

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of resource consent applications LUC 2017-104,
LUC 2017-402 & S240-2017-1 at 1069 and 1075
Highcliff Road, Pukehiki.

BY ALISON CHARLTON
Applicant

TO DUNEDIN CITY COUNCIL
The Council

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

INTRODUCTION

1. My name is Allan Cubitt. I hold Bachelor of Arts and Law Degrees from the University of Otago. I am an affiliate member of the New Zealand Planning Institute and have been involved in resource management matters since 1989. During this time, I have been involved in many aspects of planning and resource management throughout the South Island. I was the principal author of three District Plans prepared under the Resource Management Act, being the Southland, Clutha and Central Otago District Plans. I have also participated in the review of numerous District and Regional Plans throughout the South Island for a large range of private clients.
2. I am the Principal of Cubitt Consulting Limited that practices as planning and resource management consultants throughout the South Island, providing advice to a range of local authorities, corporate and private clients.
3. I am also a Certified Hearings Commissioner (Chair certified) having completed the 'RMA: Making Good Decisions' programme. I have conducted numerous hearings on resource consent applications, designations and plan changes for the Dunedin City Council, the Southland District Council, the Timaru District Council, the Waitaki District Council and Environment Southland. I was also the Chair of Environment Southland's Regional Policy Statement Hearing Panel and the Chair of the Hurunui District Council Hearing Panel on the proposed Hurunui District Plan.
4. I am familiar with the Dunedin City District Plan, the Otago Regional Policy Statement and the other relevant statutory planning documents. I am also familiar with the application site and the surrounding environment. Cubitt Consulting Limited prepared the resource consent application documentation for the site.
5. While this is a local authority hearing, I have read and agree to comply with the Code of Conduct for Expert Witnesses set out in the Environment Court Practice Note on Alternative Dispute Resolution, Expert Witnesses, and Amendment to Practice Note on Case Management. My evidence has been prepared on that basis.

SCOPE OF MY EVIDENCE

6. My evidence will cover the following matters:
 - The site and the proposal
 - The Original application
 - Status of the proposal and Section 104
 - Environmental effects
 - The objectives and policies of the District Plan
 - Proposed District Plan

- Section 104D and Plan Integrity
- Part II matters and Conclusion

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

THE SITE AND THE PROPOSAL

8. The site has been fully described in the application documentation (both the AEE and Mr Moore's report) and the planners report but I briefly set out the key points here:
 - The site is held in two titles, the oddly shaped title CFR 25979, which contains an area of 8.3 hectares and is the site of the development proposal, and CFR 203125, which contains an area of 11.3697 ha. The two titles are held together by way of a covenant under Section 240 of the RMA and have a combined area of 19.64 ha.
 - Legal and formed frontage is provided to both titles by Highcliff Road on the western boundary of the site.
 - CFR 25979 is currently vacant, relatively steep, grazing land that contains the Peggy's Hill Conservation Covenant (1.78ha) while there are also areas of native scrub scattered throughout the property. Much of this is in poor condition. The property also contains patches of gorse which are being progressively cleared. A small watercourse flows southwest through the property. The applicant's current dwelling and other farm buildings are located on CFR 203125 (1075 Highcliff Road). This site is also relatively steep grazing land with a large portion of it covered in native scrub.
 - The property occupies the lower southwest flank of Peggy Hill, directly on the eastern boundary of the Pukehiki settlement. In the wider environment, there are a large number of non-complying rural properties (at least 13) that contain dwellings. These range in area from 0.71ha up to 11.22 ha.
9. While the site is grazed by cattle, alpacas and sheep, it is not what would traditionally be called productive farmland, at least in an economic sense. 1069 Highcliff is the rougher of the two blocks, with a large portion of the site covered in indigenous vegetation or pest plants. The weed problem takes continual management, which is a costly burden when the property does not return an income. This proposal seeks to enable the development of a small dwelling (approximately 130m²) near the southern boundary of this property (at around the 320m contour), along with a new farm shed at the western boundary, for the use of Ms Charlton. She proposes to continue her alpaca (and sheep) wool spinning business on this site. The rough pasture on this site is particularly suited to alpacas and the purpose of the proposed farm shed is to provide shelter for these animals, along with providing shearing and fleece sorting facilities and storage for farm equipment.

10. A number design controls have been proposed by Mr Moore to minimise visual effects and ensure integration with rural character. These are detailed in the application and Mr Moore's evidence.
11. Earthworks will be required to form the house site, which will require excavation of a platform approximately 30m long and 17m wide to accommodate the development. Some retaining of the excavations may be needed but this will be no greater than 1.2m high with slopes battered back above and planted as indicated in Mr Moore's Figure 7(a). We estimate that the volume of earthworks involved in this process will be in the order of 650-700m³.
12. Associated with this will be a number of environmental enhancement works. The riparian areas adjacent to the watercourse and the areas around the house and shed are to be planted out in locally appropriate indigenous species. This will provide a more dominant framework of native vegetation for the buildings and to enhance the natural values of the watercourse. A condition addressing the establishment and ongoing protection of these areas is proposed.

THE ORIGINAL APPLICATION

13. To facilitate this process, consent is also sought to cancel the covenant that holds the two titles together. This will enable the property to be divided between the two parties and allow Ms Charlton to raise the funds necessary to establish her venture. Contrary to the implication in some of the submissions, the applicants are not property speculators and both wish to remain on property.
14. The original application was for a land use consent only, based on the CFR 25979 being an independent title. Both ourselves and the Council processing staff overlooked the fact that the two titles were held together by an amalgamation clause. The Furlong submission notes that Mr Hamilton is a local real estate agent who has been involved with property sales in the area, and suggests as such that he and Ms Charlton would presumably have a clear understanding of the title restrictions in place. It was Furlongs whose presentation to the original hearing alerted us to the potential issue, but to be fair to Mr Hamilton, he was not involved in the original application and we did not consult with him through the process. However, we assumed the title was unencumbered because of this situation, which was our mistake. I am confident that the applicant was not fully aware of this situation and did not deliberately misled anyone. There would be no benefit in this because if that consent was granted, it would not have achieved the outcome sought by Ms Charlton.
15. That outcome sought is to achieve independence on CFR 203125. The previous application could have been pursued, as the existence of the covenant did not prevent the establishment of an extra house on the property. However, it was not pursued, as the proposal would not be viable, economically or in a relationship sense. Hence, the new

application, which is essentially the same proposition but with the security of an independent title free of encumbrances to support it.

16. And while we do apologise to the submitters who now have to be involved in another process, I should clarify at this point that the existence of this covenant does not prevent this application. A number of submitters make comments about the covenant, with STOP suggesting that the Council did not intend it to be overridden; the Lawrence's say it was put in place precisely to stop this sort of application; the Furlongs say presumably the covenant entered into was a necessity to allow the subdivision of this land and it should be respected; Mr Forrester suggests that by removing the covenant, it would undermine all other covenants in place. Mr Grey, the section 42A report writer, states that he agrees with comments made by some submitters that the proposal would bring in to question the decision to grant the previous subdivision on a non-notified basis and says that the application would have been publicly notified in its absence.
17. With all due respect, any decision to cancel this covenant now would not bring into question the previous subdivision decision. The covenant was merely used at the time to ensure compliance with the minimum lot size but that does not mean that it cannot be revisited or that Council must always retain the covenant in place. If that was the intention of covenants (and plan rules for that matter), then we would not be able to make this application. However, that is simply not a tenable approach to the management of resources, as things change over time. As one submitter, who lives on an existing undersized rural allotment in the area (Wells, 23 Camp Road) points out, many of these existing undersized rural allotments were developed under a different planning regime. I am familiar with that planning regime (the old Dunedin City Council District Scheme) and many of the sites referred to would have had to go through a process similar to this, called in those days a specified departure. But it illustrates the point that circumstances change and that planning is more often than not, reactive.
18. While I am on this point, the STOP submission suggests that because these sites were created before the 15ha rule came into being, they cannot be used as precedent. With due respect, that misses the point. These sites have not been referred to as a precedent in the sense that because consent was granted for them, consent should also be granted in this case. What I have said is that these sites have created an environment that is not what would be considered a normal productive rural environment and is not the rural environment the District Plan seeks to maintain. One cannot ignore the existing physical receiving environment when assessing an application, particularly when it comes to assessing the effect of an activity on amenity and landscape values.
19. Turning back to the covenant issue, Mr Grey is right in that if the two titles were not held together by way of covenant in the original subdivision, then it would have been publicly notified at the time. But all this is of course irrelevant because we are now applying to

remove the covenant, and the application has been publicly notified. This enables the proposal to be assessed on its merits, and in the context of the existing environment. Because that is the process, Mr Forrester's concern that consent would undermine all other covenants, is misplaced. As an example, I have briefly looked at the environment in the location of his property at 57 Sheppard Road, which he stated in his submission is 25ha (although it appears to be closer to 33.7ha), in four titles and held together by covenants. While there are two or three smaller allotments in this neighbourhood, there would appear to be little development in the area, being mainly large farm properties. It does not therefore appear to be an environment where an argument could be made for removing those covenants.

20. I should also comment at this point in relation to a number of the submitters implying that there must somehow be a 'greater good' when applying for a resource consent, as opposed to it only being the applicant that benefits. I don't understand where that logic comes from and it clearly does not come from the RMA, which has the purpose of enabling people and communities, not just communities. Of note is that these comments have been made by people who already live on undersized allotments and in one case, the greater good would appear to be preserving the wider environment for the benefit of tourism, and those who benefit from that activity, more than anything else.

STATUS OF THE PROPOSAL AND SECTION 104

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

EFFECTS ON THE ENVIRONMENT

23. Mr Grey addresses a wide range of issues in his environmental effects assessment of the proposal. However, I believe the two key issues in the determination of this proposal are the potential effects on amenity and landscape values. Once these issues have been

determined then matters of site suitability (geo-technical, storm water and effluent disposal matters); transportation and earthworks become relevant. However, none of these matters are at issue here.

24. Before I address these effects, I will briefly address 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.
25. There is limited baseline for this site because of the landscape overlay. However, in the context of a rural site, one would expect at least a farm shed or barn, regardless of the size of the site. These buildings are restricted discretionary activities and it is very likely that a restricted discretionary application for a farm building would be granted consent on a non-notified basis. While not part of the permitted environment, the proposed barn could be considered an anticipated development on the property under the rule structure and the effects of the barn would not be unexpected on this property.
26. Mr Grey notes that the farm building proposed here is in fact a permitted activity under the landscape rules because it is within the 50m of the existing dwelling. Because it will be accessory to Ms Charlton's farming activities as described above, it is a permitted activity. The STOP submission does raise a valid concern in respect to this matter however. The current rules enable the addition of further buildings when they are within 50m of an existing building and do not have a floor area greater than 50% of that building. This does have the potential to increase built development on the site and Ms Charlton is happy with a condition that restricts further buildings on the site with the exception of a glasshouse and small garden shed (i.e. building's that do not need building consent).

Amenity

27. In relation to amenity values, Mr Grey quotes Mr Sycamore, who assessed the original application and agreed with his position in relation to effects on amenity values, which was that the proposal will not lead to a loss of amenity values that would be more than minor over the long term. In discussing the density issue, Mr Sycamore rightly noted that the landscape overlay does not exclude dwellings but is more about managing effects of the structures themselves.
28. In assessing amenity effects, my view is that the environment, both that of the subject site and the wider receiving environment must be assessed "as it exists". This includes any lawfully existing non-complying activities (such as undersized lots and the dwellings on them) and any future permitted activities, and not an environmental 'ideal' as expressed in

the plan. The definition of amenity values refers to the qualities and characteristics “of an area” that contributes to people’s appreciation of it. This area is relatively unique as it is characterised by rural residential development that is at a higher density to that which is anticipated by the ODP. This development influences the amenity of the area including the subject site. The application highlighted the following development within a kilometre of the site:

- 28 Camp Road – 1.7ha
- 59 Camp Road- 4.16ha
- 80 Camp Road – 1.94ha
- 276 Castlewood Road – 4.46ha
- 131 Greenacres Street – 8ha
- 128 Greenacres Street – 7.5ha
- 974 Highcliff Road – 11.22ha
- 977 Highcliff Road – 8.15ha
- 979 Highcliff Road – 1.05ha
- 1027 Highcliff Road – 10ha
- 1030 Highcliff Road – 0.71ha
- 1088 Highcliff Road – 10.11ha

29. 1069 Highcliff is 8.3 hectares and 1075 Highcliff is 11.46 hectares, so they are similar to several of the properties listed above. On that basis, I am of the view that the amenity values of the existing environment or the neighbouring properties are not compromised by this proposal. Mr Grey seems to agree although based on Mr Knox’s concern regarding the length of time it takes for planting to mature, he considers it could be more than minor initially. However, Mr Moore is comfortable that while effects on natural character and rural amenity values will be adverse, they will only be minor in the short – medium term and will reduce to negligible and possibly positive overall as proposed plantings become significant elements in the landscape.
30. In relation to this issue, *Stokes v Christchurch City Council* [1999] NZRMA 409 confirmed that the proper test is to ask whether the adverse effects, as proposed to be remedied and/or mitigated are more than minor, taken as a whole. So, where mitigation is proposed by way of conditions that may take some time to become fully effective (the usual case for planting), it is the final result that falls to be assessed, not the temporary situation. Temporary effects may still be relevant under section 104, but not to the threshold section 104D test.

Landscape Effects

31. It is the undersized allotments that makes the application non-complying, not the consents required for the buildings in the outstanding landscape zone. These consents are only a restricted discretionary activity. In relation to submitters concerns that the landscape should be protected from development, a fully complying site would not relieve their concerns.

32. As the Commissioner will be aware, Section 6(c) of the Act does not require the protection of outstanding natural features and landscapes from all subdivision, use, and development. It only requires that protection from inappropriate subdivision, use, and development. So, the question here is whether the proposal is 'inappropriate' in this location. Given the high density of development in the area (the Pukehiki settlement and surrounding small rural lots), the location is one that has historically been preferred for occupation. This factor alone suggests to me that dwellings and human occupation in this location is not, per se, inappropriate in this environment. Provided the specific location and design of the development addresses the key landscape values (relevant to this area, as not all of the PCOLA values are), the development cannot be considered inappropriate if it is reflective of the existing density in the surrounding environment.
33. Mr Moore has assessed the visual effects of the proposal in his evidence. He notes that there are only two public viewpoints from which the proposed buildings will be seen, being Highcliff Road directly adjacent to the property, and Highcliff Road near Buskin Road, approximately 2km distant to the west. Visual effects from these points range from negligible to minor. He also notes that the buildings are effectively screened from surrounding residential viewpoints by intervening vegetation and does not expect adverse visual effects in this context accordingly.
34. Given the intervening screening, topography and distance of the public viewpoints, I take it from Mr Moore's evidence that the proposed development will in fact be reasonably difficult for most people to see. This would suggest that the specific locations proposed for buildings are not inappropriate within this landscape. Much has been made of the altitude of the dwelling but that is largely irrelevant as it the effect of that which must be considered. Mr Moore notes that there are other houses (for example, 80 and 100 Camp Road) that are at a similar altitude and that the house is only 25m higher than the highest house in the adjoining settlement.
35. Mr Moore has assessed the proposal values of the Peninsula Coast OLA (Operative District Plan) and the Peninsula Coast ONL (2GP) at his paragraphs 25 to 27. He believes natural values of the site will be enhanced and any adverse effects on naturalness or qualities of perceived isolation are minimised because of its location at the edge of the settlement of Pukehiki. He also notes that the site is not coastal and there are no adverse effects on natural coastal character, heritage landscape features, wildlife habitats or recognized landform features. With respect to the values listed in the 2GP, it is Mr Moore's view that the proposed development will have no impact on these.
36. Councils in-house landscape expert, Mr Barry Knox, also concluded that "*with landscape mitigation effects on the values of the PCOLA are likely to overall to be minor.* [page 120 of

the agenda document]. As noted above, he does qualify this further down that page by considering the effect may be more in the moderate range until the landscape mitigation is established. And again, as noted above, Mr Moore does not agree with this (believing they are initially negligible/minor before becoming positive) and I have outlined the legal position as articulated in *Stokes* at my paragraph 30 above. This is the only reasonable position to take, as the initial effect of any development will always be more significant at first. In my experience, all Councils largely ignore construction effects on the basis that they are temporary (even though large, staged developments can take up to 5 years) and are necessary to enable the development. In my view a similar approach should be adopted to mitigation as it does take time to 'bed in'.

37. The issue of the effect on the 'night sky' is also raised in this context. Given the existing development in this location, this proposal will have little if any impact in this regard. If this is perceived as an issue by the Commissioners, conditions around outdoor lighting could be imposed that address a reduction in lumens (brightness), direction and shielding, number and location.
38. In conclusion, Council officers do seem to accept that any adverse landscape effects, overall, will be minor and that the proposed plantings will be positive in the long term.

Geo-technical Issues and Earthworks

39. Dr Jon Lindqvist has carried out geotechnical investigations in order to determine the general geotechnical conditions of the proposed building site. His work confirmed that the proposed building area and proposed access road hold no identifiable geotechnical risks. Councils Consulting Engineer has viewed Dr Lindqvist's report and essentially confirms that the site is free of natural hazards. Given that the property does contain some steep slopes, he recommends a number of conditions which are acceptable to the applicant.
40. In relation to earthworks, Mr Grey notes that the site is identified within a Wahi Tupuna area under the 2GP. He recommends that the standard accidental discovery condition be imposed if consent is granted. I agree that such a condition would be appropriate.

Transportation and Provision of Services

41. Both of these matters have been assessed by the relevant Council Department. Transportation Planning confirm that the sight line distances for the proposed access are appropriate and that the proposal will only have only a negligible effect on the transportation network. A condition regarding the construction of the access has been proposed, which is acceptable to the applicant. I agree with Mr Grey that transportation effects are less than minor.

42. With respect to servicing the development, no Council services will be utilised. As noted in the application, effluent and stormwater from the site will be disposed of on-site using an approved system that is designed to take into account the topography of the site, the extent of vegetation and the proximity to watercourses. Water sourced from the existing spring will serve as the primary source of water for domestic consumption while rainwater collection from roof surfaces will also be utilised on the site, especially to assist in the establishment of the native plantings. The development will include measures necessary to comply with the New Zealand Fire Service's Code of Practice for Fire Fighting Water Supplies. Power and telephone services are available nearby.
43. The proposal will not generate adverse environmental effects as a result of servicing the proposed dwellings.

Indigenous Vegetation and Habitats

44. Mr Grey also addresses the issue of indigenous vegetation and habitats and advises that no adverse effects on the vegetation contain within ASCV C065 are anticipated. However, it should also be highlighted that this proposal will have significant positive effects in this regard, with the proposed plantings enhancing the natural character of the area.

Cumulative Effects

45. With respect cumulative effects, Mr Grey considers *"that these have the potential to be more than minor, but only with regard to rural amenity and landscape values, in the short to medium term."* However, he goes on to say that *"if satisfactory mitigation can be achieved, any cumulative effects would likely be no more than minor"*. This is again referring to the temporary effect until the landscaping takes hold. Mr Moore does not share this concern but again the assessment approach required by Stokes is relevant.
46. In my view this is not a cumulative effect anyway, it is merely the effect of the dwelling in the landscape which is immediately obvious, not a gradual build-up of consequences overtime. The potential adverse cumulative effect here, is the ability to erect additional buildings as of right under the landscape rules. However, we have deal with this by proposing a condition that restricts further built development.

HAIL

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

Conclusion on Environmental Effects

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

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

49. 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.
50. It would seem therefore that the correct approach would still require a holistic assessment of the objectives and policies and it is on this basis that I have assessed the proposal under section 104D(b). The objectives and policies of a number of the District Plan sections are relevant to this proposal. These are the Sustainability, Rural Zones, and Landscape. The relevant objectives and policies of each are considered below.

Sustainability Section

51. 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.

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

Rural Zone Policy Framework

57. 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.
58. 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.

59. 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.
60. 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 these controls in place with respect to the native vegetation and water course within the site.
61. Mr Grey thinks productive potential will be better protected by keeping the amalgamation clue in place. As I noted in paragraph 55, the site will remain in farming use and could in fact become more productive as result of the two owners occupying a title each. The house location is currently an area of gorse, so no productive pasture land is lost by establishing a dwelling there. The gorse will be cleared and replaced with native plantings. The proposal will ensure that the productivity of native vegetation on the site will be maintained and enhanced while at least maintaining agriculture productivity at the site.
62. Related to the productivity policies are the reverse sensitivity policies that seek to minimise conflict between traditional rural activities and other activities, such as residential activities, to ensure productivity is not affected (Objective 6.2.5, Policies 6.3.3 and 6.3.12). Mr Grey again

considered the proposal inconsistent with this policy suite although he considers the potential for reverse sensitivity to be low. While this proposal is not a subdivision, I accept that cancelling the amalgamation clause does then provide the opportunity for the sites to be sold off independently. However, both titles are relatively consistent in size, and are in fact larger, than many of the rural sites in this area. The proposed development is compatible with the surrounding environment and will in fact enhance the conservation values of the site, which is a rural use. It is not actually necessary to cancel the covenant to enable the consent to be granted for another dwelling on the property – the covenant does not prevent the establishment of further dwellings on the site. However, from a practical economic point of view, it is necessary to raise the finance to build the dwelling (and to enable independence for the current owners).

63. Hence the proposal is not contrary to this policy suite and it is difficult to see how it is inconsistent with it, given the nature of the receiving environment and the fact that the titles exist.
64. This then leads on to the policy suite that deals with the provision of rural lifestyle choices, Objective 6.2.3 and Policy 6.3.4. While Policy 6.3.4 deals with the Rural Residential zones themselves, it does give a useful guide as to what areas should be avoided. The criteria require rural residential development to avoid, as much as practicable, locations that:
- are affected by natural hazards;
 - are within landscape management areas (which include LCA'S);
 - contain high class soil;
 - may lead to unsustainable provision of infrastructure
65. The proposal does not involve high class soil (although there is a small portion on the western side of 1069 Highcliff) or the unsustainable extension of infrastructure and is not affected by natural hazards. While the building site is located in an OLA, Mr Moore concludes that the proposal will eventually enhance landscape values in this location. As a consequence, the proposal is consistent with this policy.
66. 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.

67. In my view the proposal is not contrary to this policy suite.
68. Related to the provision for rural residential living is the issue of rural amenity. The specific rural zone amenity policy is 6.3.5 and it refers to the character of the rural area and requires activities to avoid, remedy or mitigate adverse effects on rural character. In my view, the proposal's adverse effect on amenity values in relation to both a 'real world' assessment and the amenity outcomes sought by the plan are no more than minor and in fact are positive when the mitigation proposed is taken into account. I consider the proposal is of "a nature, scale, intensity and location consistent with maintaining the character" of this particular area.
69. 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.
70. Mr Grey considers the proposal to be contrary to the cumulative effects policy 6.3.14. However, as I stated at paragraph 46, I don't consider this is what a cumulative effects assessment is really about. The effects of the proposal will be apparent immediately, they are not a "*gradual build of consequences*" over time, as set out in the definition of 'cumulative' effects. In my view, there is potential for adverse cumulative effects to occur if more and more built development occurs on the site but we have proposed a condition to deal with that. The only cumulative effects here will be positive in that the native vegetation enhancement will gradually build up to be quite significant.
71. Objective 6.2.4 and Policies 6.3.4 and 6.3.8 address infrastructure issues. As has already been noted, the proposal is consistent with this policy framework.

Landscape

72. Mr Grey discusses this policy framework at page 22 of the agenda and considers the proposal inconsistent with this policy suite on the basis of the short term effect until the plantings take hold. I have dealt with that issue previously. The main themes of this policy suite are protection of outstanding features and landscapes; encouragement of the maintenance and enhancement of landscape quality; and encouragement of development that integrates with the character of the landscape and enhances it quality. Mr Moore sets out an evaluation of the proposal against the relevant policies at his paragraphs 25 to 27. He considers that the proposal is compatible with the protection values of the OLA under the operative District Plan and the ONL under the proposed District Plan and that it will integrate acceptably with rural character, with no significant effects on amenity values. On that basis he believes the proposal is consistent with the relevant provisions of both plans and I agree.

Conclusion - Objectives and Policies

73. 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.
74. In terms of the merits assessment required under section 104(1)(b)(iv), I consider property is suitable for the proposed development when assessed against the policy framework of the plan. This is on the basis of the following:
- The property is not a productive farm unit and is located in an area where rural residential development is at a density greater than that anticipated by the plan. It will not impact on the productivity of the rural zone (Productivity and reverse sensitivity policies) but will enhance the productivity of existing indigenous vegetation on the property.
 - While the site does contain a small area high class soil, it is not affected and the indigenous vegetation on the site is to be protected and enhanced (Productivity and significant resources policies).
 - While the site is within an OLA, the development is attached to and integrates well with the surrounding residential/rural residential activities. (Landscape, amenity and significant resources policies).
 - Unstable areas will be avoided. (Hazards policies)
 - The sustainability of existing infrastructure will not be compromised. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

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

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

Precedent and Plan Integrity Matters

76. 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
77. 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
78. 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”.
79. In my view this proposal does not offend the effects-based policies of the District Plan and does not generate adverse effects that are any more than minor. In fact, I have concluded that overall the effects are likely to be positive because it will enable the enhancement of the indigenous vegetation on the property. On that basis, I find it hard to accept that an undesirable precedent would be created.
80. Council staff often refer to the ‘true exception’ test that came out of Judge Smith’s decision in the *Russell* case. I understand that the Court in *Russell* considered that the zoning approach of the plan was a mechanism adopted to avoid incompatible uses and development (paragraph 35, referring to Policy 4.37 and 4.3.8). That was the crux of the matter in *Russell* but is not at issue here. In my opinion the unusual rural residential density in the surrounding environment sets this particular area apart. The use proposed here is not incompatible with this environment.
81. While the Court in *Russell* referred to there being something in the application which constitutes it as a true exception, taking it outside the generality of the provisions of the plan and the zone, surely this principle must also apply to the location within which an activity is

proposed for. A zone as inflexible as the Dunedin City Rural zone cannot provide for the many different circumstances found within the diverse range of environments it encompasses. Individual resource consent applications allow the Council to assess, on a case-by-case basis, whether the approach of the plan (i.e. the zoning and minimum allotment size approach) is appropriate in all circumstances. Here I believe it is not. It must also be remembered that the Court in *Russell* actually stated that the “true exception” does not mean that a proposal needs to be unique. This statement in itself answers any argument that such areas are not a true exception merely because there are similar areas around the City.

82. This unusual wider environmental context, along with the fact that the sites are similar in size to many of the sites nearby, and the fact that natural values will be greatly enhanced on the site, sets this application apart. There are few, if any, undersized areas in the immediate area that remain undeveloped (perhaps only 946 Highcliff Road) which could use the land use consent here as a precedent. In terms of the covenant issue, I do not see this proposal as setting a precedent for say the Furlongs property. While I have not assessed it in detail, development of the title on the top of Peggy’s Hill would have far greater effects than what is proposed here.
83. 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

84. When exercising the discretion to grant or refuse the application sought, Part 2 of the Act is normally central to the determination. However, the role of Part 2 is in a state of change following the *King Salmon* decision and the general approach to the overall balancing exercise explained by the High Court in *Thumb Point Station Limited v Auckland Council*. That has been very recently been further particularised for section 104 in *RJ Davidson Family Trust v Marlborough District Council*. Hence, I do not propose to evaluate the proposal against Part 2 matters and in reality, it has been assessed against the relevant provisions above anyway. For completeness, I would merely say that Part 2 matters are not compromised by this proposal.
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. Most rural land can generally produce primary products and provide a range of lifestyle choices. However, in most cases, the land will have attributes that better suit one or the other. By recognising this, consent authorities can better protect the land that has a high productive capacity from those uses that do not need those attributes to exist.

86. The development will be in keeping with the existing surrounding development and will protect and enhance the natural resources of the site. The attributes of this property do not align with those needed for traditional rural activities (pastoral farming, forestry or other agricultural activities) but can provide a lifestyle choice while enhancing the significant natural values on the site. On this basis, I believe the purpose of the Act will be best served by granting consent to the proposal.
87. After receiving any evidence that may be presented by submitters, a set of conditions will be prepared for consideration at the hearing.

A handwritten signature in black ink, appearing to read 'P. Cubitt', is written on a light blue background.

Peter Allan Cubitt
30 January 2018