



DECISION OF QUEENSTOWN-LAKES DISTRICT COUNCIL
RESOURCE MANAGEMENT ACT 1991

Applicant/Objector:	JF INVESTMENTS NEW ZEALAND LTD
RM Reference:	OB 150585
Location:	Moke Lake Road
Proposal:	Subdivision and change of condition 18(d) of RM 100678.
Type of Consent:	Objection under s357 against determination that the application is incomplete
Legal Description:	Lot 2 DP 380706 and Lot 9 DP 477322
Valuation Number:	2907305741
Zoning:	Rural General & Rural Lifestyle
Notification:	Non-notified
Commissioner:	W D Whitney
Date of Decision:	25 May 2016
Decision:	Objection dismissed.

A. INTRODUCTION

A.1 Background

1. JF Investments New Zealand Ltd has applied to the Queenstown Lakes District Council for subdivision consent and to change a condition of consent being condition 18(d) of RM 100678. The property subject to the application is located on the slopes of Wedge Peak in an area generally known as Closeburn. The site slopes between Moke Lake Road and the Glenorchy-Queenstown Road and access to the subdivision is to be achieved off Moke Lake Road. The site subject to the application is described as Lot 2 DP 380706 and Lot 9 DP 477322 as held in Computer Freehold Register Identifier (CFR) 681521 in the Otago Land Registration District.
2. CFR 681521 confirms that the site has an area of 32.1965 hectares more or less. This appears to be an anomaly as part of Lot 9 DP 477322 is identified on the plan of subdivision as Section 2 SO 430813. It is understood that the 5.6 hectares of land described as Section 2 SO 430813 has been subdivided as authorised by RM 090537 but for some reason the existence of Section 2 SO 430813 is not acknowledged on CFR 681521.
3. On 25 March 2011 Commissioners Clarke and Cocks granted subdivision and land use consent RM 100678. That consent related to a site described as Lots 5 and 9 DP 393836 which was then held in CFR 375402. Consent RM 100678 authorised the separation of two amalgamated allotments [Lots 5 and 9] and the subdivision of Lot 9 into two new allotments. Consent was also granted to establish a building platform within each of the new allotments and to undertake associated earthworks.
4. Curiously while RM 100678 authorised the separation of Lots 5 and 9 DP 393836; there appears to have been a sequence of subsequent applications which have had the effect of amalgamating various parcels with Lot 9 DP 393836 (which subsequently became Lot 9 DP 477322). These include RM 130235 (which amalgamated Lot 9 DP 393836 with Lot 8 DP 393836); RM 140384 (which amalgamated Lot 9 DP 393836 with Lot 3 DP 380706); and RM 150029 (which amalgamated Lot 9 DP 477322 with Lot 2 DP 380706).
5. The decisions on RM 140384 and RM 150029 both refer to Lot 9 as a “balance lot” with “no established development rights” or “no residential building platform”. It

appears that the purpose of the successive amalgamations was to amalgamate Lot 9 with a nearby lot that had a residential building platform. These actions subsequent to the consenting of RM 100678 are curious given that RM 100678 authorised the subdivision of Lot 9 DP 393836 into two allotments (each to contain a building platform) and the de-amalgamation of Lot 5 DP 393836 from Lot 9 DP 393836.

6. For completeness it is acknowledged that the current site as contained in CFR 681521 (apparently excluding Section 2 SO 430813) has resulted from RM 150029.

A.2 The Proposal

7. In summary the proposal is:

- To subdivide Lot 9 DP 477322 into three allotments shown as Lot 9, Lot 10 and Lot 99 on the plan of subdivision entitled “Lots 9, 10 & 99 Being a Proposed Subdivision of Lots 9 DP 477322” dated 26 November 2014.
- Separating Lot 2 DP 380706 from Lot 9 DP 477322 to create a separate CFR for Lot 2 DP 380706.
- Changing Condition 18(d) of RM 100678 pursuant to section 127. That condition currently requires that there be no further subdivision, development or the creation of building platforms on Lots 1 and/or 2 [of RM 100678]; and the change is to insert the introductory words as underlined: “With the exception of RM150*** [RM 150585]; there shall be no further subdivision, development or the creation of building platforms on Lots 1 and/or 2 [of RM 100678]”.

8. It is emphasised that the above is a summary of the proposal. It has been necessary to summarise the proposal, rather than adopting the applicant’s description of the proposal as presented Part 1.3 on pages 3-5 of Attachment A to the application dated 25 November 2015, as that description is somewhat unclear and confusing as it makes reference to the allotments authorised by RM 100678 and does not explicitly refer to Lots 9 and 10 as shown on the plan of subdivision.

A.3 Initial Consideration of Application

9. Section 88 of the Resource Management Act 1991 (the Act/RMA) provides for the making of an application. Sections 88(3) and (3A) provide as follows:

“(3) *A consent authority may, within 10 working days after an application was first lodged, determine that the application is incomplete if the application does not-*

- (a) *include the information prescribed by regulations; or*
- (b) *include the information required by Schedule 4.*

(3A) *The consent authority must immediately return an incomplete application to the applicant, with written reasons for the determination."*

10. In this instance while the initial application RM 150585 was dated (on Form 9) 31 July 2015 the supporting Attachment A (being described as "Information and Assessment of Effects on the Environment" was dated 3 November 2015; and the application was actually received by the Council on 5 November 2015.

11. Following receipt of the initial application Ms Hanna Afifi, a Senior Planner with the Queenstown Lakes District Council, advised the applicant (in an email to the applicant's planner, Mr Geddes, dated 17 November 2015) that the application was not complete because the information as detailed in items 1-5 in Ms Afifi's email had not been provided/addressed in the application. These items are discussed further later in this decision.

12. Following an exchange of emails the applicant provided an amended Attachment A to RM 150585 which was dated 25 November 2015.

13. The Commission notes in this regard that section 88(4) of the Act provides as follows:

"(4) If, after an application has been returned as incomplete, that application is lodged again with the consent authority, that application is to be treated as a new application."

Accordingly the application RM 150585 that includes the amended Attachment A is to be treated as a new application pursuant to section 88(4) of the Act.

14. Following receipt of the new application Ms Afifi in an email dated 3 December 2015 advised that the [new] application lodged [on 25 November 2015] does not address the points of the email sent [on 17 November 2015] regarding the incomplete application. While it is not clearly stated as such in the email dated 3 December 2015 it can be inferred that the new application was also determined to be incomplete pursuant to section 88(3) of the Act for the reasons stated in Ms Afifi's earlier email of 17 November 2015, and noting the supplementary comment contained in Ms Afifi's email of 3 December 2015.

15. Upon receipt of Ms Afifi's email sent at 2.18pm on 3 December 2015 Mr Geddes responded in an email at 3.13pm on 3 December 2015 as follows:

*"Hi Hanna,
Please accept this email as formal confirmation that the applicant disagrees with your decision that the application is incomplete and wishes to object under Section 357 of the RMA.*

Regards, Nick"

A.4 Hearing

16. The Commission has had the benefit of a planning report dated 27 April 2016 prepared by Ms Afifi. The Commission has also had the benefit of email correspondence between Mr Blair Devlin, the Manager, Planning Practice at the Queenstown Lakes District Council, and Mr Geddes that was exchanged in early April 2016. This email correspondence culminated in an email from Mr Geddes dated 4 April 2016 which sets out reasons for the objection.

17. The objection was heard at Queenstown on 4 May 2016. At the hearing the Commission was assisted by Mr Devlin. Ms Afifi was not in attendance as she was on leave. Ms Mishka Banhidi, Planning Support/EA with the Queenstown Lakes District Council, provided administrative support at the hearing.

18. Prior to the hearing the Commission had the opportunity to consider the objection and relevant material including the initial and new application RM 150585 and the Commissioners' decision on RM 100678.

19. At the hearing the objector was represented by Mrs Jayne Macdonald, Counsel, of Macalister Todd Phillips who called evidence from Mr Nick Geddes a Planning Consultant with Clark Fortune McDonald & Associates Limited. Mr David Broomfield, the Director/Principal of JF Investments New Zealand Ltd also appeared at the hearing. Ms Afifi's planning report was taken as read and Mr Devlin was invited to comment following the presentation of submissions and evidence in support of the objection. Following Mrs Macdonald's reply the hearing was adjourned.

A.5 Principal Issue in Contention

20. The principal issues in contention is whether the new application RM 150585 is incomplete.

B. CONSIDERATION OF OBJECTION

B.1 Validity of Objection

21. Section 357(3) of the Act confirms that:

“(3) A person whose application to a consent authority is determined to be incomplete under section 88(3) has a right of objection to the consent authority.”

22. The procedure for making such an objection is set out in section 357C(1) and (2) which state as follows:

“(1) An objection under section 357, 357A, or 357B must be made by notice in writing not later than 15 working days after the decision or requirement is notified to the objector, or within any longer time allowed by the person or body to which the objection is made.

(2) A notice of objection must set out the reasons for the objection.”

23. In this instance while the objection was made by notice in writing (being Mr Geddes's email of 3 December 2015 that is reproduced in paragraph 15 above); that objection failed to set out the reasons for the objection as required in terms of section 357C(2) of the Act.

24. The Commission raised this matter with Mrs Macdonald at the hearing. In her submission the lack of reasons in the objection does not go so far as to render the objection invalid. She considered this to be a defect as to form. She noted that whilst reasons were not included in the initial email of 3 December 2015; such reasons were clear in subsequent correspondence [being the contents of Mr Geddes's email dated 4 April 2016].

25. The Commission has concerns with respect to the validity of the objection made on 3 December 2015 as such notice of objection was devoid of reasons. It is clear that section 357C(2) makes it mandatory for reasons to be set out in a notice of objection.

26. The Commission considers that this deficiency is in itself sufficient grounds to dismiss the objection. Notwithstanding this the Commission has refrained from dismissing the objection out of hand and has instead chosen to give consideration to the substance of the objection, as discussed below.

B.2 Substance of Objection

27. Ms Afifi's email of 17 November 2015 which advised that the application was not complete stated as follows in item 1.

".... The AEE provided is not considered to be complete as it does not contain the correct consents sought (and therefore has not addressed all relevant District Plan matters) for the following reasons:

- The proposed change to Lot 1 (note there is also a reduction to the area of Lot 2 that has not been mentioned in the application) cannot be considered as a change to conditions under Section 127. The change to the area of Lot 1 is a significant change and is therefore considered a change to the activity.***
- The proposal to subdivision Lot 9 into three lots is also a change to the activity. RM100678 is a two lot subdivision with the identification of two building platforms, and a condition which prohibits any further development of subdivision of the land.***

A change to an activity cannot be applied for under Section 127 of the Act, as Section 127 only allows a change to a condition. In this case the changes are sufficiently significant to conclude that they are not changes that can be considered under Section 127.

Therefore, please provide an updated AEE with identification of all relevant District Plan rules applicable to the proposal. The applicant may in this case chose to apply for a completely new consent to replace/surrender RM 100678. However, it is up to the applicant to determine what consents they propose to seek."

28. As previously noted Ms Afifi's email of 3 December 2015 [which found that the new application was incomplete] referred to the points of her earlier email, which included item 1 above.

29. In his email of 4 April 2016 (which contains reasons for the objection) Mr Geddes emphasised that at no point in the correspondence received from Ms Afifi had it been acknowledged that the application is for a subdivision and for a variation [change of condition] as confirmed in Form 9 of RM 150585.

30. As acknowledged in paragraph 7 above RM 150585 seeks to subdivide Lot 9 DP 477322 being part of CFR 681521 to create three allotments being Lots 9, 10 and 99 as shown on the plan of subdivision. Contemporaneously the applicant also seeks to change Condition 18(d) of RM 100678. The Commission is satisfied that the new application does not seek to subdivide the land via a change of condition pursuant to

section 127; rather a change pursuant to section 127 is necessary to avoid inconsistency between RM 100678 and the subdivision consent RM 150585 (if granted) that is now sought.

31. Mrs Macdonald confirmed at the hearing that what is sought is subdivision consent to subdivide Lots 1 and 2 RM 100678 into Lots 9, 10 and 99. The relationship of the current subdivision with RM 100678 is confirmed by a condition offered by the applicant in the new application which states:

*“Prior to any application of section 223 certification on Lots 1 and 2 RM150*** the consent holder shall provide a copy of the computer freehold register of Lots 1 and 2 created by subdivision consent RM 100678.”*

32. Mrs Macdonald submitted that the change to condition 18(d) of RM 100678 does not offend “the Shiel’s Principles” (as expressed in Memoranda prepared by Commissioner Shiels in the context of RM 080323 that were attached as Appendix H to Ms Afifi’s planning report). Mrs Macdonald submitted that there was no analysis by the Council reporting officers of the Shiel’s Principles against the facts of the current application RM 150585. She confirmed that Mr Geddes has undertaken such an analysis in his evidence and Mrs Macdonald summarised the outcome of Mr Geddes’s analysis as follows:

- “● *The tenor of the earlier application and the decision is directed to prevention of further residential development (including subdivision) on the subject site. What is proposed is consistent with that objective and cannot reasonably be said to be “fundamentally at odds” with the earlier consent.*
- *The earlier consent proposed two residential building platforms and consent notice conditions requiring extensive re-vegetative planting and plant pest control measures (“planting measures”). The present application proposes the same number of residential building platforms, and planting measures – the only difference being a conservation lot [Lot 99] is to be created to contain the majority of the land the subject of the planting measures.”*

33. Mr Broomfield explained at the hearing that it is his intention that Lot 99 will be owned by three of the owners [of adjacent allotments] and that he would be happy for a “no build” covenant to be applied with respect to Lot 99. Such covenant would provide certainty that an additional residential building opportunity would not be proposed on Lot 99 in future.

34. Ms Afifi's email of 3 December 2015 advised that the creation of Lot 99 would be a non-complying activity. It seems that the basis for Ms Afifi's opinion is that Lot 99 will not contain a residential building platform. Mrs Macdonald drew the Commission's attention to Rule 15.2.6.3iii(b)(ii) of the Operative District Plan which excludes lots created for the following purposes:

“...
(ii) *land subject to restrictive covenant, consent notice or other legal instrument that:*
 (a) *prohibits buildings in the future; or*
 (b) *protects nature conservation values; or*
 (c) *maintains and enhances open space;*
...”

from the requirement to have a residential building platform approved at the time of subdivision on that allotment in the Rural General Zone.

35. The Commission supports the substance of the objector's opposition to item 1 as contained in Ms Afifi's email of 7 November 2015 on the basis that the new application does not seek to subdivide the land via a change of condition pursuant to section 127 of the Act. Notwithstanding this the Commission finds that the description of the activity as detailed in Part 1.3 in Attachment A of the new application is incomplete. The Commission is of the opinion that Part 1.3 of Attachment A of RM 150585 should be rewritten to clearly describe the activity for which resource consent is sought so as to comply with Clause 2(1)(a) of Schedule 4 to the Act.

36. The Commission also considers that the application should contain information with respect to the future ownership and management regime proposed for Lot 99, including any “no build” condition offered by the applicant, to enable the implications of creating Lot 99 to be clearly understood by the consent authority (and any other parties in the event that the application RM 150585 is limited notified or notified); and to enable the consent authority to confirm whether the exemption provided for in terms of Rule 15.2.6.3iii(b)(ii) applies, this being relevant to the status of the application.

37. Ms Afifi's email of 17 November 2015 in items 2-5 identified other information to be included in the application. At the hearing Mr Geddes confirmed that the applicant would have no difficulty in providing the information sought in terms of items 2-5.

38. Items 2-5 are reproduced below with the Commission's comment, as appropriate.

“2.... Any new AEE for a replacement consent must address all relevant objectives and policies of the operative and proposed District Plan.”

39. The new application included objectives and policies from the Proposed District Plan. The Commission is satisfied that the application is complete as it relates to item 2.

“3....

The proposed plan of subdivision shows a lot named Section 2 SO 430813. Please clarify where this lot comes from. The area of land forms part of Lot 9 DP 477322 (CFR 681521). It does not show as a separate allotment.”

40. As noted above RM 090537 authorised the subdivision of Section 2 SO 430813 from the land now described as Lot 9 DP 477322. In an email from Mr Geddes to Ms Afifi dated 25 November 2015 Mr Geddes apparently provided the section 224(c) certificate for Section 2 SO 430813 [albeit that this has not been sighted by the Commission].

41. The Commission considers it desirable that the application contain further explanation with respect to Section 2 SO 430813 and any implications that this has for the current application RM 150585. Of particular note is that Section 2 SO 430813 apparently reduces the area of the land to be subdivided as specified in CFR 681521. The Commission notes in this context that Clause 2(1)(b) of Schedule 4 to the Act requires that an application include a description of the site at which the activity is to occur; and the Commission considers that this description needs to be accurate.

“4.... The AEE acknowledges the proposal is to enable a land exchange with the Crown. Please provide full details of this land exchange in the AEE provided and how it affects this proposal. A copy of the land exchange agreement is also required, if the application is relying on this exchange to support the proposed creation of Lot 99.”

42. The Commission assumes that this is a reference to the land exchange that was to be enabled by RM 090537 (and by the creation of Section 2 SO 430813). Such exchange appears to have no relevance in the context of the current application (except as it relates to the area of land in CFR 681521) and the Commission finds that the application is complete as it relates to item 4.

“5.... Unimplemented consent – if resource consent RM 100678 is to be relied on as an unimplemented consent for the land, to form part of the future environment, the application will need to demonstrate that it is feasible to implement the consent prior to its lapse date. I would advise the applicant to provide sufficient information to demonstrate what has been implemented to date and how the applicant can implement the consent prior to its lapse date. If it is considered that the resource consent is not likely to be implemented (if, in this case it is not feasible to implement the consent prior to its lapse date) then RM 100678 cannot be taken into consideration as forming part of the future environment.”

43. Mrs Macdonald advised the Commission that section 223 certification has been given for RM 100678. This information should be included in the current application to demonstrate that RM 100678 (which is referred to in the application) can be feasibly implemented prior to its lapse date.

B.3 De-Amalgamation

44. CFR 681521 includes Lot 2 DP 380706. The application RM 150585 proposes the “de-amalgamation” of Lot 2 DP 380706 from Lot 9 DP 477322 thus creating a separate CFR for Lot 2 DP 380706.

45. At the hearing the applicant sought to withdraw the de-amalgamation proposal. The Commission concurs with Mr Devlin that this falls outside the scope of an objection hearing. It is also noted that such a “withdrawal” would raise the question of which proposed allotment Lot 2 DP 380706 is to be amalgamated with.

46. As noted in paragraph 4 subsequent to RM 100678 being consented there have been a sequence of amalgamations provided for by RM 130235, RM 140384 and RM 150029. The existing site has resulted from RM 150029.

47. Lot 2 DP 380706 does not form part of the land to which RM 100678 relates. In these circumstances it is unclear whether the current application needs to address the “de-amalgamation” of Lot 2 DP 380706 via an application pursuant to section 241(3) of the Act, or not. The situation is further complicated by RM 150029 which has created the current amalgamated site which includes Lot 2 DP 380706.

48. The Commission considers that further consideration should be given to this issue and that this matter should be clarified in the application RM 150585 which relates to the land held in CFR 681521. In the absence of such an explanation the Commission considers that the application is incomplete in this respect also.

C. CONCLUSIONS AND DECISION

49. It will be evident from this decision that considerable complexity relates to the site subject to application. This has evidently created challenges to providing a clear description of the activity in Part 1.3 of Attachment A to the new application; which in turn has resulted in an incomplete application being made to the Council.

50. The Commission considers that a complete application should include:

- i) A clear description of the subdivision activity which is proposed with appropriate references to Lots 9, 10 and 99 as shown on the plan of subdivision.
- ii) A clear explanation of the management regime proposed for Lot 99 and any “no build” type condition offered by the applicant with respect to Lot 99.
- iii) An explanation of the relevance of Section 2 SO 430813 to the subject site and of progress with the subdivision authorised by RC 090537.
- iv) Written evidence of any s223/224(c) certification which relates to RC 100678.
- v) An explanation of whether de-amalgamation of Lot 2 DP 380706 is required or proposed in the context of the current application (particularly as the amalgamation provided for in RM 150029 has occurred subsequent to the consenting of RM 100678).

51. The Commission considers that an application for resource consent should describe the activity for which resource consent is sought; and should clearly describe the site at which the activity is to occur (see Clause 2(1)(a) and (b) of Schedule 4 to the Act). The current application has failed to do either and accordingly the Commission concurs with the consent authority that the new application RM 150585 is incomplete.

52. For all of the reasons set out above I hereby dismiss the objection by JF Investments New Zealand Ltd against the Council's decision under section 88(3) of the Act which determined that the new application RM 150585 is incomplete; this decision to dismiss the objection OB 150585 being made pursuant to section 357D(1)(a) of the Act.

A handwritten signature in black ink, appearing to read 'W D Whitney', with a long horizontal flourish extending to the right.

W D Whitney
INDEPENDENT COMMISSIONER

25 May 2016