

TO: Hearings Committee

FROM: Jeremy Grey, Planner

DATE: 22 January 2018

SUBJECT: **CANCELLATION OF COVENANT (PURSUANT TO SECTION 240 OF THE RESOURCE MANAGEMENT ACT 1991) APPLICATION S240-2017-1 1069 AND 1075 HIGHCLIFF ROAD, PUKEHIKI**

INTRODUCTION

- [1] This report has been prepared on the basis of information available on 22 January 2018. The purpose of the report is to provide a framework for the Committee's consideration of the application made pursuant to section 240 of the Resource Management Act 1991 (the Act). The Committee is not bound by any comments made within the report, but is required to make a thorough assessment of the application using the statutory framework of the Act before reaching a decision.

BACKGROUND TO APPLICATION

- [2] The land at 1069 and 1075 Highcliff Road is legally described as Lot 2 DP 306650 (Computer Freehold Register (CFR) 25979) and Lot 1 349575 (CFR 203124), respectively. It should be noted that the land comprised in these CFRs shares a common boundary. Lot 1 DP 349575 has an area of approximately 11.3 hectares (ha), while Lot 2 DP 306650 has an area of approximately 8.3ha. Lot 1 DP349575 was created via subdivision consent RMA-2005-0071 (renumbered as RMA-2005-368699), issued on 8 February 2005, and separated from a 55ha balance area. This balance area is located to the south of Highcliff Road.
- [3] A condition was included on the subdivision consent, pursuant to section 220(2)(a) of the Act, requiring the imposition of a covenant (6470757.2) on the CFRs mentioned above, subject to section 240 of the Act. The covenant required that Lot 1 DP 349575 (1075 Highcliff Road) shall not be transferred, leased or otherwise disposed of except in conjunction with Lot 2 DP 306650 (1069 Highcliff Road). The covenant allowed for a total combined area between 1069 and 1075 Highcliff Road of 19.6ha and was offered by the applicant (JS Morris) as a condition of the subdivision consent. This afforded the Council the comfort to enable the subdivision consent to be assessed and granted on a non-notified basis as, essentially, no resulting site would be less than the minimum site size of 15ha, required by the then Proposed Dunedin City District Plan.
- [4] Land use consent application LUC-2016-481 was applied for on 10 October 2016 for the establishment of a residential unit on the site at 1069 Highcliff Road, incorporating a proposed dwelling and shed. The application was publicly notified on 29 October 2016, and a hearing was subsequently held. After the hearing was undertaken, it was realised that both sites were held together and could not be separated without the

cancellation of the covenant. As a result, no land use consent was issued, given that the discovery of the covenant altered the basis on which the application was assessed.

DESCRIPTION OF APPLICATION

- [5] The applicant (Ali Charlton) has subsequently re-submitted her proposal, which now proposes the cancellation of the section 240 covenant registered on CFRs 25979 and 203124, to allow for the separation of Lot 1 349575 and Lot 2 DP 306650 and create two stand-alone sites. The cancellation of the covenant is being considered contemporaneously with land use consent applications LUC-2017-401 (to establish residential activity on 1069 Highcliff Road) and LUC-2017-402 (to authorise the continuation of the existing residential activity on 1075 Highcliff Road).

STATUTORY REQUIREMENTS

Section 240 of the Resource Management Act 1991 states:

Covenant against transfer of allotments

- (1) *Where a subdivision consent includes a condition under section 220(1)(b) which requires that the owner enter into a covenant with the territorial authority of the kind referred to in section 220(2)(a), the territorial authority—*
 - (a) *Shall not approve the survey plan unless the owner has entered into such a covenant; and*
 - (b) *When the covenant has been entered into, shall endorse on the survey plan a certificate to this effect.*
- (2) *Where a survey plan is endorsed with a certificate of the kind referred to in subsection (1)(b),—*
 - (a) *The [Registrar-General of Land] shall not deposit the survey plan under the Land Transfer Act 1952, and (in respect of a subdivision by the Crown) shall not issue a certificate of title for any separate allotment on a survey plan approved by the Chief Surveyor for the purposes of section 228; and*
 - (b) *The [Registrar-General of Land] shall not deposit the survey plan in the Deeds Register Office,—*
unless the covenant referred to in the certificate has been lodged for registration.
- (3) *Every covenant referred to in subsection (1) shall be in writing, be signed by the owner, [be signed by the [[chief executive]] or other authorised officer] of the territorial authority, and be deemed—*
 - (a) *To be an instrument capable of registration under the Land Transfer Act 1952 and, when so registered, to create in favour of the territorial authority an interest in the land in respect of which it is registered, within the meaning of section 62 of that Act; and*
 - (b) *To run with the land and bind subsequent owners.*
- [(4) *The territorial authority may at any time, whether before or after the survey plan has been deposited in the Land Registry Office or the Deeds Register Office, cancel, in whole or in part, any covenant imposed under this section or under the corresponding provision of any former enactment.]]*
- [(5) *When a territorial authority cancels a covenant in whole or in part, then—*
 - (a) *Where the survey plan has not been approved by the Chief Surveyor, a memorandum of the cancellation shall be endorsed on the survey plan:*
 - [[(b) *Where the survey plan has been approved by the Chief Surveyor or deposited, the territorial authority must forward to the [Registrar-General of Land] a certificate signed by the [chief executive] or other authorised officer of the territorial authority to the effect that the covenant has been cancelled in whole or in part, and the [Registrar-General of Land] must note the records accordingly.]]]*

PLANNING ASSESSMENT

The applicant elected at the time of RMA-2005-368699 to hold the subject lots together to create a site of approximately 19ha, which was followed through by the Council with a condition of the subdivision consent. The purpose of the existing covenant was to ensure that an under-sized Rural lot was held in a site of over 15ha, which was consistent with the residential density provisions of the then Proposed District Plan. This served to negate any potential there may have been to challenge the integrity of the Proposed District Plan. In absence of this condition, it is likely that the Council would have been less amenable to granting consent without the need for public notification, given the risk to plan integrity and of setting and undesirable precedent.

Such concerns remain relevant, particularly in light of the Proposed Second Generation District Plan (2GP). The majority of the subject land is zoned Rural – Peninsula Coast, while the northern portion of 1069 Highcliff Road is zoned Rural – Hill Slopes. The minimum site size required to establish residential activity on a vacant is proposed to be 20ha within the Peninsula Coast zone, while the minimum site size for such activity within the Hill Slopes zone is proposed to remain at 15ha. As such, the density provisions for the area are proposed to remain unchanged or become more stringent. It should be noted that the rural rule provisions of the 2GP are still under consideration and decisions have yet to be issued. However, where the 2GP rural subdivision rules are concerned, these have had legal effect since the date of notification on 26 September 2015.

While the proposal does not technically involve a subdivision of the subject land, the separation of the CFRs under section 240 of the Act would lead to a similar outcome, raising concerns around plan integrity. This would, in my opinion, significantly detract from the original intention of the existing covenant. Furthermore, in light of the proposed 2GP rules, I do not consider the presence of other under-sized sites in the vicinity as reasons for why the subject titles should be separated.

I acknowledge that in respect of the land encompassed by 1069 Highcliff Road, there are limited options for its use, which is not considered large enough to be farmed productively in isolation, as the current application has indicated. Further, it is not identified as containing any high class soils, while 1075 Highcliff Road does contain an area of high class soils. However, it is important in terms of conservation values, encompassing a 1.79ha Area of Significant Conservation Value (ASCV), identified by the operative District Plan as the Peggy's Hill Conservation Covenant (C065). I note that the land also contains native vegetation of lesser quality, which is intended to be enhanced by the applicant. While the separation of the titles would not likely alter the productive capacity of the land or inhibit the enhancement of conservation values on 1069 Highcliff Road, on balance, I do not consider that this outweighs the risk posed to plan integrity.

RECOMMENDATION

That, the Dunedin City Council declines the request, pursuant to Section 240(4) of the Resource Management Act 1991, to cancel Covenant 6470757.2, being a covenant issued pursuant to section 220(2)(a) applying to respective CFRs 25979 and 203124, for the land at 1069 and 1075 Highcliff Road, Pukehiki.

RIGHTS OF APPEAL

Pursuant to Section 120(1A) of the Resource Management Act 1991, no right of appeal to the Environment Court against the whole or any part of this decision exists for the following:

- (a) A boundary activity, unless the boundary activity is a non-complying activity;
- (b) A subdivision, unless the subdivision is a non-complying activity;
- (c) A residential activity, unless the residential activity is a non-complying activity.

(Refer Section 87AAB of the Act for definition of "boundary activity", and refer to Section 95A(6) for definition of "residential activity".)

For all other applications, in accordance with Section 120 of the Resource Management Act 1991, you may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received.

The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
Christchurch Mail Centre
Christchurch 8013

Any appeal must be served on the Dunedin City Council.

Failure to follow the procedures prescribed in Sections 120 and 121 of the Resource Management Act 1991 may invalidate any appeal.

Report prepared by:



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Planner

22/1/18

Date

Report checked by:



Campbell Thomson
Senior Planner

22/1/18

Date