

23 August 2019

SE McArthur and JK McArthur C/o Allan Cubitt Consulting PO Box 9054 Dunedin 9047

Via Email: Allan@cubittconsulting.co.nz

Dear Mr and Mrs McArthur

RESOURCE CONSENT APPLICATION: LUC 2018-669

781 OUTRAM-MOSGIEL ROAD

TAIERI

The above application for the expansion of a fruit and vegetable stall along with an attached dwelling was processed on a publicly notified basis in accordance with section 95 of the Resource Management Act 1991. The Hearings Committee, comprised of Ros Day-Cleavin (Chairperson), Councillors Aaron Hawkins and Jim O'Malley. The Hearings Committee considered the application at a hearing on 29 July 2019.

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.

The Committee did not undertake a site visit given the Committee's familiarity with the site and the comprehensive evidence presented.

The Committee has **granted** consent to the application on Tuesday 6 August 2019. The full text of this decision commences below with a consent certificate attached to this letter.

The Hearing and Appearances

The applicant was represented by:
Mr Allan Cubitt, Planning Consultant
Kaye and Steven McArthur, the applicants, were in attendance.

Council staff attending were:

Phil Marshall (Advisor to Committee), Andrew Henderson (Consultant Planner), and Lauren McDonald (Governance Support Officer).

There were no submitters at the hearing.

Procedural Issues

No procedural issues were raised.

Principal Issues of Contention

The principal issues of contention are as follows:

- 1. Whether the expansion of a commercial activity in the rural zone is contrary to the Objectives and Policies of the operative and proposed District Plans.
- 2. The weighting to be given to directive 2GP policies including Policies 16.2.1.7, 16.2.1.8, and 16.2.4.4 that variously seek to avoid residential, commercial and industrial activities establishing on rural land.
- 3. The potential precedent issue of allowing a dwelling to be established in association with the commercial activity on an under size rural lot.
- 4. Whether the proposed activity was a 'true exception" that meant that it was not likely to create an undesirable precedent for future applications.

Summary of Evidence

<u>Introduction from Processing Planner</u>

Mr Andrew Henderson, Consultant Planner from Beca Consulting summarised his report. He was of the view that consent could be granted as both tests under section 104(D) of the Resource Management Act were met. Further, Mr Henderson noted that the NZ Transport Agency had granted approval to the proposal as an affected party.

Mr Henderson traversed the policy context of the application and made the point that in his view the proposal was a true exception as very few rural retail activities which had served the public for a long term were still in existence.

Under questioning from Councillor Hawkins, Mr Henderson spoke specifically about 2GP Policy 16.2.1.7 (avoiding residential activity on undersized rural lots) and 2GP Policy 16.2.4.4. (avoid reducing rural productivity). In Mr Henderson's view there is a not a conflict between the proposal and the two policies specifically because the site in question has always been a small rural site, and in this case the baseline of existing activity is an important factor.

Under questioning from Councillor O'Malley, Mr Henderson confirmed that his draft recommended conditions of consent, should the Committee grant the proposal, had omitted a water backflow prevention device as recommended by the policy analyst from Council's 3 Waters Department.

The Applicant's Case

In introducing the applicant's case, Mr Allan Cubitt described the proposal as being an expansion of fruit and vegetable sales from a longstanding retail activity. The proposal involves the establishment of a new dwelling attached to the fruit and vegetable retail operation. Stephen and Judith McArthur then spoke to their own written evidence. They detailed the history of the site and their extensive background in growing berry fruit in Outram. In the 2000s the business thrived, and they introduced two ice-cream machines which have proven to be very popular with people travelling considerable distances to buy ice-creams.

They indicated that they are one of the last major fresh berry producers in Otago and that while they have sold their main business they wish to continue production of raspberries on the existing 2ha site.

While they now live about 4 kilometres from the site in Tirohonga Road, they wish to establish a house at 781 Outram-Mosgiel Road so that they can more effectively manage the berry production and also the retail side of the operation. Supporting statements were attached to the McArthur's written evidence from:

- Barbara and Ken Cahill Hazelnut producers 320 Allanton Road.
- Simon Donaldson Rosedale Orchard Roxburgh.
- Graham Young commercial vegetable grower Outram.

Under questioning from the Committee, the McArthurs indicated that they also wished to act as a conduit for other local farmers who have produce for sale but have no retail outlet. It was mentioned that many small farmers do not have enough produce to set up a market at the Farmers Market in Dunedin for instance.

Councillor Hawkins asked if the applicants would accept a condition to prohibit fruit and vegetables or other branded products being sold which are not locally produced. Mr Cubitt said he would return to the issue later in the hearing after discussing the matter with his clients.

Mr Cubitt then continued with summarising his written evidence. He indicated that one of the reasons for the proposed dwelling was because of a history of dishonesty whereby the public took fruit and vegetables without paying for them. He also made the point that the proposed dwelling is attached to the shop and this is evidence that the proposal is not about creating a lifestyle block but about establishing a legitimate retail activity for the sale of produce grown on site (the berry farm) and also locally grown produce from other small farmers. In this respect Mr Cubitt said the proposal fits well with wider Council policies to encourage the productive use of high-class soils on the Taieri Plains, particularly around Outram.

Moving on to other detailed matters, Mr Cubitt said that the Otago Regional Council was happy in principle to support the proposal, their involvement relating to a designation which covers much of the site for the purpose of the Lower Taieri Flood Protection Scheme. Mr Cubitt also made the point that affected party approval from the NZ Transport Agency had been obtained as the site has direct frontage to State Highway 87. Mr Cubitt also pointed out that Mrs Botting, a nearby owner, had provided written approval to the proposal.

In speaking to the policy framework of the 2GP, Mr Cubitt specifically mentioned policy 16.2.1.5 (residential activity to support farming activity) and policy 16.2.1.7 (avoiding residential activity on undersize rural lots). With respect to the history of the site, it had once been an economic unit to support farming as at two hectares the site was sufficient to provide for the needs of a family as a dairy farm.

In stating that the policy framework supports the proposal, Mr Cubitt also referred to Judge Borthwick's direction in other contexts that the strategic directions of a District Plan need to be taken into account. In this case Mr Cubitt's view is that the proposal is contrary to a single policy but that overall it is consistent with the 2GP. After discussing relevant case law he concluded in paragraph 33 of his written evidence that "the correct approach would still require a holistic assessment of objectives and policies". Mr Cubitt emphasised the uniqueness of the proposal as there are no other retail fruit stalls left on the Taieri Plains despite these being relatively common in previous decades.

Mr Cubitt made the point that there is no land fragmentation issue in this case because subdivision is not involved, and the site has been its current size for many years. Finally, Mr Cubitt mentioned that Council's Environmental Health Department had raised the issue of reverse sensitivity due to noise from the Highway. Nevertheless, NZTA has recommended conditions of consent around the acoustic design of the house to insulate from road noise. The recommended conditions of consent, should consent be granted, contain an appropriate condition in this respect.

Evidence of Submitters

There were no submitters.

Processing Planner's Review of Recommendation

Mr Henderson mentioned a 2GP policy being Policy 16.2.1.8 (avoiding commercial activity in the rural zones) in the context of the proposal being an existing commercial activity. Mr Henderson mentioned that resource consent is required for the sale of goods not grown on the site and also for the establishment of a dwelling on a site of less than the required 25 hectares in the Second Generation Plan.

In Mr Henderson's view the proposal is an efficient use of natural and physical resources.

Mr Henderson did not wish to make any alterations to proposed conditions of consent. He did note that the Committee may wish to add a condition limiting the sale of goods to those that are locally produced and grown in the area.

In Mr Henderson's view the application is unique and supports the Good Food Charter and the wider policy intent of the Second Generation District Plan.

Mr Henderson reiterated that no meat is to be sold and that retail is to be limited to fruit and vegetables grown locally. He also commented that an existing resource consent allows ice-creams to be sold and this is a significant baseline factor in supporting the current proposal.

Applicants Right of Reply

Mr Cubitt made the point that offsite goods are already brought in for sale from other local farmers.

Mr Cubitt also said that a condition will be formulated by the end of the week relating to the sale of locally grown goods.

Statutory and Other Provisions

In accordance with Section 104 of the Resource Management Act 1991, the Planner's Report detailed in full the relevant statutory provisions and other provisions the Committee considered.

Regard was given to the relevant provisions of the following chapters of the Dunedin City District Plan: Sections 4 Sustainability, 6 Rural Zone, 19.6 Signs, 20.6 Transportation and 21 Environmental Issues of the Operative District Plan.

In addition consideration was given to Sections 2 Strategic Directions, 6 Transportation, 8A Earthworks, 14 Manawhenua, 16 Rural of the 2GP (Second Generation District Plan).

Regard was also given to the Regional Policy Statement for Otago.

Main Findings on Principal Issues of Contention

The Hearings Committee has considered the evidence heard, the relevant statutory and plan provisions, and 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 decision after considering the application under the statutory framework of the Resource Management Act 1991.

That pursuant to Section 34A(1) and 104B and after having regard to 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 Dunedin City Council **grants** consent to a **non-complying activity** being the retail of fruit and vegetables additional to the already authorised retail activity and the establishment of a dwelling attached to the existing shop on the site at 781 Outram-Mosgiel Road, Taieri legally described as Lot 1 Deposited Plan 7443 (Record of Title OT3B/175), subject to conditions imposed under Section 108 of the Act, as shown on the attached certificate.

Reasons for this Decision

The Committee noted that there was no dispute that the proposed rural retail sales and residential activity are non-complying activities under the Operative District Plan and Proposed 2GP 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.

In terms of the permitted baseline, the Committee considered the evidence provided and is satisfied there is agreement across the expert planning evidence that the existing resource consent held against the site (which allows for the production and sale of 'real fruit ice cream' being sold alongside other produce also grown on site) provides an important baseline consideration in supporting the current proposal. The Committee is also satisfied that there is agreement across the expert planning evidence that there is no relevant permitted baseline for residential activity and as such there is no useful baseline to apply to this application.

Mr Henderson's section 42A Report provides a comprehensive assessment of the key environmental effects of the proposal. The Committee accepts that evidence and notes the agreement across the expert planning evidence that the effects of the proposal can be appropriately mitigated by conditions of consent so as to be no more than minor relating to rural high-class soils, productive potential of rural land, rural amenity values, bulk and location, intensity of operation, transportation, infrastructure, hazards, and earthworks. The Committee agrees that no adverse cumulative effects or reverse sensitivity effects would arise from the proposal, noting in particular that the proposal is not creating an undersized lot, rather seeking to make efficient use of the site that presently exists, and that has supported a small retail operation selling rural produce for many years. In reaching an overall view on the effects of the proposal, the Committee acknowledged the positive effects of the activity in providing for the local community in alignment with the principles of the 'Local Food Hub' concept. The Committee took additional comfort by the Condition of Consent volunteered by the Applicant that would limit the sale of goods to those goods that are locally produced and grown in the area. On this basis, the Committee concludes that the proposal would pass the first limb of the gateway test of Section 104D and as such the Committee is able to consider granting the consent.

The Committee considered Ms Henderson's analysis of the objectives and policies of the operative and proposed district plans set out in the Section 42A report. The Committee substantially agrees with Mr Henderson's evidence, noting that reasonable weight could be given to the objectives and policies of the 2GP given the rural provisions of the Proposed 2GP are consistent with the Operative Plan and essentially solidify the approach that has been taken to non-rural activities seeking to establish in rural zones.

The Committee noted that in general terms the 2GP had tightened the policy framework compared to the

operative plan and introduced a more directive approach. It noted that the use of the term "avoid" in policy 16.2.1.8 means "to not allow". The proposal seeks to establish a residential activity on an undersized site in the Rural Zone and we accept Mr Henderson's evidence that the proposal is contrary to this policy. He further noted the potential tension that exists between Policy 16.2.1.7 (which seeks to avoid residential activity in the rural zones on a site that does not comply with the density standards for the zone) (under appeal) and Policy 16.2.4.4 (which seeks to avoid residential activity in the rural zones at a density that may, over time and cumulatively, reduce rural productivity by displacing rural activities) (not under appeal). We accept Mr Henderson's evidence that although the residential activity proposed is on a small site and therefore the density is higher than ordinarily allowed for, this density will not affect the productivity of the site and does not displace any other rural activity.

With regard to Policy 16.2.1.8, which seeks to avoid commercial and industrial activities in the rural zone (not under appeal), the Committee agreed with the consistent view provided within expert planning evidence that the nature of the proposal clearly supports the rural economy and rural activities, and promotes many of the principles of the Local Food Hub concept.

Careful consideration was given by the Committee to all the evidence presented to determine if there were factors about the proposed development, subject site and environment, which would set the application apart from other potential applications in a robust and meaningful way. The Committee agreed that in this case there were specific characteristics relevant to the proposal that would enable the Committee to contemplate that the proposal represents a unique activity or true exception to the zone provisions in this instance. Specifically, the subject site is a small, existing rural lot and no subdivision is proposed that would further fragment the rural zone; there is an established retail activity on the site that has operated for a number of decades; there are few roadside stalls such as this on the Taieri Plains; there are positive effects for the community; the residential activity will support the existing retail activity and provide additional opportunities for security and on-site management of the operation. Overall, it accepted the evidence of Mr Henderson and considered the proposal to be consistent with key 2GP objectives and policies. The Committee is satisfied that when considered overall the proposal is consistent with the relevant objectives and policies of the ODP and the 2GP and on this basis the proposal would pass the second limb of the gateway test of Section 104D.

The Committee concludes that the proposal will not give rise to more than minor adverse environmental effects and satisfies both gateway tests contained in Section 104D of the Resource Management Act 1991. As such, the Committee were, therefore, able to consider the granting of consent to the proposal.

The Committee considers that granting this consent will not set an undesirable precedent and that it is a 'true exception' that takes it outside the generality of the plan and the zone. In this regard, the Committee unanimously agreed that the proposal does not challenge the integrity of the District Plan or establish an undesirable precedent for future applications.

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

Right of Appeal

Pursuant to Section 120(1A) of the Resource Management Act 1991, no right of appeal to the Environment Court against the whole or any part of this decision exists for the following:

- (a) A boundary activity, unless the boundary activity is a non-complying activity;
- (b) A subdivision, unless the subdivision is a non-complying activity;
- (c) A residential activity, unless the residential activity is a non-complying activity.

(Refer Section 87AAB of the Act for definition of "boundary activity", and refer to Section 95A(6) for definition of "residential activity".)

For all other applications, 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 Mail Centre Christchurch 8013

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

The Dunedin City Council.

The applicant(s).

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.

Commencement of Consent

As stated in Section 116 of the Resource Management Act 1991, this consent will only commence once the time for lodging appeals against the grant of the consent expires and no appeals have been lodged, or the Environment Court determines the appeals or all appellants withdraw their appeals, unless a determination of the Environment Court states otherwise.

Monitoring

Section 35(2)(d) of the Resource Management Act 1991 requires every council to monitor resource consents that have effect in its region or district. The scale and nature of the activity, the complexity and number of the conditions needed to address the environmental effects and whether the conditions have been complied with determines the number of monitoring inspections required. Given the nature of your intended works/activity, this consent will require one annual inspection.

The City Planning Department sets out the fixed fees charged for monitoring in its schedule of fees. The fee for your scheduled inspection will be included in the invoice for your application.

It should be noted that if additional inspections are required, beyond those scheduled at the time the consent is issued, then there is the ability to apply additional charges to cover the costs of these extra inspections. Often you can reduce the need for additional inspections by complying with the conditions of consent in a timely manner and by ensuring on-going compliance with those conditions. Please ensure that you read the conditions of your consent carefully to establish your obligations when exercising your consents.

Yours faithfully

Ros Day-Cleavin

Chair

Hearings Committee

Aaron Hawkins Commissioner

Jim O'Malley Commissioner



Consent Type: Land Use Consent

Consent Number: LUC 2018-669

Purpose: The retail of fruit and vegetables additional to the already authorised retail

activity and the establishment of a dwelling attached to the existing shop.

Location of Activity: 781 Outram-Mosgiel Road, Taieri.

Legal Description: Lot 1 Deposited Plan 7443 (Record of Title OT3B/175).

Lapse Date: 23 August 2024, unless the consent has been given effect to before this date.

GENERAL CONDITIONS OF CONSENT:

1. All works and activities under this consent shall be carried out in general accordance with the consent application received by the Council on 5 November 2018 and modified on 13 December 2018, 4 February 2019 and 24 March 2019, except where modified below.

- 2. The consent holder is liable for the Council's costs associated with the monitoring of this resource consent under Section 35 of the Resource Management Act 1991.
- 3. Hours of operation for the retail activity authorised under this consent are restricted to 8.30am to 5.30pm, 7 days per week.
- 4. Goods that may be sold from the site are limited to locally grown and produced food products and plant extracts, including fresh fruit ice cream and yogurt products. The sale of meat products is expressly excluded from this consent. For the purpose of this consent, 'locally grown and produced' means products grown or produced in the Otago region.
- 5. Within ten working days of each anniversary of the date of this decision the Council may, in accordance with Sections 128 and 129 of the Resource Management Act 1991, serve notice on the consent holder of its intention to review the conditions of this resource consent for any of the following purposes:
 - a. to deal with any adverse effects on the environment that may arise from the exercise of the consent which were not foreseen at the time the application was considered and which it is appropriate to deal with at a later stage;
 - b. to deal with any adverse effects on the environment which may arise from the exercise of the consent and which could not be properly assessed at the time the application was considered; and
 - c. to avoid, remedy and mitigate any adverse effects on the environment which may arise from the eexercise of the consent and which have been caused by a change in circumstances or which may be more appropriately addressed as a result of a change in circumstances, such that the conditions of this resource consent are no longer appropriate in terms of the purpose of the Resource Management Act 1991.

- 6. The site design shall ensure that overland stormwater flow paths are not materially interrupted, and any permanent structures should be situated so as to avoid any adverse effects from local ponding during storm rainfall events.
- 7. All aspects relating to the availability of the water for firefighting should be in accordance with SNZ PAS 4509:2008, being the Fire Service Code of Practice for Fire Fighting Water Supplies.
- 8. A boundary RPZ backflow prevention device must be installed downstream of the existing water meter, just inside of the site boundary.
- 9. Prior to occupation of the residential dwelling, the consent holder shall provide 45,000 litres of on-site water supply in accordance with the Council's standards.
- 10. There are no stormwater infrastructure or kerb and channel discharge points in the Rural zone. Disposal of stormwater is therefore to water tables and/or watercourses onsite, or to suitably designed onsite soak-away infiltration system or rainwater harvesting system. Stormwater is not to cause a nuisance to neighbouring properties or cause any downstream effects.
- 11. Effluent shall be disposed of to a septic tank and effluent disposal system that is to be designed by an approved septic tank and effluent disposal system designer. The wastewater disposal system installed shall be appropriate for the soil conditions in the area, with the disposal area located a minimum of 50 metres from any waterway. The on site wastewater disposal system must be serviced regularly recording the time, date and any maintenance undertaken, with these details provided to the Dunedin City Council on request.
- 12. That the dwelling must be designed, constructed and maintained to achieve an indoor design noise level of 40dB LAeq(24hr) inside all habitable spaces.
- 13. Prior to either receiving produce not grown on the site; or prior to the construction of the proposed dwelling, the following improvements to State Highway 87 and the site access at Crossing Place 31 shall be completed:
 - The consent holder shall upgrade and maintain Crossing Place 31, in accordance with the NZ Transports Agency's Planning Policy Manual Full Diagram E standard, with a minimum radius of 15m, and culverts and drainage as required.
- 14. The surface of all parking, associated access and manoeuvring areas shall be formed, hard surfaced and adequately drained for their entirety, and parking spaces permanently marked in accordance with the approved plans.
- 15. The applicant shall provide three marked staff car parks within the site.
- 16. The content of any proposed signage shall be submitted to, and approved by, the Resource Consents Manager prior to installation.

Advice notes:

General

1. No works shall be undertaken within State Highway 87 without the prior approval of the NZ Transport Agency pursuant to Section 51 of the Government Roading Powers Act 1989. An application to carry out work within the State Highway road reserve; and, and appropriate traffic management plan shall be submitted to our network contractor (Highway Highlanders coastalotago@downer.co.nz) at least ten working days prior to the commencement off any works on the state highway.

- 2. In addition to the conditions of a resource consent, the Resource Management Act 1991 establishes through sections 16 and 17 a duty for all persons to avoid unreasonable noise, and to avoid, remedy or mitigate any adverse effect created from an activity they undertake.
- 3. Resource consents are not personal property. The ability to exercise this consent is not restricted to the party who applied and/or paid for the consent application.
- 4. It is the responsibility of any party exercising this consent to comply with any conditions imposed on the resource consent prior to and during (as applicable) exercising the resource consent. Failure to comply with the conditions may result in prosecution, the penalties for which are outlined in section 339 of the Resource Management Act 1991.
- 5. The lapse period specified above may be extended on application to the Council pursuant to section 125 of the Resource Management Act 1991.
- 6. This is a resource consent. Please contact the Council's Building Services Department, about the building consent requirements for the work.

Issued at Dunedin on 23 August 2019

Ros Day-Cleavin

Chair

Hearings Committee

Aaron Hawkins Commissioner

Jim O'Malley

Commissioner

Appendix One: Approved Plan/s for LUC 2018-669 (scanned image/s, not to scale)



