at Queenstown on 31 August and 1 September 2004

Appearances

Mr N S Marquet for Queenstown Lakes District Council ('QLDC')

Ms K Swaine for Wakatipu Environmental Society Incorporated ('WESI')

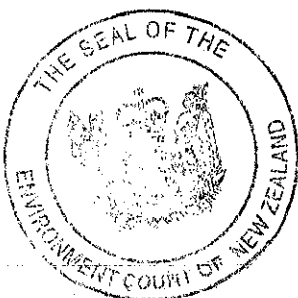
Mr J R Castiglione for the Clear Family Trust ('CFT')

Mr A O Turner for A O and B M Turner and Ponderosa Property Trust

INTERIM DECISION

Introduction

[1] This case concerns the zoning of land at the western edge of Arrowtown to the north of Malaghans Road and the east of Manse Road under the proposed district plan of the Queenstown Lakes District Council. The owners of the two blocks of land



concerned are the Clear Family Trust which owns the southern block and A O and B M Turner whose land lies to the north. Both parcels of land include parts of Feehly's Hill, which is recognised in the partially operative district plan as an Outstanding Natural Feature ('ONF'). The Clear land is on the southern side of Feehly's Hill and is the large paddock adjacent to Malaghans Road. The Turner land has frontage only to Manse Road; this land wraps around the base of Feehly's Hill as Manse Road curves around towards Arrowtown, and it contains the entire western half of Feehly's Hill.

[2] To the west of Manse Road is the Meadow Park zone which provides for a building set-back of 160 metres from Malaghans Road and a Designed Urban Edge subzone ('DUE') being a strip of approximately 50 metres width to the north of the set-back. The land north-east of the Turner land is zoned Low Density Residential. To the north of the Meadow Park zone on the opposite side of the road is an Industrial zone.

[3] We note that on the western side of Manse Road within the building set-back there is an existing house approximately 90 metres from Malaghans Road which is currently being renovated and extended.

[4] The issues in this reference revolve around the appropriate boundary of the ONF, which is Feehly's Hill, and the appropriate level of development on the flat area that skirts around the base of Feehly's Hill and lies between the hill and the two roads – Manse Road and Malaghans Road. The objectives and policies of the application under section 293 of the Resource Management Act ('the Act' or 'the RMA')¹ by the Council also seek to provide a comprehensively designed and integrated development to mark the eastern entrance to Arrowtown.

Alternative zonings for the land

[5] The proposed district plan notified by the Council in November 1995 zoned the land Rural Downlands, and identified the area as an Area of Landscape Importance. After hearing submissions, the Council rezoned the land Rural Lifestyle. WESI submitted a reference seeking that the Rural Lifestyle zone between Arrowtown and Millbrook be deleted.



¹ In its form prior to the Resource Management Amendment Act 2003 – see section 112 of the latter Act.

[6] The Court issued the First Landscape Decision² in these proceedings in 1999 in which it made some general determination as to how to recognise and provide for outstanding natural landscapes and features³ in the district. The Court adjourned the hearing so that further evidence could be called in specific areas where the parties and landowners could not agree as to the limits of such landscapes. The decision records⁴:

We should also state that our line defining the inner edge of the outstanding natural landscape in the basin is obviously not a surveyed boundary. We are prepared to move the edge at some points (particularly the dotted lines on Appendix II) if any party:

- (a) can show us why it is necessary to do so as a matter of law (since zone boundaries will be the real issue); and
- (b) calls cogent evidence on the matter.

The Court also expressly recorded it was not deciding any issues of zone boundaries in the First Landscape Decision⁵:

Although the question of zoning boundaries is as much a matter of policy as methods we have not in fact decided any zone boundaries as a result of this hearing. We hope the parties will be able to consider our three-way division of rural landscapes and suggest appropriate zone boundaries by agreement. Naturally if agreement cannot be reached we will set those issues down for further hearing.

[7] When the matter was set down for a later pre-hearing conference, the Council had taken the position that the land within 210 metres of Malaghans Road – including all the Clear land – should be zoned Rural General and that most of the Turner land should retain its Rural Lifestyle zoning. As a result of further discussion between the Council and the landowners, the Council then came to the view that the development of the Meadow Park zone opposite had changed the character of the surrounding land such that a higher density of housing could be absorbed on the Turner land than was permitted by either of the proposed zones. The Council was also concerned to enable reasonable use of the Clear land and to find a means to achieve appropriate management of Feehly's



² [2000] NZRMA 59.
 Under section 6(b) of the Act.
³ [2000] NZRMA 59 at para (112).
⁴ [2000] NZRMA 59 at para (193).

Hill. It was not possible to consider such outcomes within the scope of the WESI reference. Thus the Council chose to make application under section 293 to amend the plan beyond the scope of the reference. That application was granted by the Court with the consent of all parties.

The present proposal

[8] The Council's present proposal is to provide specifically for the sites concerned by incorporating them into an enlarged Meadow Park zone by means of a structure plan covering the whole eastern entrance to Arrowtown. There are four new areas demarcated in this structure plan:

- a residential area (RES(E)) – standing for ‘residential east’ – of 1.92 hectares of flat land in the north, bounded by the base of Feehly’s Hill on the inside, and on the outside by the Low Density Residential zone to the north-east, and Manse Road to the north and west; and a proposed ‘Designed Urban Edge’ to the south. Within this area of RES(E), development of a scale slightly denser than envisaged in low-density residential zones is permitted, with 40% site coverage and a seven metre high building height restriction. We understand the Council now proposes no minimum allotment size;
- a hillside open space area (OS-HL(E)) which comprises the land in the ONF area, Feehly’s Hill; the purpose of this area is to protect Feehly’s Hill from development;
- a designed urban edge (DUE(E)) starting 100 metres from Malaghans Road and extending to a distance 210 metres from Malaghans Road, bounded to the west by Manse Road and to the east by Feehly’s Hill; its purpose is to provide a clear, comprehensively designed edge to the urban area of Arrowtown; within this area one residential dwelling on the Clear land is proposed as a controlled activity;
- an open space area adjoining Malaghans Road (OS-MR(E)); this is an area of land between Malaghans Road and a line drawn 100 metres to the north which tapers as the base of Feehly’s Hill draws closer to Malaghans Road; the purpose of this zone is to provide an open space corridor at the entrance to Arrowtown.



The position of the parties

[9] The Clear Family Trust reached agreement with the Council and supports its position.

[10] Mr Turner generally supported the Council's proposal, but has produced a concept plan for the Turner land through the evidence of Ms D J Lucas, a qualified landscape architect. There was some discrepancy between the evidence of Ms Lucas and some of the rules suggested by her, which was clarified during the course of proceedings and which we discuss later in this decision. However, briefly, Ms Lucas' proposal was for slightly lower density and smaller-scale housing than that permitted by the Council's proposal. Ms Lucas proposed sections of a minimum size of 575 m², residential buildings with a maximum of 160 m² floor area in the RES(E) area and 90 m² in the DUE(E) area plus additional provision for garaging. In addition Ms Lucas suggested that one dwelling be allowed to encroach two metres onto Feehly's Hill.

[11] WESI maintained that a building set-back of 160 metres should be maintained on both sides of Manse Road, and that no residential activity should be permitted on the Clear land. It generally supported the approach of Ms Lucas to the northern area with its concept of 'cottage-style' development for the Turner land. However it opposed allowing any residential building to encroach upon Feehly's Hill or on the open space area adjoining Malaghans Road and submitted that the plan should make clear that there was to be no residential activity in these areas. In the view of some witnesses, this submission gave the Court scope to classify residential activity in the Open Space areas as a prohibited activity.

The issues

[12] The issues requiring adjudication in this case are:

- What is the boundary of the ONF?
- What type of development is appropriate on the Turner land?
- Should development of any residential activity be allowed on the Clear land? and if it should not, what activities constitute 'reasonable' development of that land?



- Should residential buildings be a prohibited activity in the Open Space areas?

The requirements of the Act

[13] In addressing the issues we must comply with the requirements of the RMA that district plans are to be prepared in accordance with⁶ the functions of territorial local authorities under section 31, the provisions of Part II, the assessment under section 32, and any regulations. Rules in the plan are to implement the policies⁷.

[14] There was no argument about most of those matters. As for the policies to be implemented, Ms JJ Parker, a qualified planner called by the Council, provided us with a comprehensive and helpful survey of the district wide objectives and policies relevant to the zoning of the land. Because the differences between the parties were more limited by the time the case was heard, we shall not need to refer to them all. Nevertheless they inform our decision.

Where should the ONF boundary be located?

[15] Ms R E Ramsay, a qualified landscape architect called by the QLDC, showed the boundary she proposed on an aerial photograph attached to her evidence (attachment 6). She considered that the appropriate boundary was the base of the hill where the schist rock of Feehly's Hill gives way to the flat and undulating land with its more complex but invisible underlying geology of glacial deposits and terrace alluvium. Under cross-examination she accepted that in the paddock at the corner of Manse and Malaghans Roads the boundary was less easily discernible since at that point the toe of the slope tapers more gradually than on land to the north and west. Elsewhere on the subject land she considered the line that marked the hill was clearly visible. Even where the line was less discernible, it could be ascertained to an accuracy of 'a few metres or so'.

[16] In his submissions Mr Turner proposed that the boundary be set at the 432.5 metre contour where what he described as an historic internal fence existed on his land. He submitted that this fence marked the boundary between the English pasture grass below and the more indigenous vegetation on the slopes above. He produced photographs to show the fenceline hidden behind two existing woolsheds and contended



⁶ Pursuant to section 74(1) of the Act.
⁷ Section 75(1)(d) of the Act.

that setting the ONF line in that area would not diminish the amenity of views from public places nor from residences on Manse Road. We note however that the witness with landscape expertise called by Mr Turner, Ms Lucas, after using a fine grained contour map, considered the major change in slope to be broadly approximate to the ONF boundary delineated by Ms Ramsay. She showed her line marking the difference in slope on her attachment 14.

[17] However we find that the ONF boundary is located at the base of Feehly's Hill. Whether that is along the line mapped by Ms Ramsay or that mapped by Ms Lucas can be determined, or preferably agreed, before a final decision is issued.

What is appropriate development on the Turner land?

[18] The Council's proposal is that most of the Turner land on the flat is within the RES(E) area of the proposed structure plan, and a small area of flat in the south within the DUE(E). Within the RES(E) area, buildings are to be set back ten metres from Manse Road and from the open-space, hillside area (OS-HL(E)). They are to be 4.5 metres from any other road or zone boundary and two metres from internal boundaries. We understand that there is to be no minimum size for allotments, a maximum site coverage of 40% and a height restriction of seven metres. Within the DUE(E) area of the Turner land buildings and landscaping are to be a discretionary activity, and the Council must be convinced that landscaping effectively mitigates adverse effects from Malaghan Road and is consistent with the ecological restoration of Feehly's Hill.

[19] Amongst the unchallenged objectives which the rules are designed to implement is Part 12.21.3.1 which is:

Comprehensively designed and integrated development that:

- (a) enhances the eastern entrance to Arrowtown; and
 - (b) becomes an integral part of Arrowtown's urban fabric;
- whilst having regard to:

- surrounding landscape values;
- Arrowtown's heritage resources and character;
- indigenous ecology of surrounding mountains and Feehly's Hill



This objective is supported by Policy 12.21.3.4 which is:

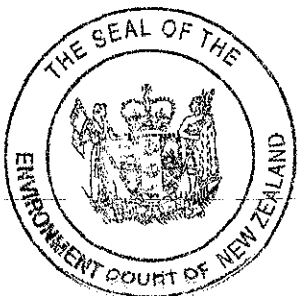
To recognise the sensitivity of the zone on the eastern side of Manse Road, and around any development that compromises the foreground to Feehly's Hill or the entrance to Arrowtown.

[20] We also refer at this point to a district-wide policy 4.2.5.1(c) which requires development to harmonise with local topography and ecological systems and other nature conservation values as far as possible.

[21] Ms Parker opined that the Council's section 293 application provides for the social and economic well-being of the community by recognising the ability of land to the north (the Turner land) to absorb additional residential development and that it would satisfy the requirements of section 5(2)(c) by the provision of an open space and set-back of 100 metres from Malaghans Road and landscaping on the DUE(E) land. It was agreed by all parties that it would do so better than a rural general or rural lifestyle zoning.

[22] Ms Lucas considered that a more refined concept would better achieve the purpose of the Act. Ms Lucas told us that the built form of much of Arrowtown is small scale, single storey vernacular, with a limited materials palette. She proposed that houses on the Turner land should be small, simple structures responding to the Arrowtown character, rather than semi-rural in nature. The subdivision she proposed was designed to differ from the large allotment, large house style of the Butel Park subdivision opposite. She gave evidence that with the type of housing she proposed, houses closely aligned with the base of the hill were in keeping with the Arrowtown character.

[23] Not all the rules put forward by Ms Lucas were mutually consistent. The concept she put forward provided for sections of around 600 m². In the RES(E) area houses were to be a maximum area of 160 m² with a further 40 m² for garaging, and in the DUE(E) area they were to be of 90 m², with provision for a single garage and attached lean-to carport/woodshed. We clarified during the course of the hearing that the dimensions for residential buildings that she proposed were for total floor area. Yet she also told us that building coverage of 40% was acceptable, as was a maximum height of seven metres (two storeys) in the RES(E) and 5.5 metres in the DUE(E) areas.



This would allow a 400 m² house (two storeys of 200 m²) plus a separate 40 m² garage on a 600 m² section in the RES(E) area.

[24] In cross-examination Ms Lucas said she was concerned about the potential for large housing, and replying to questions from the Court told us 'the plan is there be a limit on size'⁸. We take it from this that the floor area limit is the more important element in Ms Lucas's concept, and that if that is adhered to, a site coverage rule would be unnecessary.

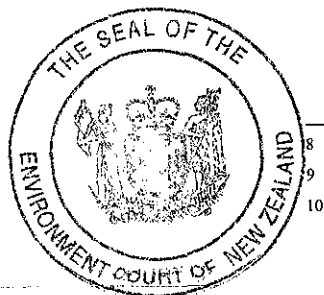
[25] We understand that Mr Turner's submission on the ONF line was designed to facilitate this concept plan with houses sited only two metres from the base of Feehly's Hill, and one house partially on the slope. We note that the relevant policy does not necessarily run contrary to such an outcome. The relevant policy, 4.2.5(5), Outstanding Natural Features, reads:

To avoid subdivision on and in the vicinity of distinctive landforms and landscape features unless the subdivision and/or development will not result in adverse effects which will be more than minor on:

- (i) landscape values and natural character; and
- (ii) visual amenity values

...

[26] In terms of these subdivision design proposals, Ms Ramsay told the Court that she would not take issue with housing being at or within two metres of the toe of the slope⁹. We also note Mr Marquet's acknowledgement that if the Court found in favour of the sort of design concept put forward by Ms Lucas, the Council would not see serious difficulty in that¹⁰. We understand Mr Marquet's comment to relate to all the matters in Ms Lucas' concept apart from the proposal to allow one house (on Lot 1) to be stepped back into the hillside at the base of the slope. We consider that matter separately.



⁸ Notes of evidence p 43.
⁹ Notes of evidence p 125.
¹⁰ Notes of evidence p 118-9.

[27] For the rest we consider that Ms Lucas' concept is more in keeping with Arrowtown's heritage resources and character. We note that the Council's initial proposal would allow a large building (360 m² comprising two storeys of 180 m²) on a small 450 m² section. We consider that the building/open space ratio in Ms Lucas' proposal offers a more appropriate foreground to Feehly's Hill and is more in harmony with local topography as required by Policy 12.21.3.4 and Policy 4.2.5.1(c). We find for these reasons that it better recognises and provides for the outstanding natural feature of Feehly's Hill, as required by section 6(b) and is therefore necessary in accordance with section 32(1)(c)(i) (in the sense of being better than the Council's proposal – *Marlborough Ridge Limited v Marlborough District Council*¹¹). We therefore find on an interim basis that in the RES(E) area there should be a site density standard of 575 m², and that there should be a building coverage rule restricting dwellings to 160 m² floor area and other buildings to a total floor area of 40 m². We also find that the set back required for buildings from the OS-HL area should be reduced to two metres. We discuss provision for dwellings in the DUE(E) area in conjunction with our discussion of potential development on the CFT land.

[28] We consider at this point whether development on Lot 1 should be allowed to cut back into the base of the hill. Ms Lucas gave evidence that the discreet straddling of the base slope by one house in conjunction with public access and the protection management of the whole hill would not have adverse effects and would be compatible with Policy 12.21.3.4. We understood from cross-examination that by the phrase 'protection management' Ms Lucas meant 'giving reserve status to'.

[29] Ms Ramsay accepted that some degradation of the limits of the hill has occurred where existing houses and farm sheds have been constructed at the base. However she considered development on the slopes of the hill would not maintain the open character of the hill and would compromise the Council policy requiring maintenance of the openness of those natural landscapes which are open at the time the plan becomes operative¹².



¹¹ [1998] NZRMA 73 at p. 91.
¹² Policy 4.2.5.6(c).

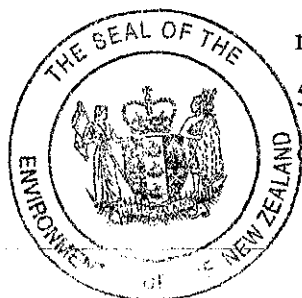
[30] Ms Lucas' evidence suggests that the partial intrusion of a single dwelling onto the base of the slope does require some form of environmental compensation, and we share the concerns of Ms Ramsay. We would not consider the proposed house on Lot 1 acceptable without adequate environmental compensation.

[31] In submissions Mr Turner offered to covenant from development all the land above 440 metres on the western side of the hill, and from the base of the hill where it can be seen from and is parallel to Malaghans Road. He offered to ensure a form of ownership that guarantees public access and to participate in an agreed ecological rehabilitation scheme for Feehly's Hill. Ms Lucas offered valuable insights into the most appropriate method of rehabilitation.

[32] We note that if Mr Turner's proposal were accepted, a segment of the lower slope would be left in his ownership, not covenanted against future development, though presumably protected by strong objectives and policies for the life of the plan. We consider that the intrusion of the proposed house on Lot 1 onto the hillslope would only be acceptable if there were greater certainty that there would be no others. Such certainty could be achieved by a no development covenant on Mr Turner's land on Feehly's Hill to the base of the slope (with the exception of Lot 1). That is the degree of environmental compensation the Court presently considers is required for it to allow the proposed house on Lot 1 as part of the RES(E) concept. Whether such a covenant will be offered is in Mr Turner's hands. If it is not, the Lot 1 boundary will follow the ONF 'boundary' at the base of the hill (i.e. the change in contour to the flats).

Appropriate development on the CFT land

[33] As a result of discussions the Council and the Clear Family Trust are agreed on the degree of development appropriate on the CFT land. This is limited to one residential dwelling as a controlled activity on the northern area set back at least ten metres from Manse Road and the OS-HL(E) boundaries and 15 metres from the OS-MR(E) boundary, that is 115 metres from Malaghans Road. The Council has retained control over roof-pitch and colour, building materials and colour, and landscaping to reduce the visual effects from Malaghans Road. The building is limited to a height of 5.5 metres above ground level and developments can only proceed when CFT have obtained resource consents for ecological restoration of that part of Feehly's Hill in its



ownership and the provision of open space in the OS-MR(E) zone. All other development is to be a non-complying activity.

[34] The only party to oppose development on the Clear land was WESI which requests that the building set-back from Malaghans Road be 160 metres. The Clear Family Trust ('CFT') submit that this would make it difficult, if not impossible, for it to obtain consent for even one residential unit on its land. We note at this point that WESI did not call evidence in support of its submission, although there was evidence called by other parties which assists its case.

[35] There are two propositions central to the CFT/Council case: firstly that since a house already exists in the set-back area west of Malaghans Road, the proposed CFT house will appear from Malaghans Road as an extension of Butel Park (the name given to the residential subdivision in the Meadow Park zone), and be absorbed into the landscape that has Feehly's Hill as the backdrop; and secondly that to refuse any residential dwelling on the CFT land would be to deny it reasonable use of its land. We examine each of these propositions.

[36] For the first of these propositions CFT relied on the evidence of Mr R B Knox, an environmental consultant who is also an associate member of the New Zealand Institute of Landscape Architects. Mr Knox assessed the proposed building area from four points on Malaghans Road, two east and two west of the site, and from two points on Manse Road, one close to the intersection of Manse/Malaghans Road, and another 100 metres along the road. From viewpoints west of the site he considered that the proposed Clear dwelling would relate more closely to the Butel Park subdivision than to the natural feature behind. He considered that the existing house only 90 metres from Malaghans Road was important in creating this perception. From the east of the site at around 320 metres from the intersection the dominant influence would be the open space set back from Malaghans Road and closer to the intersection the dwelling would again be linked with Butel Park. Mr Knox accepted that from the Manse Road viewpoints residential development would have some impact on the natural character and rural amenity values of Feehly's Hill. However he opined that given the bulk and the vegetation cover of the elevated slopes, the natural landscape values of the ONF would not be impacted to any significant extent. Mr Knox further considered that contributions



to the ecological restoration of Feehly's Hill and the provision of land for the OS-MR(E) zone balanced any loss of rural amenity associated with the proposal.

[37] In addressing the district-wide policies the provision must implement, Mr Knox stated that the presence of the Butel Park subdivision demonstrated the capacity of the landscape to absorb change, as required by Policy 4.2.5.1. He considered that the setback from Malaghans Road, accompanied by appropriate planting, avoided adverse effects on the Visual Amenity Landscape at the base of Feehly's Hill in accordance with Policy 4.2.5.4. He stated that the visual impact on Feehly's Hill would be minor and would not compromise Policy 4.2.5.5 which limited strictly the circumstances in which development in the vicinity of outstanding natural features could occur. It was also Mr Knox's evidence that the design and location controls proposed would ensure that the proposed residential activity on the CFT land was consistent with the policy on urban edges (Policy 4.2.5.7), did not contravene the policy on avoiding cumulative degradation (Policy 4.2.5.8) and satisfied the policy on structures (Policy 4.2.5.9).

[38] Mr Knox's approach was not shared by the other landscape architects who gave evidence. Ms Lucas considered that the proposition of one house as a controlled activity on the CFT land could not be supported in landscape terms; such a development constituted not an urban edge, but sporadic development in front of a hill.

[39] It was Ms Ramsay's evidence that the CFT land was vulnerable to degradation and that the topography of the site did not provide opportunities for integrating development in a way that avoided changes to its natural and rural character and preserved the clear views it affords to Feehly's Hill. She considered that this land was separated from land north of a brown house in the south of the Turner land by vegetative patterns and by the south-western toe of Feehly's Hill as it extends into the flat paddocks. Overall she did not consider that the development envisaged by the provisions of the section 293 application on the CFT land would retain its character in a manner consistent with the district-wide objectives and policies of the plan. Ms Parker did not disagree with Ms Ramsay's landscape assessment. In her evidence-in-chief she commented that the policy restricting the circumstances in which development could occur in the vicinity of an ONF would be best implemented by avoiding dwellings or other buildings on the CFT land. When asked if she would support a house site on the



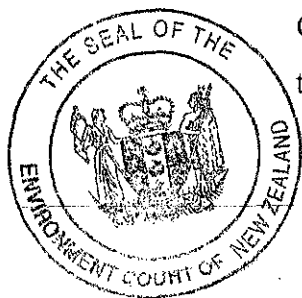
CFT land in the location proposed, if it were not for the locations of the cadastral boundary, after some thought she said 'no'.

[40] We too have doubts about the justification of the proposed dwelling site in landscape terms. We accept Ms Ramsay's evidence that the topography of the CFT site affords little opportunity to integrate any proposed house into the environment. We also note that on the photographs taken by Mr Knox from the intersection of Malaghans and Manse Roads and 100 metres along Manse Road the poles, admittedly six metres high, are very evident. We consider the impact on the ONF would be significant. We understand the evidence of Mr Knox that the Butel Park subdivision, and the single house 90 metres from Malaghans Road will be visible on the other side of Manse Road, but we consider that the impact of a number of houses on a flat or gently rolling landscape west of Manse Road is not comparable to the impact of an isolated house close to the base of a prominent outstanding natural feature.

[41] We are also troubled by Mr Knox's assessment that from 320 metres east of the Malaghans/Manse Road intersection a house on the CFT site would appear to be visually linked with the Butel Park subdivision. On the photograph produced from that view, the roof of the house 90 metres from Malaghans Road is seen. Much of the rest of the building is concealed because the site is lower lying than the point from which the photograph is taken. A house on the CFT land would not be concealed in the same way.

[42] If we were making a judgement solely on landscape grounds we would be inclined to prefer the evidence of Ms Ramsay and Ms Lucas, and not to provide for a dwelling on the CFT land as a controlled activity. We proceed to consider whether without such provision there is no reasonable use for the CFT land.

[43] While this is not a case brought under section 85 of the Act, the clear implication of that section is that plans should not render land incapable of reasonable use. CFT submit that if WESI's submissions to prohibit the proposed residential unit are accepted, no use other than landscaping, planting or ecological restoration would be permitted on CFT's land except on a non-complying basis; that simply cannot achieve the purpose of the Act because it would fail to allow any substantive use of the land.

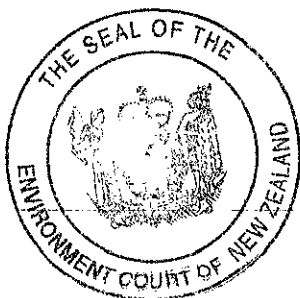


[44] Ms Parker opined that since the CFT land was only 3.5 hectares in size and therefore not viable as an economic farming unit, there would be no reasonable use for the land if a dwelling was not provided for as a controlled activity. Mr C Vivian, a resource manager called by CFT, opined that a single residential unit was not an efficient use of the CFT land, but that having regard to the other matters the Council was obliged to consider pursuant to Part II it was a reasonable use. He did not explicitly say so, but from the general tenor of his evidence, we suspect he did not consider that there was reasonable use in the absence of any residential activity.

[45] What constitutes 'reasonable' use is not defined in the Act, though in certain circumstances it is left for the Court to determine. Ms Parker opined that in some cases reasonable use included economic use or benefits, and that certainly it was the equivalent of the landowner being able to use the land in some way. We accept that, but we would be reluctant to conclude that this involves ensuring that a land use must permit a specific rate of return. A whole range of factors, including historical uses may be relevant.

[46] We accept that if the use of all the CFT land is restricted to the provision of open-space, as provided for by the OS-MR(E) area, that would not constitute reasonable use of the land. In terms of rural uses we have the rather general comment of Ms Parker that the area of the CFT land is too small to enable a 'reasonable' farming unit. However whether to lease an area for grazing or other rural activities constitutes reasonable use depends on a whole range of factors, such as the history of the zoning of the land, conditions of purchase and so forth, about which we have little information.

[47] CFT urged that resource consents for a dwelling on the CFT land had been issued in the past, most recently in February 1996, and had continued in existence until 2000; that factor favoured provision for a dwelling with suitable design and location controls as a controlled activity. In that consent the Council had expressed the opinion that 'the adverse effects could be adequately mitigated'. While that consent is not relevant to an assessment of the appropriateness of the Council's proposed section 293 provisions in landscape terms, it may well be a factor in determining reasonable use. However CFT had the opportunity to implement that resource consent or to have it extended, and did not take it. No reasons for this were suggested to us.



[48] The evidence presented to us is insufficient for us to determine in this proceeding whether in the absence of residential use as a controlled activity any reasonable use can be provided for the CFT land. We accept that additional uses to those provided for the OS-MR(E) area need to be made available.

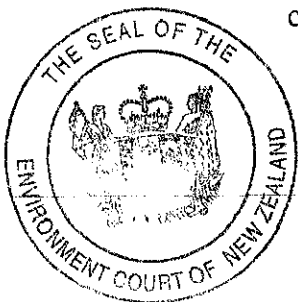
[49] It follows from this that we do not think a case has been established that the DUE(E) should contain provision for a residential dwelling on the CFT land as a controlled activity. But neither do we think a case has been made to suggest it should be prohibited.

[50] One of the concerns we had about the DUE(E) provisions was that the CFT land would contain a dwelling as a controlled activity, and that a dwelling or dwellings would be a discretionary activity on the Turner land in the DUE(E) area. This seemed to run counter to the evidence of Ms Ramsay and Ms Lucas that the land south of the toe of Feehly's Hill was in landscape terms the most sensitive. Ms Parker appeared concerned that houses on both the Turner and the CFT land in the DUE(E) might give the appearance of urban sprawl, but given that the CFT land is further from the residentially zoned area, a house on that land is the most likely to create that impression.

[51] We note that the stated purpose of the DUE is:

To provide for an interesting and comprehensively designed urban edge between the open space approach to Arrowtown and new residential activities. It is anticipated that the Designed Urban Edge (E) will successfully integrate planting with the ecological restoration of Feehly's Hill and will screen housing from Malaghans Road.

We do not consider that permitting one house as a controlled activity in the most sensitive part of the area, and by a different process considering an application for discretionary activity in the remainder, is necessarily the most appropriate way to create a comprehensively designed urban edge. We are inclined to make residential activities in the whole of the DUE(E) area discretionary. We note that in an ideal world a comprehensive design for the whole DUE(E) might be contemplated.



[52] As a consequence of this additional uses for the CFT land should be provided, at least until the question of residential development of the land is determined, and beyond that if it is determined to be unsustainable. WESI sought Rural-General zoning in its reference. In our view appropriate uses under that zoning include grazing, pastoral farming, arable and horticultural uses, but there may be others the parties may agree upon. They should be added as appropriate activities in the DUE(E) and OS-HL(E) subzones.

Should residential activity be prohibited in the Open Space Areas?

[53] WESI submitted that clarification was needed that no residential building take place in Activity Areas OS-MR(E) or OS-HL(E) areas. This was understood by Ms Parker to give scope to impose prohibited status on residential buildings in these areas. We are not certain that it does, but in the event we do not need to decide that for reasons we shall outline.

[54] There are two ways in which the Court, as opposed to the landowner, can seek to ensure that residential development does not take place in the Open Space Areas. One is to prohibit the activity. The second is to have rules with which the activity does not comply, backed by strong objectives and policies. In this case a number of unchallenged policies of the Meadow Park zone give strong backing to a council wishing to control activities. They include:

Policy 12.21.31.1

To ensure that development of the zone is comprehensively designed and integrated through the adoption of a structure plan which in conjunction with zone rules:

...

- retains significant open space adjoining Malaghans Road;

...

- retains the openness and restores the ecology of the upper slopes of the zone;

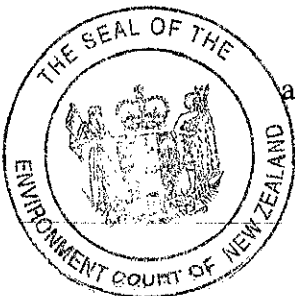
...

- maintains and enhances the landscape and ecological values of Feehly's Hill;

...

- maintains the open foreground to Feehly's Hill as viewed from Malaghans Road

and Policy 12.21.3.4:



To recognise the sensitivity of the zone on the eastern side of Manse Road and avoid development that compromises the foreground to Feehly's Hill, or the entrance to Arrowtown.

[55] In addition there are general policies which seek to protect the landscape, natural character and usual amenity values of Outstanding Natural Features, and to identify the edges of urban areas. Any proposal would be required to meet them.

[56] In considering references on plan provisions, the Court must be satisfied that any rule it adopts is necessary, in the sense of 'the better of the choices before it on the evidence' as adopted in *Suburban Estates v Christchurch City Council*¹³, in achieving the purposes of the Act and, in the case of unchallenged objectives and policies, in implementing them. There is a presumption that where those aims can be met by a less restrictive regime that regime should be adopted. We consider that with the objectives and policies we have outlined a non-complying regime offers strong protection to the values associated with open-space along Malaghans Road and on Feehly's Hill. We therefore intend to retain that status for residential activities in the OS-MR(E) zone.

Findings

[57] We summarise our findings as follows:

- We find that subject to the changes to the rules we outline below, the Council's section 293 application performs the Council's function of achieving the integrated management of land under section 31(a) of the Act, achieves its purpose under Part II, and is necessary to do so pursuant to section 32.
- The ONF boundary is to be located at the base of the slope of Feehly's Hill.
- In the RES(E) area, the minimum area of a residential section is to be 575 m², the maximum floor area of any dwelling is to be 160 m² with an allowance for accessory buildings to a maximum floor area of 40 m²; the minimum set-back from the OS-HL(E) area is to be two metres.
- An exception may be made for one house in the RES(E) zone to straddle the hill if the environmental compensation we have outlined is offered.
- In the DUE(E) all residential activity is to be discretionary.



A series of assessment matters may be added which could include:

- (a) the extent to which it is possible to provide a landowner with reasonable use of his land by other means;
- (b) the extent to which the proposal assists in providing a comprehensively designed urban edge to Arrowtown.
- Within the OS-MR(E), a range of additional uses including grazing, and arable or pastoral farming are to be permitted. Such uses are not to include tree planting.


[58] We invite the parties to confer on the changes to the rules necessary to implement these findings.

Costs

[59] The question of costs is reserved, though at present we see no reason to depart from the normal practice in plan references, that costs should lie where they fall.

DATED at CHRISTCHURCH 21 October 2004.




 C E Manning
 Environment Commissioner


 R Grigg
 Environment Commissioner

Issued¹⁴: 21 OCT 2004