

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of applications for land use and subdivision consent
(LUC 2017-222, LUC 2017-223 and SUB 202017-43)
at 91 and 99 Formby Street, Outram

BY CC OTAGO LIMITED
Applicant

TO DUNEDIN CITY COUNCIL
The Council

**EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF CC OTAGO LIMITED**

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
 - The baseline
 - Environmental effects
 - The objectives and policies of the District Plan
 - Proposed District Plan

- Section 104D and Plan Integrity

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

THE SITE AND THE PROPOSAL

8. The subject sites have been fully described in the application and the planners report but I briefly set out the key points here:

- 91 Formby Street has an area of 1.63 hectares. Legal frontage is provided by Formby Street on the eastern boundary of the site.
- 99 Formby Street has an area of 3.64 hectares. Legal frontage is provided by Huntly Road on the southern boundary and Formby Street on the eastern boundary of the site. Overhead electricity lines run along the Huntly Road boundary of this property.
- Both properties were previously part of a market garden operation but are now in grass and used for bailage by a local contractor. The previous market garden operation did not rely solely on these sites and was farmed in conjunction with another property at 498 Allanton Road (15 ha) until a couple of years ago.
- Both properties have a split Rural and Residential 5 zoning. 91 Formby Street contains approximately 1000m² of Residential 5 land, while 99 Formby Street contains around 8250m² of Residential 5 land.
- The Residential 5/Rural boundary is somewhat unusual in this location as it narrows from 52m at the Huntly Road end, down to 40m as it heads towards the township itself. A more practical boundary for the zones would have been a straight line to 87 Formby Street, which is a small site with a split zoning that contains a dwelling. It is not a rural property in nature so the zone boundary is nonsensical here. That would have provided a depth of approximately 70m for the Residential 5 Zone along Formby Street in this location.
- The properties to the west of the site are essentially rural residential in nature, or at least undersized rural sites. As the original application notes, there are eight properties immediately to the west of the site that are undersized, being between 5885m² and 10.7 hectares in area, that contain a dwelling. The rural/residential interface is clearly blurred in this location.

9. While the subject sites have previously been utilised for market garden purposes in conjunction with other land (they are not economic in this sense by themselves), this use is no longer feasible in today's economic climate. The identification of a residential zone along the frontage the sites is a clear indication that Council sees this area as appropriate for future development. We note that the site did not flood in the recent heavy rain event in July. In this context, the most appropriate land use option for the site is to develop the residential component of the sites as anticipated by the District Plan and provide for rural

residential living on the rural balance of the property while ensuring the rural land is not fragmented. That has occurred here with the rural land being held in the large Lot 9 for the subdivision of 99 Formby Street. While smaller than 54 Huntly Road (also known as 85 Formby Street) to the west, we envisage that it will operate in a similar way, with the balance of the land continuing to be used for rural purposes.

10. Upon reviewing the Planner's reports, a number of amendments have been made to the application. These are as follows:

99 Formby Street

- The removal of one of the Residential 5 allotments along the Formby Street frontage. This will lead to a density that, overall, complies with what is anticipated in this location.
- Two options have been provided to achieve this. The first, shown as the Option A scheme plan attached, provides for a potential boundary adjustment with the property to the north of the original Lot 8, being Lot 1 DP 512917. The owner of this property has expressed an interest in a larger site but no formal agreement has been reached at the time this evidence was prepared. Under this proposal, Lot 8 becomes a 624m² site that will be amalgamated with Lot 1 DP 512917, giving a total area of 1982m². Of that, 1566m² is Residential 5 so it cannot be subdivided again. Lots 2 to 7 become larger.
- Because no formal agreement is in place, the Option B scheme plan is needed (until we can clarify the position at the hearing). Again, Lots 2 to 7 become larger, with Lot 7 becoming 1768m².
- I believe both options remain within scope as they address a concern of the reporting officer without affecting any other parties.
- A relocation of the building platform within Lot 9 towards the northern boundary to address the concern raised by Mrs Darby regarding the effect the current platform would have on the cultivation of the property. Access to Lot 9 shifts as a result. No person other than the applicant is affected by this change as the platform does not move closer to the western boundary.
- The two new scheme plan options also now show a small triangle at the corner of Formby Street and Huntly Road which is not included in Lot 1. This was created in a recent subdivision, due to it being outside the fences and within the road formation. The applicant is happy to transfer this to Council as road.
- A condition is also promoted that no high-class soil is removed from the site.

STATUS OF THE PROPOSAL AND SECTION 104

11. As noted above, the two sites have a split Rural and Residential 5 zoning in the Operative District Plan ("ODP"). They also have a similar split zoning in the Proposed District Plan ("PDP") although the Residential 5 land is now zoned Township and Settlement zone. 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.

12. 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.

THE BASELINE

13. At her paragraphs 52 to 56, Mrs Darby discusses the permitted baseline. 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.
14. Mrs Darby rightly notes that there is no permitted baseline for subdivision because complying subdivisions are restricted discretionary activities. She also notes that there is a very limited baseline for the development of the land because of the mixing of the zones, which is of course essentially of the Council's making. However, she acknowledges that there is sufficient Residential 5 land within 99 Formby Street to enable the establishment of up to eight houses along the Formby Street frontage, and a dwelling within 91 Formby Street. Mrs Darby (paragraph 62) also highlights the "slightly random and variable width" of the zoning along Formby Street, alluded to above in my paragraph 8, which does not assist in creating uniform residential allotments in this location.
15. Hence the original proposal only proposed one dwelling in addition to what is anticipated in the wider environment of this location. The amended proposal is now in keeping with the density anticipated as set out above. However, one of the dwellings is to remain on the rural portion of the site to create what is essentially a rural residential site, but one that can continue to be farmed. Locating the dwelling for this site within the residential part of the site would not be an attractive proposition in the market as people who seek such sites require space and separation from neighbours.
16. Mrs Darby had two concerns with the rural location. While I do not believe the concern in relation to the practical use of the site is overly valid, it has been addressed by the relocation of the platform northwards. With respect to the second concern of taking high class soils out of production, I note that the baseline for the site would allow rural accessory

buildings, and associated gravelled yard and vehicle tracks to them, on the site that would have a similar effect. It is not fanciful to suggest that a barn to accommodate vehicles and plant involved in market gardening or some other rural use, such as calf rearing, could be established on the site.

17. Such buildings would also have a visual amenity effect similar (or worse) to those that concerned Mrs Darby in relation to a dwelling on the site.

EFFECTS ON THE ENVIRONMENT

91 Formby Street

18. Mrs Darby has recommended the land use consent sought for 91 Formby Street be granted subject to conditions. Her reason for recommending this application are set out at Section 9, paragraphs 1 to 4 of her report. I largely agreed with her position and do not propose to consider 91 Formby Street further. The only comment I would make is that the covenant proposed in recommended condition 7 is not needed as condition 1 will suffice.
19. The recommended condition 7 addresses the concern raised by Mrs Darby at her paragraph 130, in relation to the future potential to subdivide the residential land in this lot and build an additional dwelling. However, this cannot happen as of right as it would require a further application to Council and the subdivision and land use variation could be refused. The covenant is not needed accordingly.

99 Formby Street

20. In relation to 99 Formby Street, Mrs Darby recommends the grant of the application in part so that there are only eight (8) allotments created, and therefore only eight dwellings can be established. While I consider there is a strong argument to allow the nine-lot development sought, generally on the basis of the character of the surrounding environment, the applicant has amended the proposal in accordance with this recommendation.
21. The only area of contention left, is the development proposed on Lot 9, being the 2.6-hectare block that contains the vast majority of the rural land in the title. Mrs Darby considers the adverse effects of a dwelling on this site will be more than minor on the basis of the impact on rural character, and on high class soils and productivity.
22. Turning first to the issue of rural character, Mrs Darby thinks this will be compromised because there is no expectation of a dwelling on this site and that as a consequence it will have some impact on the rural amenity and openness of the Rural zone in this location. However, given the nature of the surrounding environment, the baseline outlined above, and the size and mixed zoning of the title, I disagree with this.

23. The mixed zoning of the site is rather unusual as the boundary doesn't seem to follow any physical demarcation on the ground or any existing development in the area. However, it creates an expectation of residential development along the Formby Street frontage. Complying residential sites could be created here through the subdivision process; which Council is unlikely to refuse despite the fact that a non-complying rural balance lot would be left. The balance land (Lot 9) can be accessed from Huntly Road so does not need access from Formby Street. What then is expected to happen on the balance rural land, which is already part of a rural site that is significantly smaller than the arbitrary 15ha minimum? The use of the site for market gardening or other uses that rely on high class soils cannot be forced upon a landowner. On its own, the site is not economic and it is not always feasible to collectively farm a number of small, disjointed and physically separated sites, particularly given the current economic climate facing market gardening in Dunedin.
24. However, in my view it is not correct, as suggested by a number of the submitters and Mrs Darby, to say that the high-class soils of the site are being lost to productive farming/market gardening uses. All the rural land within the site (apart from approximately 1000m² due to the variation in the width of the zone boundary) is included within Lot 9. The building platform has been pushed towards the northern boundary and comprises less than 5% of the site. I would expect a condition of consent to restrict all future buildings to be provided for within this platform. As I noted in paragraphs 16 above, this is similar to what could be expected under the permitted baseline.
25. While I note that the only rule relating to high class soils in the District Plan is that it does not get removed from the site (see Rule 6.5.3 (viii)), I have sympathy for the concerns held by submitters regarding high class soil. It is a resource that must be considered when we make decisions in respect to how we use our land. However, we must also look at this site independently – as a site that can be sold independently. The definition of environment includes:
- ecosystems and their constituent parts, including people and communities; and
all natural and physical resources; and
amenity values; and
the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.*
(My emphasis)
26. 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. Here we are dealing with what is a very small site for a rural property.

27. This equally applies to the zoning of the site, which is also an economic condition affecting the environment that was created by Council. Taking part of the site out of the rural zone leaves us with a rural balance that must be sustainably managed.
28. In my view, this proposal is the best outcome when both the wider concerns of the submitters and the individual characteristics of the site and location are considered. It achieves the following outcomes:
- Maintains the development density anticipated for this location.
 - Retains all (or almost all) of the rural land within one title.
 - Locates the dwelling and ancillary buildings so that there is minimal disruption to use of the property for rural uses.
 - No high-class soil is removed from the site.
29. Of course, the argument will made be that this can be achieved by locating the dwelling for Lot 9 within the Residential 5 land. However, that overlooks the practical realities of the situation. It is very unlikely that anyone would be interested in buying a site configured in that way. People purchase blocks of rural land of this size so that they can create space around them. In this context, the proposed approach is the best option to ensure the land is at least used in some productive sense.
30. Mrs Darby is concerned in this regard that the character and openness of the rural environment her will be compromised by a dwelling on the rural part of the site. However, that contradicts what she stated at paragraph 99 where she acknowledged that the rural/urban divide is somewhat weak here and that a house site on Lot 9 is not necessarily out of character for the surrounding area. She also highlights the blurring of the zone boundary again at paragraph 104 in relation to cumulative effects.
31. This is borne out by the AEE's description of the environment to the west and it must be highlighted that this proposal does not extend this type of development further into the rural environment – this type of development already exists beyond this site. In my view, this proposal does not add any real effect to what has already occurred in this location.
32. In this context (when dealing with landscape effects at paragraph 112), Mrs Darby highlights the impact of the anticipated development along the Formby Street frontage, the existing hedging (which restricts views into the site) and the backdrop of the Outram township. She considers the effects of the house will be much reduced but comments what is currently open rural space will become developed. However, this does not recognise the baseline of permitted farm buildings on the site, and I believe the proposal is likely to generate more positive effects in a landscape sense than what could occur on the site.

33. In conclusion, I do not find that rural character and amenity related effects of a dwelling on Lot 9 to be more than minor. And after having carefully reviewed Mrs Darby's assessment on these matters, it does not appear to me that her conclusion is any different. The one area where we perhaps may still disagree is the impact on high class soils and rural productivity but changes have been made to accommodate those concerns. For the reasons I have set out above, I also conclude that the adverse effects of this part of the proposal are no more than minor and that it also passes the section 104D effects limb test.
34. However even if it didn't, the proposal cannot be broken into parts as has been done by Mrs Darby and needs to be considered in the round. An overall assessment of the 99 Formby Street proposal should be made and I consider adverse effects are no more than minor having regard to what is anticipated by the Residential 5 zoning, the nature of the receiving environment and the characteristic of the subject title, and the baseline for the rural zone.

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

35. 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.
36. 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, Residential Zones and Subdivision. Mrs Darby has assessed the proposal against these provisions and while we differ in a number of areas, I note she only finds the 99 Formby Street part of the proposal contrary to the policies directly related to high class soils, and to a degree, rural productivity.
37. As will be apparent from my effects assessment above, I disagree with this. The site is already well under the minimum for a rural site and the subdivision has not fragmented rural land further but kept all the rural land in one title. The proposed dwelling platform has been relocated to address Mrs Darby's concern regarding the practical use of the site. No high-

class soil will be removed from the site and the area affected by buildings and tracks is unlikely to be much greater than what could occur under a number of permitted rural uses.

38. Hence it is difficult to see how the proposal is contrary to the policy outcomes sought by the District Plan. The application of the policy framework must take into account the characteristics of a site and the limitations of this particular site already make it difficult for it to achieve these outcomes. While what is proposed here doesn't improve the position, in my view it doesn't greatly change it either.

PROPOSED DISTRICT PLAN

39. Mrs Darby also assesses the proposal against the Proposed District Plan policy framework. Again, she's finds the 99 Formby Street (Lot 9) to be contrary to the high-class soil type policies and again I disagree for the reasons already stated. In my view, the sites productivity and ability to be farmed (both which are already limited) are not overly compromised by the proposed dwellings site. In my opinion, the second limb of the 104D test provides no barrier to the consideration of the proposal.

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

Precedent and Plan Integrity Matters

40. 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
41. 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

42. 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”.
43. 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. The proposal maintains the density anticipated for the location and I have concluded that rural character and amenity effects will be no more than minor.
44. Furthermore, I consider the combination of a site with a split zoning, with a significant component of rural zoned land but which is well under the minimum site size for the rural zone, along with a neighborhood where the rural/urban boundary has already been blurred, does indeed create circumstances that can be considered a ‘true exception’. Despite there being other areas where split zoning occurs, it will be difficult to find a similar combination of circumstances. And it must 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 renders any argument that such areas are not a true exception merely because there are similar areas around the City as redundant.
45. 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 has 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.

CONCLUSION

46. In my view, the potential adverse effects of the proposal are limited solely to the dwelling proposed for Lot 9 of the 99 Formby Street proposal, and in that context, relate to rural character and amenity values, and high-class soils and productivity effects only. I have concluded that these effects are no more than minor and that the proposal is not contrary to the relevant objectives and policies of the District Plan. In my view, this proposal is the best outcome for the site when the characteristics of the location and the site itself, are balanced against the wider concerns of the submitters and the policy outcomes sought by the District Plan.