QUEENSTOWN LAKES DISTRICT COUNCIL

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DECISION OF QUEENSTOWN LAKES DISTRICT COUNCIL

RESOURCE MANAGEMENT ACT 1991

Applicant:	**H Broomfield and Canterbury Trustees (2006) Limited**
RM Reference:	RM181240
Location:	11 Portree Drive, Quail Rise
Proposal:	Two lot subdivision
Legal Description:	Lot 14 DP 27472
Operative Zoning:	Quail Rise Zone
Proposed Zoning:	N/A
Activity Status:	Non-complying
Notification:	Publicly Notified on 21 February 2019
Commissioner:	Denis Nugent
Date of Decision:	**18 June 2019**
Decision:	**Refused Consent**

REASONS FOR THE DECISION

The Hearing

1. The Council has delegated to me, under section 34A of the Act, its powers and functions to hear and decide this resource consent application.

2. The hearing was held in Queenstown on 28 May 2019. Appearance were as follows:

Applicants:

- Jayne Macdonald – Counsel
- Emma Dixon – Planner

Submitters:

- Rob Young for R C & M A Young
- Lucy Williams
- Greg Thompson
- Lindsay Sowerby for himself and Yvonne Assié
- Kathy Buckham for P J, K P & S E Buckham

Council:

- Michael Pridham – Engineer
- Erin Stagg – Senior Planner

3. Ms Charlie Evans was the hearing administrator.

4. In addition to the submitters who spoke at the hearing, I received written tabled comments from:

- Mike Byers – email dated 27 May 2019 and an additional paragraph in an email dated 29 May 2019;
- Ange Whipp – email dated 27 May 2019;
- Nat Wheatley on behalf of the Wheatley Family Trust – email dated 23 May 2019
- Mark Williams – email dated 28 May 2019
- Russell Mawhinney on behalf of Russell & Susan Mawhinney and the Bolwell Family Trust – email dated 28 May 2019

5. As required by the Act, I received the Council's Section 42A Report and the applicants' evidence in advance, which I read prior to the hearing. At the hearing I received legal submissions from Ms Macdonald and a written summary of evidence from Ms Dixon. In response to my questions, Ms Dixon prepared some supplementary evidence over the luncheon adjournment. This was presented before I heard from the submitters. At the conclusion of the hearing I provided Ms Macdonald the opportunity to lodge her reply in writing. This was received in accordance with my directions on 5 June 2019.

Abbreviations Used un this Decision

NPSUDC	National Policy Statement on Urban Development Capacity
ODP	Operative District Plan
PDP	Proposed District Plan
UGB	Urban Growth Boundary

Site Visit

6. I undertook a site visit alone on Friday 24 May 2019. At the same time I took the opportunity to view the surrounding residential streets.

The Proposal

7. The applicants sought consent to subdivide the existing site at 11 Portree Drive such that the two buildings which contain the existing residential unit, including a residential flat, would each be contained within its own allotment.

8. The subdivision plan lodged with the application proposed a front lot (Lot 1) of 940 m^2 and rear lot (Lot 2) of 677 m^2 accessed via a "leg-in" of some 28 m in length[1]. The existing buildings are some 4 m apart and the boundary proposed between those buildings was no closer than 2 m from each building. It appears that the northern boundary of the "leg-in" would meet one of the corners of the house on proposed Lot 1. It would also appear that the eaves of this building would intrude into the airspace of proposed Lot 2, although this was not discussed in the evidence and no easement was proposed for such an intrusion.

Existing Environment

9. As alluded to above, the site presently contains a single residential unit and associated residential flat contained in two buildings. The front building, which I will refer to as the original dwelling, is a single level generally H-shaped 5 bedroom dwelling of 310m^2 with double garage. This was granted building consent in 1999 and retrospective resource consent in April 2016[2]. The consented plans show this building as being located no closer than 4.5 m from the southern boundary and between 7.8 and 8 m from the road boundary. I will refer to this as the main dwelling.

10. The rear building obtained resource consent in September 2017[3] as an accessory building of 160 m^2 containing a residential flat (77.49m^2) and two additional bedrooms, bathroom and a workshop associated with the primary existing residential unit on the site (82.51 m^2). This building is located on the rear of the site such that at its closest points it is 4 m from the northern, western and southern boundaries. I will refer to this as the accessory building/residential flat.

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1 I note that these areas differ from those provided in Section 1.3 of the AEE lodged with the application. That lists proposed Lot 1 as comprising some 949m^2 and proposed Lot 2 some 669m^2. I have relied on the plan as lodged on the basis that all dimensions and areas given on that plan are correct.

2 RM160182. I note that it was not the present applicants' that failed to obtain a resource consent in 1999.

3 RM170326.

11. A formed driveway from a separate road crossing consented as part of RM170326 provides access parallel to, and approximately 1m from, the southern boundary of the site to a parking area in the southern space of the "H" of the main dwelling, and to the workshop in the accessory building. I note that this workshop is described in this application as a double garage. In addition to access to the workshop, the sealed area extends parallel to the southern boundary as far as the western boundary. In front of the workshop, the sealed area extends to the entrance of the residential flat and between the two buildings to within approximately 1m of the western wall of the original dwelling. The extended sealed area appears to provide further on-site car parking as well as manoeuvring space. I note that this sealed area extends east of the proposed boundary between proposed Lots 1 and 2 (that is, into proposed Lot 1).

12. A fence has been erected from the northwest corner of the main dwelling to the northern boundary. This fence is not on the boundary proposed by this application, but rather is some 2m east of that proposed boundary.

13. Adjoining the site to the north, west and south are sites ranging in size from 1,440 m^2 to 1,570 m^2, each containing a single residential unit. The southwest corner of the site adjoins Gretton Park. This park, accessed off Gretton Way, comprises over 7,000 m^2 and contains a playground and tennis court.

District Plan Rules Affected

14. Consent is required under the Operative District Plan as set out below:

Rule	Requirement	Reason	Activity Status
15.2.3.2	Subdivision minimum requirement	Council's control is limited to the matters set out in Section 5.2 of the Section 42A Report	Controlled
15.2.3.4 (iii)	A residential flat shall not be subdivided from a residential unit	The residential flat will be subdivided from the residential unit	Non-complying
12.15.3.3 & 12.15.5.1 ii (c)	Setback from internal boundaries is 4m	The building on proposed Lot 1 has no setback at one point, and both buildings have other walls within the 4m setback	Discretionary
12.15.3.4 viii & 12.15.5.2 i	The maximum number of residential units permitted in Stage 1 is 35	The subdivision would allow the establishment of a 36th residential unit	Non-complying
12.15.3.4 viii & 12.15.5.2 v (a)	The maximum site coverage in the R Residential Activity Area is 30%	The site coverage on proposed Lot 1 would be 33%	Non-complying

15. Ms Macdonald and Ms Stagg agreed that "bundling" of the consents required is the correct approach, and that the activity status overall is for a non-complying activity.

Summary of Evidence

16. Ms Dixon outlined the factual background to the application and the reasons consent was required. Her opinions in support of the proposal were, in summary, based upon the following:

a. The council has granted consents to other applications allowing an increase in the number of residential units in the Quail Rise Zone, thereby changing the receiving environment[4];

b. The findings in those earlier council decisions that the addition of an additional lot would have relatively inconsequential effects applied to this application also[5];

c. Given the existence of the buildings and their present use, subdivision would have adverse effects on residential character and amenity values of less than minor extent[6];

d. Conditions volunteered by the applicants precluding future subdivision or the construction of a residential flat on either lot would prevent further development or increase in density[7];

e. The breach of the site coverage rule is a technical breach arising from the creation of the access "leg-in"[8];

f. The open space/outdoor living areas available for a dwelling on proposed Lot 2 would be more than adequate[9];

g. There is no possibility of further hedging or fencing between the two proposed lots[10];

h. As the building on proposed Lot 2 is almost entirely blocked from view from Portree Drive, the subdivision will not result in an outcome that appears denser than currently exists[11];

i. The fact that there is no minimum allotment size in this zone means that density effects are overstated[12];

j. There would be no change to traffic, parking or access effects[13];

k. Any deficiencies in existing servicing arrangements can be dealt with in conditions such that the adverse effects would be less than minor[14];

l. The creation of an additional allotment would create a minor positive effect[15];

m. The proposal is consistent with the relevant objectives and policies in Parts 4, 12.15 and 15 of the Operative District Plan[16];

n. The proposal is consistent with the relevant objectives and policies in Chapters 3 and 4 of the Proposed District Plan[17];

o. Greater weight should be given to the Operative District Plan than the Proposed District Plan[18];

p. The proposal is consistent with the relevant provisions from the Partially Operative and Proposed Regional Policy Statements[19];

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4 E Dixon, Evidence in Chief, paragraphs 4.1 – 4.7
5 Ibid, paragraphs 4.30 and 4.31
6 Ibid, paragraphs 4.10 – 4.16 and 4.23
7 Ibid, paragraphs 4.16 and 4.17
8 Ibid, paragraph 4.18
9 Ibid, paragraph 4.19
10 Ibid, paragraph 4.22
11 Ibid, paragraphs 4.24-4.25
12 Ibid, paragraph 4.32
13 Ibid, paragraphs 4.34 - 4.37
14 Ibid, paragraphs 4.38 – 4.42
15 Ibid, paragraph 4.44
16 Ibid, Section 5
17 Ibid, Section 6
18 Ibid, paragraph 3.12
19 Ibid, Section 7

q. The proposal is consistent with Policy PA3 of the NPSUDC and not contrary to Policy PA4 of that NPS[20];

r. Of the approximately 212 developed sections in the Quail Rise Zone, some 13 may be able to accommodate a second dwelling in a similar manner to this proposal[21]. Thus, while the current application is not unique, the number of potential future similar applications is known and limited[22].

17. Ms Dixon noted that she had reviewed the draft conditions proffered by Ms Stagg and that the applicants accepted them. Her overall conclusion was that there was no resource management reason why consent should not be granted subject to conditions.

18. Mr Young explained in a written statement that the siting of houses within Quail Rise was predicated on the limitation on further subdivision provided by both the provisions of the district plan and the restrictive covenants applying to each site. He saw those provisions as assisting in maintaining the high standards of development within the zone. He considered the consent for the residential flat and accessory building was a mis-representation but merely a first step to obtain subdivision consent based on there being two established residences on the property. He also noted the parking generated by the existing use of the property and its untidy nature.

19. Ms Williams was concerned with the potential precedent effect of granting this application. She questioned the number of 13 lots suggested in Ms Dixon's evidence, and considered there could be more[23]. Ms Williams also considered that there was clear predetermination to subdivide this lot prior to consent being sought for the residential flat and accessory building as the subdivision plan lodged was dated 2 years earlier than the residential flat application. She also considered that the applicant was creating an unfair burden on landowners in forcing them to defend the restrictive covenants.

20. Mr Thompson told me that he and his wife purchased their property in Quail Rise as they were attracted to the leafy streets, good amenities and low density of housing protected by the district plan provisions. He was concerned that the presence of the residential flat and accessory building places the Council's decision-maker in an invidious position and that the application should be considered as if that additional building were not there. He considered the council was misled as to the purpose of the additional building consented on the property, noting that the plans lodged were titled "Proposed New Home". Mr Thompson considered that prior consents referred to by Ms Dixon as creating a precedent were not of a similar nature to that proposed in this application. He also referred me to the restrictive covenant on the title prohibiting further subdivision.

21. Mr Sowerby also told me that they purchased their property deliberately because the property would be protected by the Quail Rise covenants and the rules in the district plan. He considered that the erection of real estate agent signs outside the property indicated the purpose of subdivision was to enable the sale of two separate sites. As with the other submitters, he supported Ms Stagg's recommendation that consent be refused.

22. Ms Buckham told me that they purchased their property in 2000. At that stage the sections were larger than in most subdivisions, the existing buildings were of a high standard and there was plentiful tree planting, creating a superior subdivision. Ms Buckham was concerned that the infill represented by this application, along with associated increased traffic, parking congestion, noise

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20 Ibid, paragraphs 8.2 – 8.7

21 Ms Dixon's supplementary evidence provided details of these 13 sites. In addition, in her Submissions in Reply, Ms Macdonald identified that a 14th site may also have such potential.

22 Op cit, paragraphs 10.2 – 10.5

23 As noted in footnote 21, Ms Macdonald advised that Ms Williams' site may be a 14th.

and loss of views threatened that quality. She considered the car parking outside the house, including on the road, adversely affects the visual amenity of the area.

23. Both Ms Stagg and Mr Pridham had provided full reports in the Section 42A Report circulated prior to the hearing. That was taken as read and I will not repeat its contents here.

24. Neither Ms Stagg nor Mr Pridham changed their recommendations at the hearing. Mr Pridham considered that servicing could be satisfied by implementation of the draft conditions circulated by Ms Stagg.

25. Ms Stagg accepted that she had wrongly interpreted Rule 15.2.6.2(iv)(c) as applying to this site, but considered that error had not coloured her overall judgement of the proposal. In answer to criticism of Ms Macdonald's that Ms Stagg had not provided reasons to justify her conclusions on various of the objectives and policies in the district plans, Ms Stagg enumerated those for me.

26. In answers to my questions, Ms Stagg:

    a. stated that accommodation would be provided by the residential flat/accessory building with or without subdivision consent;

    b. considered that Rule 12.15.5.2 was underpinned by Policies 12.14.3 1.1 and 12.14.3 2.2;

    c. considered that while there was no clear linkage between objectives and policies to Rule 15.2.3.4b(iii), the rule gave effect to Policy 15.1.3 5.1;

    d. considered that the Operative District Plan should be given more weight than the Proposed District Plan, at a ratio of 60:40;

    e. clarified that it was her conclusion that the proposal was contrary to the objectives and policies in Chapters 4 and 12 of the Operative District Plan, but not contrary to Chapter 15 of that plan, nor the relevant chapters of the Proposed District Plan.

Major Issues in Dispute

27. The major issue in this application is whether consent should be granted or not.

Relevant Statutory Provisions

28. The proposal is a non-complying activity. Section 104D provides that a consent authority may grant consent to a non-complying activity only if it is satisfied that either –

    a. the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

    b. the application is for an activity that will not be contrary to the objectives and policies of –

        i. the relevant plan, if there is a plan but no proposed plan in respect of the activity; or

        ii. the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or

        iii. both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.

29. The logical approach to assessing a non-complying activity is to consider the actual and potential effects of the activity on the environment[24] and the relevant provisions of the operative and

[24] Section 104(1)(a) and section 104(1)(ab)

proposed district plans[25] and arrive at a conclusion as to whether the threshold tests in section 104D are met before considering the other matters required by section 104. It is considered good practice to consider the other matters in section 104 even if the application fails to pass the section 104D tests.

30. The other relevant statutory provisions in this instance are:

a. the National Policy Statement on Urban Development Capacity;

b. the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011; and

c. the Partially Operative Otago Regional Policy Statement and Proposed Otago Regional Policy Statement.

31. If I conclude consent should be granted I must consider the restrictions in section 106 and may impose conditions under sections 108 and 220.

Effects of the Proposal on the Environment

32. In considering the effects of the proposal on the environment I may not consider any effect on a person who has given written approval to the application[26]. No such written approvals have been lodged, but it is fair to consider the applicants as having provided such approvals in respect of any effect on themselves.

33. In terms of section 104(1)(ab) the applicants have offered conditions precluding further subdivision of each site and the creation of a residential flat on either site.

34. Section 104(2) provides that a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect. The application noted that it did not rely on this clause[27] and I agree with that position.

35. The application stated that the introduction of the new internal boundary would have no physical effect on the locality, including any landscape or visual effects[28]. It noted that there would be a setback breach between the two buildings but that would not be visible from the external boundaries of the site[29].

36. Submitters have suggested that I should consider the effects of the proposal as if the accessory building/residential flat were not there. That would be an appropriate course to take if the building were unlawful. However, it was lawfully established with a resource consent. I need to consider the proposal in the light of the existing use of the site and the buildings on it.

37. The range of effects on the environment which need to be considered in this instances are as follows:

- Residential character and amenity;
- The social and economic effects on people and communities;

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25 Section 104(1)(b)(vi)
26 Section 104(3)(a)(ii)
27 Assessment of Environmental Effect at paragraph 2.2.1
28 Ibid at paragraph 2.2.2
29 ibid

- Access, parking and transport effects;
- Servicing;
- Natural hazards.

Residential Character and Amenity

38. It is under this heading that most of the concerns raised by the submitters fall. They were concerned that the type of infill development this proposal represents would undermine the existing residential character and amenity values of the Quail Rise Zone. However, many of the issues they raised are derived from the present activities lawfully occurring on the site.

39. The provisions of the district plan allow a residential unit to be located within more than one building, and residential flats are equally allowed as part of a residential unit. The district plan limitations to maintain amenity values and residential character are primarily the setback, building coverage, external appearance of buildings and building height. I accept that the limitation on the number of residential units within the R Activity Area[30] is also designed to maintain amenity values by limiting the overall density of development.

40. The residential character and amenity values expected in the R Activity Area can determined by considering the combined effect of the relevant standards applying. Those particularly relevant in this instance are: Rule 12.15.5.1 ii(c) which requires a minimum setback of 4m from internal and road boundaries; Rule 12.15.5.2 i which limits the number of residential units in each part of the Activity Area; Rule 12.15.5.2 ii(a) which limits building height to 7m; and, Rule 12.15.5.2 v(a) which limits building coverage to 30% of net site area. In combination these rules promote a low built form set within spacious open sections. These require a considerably lower intensity of development than in the Low Density Residential Zone, for example, where building coverage is 40% and setbacks variable, but in sum, smaller, and density is one unit per 450m^2 (including a residential flat for each residential unit).

41. The essential difference that subdivision of this lot would have on the residential character and amenity values would be those arising from separate ownership of the two sites. It was Ms Dixon's evidence that at least Lot 2 would be sold[31]. I was also advised that the applicants do not reside on site. I took from the applicants' evidence that the present buildings were rented as two rental units – a 7 bedroom main occupancy and a single bedroom residential flat.

42. It was Ms Dixon's evidence that the existing fencing arrangements and driveway provides for each building to operate independently[32]. However, on my visit I noted that the fence referred to by Ms Dixon is not built on the proposed site boundary, but rather 2 m east of it, and that the location of a barbeque suggests that the residential flat is using as outdoor living space land which would, if subdivision occurred, be part of Lot 1. I also noted that the eastern outlook of the residential flat relies on the existing open space between the two buildings. I consider that if a 2 m high fence were built along the proposed boundary the amenity values of that part of the building would be severely diminished. It appears, given the amount of sealed area on proposed Lot 2, that the real outdoor living area remaining post-subdivision would only be that area contained within the northern setback. For a three-bedroom house, that limited area of usable outdoor open space would provide only minimal on-site amenity values.

43. Ms Dixon described the failure of Lot 1 to comply with the building coverage rule as "technical" and being due to the creation of the access to Lot 2[33]. However, that is not a "technical' non-compliance. What it means is that if this consent were granted Lot 1 would have less outdoor

30 177 in R Activity Area

31 E Dixon, Evidence in Chief at Section 8

32 Ibid at paragraph 4.11

33 Ibid at paragraph 4.18

space than is contemplated in the zone. In addition, it appears from the location of the proposed boundary between the two buildings, that Lot 1 will have a strip of land 2m wide behind the building where there is no direct access and of little practicable value. It appears that approximately half of this strip has been sealed as part of the parking area provided for the residential flat. In addition, whereas the house on proposed Lot 1 presently is set at least 4 m from the southern boundary, that setback will reduce to zero in part. These changes combined with the breach of the coverage standard suggests an intensity of development greater than that anticipated in the zone, potentially leading to a diminution of residential character.

44. I have noted above that I cannot consider adverse effects on the applicants. However, I also note that the Environment Court rejected submissions based on failing to consider the amenity effects of a proposal on those who may follow the applicants, holding that to do so would be to fail to perform the functions prescribed for territorial authorities[34]. Thus, it is relevant to consider the amenity values that may be available to future residents/occupiers of the property. In addition, I can consider adverse effects on occupiers of the property as they have not provided written approval of this proposal. I also note that Ms Dixon arrived at her conclusion as to effects resulting from the reduced setback without considering the effects of no setback from the driveway to the dwelling on proposed Lot 1, the effects of building eaves intruding into the airspace of proposed Lot 2, or the effects of the parking area for proposed Lot 2 intruding into proposed Lot 1.

45. The applicants have also failed to consider that residential character issues derived from reductions in outlook or reduced outdoor space only arise from the proposed subdivision. So long as the site functions as a single residential unit with residential flat, such issues are internalised, if they exist at all. Once two separate landowners have their own concerns for their individual property rights, such issues can be exacerbated.

46. In my view the potential future effects on residential character and amenity values, while being limited in extent, will be more than minor. By limited in extent I mean they will not be adverse beyond this site and those adjoining.

The Social and Economic Effects on People and Communities

47. Under this heading falls for consideration the contention that the provision of an extra site through this subdivision will have a positive effect on the Queenstown housing market.

48. Ms Dixon helpfully provided a copy of the Council's Housing Development Capacity Assessment 2017[35]. This report identified that the relevant chapters and zoning provisions of the Operative and Proposed District Plans enable capacity for a little over 27,000 further dwellings within the Urban Growth Boundaries of Queenstown (which includes Quail Rise), Arrowtown and Wanaka[36]. Of these, some 18,340 further dwellings were enabled within the Queenstown UGB[37]. I note that the timing of this report means that these figures exclude additional areas rezoned urban and included within the Queenstown UGB by decisions on the District Plan Review. It appears that the number of households within the Queenstown UGB in 2016 was 6,415[38].

49. From these figures, it can be seen that the addition of proposed Lot 2 to these numbers would have a very small effect – 0.016% increase on the existing dwellings (as at 2016), and 0.005% increase of the enabled capacity.

50. Notwithstanding the potentially small increase in number of lots, the subdivision would not actually increase the habitable space available for residential occupation. Overall, I consider the

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34 *Auckland RC v Auckland CC* [1997] NZRMA 205 at 214

35 m.e. consulting, 27 March 2018

36 Ibid, page 23

37 Ibid, Figure 0.10

38 Ibid, Table 3.8

potential positive effects of the proposal under this heading are so minimal as to not be worthy of counting.

Access, Parking and Transport Effects

51. Mr Pridham was satisfied that adequate provision had been made, or could be made, for access and parking on-site.

52. Ms Stagg commented that use of the properties as rental properties for non-family households could lead to increased street parking issues. From the on-street and on-site parking I saw on my site visit, I consider these effects exist at present. As the subdivision consent would not increase the residential capacity of the buildings on site I do not consider there would be any change in the effects on roadside parking resulting from this application.

53. If there are any effects arising under this category, based on Mr Pridham's evidence, I consider they would be less than minor.

Servicing

54. Mr Pridham was satisfied that any effects on servicing could be dealt with by the conditions suggested. I accept that advice.

Natural Hazards

55. Mr Pridham noted that natural hazards were assessed for this site under land use consent RM170326. After reviewing that assessment he concluded no recommendation need be made in respect of natural hazards. I accept that advice.

Overall Conclusion on Effects on the Environment of the Proposal

56. It is my conclusion that the adverse effects on the environment of this proposal will be more than minor.

Consideration Against the Objectives and Policies of the Operative District Plan

57. Ms Dixon referred me to Objective 4.5.3.1 and Policies 4.5.3.1.1, 4.5.3.1.3 and 4.5.3.1.4, suggesting this proposal helps achieve that policy. These refer to energy use and read:

> *Objective 1 – Efficiency*
>
> *The conservation and efficient use of energy and the use of renewable energy sources.*
>
> *Policies*
>
> *1.1 Promote compact urban forms, which reduce the length of and need for vehicle trips and increase the use of public or shared transport.*
>
> *…*
>
> *1.3 To encourage residential sites to be large enough to enable buildings to be constructed to take the greatest advantage of solar energy for heating, both active and passive.*
>
> *1.4 To control the location of buildings and outdoor living areas to reduce impediments to access to sunlight.*

58. Ms Dixon suggested the proposal promoted compact urban form; that the buildings are setback the required distance from the northern boundary thus taking greatest advantage of the available solar energy; and that the relationship between the buildings maximises the outdoor living area afforded to proposed Lot 2[39].

59. As the subdivision does not alter the amount of habitable residential space I do not see that it makes any different to the urban form. The same can be said about location of the buildings from the northern boundary: that will not be altered by the subdivision. However, I consider that the creation of the boundary between proposed Lots 1 and 2 will reduce the effective outdoor space available to proposed Lot 2 and fencing is likely to reduce the solar access to such land as remains available. If anything, I consider the proposal is contrary to Policy 1.4, but overall I conclude the proposal is neutral in respect of this objective and these policies.

60. Both planners directed me to Section 4.9 Urban Growth, particularly Objectives 4.9.2, 4.9.3 and 4.9.7 and associated policies.

61. These objectives and policies attempt to establish a framework within the district plan to accommodate the growth of the district in a way that is consistent with the values of the community. They do not provide for intensified urban development at any cost, but, on the contrary, attempt to maintain the quality of existing urban environments, including built character and amenity values, while that intensification is achieved. This proposal gets no support from these objectives and policies. However, as the built form is already consented and in existence, and the subdivision consent would not in itself alter the intensity of residential development, I do not consider the proposal can be considered contrary to these objectives and policies either.

62. Both planners also referred me to Objectives 12.14.3.1 and 12.14.3.2 and associated policies, being the pertinent objectives and policies specific to the Quail Rise Zone. In combination the two objectives seek the development of low density residential activities and the conservation and enhancement of amenity values within and outside the zone.

63. Policy 1.1 is to ensure development is carried out in a comprehensive manner in terms of an appropriate strategy and to ensure activities are compatibly located. When read with Policy 1.4, which is to avoid any deviation from the Structure Plan, it is apparent that the aim of Policy 1.1 is the implementation of the development strategy resulting from the rules, particularly Rules 12.15.5.1 i and 12.15.5.2 i, along with the setback and coverage rules. Thus, while there is no minimum lot size in the R Activity Area, the limitation on the number of residential units allowed combined with the limitations on other activities in the Activity Area, the relatively low building coverage and the wide setbacks implement Policy 1.1 by enabling a variety of site sizes large enough to ensure a low density residential environment ensues.

64. Objective 2 has as part of its focus, the retention of the development type enabled by Objective 1. Of the policies under Objective 2, only Policy 2.3 is directly relevant to this application. It reads:

> *To avoid activities and development that have the potential to adversely affect the openness and rural character of the zone, adjoining land, and the wider environment.*

65. The site and the immediately surrounding environment is not of rural character so the only element to be avoided in this instance is the openness of the zone. As the built development is in accordance with the provisions referred to above in relation to Policy 1.1, I find that the proposal is not contrary to this policy.

66. Objective 3 and the associated policy relate to servicing and there is no dispute that the proposal is in accordance with them.

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[39] E Dixon, Evidence in Chief at paragraphs 5.2.to 5.7 inclusive

67. Looking at the objectives and policies for the Quail Rise Zone as a whole, the proposed subdivision fails to ensure development occurs in a strategic manner so as to achieve low density residential activities. Notwithstanding that the buildings are allowed, the increase in intensity of residential units would be contrary to these objectives and policies as a whole.

68. Turning to the objectives and policies in Chapter 15 relating to subdivision, Objectives 1 and 2, and associated policies, relate to servicing. These matters have been dealt with or can be the subject of conditions. Objectives 3 and 4 are not relevant.

69. Objective 5 seeks to maintain or enhance the amenities of the built environment through the subdivision process. The only policy relevant to this application is Policy 5.1. This reads:

> *To ensure lot sizes and dimensions to [sic] provide for the efficient and pleasant functioning of the anticipated land uses, and reflect the levels of open space and density of built development anticipated in each area.*

70. Ms Dixon considered the proposal gave effect to this policy based on the lack of a minimum allotment, compliance before subdivision with the site coverage, and that the buildings were functioning as two established dwellings. Ms Stagg, on the other hand, considered the proposal would not reflect the existing level of open space and density of the Quail Rise Zone.

71. In my view, Ms Stagg comes closest to assessing how this policy should be approached. The starting point must be a consideration of what development is anticipated in the area, which in this case would be the R Activity Area. As I have discussed above in relation to Objectives 1 and 2 of the Quail Rise Zone, there is a level of amenity value expected from a strategy of low density residential development with wide setbacks and low site coverage. While it is clearly efficient to create two sites out of the present development of the site, the cramped nature of area between the buildings once divided into separate ownership would not lead to pleasant functioning of the residential activities in the manner anticipated by the zone provisions applying to the site. I conclude that the proposal is contrary to this policy and that, if consented, it would not give effect to Objective 15.1.3.5.

72. I consider the proposal to be neutral to the remaining policies under Objective 5. While both planners discussed Policy 5.3 which seeks to encourage innovative design, I do not see that policy as requiring that every design be innovative, and there was no suggestion that this subdivision involved innovative design. I see that policy as being available to support an application which may otherwise be inconsistent with relevant policies, but uses an innovative design to ameliorate such inconsistencies.

Consideration Against the Objectives and Policies of the Proposed District Plan

73. Both planners undertook an assessment of the proposal against the objectives and policies in Chapters 3 and 4 of the Proposed District Plan. They both concluded the proposal was not contrary to these objectives and policies. The difference between them was that Ms Stagg considered the proposal inconsistent with them, while Ms Dixon went to some trouble to find support for the proposal within them.

74. I agree that only Chapters 3 and 4 are relevant to this proposal, with Chapters 5 and 6 relating to Tangata Whenua issues and Landscape respectively. I also agree with Ms Macdonald's assessment that at this stage in the review process with a number of appeals against the provisions of both chapters, the PDP deserves less weight than the ODP, and the 70:30 ratio proposed by her seems reasonable.

75. Chapter 3 sets out, via its objectives and policies, a high level strategic direction to guide the implementation of all the other parts of the PDP. There is a danger in taking such provisions and applying them line by line to an application such as this, which is no more than the subdivision of an existing site into two. Thus while one can find justification for this proposal in almost of the subclauses of Policy 3.2.2.1, one needs to step back and ask whether it is really achieving the objective of managing urban growth in a strategic and integrated manner. Clearly, the creation of a single lot in a residential zone cannot do that. Similarly, the fact that this proposal is within an area contained by an UGB does no more than make the proposal not inappropriate. It does not make appropriate.

76. In my view, most of Chapter 4 can be treated in a similar manner. While it has an objective of a compact and integrated urban form (Objective 4.2.2A), the creation of a single residential lot within a residential area does little to achieve that objective. It really requires the application of zoning provisions over whole residential areas to achieve the objective.

77. Both planners, in considering Policy 4.2.2.3, have commented that this land is close to Frankton Flats with the implication that provides some support for this proposal. The term used in the policy is "close proximity". Portree Drive is not, in my view, in close proximity to Frankton Flats. I consider that term implies within walking distance.

78. I do agree that Policy 4.2.2.8 has application. That requires that, in applying plan provisions, regard should be had to the extent to which the minimum site size, density, height, building coverage and other quality controls have a disproportionate adverse effect on housing affordability. No evidence was provided that variations from the standards in this instance would lead to the creation of properties which could be considered, in the Queenstown market, affordable.

79. Overall, I agree that the proposal is not contrary to the objectives and policies of the PDP.

Conclusion as to Tests in Section 104D

80. I have concluded above that the proposed subdivision will have adverse effects on the environment that will be more than minor, and that the proposal is contrary to the objectives and policies of the ODP. Thus I am barred under section 104D of the Act from granting consent.

81. For completeness, and in case I am wrong in in respect of the section 104D tests, I will consider the proposal against the other matters requires by section 104 of the Act.

82. It was Ms Macdonald's submission that, following the logic of the Environment Court in the *Bunnings* decision[40], the weight given to the ODP should be reduced and more emphasis given to assessment under the NPSUDC[41]. The reference referred to by Ms Macdonald is that part of the Court's decision where it discusses the approach of the NPSUDC being *to work with land price differentials for different activities, not to make activities non-complying so as to defeat the operation of the real estate market*. The Court then went on to state that it was also necessary in that instance to consider section 7(b) of the Act[42].

83. Ms Macdonald referred me to Ms Dixon's evidence that the proposal would give effect to the NPSUDC and assist the Council in meeting its obligations under it. I note, however, that no economic evidence or expert evidence on the residential real estate market was provided to enable me to undertake the type of assessment of land price differentials or relative economic efficiencies of the options in the manner undertaken by the Environment Court in the *Bunnings* case. What I was provided with was the Council's *Housing Development Capacity Assessment 2017* prepared in accordance with the NPSUDC.

84. I agree that, given the vintage of the Quail Rise Zone, it is appropriate to look beyond the ODP to those superior statutory instruments which have come into force since the ODP was made operative. It may also be relevant to refer to Part 2 of the Act where there are gaps or omissions in policy content.

85. I commence by noting that context for the objectives and policies of the NPSUDC is set in the Preamble to that document. That recognises that well-functioning urban environments provide for the well-being of people and communities, and that includes access to a choice of homes and attractive built and natural environments. It notes that the overarching theme running through the NPSUDC is that planning decisions must actively enable development in urban environments in a way that maximises well-being now and in the future.

86. Objectives OA1, OA2 and OA3 apply to this proposal. In summary these seek to achieve:

- That urban environments are effective and efficient while enabling people and communities[43] to provide for their social, economic, cultural and environmental wellbeing;
- Sufficient opportunities in urban environments for the development of housing to meet demand which provides choices that will meet the needs of people and communities for a range of dwelling types and locations; and
- That urban environments develop and change over time in response to the changing needs of people and communities.

40 *Bunnings Limited v Queenstown Lakes DC* [2019] NZEnvC 59

41 Legal Submissions for the Applicant at paragraph 38

42 *Bunnings* op cit at paragraphs 112 and 113

43 Each of the references to "people and communities" includes reference to future generations.

87. Of the policies to achieve these objectives, only Policies PA3 and PA4 may be relevant. Policy PA3 is not aimed at all decision-makers, it is only applicable when making a decision that affects the way and rate at which development capacity is provided. As I have noted above, this application does not affect development capacity as granting the subdivision consent would not alter the residential capacity of the buildings on this site. Indeed, refusing consent would retain the housing choices provided by the present buildings that enable a large residential unit (7 bedrooms) and small residential flat. Granting consent would arguably reduce housing choices by limiting the opportunities to two residential units, one with 5 bedrooms and one with 3. However, I have no evidence on the demand or otherwise for the housing options so am unable to arrive at a conclusion on that issue.

88. The relevance of Policy PA4 is also questionable in this instance. I am not being asked to consider the effects of urban development. Those effects have already been considered in the granting of consents for the original dwelling and the accessory building/residential flat.

89. Considering objectives OA1, OA2 and OA3, as the NPSUDC requires, I am satisfied that the evidence, in the form of the Housing Development Capacity Assessment, shows that there is adequate capacity to meet demand at present. The evidence of the submitters was that the existing urban environment of Quail Rise enables residents to provide for their social, economic, cultural and environmental wellbeing. There was no evidence that the urban environment was inadequate. I consider that the district plan review process presently underway, which will, at some stage, review the zoning of Quail Rise, is the most appropriate process to enable the community to consider how or whether the urban environment changes in response to the needs of people and communities and future generations. My comments on housing choices made above apply equally to Objective OA2. In addition, there was no evidence concerning the adequacy or inadequacy of housing choices in Queenstown.

90. My final comment on the NPSUDC is that it has a goal of ensuring councils plan for the expected growth in the respective district, rather than merely reacting to private initiatives. The objectives and policies of Strategic Chapters of the PDP take that approach and identify how urban growth is to be accommodated. An application for the creation of one additional residential lot within an urban area the size of Queenstown is unlikely to have very much, if any, influence on achieving the objectives and policies of the NPSUDC.

Otago Regional Policy Statement

91. Ms Dixon and Ms Stagg both discussed objectives and policies they considered relevant from the Partially Revoked RPS 1998 and Partially Operative RPS 2019. I have reviewed these instruments and the proposed RPS. I do not see these provisions as adding any additional guidance in respect of this application. If anything, Policy 4.5.1 is set against providing for urban growth by the type ad hoc single lot subdivision this proposal represents.

Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011

92. Ms Stagg's evidence was that this land had not been identified as a HAIL site and the NES did not apply. I accept that advice.

Assessment Matters in ODP

93. Chapter 12 sets out assessment matters to be considered in all resource consent applications as well as those specific to particular applications.

General

94. These require the density of development to be considered in terms of:

- The impact on the visual quality and amenity values both within the zone and the surrounding landscape;
- The visual impact on any significant landforms;
- The sensitivity of the landscape;
- Proposed rehabilitation measures;
- Integrated management of open space within a proposed development, whether in individual or common ownership.

95. Consideration of visual issues are not relevant in this instance. I have discussed the effects on amenity values above and found that, while they are potentially adverse, the impacts beyond the site are likely to be minor. There is no evidence that the open space within the site will be managed in an integrated manner. It appears that the design of the lot boundaries have not considered this issue and are likely to reduce the amenity values provided by the open spaces within the site.

96. The proposal is not visible from rural roads and there are unlikely to be any issues in respect of visibility from other public places given that the buildings are lawfully established. Natural hazards are not an issue.

97. The scale of built development is not out of keeping with the scale of other built development within the immediate vicinity, and the residential use of the buildings is consistent with the zoning.

Parking, Loading and Access

98. These issues have been accepted by Mr Pridham as satisfying the standards.

Maximum Number of Residential Buildings and Site Coverage

99. This criterion states:

> *With regard to proposals that breach one or more zone standard(s), whether and the extent to which the proposal will facilitate the provision of a range of Residential Activity that contributes to housing affordability in the District.*

100. It is unusual for a district plan to contain assessment matters for non-complying activities. I take from the inclusion of this assessment matter that a proposal which would facilitate the provisions of a range of residential activity that would contribute to housing affordability in the District would be considered unique.

101. Although Ms Dixon did, in her discussion of the provisions in the NPSUDC, contend that the subdivision of this lot would have the positive benefit of housing choice and potential affordability, this contention was not supported by evidence from a suitably qualified expert. Ms Dixon also proffered an opinion on the market value of a dwelling on Lot 2. Again this was unsupported by expert evidence and Ms Macdonald rightly conceded in her reply submissions that I should give that evidence little weight.

102. In the absence of evidence I am not prepared to find that this proposal will have any positive effect on housing affordability in the District. This proposal cannot, therefore, rely on this criterion for support.

Overall Conclusions on Assessment Criteria

103. Having considered the assessment criteria, I conclude that the compromising of the open space on proposed Lot 2 is inconsistent with those criteria, and no other matter considered counter-balances that.

Part 2 of the Resource Management Act 1991

104. Ms Stagg considered the proposal in relation to Part 2 and listed 5 clauses out of section 7 she considered relevant. I do not consider there to be value in considering the efficiency of the end use of energy (s.7(ba)) or finite characteristics of natural and physical resources (s.7(g)) in relation to this application. Consent to allow the subdivision will not affect those matters.

105. I have considered the potential effects on amenity values in the discussion of adverse effects of the proposal on the environment. Those potential adverse effects would also adversely affect the quality of the environment.

106. No evidence was provided in relation to whether subdivision of this site was a more efficient use than retaining it in a single title.

Other Matters – Section 104(1)(c)

107. I need to deal with two matters under this heading: the private covenants restricting future subdivision; and the issue of precedent.

Covenants Restricting Further Subdivision

108. Most submitters raised the fact that residential sites in Quail Rise were subject to private covenants prohibiting further subdivision of each lot. Included with the application were the covenants attached to the title for this property and such a restriction does apply to this site.

109. As I explained at the hearing, the existence of such private covenants is a private arrangement between the covenantor and covenantee. Those arrangements do not fall to be considered within the resource management process. For that reason I have not considered the covenants as a relevant matter and their existence has had no bearing on my decision-making.

Precedent

110. Ms Stagg considered this proposal would create a precedent and undermine the integrity of the district plan if subdivision of the residential flat from the residential unit were consented. Several submitters considered that to allow the limit on the number of residential units in the R Activity Area to be breached would set a precedent that would undermine the integrity of the zone.

111. Ms Dixon helpfully quoted relevant paragraphs from *Blueskin Bay Forest Heights Ltd v Dunedin CC*[44] on this issue. It was Ms Macdonald's submission that this proposal would not lead to widespread infill development in Quail Rise[45]. It was also Ms Macdonald's submission that, while Rule 15.2.3.4 (iii) restricting subdivision of a residential flat from the residential unit, does apply, this subdivision is in reality the subdivision of two dwellings. Thus, she did not address whether the breaching of that rule may create a more widespread precedent, and Ms Dixon's evidence did not address that issue either.

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44 [2010] NZEnvC 177 at [44] to [46] and [48] as quoted in *Bunnings op cit* at [103] and [104]

45 Submissions in Reply at paragraph 3[g]

112. Although the applicants' case cautioned against consideration of precedent as an issue, Ms Dixon's evidence relied in part on previous decisions of the Council consenting subdivisions that allowed an additional residential unit beyond the limitation contained in Rule 12.15.15.2 i.

113. As I understand the legal situation, the precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor that can be taken into account when considering a non-complying activity application[46]. The Environment Court has observed, however, that the precedent effect provided by earlier decisions is an expectation of like treatment, not an absolute entitlement, and that it may be the case, with the benefit of hindsight, that an earlier decision is inappropriate[47]. The Court continued "*if a proposal does not otherwise meet the criteria for grant of consent, it should not receive consent simply because another similar proposal had previously been approved*"[48].

114. Dealing first with the issue of precedent in relation to breaching the cap on the number of residential units, Ms Dixon's supplementary evidence disclosed 9 sites within the R Activity Area and 13 in the zone as a whole, that could potentially physically accommodate an additional dwelling and therefore potentially seek to be treated similarly to this application on an application for subdivision. Ms Macdonald added a further site in her reply submissions.

115. Unfortunately the District Plan, while specifying caps on 9 parts of the R Activity Area, provides no way of determining where those parts are. I therefore can only consider the 10 potential sites against the aggregate cap of 177 residential units within the R Activity Area to give a ratio of 1:17.7 or 5.6%. I consider that potential level of replication to not be inconsiderable although I accept Ms Macdonald's submission that it would not result in "opening the floodgates".

116. As Ms Macdonald noted in her reply submissions, there has already been some undermining of the ODP provisions by the Council previously granting consents to go beyond the cap. I note these were in the G and R2 Activity Areas. Although I had no evidence on the appropriateness of those earlier decisions, I do not consider they in themselves provide justification for granting this consent and potentially undermining the integrity of the ODP by encouraging further such applications.

117. No attempt was made by either of the planning witnesses to enumerate the potential for other applicants to seek to subdivide a residential flat established in a building separate from the main body of the residential unit. As residential flats are permitted in almost all zones and are defined as being part of a residential unit, that is not surprising. However, I would have expected some analysis of whether this situation could occur in other zones and the potential for applicants to seek to rely on the outcome of this application to support an application to breach Rule 15.3.2.4 (iii).

118. I note in particular that in the Rural Zone under the PDP provisions a residential flat may be up to 150m^2 in area. That is larger than the combined area of the residential flat and the two additional bedrooms in this application. Thus, it is likely in the Rural Zone that residential flats will be developed in separate buildings. I note also that these provisions relating to residential flats in the Rural Zone appear to be beyond challenge.

119. I consider that to set a precedent in this application of not considering this proposal as the subdivision of a residential flat from a residential unit could potentially undermine the PDP provisions for residential flats in the Rural Zone at the least by encouraging similar applications.

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46 *Dye v Rodney DC* [2002] 1 NZLR 37 (CA)

47 *Feron v Central Otago DC* C75/2009 at [65]

48 Ibid

Overall Conclusions

120. This proposal is discordant with the scheme of the Quail Rise Zone R Activity Area. I have found that the potential adverse effects on the environment would be more than minor and the level of discordance means that it is contrary to the objectives and policies of the Quail Rise Zone. While there may be an argument that the low density residential goals of that zone are inconsistent with the NPSUDC, this application is not the means to resolve any such inconsistency. That should be a matter for the Council and the community to consider in the context of a review of the zone provisions.

121. I have also found that granting of this application could create a precedent that could encourage other applicants to seek both similar applications to breach the residential cap in the R Activity Area, and applications more widespread in the District to subdivide residential flats from residential units.

122. Even if I were not barred by section 104D of the Act from granting consent, those reasons would have led me to refuse consent in any event.

123. For all the above reasons, under section 104B consent for the application by H Broomfield & Canterbury Trustees (2006) Limited (RM181240) to subdivide Lot 14 DP 27472 at 11 Portree Drive, Quail Rise into two lots is refused.

Dated 18 June 2019

Commissioner Denis Nugent