

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of an application for land use consent (LUC 2016-90)
at 1069 Highcliff Road, Pukehiki.

BY ALISON CHARLTON
Applicant

TO DUNEDIN CITY COUNCIL
The Council

**EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF ALISON CHARLTON**

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 Timaru District Council, the Waitaki District 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 Plan, 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
 - Environmental effects
 - The objectives and policies of the District Plan
 - Proposed District Plan
 - Section 104D and Plan Integrity

- Part II matters and Conclusion

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

THE SITE AND THE PROPOSAL

8. The site has been fully described in the application documentation (both the AEE and Mr Moore's report) and the planners report but I briefly set out the key points here:
 - The site is held in an oddly shaped title (CFR 25979) and contains an area of 8.3 hectares. Legal and formed frontage is provided by Highcliff Road on the western boundary of the site.
 - The property is currently vacant, relatively steep, grazing land that contains the Peggy's Hill Conservation Covenant (1.78ha) while there is also areas of native scrub scattered throughout the property. Much of this is in poor condition. The property also contains patches of gorse which are being progressively cleared. A small watercourse flows southwest through the property.
 - The property occupies the lower southwest flank of Peggy Hill, directly on the eastern boundary of the Pukehiki settlement. In the wider environment, there are a large number of non-complying rural properties (at least 13) that contain dwellings. These range in area from 0.71ha up to 11.22 ha.
 - The applicant's current dwelling is located on the adjacent property (1075 Highcliff Road), which is a separate property containing an area of 11.3697ha.
9. At 8.3 hectares, the site is not productive farmland, with a large portion of the site covered in indigenous vegetation or pest plants. The weed problem takes continual management, which is a costly burden when the property does not return an income. This proposal seeks to enable the development of a small dwelling (approximately 130m²) near the southern boundary of the property (at around the 320m contour), along with a new farm shed at the western boundary. A number design controls have been proposed by Mr Moore to minimise visual effects and ensure integration with rural character.
10. Earthworks will be required to form the house site, which will require excavation of a platform approximately 30m long and 17m wide to accommodate the development. Some retaining of the excavations may be needed but this will be no greater than 1.2m high with slopes battered back above and planted as indicated in Mr Moore's Figure 7(a).
11. Associated with this will be a number of environmental enhancement works. The riparian areas adjacent to the watercourse and the areas around the house and shed are to be planted out in locally appropriate indigenous species. This will provide a more dominant framework of native vegetation for the buildings and to enhance the natural values of the

watercourse. A condition addressing the establishment and ongoing protection of these areas is proposed.

STATUS OF THE PROPOSAL AND SECTION 104

12. The site is zoned Rural in the Operative District Plan (“ODP”) and is also located within the Peninsula Coast Outstanding Landscape Area (“PCOLA”). Under the Proposed District Plan (“PDP”) the bulk of the site is Rural Peninsula Coast with the upper portion zoned Rural-Hill Slope, while the Peninsula Coast Outstanding Natural Landscape overlay still applies. The relevant rules of both plans are set out in the planners report and are not disputed by the applicant. It is accepted that the proposal is a non-complying activity.
13. Any assessment of a resource consent application begins with consideration of the proposal in terms of section 104 of the Act; the actual and potential effects of the activity, consistency with the relevant plans and statements and any other relevant and reasonably necessary matter of consideration. However non-complying activities must get through one of two threshold tests in 104D before the consent authority can exercise its discretion to grant or refuse the application.

EFFECTS ON THE ENVIRONMENT

14. Mr Sycamore addresses a wide range of issues in his environmental effects assessment of the proposal. However, I believe the two key issues in the determination of this proposal are the potential effects on amenity and landscape values. Once these issues have been determined then matters of site suitability (geo-technical, storm water and effluent disposal matters); transportation and earthworks become relevant. However, none of these matters are at issue here.
15. Before I address these effects, I will briefly address the permitted baseline and the reasons for this application. Mr Sycamore discusses the permitted baseline at his paragraphs 26 to 29. 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 determining the existing lawfully established development of the site. Any effects from an activity that is equivalent to or less than that need not be regarded.
16. I agree with Mr Sycamore that there is limited baseline for this site because of the landscape overlay. However, in the context of a rural site, one would expect at least a farm shed or barn, regardless of the size of the site. These buildings are restricted discretionary activities and it is very likely that a restricted discretionary application for a farm building

would be granted consent on a non-notified basis. While not part of the permitted environment, the proposed barn could be considered an anticipated development on the property under the rule structure and the effects of the barn would not be unexpected on this property.

17. Turning now to the reasons for the application, as noted in the application, the driver for the proposal is the dissolution of the applicant's relationship. That has not, contrary to comments in both the submitters and the planners report, been promoted as a reason to grant the consent. However, I do note that this situation is possibly relevant when the definition of environment is considered. The Act defines **environment** as including —
- (a) ecosystems and their constituent parts, including people and communities; and*
 - (b) all natural and physical resources; and*
 - (c) amenity values; and*
 - (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters*
18. This situation is one of the conditions referred to in subsection (d) which affects the matters in (a) to (c).
19. But the proposal must also stand on its own merit when assessed against the traditional approach to environmental effects. In this regard, the above definition is also important. The purpose of the Act is enable people “to provide for their social, economic, and cultural well-being”. How the physical resource (in this case, land) is held (in an independent title) is an economic condition that affects the resource and the people who own it. Therefore, it follows in my view, that it is not just the land that must be sustainably managed, but the land in the form it is legally held that must be sustainably managed.

Amenity

20. In relation to amenity values, Mr Sycamore rightly notes that amenity and landscape share a common relationship. In his view, the *“proposed dwelling will not adversely affect the amenity to an extent that is more than minor. That position is also shared by the Council’s Landscape Architect over the longer term, which is discussed in the section below. While the site is within the Landscape subzone, it is not reasonable to anticipate the site will remain undeveloped in perpetuity in terms of appropriately scaled rural building”*. He goes on to discuss the density issue and again rightly notes that the landscape overlay does not exclude dwellings but is more about managing effects of the structures themselves.
21. In relation to the amenity effects of the proposal on the existing environment, my view is that the environment, both that of the subject site and the wider receiving environment must be assessed “as it exists”. This includes any lawfully existing non-complying activities (such as undersized lots and the dwellings on them) and any future permitted activities, and not an environmental ‘ideal’ as expressed in the plan.

22. The definition of amenity values refers to the qualities and characteristics “of an area” that contributes to people’s appreciation of it. This area is relatively unique as it is characterised by rural residential development that is at a higher density to that which is anticipated by the ODP. This development influences the amenity of the area including the subject site. The application highlighted the following development within a kilometre of the site:
- 28 Camp Road – 1.7ha
 - 59 Camp Road- 4.16ha
 - 80 Camp Road – 1.94ha
 - 276 Castlewood Road – 4.46ha
 - 131 Greenarces Street – 8ha
 - 128 Greenacres Street – 7.5ha
 - 974 Highcliff Road – 11.22ha
 - 977 Highcliff Road – 8.15ha
 - 979 Highcliff Road – 1.05ha
 - 1027 Highcliff Road – 10ha
 - 1030 Highcliff Road – 0.71ha
 - 1075 Highcliff Road – 11.46ha
 - 1088 Highcliff Road – 10.11ha
23. The subject site is 8.3 hectares, which is similar to several of these properties. On that basis, I am of the view that the amenity values of the existing environment or the neighbouring properties are not compromised by this proposal. Mr Sycamore seems to agree although with the caveat that this will only be in the ‘longer term’. However, Mr Moore is comfortable that while effects on natural character and rural amenity values will be adverse, they will only be minor in the short – medium term and will reduce to negligible and possibly positive overall as proposed plantings become significant elements in the landscape.

Landscape Effects

24. It is the undersized allotments that makes the application non-complying, not the consents required for the buildings in the outstanding landscape zone. These consents are only a restricted discretionary activity. In relation to submitters concerns that the landscape should be protected from development, a fully complying site would not relieve their concerns.
25. As the Commissioner will be aware, Section 6(c) of the Act does not require the protection of outstanding natural features and landscapes from all subdivision, use, and development. It only requires that protection from inappropriate subdivision, use, and development. So, the question here is whether the proposal is ‘inappropriate’ in this location. Given the high density of development in the area (the Pukehiki settlement and surrounding small rural lots), the location is one that has historically been preferred for occupation. This factor alone suggests to me that dwellings and human occupation in this location is not, per se, inappropriate in this environment. Provided the specific location and design of the

development addresses the key landscape values (relevant to this area, as not all of the PCOLA values are), the development cannot be considered inappropriate if it is reflective of the existing density in the surrounding environment.

26. Mr Moore has assessed the visual effects of the proposal in his evidence. He notes that there are only two public viewpoints from which the proposed buildings will be seen, being Highcliff Road directly adjacent to the property, and Highcliff Road near Buskin Road, approximately 2km distant to the west. Visual effects from these points range from negligible to minor. He also notes that the buildings are effectively screened from surrounding residential viewpoints by intervening vegetation and does not expect adverse visual effects in this context accordingly.
27. Given the intervening screening, topography and distance of the public viewpoints, I take it from Mr Moore's evidence that the proposed development will in fact be reasonably difficult for most people to see. This would suggest that the specific locations proposed for buildings are not inappropriate within this landscape.
28. Mr Moore has assessed the proposal values of the Peninsula Coast OLA (Operative District Plan) and the Peninsula Coast ONL (2GP) at his paragraphs 25 to 27. He believes natural values of the site will be enhanced and any adverse effects on naturalness or qualities of perceived isolation are minimised because of its location at the edge of the settlement of Pukehiki. He also notes that the site is not coastal and there are no adverse effects on natural coastal character, heritage landscape features, wildlife habitats or recognized landform features. With respect to the values listed in the 2GP, it is Mr Moore's view that the proposed development will have no impact on these.
29. Councils in-house landscape expert, Mr Barry Knox, also concluded that "*with landscape mitigation effects on the values of the PCOLA are likely to overall to be minor.* [page 106 of the agenda document]. He does qualify this further down that page by considering the effect may be more in the moderate range until the landscape mitigation is established. Mr Moore does not agree with this (believing they are initially negligible/minor before becoming positive) but I would say that the initial effect of any development will always be more significant at first. Councils largely ignore construction effects on the basis that they are temporary (even though large, staged developments can take up to 5 years) and are necessary to enable the development. In my view a similar approach should be adopted to mitigation as it does take time to 'bed in'.
30. Regardless of this, it does seem to be accepted by Council officers that landscape effects, overall, will be minor and that the proposed plantings will be positive in the long term.

Geo-technical Issues

31. As noted in Mr Sycamores report, Dr Jon Lindqvist has carried out geotechnical investigations in order to determine the general geotechnical conditions of the proposed building site. His work confirmed that the proposed building area and proposed access road hold no identifiable geotechnical risks. Councils Consulting Engineer has viewed Dr Lindqvist's report and essentially confirms that the site is free of natural hazards. Given that the property does contains some steep slopes, he recommends a number of conditions which are acceptable to the applicant.

Transportation and Provision of Services

32. Both of these matters have been assessed by the relevant Council Department. Transportation Planning confirm that the sight line distances for the proposed access are appropriate and that the proposal will only have only a negligible effect on the transportation network. A condition regarding the construction of the access has been proposed, which is acceptable to the applicant. I agree with Mr Sycamore that transportation effects are less than minor.
33. With respect to servicing the development, no Council services will be utilised. As noted in the application, effluent and stormwater from the site will be disposed of on-site using an approved system that is designed to take into account the topography of the site, the extent of vegetation and the proximity to watercourses. Rainwater collection from roof surfaces will serve as the primary source of water for domestic consumption. The development will include measures necessary to comply with the New Zealand Fire Service's Code of Practice for Fire Fighting Water Supplies. Power and telephone services are available nearby.
34. The proposal will not generate adverse environmental effects as a result of servicing the proposed dwellings.

HAIL

35. As Mr Sycamore has noted, the subject land has not been subject to a HAIL search. This was because there is no evidence that the site has ever been used for a hazardous activity or industry in the past and the topography would essentially preclude this. However, if consent is granted, a HAIL search will be required given the change in use. I don't expect any issues to arise from this but if some do, they can be dealt with prior to any building work commencing.

Conclusion on Environmental Effects

36. In my view the development will integrate well with the existing environment. Overall I believe the proposal will in fact have positive effects on the environment given the nature of the receiving environment and the mitigation proposed. On that basis, I have concluded that it passes through the first gateway test of section 104D.

37. As a consequence, I disagree with Mr Sycamores view that the effects on the OLA are more than minor and note that Mr Moore did not say this. He believes they are minor and will most likely become positive as the proposed planting takes hold. I agree with Mr Moore's position on this.

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

38. 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 recent High Court decision *QCL v Queenstown Lakes District Council* [2013] NZHC 817 at [35] and [37] has thrown 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 the Court of Appeal cases such as *Dye* and *Arrigato* endorse the accepted practice and that the recent 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.
39. 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). The objectives and policies of a number of the District Plan sections are relevant to this proposal. These are the Sustainability, Rural Zones, and Landscape. The relevant objectives and policies of each are considered below.

Sustainability Section

40. The Sustainability section sets out the broader focus of the District Plan and deals with three central themes – the sustainable management of infrastructure; the appropriate protection of significant natural and physical resources; and the maintenance or enhancement of amenity values. The introduction discusses the concept of a “holistic” approach to environmental management and considers that this is consistent with the intent of section 5 of the Act. Consequently, the Plan states “*The Council recognises the need for such an approach, both in terms of the requirements of the Act and manner in which many people perceive the environment*” (4th paragraph, page 4:1). While this is not carried through into a particular objective, it is specifically recognised in policy 4.3.10 which is “*to adopt an holistic approach in assessing the effects of the use and development of natural and physical resources*”. This to me allows a consideration of the proposal in the wider sense, without reference to the particular restrictions that might be imposed in the context of the ‘zoning’ of land, which is a legal construct, neither a natural nor a physical resource.

41. While it does not override the zone provisions in the District Plan, it allows Council to ensure that amenity and environmental quality is maintained (appropriate to the use) regardless of whether it is in conflict with the zone provisions or not. Given the nature of this location, the mitigation proposed and the low level of visibility, I am of the opinion that at both the broader level and at a site-specific level, amenity is at least maintained by this proposal in the short term and will be enhanced as the native plantings are established. The building site will retain a high-quality amenity with an excellent aspect and outlook. Because it effectively attaches to an existing rural settlement and utilises non-productive land, it will maintain the amenity of the productive rural land within the City boundary by avoiding it.
42. Policies 4.3.7 and 4.3.8 deal with incompatibility of activities. Policy 4.3.7 is a process policy so is of little use when assessing the effects of an activity but Policy 4.3.8 deals with the same issue. As will be evident from my evidence on the existing environment, this proposal is compatible with the adjoining uses.
43. Objectives 4.2.2 and 4.2.3 and Policies 4.3.2 and 4.3.5 deal with the provision of infrastructure at an appropriate level and without compromising the sustainability of existing infrastructure. The development will be self-serviced and will utilise existing roading infrastructure. Accordingly, the proposal has no impact on infrastructure.
44. Objective 4.2.4 and Policy 4.3.4 deal with the appropriate protection of significant natural and physical resources. Mr Sycamore considers the proposal inconsistent with this policy suite. This seems to be based on rural productivity issues but he does acknowledge the limitations of the land. In my view, this site is never going to be productive in the traditional sense. In my view the key values of the property that should be assessed within the context of this policy suite are the OLA and the indigenous vegetation within the property. Mr Moore finds the effects on the OLA to be minor and the enhancement of the native vegetation a positive. In my view the proposal is consistent with this policy suite.

Rural Zone Policy Framework

45. The policy framework of the Rural section contains a number of themes relevant to this proposal. They include sustaining the productive capacity of the rural zone; the provision for rural residential development in appropriate locations; the maintenance and enhancement of rural amenity; the sustainable management of infrastructure.
46. I will address each of these themes below but would first comment that just because a proposal does not conform to the “rules” does not mean that it offends the main thrust of the District Plan. It is not in contention that lot size is one of the key mechanisms used by the plan to achieve the zone objectives and policies. But in my experience, what is often overlooked is that this approach does not fit all circumstances and that there are other ways of achieving sustainable management and the outcomes sought by the plan.

47. Turning first to the key policy thread of sustaining productive capacity, the main provisions are Objective 6.2.1, Policies 6.3.1, 6.3.2 and 6.3.3, the topography and indigenous vegetation cover of this site mean it is not a productive rural site in the traditional sense. In this regard, I note that Policy 6.3.2 refers to the Rural Zone as a whole. The last paragraph of the explanation states that “To minimise the impact on rural productivity, permitted activity for residential activities in the Rural Zone will require allotments with a minimum area of 15ha.” While this may achieve that outcome in productive areas of the rural zone (for example, the Taieri Plains) there will obviously be areas of land within the Rural Zone that are not particularly productive (for example this location) and it follows that using such land for other purposes is not in conflict with maintaining productivity of the rural zone as a whole. This proposal will ensure that the productivity of native vegetation on the site will be maintained and enhanced.
48. The ability of land to meet the needs of future generations (Objective 6.2.1) is not limited solely to its productive capacity. Land has many uses and many values, including the ability to provide a rural lifestyle choice. Most land can generally produce primary products and provide a range of lifestyle choices. However, in most cases, the land will have attributes that better suit one or the other. Given the character of the receiving environment and the subject property, this is not an area where it is essential for Council to “provide for productive use” of rural land (Policy 6.3.1). However, consent to this proposal does not negate that outcome in the wider sense. By recognising this, Council can better protect the land that has a high productive capacity from those uses that do not need those attributes to exist. While there may be some elements of inconsistency with this policy suite, I do not believe the proposal can be considered contrary to it. The explanation to Policy 6.3.1 in fact notes that “*controls are needed to protect water quality, the productivity of the land resource, significant landscapes and areas of ecological importance*”. This proposal relates to an existing title and puts these controls in place with respect to the native vegetation and water course within the site. Mr Sycamore acknowledges this and considers the proposal inconsistent with this policy suite.
49. Related to the productivity policies are the reverse sensitivity policies that seek to minimise conflict between traditional rural activities and other activities, such as residential activities, to ensure productivity is not affected (Objective 6.2.5, Policies 6.3.3 and 6.3.12). Mr Sycamore again considered the proposal inconsistent with this policy suite although he acknowledges the fact that the site features few characteristics of a rural lot. Importantly, this proposal does not further fragment the rural zone, it utilises an existing rural site that is relatively consistent in size, and is in fact larger, than many of the rural sites in this area. The proposed development is compatible with the surrounding environment and will in fact enhance the conservation values of the site, which is a rural use. Hence the proposal is not contrary to this policy suite and can be considered consistent when viewed in that light.

50. This then leads on to the policy suite that deals with the provision of rural lifestyle choices, Objective 6.2.3 and Policy 6.3.4. While Policy 6.3.4 deals with the Rural Residential zones themselves, it does give a useful guide as to what areas should be avoided. The criteria require rural residential development to avoid, as much as practicable, locations that:
- are affected by natural hazards;
 - are within landscape management areas (which include LCA'S);
 - contain high class soil;
 - may lead to unsustainable provision of infrastructure
51. The proposal does not involve high class soil or the unsustainable extension of infrastructure and is not affected by natural hazards. While the building sites are currently located in an OLA, Mr Moore concludes that the proposal will eventually enhance landscape values in this location. As a consequence, the proposal is consistent with this policy.
52. Part of the explanation to Policy 6.3.4 states that *"In order to avoid adverse effects on rural character and amenity values, where opportunities for rural residential living are to be provided they need to be focused on specific locations which have the characteristics and capacity to absorb the effects on rural character and where the potential conflicts over amenity expectations can be minimised."* Mr Moore confirms that this area has those characteristics and that capacity.
53. In my view the proposal is not contrary to this policy suite.
54. Related to the provision for rural residential living is the issue of rural amenity. The specific rural zone amenity policy is 6.3.5 and it refers to the character of the rural area and requires activities to avoid, remedy or mitigate adverse effects on rural character. In my view, the proposal's adverse effect on amenity values in relation to both a 'real world' assessment and the amenity outcomes sought by the plan are no more than minor and in fact are positive when the mitigation proposed is taken into account. I consider the proposal is of "a nature, scale, intensity and location consistent with maintaining the character" of this particular area.
55. Overall, I do not find the proposal to be contrary to the objectives and policies relating to amenity values (or Policy 6.3.11 which provides for activities that are appropriate in Rural Zone provided adverse effects are addressed). While there is a degree of inconsistency with some policy elements, that is to be expected with non-complying activities (in fact all activities) and is not fatal to the 104D threshold test.

56. Objective 6.2.4 and Policies 6.3.4 and 6.3.8 address infrastructure issues. As has already been noted, the proposal is consistent with this policy framework.

Landscape

57. Mr Sycamore discusses this policy framework at his page 16. He suggests Mr Moore considers the effects on the OLA to be moderate in the short term but as I have advised, this is not the case. He clarifies *“that effects on landscape character will be adverse but minor in the short to medium term due to the effects of increased domestication, but that these will reduce to negligible as the proposed plantings establish. Eventually, the positive impact of the additional planting will at least balance out any adverse domestication effects”*. This to me suggests the values will be protected and I note his evidence at paragraphs 25 to 27 indicates this.

Conclusion - Objectives and Policies

58. In conclusion, I do not believe that of the proposal is contrary to the objectives and policies of the District Plan and I have found that it is generally consistent with the relevant policy suite.
59. In terms of the merits assessment required under section 104(1)(b)(iv), I consider property is suitable for the proposed development when assessed against the policy framework of the plan. This is on the basis of the following:
- The property is not a productive farm unit and is located in an area where rural residential development is at a density greater than that anticipated by the plan. It will not impact on the productivity of the rural zone (Productivity and reverse sensitivity policies) but will enhance the productivity of existing indigenous vegetation on the property.
 - The site does not contain high class soil and the indigenous vegetation on the site is to be protected and enhanced (Productivity and significant resources policies).
 - While the site is within an OLA, the development is attached to and integrates well with the surrounding residential/rural residential activities. (Landscape, amenity and significant resources policies).
 - Unstable areas will be avoided. (Hazards policies)
 - The sustainability of existing infrastructure will not be compromised. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

60. Mr Sycamore also assesses the proposal against the Proposed District Plan policy framework. He finds it to be consistent with a number relevant policies including public health, hazards and transportation but that it is inconsistent with some rural and natural environment policies. I have not undertaken a thorough assessment of the proposal against this plan but agree with Mr Sycamore that the proposal is at least not contrary to the PDP. On that basis, I believe the proposal also passes through the second limb of the 104D test.

SECTION 104((1)(C) – OTHER RELEVANT MATTERS

Precedent and Plan Integrity Matters

61. The authority on precedent effects is *Dye v Auckland Regional Council*, CA86/01, which provides that the granting of a resource consent has no precedent effect in the strict sense. It is obviously necessary to have consistency in the application of legal principles and all resource consent applications must be decided in accordance with a correct understanding of those principles. In factual terms, however, no two applications are ever likely to be the same, albeit one may be similar to the other. The most that can be said is that the granting of consent may well have an influence on how other applications should be dealt with. The extent of that influence will depend on the extent of the similarities
62. With respect to plan integrity arguments the Environment Court in *Wilson v Whangarei DC* W20/07 noted that such arguments are “*overused and it can rarely withstand scrutiny when measured against the provisions of the RMA.*” [Paragraph 43]. The Court of Appeal stated in the *Auckland RC v Living Earth (2008)* decision that having specific and explicit regard to the integrity of the Plan is not required as a matter of law. The 2009 Environment Court Decision *Protect Piha Heritage Soc Inc v Auckland RC* A015/09 noted that the RMA makes no reference to the integrity of planning instruments, precedent or to the coherence of and public confidence in the District Plan. While these are useful concepts that may be applied in appropriate cases, the Court stated that the need to apply them is less necessary where the plan provisions are effects based and the proposal does not generate adverse effects which are more than minor
63. The Environment Court in *Berry v Gisborne DC* W20/07 made it quite clear from that there will be very few cases where “Plan integrity will be imperilled to the point of dictating that the instant application should be declined”.
64. In my view this proposal does not offend the effects based policies of the District Plan and does not generate adverse effects that are any more than minor. In fact, I have concluded that overall the effects are likely to be positive because it will enable the enhancement of

the indigenous vegetation on the property. On that basis, I find it hard to accept that an undesirable precedent would be created.

65. Mr Sycamore raises concern with the fact that the site forms one of two adjoining sites in common ownership and comments that the dissolution of a relationship is neither a compelling nor unique reason to set this application apart. With respect, that was never promoted as a reason that would set this proposal apart, it was merely highlighted as the driver behind the proposal and the reason why the two titles would be treated differently. I maintain that the site as an independent title must be considered in isolation of the adjoining site for the reasons set out in my paragraph 19. Furthermore, the use of the two sites together will not achieve any real gains in traditional rural productivity (in an economic sense), particularly given the subject block is more of a conservation block and will become more so under this proposal.
66. Mr Sycamore refers to the ‘true exception’ test that came out of Judge Smith’s decision in the *Russell* case. I understand that the Court in *Russell* considered that the zoning approach of the plan was a mechanism adopted to avoid incompatible uses and development (paragraph 35, referring to Policy 4.37 and 4.3.8). That was the crux of the matter in *Russell* but is not at issue here. In my opinion the unusual rural residential density in the surrounding environment sets this particular area apart. The use proposed here is not incompatible with this environment.
67. While the Court in *Russell* referred to there being something in the application which constitutes it as a true exception, taking it outside the generality of the provisions of the plan and the zone, surely this principle must also apply to the location within which an activity is proposed for. A zone as inflexible as the Dunedin City Rural zone cannot provide for the many different circumstances found within the diverse range of environments it encompasses. Individual resource consent applications allow the Council to assess, on a case-by-case basis, whether the approach of the plan (i.e. the zoning and minimum allotment size approach) is appropriate in all circumstances. Here I believe it is not. It must also be remembered that the Court in *Russell* actually stated that the “true exception” does not mean that a proposal needs to be unique. This statement in itself answers any argument that such areas are not a true exception merely because there are similar areas around the City.
68. This unusual wider environmental context, along with the fact that the site itself is very small to be of productive use and is effectively to be used for conservation purposes, sets this application apart. Mr Sycamore says at his paragraph 112 that there are a number of undersized areas in the immediate area that remain undeveloped which could use consent here as a precedent. I have not been able to find any undersized allotments, apart from this one and perhaps 946 Highcliff Road, in the immediate area that have not been developed. Hence I do not believe this is an accurate statement.

69. Allowing this development to progress will not set an undesirable precedent but would follow the logic of a number of well-reasoned Council decisions where the Hearings Committee have recognised that the environment under consideration is one where the application of the permitted standards is not necessary. While there have been a number of them, you could not ever say these previous approvals have 'opened the floodgates', particularly when this Plan is been in use since 1995 and provides for the largest city in land area in New Zealand, up until the recent formation of the Auckland Council.

PART 2 CONSIDERATIONS AND CONCLUSION

70. When exercising the discretion to grant or refuse the application sought, Part 2 of the Act is normally central to the determination. However, the role of Part 2 is in a state of change following the *King Salmon* decision and the general approach to the overall balancing exercise explained by the High Court in *Thumb Point Station Limited v Auckland Council*. That has been very recently been further particularised for section 104 in *RJ Davidson Family Trust v Marlborough District Council*. Hence, I do not propose to evaluate the proposal against Part 2 matters and in reality, it has been assessed against the relevant provisions above anyway. For completeness, I would merely say that Part 2 matters are not compromised by this proposal.
71. As I have noted earlier, the ability of land zoned rural to meet the needs of future generations is not limited solely to its rural productive capacity. The RMA is an enabling piece of legislation and allows for people to provide for their own welfare without unnecessary restriction by local government. Many people desire to live in locations that afford them space and views, with good access to sunlight but within reasonable proximity to urban areas which contain the infrastructure and services necessary in today's life. Most rural land can generally produce primary products and provide a range of lifestyle choices. However, in most cases, the land will have attributes that better suit one or the other. By recognising this, consent authorities can better protect the land that has a high productive capacity from those uses that do not need those attributes to exist.
72. The development will be in keeping with the existing surrounding development and will protect and enhance the natural resources of the site. The attributes of this property do not align with those needed for traditional rural activities (pastoral farming, forestry or other agricultural activities) but can provide a lifestyle choice while enhancing the significant natural values on the site. On this basis, I believe the purpose of the Act will be best served by granting consent to the proposal.
73. After receiving any evidence that may be presented by submitters, a set of conditions will be prepared for consideration at the hearing.

Peter Allan Cubitt
3 March 2017