

**AGENDA FOR A MEETING OF THE HEARINGS COMMITTEE TO BE HELD IN THE
CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN, WAITAKERE CITY,
ON MONDAY, 1 MAY 2006, COMMENCING AT 9.30 AM.**

TABLE OF CONTENTS

<u>ITEM</u>		<u>PAGE NO.</u>
1	APOLOGIES	1
2	URGENT BUSINESS	1
3	OBJECTION UNDER SECTION 357 OF THE RESOURCE MANAGEMENT ACT 1991 BY GLORIT SUBDIVISIONS LIMITED; LONDON AND GREENWICH GENERAL TRADING COMPANY LIMITED; PETER WILLIAM MAWHINNEY; PERCEPTUS LIMITED; SWANSON HEIGHTS LIMITED; WAITAKERE RESOURCE CONSENTS LIMITED IN RESPECT OF APPLICATIONS FOR CERTIFICATES OF COMPLIANCE AND SUBDIVISION CONSENTS AT VARIOUS PROPERTIES ON ANZAC VALLEY ROAD	1

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1 APOLOGIES



2 URGENT BUSINESS

Section 46A(7) of the Local Government Official Information and Meetings Act 1987 provides that where an item of business is not on the agenda, it may only be dealt with at the meeting if:

- (i) the Committee by resolution so decides; and
- (ii) the Chairperson has explained at the beginning of the meeting (when open to the public) that the item will be raised for discussion and decision, why the item is not on the agenda, and why it cannot be delayed until a subsequent meeting.

The Committee may make a decision on a matter determined to be urgent.

NOTE: Urgent Business need not be dealt with now and may be delayed until later in the meeting.



3 OBJECTION UNDER SECTION 357 OF THE RESOURCE MANAGEMENT ACT 1991 BY GLORIT SUBDIVISIONS LIMITED; LONDON AND GREENWICH GENERAL TRADING COMPANY LIMITED; PETER WILLIAM MAWHINNEY; PERCEPTUS LIMITED; SWANSON HEIGHTS LIMITED; WAITAKERE RESOURCE CONSENTS LIMITED IN RESPECT OF APPLICATIONS FOR CERTIFICATES OF COMPLIANCE AND SUBDIVISION CONSENTS AT VARIOUS PROPERTIES ON ANZAC VALLEY ROAD

WAITAKERE WARD

N.B. This report sets out the advice of staff to the Hearings Committee in respect of a Section 357 and a Section 357A objection. It is not the decision of Council. The decision will be made after consideration of the objection by the Hearings Committee.

INTRODUCTION

A1-A295

The objector lodged three applications for Certificates of Compliance or, as an alternative, subdivision consents in relation to the development of 14 properties and three access parcels at Anzac Valley Road. The three applications are attached at pages A1 to A295. A schedule of the properties that are the subject of these applications is attached at page A6.

- A296-A302 The application was received by the Council on or after 21 February 2006. The application was assessed by Council staff, and it was determined that the information supplied by the applicant for each of the applications was deficient. Council staff acting under delegated authority rejected the resource consent applications under Section 88(3) of the Resource Management Act 1991 and the applications for certificates of compliance under Section 37. A full copy of the letter rejecting the applications is attached at pages A296 to A302.
- A303-A338 The applicant has lodged an objection to the rejection of the three applications under Section 357(1)(b). While the remedy the applicant is seeking is not stated, it appears that the applicant is seeking the acceptance of the applications by the Council and the subsequent processing of those applications. A copy of the three objections are attached at pages A303 to A338.

SUMMARY OF COUNCIL'S DECISIONS ON APPLICATIONS

The following is a summary of the decisions that were set out in the Council's letter to the applicant (now objector):

The applications for subdivision consents, which the applicant further classified as the "Lease application" (seeking consent to lease subdivisions), "Cross lease application" (seeking consent for cross lease of the subject land) and "Fee simple application" (seeking consent for the issue of fee simple title), were rejected by the Council. The applications were rejected pursuant to section 88(3). In particular, the proposals were deemed to be non-complying activities (the applicant lodged applications for controlled or restricted discretionary activities only) and as such required full assessment of effects against all relevant rules and planning documents. The applicant failed to provide such an assessment.

The applications for certificates of compliance were rejected for similar reasons (although it is acknowledged that there is no specific statutory equivalent to section 88(3) in respect of applications for certificates of compliance). The Council has a discretion under Subsection 37(1) and 37(2) to waive a failure to comply with the Act or to waive a failure to provide relevant information. Thus the Council may determine not to grant a waiver where that is warranted. The applications were made as joint applications (ie, with the consent applications) and lacked the necessary supporting information. These applications were more than complex; they were undefined and deficient.

This report recommends that the Committee uphold Council's original decision to reject the resource consent applications as 'incomplete' under Section 88(3) and to reject the certificate of compliance applications as unseverable from the resource consent applications, and fundamentally defective under Subsection 37 and 139.

It is not considered appropriate to exercise Council's discretion to require additional information under Section 139(2) to remedy the deficiencies contained in the certificate of compliance applications. In particular, the Resource Management Act does not envisage that certificate of compliance applications be processed as if they were resource consent applications and the applicant should comply with the statutory process expected under the Act, which is to lodge individual certificate of compliance applications which can then be assessed on their merits, without the complications of parallel resource consent applications. However that is an option that may be considered by the Committee and the applicant can address that issue at the hearing.

STATUTORY REQUIREMENTS

A339-A343

The relevant provisions of the Resource Management Act 1991 are comprised in Sections 357 (Right of objections to local authorities against certain decisions) and 357A (Right of objections to consent authority against certain decisions or requirements). A copy of these sections of the Act is attached at pages A339 to A343 for the information of the Committee. These sections are explained below.

Under section 88(3), if an application for resource consent does not include an adequate assessment of environmental effects or the information required by regulations, the Council may reject the application. In this case, the Council (through its planning officers) determined, within the statutory five day time period following receipt of the applications, that the applications should be rejected and therefore returned the application to the applicant with written reasons for its decision.

Under Subsection 37(1) and (2), if a person is required to comply with a requirement of the Act or to provide information under the Act and fails to do so, then the Council has a discretion to waive compliance or direct that the omission or inaccuracy be rectified. Equally, the Council may choose not to grant a waiver, depending on the circumstances.

Section 357(1)(b) allows the applicant to lodge an objection against the determination made by the Council to reject the resource consent applications.

The jurisdiction to consider the objections pertaining to certificates of compliance arises from Section 357A(1)(a)(iv). The Council will therefore consider the objections relating to the applications for subdivision consent under Section 357 and the objections relating to certificates of compliance under Section 357A.

Objections under Section 357, 357A, and 357B are generally considered and determined by Council officers acting under delegated authority. However, the applicant indicated (in paragraphs 13.1 and 14.1 of each objection) that the matter be referred to the Hearings Committee for a determination.

Section 357D provides that after considering an objection, the consent authority may dismiss the objection, or uphold it either partly or wholly. If the applicant who lodged the objection is dissatisfied with the consent authority's decision, it has the right of appeal to the Environment Court.

BACKGROUND

The applicant has sought the following in three applications:

Application 1 (referred to as the Lease Subdivision)

Certificates of compliance for boundary adjustments and subdivision of land as depicted on plans FS1 and FS2

or, as an alternative:

subdivision consent for issue of fee simple title as depicted on plan FS1 and lease subdivisions on plans L1 to L80.

Application 2 (referred to as the Cross Lease Subdivision)

Certificates of compliance for boundary adjustments and for the construction of 77 sheds

or, as an alternative:

Subdivision consent for cross lease as a controlled or limited discretionary activity.

Application 3 (referred to as the Fee Simple Subdivision)

Certificates of compliance for boundary adjustments and lease arrangements as depicted on plans FS1 and FS2;

or, as an alternative:

Subdivision consent seeking consent to subdivisions as depicted on plans FS3 and FS4.

All three applications relate to the same area of land.

It is not clear how the three applications relate to each other. It could be that the applications are in a sequence. If that is so, it appears that the sequence of applications is as follows. Application 1 seeks certificates of compliance or the subdivision of the subject properties, Application 2 seeks to establish 77 sheds or the subdivision of the subject properties, and Application 3 seeks to then make boundary adjustments or undertake a different subdivision pattern on the subject land.

It could also be that the applicant has lodged three applications at the same time and that the three applications are unrelated, and so if one or more of the applications is not successful, one or more of the other applications may be granted. This appears more likely, as no obvious reference is made in each application to the other applications. It is therefore on this basis that the applications are assessed, on their individual merits, in terms of the objections under Sections 357 and 357A.

DISCUSSION

The objector/applicant has lodged separate objections in respect of each of the three applications made to the Council. This report addresses the applications for subdivision consent and the applications for certificates of compliance as separate matters and makes recommendations to the Committee below. Although each application is to be assessed on its merits, the author considers that there are common elements to each and it is more efficient to deal with the resource consent applications as a whole, and the certificates of compliance applications as a whole. There is a commonality in the deficiencies of each genre of application, as set out below.

Applications for Subdivision Consents (Lease, Cross Lease and Fee Simple)

The objector's claims and bases for the objections lodged in respect of the subdivision consent applications are addressed below.

Application For Consent For Types Of Activities

The objector considers that the application for a subdivision (as an alternative to the Certificates of Compliance application) meets the requirements of the General Subdivision Rule 2.2(a) and the Foothills Subdivision Rule 7.2(c).

The District Plan

Subdivision applications must meet or address all the relevant Rules in a District Plan. The objector has referred to two relevant subdivision Rules, but has mis-interpreted the Foothills Subdivision Rule. While the objector is correct that the subdivision applications may meet the General Subdivision Rule 2.2(a), the application does not meet Foothills Subdivision Rule 7.2(c), which states:

“...any subdivision that is otherwise a Controlled Activity not meeting the standards in Rule 7.1(c).” (emphasis added)

This means that the application must comply with Foothills Subdivision Rules 7.1(a) and 7.1(b), and if it does meet both of those two Rules but does not meet Foothills Subdivision Rule 7.1(c), then it becomes a Limited Discretionary Activity.

In the case of the subdivision application and the lot sizes listed on plans FS3 and FS4, many of the proposed lots fall below the 4 hectare minimum lot size required by Foothills Subdivision Rule 7.2(a). Because this Rule is not met, Foothills Subdivision Rule 7.2(c) does not therefore apply. The activity must then be assessed against Foothills Subdivision Rule 7.3 Discretionary Activities, however it does not meet the requirements of that Rule. Consequently the application is to be assessed against Foothills Subdivision Rule 7.4 Non-complying Activities, and it meets the requirements of Rule 7.4(c), which states that a subdivision is non-complying if it:

“...occurs in an area which is not within a structure plan area and where the site area for each proposed site is less than 4ha...”

In this case, the subject land is not located within a structure plan area. In the processing of subdivision consents, each application defaults to the most stringent activity status, and is assessed on that basis. In this case, the most stringent activity status is Non-complying.

In rejecting the application, the Council has not mis-interpreted the Resource Management Act 1991, rather it has assessed the application against the District Plan Rules (prepared under the Resource Management Act 1991) and determined that the application requires consent for an activity that is a Non-complying activity under the District Plan.

Case Law

The Council's rejection of the application refers to the obiter comments of Randerson J in *Waitakere City Council v Kitewaho Bush Reserve Company Limited & Ors*. Relevant aspects of that judgment are as follows:

- Good resource management practice requires that in general, all resource consent required should be carefully identified from the outset and application made so they may be considered together or, at least, in circumstances where one application informs the others (para 27).
- It is incumbent upon a party asserting that resource consents are not required (or that a certificate of compliance should issue) to provide all reasonably necessary information to establish those facts (para 34).
- The status of an activity is not open for selection by an applicant; it is controlled by the Act and the district plan provisions (para 94).
- Section 11 Resource Management Act does not allow an applicant to pick and choose the subdivision rules that it wants to rely upon, and ignore those that do not suit it. In particular, where an activity requires consent as a non complying activity, the applicant cannot overlook this requirement.

Having considered the matters raised by the objector in this part of the objection, it is considered that the matters that are raised are without substance and do not amount to an error by the Council in its rejection of the subdivision application applied for as an alternative to the Certificate of Compliance application. The objector has misinterpreted the relevant provisions of the District Plan and the Act (relating to activity classification, as referred to in the objection) and has failed to provide the information necessary to process the application for a non-complying (as opposed to limited discretionary) activity.

No Reason Given For Non-complying Status

This part of the objection relates to the subdivision of the subject land (refer paragraphs 6.1 line 5 and paragraph 6.2 line 1).

The objector appears to have read paragraph 5.1 of the Council's response in isolation. The Council's letter indicates in paragraph 5 that the applications do not meet Section 88(3) for the reasons set out in 5.1 to 5.4(b). The Council's approach to this subdivision application and its activity status is outlined above, and that reasoning was also applied when the application was first received. Consequently this part of the objection is based upon a mis-interpretation of the District Plan.

Restrictions On Assessment Of Effects

This part of the objection discusses the information requirements associated with subdivision in paragraphs 7.1-7.2 of the objection. It also discusses the effects of subdivision in paragraph 7.3, and then the information required by regulation in paragraph 7.4.

Information Requirements For Subdivision

The objector has singled out City Wide Information Requirements For Resource Consents Rule 1.2(p) in the discussion of the effects that apply to the subdivision application. The objector discusses the limitations imposed on the information requirements for controlled and limited discretionary activities, but has mis-interpreted the District Plan in terms of the activity status of the application. In the case of non-complying activities, it is usual for all of the matters identified in General Information Requirement Rules 1.2(a) to 1.2(p), plus the additional matters specified on the Resource Consent Application Check Sheet to be provided to Council.

Effects of Subdivision and Information Required By Regulation

The assertion by the objector that subdivision of land has no adverse environmental effects, (as stated in the objection at paragraph 7.3, line 3) is not considered to be appropriate. Council has extensive experience of subdivision in the Foothills Environment, and has a duty to ensure that all subdivisions avoid or mitigate the effects that activities such as the creation of driveways and other impermeable surfaces, earthworks, and vegetation alteration create. Further to this, there is no geotechnical report provided that shows that the indicative roads and building platforms are sufficiently stable.

Given that the subdivision application is a non-complying activity, the application itself was deficient in the information requirements (including the assessment of effects) and lacks the specific and detailed information requirements necessary for the Council to adequately assess the application.

Effects Of Land Use Not Relevant

Again, the assertion by the objector that the subdivision of land has no adverse environmental effects (as stated in the objection at paragraph 8.1, line 6) is not considered to be appropriate. Council has extensive experience of subdivision in the Foothills Environment, and has a duty to ensure that all subdivisions avoid or mitigate the effects that activities such as the creation of driveways and other impermeable surfaces, earthworks, and vegetation alteration create. Further to this, there is no geotechnical report provided that shows that the indicative roads and building platforms are sufficiently stable. It is well established that subdivision consent applications must be assessed as more than mere lines on a plan; effects of land use are relevant considerations (eg. *Kitewaho Bush Reserve Co Ltd v Waitakere City Council* (A106/01); *Pukenamu Estates Limited v Kapiti Environmental Action Inc* (High Court, Wellington, AP106/02, Ronald Young J, 1 July 2003)).

Given that the subdivision application is a non-complying activity, the application itself was deficient in the information requirements (including the assessment of effects) and lacks the specific and detailed information requirements necessary for the Council to adequately assess the application.

Effects Of Discharge Not Relevant

The objector refers to the Council's statement that the relevant resource consents will be required from the Auckland Regional Council. This was referred to in paragraph 3.1 of the Council's letter. The applicant/objector has claimed that the effects of discharge from the subject land are not relevant to its current application. The Council disagreed and set out its reasons in the letter.

Again, Randerson J's decision is relevant in so far as it confirms the Council's discretion under Section 91, that is, the Council may defer an application where it considers that additional consents will be required. The applicant/objector would require a discharge permit from the Auckland Regional Council in order to proceed with its planned development.

Effects On Other Owners Not Relevant

The objector claims to have supplied information including leases, forestry rights and powers of attorney in respect of the subject land however no evidence has been supplied in the context of the present applications. Some of the subject land is held by persons/entities other than the applicant/objector. The effects of the proposal on the other owners and occupiers is relevant. The information supplied with the application is inadequate for a proper assessment of the effects on other owners/occupiers of the subject land.

Joint Applications

It is not clear from the documents supplied which parts of the document are applicable to the Certificate of Compliance, and which parts are applicable to the subdivision application. The majority of the documentation appears to relate to the subdivision application, but the Council letter clearly states that it is not appropriate for the Council to make the decision about what information is relevant to which application. Consequently it is appropriate for the objector to separate the two applications, and provide all the relevant information for both applications. This will ensure that the Council is clear about nature of the application(s) it is receiving and the information that has been supplied to support that particular application. In particular the statutory processes are quite distinct and different considerations apply to each. It is inappropriate to attempt to merge or fuse consideration of the two genres of applications.

Delay

The objector alleges that the Council misused Section 88(3) as a “delay mechanism”. However, the Council rejected the application within the five working day period specified in section 88(3) of the Resource Management Act 1991 on the grounds set out in the Council’s letter of 28 February 2006. The objector has mis-interpreted the District Plan and relevant case law, and therefore has no basis upon which to allege that the Council has acted to delay the processing of the application.

Administration Charges

Paragraph 12.1 of the objection claims that administrative charges are not a ground upon which an application may be rejected.

Paragraph 3.4 of the Council’s letter relates to the matter of the Resource Management Act 1991 not envisaging the joint lodgement of Certificate of Compliance and subdivision applications. It provides three reasons for not severing the two applications, one of which is the matter of administrative charges (referred to in paragraph 3.4(c)). The matter of incorrect administrative charges was a relevant factor in the Council’s original decision to reject the applications.

Council has a 100% cost recovery policy in relation to the processing of resource consents and is empowered by Section 36 of the Resource Management Act 1991 to fix charges associated with the receiving, processing and granting of the consent (refer Section 36(1)(b)). For this application the Council received \$2,750.00 from the applicant.

The Council charges \$850.00 as a base fee for the processing of “complex” land use Certificates of Compliance. It does not accept the applicants’ assertion in the application that the Certificate of Compliance application falls into the “Simple” Category, which requires a base fee of \$385.00. The Council also charges \$2,750.00 for subdivisions creating 21 or more lots.

In both Certificate of Compliance and Subdivision applications, where technical or specialist professional disciplines are required to assist in the processing of the application, that cost is separate to the base fee, and charged over and above the base fee.

The base fees paid in relation to this application do not cover the cost of processing both the Certificate of Compliance and the Subdivision Consent application. The applicant asserts in the application that if the Certificate of Compliance application is refused, the \$2,750.00 fee paid could then be used to meet the cost of processing the subdivision application. The objector does not acknowledge that processing the Certificate of Compliance application would incur costs to the Council. If the Certificate of Compliance application was refused, the remainder of the \$2,750.00 fee paid would not meet the base fee requirements for the processing of a subdivision of more than 21 lots.

Given this possibility, the Council remains of the view that the processing fee paid is deficient, and that it is appropriate that the Certificate of Compliance application be severed from the subdivision application, and the appropriate base fees paid for both.

Having considered the matter of administration charges raised by the objector in this part of the objection, it is considered that this matter is without substance and does not amount to an error by the Council in its rejection of the Certificate of Compliance application or the alternative subdivision application.

Applications for Certificates of Compliance (proposed boundary adjustments and lease arrangements)

In the alternative to the subdivision consent applications, the applicant sought certificates of compliance for the proposed activities.

Certificate Of Compliance Not Subject To Section 88(3)

The objector claims that an application for a Certificate of Compliance is the same as an application for resource consent. However, Randerson J in *Waitakere City Council v Kitewaho Bush Reserve Company Ltd & Ors*¹ confirmed in obiter that, until granted, an application for a Certificate of Compliance is not deemed to be an application for resource consent. As noted above, the *Kitewaho* decision also confirmed that it is incumbent upon a party asserting that resource consents are not required, or that a certificate of compliance should issue, to provide all reasonably necessary information to establish those facts.

Further, the Council has a statutory discretion to return an application that is lacking proper supporting information. This was not a case of an application that could be considered to have some merit but required the provision of some additional information in order for Council to determine the application (in which case further information could have been sought under Section 139(2)). Instead, the applicant/objector had merged the Certificate of Compliance and subdivision consent applications in the one deficient application. The Council was entitled to reject the applications as fundamentally defective and exercise its discretion against the grant of waiver under Subsection 37(1) and (2).

The reasons for the rejection of the Certificate of Compliance applications are set out in detail in the original decision letter by Council which is appended to this report and are referred to in summary form above under the heading "Joint Applications".

CONCLUSION

A number of issues have been raised in the section 357 objections, and they require a decision. The matters that require a determination are identified as

Application 1 (referred to as the Lease Subdivision)

Certificates of compliance for boundary adjustments and subdivision of land as depicted on plans FS1 and FS2

or, as an alternative:

subdivision consent for issue of fee simple title as depicted on plan FS1 and lease subdivisions on plans L1 to L80.

Application 2 (referred to as the Cross Lease Subdivision)

Certificates of compliance for boundary adjustments and construction of 77 sheds

or, as an alternative:

Subdivision consent for cross lease as a controlled or limited discretionary activity.

¹ [reference]

Application 3 (referred to as the Fee Simple Subdivision)

Certificates of compliance for boundary adjustments and lease arrangements as depicted on plans FS1 and FS2;

or, as an alternative:

Subdivision consent seeking consent to subdivisions as depicted on plans FS3 and FS4.

For the reasons set out above, it is concluded that the three resource consent applications should not be accepted for processing by the Council, as they are deficient in terms of Section 88(3) of the Resource Management Act 1991. For reasons set out above, the Section 139 applications for certificates of compliance are also fundamentally defective and no waiver should be granted under Section 37 of the Act. The decision made by the Council and recorded in its letter dated 28 February 2006 was valid and was accurate in its application of the relevant district plan provisions.

RECOMMENDATIONS

That pursuant to sections 357 and 357A of the Resource Management Act 1991, subject to additional or contrary information being presented at the hearing, the three objections made by Glorit Subdivisions Limited; London and Greenwich General Trading Company Limited; Peter William Mawhinney; Perceptus Limited; Swanson Heights Limited; Waitakere Resource Consents Limited **be declined** in respect of applications for

Application 1 (referred to as the Lease Subdivision)

Certificates of compliance for boundary adjustments and subdivision of land as depicted on plans FS1 and FS2

or, as an alternative:

subdivision consent for issue of fee simple title as depicted on plan FS1 and lease subdivisions on plans L1 to L80.

Application 2 (referred to as the Cross Lease Subdivision)

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Application 3 (referred to as the Fee Simple Subdivision)

Certificates of compliance for boundary adjustments and lease arrangements as depicted on plans FS1 and FS2;

or, as an alternative:

Subdivision consent seeking consent to subdivisions as depicted on plans FS3 and FS4.

Report prepared by: Eryn Shields, Principal Planner: Resource Management.

