

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of applications for land use and subdivision consent
(LUC 2016-169 and SUB 2016-28) at 82 Riccarton
Road East, Mosgiel.

BY MAINLAND PROPERTY (2004) LTD

Applicant

TO DUNEDIN CITY COUNCIL

The Council

**EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF MAINLAND PROPERTY (2004) LTD**

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 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 I am currently the Chair of the Hurunui District Council Hearing Panel on the proposed Hurunui District Plan.
4. I am familiar with the Dunedin City District Plan, the Otago Regional Policy Statement and the other relevant statutory planning documents. I am also familiar with the application site and the surrounding environment. Cubitt Consulting Limited prepared the resource consent application documentation for the site.
5. While this is a local authority hearing, I have read and agree to comply with the Code of Conduct for Expert Witnesses set out in the Environment Court Practice Note on Alternative Dispute Resolution, Expert Witnesses, and Amendment to Practice Note on Case Management. My evidence has been prepared on that basis.

SCOPE OF MY EVIDENCE

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

- Proposed District Plan
- Otago Policy Statement
- Section 104D and Plan Integrity
- Part II matters

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

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 6.7 hectares in area having been created by subdivision consent RMA 2003-0879 (4 June 2004), which was processed under Variation 9A to the Dunedin City District Plan. At that time, 6 hectares was the minimum lot size for the Rural zone.
- The site occupies the eastern half of a low hill on the lower slopes of Saddle Hill that sits directly to the south of the western part of the East Taieri Township. The hill itself is characterised by a relatively narrow, flattish ridgeline which falls away relatively steeply to either side. The northern slopes become more moderate lower down near the boundary with the residential properties to the north. While there are some shallow slide failures evident on the northern slopes of the hill, most of the site is stable. The site is predominantly covered in rough pasture with areas of tree planting, dominated by Eucalyptus species, particularly on the steep southern face of the hill and associated with the slide features on the northern side.
- Directly to west and south are three properties that were also subdivided under the 6 hectare rule. They accommodate substantial dwellings.
- To the east are a number of undersized rural allotments that range from just under to 1 hectare up to just over 2 hectares.
- There is a consented building platform on the western end of the hilltop which is not yet developed. As was common with the 6 hectare allotments created by Variation 9A, subsequent land use consent was needed to facilitate the construction of the dwelling where they were not built prior to Environment Court decision that reinstated the 15 hectare rule. When a dwelling is constructed on this platform, the temporary residence located in the barn near the eastern end of the ridgeline must be decommissioned. A farm shed is located directly to the south of the temporary dwelling, near the south-eastern corner of the property. A small shed is also located near the hill summit.

- Current access is via a right of way off Riccarton Road East and a formed drive that has been developed to give access to the existing buildings on the site. Direct access to Riccarton Road East is also available in the northern corner of the property, to the south of the Residential zone.
9. The original proposal sought consent for three allotments (ranging between 2 and 2.5 hectares), each with a proposed building platform. The platform on Lot 1 was positioned around the current temporary dwelling site while the platform on Lot 2 represented the consented platform on the parent site. The platform on Lot 3 was positioned in the northern corner of the site, south of the Residential 1 properties.
 10. Upon reviewing the Planner's reports and the concerns expressed by Councils Landscape Architect, the proposal has been amended to remove the parent sites consented building platform and amalgamating the original Lots 1 and 2 to create a new Lot 1 of 4 hectares. The building platform on this lot encompasses the temporary residence but makes provision for this to be extended or redeveloped. The building platform for the new Lot 2 (previously Lot 3) is largely unchanged although it has been shifted uphill by 10m to increase the distance from the residential properties to the north and to provide better for outward views. Mr Moore has also promoted a suite of mitigation conditions for both lots which have been accepted by the applicant. The new proposal is illustrated on Figure 7 of Mike Moore's evidence.
 11. The consequences of the change are quite significant. The current building platform on this site is located on the highest point of the hill and is unavoidably prominent from some viewpoints. If this site was developed as permitted (with a dwelling that could be up to 7m high and 30m long), there would be two buildings of significant scale on the ridgeline. Under the new proposal, there will now be no other node of built development on the hill top.

STATUS OF THE PROPOSAL AND SECTION 104

12. The site is zoned Rural in the Operative District Plan and despite not being a coastal site, it is rather strangely zoned Rural-Coastal in the Proposed District Plan. The site is not located within the Saddle Hill Conservation Landscape Area (SHLCA). 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.
13. 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.

EXISTING ENVIRONMENT AND THE BASELINE

14. At her paragraphs 39 to 43, Mrs Darby discusses the permitted baseline. She rightly notes that 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.
15. At the time this site was subdivided, a dwelling was permitted on the site. As noted earlier, the reinstatement of the 15 hectare rule caught a number of 6 hectare lot owners out as more often than not they had not constructed dwellings within their properties and did not have land use consents for dwellings because they did not need them at the time. Hence the land use consent applying to this site is effectively an administrative consent to rectify that problem. Initially a dwelling could have been sited anywhere on the property (within the appropriate yards of course) and to a 10 metre height without any design controls. The subsequent land use has identified a building platform on the highest and most prominent part of the site, with a maximum height of 7m and a maximum length of 30m. This building is part of the existing legal environment.
16. The existing barn, now a temporary dwellings, is also part of this existing legal environment although its use as a residence must be disregarded when considered in conjunction with a future dwelling on the existing platform because that cannot occur. However as Mrs Darby notes, the building itself will not be removed and will continue to be used. This building has a light colouring and a ridgeline location that makes it visually prominent.
17. What is now proposed will see no increase in built development on the site. Importantly however, there will effectively be a relocation of the permitted building site that has the greatest adverse environmental effects (being the highest point on the site) down to a lower, less visually dominant site that integrates with the existing development in East Taieri.
18. In my view, and that of Mr Moore's, the adverse effects of this proposal are now less than what is permitted on the site as of right. This should be a significant factor in the Panels assessment of the environmental effects of the proposal, which I now address in more detail below.

EFFECTS ON THE ENVIRONMENT

19. Mrs Darby addresses a wide range of issues in her environmental effects assessment of the proposal. However I believe the two key issues in the determination of this proposal are the potential effects on amenity and landscape values. Once these issues have been determined then matters of site suitability (geo-technical, storm water and effluent disposal matters); transportation and earthworks become relevant. Of these matters, only geo-technical, storm water and effluent disposal matters need to be addressed here.

Amenity

20. In relation to amenity values, Mrs Darby promotes her usual opinion that the “assessment on amenity values needs to be viewed in the context of its zoning.” However as I have stated before in front of this Committee, in the context of assessing effects, I disagree with this position. I believe 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 the rural environment ‘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. What the zoning permits or otherwise has no influence on this perception of the actual physical environment of an area at any particular point in time. The ‘zoning’ of land is a legal construct, neither a natural nor a physical resource. To start an effects assessment from the environmental ideal as expressed by zone provisions is unrealistic and would lead to an assessment of effects that is out of kilter with the real world.
21. This means that the amenity values listed within a District Plan for the zone should not be substituted for the amenity values that are actually created by an environment which currently does not meet the minimum density standards of the zone or does not exhibit those amenity stated in the District Plan for that zone.
22. The Environment Court in *Saddle Views Estate Limited and KJ Taylor v DCC [2014 NZEnvC 243]* (the decision relating to 4A Braeside) in their discussion on the meaning of environment in this context completely misinterpreted my evidence on this matter and suggested I was wrong that the provisions of the plan (or the zone) should not be considered when describing the environment “as it exists”. Contrary to what the Environment Court said, I did not overlook the fact that the environment is also the reasonably foreseeable future environment (i.e. the environment that the plan permits), as it was specifically mentioned in my evidence in chief. Quite clearly an undeveloped site must be assessed in terms of the level of development the plan permits as of right. The point the Court did not grasp in my evidence was that when the amenity of the site and the receiving environment no longer reflects (or never has reflected) the amenity values stated in the District Plan, you cannot superimpose those ideal values over that environment and start

your effects assessment from that point. The Court did say however that *“there is an element of truth in Mr Cubitt’s concept that the ‘environment’ in s104 (ands104D) is not an ideal”*.

23. The land surrounding the 82 Riccarton Road East site is held in a range of property sizes, almost all of which support residential activity with some, to varying extents, also accommodating rural pastoral land uses. Generally speaking, the nearer to Main South Road the smaller the allotments, with a transition from a relatively high residential density (zoned Residential 1) along Main South Road through to 2ha rural residential blocks, up to 6ha rural lifestyle, to 15ha+ holdings further up towards Saddle Hill Road. The nature of the surrounding site was recognised in Council’s decision on SUB-2010-28 and LUC-2010-142 where it referred to the area as being a “transitional zone” (see paragraph 4 page 7).
24. The Court in *Saddle Views Estate Limited* also discussed the ‘transition’ phrase in relation to the 4A Braeside environment (to the east of this site) and accepted that *“the environment of the site may be in “transition” in the sense that it is changing over time from a typical rural working landscape with few house to a lifestyle area with more up-market (as opposed to utilitarian) house on 15 hectare blocks on the middle and upper slopes of Saddle Hill.”* With respect to the site itself it said *“it is in the Rural Zone and it cannot be said to be in transition from a rural character to an urban character. It is simply moving from one type of rural character to another.”* I bring this up for two reasons. Firstly, no one said this area (or the area of subject site) was transitioning to an “urban environment” and obviously the subject site itself had not already transitioned. No consent would’ve been needed if it had. The point being made by the applicant was that the character of much of this wider area does not reflect its zoning.
25. Secondly, while not specifically referring to the area being ‘in transition’ the Environment Court in *Kimberly John Taylor and Saddle Views Estate Limited v DCC [2014 NZEnvC 221]* (the decision relating to 103 Riccarton Road East), the Environment Court made the following observations in relation to this environment (which is the same environment as what you are considering here):

At paragraph 65 – *“If we consider that future element of the environment together with the existing component on the south-east side of Riccarton Road (the 2003 subdivision), we consider that in the vicinity of the site but not more widely the district plan has lost a degree of integrity in relation to the rural values and character it seeks to protect. This is exacerbated by the fact that the key elements of rural character which the district plan seeks to maintain ...have already been reduced in the six hectare lots on the southern side of Riccarton Road East ...”*

At paragraph 66 – *“However, the relatively low rural – as opposed to a rural residential (in a broad sense) - character of the existing and reasonably foreseeable future environment in which the site is set suggests that the applicants proposal is well suited to it.”*

26. The site sits within the environment discussed by the Court above, which was hugely influential in the Courts decision. Despite this, Mrs Darby implies at her paragraph 130 that because many of these allotments were complying at the time they were created (although at least three directly adjoining lots of 103 Riccarton Road were not) this should not be a factor in the decision. She says at paragraph 137 that *“the surrounding undersized Rural-zoned sites should not be overly influential in any decision to grant consent...”*. In my view it is irrelevant as to how this environment was created, it must be taken for what it is when determining the effects of any new development that may want to establish there. To me all that this analysis does is confirm the position that the area is in ‘transition’ which is understandable given its location on the urban fringe and its elevation and climatic attributes. It is clearly better suited to residential type land uses as opposed to traditional rural land uses. The Court thought so in relation to 103 Riccarton Road.
27. In this context the application noted that *“the proposed density is not out of keeping with existing development and does not extend the area of residential development further into otherwise undeveloped areas of the Rural zone”* and that *“While it does introduce another two residential activities in the area, it is effectively infill development of land not suitable for productive rural activity. The character of this location is very much of a ‘residential lifestyle’ nature with low density residential activity the predominant land use.”*
28. I note that at paragraph 97 of Mrs Darby’s report she advises that the Councils Landscape Architect does not consider the proposed development as ‘in-filling’. However at paragraph 68 of the *Taylor* decision, the Court considered that application *“is more of an infill situation than development of rural land of high rural and amenity.”* In my view the situation is the same here as it does not extend the environment described by the Court outlined above further into the rural zone. In fact the revised proposal will actually reduce this effect and as such it also makes Mrs Darby’s comments regarding cumulative effects at paragraph 144 redundant. The permitted effects of development on this site will be reduced by this proposal. I think Mrs Darby has taken the Courts comment quoted in that paragraph out of context. As I noted above, the Court was illustrating that rural amenity, as the district plan sees it, has already been compromised here. They were not concerned about cumulative effects with the 103 Riccarton Road decision and Mrs Darby’s comments about the influence of those allotments not being particularly visible are largely redundant under the new proposal. Even if the 103 Riccarton Road allotments were more visible, there was still a high chance that the consent would have been granted given their comments regarding the receiving environment.

29. In my view the effects of the proposal on rural amenity values will be in fact be positive overall given the reduction in the visual effects that could occur as of right. I note that Mr Moore concurs with this. In his view *“the lower slopes in this area have a favoured aspect and are close to the settlements of East Taieri and Mosgiel... these factors mean that the moderately high rural built density in this area does not appear inappropriate in this setting, where sensitively located.”* His assessment confirms that *“rural character and associated amenity values will be maintained by the amended development proposal”* and goes on to say that *“Residential development at the scale proposed is consistent with the existing rural character in this area and the location of the building sites minimizes any adverse effects”* and that *“there appears to be little concern from adjoining land owners regarding the visual effects of the proposed development. The proposed setbacks along with the other mitigation measures will be sufficient to ensure that the amenity of adjoining properties is protected.”* In his view any adverse cumulative effects on rural character and amenity values will be minor at worst.

Landscape Effects

30. Despite not being located within any landscape management area, the staff reports place great emphasis and focus on the SHLCA. In my view this is totally inappropriate and steps outside the matters that should be considered in determining this application. Even Mr Moore is concerned about this where he says at his paragraph 50 *“but I do wish to query the relevance of the Saddle Hill Landscape Conservation Area (SHLCA) The site is not located within the SHLCA and therefore the proposed development will have no effect at all on these overlays... the low hill can be seen ... in views toward the SHLCA but this does not mean that the effects of development are effects on the SHLCA or that consideration of the district plan provisions pertaining to this overlay is triggered.”*
31. The staff approach to this issue appears to suggest that we should to maintain a buffer zone adjacent to such areas. There is no basis for this in the District Plan or in law as far as I’m aware. To adopt such an approach would not promote the sustainable management of natural and physical resources and would have significant social and economic implications around the country as it would effectively create de facto reserves around all important landscapes, national parks, reserves and similar areas. Hence any comments in relation to the SHCLA area should be disregarded by the Panel as should the assessment of Objective 14.2.1 and Policies 14.3.1 and 14.3.3. And as Mr Moore notes, *“even if the site was within the SHLCA, Objective 14.2.1 and Policy 14.3.1 would not be relevant because these relate to outstanding natural features and landscapes (RMA section 6) and the SHLCA is a section 7 landscape.”*
32. As the Environment Court noted in the *Taylor* decision [paragraph 34], the only relevant policy from the Landscape section is Policy 14.3.4 that *“encourages development which*

integrates with the character of the landscape and enhances landscape quality". In this regard Mr Moore concludes that "... the proposed amended development will integrate readily with the existing character of its setting. When assessed against the landscape as currently existing, I believe that it will have adverse effects that are no more than minor. However, when what could be developed as of right is also factored in, I believe that the comparative effects of the amended proposal will be positive."

33. I agree with Mr Moore and conclude that overall the landscape effects of the proposal will in fact be positive.

Geo-technical Issues

34. The applicant is well aware of the potential for land instability in the area as the slopes of Saddle Hill have a well-documented history of land instability. However the subject properties (and the wider area) have been subjected to extensive investigations over the last decade or so by at least two geo-technical engineers. Hence the geology of the site is well known and stable building platforms have been identified in all allotments. The Late Mr Mike Robins, an engineer with Geolink Land Investigations Ltd, assessed the site for the original subdivision (and associated platforms), while Dr Jon Lindqvist further assessed the barn site on Lot 1 for its use as temporary dwelling in 2015.

35. Dr Lindqvist also assessed the original Lot 3 (now Lot 2) for this process. He advised that:

"Selection of a building area is complicated by a broad area of shallow slides that have developed in the loess subsoil cover upslope of Lot-3, however the slides and associated patches of hummocky ground are confined to the western 2/3rds of Lot 3 (Figure 1).... The area of relatively smooth ground with gradients of 14° to 17° (reducing down-slope) between this mound and Riccarton Road East is considered the most suitable for a new house build.

36. On that basis he concluded that:

- *The easternmost approximately 1/3 of the area of proposed Lot-3, indicated in Figures 1 & 5 of this report, is considered suitable for a house platform.*
- *It is recommended that: (1) piles or concrete footings, and retaining walls are placed directly on schist after removal of soil cover, or on a correctly designed hard fill pad on schist; and (2) drainage systems are installed to intersect and remove any surface water or spring water flow that may affect the stability of ground in the vicinity of the building.*

37. Despite this, the Otago Regional Council submission raised concerns with land instability issues affecting this site. In response to that Dr Lindqvist has carried out further investigation

of the subsurface of the proposed platform of Lot 3. His findings indicate that the requirement for removal of subsoil materials above schist bedrock prior to building pad construction on this site is now considered unnecessary.

Effluent and Stormwater Disposal

38. Mrs Scott and the ORC have raised concerns around the issue of stormwater and effluent disposal. To that end the applicants have commissioned Derrick Railton, a Director of Fluent Infrastructure Solutions Ltd in Dunedin, to address the matter. Mr Railton has over 35 years' experience in the field of infrastructural and environmental engineering, with a particular focus on wastewater engineering.
39. With respect to stormwater, Mr Railton concludes that *"Lot 1 is already served by an existing stormwater system that appears to be well designed and installed, and working satisfactorily"*. With respect to Lot 2, he notes that there is limited opportunity to disperse increased peak runoff flows from impermeable areas given the close proximity of the proposed building platform to the existing discharge drain. He therefore recommends stormwater detention for impermeable areas on the Lot 2 so as to avoid increases in peak runoff due to development of the building platform and access ways. This can be achieved by using one, or a combination of, detention storage options including tanks to collect roof water, subsurface tanks and bunded areas. In his opinion the best approach to take with this allotment is to require a stormwater management plan at building consent stage so that the option adopted can be configured to suit the building and access way layout for the site.
40. Turning to wastewater, Mr Railton notes that the consented wastewater system serving the temporary dwelling on Lot 1 appears to be working satisfactorily does not consider that lot further.
41. With respect to Lot 2, he advises that his investigation (and that of Dr Lindqvist) has identified the subsoils to be predominantly clayey silt loess overlying schist bedrock. On that basis he has classified these soils as Category 6 soils under the AS/NZS:1547:2012 "On-site Domestic-Wastewater Management" standard. This category is the highest (least permeable) and therefore most conservative soils category in the standard. However his evidence confirms that he is satisfied that *"on-site wastewater management can be simply and readily achieved on Lot 2 in a safe and sustainable manner without any offsite effects of any significance."*
42. Mr Railton concludes that:
"Having evaluated and assessed the stormwater and wastewater management aspects of the proposed development at 82 Riccarton Road East, East Taieri, I confirm my view that both aspects can relatively simply and sustainably be managed within the site boundaries. Stormwater management can be achieved in accord with the DCC Code of Subdivision and

wastewater treated in accordance with the NZ standard for on-site wastewater management AS/NZS1547:2012. I am satisfied in this regard that any potential off-site effects due to the proposed activities will certainly be less than minor.”

Conclusion on Environmental Effects

43. In my view the site is well suited to the use proposed and the development will integrate well with the existing environment. Overall I believe the proposal will in fact have positive effects on the environment given the nature of the receiving environment, the permitted baseline 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

44. The usual approach when considering the relevant objectives and policies under the 104D test for non-complying activities involves an overall consideration of the purpose and scheme of the Plan rather than determining whether the non-complying activity fits exactly within the detailed provisions of the Plan. However the recent High Court decision *QCL v Queenstown Lakes District Council* [2013] NZHC 817 at [35] and [37] has thrown some doubt on this approach by suggesting that the activity must not be contrary to any of the objectives and policies. However I understand that the Court of Appeal cases such as *Dye* and *Arrigato* endorse the accepted practice and that the recent Environment Court decision of *Cookson Road Character Preservation Society Inc. v Rotorua District Council* [2013] NZEnvC 194 specifically discussed the High Court finding and deliberately determined not to apply it, considering it contrary to accepted practice and Court of Appeal authority.
45. It would seem therefore that the correct approach would still require a holistic assessment of the objectives and policies and it is on this basis that I have assessed the proposal under section 104D(b). The objectives and policies of a number of the District Plan sections are relevant to this proposal. These are the Sustainability, Rural Zones, Landscape, Hazards and Subdivision. The relevant objectives and policies of each are considered below.

Sustainability Section

46. The Sustainability section sets out the broader focus of the District Plan and deals with three central themes – the sustainable management of infrastructure; the appropriate protection of significant natural and physical resources; and the maintenance or enhancement of amenity values. The introduction discusses the concept of a “holistic” approach to environmental management and considers that this is consistent with the intent of section 5 of the Act. Consequently the Plan states “*The Council recognises the need for such an approach, both in terms of the requirements of the Act and manner in which many people perceive the environment*” (4th paragraph, page 4:1). While this is not carried through into a particular objective, it is specifically recognised in policy 4.3.10 which is “*to adopt an holistic approach in*

assessing the effects of the use and development of natural and physical resources". This to me allows a consideration of the proposal in the wider sense, without reference to the particular restrictions that might be imposed in the context of the 'zoning' of land, which is a legal construct, neither a natural nor a physical resource.

47. I note here that the Environment Court in the *Saddle Views* decision [at paragraph 16] again misinterpreted my evidence when the Court said that I suggested that the sustainability section over-ride later provision in the District Plan. While the Court acknowledged that "overrides" is their word rather than mine, I did not suggest that at all. My position is simply that the amenity policy in this section, along with sections 7 (c) and (f) of the Act, apply in a general sense rather than in the context of the zoning. These provisions allow you to ensure that amenity and environmental quality is maintained (appropriate to the use) regardless of whether it is in conflict with the zone provisions or not. Given the nature of this location, the mitigation proposed and the reduction in built development on the ridgeline, I am of the opinion that at both the broader level and at a site specific level, amenity is at least being maintained by this proposal.
48. Also of significance is the provision of a wider range of high quality rural residential living sites that are located in a sought after area of the City. The sites created will retain a high quality amenity with an excellent aspect and outlook. Because it effectively attaches to an existing urban area and utilises non-productive land, it will maintain the amenity of the productive rural land within the City boundary by avoiding it.
49. The location of the proposal on the fringe of the urban area is also relevant when one considers Policy 4.3.7 and Policy 4.3.8 which deal with incompatibility of activities. Policy 4.3.7 is a process policy so is of little use when assessing the effects of an activity but Policy 4.3.8 deals with the same issue. As will be evident from my evidence on the existing environment, this proposal is compatible with the adjoining uses.
50. Objectives 4.2.2 and 4.2.3 and Policies 4.3.2 and 4.3.5 deal with the provision of infrastructure at an appropriate level and without compromising the sustainability of existing infrastructure. The new lots will be self-serviced and will utilise existing roading infrastructure. Accordingly the proposal has no impact on infrastructure. As a consequence I consider that both proposals are consistent with this policy framework.

Rural Zone Policy Framework

51. 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.

52. 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.
53. 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 size, topography and soil quality 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.
54. 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.
55. Related to the productivity policies are the reverse sensitivity policies that seek to minimise conflict between traditional rural activities and other activities, such as residential activities, to ensure productivity is not affected (Objective 6.2.5, Policies 6.3.3 and 6.3.12). The encroachment of residential and rural residential development in the area has created an area in transition which has significantly reduced the viability of lower to mid-slopes of Saddle Hill for productive rural purposes. However the proposed development is attached to and is compatible with this environment. Hence the proposal is not contrary to this policy suite.
56. 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 requires 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

57. The proposal does not involve high class soil or the unsustainable extension of infrastructure and is not located in an LCA. The proposed building platforms avoid unstable areas. As a consequence, the proposal is consistent with this policy.
58. 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 these areas have those characteristics and that capacity. Furthermore the sites are also ideally located directly on the boundary of the greater Mosgiel urban boundary in terms of energy efficiency and community services. Mosgiel is a popular residential area so there is unlikely to be any issue with the efficient use of existing land zoned for residential or rural residential purposes in this area.
59. In my view the proposal is not contrary to this policy suite.
60. 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 assessment of a proposal's effect on amenity values must be a 'real world' assessment. As I noted above, the Environment Court has found that this area no longer retains rural amenity as anticipated by the plan. I consider the subdivision is of “a nature, scale, intensity and location consistent with maintaining the character” of this particular area. I therefore disagree with Mrs Darby and conclude that the proposal is not contrary to Policy 6.3.5.
61. The individual amenity values of adjoining properties are provided for in Policy 6.3.6 with the need to avoid, remedy or mitigate the adverse effects of buildings and vegetation. The only neighbour to Lot 2 that submitted was Mr and Mrs Vidal at 87 Min South Road and they submitted in support. As I noted earlier, Mr Moore stated that *“there appears to be little concern from adjoining land owners regarding the visual effects of the proposed development. The proposed setbacks along with the other mitigation measures will be sufficient to ensure*

that the amenity of adjoining properties is protected". On this basis I am of the view that the proposal is consistent with Policy 6.3.6.

62. 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.
63. Objective 6.2.4 and Policies 6.3.4 and 6.3.8 address infrastructure issues. Both Mrs Darby and I consider that the proposal is consistent with this policy framework.
64. The only other relevant policy is Policy 6.3.14 which deals with adverse cumulative effects. I have addressed this issue at paragraphs 28 and 29 above, and conclude that the proposal will not give rise to adverse cumulative effects.

Landscape

65. I have discussed this policy framework in paragraphs 30 to 32 above. The proposal is considered consistent with the relevant policy of this policy suite.

Natural Hazards

66. Mrs. Darby accepts that the proposal is consistent with the hazards policy suite. I agree as this raft of policy merely requires the effects of hazards to be avoided, remedied or mitigated (Objective 17.2.1) while ensuring building and vegetation removal is "controlled" in areas identified as being or is likely to be, prone to erosion, falling debris, subsidence or slippage (Policy 17.3.2). This policy suite is given effect to by avoiding potentially unstable areas.

Subdivision

67. The objectives and policies of the Subdivision section seek to ensure that subdivision is co-ordinated and sustainable, with physical limitations and potential land uses taken into account to ensure that adverse effects are avoided, remedied or mitigated. All necessary infrastructure should be provided by the developer to avoid the need for unsustainable upgrades of public services [Objective 18.2.7 and Policy 18.3.7].
68. The application seeks consent for the subdivision and the future land use activity on all allotments and is therefore coordinated and holistic. No physical limitations that will affect the future use of the new allotments have been identified through the assessment of effects. The development proposed has been determined appropriate in the location given the surrounding activities. All residential activities will be self-serviced and will not give rise to adverse effects on the roading infrastructure.

69. The proposal is consistent with the objectives and policies of the Subdivision section.

Conclusion - Objectives and Policies

70. 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 in fact consistent with many elements of it. On that basis it passes through the second limb of the 104D test.
71. 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 activities associated with farming or other rural activities would be incompatible with the surrounding land uses. It will not impact on the productivity of the rural zone (Productivity and reverse sensitivity policies).
 - The site does not contain high class. (Productivity and significant resources policies).
 - The site is not an outstanding landscape or an LCA. The development is attached to and integrates well with the surrounding residential activities. (Landscape, amenity and significant resources policies).
 - Unstable areas are avoided. (Hazards policies)
 - The attributes of the sites align more with the values people seek in lifestyle properties. They afford views, sun and space but are not isolated, being located directly on the urban boundary of Mosgiel. Mosgiel provides the infrastructure and services necessary in today's life without the need for long vehicle trips. (Rural-residential, infrastructure, transportation and efficiency policies).
 - The sustainability of existing infrastructure will not be compromised. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

72. Mrs Darby also assesses the proposal against the Proposed District Plan policy framework. She's finds it to be consistent with most relevant policies but inconsistent with some rural policies and contrary to Policy 16.2.3.8. For the reasons expressed above, I disagree that it is contrary to this policy.

73. I also note here that the Court in the *Saddle Views Estate* stated that their decision should not be the final word on the matter and clearly indicated that this particular land should be considered for rezoning under the District Plan review [see paragraph 111 of the decision]. The Court noted that there was good evidence of the potential benefits of a greater housing density in the area but that any rezoning for the site would need to carefully balance the various issues, such as landscape, housing demand and geotechnical constraints. These matters have all been addressed for this wider environment yet Council has in fact imposed a stricter zoning over the site, Rural Coastal. Given the Courts direction and the fact that this is clearly not a coastal site, the approach taken under the Proposed District Plan is hard to fathom.

OTAGO REGIONAL POLICY STATEMENT

74. The Regional Policy Statement provides an overview of resource management issues facing the Otago region and how the integrated management of its natural and physical resources is to be achieved. District Plans must reflect the provisions of the Policy Statement and cannot be inconsistent with it. It is therefore mainly relevant at the policy formulation level and is not particularly relevant to a subdivision promoting two new house sites. I have dealt with the issue of hazards and urban growth above and do not believe this proposal is inconsistent with the RPS or the proposed RPS.

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

Precedent and Plan Integrity Matters

75. Mrs Darby raises the issue of precedent and is concerned that the implication of granting the consent will extend well beyond the site. I disagree and set out the case law framework in which I consider precedent on plan integrity issues should be considered in, which is more often than not overlooked by Dunedin City Council decisions.
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 we have concluded that overall the effects will be positive because it will reduce the permitted built development on a prominent ridgeline. On that basis I find it hard to accept that an undesirable precedent would be created.
80. The Councils decision refers 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. I maintain that the existing environment here is an unusual mix of non-complying rural zoned allotments (some recently granted by Council) surrounded by a mix of residential and rural residential zonings that is not typical of the normal rural environment. The Court in the *Taylor* decision came to the same conclusion. The use proposed here is not incompatible in this environment.
81. In my opinion the Council applies the ‘true exception’ test of *Russell* too literally and does not appropriately consider the wider case law outlined above. 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. There are a diverse range of environments within the rural zone and individual resource consent applications allow the Council to assess, on a case by case basis, whether the approach of the plan (i.e. the zoning and minimum allotment size approach) is appropriate in all circumstances. Here I believe it is not. It must also be remembered that the Court actually stated that the “true exception” does not mean that a proposal needs to be unique. This statement in itself renders any argument that such areas are not a true exception merely because there are similar areas around the City is redundant.

82. It has been acknowledged previously by the Councils Hearings Committee and the Court, that the location is an area where rural amenity is already compromised (unlike the situation in *Russell* where the Court was unable to conclude that there was a cluster of housing which distinguished that area. Paragraph 34, page 10). It is unlikely to be replicated in this way in other areas of the city. The attributes of the sites align more with the values people seek in lifestyle properties and is an area transitioning to a more urban character. There will be few areas remaining in Dunedin where this combination of factors exists.
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 necessarily. 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. In exercising the discretion to grant or refuse the applications sought, Part 2 of the Act becomes central to the determination. Obviously the key provision in that regard is the Act's single purpose as set out in section 5. That purpose is *to promote the sustainable management of natural and physical resources*.
85. The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources. Such a judgement allows for a comparison of conflicting considerations and the scale or degree of those conflicting considerations and their relative significance in the final outcome. The other sections in Part 2 of the Act, comprising sections 6, 7 and 8, inform and assist the purpose of the Act.
86. I am of the view that there are no section 6 or 8 matters at play here. Section 7 of the Act lists other matters that must be considered when making a determination upon an application for consent. These include the efficient use and development of physical resources; the maintenance and enhancement of amenity values; the maintenance and enhancement of the quality of the environment and the finite characteristics of physical resources.
87. Amenity and environmental quality related effects have already been addressed in the preceding evidence. In my view, these sections of the Act apply in a general sense rather than in the context of the zoning. These provisions allow you to ensure that amenity and environmental quality is maintained (appropriate to the use) regardless of whether it is in conflict with the zone provisions or not. The evidence of Mr Moore should satisfy you that the subdivision will maintain and enhance amenity values.

88. At the Council hearing the reporting officer considered the proposal an inefficient use of land because it will fragment rural land and will not maintain rural land and the landscape. Similar arguments were made in respect to 7(g) (finite characteristics). I disagree with this position and believe the contrary is true. The land is not productive and is ideally suited and located to provide for rural residential living which is a legitimate use of rural land. It is an efficient use of the subject lands and assists in protecting a truly finite and limited resource, high quality rural land elsewhere, from development pressure. The Court accepted similar evidence in the *Saddle Views* decision.
89. 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. Again, the Court accepted similar evidence in the *Saddle Views* decision.
90. This is an area in 'transition' which is heavily influenced by the existing development in the area. The development will be in keeping with the existing surrounding development. The attributes of the sites align more with the values people seek in lifestyle properties. They afford views, sun and space but are close to Mosgiel.
91. On this basis I believe the purpose of the Act will be best served by granting consent to the proposal.
92. Mrs Darby has prepared a set of conditions for consideration should the consents be granted. These are generally fine but will be updated for the hearing to reflect the changes in the proposal.

Peter Allan Cubitt
8 August 2016