

Annexure 1

Scope – Rule 20A: scope to approve area and slope conditions of the permitted activity

[1] Federated Farmers, Wilkins and the Dairy Interests oppose the conditions for the permitted activity proposed by the Regional Council and others, arguing there is no scope for the court to approve amendments to Rule 20A by:

- (i) reducing the area of IWG from 15% to 10%; or
- (ii) introducing a slope control of 10 degrees.

The law

[2] The parties agree with the Regional Council submissions on the legal principles that apply when considering whether the court has scope to approve relief.¹

[3] What follows then is a brief synopsis of the legal principles to set the context for our decision. We commence with the overview of the plan making processes in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*:²

[27] ...The RMA process for preparing, changing and reviewing plans, as set out in sch 1 to the RMA, is designed to:

- (a) progressively refine the disputed issues as the proposed plan goes through the submission and appeal process; and
- (b) promote the principles of procedural fairness and natural justice by ensuring potentially affected parties know what changes to the proposed plan are sought so they can choose to participate in

¹ SRC, 'Scope' dated 12 July 2022.

² *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [27]-[28].

decisions being made on that issue.

[28] It is for these reasons that an appellant in such proceedings cannot pursue an outcome on appeal that falls outside the scope of their original submission.³ ...

[4] While consequential amendments may be made to a plan, for there to be scope the amendments must be ‘necessary and desirable’ and ‘foreseen as a direct or otherwise logical consequence of a submission’.⁴ Observing that consequential amendments generally include uncontested matters, such as amending planning maps to reflect the substantive changes sought, the High Court in *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* held changes should not be made to the plan through the appeal process that could not have been anticipated from reading the notice of appeal.⁵

[5] Further, the question of whether amendments to a plan are reasonably and fairly raised in submissions, is to be approached in a realistic, workable fashion.⁶ Because an appeal cannot raise issues which are outside the scope of a submission, and secondly, the jurisdiction of the Environment Court is then limited by the scope of the relief sought on the appeal,⁷ the starting point when determining the scope of an appeal is to consider the appellant’s original submission on the proposed plan.⁸

[6] With that said, we turn first to the notified plan and the submissions made on the same.

³ *Avon Hotel Ltd v Christchurch City Council* [2007] NZRMA 373 (EnvC).

⁴ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

⁵ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [99].

⁶ *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC).

⁷ *Hauraki Maori Trust Board v Waikato Regional Council* HC Auckland CIV-2003-485-999, 4 March 2004 at [76].

⁸ *Gertrude’s Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [30].

Notified proposed plan

[7] Under the notified version of the proposed plan, the IWG activity was addressed in its own rule (Rule 23). Excluding the alpine physiographic zone where IWG was not permitted, the activity is permitted subject to the following conditions:

- (a) the land area did not exceed 20 ha or 50 ha (depending on the zone);
and
- (b) the activity complied with various setbacks from water bodies where the activity is occurring on sloping land.

Submissions on the proposed plan

[8] Fish & Game and Forest & Bird have standing to appeal because they made submissions on the proposed plan, including on the Physiographic Zone Policies (Policies 4-12), Policy 16 and Rule 23 (RMA, Schedule 1, cl 14).

[9] Forest & Bird submitted in support of Policy 16 proposing minor amendments to strengthen and improve clarity of terms and phrases. Amendments proposed to the physiographic zone policies (Policies 4-12) were to prohibit IWG in certain zones. Rule 23 – the rule for IWG - is opposed and substantive amendments were proposed. In its relief Forest & Bird sought the inclusion of an additional physiographic zone to the zones where no IWG was to take place⁹ and to make additional physiographic zones subject to the condition that IWG not exceed 20 ha.¹⁰ Amendments were proposed to clarify the implementation of setbacks from water bodies.¹¹

[10] Fish & Game's submission on the plan is comprehensive and in relation to

⁹ Rule 23(b)(ii) (notified).

¹⁰ Rule 23(b)(iii) (notified).

¹¹ Rule 23(b)(vii) (notified).

the Physiographic Zone Policies, Policy 16 and Rule 23 they sought outcomes similar to Forest & Bird.

SRC decision on provisions and matters raised in submissions

[11] In its decision on provisions and matters raised in submissions, the Regional Council merged several rules with the effect that IWG together with other farming activities was to be addressed under a single rule (Rule 20).¹²

[12] For the IWG activity, the area thresholds for the different physiographic zones were replaced by a single threshold that applied everywhere. IWG is permitted if (amongst other matters):¹³

- (a) the activity does not occur on more than 15% of the area of the landholding or 100 ha, whichever is the lesser.

[13] The variable setbacks based on slope were replaced by management practices to reduce contaminant losses.¹⁴

Notices of appeal

Forest & Bird appeal

[14] Forest & Bird appealed specific plan provisions proposing amendments or in the alternative, any wording that would adequately address the reasons for its appeal.¹⁵

[15] The appeal seeks to prohibit IWG in certain physiographic zones and to amend the wording of the relevant policies. Forest & Bird did not appeal Rule 20

¹² Report and Recommendations of the Hearing Panel, dated 29 January 2018 at Chapter 10.

¹³ Rule 20 (DV).

¹⁴ Rule 20(a)(iii) (DV).

¹⁵ Notice of appeal, at [8] and Table 1.

(DV) which permits IWG. The appeal in relation to Policy 16 seeks stronger policy direction by, among other measure, deleting ambiguous phrasing.

Fish & Game appeal

[16] The general reasons given by Fish & Game for its appeal include:¹⁶

- (a) the suite of objectives, policies and rules provide for land use activities that cause degradation of water quality and adverse effects on water bodies;¹⁷ and
- (b) the rules permit the discharge of contaminates in contravention of s 70;¹⁸ and
- (c) the suite of methods are not sufficiently certain or robust to effectively ensure that water quality is or can be maintained, or improved where is has been degraded.¹⁹

[17] By way of relief Fish & Game sought:²⁰

- (a) certain amendments to provisions set out in Appendix A to the notice of appeal;
- (b) such other changes to the above provisions that address the reasons for the appeal; and
- (c) consequential changes.

[18] Relevantly, Fish & Game appealed the following provisions:²¹

- (a) Policies 4-12;
- (b) Policy 16; and

¹⁶ Forest & Bird and Fish & Game, closing submissions at [49].

¹⁷ Notice of appeal at [7(v)].

¹⁸ Notice of appeal at [7(xii)].

¹⁹ Notice of appeal at [7(iv)].

²⁰ Notice of appeal at [8].

²¹ Notice of appeal, Appendix A.

(c) Rule 20.

[19] The relief sought in relation to the physiographic zone policies, amongst other matters, is to strengthen and clarify the direction given in relation to consenting IWG.

[20] The relief sought in relation Policy 16 is to strongly discourage the granting of consent for IWG where (inter alia):²²

- (a) the activity's adverse effects cannot be avoided where practicable or otherwise remedied or mitigated; or
- (b) existing water quality is degraded to the point of being overallocated.

[21] For all farming activities, an amendment to Policy 16 was proposed bringing back the requirement for variable setbacks from water bodies relative to slope as part of a FEMP.

[22] Finally, Fish & Game appealed the conditions that apply to the permitted activity rule (Rule 20). While the appeal does not propose amendments to the condition limiting the area of permitted IWG activities, it does seek new setback controls based on slope.

Discussion

[23] Forest & Bird's submission on the notified plan is concerned with the appropriateness of IWG in some physiographic zones and proposed amending Rule 23 to prohibit IWG in two zones and restricting the area of IWG activity in the others. The rule was amended by the Regional Council in response to submissions on the plan, standardising the controls on permitted IWG activities and deleting the controls that applied to the various physiographic zones.

²² Notice of appeal, Policy 16 at 21-22.

[24] We find that the amended relief is outside the scope of Forest & Bird's submission on the plan and outside the scope of its appeal. Persons with a potential interest in the appeal could not have foreseen an area or slope constraints being approved by the court either as a direct or otherwise logical consequence of this appeal.

[25] As with its submission, Fish & Game filed a comprehensive appeal. A key reason for the appeal concerned the plan's ability to maintain water quality or to improve water quality where degraded.²³ Detailed reasons are given for the appeal and for the relief (both general²⁴ and specific).²⁵

[26] Fish & Game appeals Rule 20 seeking to reinstate the variable setback controls that apply in relation to water bodies where IWG is to take place on sloping land. There is no appeal seeking to impose a general condition restricting the slope on which IWG can take place and nor does Fish & Game appeal the condition limiting the area of the permitted IWG activity.

[27] Applying *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*, we find the amended relief does not flow from the relief sought on appeal and could not be anticipated by the public from general and specific reasons for the appeal when read and understood together. Assuming that the provenance of the slope and area restrictions is the NES-F, these conditions are highly contested and cannot be said to flow naturally or inevitably from the changes that were sought.

Outcome

[28] The amended relief supported by SRC and others, is outside the scope of the submissions on the plan and outside the scope of the appellants' appeals.

²³ See notice of appeal, [7(a)(i)].

²⁴ Notice of appeal, [8(b) and (c)].

²⁵ Notice of appeal, [8(a)] and Appendix A.

