

BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of the Variation to the Proposed District  
Plan, Priority Area Landscape Schedules

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**WRITTEN SUBMISSION ON BEHALF OF**

**DR JOHN COSSENS**

Date: 16<sup>th</sup> of October 2023

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## MAY IT PLEASE THE COMMISSION

1. Landscapes are a human construct and reflect the perceptions, attitudes and values of the people who live, visit and view a particular area. Without people, there are no landscapes. As such the development of landscape values are not solely the domain of experts, and yet we have notified landscape schedules here, which have largely been developed by two landscape consultants, indeed for many of the priority areas, the landscape schedules were developed by one person.

2. Ms Helen Mellsop, lead landscape consultant for the Council and developer of much of the landscape schedules has previously said.

*Qualitative research or surveys of affected stakeholders can be more reliable ways of determining landscape values than expert analysis<sup>1</sup>*

3. And yet, I submit that the landscape assessment methodology employed in the development of the landscape schedules has not sought to identify these strongly held landscape values in a meaningful way.

4. My deep concern is that by not addressing the elephant in the room, that is, the landscape assessment and consultation methodology, has given a legitimacy to the landscape schedules, and that they have become a *fait accompli*, which the Commission will find it very difficult, if not impossible, to question or overturn.

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<sup>1</sup> H Mellsop, BOE, Cossens v QLDC, NZEnvC-2017-CHC-79, [5.13]

5. It is therefore my submission that the landscape schedule hearings and the commission's findings will never be validated or accepted based on the fact that the landscape methodology for the development of the schedules has not been authenticated by both the community and appropriate experts. Until that is done, then, in my opinion, the schedules have no standing and are largely the opinion of two experts, rubber stamped by other experts, rather than a combination of accurately captured resident landscape values combined with those of landscape experts.
6. I have previously written extensively on the subject of the landscape schedule methodology and the Commissioners are by now, well aware of my concerns. My main concerns are these:
7. It is well accepted that landscapes are a human perceptual construct and I have referred to this in an earlier memorandum:

*Intrinsic to the identification of landscape values is the understanding of how the community assigns different values to different landscape areas and what importance they attach to them. Landscape values are fundamentally about perceptions and attitudes (the associative and sensory elements assigned to the physical) and as such their identification requires a more nuanced, community centric approach rather than being reliant on expert opinion.<sup>2</sup>*

NZILA best practice guidelines also state:

*Landscape embodies the relationship between people and place: It is the character of an area, how the area is experienced and perceived, and the meanings associated with it. An area as perceived by people, including how the area is experienced, understood, interpreted, and regarded.*

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<sup>2</sup> Memorandum to the Commission, J Cossens, 12 Sept 2023

8. On that basis best practice landscape assessment as detailed in the *NZILA best practice guidelines* considers that consultation with the community and stakeholders is **essential** such that assessors have an in-depth understanding of what is '*in people's heads*', that is, what are their landscape perceptions, values and attitudes.
9. But if consultation is to be undertaken, then surely it needs to be the best it can be? That is fair, reliable, representative and leads to useable information on the values the community places on the landscape they live in. Otherwise, why do it?
10. I submit that this 'consultation' or rather gaining an understanding of community landscape values and perceptions did not occur in a meaningful, accurate and reliable way prior to development of the schedules. Indeed, the timeline of the landscape schedule development provided by the Council confirms that the landscape consultants did not consider the results of the landscape feedback until after they had produced draft landscape schedules.
11. I refer the commission to *Tainui v Hamilton City Council*.<sup>3</sup> In that case, the High Court considered an application by Tainui for judicial review of a decision by the Hamilton City Council to publicly notify a proposed variation to the Hamilton City Proposed District Plan (HCPDP).
12. Of most relevance here, is how the Court viewed the term 'consultation' as it relates to schedule 1 processes of the RMA. *Tainui* had submitted the Council was under a duty to consult the Iwi before notification based on cl 3(1)(d) RMA. The Council had argued it did not need to consult with *Tainui* before notification but

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<sup>3</sup> Waikato Tainui Te Kauhanganui Inc v Hamilton City Council, CIV 2009-419-1712

would consult with the Iwi after the variation was notified through the statutory submission process.

13. Because it is of such importance here, it is worthwhile to consider the Court's analysis of where it sees consultation taking place.
14. Mr Milne, counsel for *Tainui* had submitted that under cl 3(1)(d) the Council was required to consult *Tainui* before notification of Variation 21 and referred in that respect to cl 2(1) of schedule 1, which states:

***2 Preparation of proposed policy statement or plan***

*(1) The preparation of a policy statement or plan shall be commenced by the preparation by the local authority concerned, of a proposed policy statement or plan.*

15. Mr Milne submitted that cl 3(1)(d) contemplates consultation with iwi during the preparation of a proposed plan. In this case, Variation 21 was the proposed plan. As preparation of a variation occurs prior to notification, Mr Milne argued that the consultation period must necessarily occur before such notification. In accepting Mr Milne's argument Justice Allan said:

*[41] I consider that cl 2 must bear upon the proper construction of cl 3. Clause 2 makes sense only if the phrase "proposed policy statement or plan" is read to mean "proposed policy statement or proposed plan". The term "proposed plan" is defined as meaning a plan that has been notified under cl 5 of schedule 1, but has not become operative. At the point of notification therefore, the process of preparation of the proposed plan ceases.*

*[42] In order to achieve consistency with cl 2, the opening words of cl 3(1) must be interpreted as meaning "during the preparation of a proposed policy statement or proposed plan ...". The preparation process concludes at the*

*time of notification of the proposed plan. Accordingly, the cl 3 consultation obligation, which must be undertaken during the preparation of a proposed plan, must occur prior to public notification. (emphasis added)*

16. Critically, Justice Allan also noted the importance of clause 3(4) of schedule 1 RMA:

*[45] Section 82 of the LGA requires consultation to be undertaken before a local authority makes a decision. In this case, the decision was whether to approve proposed Variation 21 for public notification. Subsection (e) requires the local authority to consult with an open mind and, when making its decision, to give due consideration to the views presented during consultation. Due consideration can only be given if the consultative process precedes the decision.*

*[46] Curiously, cl 3(4) expressly applies s 82 to cl 3(2), but not to cl 3(1). Nevertheless, it would be an odd result if the principles of consultation found ins 82 of the LGA were to apply to consultation with parties whom the Council was not bound to consult, but did not apply where the Council faced a mandatory obligation to consult.*

*[47] It may have been that Parliament was concerned to ensure that any discretionary consultation undertaken by a local authority pursuant to cl 3(2)*

17. However, as held in *Tainui* all consultation, whether it be Tangata Whenua or Pakeha (the public) **must** be undertaken **before** notification. The logic of such a determination is based on the premise that consultation must be undertaken before a decision is made.

18. The Court in *Tainui* further reinforced this point when commenting on the need for a decision maker to keep an open mind.

*[51] Furthermore, the party required to consult must approach the consultation with an open mind. Where the consulting party has already finally decided upon the matter, true consultation cannot occur. In *Wellington International Airport Ltd v Air New Zealand* at 684–685, the Court summarised what might be expected of a party before it could be said that a decision was made after consultation:*

*If the party having the power to make a decision after consultation holds meetings with the parties it is required to consult, provides those parties with relevant information and with such further information as they request, enters the meetings with an open mind, takes due notice of what is said, and waits until they have had their say before making a decision, then the decision is properly described as having been made after consultation.*

19. Justice Allan made comment on a situation, not dissimilar to the one at issue here, namely the consultation requirements in respect of a plan change:

*[52] Mr Milne submits that the key principle is that consultation cannot occur when a proposal is already decided upon; consultation is the discussion that occurs before deciding what will be done. I agree.*

20. And finally, the Court in *Tainui* in summarising its analysis of where consultation should take place in the scheme of Schedule 1 of the RMA said:

*[61] Preparation of a proposed plan is the commencement stage (cl 2(1)). This stage requires consultation with specified parties (cl 3(1))*

and permits consultation with other parties (cl 3(2)). Clause 4 outlines certain requirements which must precede notification of a proposed district plan. Only after these clauses have been complied with may the Council publicly notify the plan under cl 5(1). Following notification, the Council opens the submission process (cl 6), summarises the submissions and calls for further submissions (cl 7), ultimately coming to a decision on each submission (cl 10). Hence, consultation under cl 3 must logically precede notification under cl 5.

[62] *The meaning of an enactment must be ascertained from its text and in the light of its purpose: s 5(1) of the Interpretation Act 1999. I consider that the plain meaning interpretation of cl 3 supports the conclusion that consultation must occur prior to notification. Clause 3(1)(d) requires a local authority to consult with the relevant iwi authority during the preparation of a “proposed” plan. This is apparent both from the language of the clause itself and from the chronological sequence in which schedule 1 is organised.*

[63] *The process of preparing a proposed plan ceases at the point the proposed plan is notified. At the point of notification, a decision has been made on the form of the proposed plan. The proposed plan then moves from the schedule 1 preparation stage to the next stage, involving the submissions process. In order for consultation to be effective, it must occur before the proposed plan is notified.*

21. I refer the Commission to the ‘step by step’ process of the Council’s landscape schedule development as outlined in the *Methodology Statement*

Sept 21 – Oct 2021  
Briefing by QLDC Project Manager Sarah Picard  
Preparation of Draft Methodology Statement Report – Bridget

## Gilbert Landscapes

Oct 21 – Nov 21

Review of Draft Methodology Statement Report – Helen Mellsop & Brad Coombs

Nov 21 – Dec 21

Preparation of Sample PA Landscape Schedules – Helen Mellsop and Bridge Gilbert

Attendance at hui with Aukaka to discuss Mana Whenua Perspectives on the PA Landscape Schedules – Sarah Picard, Bridget Gilbert, Helen Mellsop, Brad Coombs)

Dec 21 – Jan 21

Joint Field Surveys of Priority Areas – Bridget Gilbert, Helen Mellsop, Brad Coombs

**Peer review of 4 sample PA schedules – Brad Coombs**

Refinement of the 4 PA Landscape Schedules in response to peer review comments – Helen Mellsop, Bridget Gilbert

Jan 21 – Feb 22

Preparation of remaining PA schedules to produce final draft (1) PA schedules - Helen Mellsop, Bridget Gilbert

Feb 21 – Mar 22

Preparation of final draft (2) PA schedules - Helen Mellsop, Bridget Gilbert

Mar 21 – Apr 22

Review of final draft (2) PA schedules by other experts **Targeted Landowner engagement by QLDC.**

Apr 21 – May 22

Preparation of final draft (2) PA schedules integrating expert comments

**May 21 – Jun 22**

**Review of landowner and public feedback and preparation of FINAL PA schedules - Helen Mellsop, Bridget Gilbert**

**Review and Issuing Draft Schedules to QLDC with methodology statement.**

22. What is confirmed by the step by step process of the Council landscape schedule development is that the landowner and public feedback was **only** considered **after** the second final draft of the landscape schedules had

been prepared and just before the final draft was presented to the QLDC. I would also note that the peer reviewer Mr Coombs only looked at 4 draft PA schedules early on, and from the process outlined, had little involvement subsequent to that, so effectively, Ms Gilbert and Ms Mellsop were left to their own devices to finalise the schedules. I might add, it is apparent that many of the PA schedules were only developed by a single expert, so the opinion of just one person effectively created the PA landscape schedules.

23. It is clear that the QLDC did not adequately consult before notifying the plan change and in fact the ‘consultation’ on the PA landscape schedules was only considered by the experts after they had produced the final draft of the schedules. This process of consulting after the fact, was the vey thing that Justice Allan had warned about.
24. I also refer the commission to a breakdown of the ‘landscape feedback’ responses which had to be uncovered via an LGOIA request.

#### QLDC LGOIA RESPONSE

Q: What were the number of responses received from each of the Upper Clutha priority areas

A: There were 126 direct references to an Upper Clutha priority area and please see the below table for the responses received online

Upper Clutha PA	Let’s Talk	Email
Hāwea South	11	4
Cardrona Valley	12	5
Dublin Bay	6	3
Cardrona River/Mt Barker	12	3
Church Rd	3	1
Roys Bay	3	2
West Wanaka	6	2
Lake McKay and Environs	3	2
West of Hāwea River	9	1
Mount Alpha	6	1
Mount Barker	7	-
Mt Iron	12	-

Halliday Road/Corbridge	5	-
Maungawera Valley	4	

25. In the table above, provided by the Council, of the priority area responses (remembering these do not denote the number of people living in those priority areas who responded, but rather the number of ‘references’ made by all people about the priority areas), what is apparent is the very small number of references for each priority area. The difficulty with such small numbers is that individual responses can skew or bias the overall conclusion for each priority area. Take for example, where 4-6 references have been made (Church Road, Roys Bay, Lake McKay, Halliday Road, Maungawera Valley). Such numbers would essentially mean 1-2 people account for 25-30% of the sample which unduly biases the responses in favour of those people(or interest groups). In short, the ‘references’ to the PA’s were too small and do not accurately represent the PA ‘values’ of the community and affected residents.
26. Landscape consultation with affected parties was clearly a sham in that critically important consultation on landscape values did not ask about landscape values, but rather sought feedback on landscape schedules which had not even been developed. Further, the consultation supposedly to be fed into the landscape schedule development process was unreliable, sample sizes too small, biased and only ever considered after the draft schedules were developed.
27. At every turn, the QLDC have tried to rebuff attempts to test the methodology. For example, most recently, they have purposely excluded ‘landscape methodology’ as an agenda item from the recently held ‘expert conferencing’ despite a number of submitters raising concerns about the landscape assessment methodology employed. The Council has provided

no expert evidence in support of the consultative process they employed, and in my view have actively discouraged any investigation into the consultation. Until the matter of the consultation and landscape methodology is resolved, I do not see how there is any legitimacy to the hearings into the landscape schedules.

28. There are two main themes to my submission. Firstly, that the landscape methodology employed, including the community consultation, was not best practice nor fair, and secondly, that the resulting landscape schedules will not provide greater clarity, certainty or consistency, and do not accurately identify development potential within the rural zone.
29. In my view the Council is determined to use the same 'expert' opinion approach which they used throughout the Environment Court PDP appeal hearings and indeed have used the same experts whose evidence was strongly criticised in the hearings; however, I would note that the Environment Court determined that there were '*serious design flaws*'<sup>4</sup> in the decisions version of the PDP. It suggests to me that the Council have persisted with using Ms Mellsop and Ms Gilbert in developing the landscape schedules but they were two experts who opposed landscape scheduling and considered them unnecessary. Both experts also had strong opinions on what the landscape values of the Upper Clutha were, and yet, they were engaged by the QLDC to develop the PA landscape schedules. That to me, is akin to having the '*fox in the henhouse*' as I very much doubt both Ms Gilbert and Ms Mellsop have changed their views on how landscapes and development should be approached within the rural zones of the Upper Clutha.

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<sup>4</sup> Federated Farmers v QLDC, [2019] NZEnvC (205), Topic 2.2, [143]

30. As we will come to later, is it then any surprise that Ms Mellsop and Ms Gilbert have recommended ‘*very limited to no development capacity*’ across **all** of the Upper Clutha PA’s? In my opinion this just reinforces their previously held views. Thus the landscape schedules developed have come from a very narrow field of view, whereas the better approach would have been to start from with resident landscape values and only then engage the consultants. By way of analogy, in the marketing world, most marketing mistakes and product failures have come from people who thought they knew what customers wanted. The same principle should have applied here.

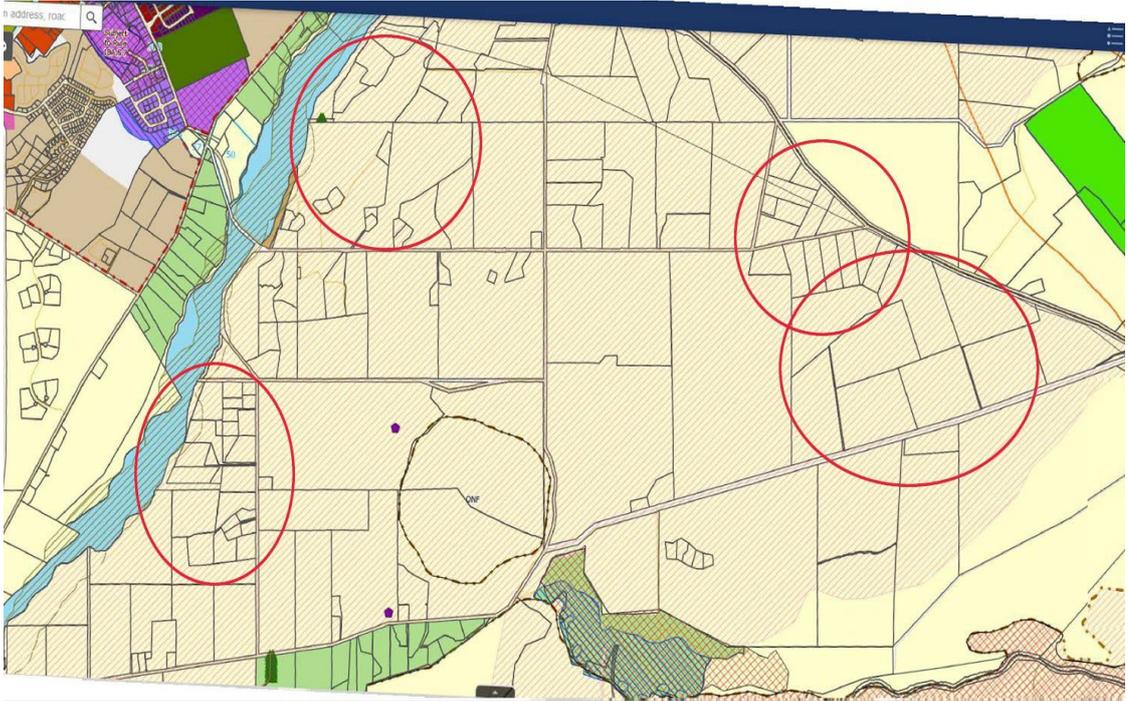
### **OTHER METHODOLOGICAL FLAWS**

31. Over the past eighteen months since the Council first began the process of consulting on the Landscape Schedules, I have had a deep concern that the Council landscape assessment methodology was not best practice nor was the consultation fair, robust and reliable.
32. Over that time, I have communicated my concerns to the Council and Councillors through various emails, and also via the Environment Court lodging a number of memoranda and issued proceedings. The Council rebuffed and rejected my correspondence at every turn largely on legal grounds rather than providing any evidence to support the consultative and landscape methodology employed, and the Environment Court determined that the best place to raise my concerns was through the RMA Schedule 1 post notification hearings process which is what I am doing now, and have done so with previous submissions and memoranda.<sup>5</sup>

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<sup>5</sup> [2022] NZEnvC 206, [27] – ‘*Insofar as Dr Cossens or Darby Planning have concerns about such matters, their proper recourse is to make a submission under Sch 1 RMA and, if not satisfied with the outcome, to appeal.*’

33. One of the important outcomes of the PA landscape schedules was to identify where there were development pressure points and also to identify where development growth could be directed in the future. However, the landscape schedules developed by Ms Gilbert and Ms Mellsop in the Upper Clutha basin, have effectively applied a 'very limited capacity' rating to all PA areas and yet this seems inconceivable that there are no areas in the Upper Clutha rural zone that could accommodate some development growth.
34. In my opinion all this blanket approach to landscape capacity will achieve is simply to perpetuate the uncertainty that has arisen through the discretionary regime of the past 20 years, where subdivision and development resource consents are determined on an individual, ad hoc basis and that the high transaction costs the Environment Court was concerned about will continue. Under this discretionary approach, there is directed planning to development in the rural zones.
35. I consider that there must be a more directive approach to the development of landscape schedules which identify where some growth could happen. For example, within the Cardona/Mt Barker RCL PA there are areas and nodes of development which clearly have further capacity for development. I refer the Commission to a map of the Cardrona/Mt Barker RCL PA where I have identified areas within the PA which in my view could accommodate further growth without affecting the overall landscape values of the PA. I have based this analysis on such factors as distance from main roads, out of view of visitors and other road users, landscape characteristics allow for dwellings to sit within the landscape, existing development and so on. However, it is not for me to say whether these areas have landscape capacity, this should have been done by the landscape experts in conjunction with the community.



## MEASURING CUMULATIVE AFFECT OVER TIME

36. The ability to measure and track cumulative affects over time has also not been accounted for in the methodology and landscape schedules and rather, cumulative effect measurement will remain with the very arbitrary opinion of landscape consultants and yet, the very experienced and well qualified landscape expert Dr Marion Reed observed that.

*With regard to cumulative visual effects, this relates to the effects on particular people or groups of people and involves the characteristics of views and the visual amenity enjoyed by people from particular locations.*<sup>6</sup>

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<sup>6</sup> Dr Mario Reed, Wakatipu Basin Residential Subdivision and Development: Landscape Character Assessment, 2014, page 19

37. There has been no attempt by the Council and landscape experts to put in place a landscape assessment regime which will capture change in cumulative effects over time. This to me is a further indictment of the landscape assessment methodology and the resulting landscape schedules because there is no method for monitoring cumulative effects of landscape change.

## **REJECTION OF LAY EVIDENCE?**

38. I note in the evidence of Mr Jeremy Head who has replaced Ms Mellsop as landscape expert for the QLDC, for many of the submitters Mr Head made the comment '*no technical evidence presented in support of this submission point*'. This appears to suggest the submission is in some way invalidated because a lay submitter has not provided technical evidence. To me this is further evidence of the bias against lay evidence and yet isn't the lay evidence an important part of this process.

## **SUMMARY**

39. As a result of the Environment Court decision [2019] NZEnvC 205 Topic 2.2 and further articulated in [2021] NZEnvC 60 Topic 2.7, the QLDC was directed, in consultations with the appeal parties, to develop a Landscape Values Identification Framework (VIF) which would identify landscape values and capacity that would then be included in Chapter 21 values schedules, most notably for landscape priority areas.
40. It is my submission that the landscape schedules as the currently stand have not met the purpose for which they were intended, in that they have not adequately identified landscape capacity and have identified locations within the PA's which can absorb development without impacting the overall landscape character.

41. By not meeting their purpose, the PA landscape schedules have not provided greater clarity or certainty and will not lead to more consistency in decision making, nor reduce transactional costs of rural resource consent applications.
42. Furthermore, the landscape schedules as they currently stand, do not provide a mechanism for measuring cumulative effects, nor monitoring change in landscapes and impacts over time. This inability to monitor cumulative effects was identified by the Environment Court as a significant failure of the decision version of the PDP and which the Court sought to have rectified. This has not been achieved by the Council's notified schedules.
43. To my mind, much of the current failing of the PA landscape schedules stems from poor methodology and needs to be rectified if the schedules are to do what they were designed for, and to be accepted by the community.
44. Finally, as I have outlined, I do not consider the consultative process leading up to the development of the schedules has been fair, reliable and representative of community landscape values. In particular, those people most affected by the notified schedules have not been given a fair chance to have their say. This failure in consultation needs to be rectified before the landscape schedules can be accepted.
45. As was held in *Tainui*, consultation cannot occur when a proposal is already decided upon; consultation is the discussion that occurs before deciding what will be done.

46. Respectfully, the Commission needs to ask itself a very simple question. For any PA, say for example the Cardrona Mt Barker RCL PA in which I live, can the Commissioners say with certainty what the landscape values, attitudes and perceptions of the **residents** (not experts) who live within that landscape priority area are? If the Commissioners cannot say what they are, or cannot find them within the landscape schedule documentation, then the schedules have failed. For as I have previously stated, and is well accepted, landscapes are a human construct where without people there are no landscapes. so the starting point for any landscape value schedules must lie with residents, visitors and landowners, not outside consultants.

Dated this 16<sup>th</sup> of October 2023



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Dr John Cossens, Wanaka