

BEFORE THE DUNEDIN CITY COUNCIL

UNDER	the Resource Management Act 1991
IN THE MATTER	an application for resource consent of SUB-2016-90 and LUC-2016- 459
BY	DIANNE REID Applicant

BRIEF OF EVIDENCE OF PETER ALLAN CUBITT

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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:
 - (a) The site and the proposal
 - (b) Status of the proposal and Section 104
 - (c) Existing Environment and baseline
 - (d) Environmental effects
 - (e) The objectives and policies of the District Plan
 - (f) Proposed District Plan
 - (g) Section 104D and Plan Integrity
 - (h) Part II matters
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, Mr Lloyd and Mr Carr.

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:
 - (a) The site is 83.5 hectares in area. Legal and formed frontage is provided by Saddle Hill Road on the northern boundary of the site. There is also leg-in access to Scurr Road, which is a rural residential enclave, while there are also a number of unformed legal roads in this location that traverse or extend into the property.
 - (b) The property is held in CFR 10C/237. This title contains five (5) defined parcels. Lot 1 DP 12954 (40.6ha) and Lot 2 DP 19043 (12.3ha) front Saddle Hill Road. The property's current dwelling is located within Lot 1 DP 12954. The remaining three parcels have access to Scurr Road, either directly or indirectly from the

unformed legal road in the area. The two parcels (Lot 2 DP 19273 and Lot 3 DP 19043) that adjoin the rural residential zone are at a rural residential scale (4940m² and 1.63ha). These parcels access Scurr Road by the leg in, which is zoned Rural Residential. The remaining parcel (Lot 1 DP 19273) is 28.4 hectares.

- (c) The property essentially drops to the south, towards the coast, from Saddle Hill Road, which is more or less on the summit ridge. The majority of the property is covered in largely regenerating indigenous forest or gorse dominated scrub, which is not protected from the animals that graze the pasture on the spur landforms near the dwelling.
 - (d) Directly to the east is the Scurr Road rural residential area which contains a number of sites that do not comply with the 2-hectare minimum, with some sites in the 1.2 to 1.3 range.
 - (e) To the north is the Sproull Drive rural residential area, within which all of the sites appear to be under the 2-hectare minimum. These sites range in size from 4000m² up to 1.1 hectares, with most around 6000m².
 - (f) A submission has been lodged on the PDP seeking a rural residential zoning over Lots 1 to 4.
9. While the subject site is 83 hectares, it is not particularly productive farmland, with the vast majority of the site covered in indigenous vegetation or pest plants. With the property not able to generate a sustainable income, the weed problem continues to worsen along with the associated negative effect on the indigenous vegetation. In this context, the most appropriate solution is to subdivide the property in to smaller allotments which will generate the capital necessary to address the land management issues. While this could be achieved with a complying 15-hectare lot subdivision (under the ODP at least), the best way to achieve this outcome is to concentrate the lifestyle development next to the existing development in the area and retain the bulk of the rural land in one title to enable consistent management of the indigenous vegetation and pasture land on the property.

10. The area of the subject property that adjoins the rural residential development in the area is effectively isolated from the remainder of the property due to the topography. It comprises a thin strip of flattish land that is separated from the balance of the property by the steep and heavily vegetated gully formations. As a consequence of this, since its initial development as farmland it has become weed infested and has no practical value as farmland.
11. As a consequence of this, this location is seen as the most appropriate to locate any development on the site and the proposed subdivision has been designed to reflect the adjoining development accordingly. The application seeks consent for four lifestyle sized allotments (ranging between 4800m² and 1.1 hectares), each with a proposed building platform. The platforms have been promoted as “Landscape Building Platforms” (‘LBP’) given the site is currently located within the Saddle Hill Landscape Conservation area.
12. However as noted by Mrs Darby, these platforms will become redundant if the proposed Plan is approved in its current form. She also notes that the purpose of the platforms is largely only to identify stable platforms and provide the yard setbacks for the proposed dwellings. As this application has been promoted with a number of conditions addressing landscaping and the design of the dwellings, it is not necessary to create LBP’s that require a further controlled activity consent. Hence it is appropriate that this aspect of the application be withdrawn and that any land use that the Commissioner may be minded to consent should enable the development of the dwellings without any need for the future controlled activity consent.
13. The lifestyle allotments (shown as Lots 1 to 4 on the scheme plan) are to be created from Lot 2 DP 19043. The 9.4ha balance area of that parcel will be held in Lot 5 which will be amalgamated with the residue of the title. The property’s existing dwelling will be contained in this parcel.
14. Upon reviewing the Planner’s reports, a number of other amendments to the application have been made. These are as follows:
 - (a) Relocating the platform on Lot 4 westwards and reducing the size of the platform to provide greater separation distance to the

property at 405b Saddle Hill road. This will increase that side yard from 20m to 40 m. Although that is not the full 40m recommended by Mrs Darby, the new location will retain a greater separation distance without pushing the platform on to the sloping land to the west, which would require a greater degree of earthworks.

- (b) The promotion of a “no further subdivision” covenant over Lot 5 and the residue of the title.
- (c) Access to Lot 2 will be determined prior to Section 224(c) certification after the completion of a traffic speed survey.

STATUS OF THE PROPOSAL AND SECTION 104

- 15. The majority of the site is zoned Rural in the Operative District Plan (“ODP”) with the Scurr road leg-in portion zoned “Rural Residential”. Despite not being a coastal site, it is zoned Rural-Coastal in the Proposed District Plan (“PDP”) again with the exception of the leg-in being zoned “Rural Residential”. The site is also located within the Saddle Hill Conservation Landscape Area (SHLCA) in the ODP but the site of the dwellings is not located in the SHLCA in the PDP. The relevant rules of both plans are set out in the planners report and I agree that those rules are applicable. It is accepted that the proposal is a non-complying activity.
- 16. 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

- 17. At her paragraphs 38 to 46, 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.

18. Mrs Darby rightly notes that there is no permitted baseline for subdivision because complying subdivisions are restricted discretionary activities. However, she notes that it is likely that a restricted discretionary subdivision would normally be granted consent on a non-notified basis. In relation to this property she considers that a 15 ha density complying subdivision is not feasible given the “outstanding landscape area designation over the property” and other issues such as the need to clear indigenous vegetation.
19. While I agree, there is no permitted baseline for subdivision, I disagree with the position outlined by Mrs Darby in relation to what is feasible on this property. First and foremost, none of the site is affected by an “outstanding” landscape overlay. The Saddle Hill landscape overlay is merely a “Landscape Conservation Area”. I will deal with this in more detail below but suffice to say here that it is not an outstanding landscape in terms of s6(b) of the Act, it is merely what is generally known as an “amenity landscape” and is not afforded any particular status under the Act.
20. Secondly, only the top 300 to 400 metres of the property is affected by the LCA. The two parcels (Lot 2 DP 19273 and Lot 3 DP 19043) that adjoin the rural residential zone to the east and Lot 1 DP 19273 (a total of approximately 30.6 hectares) are located outside the LCA along with over half of Lot 1 DP 12954, which contains 40 hectares. In my view, it is entirely feasible to create a subdivision that would enable the construction of four dwellings on relatively flat, clear land outside the LCA within the lower portion of the property. This achieves the permitted 15-hectare density (which is still the operative rule) although does not achieve the minimum subdivision site standard of the PDP,. However as Mrs Darby notes, this standard is subject to numerous submissions so may change in the future.

EFFECTS ON THE ENVIRONMENT

21. Mrs Darby addresses a wide range of issues in her 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. Of these matters, only geo-technical and transportation matters need to be addressed here.

Amenity

22. In relation to amenity values, Mrs Darby concluded at paragraph 120 *“[o]verall...the proposed subdivision is not expected to adversely affect the amenity in terms of the existing environment or the neighbouring properties. However, it is not in accordance with the expectations of the Rural zone and does not reflect the amenity values of a rural area. If the effects are acceptable in this case, it is only because of the adjacent rural-residential development and zoning, although the District Plan does not provide for the blurring of the zones.”*
23. Mrs Darby’s position in relation to the amenity effects on the existing environment disregards the zoning of the receiving environment which I consider an appropriate starting point. In my view 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.
24. The definition of amenity values refers to the qualities and characteristics “of an area” that contributes to people’s appreciation of it. In this area, the Sproull Drive location 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 adjoining rural land across the road and as noted above, was a significant factor in the subdivision design for the subject property. On that basis, it is agreed that the amenity values of the existing

environment or the neighbouring properties (with the mitigation measures in place – see paragraph 34 of Mike Moore's evidence) are not compromised by the development. The development has in fact been designed to reflect the amenity values of the area.

25. Mrs Darby's concern relates to the expectations of the rural zone and because it does not meet the 15-hectare minimum, it therefore does not reflect the amenity values of a rural area. This seems to me to be more a policy issue because she has already assessed the 'real world' effects as being minor. At her paragraph 170 she quotes the *Mason Heights Property Trust* Environment Court decision in relation to the issue of precedent. That decision considers the 'true exception' test and notes that while not mandatory, it may help to assess issues of precedent and whether a proposal meets the objectives and policies of the Plan (in this case, those relating to rural amenity) by an alternative method. That is exactly the point in this case. A different method has been chosen to achieve the outcomes of the ODP. The density requirements are met but rather than spread the development across the property, clustering the development adjacent to the rural residential zone better conserves the natural character and rural amenity values of the property. The property will retain its open, rural character while the native vegetation resource will not be fragmented by boundaries. Being held in only one title as opposed to five, it can be managed in a consistent way.
26. Overall I conclude that the proposal will better achieve the rural amenity outcomes sought by the plan than a subdivision meeting the 15-hectare minimum. While I agree with Mrs Darby that the PDP does not encourage a blurring of zone boundaries, sometimes that is a better environmental outcome. The 'no further subdivision' covenant will ensure the openness of the property is retained and rural residential development (of whatever size) encroaches no further into the rural zone. Furthermore, if consent is granted to this, the zoning issue is likely to be resolved through the PDP process.

Landscape Effects

27. As I have noted above, Mrs Darby's report refers to or implies that (with reference to s6(b) of the Act) the site is located within an "outstanding" landscape. However, we are not dealing with an "outstanding

landscape” in terms of section 6(b) of the Act. This is a “landscape conservation area”. The District Plan describes such areas as “... *areas which have particular impact on landscape quality due to high levels of visibility from major public viewing locations and/or the presence of particular landscape character and values. The areas are generally the higher land visually containing the most densely settled urban and rural areas of Dunedin.*”

28. These landscapes are generally called “amenity landscapes” and are not afforded any particular status under the Act. Section 7(f) requires you “to have particular regard” to the “maintenance and enhancement of amenity values”. This imposes a duty to be “on enquiry” but does not require you “to recognise and provide for” such values as Section 6(b) does. In the context of these LCA’s, this is important as given their location (*the higher land visually containing the most densely settled urban and rural areas of Dunedin*) there are many other competing issues and it is not appropriate to retain the status quo purely for landscape reasons. In this context, it is worthy to note that the LCA has been removed from this portion of the site by PDP. In my view this change probably reflects an acknowledgement of the existing character of this area, being largely rural residential in nature.
29. Mr Moore has assessed this issue in his evidence and concluded at paragraph 35 that the development “... *will result in enhancement of the quality of the landscape and will integrate seamlessly with the existing character. This is because it will be carefully controlled to ensure that buildings nestle into a more dominant bushland setting and because the indigenous forest will be legally protected and managed to enhance its natural character values. Natural elements will remain strongly dominant and the mitigation measures proposed will ensure that any adverse effects on the natural character of the skyline as viewed from the south, are negligible.*”
30. Of note is the fact that Councils in-house landscape expert, Mr Barry Knox, also concluded that “*the proposed subdivision would be unlikely to lead to adverse effects which would be more than minor, as long as the mitigation measures promoted in the application are fully implemented*”. [page 145 of the agenda document]. Mrs Darby addresses this issue at paragraphs 87 to 96 and she agrees with the expert opinion of the two

landscape architects. She believes that the landscape effects are likely to be minor and that the proposed houses will have limited effect on the wider landscape.

31. I agree with these assessments and conclude that not only will the landscape effects of the proposal be positive, but that the proposal will achieve a better landscape outcome than a subdivision that complies with the 15-hectare minimum of the ODP.

Geo-technical Issues

32. As Mrs Darby notes in her report, the western portion of the site is identified as potentially having some instability issues but this does not extend to the site of the proposed dwellings. However, erring on the side of caution, Mrs Reid commissioned Dr Jon Lindqvist to assess the stability of the building sites. He found no evidence of land instability in this location and does not consider it to be susceptible to instability. However, he did recommend that the subsoil conditions be assessed during preparation of the building platforms as he did not carry out a thorough ground surface investigation due to the heavy vegetation on the site.
33. Council's Consulting Engineer has reviewed the proposal and does not oppose it upon stability grounds. However, they have recommended conditions that should be imposed on the consent should it be granted. Mrs Darby is concerned that the work required to determine the appropriateness of the ground conditions generally occurs after consent is granted and the new owners are looking to build. This would leave any required remedial work sitting with the purchaser. To overcome this concern, Mrs Darby is recommending a condition that requires this work to be carried out prior to section 224(c) certification.
34. Given the applicant is confident that ground conditions are favourable, this approach is more acceptable than delaying the issue of the subdivision consent. While a consent notice would alert potential purchasers of the need to determine ground conditions before building, the applicant agrees this should rest with the developer. Hence the condition 3 (a) and (b) are acceptable to the applicant (subject to rectifying some small typos).

Transportation

35. The only real practical issue to deal with in constructing the proposed subdivision is the provision of access that achieves safe sight distances. Councils Transportation Planning are unable to support the application in its current form given concern with the proposed sight distances. This is due to their position that the operating speed on the road is higher than assessed by Mr Carr. If this is resolved, they have no concern with the proposal.
36. In my view, Mr Carr's evidence in relation to the speed environment (at his paragraphs 18 to 25) is reasonably compelling and should satisfy the Commissioner that adequate sight lines can be provided for all allotments. In his view the geometry of road formation in front of the subject site is different to the location in which the Councils speed data has been collected. This, along with the advisory speed limits in place at this location, should result in a lower speed environment than the data indicated from the site further to the east.
37. Mr Carr has attempted to provide a definitive answer to the average speeds on the road but has been thwarted by the low levels of traffic using the road and a lack of time to set up a speed survey. To address this concern, he promotes a condition along the following lines:
 - a. *Vehicle crossings to Lots 1, 3 and 4 will be constructed in accordance with the approved plans.*
 - b. *Vehicle crossings in other locations, or onto Saddle Hill Road from Lot 2, are not to be constructed other than where it can be demonstrated that appropriate sight distances are achieved based on the measured operating speed of the road. Any vehicle crossing authorised any this condition shall be constructed in accordance with the approved plans.*

Advice Note: the operating speed of the road is to be determined by an automatic traffic counter method, with the counter located in a position to be determined by a suitably qualified professional in consultation from the Council's transportation engineer.
38. If Council's Transportation Planner is still not comfortable with Mr Carr's evidence on this matter, then I agree that this condition is a practical way to solve the issue. If the condition is to be imposed, it should be included as a section 224(c) certification condition.

Positive Effects – Indigenous Vegetation Protection

39. As has been detailed in the application and Mr Lloyd's evidence, the site has been assessed for its ecological values. This assessment also identified the potential adverse effects of subdivision, and provided advice in relation to the management of the indigenous forest to ensure its survival and enhancement. Mr Lloyds evidence confirms that the indigenous forest at the site is significant but that it is under threat due weeds displacing indigenous vegetation and stock limiting the recruitment of indigenous forest tree species on the forest margins adjacent to pasture. He believes this will continue under the current management and will worsen if the property is farmed at a higher intensity.
40. The enhancement and ongoing protection of this forest (approximately 55 hectares) is proposed by this application and is considered a significant benefit of the proposal. However, Mrs Darby does not consider this to be a direct consequence of the subdivision, on the basis that it can occur anyway. This tends to downplay the significance of this offer. While I agree, such work could occur without the need for the subdivision, the reality is that this generally does not occur because of the ongoing cost involved. What is proposed here will be a relatively costly management regime which could not occur without the subdivision providing the capital.
41. The subdivision has been designed to ensure the majority of the protected vegetation is within the one allotment to ensure it is managed consistently. Without active management, it is reasonably clear that the indigenous vegetation within the site will become degraded by weed infestation and stock grazing over time.

Conclusion on Environmental Effects

42. In my view the site is well suited to the use proposed and 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, the anticipated level of development for the site under the ODP and the mitigation proposed. On that basis, I have concluded that it passes through the first gateway test of section 104D.

43. The one remaining matter to determine is whether adequate access can be provided to Lot 2. If that cannot be achieved, then that allotment can be accessed via one of the other allotments or can simply be amalgamated with the adjoining allotments.

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

44. 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.
45. 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, Landscape, Hazards and Subdivision. The relevant objectives and policies of each are considered below.

Sustainability Section

46. 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.

47. 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 being maintained by this proposal.
48. Also of significance is the provision of a wider range of high quality rural residential living sites within the City that do not come with 2 hectares of land to maintain. The sites created will retain a high-quality amenity with an excellent aspect and outlook. Because it effectively attaches to an existing rural residential node and utilises non-productive land, it will maintain the amenity of the productive rural land within the City boundary by avoiding it.
49. The location of the proposal on the fringe of a rural residential area is also relevant when one considers Policy 4.3.7 and Policy 4.3.8 which 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.
50. 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 new lots

will be self-serviced and will utilise existing roading infrastructure (subject to access to Lot 2 being confirmed). Accordingly, the proposal has no impact on infrastructure.

51. Objective 4.2.4 and Policy 4.3.4 deal with the appropriate protection of significant natural and physical resources. Mr Lloyd considers the indigenous vegetation within the property to be significant and this application provides for the protection and enhancement of that resource. The proposal is therefore consistent with this policy suite.

Rural Zone Policy Framework

52. 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.
53. 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.
54. 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 subdivision has been designed to ensure that the productivity of both the existing pasture land and native forest will be maintained and enhanced.

55. 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 puts those controls in place and will ensure the productivity of the native forest is maintained and enhanced.
56. 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). The proposed development is attached to a rural residential node and is compatible with this environment. Hence the proposal is not contrary to this policy suite.
57. 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:
 - (a) are affected by natural hazards;

- (b) are within landscape management areas (which include LCA'S);
 - (c) contain high class soil;
 - (d) may lead to unsustainable provision of infrastructure.
58. 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 LCA, Mr Moore concludes that the proposal will enhance landscape values in this location. It is also noted that the LCA has not been included over this land in the PDP. As a consequence, the proposal is consistent with this policy.
59. 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.
60. In my view the proposal is not contrary to this policy suite.
61. 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 subdivision is of "a nature, scale, intensity and location consistent with maintaining the character" of this particular area.
62. The individual amenity values of adjoining properties are provided for in Policy 6.3.6 with the need to avoid, remedy or mitigate the adverse effects of buildings and vegetation. The building platform on Lot 4 has been shifted westwards so as to provide a 40 metre set back to the boundary of 405 Saddle Hill Road. This, along with the substantial vegetation within that property, will ensure that adverse effects of the

dwelling are avoided. On this basis, I am of the view that the proposal is consistent with Policy 6.3.6.

63. 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.
64. Objective 6.2.4 and Policies 6.3.4 and 6.3.8 address infrastructure issues. Provided the issue of access to Lot 2 is addressed, the proposal is consistent with this policy framework.
65. The only other relevant policy is Policy 6.3.14 which deals with adverse cumulative effects. Mrs Darby has addressed cumulative effects at paragraphs 131 at 135 of her report, and in a policy sense at page 31 of her report. She concludes that the proposal will not give rise to adverse cumulative effects and I agree. Mrs Darby seems to confuse this issue with precedent effects in her paragraph 35. Precedent is not an environmental effect as such and cannot be assessed with any certainty. The nature of cumulative effects is defined in Mrs Darby's paragraph 131 and this reflects the normal assessment of a proposal. In that sense the consideration of 'cumulative' effects as a separate category is unnecessary.

Landscape

66. Mrs Darby discusses this policy framework at her page 31. She considers the proposal to be considered consistent with this policy suite and I agree. However, I note that she refers to Objective 14.2.1 and Policy 14.3.1 which are irrelevant to this proposal because they refer to outstanding landscapes, which is not what we are dealing with here.

Natural Hazards

67. Mrs. Darby considers that the proposal is expected to be consistent with the hazards policy suite. I agree as this raft of policy merely requires the effects of hazards to be avoided, remedied or mitigated (Objective 17.2.1) while ensuring building and vegetation removal is "controlled" in

areas identified as being or is likely to be, prone to erosion, falling debris, subsidence or slippage (Policy 17.3.2). This policy suite is given effect to by the conditions proposed by Mrs Darby.

Subdivision

68. The objectives and policies of the Subdivision section seek to ensure that subdivision is co-ordinated and sustainable, with physical limitations and potential land uses taken into account to ensure that adverse effects are avoided, remedied or mitigated. All necessary infrastructure should be provided by the developer to avoid the need for unsustainable upgrades of public services [Objective 18.2.7 and Policy 18.3.7].
69. The application seeks consent for the subdivision and the future land use activity on all allotments and is therefore coordinated and holistic. No physical limitations that will affect the future use of the new allotments have been identified through the assessment of effects. The development proposed has been determined appropriate in the location given the surrounding activities. All residential activities will be self-serviced and will not give rise to adverse effects on the roading infrastructure, subject to the access to Lot 2 being addressed.
70. Mrs Darby considers the proposal inconsistent with Objective 18.2.1 and Policy 18.3.1 due to the layout not being in accordance with the zone expectations and the lack of a 'no further subdivision' covenant. The second matter has been resolved and as I have outlined above, I believe the subdivision better achieves the outcomes sought for the rural zone in this particular location (accepting that this layout may not achieve that in all rural locations).
71. The proposal is consistent with the objectives and policies of the Subdivision section.

Conclusion - Objectives and Policies

72. 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. On that basis, it passes through the second limb of the 104D test.

73. 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:
- (a) The property is not a productive farm unit and adjoins an area of rural residential development that 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.
 - (b) 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).
 - (c) While part of the site is an LCA, the development is attached to and integrates well with the surrounding rural residential activities. (Landscape, amenity and significant resources policies).
 - (d) Unstable areas will be avoided. (Hazards policies)
 - (e) The attributes of the building sites align more with the values people seek in lifestyle properties. They afford views, sun and space but are not isolated, being located adjacent to an existing rural residential area and in close proximity to Brighton and Mosgiel. Mosgiel provides the infrastructure and services necessary in today's life without the need for long vehicle trips. (Rural-residential, infrastructure, transportation and efficiency policies).
 - (f) The sustainability of existing infrastructure will not be compromised. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

74. Mrs Darby also assesses the proposal against the Proposed District Plan policy framework. She's finds it to be consistent with a number relevant policies (including the natural environment policy suite) but

inconsistent with some rural policies. The key matter is that the proposal is not considered contrary to the PDP and 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

75. 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
76. 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, we have concluded that overall the effects will be positive because it maintains the density standard in the rural zone while enabling the enhancement of the large area of significant indigenous vegetation on the property. It achieves the policy outcomes sought by the plan via an alternative method. On that basis, I find it hard to accept that an undesirable precedent would be created or that Plan integrity is imperilled.
77. Mrs Darby places limited weight on the proposed enhancement of the indigenous vegetation and suggests under the QEII approach, costs are minimal. First the applicant wishes to retain control of the vegetation management. Her experience on other properties is that QEII have such limited funds that it cannot sustain the necessary management work. Secondly, with respect, this overlooks the loss of the ability to generate an income from the property while maintaining a resource for the public benefit, rather than any benefit to them.
78. In my opinion the combination of the approach to the sustainable management of all the values and resources of this property along with

the density of the adjoining rural residential development sets this proposal apart. There are a diverse range of environments within the rural zone and 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 renders any argument that such areas are not a true exception merely because there are similar areas around the City is redundant.

79. 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

80. In exercising the discretion to grant or refuse the applications sought, Part 2 of the Act becomes central to the determination. Obviously, the key provision in that regard is the Act’s single purpose as set out in section 5. That purpose is *to promote the sustainable management of natural and physical resources*.
81. The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources. Such a judgement allows for a comparison of conflicting considerations and the scale or degree of those conflicting considerations and their relative significance in the final outcome. The other sections in Part 2 of the Act, comprising sections 6, 7 and 8, inform and assist the purpose of the Act.

82. I am of the view that the only section 6 matter in play here is s6(c) which deals with the indigenous vegetation issue (despite Mrs Darby addressing s6(b)). Mrs Darby considers the proposal gives effect to this matter and also most of the section 7 'other matters' that must be considered when making a determination upon an application for consent.
83. For the most part, I agree with Mrs Darby. Amenity and environmental quality related effects have already been addressed in the preceding evidence. In my view, these sections of the Act apply in a general sense rather than in the context of the zoning. These provisions allow you 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. The evidence of Mr Moore should satisfy you that the subdivision will maintain and enhance amenity values.
84. With respect to s7(b) (efficient use of land) and 7(g) (finite characteristics), the land is not productive and is ideally suited and located to provide for rural residential living which is a legitimate use of rural land. It is an efficient use of the subject land and assists in protecting truly finite and limited resources, being the area of significant vegetation and also high quality rural land elsewhere in the city from development pressure.
85. 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.
86. The development will be in keeping with the existing surrounding development and will protect a finite and significant natural resource being the indigenous vegetation. 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.

87. Mrs Darby has prepared a set of conditions for consideration should the consents be granted. These are generally fine subject to some fine tuning.

Peter Allan Cubitt

31 January 2017