

29 November 2017

Balmoral Developments (Outram) Ltd
C/- Paterson Pitts Group
Attention: Kurt Bowen
PO BOX 5933
Dunedin 9058

Dear Mr Bowen

**RESOURCE CONSENT APPLICATION – SUB 2017-49 & LUC 2017-255,
94 HOLYHEAD STREET, OUTRAM**

The above application for subdivision and land use consent at 94 Holyhead Street, Outram was processed on a notified basis in accordance with Section 95 of the Resource Management Act 1991. The Consent Hearings Committee, comprised Commissioners Matthew McCallum-Clark (Chairperson), Rosalind Day-Cleavin and Councillor Andrew Whiley, heard and considered the application at a hearing on 15 November 2017.

At the end of the public part of the hearing, the Committee, in accordance with Section 48(1) of the Local Government Official Information and Meetings Act 1987, resolved to exclude the public.

Prior to the commencement of the hearing, a site visit was undertaken by the Hearings Committee.

The Committee has **declined** consent to the application on 29 November 2017. The full text of this decision commences below.

The Hearing and Appearances

The applicant was represented by:

Phil Page (Legal Counsel)

Kurt Bowen (Registered Surveyor)

Russell Lundy (Real Estate Agent)

Hugh Forsyth (Landscape Architect)

Gary Dent (Infrastructural and Environmental Engineer – Stormwater)

Derrick Railton (Infrastructural and Environmental Engineer – Wastewater)

Council staff attending were:

Campbell Thomson (Senior Planner/Committee Advisor)

Lianne Darby (Planner)

Grant Fisher (Transport Planner/Engineer)

John Eteuati (Development Engineer, 3 Waters)

Wendy Collard (Governance Support Officer)

Submitters in attendance included:

Otago Regional Council (Warren Hanley (Planner), Jean-Luc Payan (Manager, Natural Hazards), Dominic Fletcher (Water Resources and Dams Engineer))

New Zealand Transport Agency (Graeme Hall (Southern Regional Manager), Julie McMinn (Consultant Planner))

Patricia Scott

Procedural Issues

No procedural issues were raised.

Principal Issues of Contention

The principal issues of contention are as follows:

- Whether the subdivision of land zoned for rural purposes represented a sustainable use of land comprising high class soils
- Whether the subdivision and residential development of land zoned for rural purposes resulted in effects on rural character and amenity that were no more than minor
- The extent to which the subdivision would exacerbate or create surface flooding on the subject land or other land in the catchment
- Whether the circumstances of this proposal represent a "true exception", and therefore whether any approval of the application would set an undesirable precedent

Summary of Evidence

Introduction from Processing Planner

Mrs Darby outlined details of the application noting that the proposal would result in 15 new residential lots ranging in size from 1010m² to 1550m², all significantly under-sized for Rural-zoned lots but compliant with Residential 5-zone expectations.

Mrs Darby advised that the subject site is part of a rural property formerly used for market gardening, at 94 Holyhead Street, Outram. She commented that the site is an irregular shaped property with State Highway 87 and its road reserve along its northwest and northern boundaries, the Taieri River floodbank along its south-eastern boundary, and Holyhead Street on its southern edge. Mrs Darby noted that the site abuts several residential properties on its western boundary. She described an existing dwelling on-site with access to the end of the formed section of Holyhead Street. Alternative access is also available to State Highway 87 via an existing intersection which serves an unnamed road (within State highway road reserve) running along the northern edge of the subject site.

Mrs Darby commented that the subject site is part of a rural property previously the subject of a private plan change, PC-2012-14, to rezone the land from Rural to Residential 5. She noted that the Hearings Committee declined the plan change application on 13 June 2013 and that the applicant then appealed the decision. A consent order, ENV-2013-CHC-84, was subsequently issued on 21 January 2015 which rezoned approximately half the subject property as Residential 5. Mrs Darby commented that the balance land at the north-eastern end of the site remains zoned Rural and is the subject of this application.

Mrs Darby noted that Lot 10 SUB-2017-32 is zoned Residential 5 in the operative District Plan and Township and Settlement in the proposed Plan; and that Lot 27 SUB-2017-32 is zoned Rural in the operative District Plan, and Rural – Taieri Plains in the Proposed Plan. Mrs Darby determined the activity status of the proposed subdivision to be a non-complying activity by the Dunedin City District Plan and the Proposed Plan. She determined the activity status of the residential activity for the new sites under the Dunedin City District Plan to be a non-complying activity.

Mrs Darby advised the Committee that the various reports from Council departments had generally not raised any issues with regard to the servicing of the new lots and new development, subject to compliance with the appropriate conditions of consent. Overall, Mrs Darby was of the view that the proposed development is not expected to create any issues for the existing infrastructure of Outram. However, based on her assessments, Mrs Darby was of the view that the proposed subdivision and development would not be a sustainable use of Dunedin's physical and natural resources, particularly in respect of high class soils, productive worth, and rural character and amenity. Mrs Darby further commented that while significant flooding from the Taieri River is unlikely to occur, more localised surface flooding might be a concern for the new lots, and properties upstream and downstream. In the absence of definitive calculations and details, Mrs Darby stated that it is not possible to say with confidence that the development will have no adverse impact on surface flooding in this location.

Mrs Darby concluded that the effects on the environment would be more than minor in terms of the Rural zoning and rural character, including the preservation and use of high class soils for rural production. She also concluded that the effects on surface flooding have not been determined conclusively to be less than minor. Mrs Darby advised the Committee that the proposed subdivision is also considered to be contrary with many of the relevant objectives and policies of both the District Plan and Proposed Plan in respect of sustainability, rural productive worth, high class soils rural character and amenity, and the protection of natural and physical resources. Mrs Darby advised the Committee that in her opinion the proposal does not meet either branch of the gateway test under section 104D of the Resource Management Act and therefore that the Committee is not in a position to consider the granting of consent. It was her view that the proposal should be declined. In the event that the Committee reached a different conclusion, Mrs Darby provided a draft of conditions and advice notes.

The Applicant's Case

Mr Page presented legal submissions which described the site and the proposal, and set out the background to application, including the applicant's previous market gardening activities and the previous Plan Change 14 process that applied to the wider site.

Mr Page outlined wastewater servicing, hazard, stormwater and transport issues. Mr Page spent some time on the issue of high class soils, which he considered should have low weight applied to them, due to the small proportion, in a district-wide context, of loss of such soils.

It was confirmed that the applicant had lodged a submission to the 2GP to rezone the land, on which a decision is yet to be made. Related to this, Mr Page spent some time on the nexus between the National Policy Statement on Urban Development Capacity 2016 (NPS) the 2GP process, demand for land at Outram and the suitability of the present site for residential development.

Mr Russell Lundy, an experienced real estate agent, spoke to his pre-circulated evidence, explaining the relatively high demand for land at Outram, and his opinion that the Mosgiel and Outram land markets were inter-related.

Mr Hugh Forsyth, an experienced landscape architect, tabled and spoke to a summary of his pre-circulated evidence. Mr Forsyth provided a visual background to the site and surrounding sites including the walkway that people use to access the Outram Glen area. He also commented on the treatment of the historic homestead. Overall, his evidence concluded that the site possessed limited to no rural characteristics and therefore with residential development there would be no loss of rural amenity, should the applications be granted.

Mr Gary Dent, an experienced engineer, spoke to his pre-circulated evidence which included the progress on stormwater management that had been made since his evidence had been lodged with Council.

He commented on the size of the detention pond, and two potential locations for the discharge of stormwater to the Taieri River via a pumping station, including some detail regarding the piping of the stormwater discharge to the State Highway 87 bridge abutment. He confirmed that there would be no stormwater disposal to the drain to the west, across State Highway 87. He confirmed that this would result in a net-positive outcome for people and properties downstream on the drain to the west.

Mr Derrick Railton, an experienced wastewater engineer, spoke to his pre-circulated evidence. He commented that the well-drained soils are good at removing pathogens from on-site wastewater systems. Overall, he was satisfied that the proposed on-site wastewater systems, if appropriately maintained, would protect ground water.

Mr Kurt Bowen, an experienced surveyor, helpfully tabled a summary of his pre-circulated planning evidence. Mr Bowen's pre-circulated evidence was comprehensive and drew the Committee's attention to key issues. He concluded that, in his opinion, the effects of the proposal are no more than minor and that consents ought to be granted.

All of the applicant's representatives were asked a range of questions by the Hearing Committee and responded in appropriate detail. In response to a question about the number of lots proposed it was noted that no reduction in the scale of the development was offered for consideration.

Submitter Appearances

Ms Julie McMinn, Consultant Planner on behalf of the New Zealand Transport Agency (NZTA) spoke to her pre-circulated evidence and responded to questions from the Committee. Mr Graham Hall (NZTA Manager – Systems Management – Lower South Island) was also in attendance to answer questions relating to the reported blocked culvert under SH87. Ms McMinn advised the Committee that, subject to a condition of consent, the applicant's alternative layout plan presented at the Hearing is acceptable and satisfies the concerns of the NZTA as expressed in its original submission with regard to the additional use of the State Highway on Mountford Street.

Mr Jean-Luc Payan, Manager Natural Hazards, Otago Regional Council (ORC), spoke to his pre-circulated evidence and projected photographic images of the 1980 and 2017 Taieri River flood events. Mr Payan emphasised that the subject area is heavily reliant on the floodbanks to mitigate the Taieri River flood hazard, and following questions from the Committee, stated that there was insufficient information available to properly assess the mitigation offered by the design options presented by the applicant. He concluded that the proposed development of the subject site would create a risk that does not exist at present, and even with mitigation provided by design, an element of risk would always remain.

Mr Dominic Fletcher, Consulting Water Resources and Dams Engineer for the Otago Regional Council, spoke to his pre-circulated evidence and commented that his brief was to undertake a limited technical review of the proposed subdivision storm water system. He commented that an absence of detailed information provided by the applicant made the technical review of the proposed storm water system difficult. Following questions from the Committee, and in particular a response to a question by Commissioner McCallum-Clark, Mr Fletcher expressed concerns around the capacity, size and depth of the detention pond and potential risks to the flood stop banks. Mr Fletcher was of the view that further information was required to demonstrate that the stormwater detention pond and associated pump stations works would not affect the integrity of the stop banks during construction and operation.

Mrs Patricia Scott tabled and spoke in support of her submission in opposition to the proposed development. She presented concerns relating to development, commenting that it is inconsistent with the District Plan. She questioned the reported demands for additional housing in the Outram area, and promoted the importance of food security and ensuring the potential of high class soils is protected. Following questions by the Committee, Mrs Scott confirmed she supported the recommendation to decline the application.

Processing Planner's Review of Recommendation

Mrs Darby was asked by the Committee if she wished to review her recommendation considering the evidence presented at the hearing. She advised that she maintained her original recommendation to decline consent.

Applicants Right of Reply

Mr Page reiterated the positive aspects of the application and expressed his view that it is appropriate for the consents to be granted.

He responded to ORC's evidence, and was critical of Dr Payan's evidence, observing in particular that almost the whole of the Taleri Plain is protected by stopbanks and that this ought not to be a reason to limit further development.

Mr Page commented that a natural depression is to be used for the detention pond, and that this already has a resource consent. He stated that any additional capacity required can be dealt with under the original consent or by increasing the pumping. He did not consider it necessary for the Committee to consider technical evidence on this.

Mr Page pointed out the specific elements of the NPS on Urban Development Capacity that do apply to this application, including Policies PC1-4.

Statutory and Other Provisions

The Planner's Report detailed in full the relevant statutory provisions and other provisions the Committee considered, with the exception of the National Policy Statement on Urban Development Capacity 2016.

The Committee noted that Sections 104D and 104 provided the main decision-making framework for the application.

In particular, regard was given to the relevant provisions of the following chapters of the Dunedin City District Plan: 4 Sustainability, 6 Rural/Rural Residential, 8 Residential Zones, 17 Hazards, 18 Subdivision, and 20 Transportation; and the following chapters of the Proposed District Plan: 2 Strategic Directions, 6 Transportation, 9 Health and Safety, 15 Residential, and 16 Rural. Statutory provisions considered included Sections 5, 7(c) and 7(f) within Part 2 of the Act. Regard was also given to the Regional Policy Statement for Otago and the NPS on Urban Development Capacity.

Main Findings on Principal Issues of Contention

The Hearings Committee has considered the evidence heard, the relevant statutory and plan provisions, the principle issues in contention. The main findings on the principal issues have been incorporated within the reasons discussed below.

Decision

The final consideration of the application, which took into account all information presented at the hearing, was held during the public-excluded portion of the hearing. The Committee reached the following decisions after considering the application under the statutory framework of the Resource Management Act 1991. In addition, a site visit was undertaken prior to the hearing. This site inspection added physical reality to the Committee's considerations of the evidence heard at the hearing.

Subdivision – SUB-2017-49

*That pursuant to Section 34A(1) and 104B and after having regard where appropriate to Part 2 matters and Sections 104 and 104D of the Resource Management Act 1991, and the provisions of the Dunedin City District Plan and the Proposed Second Generation Dunedin City District Plan, the National Policy Statement on Urban Development Capacity 2016, and the Resource Management (National Environmental Standard for Assessing and managing Contaminants in Soil to Protect Human Health) Regulations 2011, the Dunedin City Council **declines** consent to a **non-complying** activity being the subdivision of the land at 94 Holyhead Street, Outram, legally described as Lot 10 and 27 SUB-2017-32 (currently part of Lot 2 DP20759:(Computer Freehold Register OT12B/346).*

Land Use – LUC-2017-255

*That pursuant to Section 34A(1) and 104B and after having regard where appropriate to Part 2 matters and Sections 104 and 104D of the Resource Management Act 1991, and the provisions of the Dunedin City District Plan and the Proposed Second Generation Dunedin City District Plan, and the National Policy Statement on Urban Development Capacity 2016, and the Resource Management (National Environmental Standard for Assessing and managing Contaminants in Soil to Protect Human Health) Regulations 2011, the Dunedin City Council **declines** consent to a **non-complying** activity being the establishment of residential activity on Lots 33 to 46 and 53 of subdivision SUB-2017-49, associated earthworks and soil disturbance, at 94 Holyhead Street, Outram, legally described as Lot 10 and 27 SUB-2017-32 (currently part of Lot 2 DP20759:(Computer Freehold Register OT12B/346).*

Reasons for this Decision

The Committee noted that there was no dispute that the proposed subdivision and associated land use consents are non-complying activities, and that it is necessary for the proposal to pass the “gateway test” of section 104D of the Resource Management Act 1991. This requires that either the environmental effects of the proposal are no more than minor, or the proposal is not contrary to the objectives and policies of the operative and proposed District Plans, when assessed as a whole.

The Committee agreed that the proposed lots are all significantly undersized for the Rural zone, being more consistent with the Residential 5 zone of Outram. The Committee was unanimous in its view that the proposed subdivision and residential development will not sustain the potential of natural and physical land resource because the subject site is rural land with significant proportions of high class soils, and there is no expectation in the operative or proposed district plan that this land will be developed with housing. The fact that the site contains high class soils was not disputed. Neither the District Plan nor the Proposed Plan expect high class soils to be covered by housing to the extent proposed where located within a rural zone. Mr Page and Mr Bowen provided a range of material, including a number of Environment Court cases that confirmed that the presence of high-class soils is not determinative of itself, but rather is a matter which the Commissioners have weighed along with other factors.

Mr Page encouraged the view that as part of the site had been identified for use as an effluent disposal area in the structure plan for the previous Plan Change process, that this should be considered when weighing up the high class soils issue. While the Commissioners agreed that the previous plan change process is relevant, the applicant is departing significantly from the structure plan with respect to the application site. In particular, it is no longer proposed that there will be any communal wastewater system to utilise this land as an effluent disposal area, such that the weight to be applied to the previously indicated use of part of the site is low.

The Committee noted the evidence of Mr Forsyth, relied on by Mr Bowen, and the information in Mrs Darby's s42A Report. The conclusions of the applicant on this matter appeared to be that while visually pleasant, the site was small and had lost much, if not all, of its rural character and associated rural amenity values. While taking the evidence into account, the Committee also had the benefit of undertaking a site visit, and being able to consider the location of the development approved under Plan Change 14, the application site and the surrounding area. The Committee was of the view that while the site is a small site, it is rural in nature and that small rural sites are not unusual on the outskirts of towns and cities throughout the country. The Committee was of the view that the site exhibited rural amenity values, including visual values, a comparatively low level of development and activity, quietness and a predominance of natural, rather than built form. These elements of rural amenity would be lost through residential development.

Mr Bowen noted an activity, such as forestry, could be undertaken on the site and would have, in his opinion, more significant effects. While the Committee agreed that such an activity could occur, the Committee did not consider that any well-considered permitted baseline assessments were put forward, and exercised its discretion not to consider any permitted baseline scenarios.

The Committee noted that the applicant has submitted an alternative layout plan for the proposed subdivision to ensure internal access to all new lots occurs from Holyhead Street, essentially removing all vehicle accesses from Mountfort Street. The Committee was satisfied that while the subdivision would introduce greater traffic onto Holyhead Street, Holyhead Street is expected to function effectively and safely. The Committee also noted that the alternative layout plan presented by the applicant satisfied the concerns of the NZTA as expressed in its original submission with regard to the additional use of the State Highway on Mountfort Street.

The Committee understood from the application, s42A Report and evidence, that the site is subject to a number of natural hazards, including flooding from the Taieri and liquefaction potential. The flooding from the Taieri is effectively mitigated by the flood bank immediately to the east of the site. The Committee was satisfied that, while any additional development in Outram increases the risk to the community, the floodbank is adequate mitigation of this risk, provided its integrity can be maintained. The Committee was also informed that the Building Act, and further geotechnical work underway by the applicant, largely dealt with the liquefaction risk.

The Committee were concerned about the potential for stormwater to cause localised flooding on the site, whether there were adequate methods to dispose of stormwater and whether those disposal methods may have effects on the integrity of the stopbanks. The Committee noted the concern of the ORC with respect to these matters. The Committee was unable to conclude that these matters were adequately dealt with, such that the adverse effects would be no more than minor. In particular, the Committee were troubled by the diverse range of detention pond sizes advanced by Mr Dent, the lack of definitive answers on design and capacity of any pumped system, and the unresolved hurdles to be addressed to achieve a discharge to the Taieri River.

It was the considered view of the Committee that the proposal failed to pass the gateway test in relation to the effects of the proposal. In reaching this view, the Committee considered the advice of Mrs Darby, noting that at her paragraph 211, she expressed the view that the proposed subdivision and residential development of the subject site will have significant adverse effects in terms of its Rural zoning and rural character, including the preservation and use of high class soils for rural production, and the views of the ORC with respect to stormwater management and stopbank integrity.

In respect of the objectives and policies of both Plans, the Committee accepts the advice of Mrs Darby that the proposal is inconsistent with those relating to the development of hazard areas, and effects on neighbouring properties and contrary to the objectives and policies that address rural production, sustainability, land fragmentation, the protection of high class soils, rural character and amenity, density, and the protection of natural and physical resources. The Committee noted the view confirmed by Mr Bowen, for the applicant, that the proposal was contrary to the most relevant objectives and policies of the plans. The Committee noted the consistent views of the experts, which coincided with their own views, that in this case, the proposal failed to pass the gateway test in relation to the objectives and policies.

The Committee did not accept the applicant's suggestion that the proposal represents a true exception and preferred Mrs Darby's assessment that there is a limited true exception argument for this proposal. The Committee note that although the nature and position of the subject site within the Rural zone has characteristics which are unusual and unlikely to be replicated elsewhere, the proposal is for the subdivision of Rural-zoned land at the edge of a township. The Committee agreed with Mrs Darby that this is not a unique situation, and the granting of consent could result in setting an undesirable precedent where other property owners at the edge of an urban settlement could conceivably expect to be able to subdivide their small rural block in a similar manner.

At the hearing, the requirements of the National Policy Statement on Urban Development Capacity 2016 were considered. The Committee agreed that the provisions of the NPS needed to be taken into account, but were not persuaded that the NPS was particularly directive with respect to this application. Further, the Committee did not agree that Outram and Mosgiel were 'essentially the same catchment' in terms of the NPS. The Committee noted the 2GP plan processes underway, and that the available land in Outram meant that there was time for a considered and co-ordinated future planning process to address any shortfalls in the supply of residential zoned land.

Overall, the Committee's view on the main findings on the principal issues of contention, include that; the proposal to subdivide land zoned for rural purposes for residential housing does not represent a sustainable use of land comprising high class soils; that the proposed subdivision and residential development of land zoned for rural purposes resulted in effects on rural character and amenity that were more than minor; that there is insufficient detail provided by the applicant to determine the extent to which the subdivision would exacerbate or create surface flooding on the subject land or other land in the catchment; the proposal is contrary to the objectives and policies of the operative and proposed district plans; and that the circumstances of this proposal do not represent a "true exception" and therefore any approval of the application may set an undesirable precedent.

The Committee concluded that the granting of the consent would be inconsistent with the purpose of the Resource Management Act 1991, which is to promote the sustainable management of natural and physical resources.

Right of Appeal

In accordance with Section 120 of the Resource Management Act 1991, the applicant and/or any submitter may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received. The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
CHRISTCHURCH 8140

Any appeal must be served on the following persons and organisations:

- The Dunedin City Council.
- The applicants.
- Every person who made a submission on the application.

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

Please direct any enquiries you may have regarding this decision to Lianne Darby, whose address for service is City Planning, Dunedin City Council, PO Box 5045, Dunedin 9058.

Yours faithfully

A handwritten signature in black ink, appearing to read 'mccallum', written in a cursive style.

Matthew McCallum-Clark
Chairman
Hearings Committee