

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHĪ

Decision No. [2023] NZEnvC 116

IN THE MATTER

of the Resource Management Act 1991

AND

an appeal under clause 14 of the First
Schedule of the Act

BETWEEN

BRUCE NORRISH

(ENV-2018-CHC-248)

Appellant

AND

DUNEDIN CITY COUNCIL

Respondent

Court: Environment Judge P A Steven
Environment Commissioner M C G Mabin

Hearing: at Dunedin on 2 March and 23 March 2023

Submissions: B Norrish for himself
M Garbett and G Cassidy for the respondent

Last case event: 31 March 2023

Date of Decision: 6 June 2023

Date of Issue: 6 June 2023

FINAL DECISION OF THE ENVIRONMENT COURT



- A: Under s279(1)(b) of the RMA,¹ the Environment Court orders that the appeal is allowed to the extent that the Dunedin City Council is directed to amend the provisions of the proposed Dunedin City Second Generation District Plan as set out in Appendix B, attached to and forming part of this decision.
- B: Under s285 of the RMA, there is no order as to costs.

REASONS

Introduction

[1] This decision determines an appeal against a decision of the Dunedin City Council (the Council). The appellant is Mr Bruce Norrish.

[2] The hearing occurred over two days, although at the close of the first day of the hearing (on 2 March 2023), the court expressed concerns about the approach of the Council's evidence in responding to the points raised on appeal by Mr Norrish.

[3] The Council was directed to file further evidence and this direction was confirmed in a Minute issued on 3 March 2023.

[4] The reconvened hearing took place on 23 March 2023 where we proceeded to hear the supplementary evidence from the Council.

Background

[5] Mr Norrish owns and resides at a property at 171 Pigeon Flat Road, Dunedin. He has been the owner and guardian of the land for over 40 years. Mr Norrish attributes the current condition of the property to his hard work and

¹ Resource Management Act 1991.

careful management.²

[6] In the decision version of the notified 2nd Generation Plan (2GP) more than half of his property, being that part above the 300 m elevation contour line, was mapped within the Flagstaff – Mt Cargill SNL. Mr Norrish appealed the decision. This contour would cover more than half his land and take in all of his pine plantations.

[7] Mr Norrish noted³ that when the Operative District Plan (ODP) was being determined, a Landscape Conservation Area (LCA) had been overlaid on his property and through an appeal to the Environment Court in 2002 he had accepted a boundary at the 420 m contour line.

[8] His case was that as Council experts stated LCAs and SNLs are essentially the same, and his land is the same, there should be no need to change the Environment Court's 2002 decision.

[9] Mr Norrish expressed a concern that the SNL would interfere with his use of his land.

Site

[10] Mr Norrish's property is on the south side of State Highway 1 (SH1), about 7 km south of Waitati on Blueskin Bay, and about 9 km north of Dunedin. The property is described in the evidence-in-chief of Katie James⁴ and Luke McKinlay⁵ and drawing on this and the court's site visit observations, the property may be described as covering about 80 ha and has a nearly rectangular outline of about 1,100 m by 730 m. It is bisected by the Pigeon Flat Road reserve that winds across the property on a northwest to southeast alignment. The road is unsealed and

² Norrish EIC, dated 23 November 2022, at [2].

³ Norrish EIC, at [3].

⁴ James EIC, dated 10 November 2022, at [12].

⁵ McKinlay EIC, dated 10 November 2022, at [35]–[38].

sidles across the slope dropping from 350 m to 300 m.

[11] The northern part of the property is on Pigeon Flat, with the southern part and focus of this appeal on the steeper slopes of the ridge landform. In detail, witnesses described three elements of the topography:

- (a) the south-eastern corner of the site includes a highpoint, referred to in the evidence as “the Knoll”.⁶ The ridge and Knoll in the south and southwest that forms the skyline of the view from SH1 across Mr Norrish’s land. The ridge is a continuation of the landform that runs west from Mt Cargill to Leith Saddle. The Knoll at 450 m elevation is the highest point on the ridge as it crosses Mr Norrish’s land. The ridge and Knoll landform areas were included in the Flagstaff – Mt Cargill LCA as discussed further below;
- (b) the steep slope below the ridge crest and Knoll. This drops from about 430 m elevation to 280 m elevation, and Pigeon Flat Road crosses the lower part of the slope, this being the land we refer to as the appeal site; and
- (c) Pigeon Flat is at 280 m to 240 m elevation and occupies ~1/3 of the site, in the northeast part.

[12] There are no obvious catchments on the steep slope, but a stream and valley runs to the northwest across the Pigeon Flat part of the property.

[13] The Council’s witnesses⁷ informed us the primary viewing locations for the site are to the left of the highway when travelling southbound towards Dunedin. Mr Norrish informed⁸ us this view occurs for less than one minute when travelling at highway speeds.

⁶ ‘The Knoll’ derives from the description given to this feature by the Environment Court in *Norrish v Dunedin City Council* EnvC C8/2002, 25 January 2002.

⁷ McKinlay reply, dated 15 December 2022, at [16].

⁸ Norrish EIC, at [5].

[14] The court undertook a site visit that replicated these visual amenity viewing angles for the site, travelling south on SH1 from Waitati to Leith Saddle, with the site being in view about one kilometre before reaching Leith Saddle.

[15] From Waitati the highway rises through undulating topography from sea level to around 250 m elevation where it passes onto Pigeon Flat. This low relief pasture area, described as the Pigeon Flat area is primarily to the north and east of the appeal site.⁹ It is surrounded on three sides by higher bush-clad ridges.

[16] The steep slopes of the ridges start generally above the 280 m contour line and rise to over 700 m, although at the appeal site the ridge only reaches 450 m elevation. Pigeon Flat and these surrounding ridges are the landscape context for Mr Norrish's property.

[17] The eastern and western ridges are not directly important to this decision, but for completeness extend from Weatherstone Hill to Mt Cargill in the east, and Clump Peak to Swampy Summit to Leith Saddle in the west. The appeal site is located on the southern enclosing ridge.

[18] The ridges enclosing Pigeon Flat have been identified as having landscape values that merit protection. In the ODP these ridges were included in the Flagstaff – Mt Cargill LCA. In the 2GP they are included in the Flagstaff – Mt Cargill SNL.

[19] Mr McKinlay had provided a vegetation cover map¹⁰ that shows almost the whole property is covered by scrub, indigenous forest, and pine plantations. Mr McKinlay was unable to provide the court with the areas of the different vegetation types, but we estimate indigenous vegetation covers about 70% of the property, pine plantations about 20% and pasture about 10%.

⁹ McKinlay EIC, at [35].

¹⁰ McKinlay EIC, Annexure 3.

[20] All the pine plantations occur south of Pigeon Flat Road on steep slopes within the contested area. We observed the pine trees are taller than the indigenous vegetation and thus were more noticeable when viewed from the highway.

[21] Built structures and transport infrastructure cover a very small part of the property and include Pigeon Flat Road, a skid/quarry area largely hidden in the plantation near the western side of the property, and the electricity transmission lines, all of which are within the contested area. A small group of buildings is associated with Mr Norrish's dwelling on the north side of Pigeon Flat Road.

[22] The court's site visit occurred on a fine autumn day with very good visibility. From SH1 the variations in site topography were not obvious but driving along Pigeon Flat Road showed the steeper slopes of the contested area.

[23] Our general impression was of a largely bush covered site with tall pine plantations, indigenous shrubs and low trees, and small areas of pasture.

Mr Norrish's requested outcome

[24] Mr Norrish seeks that the parts of his property lying between the 300 m and 420 m contour lines be removed from the SNL (the contested strip). This would leave only those parts of his land above 420 m elevation within the SNL, this being the area within the Flagstaff – Mt Cargill LCA in the ODP.

[25] Although that is his preferred outcome, he proposed an alternative that would include the lower slopes to the east of the Knoll that are the most visible from the highway.¹¹ This was depicted on a plan produced to the court as Exhibit A (attached to this decision as Appendix B).¹²

[26] This land comes into view when driving south after passing the high voltage

¹¹ Norrish EIC, at [20].

¹² This alternative proposal had been previously submitted to the Council and rejected.

power lines that cross the highway 340 m west of the Pigeon Flat Road overbridge. This more visible part of his property sits between Pigeon Flat Road and SH1 and west of the sharp bend in Pigeon Flat Road referred to as “The Point”.

[27] Mr Norrish noted¹³ the lower elevation parts of the proposed SNL were not visible from Blueskin Bay due to intervening hills and were only in view from the highway adjacent to his land. He expressed the opinion the existing boundary at the 420 m contour provided protection for the hill tops and skyline.

[28] He further pointed out most of the SNL around his property is in various forms of public ownership, and there is little privately owned land affected apart from 171 Pigeon Flat Road.

[29] In addition, he suggested there is no need for the SNL boundary to be defined by a contour line as neither the SNL nor the LCA boundaries consistently follow contour lines elsewhere.

The Council’s position

[30] Counsel for the Council considers the 420 m contour boundary sought by Mr Norrish is not appropriate as the 300 m contour boundary best gives effect to objectives and policies of the 2GP and section 7(c) and (f) of the RMA.¹⁴

The issue to be determined

[31] Does the area of Mr Norrish’s property at 171 Pigeon Flat Road between the 300 m and 420 m contours sufficiently meet the criteria of Policy 2.4.4.1 of the 2GP to merit inclusion in the Mt Cargill – Flagstaff SNL overlay?

¹³ Norrish EIC, at [5] and [6].

¹⁴ Council legal submissions dated 2 March 2023, at [7] and [8].

History of LCA and SNL overlays at 171 Pigeon Flat Road

[32] Ms James¹⁵ summarised the history of Mr Norrish's land with respect to the LCA in the ODP, and the SNL in the 2GP.

[33] The ODP was notified in 1995 and this introduced the Flagstaff – Mt Cargill LCA which at that stage covered all of Mr Norrish's property. Ms James does not specify where the proposed LCA boundary was in relation to the Norrish property, but we consider it reasonable to assume the boundary would have been to the north of Mr Norrish's land.

[34] Mr Norrish made a submission on the proposed boundary, requesting his land be entirely excluded from the LCA. Decisions on submissions amended the proposed boundary to run along Pigeon Flat Road so that the parts of Mr Norrish's property north of the road (below about 320 m elevation) were excluded from the LCA overlay. Mr Norrish appealed the Council decision seeking the LCA boundary be moved so that his property was excluded.

2002 Environment Court decisions

[35] In an interim decision,¹⁶ the court found the LCA boundary along Pigeon Flat Road to have been adopted by the Council for expediency rather than because it reflected an appropriate LCA boundary. The court found that the boundary could lie anywhere between the 350 m and 420 m contour, and directed the Council and Mr Norrish, with the assistance of a surveyor, to agree on an acceptable boundary on or between these two contours.

[36] The parties agreed by consent memorandum¹⁷ that the boundary should be placed at the upper or 420 m contour, and the court confirmed this in its final

¹⁵ James EIC, at [20]-[28].

¹⁶ *Norrish v Dunedin City Council* EnvC C8/2002, 25 January 2002.

¹⁷ Dated 20 March 2002. See *Norrish v Dunedin City Council* EnvC C43/2002, 3 April 2002 at [1].

decision. Thus, the court's final decision¹⁸ confirmed the location of the LCA boundary that had been agreed between the Council and Mr Norrish.

[37] As noted by Ms James,¹⁹ this court is not bound by Judge Smith's prior decisions. However, we were told that there were very close similarities with the guiding principles behind LCAs and SNLs.

[38] The Council had previously agreed to the LCA boundary at the 420 m contour across Mr Norrish's land (which was the highest contour suggested by the court).

[39] Accordingly, we consider that natural justice requires that the Council, having now proposed a significantly different boundary, make a robust case that the SNL boundary should be moved to the 300 m contour which is below the lowest contour of 350 m suggested by the court in 2002.

[40] As was the situation when the appeal was heard in 2002, the landscape issues, objectives, policies and rules relating to the landscape parts of the 2GP and the present appeal are not in dispute. Although we are not bound by the 2002 Environment Court decision, the question in 2002 remains the same today: what placement of the SNL boundary would best meet the objectives and policies of the 2GP and the overall statutory purpose of the RMA?

Review of ODP LCAs

[41] In preparing for its 2GP, the Council commissioned a report on the status and definition of the LCAs. This was undertaken by a landscape architect, Mr Mike Moore. A copy of his 2013 report was provided to the court.²⁰ Mr Moore describes his recommendations for the northern boundary of an amended

¹⁸ *Norrish v Dunedin City Council* EnvC C43/2002, 3 April 2002.

¹⁹ James EIC, at [14].

²⁰ McKinlay Statement of further evidence, Annexure 2.

Flagstaff – Mt Cargill LCA in the area of Mr Norrish’s land as follows:²¹

Between Wetherston Hill and Miller Road the 200 m contour is adopted. There are areas with more and less natural character values either side of this, but this line represents an appropriate boundary at the overall scale.

[42] We note that Wetherston Hill is 3 kilometres to the northeast of 171 Pigeon Flat Road and following the 200 m contour line west from here takes in Pigeon Flat then swings 3 kilometres north to Miller Road. Mr Moore’s 2013 recommendation for the boundary of the LCA takes it some 2.5 km north of the 420 m contour boundary and the whole of 171 Pigeon Flat Road would thus be within the LCA.

[43] Ms James states²² that in the notified 2GP, the Flagstaff – Mt Cargill SNL covered the whole of Mr Norrish’s property and extended north to the 200 m contour which is beyond the Pigeon Flat landform. Thus, the Council had adopted Mr Moore’s 2013 recommendation for an expanded SNL in this area. This reflected the position taken in the notified ODP before being amended by the court’s 2002 decision.

[44] Mr Norrish made a submission on this SNL boundary, seeking retention of the 420 m contour boundary established for the LCA by the court in 2002. The Hearing Panel sought advice from Mr Moore who reviewed his boundary at the 200 m contour and agreed that it was “unjustifiably inclusive of land that has little natural character value or wider prominence (other than from State Highway)”.²³

[45] He recommended the 300 m contour as an appropriate boundary,²⁴ moving the boundary 2 kilometres south from the notified position at the 200 m contour.

²¹ Moore, *Dunedin City, Amendment of current Landscape Conservation Areas for District Plan Review*, dated 26 August 2013 at p 8.

²² James EIC, at [24].

²³ James EIC, at [26].

²⁴ James EIC, at [26].

The Hearing Panel accepted Mr Norrish's submission in part and, following Mr Moore's recommendation, adjusted the SNL boundary to the 300 m elevation contour. Mr Norrish has appealed this boundary.

[46] Despite Mr Moore's involvement in the appeal on the LCA and its review prior to notification of the 2GP, Mr Moore was not a witness in this appeal, so we were unable to question him on his expert opinion. We have set out this convoluted history of the landscape protection boundary at 171 Pigeon Flat Road to show that landscape experts, hearings commissioners, and the Environment Court have all wrestled with this issue and found appropriate boundaries at five different elevation contours: 420 m, 350 m, 320 m, 300 m, and 200 m.

[47] Clearly, there is no obvious location for the boundary that finds broad acceptance.

[48] We had been interested in learning more about the mapping of the LCAs and how they differed from the SNL in light of the grounds of appeal raised by Mr Norrish.

[49] The 2002 decision described the LCA as being in reliance of s7(c) and (f) of the RMA.²⁵

[50] In the ODP LCAs are defined as:²⁶

...areas which have particular impact on landscape quality due to high levels of visibility from major public viewing location or the presence of particular landscape character and values, and which are defined on the District Plan maps.

[51] Unfortunately, the 2GP does not define an SNL, although Policy 2.4.4.2 refers to the SNL as natural landscapes that have "values of high significance". Objective 10.2.5 requires that SNLs (and Outstanding Natural Landscapes) are

²⁵ *Norrish v Dunedin City Council* EnvC C8/2002, 25 January 2002, at [4].

²⁶ ODP, Definitions p 3-16.

protected from inappropriate development, and their values are maintained and enhanced.

[52] Ms James, the planning policy witness for the Council stated:²⁷

LCAs in the ODP are the equivalent of SNLs in the 2GP, being landscapes that contribute to the maintenance and enhancement of amenity values and the quality of the environment, in accordance with section 7(c) and (f) of the RMA.

[53] Likewise, Mr McKinlay, the landscape witness for the Council was of the opinion that:²⁸

Significant Natural Landscapes (SNL) in the 2GP are the equivalent of LCAs in the ODP [...].

[54] At the further request of the court, we heard evidence from Ms Jane Macleod on this issue.²⁹ Ms Macleod, Team Leader of Planning at the Council helpfully explained that the SNL is intended to be a landscape flowing from s7(c) and (f) of the RMA in the following passage:³⁰

As set out in the evidence of Katie James on behalf of the DCC dated 10 November 2022 (para 19), LCAs in the ODP are the equivalent of SNLs in the 2GP, being landscapes that contribute to the maintenance and enhancement of amenity values and the quality of the environment, in accordance with section 7(c) and (f) of the RMA.

...

Firstly, the ODP direction does not refer to natural science factors, except in relation to the presence of indigenous vegetation. As I understand it, natural science factors also include, for example, geological features and indigenous fauna.

²⁷ James EIC, at [19].

²⁸ McKinlay EIC, at [14].

²⁹ Mr McKinlay referred to these values as the amended Pigeon Bay Criteria adopting the approach in the 2013 report of Mr Moore.

³⁰ J Macleod affidavit, dated 14 March 2023, at [8], [18]-[19].

In addition, the ODP direction does not refer to “*transient values*” (e.g. mist, cloud, wildlife). It also excludes any reference to the cultural or historical values that are covered by clauses e to g in 2GP Policy 2.4.4.1, although I note that the cultural significance of particular landforms to Manawhenua are mentioned in the listed values of specific LCAs in section 14.5.3 of the ODP.

In summary, the direction provided in the ODP for the identification and assessment of LCAs is considerably less specific than that provided in the 2GP for SNLs. I consider that the direction that is provided in the ODP, which focuses on the visual appearance of landscapes, including the presence of indigenous vegetation, differs significantly from that provided in the 2GP, which covers a broader range of factors. Policy 2.4.4.1 takes in:

- (a) “*aesthetic values and memorability*” and “*expressiveness and legibility*” – similar to “*visual significance*” in the ODP direction;
- (b) “*natural science factors*” broader than the “*presence of ... indigenous vegetation*” in the ODP direction, as it also encompasses e.g. geology and fauna, and in the 2GP policy natural science factors are valued on their own terms and not simply as a contributor to visual qualities, as is implied in the introduction to section 14.5.3 in the ODP;
- (c) “*transient values*” – not covered in the ODP direction; and
- (d) cultural and historical values (“*whether values are recognised and shared*”, “*value to takata whenua*”, “*historical associations*”) – not covered in the ODP direction.

[55] However, referring to this policy in particular, Ms Cassidy, counsel for the Council considered the comparison is more nuanced because:³¹

...while the two landscape classifications are broadly equivalent, they are not the same and a greater emphasis in the SNL classification is placed on biophysical values of indigenous vegetation and the sensory and associated values of naturalness in the SNL ...

[56] Mr McKinlay³² provided a map showing the areas covered by the Flagstaff – Mt Cargill LCA and SNL overlays. There are considerable differences in the

³¹ Council, legal submissions dated 2 March 2023 at [46].

³² McKinlay, Statement of further evidence, Annexure 1.

outer boundaries of the LCA and SNL, with the appeal site being one of many places where the SNL boundary has been expanded to include more land than the LCA. Only Mr Norrish has appealed any boundary changes.

[57] Large areas of the LCA have also been removed, particularly in the southwest in the partly plantation area either side of Three Mile Hill Road between Mosgiel and Dunedin, and in the north and east where the LCA has been reclassified as ONL. Mt Cargill is now an ONL in the 2GP and is no longer part of the SNL that bears its name.

[58] The southern ridge enclosing Pigeon Flat includes Mt Cargill with its communications tower. The ridge is clothed in bush, which is mostly indigenous scrub and forest, although there are pine plantations in some areas, such as on Mr Norrish's land. Three kilometres west of the tower, transmission lines run down the face of the ridge, crossing the eastern side of Mr Norrish's property. Neither Mt Cargill nor the transmission lines are directly in view from the highway when passing Mr Norrish's land.

Partly Operative Otago Regional Policy Statement

[59] The direction for SNLs in the 2GP arises from directives in the partially operative Otago Regional Council Regional Policy Statement (PORPS) Objective 3.2, Policy 3.2.5, Policy 3.2.6, Policy 3.1.11, and Schedule 3.

[60] Objective 3.2 requires: Otago's significant and highly-valued natural resources are identified, and protected or enhanced where degraded. There are 18 policies under this objective relating to identification and management of:

- (a) significant indigenous vegetation and habitats (Policies 3.2.1 and 3.2.2);
- (b) outstanding natural features, landscapes and seascapes (Policies 3.2.3 and 3.2.4);
- (c) highly valued natural features, landscapes and seascapes (Policies 3.2.5

and 3.2.6);

- (d) the coastal environment including its landward extent, outstanding natural character and nationally important surf breaks (Policies 3.2.7, 3.2.8, 3.2.9, 3.2.10, 3.2.11, 3.2.12);
- (e) outstanding freshwater bodies (Policies 3.2.13, 3.2.14);
- (f) significant values of wetlands (Policies 3.2.15 and 3.2.16); and
- (g) significant soil (Policies 3.2.17 and 3.2.18).

[61] Relevant to this appeal are Policies 3.2.5 and 3.2.6 relating to highly valued landscapes. These capture s7(c) and (f) landscapes relating to the maintenance and enhancement of amenity values s7(c), and maintenance and enhancement of the quality of the environment 7(f). This is in contrast to s6(b) that requires the protection of outstanding natural features and landscapes from inappropriate subdivision, use and development.

[62] In the PORPS, Policy 3.2.5 requires identifying highly valued natural features, landscapes and seascapes for their contribution to the amenity or quality of the environment but which are not outstanding, using the attributes in Schedule 3. Thus, this policy is also the method for the identification of s7(c) and s7(f) landscapes.

[63] Policy 3.2.6 requires maintenance of enhancement of highly valued natural features, landscapes or seascapes by:

- (a) avoiding significant adverse effects on those values that contribute to the high value of the natural feature, landscape or seascape;
- (b) avoiding, remedying or mitigating other adverse effects; and
- (c) encouraging enhancement of those values that contribute to the high value of the natural feature, landscape or seascape.

[64] The PORPS Schedule 3 is titled “Criteria for the identification of outstanding natural features, landscapes and seascapes, and highly valued natural features, landscapes and seascapes”. The text of the schedule is set out in

Appendix A to this decision.

2GP Objectives and Policies

[65] These PORPS provisions are given effect to in the 2GP by Objective 2.4.4, Policy 2.4.4.1, Policy 2.4.4.2, Policy 2.4.4.3; and Objective 10.2.5, Policies 10.2.5.9 – 10.2.5.15; and Appendix 3.

[66] The approach to SNLs is set out in the 2GP at Objective 2.4.4 that requires “Dunedin’s outstanding and significant natural landscapes and natural features are protected.”

[67] Policy 2.4.4.1 sets out how the candidate landscapes are to be identified and assessed:

Policy 2.4.4.1

Identify and assess natural features and natural landscapes based on the following values:

- a. natural science factors;
- b. aesthetic values and memorability;
- c. expressiveness and legibility;
- d. transient values;
- e. whether values are shared and recognised;
- f. value to takata whenua; and
- g. historical associations.

[68] Policy 2.4.4.2.b requires that where landscapes have values of high significance they are classified and mapped as a SNL. Once the ONLs, ONFs and SNLs have been identified, they are to be listed in Appendix A3 of the 2GP (attached as Appendix A to this decision).

[69] Objective 10.2.5 requires that the listed areas are to be “protected from inappropriate development; and their values, as identified in Appendix A3, are maintained and enhanced”.

[70] The rules for managing activities in SNLs are set up by the policies sitting under Objective 10.2.5³³ this is that ONFs, ONLs and SNLs “are protected from inappropriate development; and their values, as identified in Appendix A3, are maintained or enhanced”.

[71] Under this objective there are seven relevant policies (10.2.5.9 – 10.2.5.15) that directly refer to SNLs and detail requirements for numerous specific activities, of which forestry, buildings, and future land use and development could apply in this case, although they are not directly relevant to this appeal (despite being a concern to Mr Norrish).

Policy 2.4.4.1 factors

[72] We were told by Mr McKinlay that Policy 2.4.4.1 uses the factors first referred to in *Pigeon Bay Horticulture Ltd v Canterbury Regional Council*,³⁴ and later revised, as the modified Pigeon Bay factors.³⁵ Mr McKinlay referred to a “repackaging” of these based upon current best practice under the NZIA guidelines. This describes them as biophysical, sensory and associated values which he said are more accommodating of both tangata whenua and western world views in a holistic manner.³⁶

[73] Both s7(c) amenity landscapes and the s6(b) outstanding natural landscapes and natural features are to be identified under the guidance of this policy. As we earlier noted however, the 2GP places greater emphasis on s6(b) characteristics in the identification of an SNL.

[74] A qualitative judgement is required to be made as to whether the landscape is allocated to the ONF, ONL or SNL categories based upon whether they are

³³ James EIC, at [38].

³⁴ [1999] NZRMA 209.

³⁵ These were revised in *Wakatipu Environmental Society Inc v Queenstown-Lakes District Council* EnvC C180/99, 2 November 1999.

³⁶ NOE, at p 22.

judged to have “exceptional values” or “values of high significance” pursuant to Policy 2.4.4.2.

Court’s approach to the evidence

[75] We proceed on the basis that the biophysical, sensory and associative attributes further itemised in Policy 2.4.4.1 can be assessed through visual amenity (s7(c)) and quality of the environment (s7(g)) perspectives.

[76] Taking this approach, we have considered whether the attributes of the contested strip are sufficiently visually evident from the primary viewing area along SH1 travelling towards Dunedin to justify inclusion within the Flagstaff – Mt Cargill SNL. We note that the values must be of “high significance” to warrant inclusion.³⁷

Does the appeal site have values of high significance?

[77] Mr McKinlay referred to the appendices and the values identified which use the repackaged modified Pigeon Bay criteria, particularly Appendix A3.3.2 which lists the specific values identified for the Flagstaff – Mt Cargill SNL. In his evidence-in-chief, he had defended the location of the contour with reference to the assessment identified in that appendix, rather than referring to the factors listed in Policy 2.4.4.1.

[78] Ms James similarly stated³⁸ the central question of the appeal is whether the area of the site between the 420 m and 300 m contour lines shares the values outlined in Appendix A3.3.2 used to assess the Flagstaff – Mt Cargill SNL, in line with Policies 2.4.4.1 and 2.4.4.2.

[79] However, Appendix A3.3.2 contained the resulting assessment for this

³⁷ By Policy 2.4.4.2(b).

³⁸ James EIC, at [39].

particular SNL that was being challenged by Mr Norrish. The SNL should have been assessed against the values listed in Policy 2.4.1 rather than testing the assessment against the SNL-specific assessment under the policy contained in Appendix A3.3.2.

[80] At the reconvened hearing we received further evidence from the Council containing the appropriate assessment. We now turn to our consideration of the evidence.

Natural science factors

[81] Mr McKinlay describes³⁹ natural science factors of indigenous vegetation, habitat for native fauna, and the underlying geology. These would fall comfortably within s7(f) RMA, quality of the environment attributes.

[82] The site geology is not visually evident due to the complete ground cover of vegetation. It could only be known by expert investigations or by reference to a geological map the existence of which McKinlay mentions but does not identify.

[83] The indigenous vegetation cover can be seen, although the most visually dominant vegetation is the non-indigenous pine plantation with trees that rise many metres above the lower canopy of indigenous vegetation. Mr McKinlay provides an extract from a vegetation cover map,⁴⁰ but the four different indigenous vegetation types mapped cannot be readily differentiated from SH1. We assess the indigenous vegetation cover is not a visually relevant natural science factor.

[84] Mr McKinlay notes⁴¹ that the presence of indigenous vegetation “is highly likely to provide habitat for native birds and other native fauna”. While we accept

³⁹ McKinlay Statement of further evidence, at [8]-[10].

⁴⁰ McKinlay EIC, Annexure 3.

⁴¹ McKinlay Statement of further evidence, at [9].

this is likely to be the case, Mr McKinlay provides no evidence of what species might be present, or in what numbers. Thus, it is not possible to assess the significance of the indigenous fauna habitat, and it is unlikely to be a visually apparent attribute while travelling SH1.

Aesthetic values-visual amenity

[85] Mr McKinlay⁴² sets out his identification and assessment of the site's aesthetic attributes, focussing on visual amenity.

[86] Mr McKinlay states:⁴³

The slopes above the 300m contour have high visual prominence from SH1 on the northern approach to Dunedin. This is due to the alignment of SH1 towards the site from Pigeon Flat Road overbridge and the proximity of SH1 to this part of the SNL. ...

[87] The primary viewing locations are looking south while travelling south on SH1. On our site visit, we observed that SH1 was not aligned towards the site, rather the site is to the left of the driver's line of sight and would only be readily visible to a passenger.⁴⁴

[88] These views are not continuous, being occasionally obscured behind road cuttings and vegetation. As Mr Norrish points out, it is typically viewed for a minute or so while travelling at 100 kmph.

[89] From our site inspection the total viewing length is about 625 m and takes less than 25 seconds at 100 kmph. However, the skyline ridge which would generally be above the 420 m contour can be described as prominent in that view,

⁴² McKinlay EIC, at [11]-[14].

⁴³ McKinlay Statement of further evidence, at [11].

⁴⁴ Mr McKinlay confirmed that the photographs included in his evidence depicting the driver's view were taken from the opposite side of the road, having parked by car and looked toward the site.

as found by the court in its 2002 decision. We find the area of Mr Norrish's property between the 420 m and 300 m contour does not share the high visual prominence of the ridgeline above the 420 m contour.

Memorability

[90] Mr McKinlay⁴⁵ describes the “parts of the site between 300 and 420 m contours at 171 Pigeon Flat Road are not highly memorable when considered in isolation”. We agree, although this statement is inconsistent with his description of the site above 300 m as having “high visual prominence”.⁴⁶

[91] Mr McKinlay appeals to ‘context’, noting the site is near other landscape features that “are typically regarded as some of the most memorable landscape features of the Flagstaff – Mt Cargill SNL and Mt Cargill/Kapukataumahaka ONL”.⁴⁷

[92] This is an appeal to significance by association. However, these memorable parts of the SNL are not in view when travelling south on SH1. Accordingly, Mr Norrish's land does not form part of the visual context for those features from the primary viewing location.

[93] Mr McKinlay also refers to Mr Norrish's land being part of motorists' ‘mental map’ while entering Dunedin between Leith Saddle and Kilmog Hill south of Blueskin Bay.⁴⁸ This is difficult to understand as Kilmog Hill is north of Blueskin Bay, and the journey from Leith Saddle to the hill is leaving Dunedin and the site is not visible in that travel direction.

⁴⁵ McKinlay Statement of further evidence, at [13].

⁴⁶ McKinlay Statement of further evidence, at [11].

⁴⁷ McKinlay Statement of further evidence, at [13].

⁴⁸ McKinlay Statement of further evidence, at [13].

Our evaluation

[94] In summary, we find the aesthetic values of 171 Pigeon Flat Road between the 300 m to 420 m contours to be unremarkable. They are not visually prominent and in Mr McKinlay's own words, are not highly memorable.

Naturalness

[95] Mr McKinlay notes⁴⁹ the pine plantations within the 300 m to 420 m contour strip means landcover has been modified, and even allowing for the presence of transmission lines and ancillary buildings, there is a *significant relative dominance of natural rather than human made landscape elements*.

Our evaluation

[96] We consider the pine plantation is a human made landscape element. Mr McKinlay was unable to assist us with the actual areas of plantation land cover compared to indigenous vegetation cover, but from our site visit we observed the plantation to be a significant element of the view from SH1. Thus, we do not accept his evidence that there is a significant relative dominance of natural rather than human made landscape elements.

Expressiveness

[97] Expressiveness (legibility) is a Pigeon Bay factor relevant to s6 outstanding natural landscapes. It relates to how obviously the landscape demonstrates the formative processes that lead to it. Mr McKinlay opined⁵⁰ that the moderate steepness of the slopes between the 300 m and 420 m contours is expressive of their volcanic origin. While accepting that it is not a conical volcanic form, and

⁴⁹ McKinlay Statement of further evidence, at [12].

⁵⁰ McKinlay Statement of further evidence, at [15].

nor is there any specific geological feature which is legible, he stated as follows:⁵¹

But I think most laypeople are aware – would be, would consider it likely that this is the result of previous volcanic activity. Generally, in terms of the criteria of expressiveness and legibility, this refers to the physical attributes of a landscape, which reflect the origins, and to my mind, you know, the steep ridgeline that joins Mr Cargill through the site, Leith Valley, through to Swampy Summit, is part of the volcanic landscape of Dunedin, which is quite characteristic of this area.

Our evaluation

[98] In isolation, Mr McKinlay accepted that this factor this was not sufficient justification for inclusion as an SNL and we agree with that opinion. Moreover, as noted above, the heavy cover of vegetation on the land obscures any view of the rocks that underly the slope of the landforms on it so that there is no legibility of formative processes in our view.

Transient values

[99] Mr McKinlay postulates the presence of native birds and other native fauna is highly likely due to the “extensive cover of indigenous forest types between the 300 m and 420 m contours”.⁵²

[100] However, he was unable to quantify how extensive the indigenous forest cover is, nor are there any data on fauna species and numbers, and how these might be visibly apparent when viewed from SH1 which is nearly 1 kilometre away. Thus, it is not possible to assess how significant these transient attributes might be.

[101] The evidence referred to other transient features such as snow cover and low clouds which are said to have an association with the hillslopes surrounding

⁵¹ NOE p 25.

⁵² McKinlay Statement of further evidence, at [16].

the peaks, with snow cover on the upper slopes.

Our evaluation

[102] We accept that these attributes will certainly be visible from time to time and will also occur on many of the higher slopes and ridges in this area. However, they do not stand out as worthy of special protection even if present in relation to the lower slopes between the 300 and 420 m contours.

Shared and recognised values

[103] Mr McKinlay appeals to the site above 300 m being part of the encircling hills “sometimes referred to as the outer town belt of Dunedin”.⁵³ A ‘sometimes reference’ does not speak to us of a widely shared and recognised values.

[104] Furthermore, Dunedin is not in view in this location and the encircling hills are so broad that the city does not come into view until 4 kilometres south of Leith Saddle, significantly blunting any visual effect of encirclement at 171 Pigeon Flat Road.

[105] He was questioned about Mr Moore’s original assessment where he stated that:⁵⁴

The area is valued by residents of and visitors to the city as a natural landscape backdrop and as a recreational resource close to the city.

[106] However, he acknowledged that this particular site does not have any recreational value to residents of or visitors to the city, as it is private land. He accepted that the more relevant aspect is that it forms part of the encircling hills around Dunedin.

⁵³ McKinlay Statement of further evidence, at [18].

⁵⁴ NOE p 40.

Value to takata whenua

[107] Mr McKinlay notes the parts of the site between 300 m and 420 m contours are not covered by a wāhi tūpuna overlay area, but that they form context for nearby peaks that are of significance to mana whenua. Once again, this is an appeal to significance by association. Had these slopes been significant to mana whenua they would have been included in the wāhi tūpuna overlay.

[108] Mr McKinlay completes his assessment of the Pigeon Bay criteria by noting there are no historical associations known for the site.⁵⁵

Summary of our overall evaluation

[109] Having been questioned about each of the Policy 2.4.4.1 values, Mr McKinlay stated that it is the combination of the visual prominence of the site, the indigenous vegetation cover and consistency with the joining uncontested parts of the SNL that in his opinion, justify retention of the 200m contour.⁵⁶

[110] However, we were not persuaded by Mr McKinlay's assessment. We find that the site between the 300 m and 420 m contours does not display the listed values to an extent that would justify the area being included in the Flagstaff – Mt Cargill SNL. Nor is there anything in Mr Moore's 2013 report that is specific to the Norrish site which provides support for Mr McKinlay's position.

[111] We have considered the Council's preference to maintain a boundary at the 300 m contour to maintain coherence. Mr McKinlay acknowledged that the SNL is not controlled by this contour line in all places. Despite that, in his opinion, it "makes sense" in terms of the factors he considered.

[112] Mr Norrish had been critical of this position. He contended that "the

⁵⁵ McKinlay Statement of further evidence, at [20].

⁵⁶ NOE p 43.

Council's experts were more interested in the line on the map than the actual landform".⁵⁷ We consider that a departure is justified in this location. We prefer Mr Norrish's alternative proposal covering the north-western corner of his property as unlike the rest of the contested strip this portion is visually prominent from the highway.

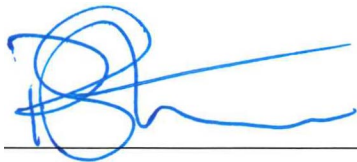
[113] For completeness, we note that Mr Norrish had expressed a concern at the impact of the SNL on the ongoing use of his land for forestry as he has an established plantation. Accordingly, the court had questions for the Council witnesses on their evidence about that, particularly in relation to the application of the NES-PF where different activity status applies depending on whether the land is within a significant natural area or in an outstanding landscape (on the one hand) or feature or a visual amenity landscape.

[114] The SNL regime in the 2GP obscures the differing roles of s6(b) and s7(c) landscapes under the RMA, although that is not a matter we are able to take any further, other than to note counsel's submissions that the SNL is to be treated as a visual amenity landscape when applying the NES-PF regulations.

Outcome

[115] The appeal is upheld (in part), and Mr Norrish's alternative proposal as depicted in Exhibit A, (attached to this decision as Appendix B) is accepted.

For the court



P A Steven
Environment Judge



⁵⁷ Norrish EIC, at [10].

APPENDIX A

Otago Regional Policy Statement Schedule 3

[1] The PORPS Schedule 3 is titled: Criteria for the identification of outstanding natural features, landscapes and seascapes, and highly valued natural features, landscapes and seascapes states.

[2] The text of the schedule is as follows:

The identification of natural features, landscapes and seascapes will have regard to the following criteria:

1. Biophysical attributes
 - a. Natural science factors, including geological, topographical, ecological and dynamic components
 - b. The presence of water including in seas, lakes, rivers and streams
 - c. Vegetation (native and exotic)
2. Sensory attributes
 - a. Legibility or expressiveness – how obviously the feature or landscape demonstrates its formative processes
 - b. Aesthetic values including memorability and naturalness
 - c. Transient values including presence of wildlife or other values at certain times of the year
 - d. Wild or scenic values
3. Associative attributes
 - a. Whether the values are shared and recognised
 - b. Cultural and spiritual values for Kāi Tahu, identified by working, as far as practicable, in accordance with tikanga Māori; including their expression as cultural landscapes and features
 - c. Historical and heritage associations



2GP Appendix A3

[3] Appendix A3 contains lists for each of the identified SNLs within the district. This includes a description of the land concerned; a list of values present in each of these areas requiring protection; principal threats to the values; and key design elements to be required or encouraged.

[4] A3.3.2 is the relevant appendix for the Flagstaff – Mt Cargill SNL, with A3.3.2.2 Values to be protected being the relevant section.

A3.3.2 Flagstaff - Mt Cargill Significant Natural Landscape

A3.3.2.1 Description of area

This Significant Natural Landscape covers the hills to the north of urban Dunedin including Flagstaff (Whānau-paki), Swampy Summit (Whawha-raupō), and the lower slopes of Mount Cargill (Kapuketaumahaka), below the Mt Cargill ONL, to Signal Hill. The geology is largely volcanic and the hills reach elevations of 739 metres (Swampy Summit). The area is the catchment for numerous small rivers and streams, most notably the Waitati River, Water of Leith and Lindsay Creek.

Land cover/land use is a mix of remnant indigenous vegetation (forest and grassland), agriculture, forestry, rural residential development and exotic scrub. The main northern approaches to Dunedin traverse these hills and the hills provide the northern backdrop to the city and the west harbour, as well as the southern backdrop to the Blueskin Bay area. The area is host to a number of utility structures, as well as quarries.

The peaks are a cultural identity marker for Manawhenua and are identified as a wāhi tūpuna. See Appendices A4.28, A4.32, and [A4.49](#).

A3.3.2.2 Values to be protected

The following values have been identified as important to protect:

a. Biophysical values:

- i. The extent and integrity of the natural landscape elements including wildlife.
- ii. Flagstaff Peak patterned ground is a regionally significant geopreservation site.
- iii. Volcanic Peaks and associated landforms including the summits of

Flagstaff and Swampy Summit and the sequence of legible and largely intact eroded volcanic spurs which extend below the summit.

- iv. Podocarp Broadleaf forests e.g. Moore's Bush.
- v. Cloud forest (*Libocedrus* and podocarps) on Leith Saddle.
- vi. Broadleaf forest e.g. Burns Park.
- vii. Regenerating indigenous forest on the slopes of Flagstaff.
- viii. *Ozothamnus*/*Dracophyllum* shrublands at Swampy Summit.
- ix. Snow tussocklands on Flagstaff.

b. Sensory values:

- i. Volcanic landscape which remains expressive of its formative processes.
- ii. Legibility of the natural landform and associated visual coherence of the landscape i.e. patterns of land use reflecting the topography.
- iii. Low impact of built elements, earthworks, and exotic tree plantings, and the significant relative dominance of natural landscape elements.
- iv. Naturalness of elevated landforms.
- v. Landform and vegetative altitudinal connectivity present.
- vi. The extent and quality of views across the landscape from public roads and tracks.
- vii. Naturalness attributes of the rural landscape which provides backdrop and containment to the discrete harbourside settlements.
- viii. Naturalness of the foreground to the Mt Cargill ONL above.
- ix. Forms much of the backdrop to urban Dunedin.
- x. The landforms are striking and memorable and many are iconic landmark features of Dunedin.
- xi. Native vegetation cover and vegetation patterns that reflect the natural topography and natural skylines.
- xii. Has very high levels of visibility from significant population centres and major roads.
- xiii. High rural amenity value.
- xiv. Transient values include the cloud cap and seasonal snow cover and wildlife.
- xv. The ridges and peaks are connected by a network of popular walks and mountain bike tracks incorporating scenic recreation and nature reserves.
- xvi. Expansive and panoramic views over Dunedin city and beyond are afforded from the accessible summits.

- xvii. Overall, the landforms are striking and memorable and many are iconic landmark features of Dunedin.

c. *Associative values:*

- i. Flagstaff (Whānau-paki) is considered wāhi tupuna, is referred to in mihi as a cultural identity and is a boundary marker between hapū.
- ii. Both Flagstaff (Whānau-paki) and Swampy Summit (Whawharaupō) were part of traditional trails (ara tawhito) running between the Taieri Plain and Blueskin Bay.
- iii. The ring of encircling hills has been referred to as the outer town belt.
- iv. The hilltops are distinctive city landmarks and provide a natural approach to the city.
- v. Flagstaff refers to the flagpole that was used in early European times to alert the wider population that a ship had entered the harbour. An alternative explanation is that the name refers to the poles that were used to mark the original track northwards from Dunedin which ran along the Flagstaff and Swampy summit tops to Hightop.
- vi. Historic buildings and structures and shelter and amenity plantings are present.
- vii. Heritage landscape qualities including the legibility of the previous more intensive dairy farming land use.



