

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of an application for land use consent (LUC-2018-669) at 781 Outram-Mosgiel Road, Outram.

BY SE & JK MCARTHUR

Applicant

TO DUNEDIN CITY COUNCIL

The Council

**EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF SE & JK MCARTHUR**

INTRODUCTION

1. My name is Allan Cubitt. I hold Bachelor of Arts and Law Degrees from the University of Otago. I am an affiliate member of the New Zealand Planning Institute and have been involved in resource management matters since 1989. During this time, I have been involved in many aspects of planning and resource management throughout the South Island. I was the principal author of three District Plans prepared under the Resource Management Act, being the Southland, Clutha and Central Otago District Plans. I have also participated in the review of numerous District and Regional Plans throughout the South Island for a large range of private clients.
2. I am the Principal of Cubitt Consulting Limited that practices as planning and resource management consultants throughout the South Island, providing advice to a range of local authorities, corporate and private clients.
3. I am also a Certified Hearings Commissioner (Chair certified) having completed the 'RMA: Making Good Decisions' programme. I have conducted numerous hearings on resource consent applications, designations and plan changes for the Dunedin City Council, the Southland District Council, the Hurunui District Council, the Timaru District Council, the Waitaki District Council, the Grey District Council, the Otago Regional Council, the West Coast Regional Council and Environment Southland. I was also the Chair of Environment Southland's Regional Policy Statement Hearing Panel and the Chair of the Hurunui District Council Hearing Panel on the proposed Hurunui District Plan.
4. I am familiar with the Dunedin City District Plans, the Otago Regional Policy Statement and the other relevant statutory planning documents. I am also familiar with the application site and the surrounding environment. Cubitt Consulting Limited prepared the resource consent application documentation for the site.
5. While this is a local authority hearing, I have read and agree to comply with the Code of Conduct for Expert Witnesses set out in the Environment Court Practice Note on Alternative Dispute Resolution, Expert Witnesses, and Amendment to Practice Note on Case Management. My evidence has been prepared on that basis.

SCOPE OF MY EVIDENCE

6. My evidence will cover the following matters:
 - The site and the proposal
 - Status of the proposal and Section 104
 - The baseline
 - Environmental effects
 - The objectives and policies of the District Plans

- Decision Making Framework

7. My evidence is based on the application material, my visits to the site and the surrounding area, the submissions received and the Council Consultants Planner's report.

THE SITE AND THE PROPOSAL

8. The site has been fully described in the application documentation and the planners report but I briefly set out the key points here:

- The property has an area of 2.0234 hectares and has formed access to SH 87, which is a Limited Access Road at this location. The site is listed as having a registered Crossing Place, numbered 31.
- The property contains a raspberry and strawberry plantation that occupies most of the site. The applicants, who have operated a horticulture business in the area for in excess of 50 years, also grow vegetables, including cauliflowers, lettuces, leeks and potatoes, in the wider Outram area.
- A stall has also been operating from this site for the last 40 years retailing the fruit and vegetable produced from the applicant's holdings. The stall replaced a dwelling that was previously on the site.
- The stall and associated cool store are set back approximately 20m from the road, with the area in front of the stall occupied by a car park, with separate entry/exit lanes from SH 87.
- A resource consent was granted in 2004 to allow the sale of 'real fruit' ice cream and yoghurt from the site, using the berries produced on site. There is no sale of commercial ice cream brands.
- Over the summer period, up to 5 staff from the local community are employed in the stall.
- The wider area is generally rural, although there are some undersized rural allotments in the area. Directly adjoining the site to the west, 799 Outram-Mosgiel Road is 2.3-hectares in size, while just across the bridge 52 Mountford Street is only 3246m². To the east is 720 Outram-Mosgiel Road at 4047m² and 663 Outram-Mosgiel Road at 3335m².

9. The proposal is to essentially increase the scale of the existing retail outlet to ensure the viability of the applicant's market garden business, along similar producers, into the future. This will involve the ability to retail produce not only grown on this site, but also from the local area as well as other parts of Otago. In addition to fruit and vegetables, other local produce such as homemade jams (from the applicant's own berries), honey and eggs, would also be retailed when they were available.

10. As a consequence, consent is sought that would enable the existing rural retail outlet to sell food produce produced in the wider Otago region, which is not 'commercially' branded. The proposal will be based on a number of the principles of the Local Food Hub concept. The objective is to retail fresh, high quality locally grown food, which is promoted in a way that the customer is provided with the back story of the social, environmental and community values incorporated into the production process.
11. In order to ensure the success and viability of the proposal, consent is also sought to reinstate the dwelling on the property so that the applicants can live on the site. The dwelling will essentially be attached to the existing retail stall, with an existing cool store building to be removed.
12. The application also includes a number of conditions agreed with the NZTA. The conditions relate to the formation of the State Highway access and a noise insulation standard for the proposed dwelling to address reverse sensitivity effects.

STATUS OF THE PROPOSAL AND SECTION 104

13. The site is zoned **Rural** in the Operative District Plan ("ODP") and **Rural Taieri Plains** in the Proposed Second-Generation Dunedin City District Plan ("2GP"). The bulk of property is also identified as containing high class soils in both Plans. However, this does not apply to the existing raised north east corner of the site where the existing stall and car park is located. The same area of the site is also affected by a flood hazard overlay (Hazard 1) and the Otago Regional Council Designation 217 for the "Lower Taieri Flood Protection Scheme" under the 2GP.
14. I am in agreement with the Mr Henderson's report regarding the status of the activity and it is accepted that the proposal is a non-complying activity under both plans.
15. Mr Henderson notes at paragraph 17 of his report that the applicant has identified the need to get approvals from the Otago Regional Council in relation to the designation affecting the property (D217), which relates to flood control matters. Section 176(1)(b) of the Act provides that:
 - a. *no person may, without the prior written consent of that requiring authority, do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project or work to which the designation relates, including—*
 - i. *undertaking any use of the land; and*
 - ii. *subdividing the land; and*
 - iii. *changing the character, intensity, or scale of the use of the land.*

16. This proposal involves both a change in the intensity of the existing use of the site, along with the addition of a new land use (the dwelling). While we do not believe these works are likely to hinder or prevent the purpose of the designation being achieved, the proposal has been discussed with the relevant people at the Otago Regional Council. They have advised that they see no 'red flags' and are comfortable with the approach that the applicant seeks the necessary approvals from them, if and when the consent in front of you is approved. On that basis we do not consider Section 91 of the Act to be relevant here. (That section allows Council to defer the hearing of the application if other consents are necessary and important for a better understanding of the activity.)
17. Turning to the assessment of resource consent applications, this begins with consideration of the proposal in terms of the matters listed in section 104 of the Act - the actual and potential effects of the activity, the provisions of relevant plans and policy statements, and any other relevant and reasonably necessary matter. However, non-complying activities must get through either the effects or policy threshold test in Section 104D before the consent authority can exercise its discretion to grant or refuse the application.

THE PERMITTED BASELINE

18. At paragraphs 30 to 32, Mr Henderson discusses the permitted baseline and the existing environment. Section 104(2)(b) of the Act provides Council with a discretion to disregard the effects of an activity if a rule permits an activity with that effect. The baseline is established by determining what can occur as of right on the site and what can occur by way of a resource consent, implemented or not. Any effects from an activity that is equivalent to or less than what can be generated under this scenario need not be regarded by the Panel.
19. I generally agree with Mr Henderson's position on the baseline for this site. The original dwelling on the site does not form part of the permitted baseline and there is no baseline for residential development on the site. The existing resource consent obviously establishes a baseline for commercial activity at the site, being the production and sale of real fruit ice cream and produce. However, I would also note that the existing environment includes the sale of fruit and vegetables from the stall that have not been produced on the site. This has occurred for at least the last 40 years.

EFFECTS ON THE ENVIRONMENT

20. Mr Henderson addresses a wide range of issues in his environmental effect's assessment of the proposal. Overall, he has concluded that any adverse environmental effects of the proposal will be no more than minor (subject to the appropriate conditions being imposed) and, on that basis, has accepted that it passes through the s104D gateway test for consideration by the panel. I largely agree with Mr Henderson's conclusions and accordingly my comments on environmental effects are brief.

Rural Amenity Values

21. In my view, the effect of the proposal on rural amenity values is probably the most critical matter in the success or otherwise of the application, along with the issue of rural productivity. Mr Henderson has addressed this issue at paragraphs 37 to 42 of his report and concludes that *“any adverse effects on rural amenity will not be more than minor”*. His view is essentially based on the fact that the site is existing and has been operating as rural retail outlet for many decades, and that the proposal is designed to maintain the rural use of the site.
22. I agree with Mr Henderson’s approach to assessing this issue. When assessing the impact of a proposal on amenity and rural character values, the character of the existing environment becomes the key factor. The objective of this proposal is to ensure the productive values of the site are not only maintained, but enhanced through ensuring a viable retail outlet for the produce is secured. Hence, the new built development on the site will attach to the existing buildings to ensure the productive areas of the site are avoided and the open, rural character of the site is maintained.
23. Mr Henderson is also comfortable that the location of the buildings will not have any adverse effect on the amenity values of adjoining landowners or the safe and efficient operation of the State Highway. In this context, I note that the owner of 749 Outram-Mosgiel Road (Ms Botting), being the property most affected by the proposal, and NZTA, have either given written approval or provided a submission in support of the proposal.

Intensity of the Operation and Transportation Effects

24. The intensity of an activity such as a retail outlet can have amenity and traffic related effects. Mr Henderson deals with these issues at his paragraphs 43 to 47. The applicant undertook significant consultation with the NZTA and provided them further advice on the details of current operation (including signage, car park configuration, car park spill over areas etc) and what is anticipated with the increase in activity on the site, including hours of operation, vehicle numbers and type expected at the site, and the like. As a part of this consultation, the applicant agreed to update the existing access and provide an appropriate level of noise insulation in the dwelling. As a consequence of this, the NZTA has given written approval to the proposal. Hence, the traffic related effects of the proposal cannot therefore be considered by the Panel.
25. Mr Henderson also notes that the proposed hours of operation only affect NZTA, given the separation between the subject site and neighbouring properties. In the context of the neighbouring properties, he highlights the submission in support from the neighbour at 749 Outram Mosgiel Road. Again, the Panel need not be concerned with this aspect of the proposal.

High Class Soils/Productive Potential of Rural land

26. While the site generally comprises high class soil, the new built development proposed will link with the existing buildings and avoid the high-class soils within the site. However, the most important aspect of this proposal (possibly more relevant in a policy context) is the potential benefits this proposal will have for the small fruit and vegetable producers in the area who utilise high class soil but who do not necessarily have a sustainable and secure retail outlet. The ability to retail other produce from the area will assist in ensuring the viability of other producers (not just on economic units) and increase awareness of fresh, local food sources. This in turn will assist in retaining land, particularly high-class soil, in productive use, even on smaller lifestyle blocks.
27. Hence, while the proposal will have no direct physical impact on high class soils, it offers the opportunity to ensure the use of these soils for food production remains viable and secure in what are currently difficult times for this industry.

Hazards and Earthworks

28. The proposed District Plan identifies the majority of Lot 1 as a Hazard 1 – Flood zone, generally below the raised area where the built development occurs, while the ORC has designated the low-lying areas for its “Lower Taieri Flood Protection Scheme”. The dwelling will be sited on the edge of these notations but on poles so as to avoid the ponding area and avoid affecting any overland flows. Mr Henderson deals with this issue in his paragraphs 50 to 53 and highlights that the applicant has advised that the approval of the ORC for any works that may affect the designations will be sought if and when these consents are granted. On that basis, he considers there will be no adverse effects arising from the natural hazards that affect the site that are more than minor.
29. Mr Henderson has also addressed the potential HAIL issue at paragraph 53 (given the site is a market garden) but it is unlikely the standards of that legislation will be infringed by this activity. However, the applicant is aware of these requirements so the situation will be reassessed once the final extent of any earthworks needed is known.
30. In conclusion, the proposal is not constrained by the natural hazards affecting the site, while its development will not exacerbate the effects of these natural hazards.

Conclusion on Environmental Effects

31. I agree with Mr Henderson that the proposal will have no more than minor adverse effects on the environment. On that basis, I have concluded that it passes through the first gateway test of section 104D. The proposal will also have the significant positive effects of supporting the

local market garden community (and that of the wider Otago area) and providing a local source of fresh, high quality produce.

OBJECTIVES AND POLICIES OF THE DISTRICT PLANS

32. The fact that the activity is non-complying means direct support from any specific provisions of the plan will be unlikely. Thus, the usual approach when considering the relevant objectives and policies under the 104D test for non-complying activities involves an overall consideration of the purpose and scheme of the Plan rather than determining whether the non-complying activity fits exactly within the detailed provisions of the Plan. However, the High Court decision *QCL v Queenstown Lakes District Council* [2013] NZHC 817 at [35] and [37] did throw some doubt on this approach by suggesting that the activity must not be contrary to any of the objectives and policies. However, I understand that Court of Appeal cases such as *Dye* and *Arrigato* have endorsed the accepted practice while the Environment Court decision of *Cookson Road Character Preservation Society Inc. v Rotorua District Council* [2013] NZEnvC 194 specifically discussed the High Court finding and deliberately determined not to apply it, considering it contrary to accepted practice and Court of Appeal authority.
33. It would seem therefore that the correct approach would still require a holistic assessment of the objectives and policies and it is on this basis that I have assessed the proposal under section 104D(b).
34. Mr Henderson has undertaken a thorough review of the relevant objectives and policies in his report. In relation to the ODP, while Mr Henderson finds some (minor) inconsistency with the relevant policy provisions, he does not find the proposal contrary to those provisions including the key Rural section. I agree with Mr Henderson's findings and as a consequence do not propose to address the ODP further.
35. In relation to the 2GP, Mr Henderson also finds the proposal not to be contrary with the bulk of policy framework with the exception of Policy 16.2.1.7, which requires residential activity to be avoided on sites that do not comply with the density standards for the zone. While I agree with Mr Henderson on this point, I consider that the proposal is consistent with the other policies dealing with this issue in the 2GP. Objective 16.2.1 sets out what the Plan considers the rural parts of the city should be used for, with these three things being '*productive rural activities*', '*the protection and enhancement of the natural environment*' and other '*activities that support the wellbeing of rural communities where these activities are most appropriately located in a rural rather than an urban environment*'. The objective then goes on to say that 'residential activity' in rural zones is limited to that which directly supports farming. Policy 16.2.1.5 again requires residential activity to be at a level (density) that supports farming activity. This is a broader test than that within Policy 16.2.1.7, as it merely requires residential

activity to be at a level that supports farming, rather than meeting any specific standard as Policy 16.2.1.7 requires.

36. In this case, the residential activity will directly support the farming of the site, along with produce retail outlet which I consider falls with the 'other activity' category of the objective. In this context, I agree with Mr. Henderson that the proposal does not compromise Policy 16.2.4.4 as it does not reduce rural productivity or displace rural activities.
37. I note that Mr. Henderson has not directly addressed Policy 16.2.1.8, which is a directive policy (and not therefore aligned with the effects-based approach of the RMA) that seeks to avoid industrial and commercial activities in the Rural zone unless otherwise provided for. This is a commercial activity not otherwise provided for.
38. However, Mr. Henderson has considered the matter in the context of the Strategic Directions policy framework (Objective 2.3.1 and Policy 2.3.1.2). I would note in this context that the Environment Court in the *Blueskin Energy* case considered that Strategic Directions provisions are not to be applied directly to applications for resource consent but are to be borne in mind when interpreting and applying the subsequent detailed plan provisions.
39. However, Mr Henderson's view aligns with my position on this particular policy framework. Because it is a retail activity that sells produce derived from the rural zone, he considers it supports the rural economy. I agree. In my view, the nature of this particular retail activity is such that it clearly supports the rural economy and rural activities. As was highlighted in the application *"the purpose of the proposal is in fact to secure the long-term productive use of not only this site but also other existing productive sites in the area that do not have particularly secure access to markets. The ability to retail other produce from the area will assist in ensuring the viability of other producers (not just on economic units) and increase awareness of fresh, local food sources. This in turn will assist in retaining land, particularly high-class soil, in productive use, even on smaller lifestyle blocks"*. The proposal will be based on a number of the principles of the 'Local Food Hub' concept, which Mrs McArthur will discuss in further detail in her presentation to the Panel.
40. In the context of this policy suite, it should also be borne in mind that the site already retails produce that is not grown on the site and has done so for a number of decades. Hence, the use is nothing new for this particular location.

Conclusion on the Policy framework

41. As a consequence of the forgoing, I am of the opinion that the proposal is not contrary to the policy framework of the 2006 District Plan (and is in fact consistent with much of it) or the overall thrust of the 2GP. While it is contrary to the density restriction imposed by Policy 16.2.1.7 of the 2GP, this policy should not trump the wider policy framework of the 2GP given the nature of the current use of this site. On that basis, I consider it also passes through the policy limb of the s104D test.

DECISION MAKING FRAMEWORK

42. Both Mr Henderson and I consider that the proposal passes through both limbs of the s104D test. Mr Henderson has assessed the proposal against the relevant decision-making framework and considers that the proposal should be granted consent, subject to conditions. In terms of the 'true exception' test, Mr Henderson considers that the proposal has specific characteristics that enable it to be considered a unique activity or a true exception to the point that the integrity of the District Plan is not challenged. I agree and believe the purpose of the Act will be best served by granting consent to the proposal subject to the conditions proposed by Mr Henderson.

A handwritten signature in black ink, appearing to read 'P. Cubitt', is positioned above the printed name.

Peter Allan Cubitt
11 May 2019