ORIGINAL

Decision No. C010/2005

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of two references under clause 15 of the First Schedule to the Act

BETWEEN **INFINITY GROUP**

(RMA337/03)

DENNIS NORMAN THORN

(RMA352/03)

Appellants

AND **QUEENSTOWN-LAKES DISTRICT COUNCIL**

Respondent

BEFORE THE ENVIRONMENT COURT

Alternate Environment Judge D F G Sheppard (presiding)
Environment Commissioner P A Catchpole
Environment Commissioner M P Oliver

HEARING at Wanaka on 21, 22, 23, 24 and 25 June, and 20, 21, 22, 23 and 24 September, 2004.

APPEARANCES:

W P Goldsmith and J M Crawford for Infinity Group
P J Page and A Durling for D N Thorn
G M Todd and (from 20 September 2004) K Rusher for the Queenstown-Lakes District Council
J R Haworth for the Upper Clutha Environmental Society Incorporated.

THE SEAL OF THE ENVIRONMENT COURT OF NEW ZEALAND

INTERIM DECISION

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Introduction

[1] Lake Wanaka and its setting are renowned for their outstanding natural beauty. The main issue in these proceedings was whether a proposed extension of Wanaka town on a peninsula to the north-east should be disallowed or restricted because of adverse effects on landscape and visual amenity values.

[2] The Queenstown-Lakes District Council, at the request of the developer, proposed a special zone for the 75-hectare site that would enable a mixed-density residential development with up to 240 residential units, and open space areas. After hearing submissions, the Council increased the number of residential units from 240 to 400.

[3] Two reference appeals were lodged with the Court. One, brought by the developer, sought amendments to the special plan provisions. The other, brought by an opponent, sought that the previous Rural General zoning of the site remain.

[4] The two references were heard together. The parties were the developer (Infinity Group), which generally supported the special zoning for residential development; the Council, which also generally supported the special zoning; the other referrer, Mr D N Thorn, who opposed the special zoning for development; and the Upper Clutha Environmental Society, which opposed provision for development at the lake end of the site.

[5] The references having been lodged in May 2003, prior to the commencement of the Resource Management Amendment Act 2003, there was no dispute that the proceedings have to be decided as if that amendment Act had not been enacted.[1]

The site and its environment

[6] The site is roughly rectangular in shape, and has an area of 75.484 hectares. It is located on the Beacon Point Peninsula, immediately north of a residential area served by Rata Street and Hunter Crescent; and east of another residential area known as Penrith Park. To the north, the site abuts a recreation reserve, which in

[1] Resource Management Amendment Act 2003, s 112(2).

turn abuts Lake Wanaka. The adjoining land to the east is exotic forest, and to the south-east, pasture.

[7] The southern boundary of the site is about 2.3 kilometres from the Wanaka Town Centre. The western boundary of the site is about 700 to 800 metres from Lake Wanaka, and the northern boundary is about 120 metres from the lake edge.

[8] The site is generally rolling, with shallow gullies, rounded ridges and a predominantly westerly aspect. The northern boundary is near the top of a steep scarp which drops to the lake. The eastern boundary is about 130 to 300 metres from a ridge.

[9] The average level of the lake is about 279 metres above sea level. The highest point on the site is about 360 metres above sea level, and the lowest point about 305 metres above sea level.

[10] Most of the site has a slope pattern that ranges from 1 in 7 to flatter than 1 in 20, but there are areas near the eastern boundary, the south-western end and the north-eastern end that slope between 1 in 7 to 1 in 3. The escarpment down to the lake beyond the northern end of the site is generally steeper than 1 in 3.

[11] In pre-historic times, the site was overrun by glacial advances which left morainic deposits, more recently about 23,000[2] and 18,000[3] years ago. The younger (Hawea) moraine generally lies between the 300- and 360-metre contour lines on the site.

[12] The vegetation of the site is mainly exotic pasture grasses, and there are scattered stands kanuka and matagouri mainly at the northern end of the site and along parts of the eastern boundary. There are also pockets of kanuka in gullies and patches elsewhere on the site.

[13] The site is visible to varying degrees from parts of Lake Wanaka, and from parts of West Wanaka, including the Millennium Walkway along the western shore, and residential areas to the west and south of the site. More particularly, the northern part of the site is visible from the lake, and the elevated slopes near the

[2] The Mt Iron Advance.
[3] The Hawea Advance.

eastern boundary are visible from the west and south, as well as from parts of the lake.

[14] Some people cross the south-eastern corner of the site to gain access to walking and cycle tracks in the adjacent plantation, and others use cycles on tracks through the kanuka at the northern end. The owner has acquiesced in that, but the site is private property and there is no public right of access over it. There is a popular walking path through the lakeside reserve to the north of the site.

Relevant planning instruments

[15] There are three planning instruments applicable to the site: the Otago Regional Policy Statement; the transitional district plan; and the partly operative Queenstown-Lakes District Plan.

Otago Regional Policy Statement

[16] The Otago Regional Policy Statement became operative on 1 October 1998. Among other matters, there are objectives and policies of protecting natural features and landscapes from inappropriate subdivision, use and development;[4] ensuring public access opportunities to and along margins of lakes are maintained;[5] protecting areas of natural character, outstanding natural features and landscapes of lakes;[6] consolidation of urban development to make efficient use of infrastructure;[7] avoiding, remedying, or mitigating adverse effects of subdivision, land-use and development on landscape values;[8] and maintaining the natural character of areas with significant indigenous vegetation.[9]

The transitional district plan

[17] The transitional district plan had been prepared under the former Town and Country Planning Act 1977, and is deemed to be the operative district plan under the

[4] Objective 5.4.3, Policy 5.5.6, and Objective 6.4.8.
[5] Objective 6.4.7 and Policy 6.5.10.
[6] Objectives 6.4.8 and 9.4.1(c).
[7] Policy 9.5.2(a).
[8] Policies 9.5.4 and 9.5.5(c).
[9] Policy 5.5.7(i); Objective 10.4.3 and Policy 10.5.2.

Resource Management Act 1991[10] until replaced by a district plan prepared under the 1991 Act.

[18] By the transitional plan, the northern part of the site (Mr J C Kyle estimated about one-quarter to one-fifth) is zoned Rural L (Landscape Protection), and the rest is zoned Rural B.

[19] There is a policy of ensuring that areas of high visual amenity are protected by zoning.[11] The zone statement for the Rural L Zone records that the shores of Lake Wanaka in the vicinity of Wanaka town are worthy of protection; and states an objective of providing for greater development of the town in depth, complemented by the Rural L zone restricting development around the lake margin.[12]

[20] The Rural B zone is a general rural zone applying to land suitable for pastoral use, although other uses compatible with scenic values and land stability are also permitted.[13]

The Queenstown-Lakes District Plan

[21] The proposed Queenstown-Lakes District Plan was prepared under the Resource Management Act, and was publicly notified on 10 October 1995. The site was in the Rural Downlands Zone, but by decision on submissions, it was included in the Rural General Zone, a zone which primarily encourages retention of land for farming carried out in such a way that protects and enhances nature conservation and landscape values.[14] The plan provides objectives, policies and methods applicable to managing the effects of subdivision and buildings that address landscape and visual amenity values.

[22] The proposed district plan was made partly operative from 11 October 2003, but many provisions of Sections 4 and 5 (District-wide Issues and Rural Areas), among others, are not yet operative.

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[10] S 373(1).
[11] Policy 3.5.02.
[12] Section 3.5.01.
[13] Sections 3.3.01 and 3.3.02.
[14] Section 5.3.1.1.

[23] The plan states a vision of community aspirations for a sustainable district. this contains a statement that undeveloped ridgelines and visually prominent landscape elements that contribute to the District's well-being (among other features) are protected from activities that damage them.[15]

[24] In Chapter 4 on district-wide issues, there are (among others) objectives of preserving the remaining natural character of lakes and their margins, protecting natural features.[16] There are (among others) policies of long-term protection of geological features;[17] of sites having indigenous plants of significant value;[18] and of avoiding adverse effects on the environment.[19]

[25] The district-wide provisions relating to landscape and visual amenity, provide for classification of rural landscapes into three classes: Outstanding Natural Landscape, Visual Amenity Landscape and Other Rural Landscape.[20] Specific policies and assessment matters apply to rural landscapes in each of those classes. However the Plan does not identify urban landscapes, nor does it provide specific policies and assessment criteria in respect of them.

[26] Even so, there are policies on future development that are not specific to particular classes of rural landscape. They include a policy of avoiding, remedying or mitigating adverse effects of development where the landscape and visual amenity values are vulnerable to degradation;[21] and of encouraging development in areas with greater potential to absorb change without detraction from landscape and visual values.[22] There is a policy of avoiding sprawling subdivision and development along roads in visual amenity landscapes.[23] There is also a policy of ensuring that the density of subdivision and development does not increase so the benefits of further planting and building are outweighed by adverse effects on landscape values of over-domestication of the landscape.[24] The environmental results anticipated from

[15] Section 3.6, 2nd paragraph.
[16] Objective 4.1.4.1.
[17] Policy 4.1.4.1.1, 4.1.4.1.4, and 4.1.4.1.12.
[18] Policies 4.1.4.1.4 and 4.1.4.1.11.
[19] Policy 4.1.4.1.7.
[20] Section 4.2.4.
[21] Policy 4.2.5.1(a).
[22] Policy 4.2.5.1(b).
[23] Policy 4.2.5.6(d).
[24] Policy 4.2.5.8(a).

implementing the policies and methods relating to landscape and visual amenity include protection of the visual and landscape resources and values of lakes.[25]

[27] For an objective of efficient use of energy, there is a policy of promoting compact urban forms which reduce the length of and need for vehicle trips.[26]

[28] In a part of the plan about urban growth, the Council identified an issue of protecting landscape values and visual amenity.[27] In that context there is an objective of growth and development consistent with the maintenance of the quality of the natural environment and landscape values.[28] There is a related policy of protecting the visual amenity, and avoiding detracting from the values of lake margins.[29] Associated with another residential growth objective are policies of enabling urban consolidation where appropriate and encouraging new urban development in higher density living environments.[30] The environmental results anticipated from implementing the policies and methods relating to urban growth include avoidance of development in locations where it will adversely affect the landscape values of the district.

[29] Similarly, in a part of the plan about residential areas (district-wide), there is a policy of enabling residential growth having primary regard to protection of the landscape amenity.[31] In respect of Wanaka in particular, there is an objective that residential development is sympathetic to the surrounding visual amenities of the rural areas and lakeshores.[32]

[30] A resource management consultant, Ms N M Van Hoppe, gave the opinion that the Rural General zone is an inappropriate zoning for the site, on the grounds that it is not efficient or commercially viable to farm it due to its small area, being adjoined on two boundaries by residential activities, and only being accessible through residential areas. The witness also considered the Rural General zoning of the site inappropriate because it does not allow for the residential development that the site is capable of absorbing.

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[25] Para 4.2.6(vi).
[26] Para 4.5.3.1.1.
[27] Para 4.9.2.
[28] Section 4.9.3, Objective 1.
[29] Ibid, Policy 1.1.
[30] Ibid, Policies 3.1 and 3.2 for Objective 3.
[31] Section 7.1.2, Policy 1.4.
[32] Section 7.3.3.

[31] The zoning of a piece of land in a proposed plan can be changed by the Court on an appropriate appeal. To that extent evidence about the appropriateness of the existing zoning of the land might be relevant on appeals arising from such a variation. However, the issue on appeals arising from a variation is focused on the appropriateness of the zoning and other provisions proposed by the variation. If those provisions are not upheld, and the variation is cancelled, the existing zoning remains.

Variation 15

[32] The Council proposed the special zoning for Infinity Group's site by publishing a variation (identified as Variation 15) to its proposed district plan. We will summarise the contents of the variation, and the sequence of events in respect of it. We will then address the question whether the variation has merged with the proposed district plan, and describe further amendments to the special zone agreed on by Infinity Group and the Council, and presented by them to the Court.

Contents

[33] Variation 15 creates a special Peninsula Bay Zone and proposes that the site be rezoned accordingly. The zone includes a layout and design plan for development of the site, which identifies separate activity areas (or subzones) in the site.

[34] The Variation also provides statements of issues, objectives and policies, and implementation methods for the Peninsula Bay Zone. The implementation methods including rules containing site and zone standards governing (among other things) the development of sites, including lot sizes, the extent of earthworks, the heights, locations, density and appearance of buildings, and the heights and appearance of plantings. The rules also govern the classes of activities in the zones.

[35] In terms of Variation 15 as notified, the zone would limit development to a total of 240 residential units. There were to be four activity areas:

- Area 1 would be a low-density residential area (minimum lot size 1000 square metres) in the centre of the site, covering about half the area of the zone, in which complying buildings would be permitted activities:

- Area 2, about 20 % of the area of the zone, was to be a rural-residential area along the northern and eastern edges of the zone, in which buildings would be discretionary activities.

- Area 3 was to be a higher-density residential area in the middle of the site, about 5% of the zone area, in which complying buildings would be permitted activities:

- Area 4 was to be for open space and recreation, applying to about 20% of the site area around the residential areas, in which buildings would be non-complying activities.

The sequence of events

[36] The Council publicly notified Variation 15 on 13 October 2001, the time for lodging submissions closing on 23 November 2001, by when 19 submissions in opposition had been lodged.

[37] On 15 March 2002, before it had notified a summary of submissions for further submissions to be lodged, the Council purported to put the variation on hold. The purpose was to await a community consultation process under the style Wanaka 2020, for which a workshop was to be held in May.

[38] On 19 July 2002, a Council committee discussed the views expressed at the workshop, and decided to proceed with Variation 15. The Council then asked the developer, Infinity Group, for amended layout and zone provisions to allow for 400 dwellings.

[39] On the next day the Council published its summary of the submissions on the variation. The time for lodging further submissions closed on 26 August, by when 35 further submissions from 5 people had been lodged (including 12 by Mr Thorn).

[40] On 29 October 2002 Infinity Group provided the Council with an amended plan increasing the maximum number of dwellings in the zone from 240 to 400, increasing the extent of Area 3 (higher-density residential), and reducing the minimum lot size from 1000 square metres to 700 square metres (Area 1).

[41] In February 2003 the Council heard the submitters following which, on 17 April 2003, it reached its decision on the submissions, altering the special zone provisions in these respects in particular:

(a) Creating new Areas 5a and 5b at the northern end of the site, and making provision for protection of native vegetation in Area 5b;

(b) Increasing to 400 the maximum number of residential units in the zone;

(c) Reducing the minimum lot size in Area 1 to 700 square metres;

(d) Identifying 24 additional sites in Area 1; and

(e) Providing for multi-unit development in Area 3.

[42] On 2 May 2003 the Council gave notice of its decisions on the submissions; and on 26 May Infinity Group and Mr Thorn lodged with the Environment Court reference appeals arising from the variation.

[43] By their appeal, Infinity Group sought deletion of Rule 12.19.3.5 prohibiting removal of native vegetation, disturbance of earth, structures and residential and visitor accommodation activities in Area 5b; and consequential amendments to other rules and to the layout and design plan.

[44] By his appeal, Mr Thorn sought that the site be zoned Rural General. In effect he sought that Variation 15 be cancelled.

[45] The Council contended that the Variation should be confirmed, albeit with some amendments to the provisions for the Peninsula Bay Zone:

(a) Prohibiting removal of kanuka outside nominated residential building platforms in Areas 2 and 5b;

(b) Specifying maximum building heights by reference to datum levels for residential building platforms in Areas 2 and 5b;

(c) Deleting the exemption for earthworks within residential building platforms in Areas 2 and 5b, so that assessment criteria encouraged carrying them out in the period between 1 May and 31 October.

[46] The Upper Clutha Environmental Society contended that the zoning should be amended to prohibit development of the part of the site at the northern end, effectively Area 5.

The effect of the merger of Variation 15

[47] A question arose about the significance of Variation 15 having, by clause 16B of the First Schedule to the Act, merged in the proposed district plan, both being at the same procedural stage.

[48] Mr Todd, for the Council, submitted that the Court should start with the existing Rural General zoning, consider the zoning proposed by the variation, and that it is open for it to come to a determination allowing for something within that spectrum.

[49] Counsel for Infinity Group, Mr Goldsmith, addressed this question in his closing submissions. He observed that in considering a resource-consent application in respect of the site, the consent authority would have regard to the district plan as amended by Variation 15; and the former Rural General Zone would not form part of the evaluation of the application.[33] Otherwise it would be faced with the complex and unwieldly task of assessing an application by reference to three (or possibly more) planning instruments.

[50] Counsel then addressed the question whether that approach should apply to consideration of a variation. He remarked that there is an inherent conflict between the two subclauses of clause 16B, and that this case is further complicated by the proposed plan being partly operative. Mr Goldsmith also submitted that there is no presumption in favour of any particular zoning of the site, the proceedings being more in the nature of an inquiry,[34] from which the Court has to determine the most appropriate zoning for the land.

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[33] *Awly Developments v Christchurch City Council* Environment Court Decision C103/2002, para 53; *Peat v Waitakere City Council* Environment Court Decision A82/04, para 66.

[34] *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[51] Clause 16B(1) prescribes that a variation shall be merged in and become part of the proposed instrument as soon as the variation and the proposed instrument are both at the same procedural stage.

[52] Variation 15 reached the stage of being subject to determination of reference appeals to the Environment Court on 26 May 2003, when these appeals were lodged. The proposed district plan was also at that stage then. It did not become partly operative until 11 October 2003. So we find that by Clause 16B(1), the variation merged in and became part of the proposed district plan on 26 May 2003.

[53] That does not mean that the Rural General zoning of the site provided by the proposed plan as amended by decisions on submissions is irrelevant. At the least, if the variation is cancelled, so the special Peninsula Bay Zone no longer applies to the site, the application to it of the Rural General zoning would be revived.

[54] Even so, we accept Mr Goldsmith's submissions that there is no presumption in favour of any particular zoning of the site, the Court being required to determine the most appropriate zoning for the land (with the limit, submitted by Mr Todd, that it falls within the range between the status quo and that proposed by the variation).

[55] We doubt whether clause 16B(2) affects that. We infer that subclause (2) is intended to apply to resource-consent applications and enforcement action, not to reference appeals.

Amendments to Variation 15

[56] The Council amended Variation 15 by its decisions on submissions. By its appeal Infinity Group sought further amendments. By the time of the appeal hearing, Infinity Group and the Council had reached agreement on numerous further amendments to the provisions of the special Peninsula Bay Zone. Without detailing them all, the more important are these:

[57] Altering the layout plan so that 6 lots in Area 5 are returned to Area 1, and identifying 11 sites with building platforms in Area 5a, instead of 6 larger sites with no identified platforms:

(a) Inserting objectives, policies, implementation methods, explanation and reasons specific to Area 5:

(b) Making buildings in Area 5a controlled activities on identified building platforms, otherwise discretionary activities:

(c) Reclassifying removal of native vegetation, earthworks, structures, residential and visitor accommodation activities in Area 5b from prohibited to non-complying;

(d) Amending the control on buildings in Area 5a that break a ridgeline as viewed from any public place so that it applies only to views from up to 700 metres from the shoreline;

(e) Reducing building height limits for Area 5a from 5 metres to 4.5 metres, and providing for a limit of 11 units in that area.

[58] Subsequent to the agreement between Infinity Group and the Council on those amendments, Infinity Group proposed further amendments to the special Peninsula Bay Zone provisions, both prior to, and during the appeal hearing. Infinity Group proposed the further amendments on the basis that the hearing was an iterative process intended to achieve the best zoning outcome for the land, including the most appropriate zone provisions.

[59] We accept that the Variation contains elaborate zoning provisions for comprehensive development of a considerable area of land in ways that are intended to avoid, remedy and mitigate adverse effects on the environment. But the successive amendments, however well intentioned, certainly presented the opposing parties and the Court with a proposal that continued to be altered up to the end of the appeal hearing. So we doubt that the proposal presented by Infinity Group to the Council in 2001 had been prepared with sufficient care having regard to the importance of the site and the scale of the development.

Authority for increased density

[60] In the variation as notified in 2001, the special Peninsula Bay Zone provided for a maximum of 240 residential units, and a minimum site area of 1000 square metres. By its decision on the submissions, the Council increased the maximum number to 400, reduced the minimum size to 700 square metres, and made consequential changes to the layout plan. Mr Thorn challenged the Council's

authority to make those amendments in that way, contending that no submission on the variation had sought them.

Arguments and evidence

[61] Mr Thorn's planning witness, Mr W D Whitney, gave the opinion that people who had not lodged submissions on the variation might have done so, if it had provided for 400 residential units, with the consequential increase in traffic effects. He observed that anyone wishing to debate the merits or otherwise of the amendments had been deprived of the opportunity to do so, as the amendments had not been provided for in a submission notified for further submissions.

[62] In cross-examination, Mr Whitney accepted that in hearing the submissions, the Council had had before it a traffic engineer's report which, at the Council's request, had considered the effects arising from a 400-unit development. The witness also accepted that a person who had read the original notification of the variation but had not checked the notification of submissions could find that the outcome is different from what was originally notified, but he observed that people do have opportunity to respond to what is in submissions.

[63] The Council relied on a primary submission on the variation by Ian and Sally Gazzard, in which they had stated that they had no objections to high density housing in suitable areas as they believed there is also a need for small sites. That submission had been notified in summary form for further submissions.

[64] Its planning witness, Ms N M van Hoppe, stated that the Council had obtained specialist reports during its decision-making process which had concluded that increased traffic volumes due to increase in density and volume within the zone would result in no more than minor effects that could be absorbed by current and proposed services.

[65] Infinity Group submitted that the assessment of whether the increase in residential density was reasonable and fairly raised by submissions should be approached in a realistic workable fashion, rather than from the perspective of legal nicety.[35] Mr Goldsmith also relied on *Haslam v Selwyn District Council.*[36]

[35] *Royal Forest & Bird Society v Southland District Council* [1997] NZRMA 408 pg 10.
[36] Environment Court Decision C71/93, p 10.

[66] Infinity Group relied on the Gazzards' primary submission, and on a further submission by the Wanaka Residents' Association supporting the Gazzards' statement about high-density housing and need for smaller sites. Infinity Group also relied on the report of the Wanaka 2020 workshop that community discussion had indicated that the Peninsula Bay development could be beneficial with greater density.

[67] Mr Page (counsel for Mr Thorn) contended that the Gazzards' submission had not raised an increase in density, as it did not state any relief sought by them; and that it can only be understood as support for the high density residential area (Area 3) of the zone as notified. On the Wanaka Residents' Association's further submission, counsel argued that a further submission cannot extend the scope of a primary submission.

[68] Mr Whitney gave the opinion that what the Gazzards had sought by their submission was that adequate infrastructure be planned and installed before further development takes place. They had not sought a decision increasing the number of residential units or reducing the lot sizes. The witness also gave the opinion that the Wanaka Residents' Association, by its further submission, had supported the Gazzards' submission on high density housing "provided adequate surrounding infrastructure can be provided".

[69] Mr Whitney observed that the Wanaka 2020 workshop report was an informal document that did not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of Section 74(2)(b)(i) of the Act. The report summarised general conclusions from workshop discussions, and responses to those conclusions developed by facilitators and the technical support team. Mr Whitney gave his reasons for suggesting that an increase in density in response to that report might be promoted closer to Wanaka town centre than increased density at Peninsula Bay.

[70] Mr Whitney did not agree with Ms Van Hoppe's opinion that the Wanaka 2020 workshop should be considered as part of the consultation for the variation, because once a variation is notified, consideration is limited to its contents and to the submissions and further submissions lodged in response to it.

Consideration

[71] In considering this question we state our understanding of the law; state our findings about the contents of the relevant submissions; address the significance for this purpose of the Wanaka 2020 workshop report; reach our conclusion; and then consider the consequences of it for the case.

The law

[72] It has been part of New Zealand planning law for decades that despite arguments about the realities of the situation, and appeals to common sense, a planning authority cannot alter a variation except to the extent that the alteration is sought by a submission lodged in accordance with the prescribed procedure.[37] The application of this principle to the Resource Management Act regime was confirmed by the High Court in *Countdown Properties v Dunedin City Council* [38] and in *Royal Forest & Bird v Southland District Council*[39] cited by Mr Goldsmith. A planning authority cannot alter a variation beyond what is reasonably and fairly raised in a submission. For example, a submission seeking co-ordinated development does not provide a basis for deleting a zone.[40] However the process of deciding whether an alteration is beyond that limit is not to be bound by formality, but approached in a realistic workable fashion, rather than from a viewpoint of legal nicety.[41]

[73] A further submission is confined to either supporting or opposing a submission.[42] It cannot introduce additional matters.[43]

[74] The decision in *Haslam* is not quite in point. It related to amendments to a proposal the subject of a resource consent application, not to a planning authority's decision on submissions.

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[37] See *Wellington City v Cowie* [1971] NZLR 1089 (CA); *Whitford Residents' Association v Manukau City Corporation* [1974] 2 NZLR 340 (SC); *Nelson Pine Forest v Waimea County Council* (1988) 13 NZTPA69 (HC).
[38] [1994] NZRMA 245 (HC).
[39] [1997] NZRMA 408 (HC).
[40] *Weatherwell-Johnson v Tasman District Council* Environment Court Decision W181/96.
[41] *Royal Forest & Bird Society*, supra.
[42] First Schedule, clause 8.
[43] *Hilder v Otago Regional Council* Environment Court Decision C122/97.

The contents of the relevant submissions

[75] The Gazzard's submission on the variation was produced in evidence.[44] It is a completion of a standard form issued by the Council. In the part where submitters are to state the specific provisions of the variation that the submission relates to, the Gazzards had entered : "A suitable infrastructure to supply adequate services, i.e. roads, water, electricity and sewage." In the section for stating the decision sought from the Council, the Gazzards had entered: "That adequate infrastructure is planned and installed before further development takes place. Roads widened, or do you restrict parking to only one side of roads?[45]

[76] In the section for stating the nature of the submission, the Gazzards set out their concerns about infrastructure being provided. They also set out their submission about the design of the development, referring to colours, materials, and tree plantings. That is the context in which this passage appears:

> We would like to see more open spaces between older existing established areas and understand 'Infinity' are addressing that issue with those concerned.
> We have no objections to High Density housing in suitable areas as we believe there is also a need for small sites.
> The narrowness of existing entry roads to the proposed area virtually precludes two way traffic when cars are parked on both sides of the road.

[77] The Council and Infinity Group did not rely on any other submission. We have examined the other submissions produced in evidence, and have found nothing in them that would support their argument that the Council was entitled to make the changes in question to the variation as notified.

[78] The further submission by the Wanaka Residents Association states support for the Gazzards' submission in this way:

> We support the part of the submission 15/8/1 – "Have no objection to high density housing in suitable areas, as believe there is a need for smaller sites."

[79] The Association's further submission gave this statement of its reasons:

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[44] Exhibit 2.
[45] Underlining in the original.

> The Wanaka 2020 Workshop identified this area as one suitable for some increased density. We support this provided adequate surrounding infrastructure can be provided.

The significance of Wanaka 2020

[80] We now consider whether the Wanaka 2020 Workshop referred to by the Wanaka Residents Association in its further submission is significant in deciding whether the Council was entitled to make the changes in question to the variation as notified.

[81] Mr Thorn contended that Wanaka 2020 was a non-RMA process, was not required to be consistent with Part II of the Act, or with the provisions of the partly operative district plan, and does not provide a lawful basis for the alterations to the variation in question.

[82] Mr Whitney did not criticise the Wanaka 2020 programme, but gave the opinion that the report of the workshop is an informal document, and observed that it is described as:

> ... a summary of general conclusions from workshop discussions, and responses to those conclusions developed by the facilitators and the technical support team.
> It is a first step only ...

[83] Mr Whitney considered that the report does not have status as a management plan or strategy document prepared under another Act to which regard is to be had in terms of section 74(2)(b)(i) of the Act.

[84] The Council acknowledged that the findings of the Wanaka 2020 report have no statutory basis, but contended that they confirmed the position the Council took in its decision. Ms Van Hoppe stated that in the Wanaka 2020 workshop the community had indicated that the proposed zone could absorb greater density.

[85] Infinity Group maintained that the Council's decision is supported by the findings of the community planning exercise recorded in the Wanaka 2020 report. A planning consultant, Mr Kyle, stated that although the Wanaka 2020 plan has no statutory basis in terms of the Local Government Act, it is intended to form part of the Council overall community plan required by it, and is reflective of how the Wanaka community wishes to deal with urban growth issues.

[86] Whatever value the Wanaka 2020 programme may have, it is not a substitute for the well-established process under the Resource Management Act by which the public are entitled to notice of proposals to alter planning instruments, and have legal rights to take part in formal hearings about them. There is no evidence that the public were given notice that the Wanaka 2020 workshop might lead to increasing the density under the Peninsula Bay Zone the subject of Variation 15 from 250 to 400 residential units. The evidence indicates that expressions of views on that topic were the subject of development by facilitators and a technical support team, but we are unable to form an opinion on whether that was an objective process. Further, people interested in the content of Variation 15 were entitled to confine their attention to steps in the procedure prescribed by the Resource Management Act, and should not be prejudiced by not having taken part in the Wanaka 2020 exercise, however valuable that might have been for other purposes.

[87] In short, we find that conclusions of the Wanaka 2020 workshop, or any report of it, cannot be relied on to justify the Council's decisions to make the alterations in question to Variation 15.

Decision

[88] We now consider whether the alterations to the number of units and minimum site area made by the Council were reasonably and fairly raised by the Gazzards' submission, approaching the Council's task in a realistic, workable way, rather than being bound by formality or legal nicety.

[89] Reading their submission as a whole, we do not accept that it indicated any wish by the Gazzards for any increase in the number of residential units provided for by the variation. Variation 15 as notified contained provision for a higher-density residential area (Area 3). The Gazzards' submission on the variation was about adequate and timely provision of infrastructure in a development that included that provision for a higher-density residential area. There is nothing in the submission capable of being understood as a wish for more extensive higher-density development.

[90] Rather, the Gazzards' statement that they had no objection to high-density housing, can only be understood in its context as stating no more than this: they had no objection to high-density housing on suitable areas, as they believed there was a need for smaller sites, but they wanted the infrastructure services provided first.

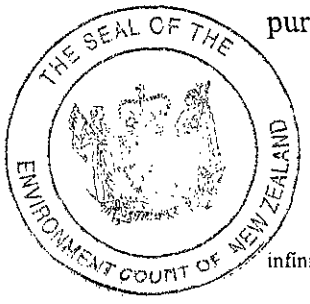
[91] This is not to form an opinion bound by formality, or legal nicety. We place no great weight on the absence of anything about density in the section of the submission form for stating the decision sought from the Council. We have considered the document as a whole. We find that its contents do not support a finding that the Gazzards wanted more high-density development, nor that they wanted an increase in the number of residential units.

[92] We have also read the Gazzards' submission as a whole to consider whether it indicated any wish by them for a reduction in the minimum lot size provided for by the variation. The only reference to lot size is in the same sentence in which they stated that they had no objection to high-density housing. In that sentence the Gazzards were stating that they had no objection to high-density housing as they believed there is a need for smaller sites. In context, they were not asserting that site sizes should be smaller than the variation provided for. Rather, they were expressing their support for its provision for smaller sites (ie 1000 square metres), but urging that adequate infrastructure should be installed before development takes place.

[93] Again, we do not place reliance on points of form or of legal nicety. It is a matter of reading the sentence in its context. We find that reading it in that way does not support a finding that the Gazzards were wanting the variation to provide for site sizes that would be smaller than those provided for. To the contrary, they had no objection to what the variation provided in that respect, and they wanted the Council to provide that the infrastructure for the development must be provided first.

[94] The Residents Association's submission supported the Gazzards' submission in that respect. Even if the Residents Association had wanted even higher density, or even smaller sites, the Association would not have been able to give effect to that merely by lodging a further submission supporting the Gazzards' primary submission, because a further submission cannot go further than the primary submission to which it relates. In the absence of a primary submission seeking more residential units or smaller sites than the notified variation provided for, the Council could only have given effect to such a wish by promoting a further variation.

[95] To conclude, we uphold Mr Thorn's challenge in this respect, and find that the Council did not, in the circumstances, have power to amend Variation 15 as it purported to do:



(a) by increasing from 240 to 400 the maximum number of residential units; nor

(b) by reducing the minimum lot size from 1000 square metres to 700 square metres.

Consequently the variation has to be treated as if it had not been amended in those respects; and as if the amendments made to the layout and design to give effect to those amendments had not been made.

The consequences of the finding

[96] Infinity Group contended that if the Court were to come to that conclusion, it should issue an interim decision allowing them opportunity to propose an amended layout and design plan providing for a maximum of 240 residential units; and observed that Infinity Group would be free to pursue an additional 160 units by further application. The alternative would be to revert to the layout and design plan the subject of the notification of the variation.

[97] As the latter no longer represents what any party wants, it would be preferable (depending on the outcome of other issues in these proceedings) to accede to Infinity's proposal. If Infinity Group should later apply for consent to increase the maximum number of residential units, natural justice would require that the application should be notified.

The draft stakeholders' deed

[98] Infinity Group maintained that a significant positive environmental outcome that would result from confirmation of Variation 15 is the Area 4 park and central facility that would be provided for the general public. The developer would have an obligation under a stakeholders deed to be entered into between Infinity Group and the Council to construct them, to maintain them for 5 years, leaving the Council with a choice that they vest in the Council as a recreation reserve, or continue as a privately-owned facility accessible by the public at large.

[99] Counsel accepted that the proposed stakeholders' deed would represent a private contract, the parties to which would be free to vary or cancel it at any time; and that no-one else would be entitled to enforce compliance with it.

[100] The Council accepted that even if the Council were to enter into such a deed, it could have little significance for the Court's decision in these proceedings; that if the park and facility were vested in the Council, their value could be taken into account in assessing the amount of any financial contribution levied on the developer; but that the Council could not bind or fetter its judgment in that regard in advance.

[101] The Court invited further submissions from Infinity Group on the significance of the proposed deed. Infinity Group stated that it was content to leave the central facility (and the possibility of it containing a swimming pool) to be settled with the Council in future, and did not rely on its provision as a positive outcome that would necessarily result from confirmation of the variation. In respect of the proposed park and proposed re-vegetation of it by the developer, Infinity Group offered amendments to zone provisions to ensure that the park and re-vegetation would be implemented.

[102] Infinity Group submitted that the proposed stakeholders' deed would have lesser significance to the proceedings and may have none. It did rely on the intention that the Council, which has responsibility under the Act, would be a party to the deed, and that the public could reasonably expect that it would enforce agreements that it has entered into, while acknowledging that the public would not be able to resort to enforcement proceedings if the Council failed to do so. Counsel also contended that there would be a positive advantage in that a future owner of land in the zone would not be able change the outcomes provided by the deed through a consent or variation process.

[103] In our judgement the Court should not place weight on the proposed stakeholders' deed in deciding these appeals for these reasons:

(a) Infinity Group and the Council have not entered into such a deed; and although Infinity Group may genuinely intend to do so if the Council is willing, there is no basis for assurance that the deed will be entered into.

(b) Even if such a deed was entered into, the processes under the Act for variation and enforcement of plan provisions would not apply in respect of it. As a private contract, the parties could agree –for purposes that might have nothing to do with the purpose of the Act– to vary or cancel it; and the public would in practice have no recourse in law.

[104] Where a private promoter of a variation or plan change wishes that intended public facilities be taken into account as positive environmental outcomes, the better practice is for the obligation to provide them be imposed by rules or other implementation methods in the plan.

Compliance with Section 32

[105] Mr Thorn contended that the Council had failed to comply with its duties under section 32 of the Act in respect of the objectives, policies, rules and other methods in Variation 15 in these respects:

(a) The Council had not itself independently performed those duties, but had simply adopted documentation in that respect that had been prepared by or on behalf of Infinity Group. Counsel argued that the obligation fell on the Council, and that it could not pass the responsibility to a developer and merely adopt its documentation.

(b) The variation does not achieve Part II of the Act as expressed in district-wide objectives and policies of the plan that are no longer in contention by reference appeal, and is not consistent with those objectives and policies–

i. In that they discourage development in landscapes that are vulnerable to change and contribute significantly to amenity values; and

ii. In not making a comparison with likely benefits and costs of development on alternative sites.

[106] The Council contended that it had fulfilled its duties under section 32 in respect of the variation in that, although the preparatory work had been done for Infinity Group, the Council had ensured that the work had been done properly in accordance with the requirements of the Act.

[107] Infinity Group observed that although a submission on the variation had arguably raised compliance with section 32, this issue had not been raised by Mr Thorn in his reference, and contended that the issue is not before the Court. Infinity Group also contended that on the evidence the variation did comply with section 32, in that:

(a) Variation 15 is the most appropriate means of exercising the Council's functions;

(b) Variation 15 would not be contrary to the district-wide objectives and policies of the district plan on landscape values, particularly as the issue is whether the site is appropriate for further development in relation to all the objectives and policies:

(c) There is no obligation under the section to make a comparison with development of alternative sites.

[108] As the Court has to decide these appeals as if the 2003 Amendment Act had not been enacted, we refer to the version of that section as originally enacted, and incorporating the amendments to it made by section 2(1) of the Resource Management Amendment Act (No 2) 1994. Subsection (1) directed that before adopting an objective, policy, rule or other method in relation to a function described in subsection (2), the person concerned was to have regard to certain matters described in paragraph (a), carry out an evaluation described in paragraph (b), and be satisfied of matters described in paragraph (c). Subsection (2) provided that those duties applied (among others) to a local authority in relation to the public notification under clause 5 of Schedule 1, of a variation, and in relation to a decision made by a local authority under clause 10 of Schedule 1, on any variation.

[109] Subsection (3)[46] provided:

> A challenge to any objective, policy, rule or other method, on the ground that subsection (1) of this section has not been complied with, may be made only in a submission made under–
>
> ...
>
> (b) Schedule 1.

[110] However the Environment Court can take into account any inadequacy of a section 32 analysis to determine the appropriateness of any part of the plan on its merits; but does not have jurisdiction to declare the instrument invalid on that account.[47]

[46] As substituted by the 1994 amendment.

[47] *Kirkland v Dunedin City Council* (2001) 7 ELRNZ 44 (HC); upheld on appeal [2001] NZRMA 529; 7 ELRNZ 227 (CA).

[111] Consideration of a challenge to the adequacy of compliance with the section is restricted to cases in which that issue was raised in the submission giving rise to the reference.[48] However that does not preclude the Court from taking into account matters referred to in section 32 in deciding the appropriateness of contents of a variation on their merits.

[112] Because he was absent from the district at the time, Mr Thorn did not lodge a primary submission on Variation 15. He did lodge further submissions in support of primary submissions that had been lodged by Jadwich Fryckowska, R and P McGeorge, D J Cassells & others, G and H Crombie, Heather Hughes, Martin White, Lindsay Williams, and N Brown; and in opposition to a primary submission by Infinity Group. None of the primary submissions in respect of which Mr Thorn lodged further submissions in support contained a challenge based on failure to comply with section 32, nor did Mr Thorn's further submissions in support of them.

[113] The primary submission by Infinity Group, in respect of which Mr Thorn lodged a further submission in opposition, did contain this assertion:

> The section 32 Report was adequate and appropriately addresses the proposal. In particular it identified relevant issues, assessed objectives and policies, assessed rules and methods, and outlined consultation. The Variation will not detract from the landscape values of the District.

[114] Although that primary submission expressly asserted that the section 32 report had been adequate and appropriately addressed the proposal, Mr Thorn's further submission in opposition to that primary submission did not raise a challenge on the basis that section 32 had not been complied with.

[115] Mr Thorn's reference to this Court of Variation 15 did not contain an allegation to the effect that the Council had failed to comply with the duties imposed on it by section 32 in respect of the variation.

[116] So we find that,–

(a) having not lodged a primary submission challenging the variation on the ground that section 32(1) had not been complied with,

[48] Ibid, paras 15 and 20 of the Judgment of the HC; and para 17 of the Judgment of the CA.

(b) having not lodged a further submission supporting someone else's primary submission containing such a challenge,

(c) having not lodged a further submission opposing Infinity Group's assertions in that respect, and

(d) having not alleged non-compliance with the section in his reference,[49]

– Mr Thorn was not entitled to contend, in these proceedings, that the Council had failed to comply with those duties. Therefore we reject Mr Thorn's contention to that effect.

[117] To the extent that Mr Thorn's contentions and evidence relate to the appropriateness of contents of the variation in respects that may be influential to the outcome of his appeal, we consider them on the merits in other sections of this decision.

The basis for decision

[118] Infinity Group submitted that there is no presumption in favour of any particular zoning of the site, and that the basis for deciding these appeals is that the variation has to–

(a) be necessary in achieving the purpose of the Act;

(b) assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose;

(c) be the most appropriate means of exercising that function; and

(d) have a purpose of achieving the objectives and policies of the Plan.

[119] Those submissions were founded on earlier decisions[50] and derived from provisions of the Act. They were not contested.

[49] An allegation to that effect in the reference would not have sufficed without having arisen from a submission containing a challenge that s 32 had not been complied with.
[50] Eg *Hibbit v Auckland City Council* [1996] NZRMA 529, 533.

[120] Mr Thorn contended that in considering whether the proposed zoning of the site is necessary to achieve the purpose of the Act, that purpose should be determined by looking at the settled objectives and policies of the plan, as was done in *Suburban Estates v Christchurch City Council.*[51] Infinity Group disputed that and contended that a number of objectives and policies remain subject to challenge, a presumption that the purpose of the Act is fully represented by the objectives and policies of the plan would not be justified, citing *Dickson v North Shore City Council.*[52] Mr Thorn contested that any material objectives and policies were still subject to challenge; and urged that the Court's analysis should begin with the question whether the variation would achieve Part 2 as expressed through the district-wide objectives and policies of the plan.

[121] A variation is a method by which a local authority can propose an alteration to a proposed planning instrument.[53] This is done by a process of publication, opportunities for submissions and further submissions, hearing and reasoned decision by the local authority, and opportunity for appeal to the Environment Court.[54]

[122] The scope of a variation is not restricted by objectives and policies of the proposed plan. Indeed it is permissible for a variation to alter general objectives and policies. The process is comparable with that for adopting the proposed plan itself.

[123] The *Suburban Estates* and *Dickson* cases were appeals about the contents of proposed district plans, not about variations to them.

[124] Because the scope of a variation is not restricted by objectives and policies of the proposed instrument that is being altered, we do not accept Mr Thorn's submission that it has to be necessary to achieve the purpose of the Act as incorporated even in settled objectives and policies of the instrument. Rather, we hold that in this respect a dispute about a variation should be tested–

(a) by whether it achieves the purpose of the Act stated in section 5; and

(b) by whether it has a purpose of achieving the settled objectives and policies of the instrument that are not being altered by the variation.

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51 Environment Court Decision C217/2001.
52 (2002) 8 ELRNZ 172.
53 See definition in s2(1).
54 First Schedule, cl 16.

[125] In accordance with section 32(1), the criterion in item (a) gives effect to the overarching importance of the purpose of the Act; and the criterion in item (b) should ensure that if the variation is upheld, the instrument as altered retains its coherence.

Landscape and visual amenity effects

[126] We now address the main issue in the decision of these proceedings: Whether and to what extent the development provided for by the variation would have adverse effects on the landscape and amenity values of the locality. There was no question in respect of the development of most of the site. The issue was limited to development of two discrete areas of the site: Areas 2 and 5.

[127] It was Mr Thorn's case that parts of those areas are vulnerable to change and are not capable of absorbing the development on them that the variation provides for; and that the controls proposed by the variation would not be sufficient to protect the landscape and the natural amenity values of Lake Wanaka. Area 2 slopes up to the pine forested ridge which runs along the east of and above the site. Mr Thorn urged that the integrity of that ridge as a rural backdrop to Wanaka should be maintained. Area 5 is at the northern end of the site, farthest from existing development and closest to Lake Wanaka. Mr Thorn (supported by the Environmental Society) contended that the part of this area where development could be visible from the lake and lakeshore should be left undeveloped.

Classification of landscape

[128] An important question in considering the effects on landscape and visual amenity values is whether the site is in an outstanding natural landscape (ONL), or a visual amenity landscape (VAL); or whether it is not part of a rural landscape at all, but part of an urban landscape. The classification identifies which objectives and policies are applicable.

[129] Infinity Group's primary position was that the landscape of which the site forms part is not a VAL, but instead is part of the Wanaka urban landscape. If that is so, the policies applicable to VAL landscapes are not directly relevant. But if the Court finds that the site **is** part of a VAL, then Infinity Group contended that confirmation of Variation 15 would be consistent with those policies.

[130] The Council contended simply that the site is entirely in a VAL; but Mr Thorn contended that the part of the site (being in Area 5) between the lake shore and the ridge above it is correctly classified as being part of the ONL that includes the lake itself; and that the rest of the site is in a VAL. He contended that it is not open in law to classify it as being in an urban landscape.

[131] Three witnesses who were qualified in landscape and visual amenity matters gave evidence: Mr D J Miskell, Mr B Espie, and Ms D J Lucas.

[132] Mr Miskell gave the opinion that the site is not part of an ONL, a VAL, or an ORL; but being adjacent to existing residential areas in the south and west, is a natural extension of Wanaka town.

[133] Mr Espie gave the opinion that two landscapes meet in the vicinity of the site: a rolling agricultural landscape to the south-east, and a more remote and dramatic landscape to the north-west. Each contains pockets that share characteristics of the other, and a line between them would be arbitrary. He classified the former as a VAL, and the latter as an ONL; and as the site does not contain any outstanding natural feature, he classified it as part of a VAL.

[134] Ms Lucas gave the opinion that the VAL extends across the site to the lakeside ridge; and that from the ridge to the lakeshore is included within the ONL of the lake.

[135] The site is adjacent to the urban area to the west and south, is adjacent to a rural area to the east, and to the lake to the north. The site itself contains no urban development, but has a rural appearance. We are not persuaded by Mr Miskell's reasons for treating it as part of the urban landscape.

[136] Setting aside for separate consideration the northern part of the site beyond the ridge above the lake, we accept the opinions of Ms Lucas and Mr Espie that it is in a VAL.

[137] Mr Espie extended that classification to the northern part of the site beyond the ridge above the lake because it does not contain any outstanding natural feature. He acknowledged that the VAL meets an ONL in the vicinity of the site, and that the boundary between them would be arbitrary. Ms Lucas included the part beyond the

ridge in the ONL because in landscape and visual terms it is part of the landscape of the lake.

[138] We find Ms Lucas's approach more persuasive. The fact that the site is one land holding should not influence its landscape classification. The topography of the site lends itself to separate classification of the part beyond the northern ridge, visible from the lake and locations from which the lake can be viewed.

[139] In summary, we find that the northern part of the site beyond the ridge above the lake is correctly classified ONL; and the rest of the site is correctly classified VAL.

Assessment of landscape and visual amenity effects

[140] Next we have to consider the landscape and visual amenity effects of the development that would be provided for by the variation.

The parties' attitudes

[141] Mr Thorn contended that the higher parts of the site adjacent to the eastern boundary (Area 2) and Area 5 are vulnerable to change and not capable of absorbing the development that the variation would provide for; and that the variation would not sufficiently protect the natural and landscape values associated with the lake. He contended that this area should be left largely undeveloped, and in that he was supported by the Environmental Society.

[142] Infinity Group accepted that the backdrop ridge is important and acknowledged that stricter controls are required for Area 2 (than elsewhere in the zone) to ensure an appropriate interface between the lower land and the higher pine-clad ridge behind. It contended that the level of development proposed for Area 2 is appropriate, and would not have effects on landscape and visual amenities sufficient to warrant the land being given some form of non-residential zoning.

[143] All parties agreed that the most sensitive area of the site in landscape and visual amenity terms is Area 5 at the northern end. Infinity Group urged that the development provided for in that area had been very carefully assessed. This had included computer-aided inter-visibility analysis, and preparation of a video-simulation based on computer-modelled dwellings built to maximum permitted

heights and within the identified building platforms, taking into account controls on external colours and the requirement to retain existing kanuka vegetation. It contended that the development provided for in Area 5 would not have adverse effects on landscape and visual amenity values which would warrant that area of land being zoned in a way which would exclude development.

The evidence

[144] Ms Lucas gave the opinions that the development provided for by the variation would have significant adverse effects on the important landscape and natural amenity values of the lake and its enclosing landform; and on the eastern ridge which provides a natural backdrop and context for the town. She expressed concern that even with strict location and height controls for residences along the lakeside ridge, the landscape protection would be dependent on the kanuka vegetation being adequately retained. That witness gave the opinion that with premium prices for such sections, expansive views would be sought from inside and outside each house; protection of the kanuka screening could not be assured; and that any buildings visible on that ridge would reduce the naturalness of the lake experience.

[145] Mr Espie gave the opinion that the Peninsula Bay zone would have the effect of extending the area of Wanaka townscape up the slope that forms the middle-ground of views that are available from the west. This extension would take the form of a horizontal strip behind existing development but, because the existing ridgeline would not be broken, the appreciation of landscape that is had by observers to the west of Peninsula Bay would not fundamentally change. His opinion depended on ensuring the retention of existing kanuka, and controlling building heights and colours.

[146] Mr Miskell considered that sensitive design controls would protect and enhance the amenity values which are the most vulnerable to change. He acknowledged that residential buildings would inevitably alter the appearance of the site from some viewpoints in the surrounding landscape, but considered that the site has the ability to absorb the changes because an effective rural setting will remain.

[147] Mr Miskell considered that the natural character of Lake Wanaka would be altered only to a minor degree because the site is only a minor part of the surrounding landscape. Views from the lake to the north of the site would

effectively be unchanged, and views from the west would be seen in the context of existing development. He gave his opinion that overall amenity values would be enhanced by the creation of a pleasant living environment, recreational attributes would be enhanced, and much of the remnant kanuka will be retained.

Our findings

[148] We accept that the development provided for elsewhere on the site than in Areas 2 and 5 would not have significant adverse landscape and visual amenity effects. However we do not accept that the potential effects of development in Areas 2 and 5 would or could be adequately or appropriately avoided, remedied or mitigated by the controls on the height, bulk, location or appearance of buildings, nor by requirements to retain vegetation.

[149] While it remains alive in suitable locations and height, vegetation can hide, or at least soften the view of development. But hiding development, or softening its appearance, does not excuse providing for development that should not be provided for in an ONL, or in a VAL where it would not have potential to absorb change without detraction from landscape and visual values.

[150] Further we do not have confidence that district plan requirements for retaining vegetation will necessarily be effective in the long term. As well as being vulnerable to fire, disease, and natural mortality, the continued life of vegetation may depend on the extent to which it is perceived to obstruct valued views.

[151] If there is to be development in sensitive areas, there should certainly be controls on earthworks, and on the height, bulk, location and appearance of buildings and on sealed surfaces, so that their appearance recedes into the background. However the question in these proceedings is whether development should be provided for in those areas at all.

[152] We bear in mind that Area 5 is largely in an ONL, in which development would be visible from public places, and detract from views of otherwise natural landscape. Area 2 is in a part of the VAL, and development would be visible from public places and affect the naturalness of the landscape. We find that both areas are vulnerable to change, and neither is capable of absorbing the development the variation would provide for.

[153] In respect of the development of Area 2, we have not been persuaded by Mr Espie's opinion that the appreciation of the landscape from the west would not fundamentally change. From there the present landscape is rural, and possesses visual amenity. However much the sight of it is hidden or softened by vegetation, however much its prominence is mitigated by compliance with controls on earthworks and the height, bulk, location or appearance of buildings, that part of the landscape would no longer be rural. It would be changed to rural-residential.

[154] Counsel for Infinity Group submitted that, by comparison with Mr Miskell, Ms Lucas had made only an extremely cursory assessment of the potential effects of buildings in Area 5, limited to brief comments in two paragraphs of her rebuttal evidence. We do not criticise Mr Miskell, but we found Ms Lucas's reasons for her opinions realistic and persuasive.

[155] We accept Ms Lucas's opinions, and find that the development provided for by the variation in Areas 2 and 5 would have significant adverse effects on landscape and visual amenity values.

Application of criteria

[156] Having come to our findings on that critical issue, we now consider the variation by reference to the four criteria already identified, to assist our decision whether it should be upheld or cancelled.

Is Variation 15 necessary to achieve the purpose of the Act?

[157] The first criterion is whether the variation is necessary to achieve the purpose of the Act.

[158] Infinity Group submitted that in applying this test, the word 'necessary' should be understood in the sense of being desirable or expedient in achieving the purpose.[55] It contended that the purpose of the Act would be better achieved if provision is made in the district plan for a special zoning to enable a mixed-density community development on the site, rather than it retaining a rural zoning, in that:

[55] Citing *Countdown Properties (Northlands) v Dunedin City Council* [1994] NZRMA 145, 152 (FC).

(a) The proposed Peninsula Bay Zone represents a logical extension of the residential part of east Wanaka:

(b) It supports the Council's strategy of managing growth in and around urbanised areas:

(c) It is consistent with the findings of the Wanaka 2020 community planning report:

(d) Overall amenity values would be enhanced through creation of a pleasant living environment with improved recreational opportunities and retention of much of the remnant kanuka, enhancing the certainty that these environmental outcomes would be achieved.

[159] Three qualified planners gave evidence on this topic: Mr Kyle, Ms Van Hoppe, and Mr Whitney.

[160] Mr Kyle gave the opinion that the variation is necessary to achieve the purpose of the Act on four main grounds:

(a) There is not enough land zoned residential at Wanaka to accommodate continuing growth:

(b) The proposed Peninsula Bay zone serves the Council strategy of urban consolidation and development of compact urban forms centred on existing settlements in accommodating urban growth:

(c) It gives effect to the recommendations of the Wanaka 2020 report favouring increasing density to avoid sprawl:

(d) The site is suitable and the development would not give rise to adverse environmental effects or impinge on significant landscape values.

[161] Ms Van Hoppe gave the opinion that Variation 15 would be effective in achieving the purpose of the Act in that sustainable management of natural and physical resources would be achieved in these respects:

(a) The high and low density residential use would be an efficient use of the site:

(b) The Peninsula Bay zone would provide a practical and logical boundary for Wanaka avoiding sprawling subdivision:

(c) The rate of residential development would be consistent with proposed capacity of service infrastructure:

(d) The character of the Wanaka residential zone would be retained:

(e) Natural resources in the site having significant value, such as native vegetation, and ecological values, would be protected.

[162] Mr Whitney questioned whether the variation is necessary in achieving the purpose of the Act. He referred to research by a Council official, Ms V Jones, that had been reported to the Council's Strategy Committee, showing that the existing zoning provided capacity for 2843 additional dwellings at Wanaka; for 679 more in Rural-Residential and Rural-Lifestyle zones; together with further capacity in nearby townships. From that Mr Whitney concluded that there is no urgency for providing additional residential-zoned land at Wanaka.

[163] Mr Whitney also gave the opinion that development to the south-east of the town would provide for growth of the town in areas accessible to the town centre, business and industrial zones, and other services available in central Wanaka.

[164] Ms Van Hoppe concurred with Mr Whitney that, based on Ms Jones's research, there is no immediate urgency in providing for residential growth at Wanaka; but she observed that –

(a) Ms Jones's research had assumed that all consents for residential subdivision and development would be exercised, and owners of land zoned residential with capacity for further subdivision or development would do so prior to the Council providing for further growth;

(b) As market forces would dictate the pace of residential development within the Peninsula Bay zone, it might be some time before its full capacity would be realised.

[165] Mr Kyle responded that Ms Jones's model does not respond to the preferences and aspirations of individual landowners, so the rate of release of land for infill development cannot be predicted reliably.

[166] We accept Infinity Group's submission that in applying this test, the word 'necessary' has to be understood as desirable or expedient. But the variation has to be desirable or expedient for achieving the purpose of the Act, being the sustainable management of the natural and physical resources concerned. The explanation in section 5(2) of sustainable management refers to two main elements: the enabling of people and communities to provide for their social, economic, and cultural well-being, health and safety; and the constraints referred to in paragraphs (a), (b) and (c), which include safeguarding the capacity of ecosystems, and avoiding, remedying and mitigating adverse environmental effects.

[167] The first consideration then is whether provision for a further 240 dwellings at Wanaka is desirable or expedient. There are indications both ways.

[168] In support, it may reasonably be inferred that upholding the variation would enable Infinity Group, and ultimate occupiers of dwellings provided in accordance with the Peninsula Bay Zone, to provide for their social and economic well-being.

[169] Without implying any criticism of Ms Jones's valuable work, we understand the limitations of the results that were mentioned by Ms Van Hoppe and Mr Kyle. We also accept that it would take some years before the full capacity of the Peninsula Bay zone would be realised. Even so, the considerable extent of the unused capacity for further dwellings in the current provisions of the plan leaves ample scope for the market to respond to the preferences and aspirations of landowners and would-be residents without the site being developed at all.

[170] The Council's wishes to consolidate residential growth at Wanaka so as to avoid sprawl, and to provide a variety of densities, could be achieved without providing for the site to be zoned as proposed. If those wishes were achieved without the proposed rezoning of the site, the significant native vegetation on the site would not be placed at risk; nor would the landscape and visual amenity values, to which the northern and eastern edges of the site could continue to contribute if undeveloped.

[171] In short, the zoning may be favourable for those taking part in the development, whether as developer, or as purchasers of residential lots or dwellings, or as users of the recreational facilities to be provided. However we have not been persuaded that residential development of the site is needed now to accommodate the growth of Wanaka, or to enable the community to provide for its social or economic well-being.

[172] In our judgement, Variation 15 is not necessary to achieve the purpose of the Act, even giving the word 'necessary' the meaning of desirable or expedient. The environmental and ecological outcomes would not be improved by upholding the variation rather than by cancelling it.

Would Variation 15 assist the Council to control effects?

[173] We now apply the second criterion: Whether the variation would assist the Council to carry out its functions of the control of actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[174] Infinity Group contended that the variation would assist the Council to do so by managing Wanaka's growth, planning for the future of the site in an integrated manner designed to enhance overall amenity values without detracting from the landscape values and natural character of Lake Wanaka.

[175] Mr Kyle supported that contention, referring to the variation enabling mixed density development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. He gave the opinion that the resulting development would be in harmony with the landscape and visual amenity values of the area, and would not be incongruous with the residential development surrounding the site.

[176] Mr Whitney gave the opinion that integrated management of effects of the use, development or protection of the land resource is fundamental. He observed that the variation would provide for development at the northern extreme of Wanaka, rather than providing for a compact urban form.

[177] We accept Mr Whitney's point in that respect. We find that the Council's function of controlling effects of the use and development of the site would be assisted by the provisions of the variation identified by Mr Kyle, as far as they go. But they do not go far enough to assist it to control development so that it avoids adverse effects on the landscape and visual amenity values of the environment of development at the northern and eastern edges of the site.

Would Variation 15 be the most appropriate means?

[178] The third criterion is whether the variation is the most appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[179] Infinity Group contended that the variation is the most appropriate means of doing so, in that the Peninsula Bay Zone would ensure that amenity values, and the quality of the environment, is maintained and enhanced, while retaining and protecting large areas of vegetation. It also relied on the benefit to the general public of the proposed park and central facility proposed for Area 4. It urged that those outcomes would not be achieved if the variation is cancelled so that the rural zoning of the site would be reinstated.

[180] In his evidence in this respect, Mr Kyle listed aspects of the variation that he considered are beneficial, including the provision for mixed-density residential development, recognising the landscape sensitivity of parts of the site, providing for protection of natural values, and minimising effects of development beyond the site. The witness concluded that those provisions are efficient, appropriate and effective in assisting the Council to manage Wanaka's urban growth.

[181] Mr Whitney observed that the report to the Council on the analysis and evaluation of the variation in terms of section 32 had advised that the Council had to consider thorough investigations of alternative sites and directions for growth (advice with which the witness agreed). Mr Whitney stated that he had found no evidence of a thorough investigation of alternative sites and directions for growth at Wanaka having been undertaken. As already mentioned, this witness identified other means of providing for growth of Wanaka, and gave the opinion that investigation of alternative sites and directions for growth should occur.

[182] The criterion is whether the variation is the most appropriate means of exercising the Council's function. The use of the word 'most' gives effect to section 32(1)(c)(ii), which directs that a person adopting a method in a planning instrument is to be satisfied that it is–

> ...the most appropriate means of exercising the function, having regard to its efficiency and effectiveness relative to other means.

[183] On its face, that direction calls for a comparison between the means proposed and other possible means of exercising the Council's function, in order to achieve the Act's purpose.

[184] In his evidence on this topic, Mr Kyle identified provisions of the variation that he considered beneficial. He acknowledged that there are a number of sites around Wanaka that are suitable for accommodating growth. He addressed other means than variation of authorising development of the subject site (resource consent, district plan review, privately promoted plan change). But he did not address the question whether the variation, containing those provisions for development of the subject site, is the *most* appropriate means of exercising the function.

[185] Infinity Group contended that in these proceedings consideration of other possible sites for accommodating growth would not be correct or appropriate, and consideration should not be given to whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites. Counsel argued that on a variation there is no obligation to do so, relying on the High Court Judgment in *Brown v Dunedin City Council.*[56]

[186] In that Judgment the High Court held that section 32(1) does not contemplate that determination of a site-specific proposed plan change will involve a comparison with alternative sites. The learned Judge affirmed that the assessment should be confined to the subject site, and observed it would be unrealistic and unfair to expect those supporting a site-specific plan change to undertake the task of eliminating all other potential sites within the district.

[56] [2003] NZRMA 420, Chisholm J.

[187] *Brown's* case related to a plan change rather than a variation. But having considered the learned Judge's reasoning, we see no basis for not applying it to a site-specific variation, such as that the subject of these proceedings. Accordingly we accept Infinity Group's contention, and hold that this criterion does not require consideration of whether the variation providing for development of the subject site is the *most* appropriate means of exercising the Council's function in comparison with development of other sites.

[188] Even so, no planning witness gave the opinion that the provisions of the Peninsula Bay Zone would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

[189] Mr Kyle identified a number of beneficial aspects of it. So did Ms Van Hoppe, but she identified respects in which, even with amendments agreed on by Infinity Group and the Council, there may result in too little control over development in Area 5 at the northern end of the site (which is sensitive for landscape and visual amenity values). In cross-examination by counsel for Infinity Group, Ms Van Hoppe resiled on the status of removal of native vegetation not in public view; and accepted that later amendments proposed had addressed another point about building heights.

[190] Mr Whitney gave the opinion that the provisions for development of elevated parts of the site (especially at the northern end) would not preclude adverse effects on visual amenity from the lake surface and elsewhere, nor make adequate provision for public access there.

[191] Reviewing the evidence as a whole, we do not find in it an adequate foundation for finding that the revised provisions of the Peninsula Bay Zone (as proposed at the Court hearing) would be the *most* appropriate means of exercising the Council's function of controlling actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose.

Does Variation 15 have a purpose of achieving the objectives and policies?

[192] We now consider the variation by the fourth criterion, whether it has a purpose of achieving the settled objectives and policies of the Plan. Logically this

criterion only applies in respect of methods that do not implement objectives and policies specific to the variation.

[193] We have summarised the relevant objectives and policies. They include protection of natural resources including the natural character of lakes, outstanding rural landscapes, and visual amenity values. They also promote urban consolidation and compact urban forms by higher density living environments.

[194] Infinity Group maintained that the variation is generally consistent with the objectives and policies of the plan; that it achieves those addressing the peripheral expansion of urban areas; and respects those relating to landscape and visual amenity.

[195] Mr Thorn contended that the variation would not achieve Objective 4.2.5.1 and associated Policies 1(a) to (c), relating to identification of parts of the district with greater potential to absorb change in preference to those vulnerable to degradation. His counsel argued that once the parts of the district most capable of change have been identified, an assessment is required to ensure that development harmonises with local topography and ecological systems and other nature conservation values as far as possible. He contended that as the process has not been carried out, the proposed zoning does not have a purpose of achieving that objective and associated policies.

[196] Counsel for Infinity Group responded that in considering Variation 15 as a whole, Objective 4.2.5.1 should be applied on a 'macro' basis rather than a 'micro' basis. He contended that the issue is whether in relation to that objective the site is appropriate for further development. He urged that although landscape and visual amenity issues are important, it is equally important to provide for the growth being experienced and to provide for open space and for recreation.

[197] We quote Objective 4.2.5.1, and the associated policies in question:

> Objective:
> Subdivision, use and development being undertaken in the District in a manner which avoids, remedies or mitigates adverse effects on landscape and visual amenity values.
> Policies:
> 1 Future Development
> (a) To avoid, remedy or mitigate the adverse effects of development and/or subdivision in those areas of the District where the landscape and visual amenity values are vulnerable to degradation.

(b) To encourage development and/or subdivision to occur in those areas of the District with greater potential to absorb change without detraction from landscape and visual amenity values.
(c) To ensure subdivision and/or development harmonises with local topography and ecological systems and other nature conservation values as far as possible.

[198] Mr Thorn may be right in suggesting that Policies 1(a) and (b) involve identifying parts of the district with greater potential to absorb change and those vulnerable to degradation. But that has not yet been done, no doubt because the plan is not yet fully operative. By definition variations are proposed at the stage when the plan is not fully operative. So we do not accept the fact that Variation 15 is proposed prior to the Council giving effect to its policy of identifying parts of the district should influence our decision on whether the variation should be cancelled.

[199] Rather we consider that the appropriate question is whether the development that the variation would authorise–

(a) would avoid, remedy or mitigate adverse effects on landscape and visual amenity values;

(b) would do so in an area where they are vulnerable to degradation, rather than having potential to absorb change without detracting from those values; and

(c) would harmonise with local topography and ecological systems and other nature conservation values as far as possible.

[200] From the findings we have already stated, we do not accept that the development that the variation would authorise would, in respect of the northern end and the eastern edge, achieve the objective or Policy 1(a), corresponding to items (a) and (b) in the previous paragraph. To that extent we find that Variation 15 does not have a purpose of achieving the objectives and policies of the plan.

[201] So far we have focused on the particular objective and policies relied on by Mr Thorn. We now expand our focus to include all the objectives and policies of protecting natural resources, including the natural character of lakes, outstanding rural landscapes, and visual amenity values. In our judgement, development of the northern and eastern edges of the site, that would be visible from the surface of the lake and elsewhere, would not serve those policies either. Nor would development of the site, even where the development itself is higher density, achieve the

objectives and policies of promoting urban consolidation and compact urban forms. On the contrary, it would extend the town further.

[202] In short, we judge that the variation would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

Summary of findings on criteria

[203] We have considered the variation by reference to each of the four criteria already identified.

[204] The variation would assist the Council in its function of controlling the effects of residential development of the site if it is to be developed for that purpose.

[205] However the variation is not necessary (in the sense of desirable or expedient) in achieving the purpose of the Act; it would not be the most appropriate means of controlling the actual and potential effects of the use, development and protection of land in order to achieve the Act's purpose; and it would not achieve the settled objectives and policies of the plan about protecting natural resources, nor the thrust of settled objectives and policies about promoting urban consolidation and compact urban form.

Specific provisions of Variation 15 in issue

[206] There were issues raised concerning several specific provisions of the variation on which we have to give our rulings.

Link Road

[207] A question was raised about the possibility of a road on the site being available for access to and from future development of land to the east of the site.

[208] Infinity Group recognised that provision for such a link road could have value. It did not itself propose it, but was willing to facilitate any option that achieved the objectives of all parties.

[209] Whether the district plan should be altered to provide for urban development of the land to the east of the site is not in issue in these proceedings. Nothing in this decision should be taken as endorsement of it. On that basis, we see no point in making provision for access to and from it through the site.

Public open space

[210] The next question concerned whether the Court has authority to reduce the public open space Area 4 of the proposed development by removing Area 4b as proposed at the hearing.

[211] Infinity Group responded that the variation had never provided that Area 4 would be public open space at all; but it volunteered to dedicate all of Area 4 except Area 4b as public open space.

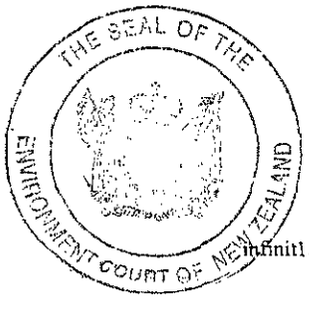
[212] We apprehend that this supposed issue arose from misunderstanding. We have found no evidence that raises an issue requiring the Court's ruling.

Residential flats

[213] Then there was a question about whether the effect of upholding the variation would be that there could be 400 residential units and also 400 additional residential flats on the site. Evidently this arose because of a general provision in the district plan which is understood to have effect that an owner of a residential unit is also entitled to have a residential flat on the same site.

[214] Infinity Group responded to the point by stating that if the Court had any concern over this, it would have no objection to an amendment providing that in the Peninsula Bay Zone, a residential unit does not include an entitlement to a residential flat on the same site.

[215] Because an issue had been made about the total number of dwellings provided for by the variation, we continue our consideration of the variation on the basis that if it is upheld, it would be amended accordingly.



[216] Development of such a large area would be likely to take place over a considerable period, and might be undertaken by more than one developer. We question the practicability of administering a limit on the total number of residential units in those circumstances.

Status of removal of kanuka

[217] There were also differences about the status of the activity of removing kanuka vegetation in certain areas of the site: whether it should be a discretionary activity, a non-complying activity, or a prohibited activity.

[218] The Council submitted that removal of kanuka outside nominated building platforms in Areas 2 and 5 should be a prohibited activity.

[219] The importance of protecting the kanuka is two-fold. First, it is valued for its inherent worth as native vegetation. Secondly, while it survives it could to some extent screen development in those areas from view from the lake surface and elsewhere.

[220] However retaining the kanuka would not necessarily be perceived by successive owners of lots in those areas as being in their own interests, particularly in commanding the widest views of the superlative lake and mountain-scape.

[221] The high value of retaining the kanuka could be shown by prohibiting its removal. However in our judgement, owners are more likely to moderate their desires to maximise views if there is provision for applying for consent, and conditions and criteria published for consideration of proposals.

[222] Accordingly we will continue to consider the variation on the basis that removal of kanuka from those areas would be a non-complying activity, with conditions and criteria designed to ensure that consent would only be granted if the removal would not reduce the extent that landscape and visual amenity values are maintained.

Building height limits

[223] Some differences of opinion about the basis for determining the maximum height of buildings led to Infinity Group and the Council preferring use of height limits above a datum, rather than above supposed ground levels, in Areas 2 and 5. The Council urged inserting an additional criterion for deciding earthworks, to encourage carrying them out in the period between May and October.

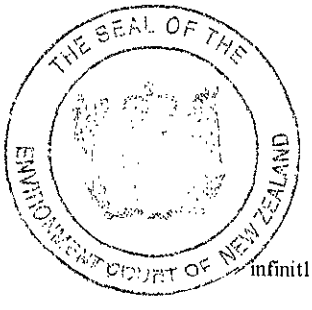
[224] We accept that this method might encourage additional excavation, but Infinity Group accepted that earthworks for residential buildings should then be part of the controlled activity consent process for buildings. The criterion encouraging earthworks between May and October was not opposed.

[225] We accept that setting maximum building heights by reference to datums provides certainty and enforceability, and is preferable to the general district plan mechanism which has difficulties in both respects. So we will continue to consider the variation on the basis that the building height limits in Areas 2 and 5 would be set by reference to appropriate datums; that earthworks for residential buildings should then be part of the controlled activity consent process for buildings; and that there be a criterion encouraging earthworks between May and October.

Building appearance

[226] Another issue of detail related to the extent to which the Council would have control over the external appearance of buildings in Areas 2 and 5a. Infinity Group proposed that this be done by stating that the external appearance of buildings, including design, cladding, colour and reflectivity, and consistency of design and appearance of garaging and outbuildings with the principal dwelling be matters in respect of which the Council would have control when considering, as controlled activities, the addition, alteration or construction of all buildings in those areas.

[227] In our judgement that appears to be appropriate, and we will continue to consider the variation on the basis that it is amended accordingly.



Future driveways and walkways

[228] There was also some reference to the routes of future driveways and walkways. Infinity Group accepted that they are shown conceptually on the plans, and the routes had not been fixed by survey or by reference to topography.

[229] We continue our consideration of the variation on that basis.

Exercise of power under section 293

[230] Infinity Group proposed that, if the Court held (as it has) that the maximum number of residential units is limited to 240, the Court should act under section 293 to raise the limit to 400 residential units. Consequential changes would involve increasing the extent of Area 3 and reducing the minimum lot area in Area 1 from 1,000 square metres to 700 square metres.

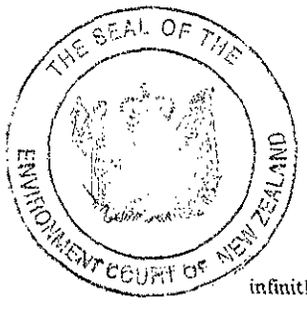
[231] Infinity Group argued that because the possibility of there being 400 residential units is already before the public from the Council decision on submissions, public notification of the proposed amendment should not be required. However the Council submitted that if the Court found that a reasonable case had been made for the amendment, it should direct public notification.

[232] Mr Thorn opposed this proposal, contending that the Council should be given an opportunity to reconsider its position, it having clearly signalled that it did not favour a 240-dwelling development, but preferred a higher density. He urged that this could only be done by cancelling the variation.

[233] In reply, counsel for Infinity Group submitted that the Council's preference for a higher density supports rather than counts against the proposition; and that there is no need to give it further opportunity for reconsideration.

[234] We quote the relevant parts of section 293:

> **293. Environment Court may order change to policy statements and plans–** (1) On the hearing of any appeal against, or inquiry into, the provisions of any policy statement or plan, the Environment Court may direct that changes be made to the policy statement or plan.
> (2) If on the hearing of any such appeal or inquiry, the Environment Court considers that a reasonable case has been presented for changing or revoking any provision of a policy statement or plan, and that some opportunity should be given to interested parties to consider the proposed



change or revocation, it may adjourn the hearing until such time as interested parties can be heard.

(3) As soon as reasonably practicable after adjourning a hearing under subsection (2), the Environment Court shall—

(a) Indicate the general nature of the change or revocation proposed and specify the persons who may make submissions; and

(b) Indicate the manner in which those who wish to make submissions should do so; and

(c) Require the local authority concerned to give public notice of any change or revocation proposed and of the opportunities being given to make submissions and be heard.

...

[235] In considering those provisions, we apply the law explained by the High Court. The power is to be exercised cautiously and sparingly.[57] Before the Court has jurisdiction to invoke the section it must consider, first, that a reasonable case (strong enough to have a reasonable chance of success) has been presented and, secondly, that some opportunity should be given to interested parties to consider the proposed change. The requirement for further public notification and submissions is an integral component of the package. Even if the Court considers that a reasonable case has been presented, it will be exceedingly rare where the Court would exercise the power even within the scope of the reference, because interested parties will have had their opportunity to consider the proposed change.[58] There must be a nexus between the reference and the changed relief sought.[59]

[236] We now consider whether the conditions in which the power may be exercised exist in this case; and if they do, we can then form our judgement whether in the circumstances it should be exercised.

Has a reasonable case been presented?

[237] The first condition of the Court's power is that on the hearing of the appeal, the Court considers that a reasonable case has been presented for the change in question, understanding a reasonable case as one strong enough to have a reasonable chance of success.

[238] Infinity Group and the Council maintained that there is a reasonable case for increasing the density of the zone from 240 to 400 residential units on the ground that the report of the Wanaka 2020 workshop supported development of Beacon

[57] *Gisborne Refrigerating Co v Gisborne District Council* (1990) 14 NZTPA 336 (Greig J).

[58] *Canterbury Regional Council v Apple Fields* [2003] NZRMA 508; 9 ELRNZ 311 (Chisholm J) paras 41, 45, 47, 50.

[59] *Hamilton City Council v NZ Historic Places Trust* (HC, Hamilton; 11/08/04, Harrison J, para 25).

Point (which includes the site) should be more intensely developed to avoid continuing sprawl and scattered development.

[239] Mr Kyle stated that the findings of the Wanaka 2020 process are highly reflective of how the Wanaka community wishes to deal with the urban growth issues affecting the town. He also gave the opinion that the increase in the density is consistent with the objectives and policies on urban growth, with its primary focus on urban consolidation and avoidance of development where it would adversely affect landscape values or involve costly extensions to, or duplication of, urban infrastructure.

[240] Ms Van Hoppe observed that the changes would not affect the overall configuration of the Peninsula Bay Zone, but would make more efficient use of the land in Areas 1 and 3.

[241] Mr Whitney considered that the proposed development of the site can be regarded as urban sprawl rather than consolidation, and observed that it is some distance from existing schools, shopping and employment areas of Wanaka.

[242] It is not for us to make a final judgement in these proceedings on those issues. Our duty is to decide whether the case for the changes to the variation is strong enough to have a reasonable chance of success.

[243] In that respect we are not influenced by the outcome of the Wanaka 2020 workshop. That process was managed by facilitators and a technical support team who prepared the report, and we have no information about whether they had a particular agenda. It was not a process under the Resource Management Act that people with an interest in Variation 15 would necessarily take part in; nor would they expect that the recommendations might be relied on for making important changes to the variation. At best the report represented the views of the people who chose to take part in the workshop.

[244] We do not accept that simply because there could result 400 residential units instead of 240 on a 75-hectare site, that amounts to a case for the changes strong enough to have a reasonable chance of success

[245] On the difference between Mr Kyle and Mr Whitney on whether the increased density would appropriately serve the policies of consolidation and compact urban form, we find more plausible and prefer Mr Whitney's opinion that increasing the density of development on the site so far from the town centre represents sprawl rather than consolidation.

[246] In summary, we do not consider that a reasonable case, one strong enough to have a reasonable chance of success, has been presented for the changes in question. This condition of the Court's power under section 293 does not exist.

Should opportunity be given to interested parties to consider the amendment?

[247] The first condition of the Court's power under section 293 to direct the changes to the variation is that the Court considers that some opportunity should be given to interested parties to consider them.

[248] Contrary to what might seem to be its own interest, counsel for Infinity Group submitted that public notification is not necessarily required. However we have no doubt at all that, if a reasonable case had been presented for the changes in question, opportunity should be given to interested parties to consider them, and if they wish, make submissions and present evidence on them.

Should the power be exercised?

[249] If we had found that a reasonable case had been presented for the changes, we would then have to make a judgement whether in the circumstances the power should be exercised.

[250] Infinity Group proposed that the changes should be assessed by the factors identified in the *Apple Fields* case,[60] and contended that those criteria are fulfilled.

[251] Because we have found that the first condition of the Court's power has not been fulfilled, there is no need for us to make a point-by-point consideration of the proposed changes to Variation 15 be reference to those criteria. It is sufficient for us to refer to item (3), which we quote:

[60] [2003] NZRMA 508; 9 ELRNZ 311 paras 13, 55-62.

That the discretion must be exercised cautiously and sparingly for these reasons:

(a) It deprives potential parties of interested persons of their right to be heard by the local authority;
(b) The Court has to discourage careless submissions and references;
(c) The Court has to be careful not to step into the arena – the risk of appearing partisan is the great disadvantage of inquisitorial methods.

[252] On item (a), in this case exercise of the power would continue to deprive people of the opportunity to be heard by their elected local authority on the changes.

[253] On item (b), the cause of the proposal in this case is not careless submissions or references, but the Council's unsound assumption of authority to make the changes. The Court should, and does, discourage, rather than encourage, that.

[254] On item (c), although in this case the changes are proposed by a party, not on the Court's own initiative, the Court should still be careful not to step into the arena, as it might have to make a final judgement, later, on a dispute over the appropriate density of future development of the site.

[255] For those reasons, even if both conditions of the Court's power to act under section 293 were fulfilled, we would not exercise the power.

Part II of the Act

[256] In coming to a judgement on the variation overall, we have duties under Part II of the Act, which states its purpose and principles. Part II contains sections 5 to 8. Section 5 states the purpose and explains what is meant by sustainable management. As the remaining sections are supportive of and more particular than section 5, we consider them first.

[257] Section 6 imposes a duty on functionaries to recognise and provide for a number of matters of national importance. Some of them are raised by this case and we will address them.

[258] Section 7 imposes a duty on functionaries to have particular regard to certain other matters. Some of them were relied on in this case, so we address them too.

[259] The parties were agreed, and we accept, that the variation does not raise any issue in respect of the duty imposed by section 8 to take into account the principles of the Treaty of Waitangi.

Matters of national importance

[260] We quote section 6:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance:
> (a) The preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development:
> (b) The protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development:
> (c) The protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna:
> (d) The maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers:
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

[261] Mr Kyle gave the opinion that the variation would preserve the natural character of Lake Wanaka and its margins, would protect significant areas of kanuka, would enhance public access to the margin of the lake, and would not impact on Maori ancestral lands, water, sites, lakes or rivers.

[262] Ms Van Hoppe gave the opinion that the northern area of the proposed zone would not impact on the natural character of Lake Wanaka's margin; and that any potential effect of visibility of development could be mitigated or avoided by the proposed zone provisions. This witness stated her belief that the proposed public walkways and open space would enhance public access to and along the lake, and that the development would have no more than minor effects on the existing walkway.

[263] Mr Whitney gave the opinion that subdivision and development of the northern end and elevated eastern edge of the site would be inappropriate because it would be visible from the margin of the lake, and from the surface of the lake (itself an outstanding natural landscape) to the north, and from the north-east, and generally from west. This witness also stated that residential development at the northern end

of the site would be likely to present a private atmosphere that would not enhance public access at the lakeshore.

[264] Earlier in this decision we stated our findings that the variation would provide for development in Area 5 that would have significant adverse effects on landscape and visual amenity of Lake Wanaka and its shores. Based on those findings, we hold that the variation would not recognise and provide for the preservation of the natural character of the lake and its margin. In our judgement, development of parts of the site that would be visible from the surface or the margin of the lake, even if existing kanuka or other vegetation did not exist, would not be appropriate; and the variation would not sufficiently protect the natural character from it, nor protect the outstanding natural feature and landscape of the lake from it. It would not fulfil the Council's duty under section 6(a) and (b).

[265] The variation contains measures designed to protect some of the areas of significant indigenous kanuka vegetation on the site, though not all of them. To the extent that it does not, the variation would not fulfil the Council's duty under section 6(c).

[266] The variation recognises and contains some provisions for maintenance and enhancement of public access to and along the lake. Although the presence of private development might mean that some people's enjoyment of that access is less, in our judgement that does not deserve categorising as a failure on a matter of national importance.

Matters for particular regard

[267] We quote the relevant parts of section 7:

> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> ...
>
> (aa) The ethic of stewardship:
> (b) The efficient use and development of natural and physical resources:
> (c) The maintenance and enhancement of amenity values:
> (d) Intrinsic values of ecosystems:
> (e) [Repealed.]
> (f) Maintenance and enhancement of the quality of the environment:
> (g) Any finite characteristics of natural and physical resources:
> (h) ...

[268] Mr Kyle gave the opinion that the variation would achieve the relevant matters set out in section 7. He stated that the development would make efficient use of existing service infrastructure and roading (paragraph (b)); that amenity values would be maintained (paragraph (c)); that ecosystem values at the site would be preserved and enhanced (paragraph (d)); the development would enhance the quality of the environment by provision of reserve areas and formalised access to the margin of the lake, and by facilities to be located on reserve areas, and would not exhaust future resources.

[269] Mr Whitney gave the opinion that development of the part of the site that overlooks the lake would not be consistent with the ethic of stewardship (paragraph (aa)), exemplified by the Lake Wanaka Preservation Act 1973 and subsequent community protection of the lake. He questioned whether the development authorised by the variation could be found to be an efficient use of resources (paragraph (b)) without a thorough investigation of alternative sites and directions for growth.

[270] On the maintenance and enhancement of amenity values (paragraph (c)) and of the quality of the environment (paragraph (f)), Mr Whitney gave the opinion that the amenity values of the site are enjoyed by those who view the land as a backdrop to the town, including from the surface and margins of the lake. He considered that the need for the land to be used to accommodate urban growth should be demonstrated before those amenity values, and that quality, is sacrificed. Similarly the witness observed that the finite characteristic of the land resource should be considered before a decision is made to allocate it for residential subdivision and development.

[271] Although the variation would allow development that may be visible from the lake, it contains provisions designed to minimise the effect on the natural character of the lake and its visual amenities. In those circumstances we judge it disproportionate to find that the Council failed to have particular regard to the ethic of stewardship in that respect.

[272] On paragraphs (b) and (g), the Council does not appear to have examined options for growth of Wanaka adequately. Nor did it explain the limit on the number of residential units, be it 240 or 400. We would have expected a comprehensive assessment of the development capability of a site of this size. However we consider that it would be disproportionate to find that the Council had failed to have particular

regard to the efficient use of land and of existing service infrastructure, or of the finite characteristics of the land resource, in that regard.

[273] On paragraphs (c) and (f), the variation does contain provisions designed to maintain and enhance amenity values and the quality of the environment. We do not find that the Council failed to have particular regard to those important matters.

[274] In summary, we do not find that the Council failed in its duty to have particular regard to the applicable matters listed in section 7.

The purpose of the Act

[275] The purpose of the Act is stated in section 5, which we quote:

> **5 Purpose**– (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

[276] The Act has a single purpose, and it is our duty to consider the aspects of the variation that might serve it, and those that would not, in coming to a judgement whether it should be upheld or cancelled.

[277] The main resources concerned are the land of the site, the lake and its margins, the landscape and visual amenity values, and the significant native kanuka vegetation. The physical resources, particularly roads and other service infrastructure, are in this case less important.

Judgement

[278] Earlier in this decision, we reviewed the evidence and gave our reasons for finding that Variation 15 :

(a) Is not necessary to achieve the purpose of the Act;

(b) Has not been shown to be the most appropriate means of exercising the Council's functions to achieve the Act's purpose;

(c) Would not achieve the settled objectives and policies of the partly operative district plan about protecting natural resources; and

(d) Would not sufficiently protect the natural character of the lake (an outstanding natural feature and landscape) from inappropriate development.

[279] On those bases, it is our judgement that the variation would not serve the purpose of the Act of promoting sustainable management (as described) of natural and physical resources.

Determinations

[280] For those reasons, the Court determines:

(a) That Appeal RMA352/03 is allowed:

(b) That Variation 15 is cancelled:

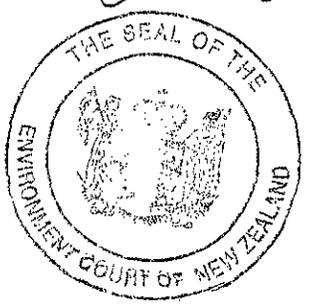
(c) That Appeal RMA337/03 is consequentially disallowed.

Costs

[281] The question of costs is reserved. Any application for costs may be lodged and served within 15 working days of the date of this decision. Any response may be lodged and served within 15 days of receipt of the application.

DATED at Auckland this 26th day of January 2005.

For the Court:



D F G Sheppard
Alternate Environment Judge

Issued: 28 JAN 2005