

# RULINGS FROM THE COURTS

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## **Environment Court decision on effect of side agreement on activity status**

*Hewetson v Queenstown Lakes District Council, W056/09, 27 July 2009, Judge Dwyer*

This decision dealt with the effect of a side agreement between a developer and Council in respect of the application of planning provisions. The Court held that the side agreement in question could not have the effect of changing the activity status of an activity and that the application of the doctrine of estoppel is not applicable in resource management law.

### **Background**

In 2007, Mr Hewetson applied for a resource consent to convert an existing storage shed on the western slopes of Dublin Bay, Lake Wanaka, into a house. Mr Hewetson's property was one of three allotments created by subdivision in 1993. The property was located in an Outstanding Natural Landscape area and the conversion was considered a discretionary activity under the District Plan.

The Queenstown Lakes District Council refused to grant consent for the conversion because of the adverse effects on the Outstanding Natural Landscape. Mr Hewetson appealed the decision to the Environment Court. He argued that the application should have been dealt with by the Council as a controlled activity rather than a discretionary activity.

### **Issues and Court's findings**

Mr Hewetson submitted that a side agreement, a deed entered into by the Council and the original owner of the land, made his application a controlled activity. He also submitted that the Council was estopped from treating his application differently from an earlier consent for a cottage on the property and the consents for houses on the adjacent

subdivided properties, which were assessed as controlled activities.

In response the Council submitted that the agreement did not override the District Plan provisions and, if it was relevant, had the effect of adding development constraints on the appellant. It also argued that the way in which previous applications were assessed did not prevent it from treating this application differently in accordance with the District Plan.

### *Effect of side agreement on activity status*

The side agreement was entered into by Council and the original owner of the property by way of quid pro quo for the subdivision consent. Under the Transitional District Plan at the time, subdivision in rural areas was tied to a requirement that the properties created be capable of being used as independent farming properties or independent economic units.

The subdivision application was originally declined by the Council and the owner appealed the decision to the Planning Tribunal. However before the appeal could be heard the Council came to an agreement with the owner that the consent could be granted. The subdivision was approved by the Planning Tribunal.

The side agreement required various horticultural works to be carried out on the sites. Once the works were completed, the agreement provided that an application for a house could be considered and that Council would have regard to three specific matters including visibility and design of the building and landscaping. However, the agreement did not go as far as to state that consent would be granted (as is the case for controlled activities).

The Court held that the side agreement could not change the discretionary activity status provided for in the District Plan to a controlled activity status. The Court came to this conclusion after considering

section 77B of the Resource Management Act 1991, which provided that the only instrument that can identify a particular activity as controlled, specify the matters over which control is reserved and restrict a consent authority's power to impose conditions, is the relevant District Plan.

### *Application of estoppel*

The Court held that the applications to erect houses on the adjacent subdivided properties were determined in accordance with the District Plan at the time the applications were made. The Court accepted that the cottage consent on the property was, in fact, dealt with as a controlled activity based on the provisions of the deed. However, the Court found that the previous applications had been incorrectly assessed as controlled activities.

Notwithstanding this, the Court held that the Council could not be estopped from considering the application as a discretionary activity in accordance with the District Plan. The Court referred to section 84 of the RMA, which provides that the Council is obliged to act in accordance with the terms of its District Plan, to support its finding.

### **Concluding comment**

This decision highlights the importance of ensuring that any agreement with Council regarding the status of an activity or which specifies matters over which the Council maintains discretion, is recognised and provided for in the relevant District Plan.

It is also a helpful reminder that the activity status of applications is assessed against the current provisions on the relevant District Plan, regardless of how neighbours' applications or earlier consents have been dealt with. Even in situations where the Council has processed a similar application in a certain way, where that was incorrect the Council cannot be compelled to in effect continue the error.