

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of an application for land use consent (LUC 2017-98)
at 533 Mount Cargill Road, Waitati.

BY JOHN ROBERT FAIRWEATHER

Applicant

TO DUNEDIN CITY COUNCIL

The Council

**EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF JOHN ROBERT FAIRWEATHER**

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
- Status of the proposal and Section 104
- The baseline
- Environmental effects
- The objectives and policies of the District Plan
- Proposed District Plan

- Section 104D and Plan Integrity
- 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) but I briefly set out the key points here:

- The site comprises two independent titles, each around 5.5 hectares and have a total area of just under 11 hectares. For the purposes of this application, the two titles have been treated as one land parcel.
- Legal and formed frontage is provided by Mount Cargill Road on the southern boundary of the CFR OT260/294. Both titles also have legal frontage to Mount Cargill Road on their eastern boundary. However formed access is not practical and for all intents and purposes, CFR OT79/251 can only be used in conjunction with CFR OT260/294.
- The property is located on the eastern slopes of Weatherston Hill, and slopes moderately steeply down to the north and east, to the Cedar Creek valley base. There is a flatter area (at about the 295m contour) at the end of the access way from Mount Cargill Road that has been cleared of trees. The bulk of the property is covered in a mix of regenerating native forest (Kanuka dominated on higher slopes), exotic plantation forestry and pest plants (gorse and broom). The exotic trees are largely Eucalyptus but there is also Wattle, Fir and Macrocarpa, with a dense, largely native understory beneath the forestry canopy.
- Historically this property was one of the small farms that were scattered along the Mount Cargill Road and it appears there was a farm house at the termination of the access way although it is unclear when the dwelling ceased to be used. The applicant, Mr Fairweather, whose family has owned the site since 1953, advises that there are also the remains of a concrete dairy shed within the property.
- The access leg-in from Mount Cargill road appears to be legal road and is therefore under the control of Council. The western boundary of this access way, which adjoins 525 Mount Cargill Road, is lined with Macrocarpa trees. The eastern boundary adjoins 539 Mount Cargill Road. However, the title boundary overlay on Councils aerial webmap indicates some discrepancy with the boundary lines and it is not particularly clear where the actual boundaries are in this location.
- The property to the south west, 525 Mount Cargill Road (the Burchell property), is approximately 6 hectares in area and contains a dwelling. This dwelling is very visible

from Mount Cargill Road, being located directly adjacent to the road frontage and without screening. The title overlay on the aerial webmap noted above indicates this dwelling is in fact in the legal reserve although this is unlikely. Contrary to what the planners report suggests, this dwelling is at a higher altitude than the proposed dwelling site (Mr Moore advises by about approximately 19-20m). The subject property is separated from the northern pasture area of this property by an area of exotic planting. A row of mature *Macrocarpa* trees occupies the fence line but there are a number of rows of younger trees, *Macrocarpas* and *Eucalyptus*, inside these trees.

- The property to the south east, 539 Mount Cargill Road, is approximately 3.9 hectares in area and does not contain a dwelling. This site is heavily vegetated and also slopes down to Cedar Creek. There is an area of exotic trees located on the subject property that runs for approximately 200 metres along the northern boundary of this property from the access point.
- As the application noted, there are a number of dwellings on undersized rural allotments to the south of the site. These range in area from 4.5 to 14.6 hectares. Contrary to the implication in the application, the adjoining 3.9-hectare site at 539 Mount Cargill Road is not built on.

9. The owner of the site, Mr Fairweather, lives in Christchurch and finds it difficult to maintain the property from this distance. With the property only containing an area of 11 hectares and with a significant portion of the site covered in indigenous vegetation or pest plants, the property cannot generate a sustainable income, although could return a small income if fully planted out in exotics. However, the property has intrinsic biological values and these would not be protected or enhanced under this approach as they are not fully protected or enhanced under the current regime. In this context, the most appropriate solution is to allow the establishment of a dwelling on the property, which is then likely to attract a purchaser for the site who is interested in a lifestyle property that focuses on the maintenance and enhancement of indigenous vegetation.

10. As a consequence of this, Mr Moore was commissioned to assess the site in terms of the landscape effects that this option may have (given in is located within a LCA) and provide advice as to how this may be achieved. The logical site for the dwelling is within the flat area that has been cleared and Mr Moore confirmed he was comfortable with that given that this site nestled down below the road and is screened by existing vegetation and the landform to the south. Given the concerns raised by submitters, Mr Moore has increased the area of exotics to be retained along the southern boundary but these were always likely to be retained because these trees are also essential for shelter from the southerly wind.

11. Mr Moore has also produced a new plan to clarify some of the apparent confusion over what is proposed. This plan shows:

- Existing indigenous dominated regenerating forest to be retained and managed to enhance natural character values (Zone A).
- Bush regeneration area – managed to encourage natural regeneration of native species. Exotic trees in this area mainly already harvested (Zone B).
- Existing exotic and native plantings – retained and managed to maintain / enhance screening of the house site from Mt Cargill Rd and to ensure a strongly planted backdrop from viewpoints to the north (shown expanded in width to reduce reliance on mature *Macrocarpa*) (Zone C).
- Exotic trees to be retained in medium term (Zone D).
- Exotic trees ready for harvesting (Zone E).

12. A number of design controls for the proposed dwelling is set out in the application and Mr Moore's evidence.

13. No subdivision is proposed. While not explicitly stated in the application, because the two titles are promoted as the 'site', they will need to be voluntarily amalgamated.

STATUS OF THE PROPOSAL AND SECTION 104

14. The site is zoned Rural in the Operative District Plan ("ODP") and is zoned Rural-Hill Slopes in the Proposed District Plan ("PDP"). The site is also located within the Flagstaff Mt Cargill Conservation Landscape Area (FMCLCA) in the ODP and within the Flagstaff – Mt Cargill Significant Natural Landscape (FMCSNL) of the PDP. 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.

15. Any assessment of a resource consent application begins with consideration of the proposal in terms of section 104 of the Act; the actual and potential effects of the activity, consistency with the relevant plans and statements and any other relevant and reasonably necessary matter of consideration. However non-complying activities must get through one of two threshold tests in 104D before the consent authority can exercise its discretion to grant or refuse the application.

THE BASELINE

16. At her paragraphs 36 to 42 Ms Shipman discusses the permitted baseline. Section 104(2)(b) of the Act provides Council with a discretion to disregard the effects of an activity if a rule permits an activity with that effect. The baseline is established by determining what can occur as of right on the site and determining the existing lawfully established development of the site. Any effects from an activity that is equivalent to or less than that need not be regarded.

17. Ms Shipman rightly notes that here is no permitted baseline for residential activities or structures on the site (due to the landscape overlay). The existence of a previous dwelling on the site was not promoted as a baseline for this application. It merely highlighted the history of the site and also illustrates the nature of this particular area, which is characterised by smaller holdings.

18. Where I disagree with Ms Shipman is in relation to her comments at paragraph 38 where she states that consent to a dwelling on the site would see the applicant lose the existing right to re-establish forestry on the site. There is no legal basis for this position. I cannot see how the erection of a dwelling on an area of the property where there is no forestry has any bearing on the ongoing status of the forestry activity on the bulk of the property. Neither activity relies on the other in any way. The dwelling will not “increase the degree of non-compliance” of the forestry activity, which pre-dates the landscape controls.

19. If this argument had any validity, it would also stretch to the applicant’s ability to harvest the existing trees. This is important as the applicant proposes to harvest the existing exotic trees in Zone D (with the exception of the roadside plantings) and Zone E. While the most likely outcome after harvesting those trees is that the areas will be left to regenerate in native vegetation, the applicant wishes to keep the replanting option open.

20. This approach to the existing use rights has led to a condition that requires a landscape structure plan that sets a date for the removal of any of the exotic woodlots. This is simply impractical as there are many unknown market factors influencing a harvest date. Regardless of the fact that the trees may have reached a size suitable for harvest, there has to be a market for the trees. The trees won’t be harvested unless there is a suitable market and accordingly a harvest date cannot be predicted at this time. Furthermore, there are several different woodlots within the property, with the trees at different ages. This further complicates such a condition.

EFFECTS ON THE ENVIRONMENT

21. Ms Shipman addresses a wide range of issues in her environmental effects assessment of the proposal. The two key issues in the determination of this proposal are the potential effects on amenity and landscape values. Many of the other effects considered (such as visibility and glare) relate to these overarching issues.

Amenity

22. In relation to amenity values, Ms Shipman concluded at paragraph 51 that *“Overall, the proposal is considered to maintain the rural character and amenity of the site and surrounds subject to conditions of consent mitigating any adverse effects to minor.”* I agree with Ms Shipman’s position that the proposal will *“maintain the rural character and amenity of the site and surrounds”*. As the application noted, the site sits directly on the northern boundary of an area where there are several non-complying rural allotments that contain dwellings, with four

of these sites being in 4.5 and 5.9-hectare range. Hence the immediate location is influenced by a higher level of residential development than would normally be the case in a rural zone. This proposal will effectively amalgamate two titles of a similar size to these sites and as a consequence, will bring the property closer to the 15-hectare density standard.

23. However, I do not consider any further conditions, over and above what the application promoted, are necessary to ensure adverse effects are minor. Having said that, the applicant is amenable to condition 9, which requires a lighting plan to address night sky issues. I note here that there is a double up in the recommended conditions with condition 5 and 14 being similar, and a conflict between conditions 6 and 13. Condition 6 is preferred as that was the condition promoted by Mr Moore.

24. Turning to the Macrocarpa trees along the southern boundary of the property, as I noted earlier, the building site is significantly lower in the landscape than the dwelling at 525 Mount Cargill Road. It would be difficult to see from the road and from most parts of the neighbouring properties if these were all removed. Hence the row of mature Macrocarpa trees on the fence line adjoining 525 Mount Cargill do not need to be relied for screening the site, particularly when there are a number of rows of younger trees inside these trees. Mr Moore's plan has been amended to increase the area to be retained for screening purposes along this boundary to address the potential for the older trees to be removed in the future, if that is deemed necessary for safety or amenity (shading) issues. Retaining the trees in this location is also important for on-site amenity reasons as they act as a wind barrier.

25. Extending the width of the screen plantings has not been seen as necessary along 50m of the boundary of the Hamel property at 539 Mount Cargill Road. It is difficult to see what effect this screen is mitigating as that property seems to be completely covered in native vegetation. Unless you are standing right on the boundary, you are unlikely to see the building site from within that property. Because consent would be required to clear that native vegetation, this is unlikely to change in the near future.

26. With respect to the trees in the access way, these are located on legal road reserve and are therefore under the control of Council. Hence the applicant cannot manage these trees for amenity purposes but it is unlikely that Council will ever remove them unless they become a danger to safety.

27. Ms Shipman address noise (along with reverse sensitivity) at her paragraphs 83 and 84. I concur with her assessment in relation to these matters.

28. Overall, I conclude that the density and design of proposal is in keeping with the character of the area and that adverse effects amenity values will be, at worst, no more than minor.

Landscape Effects

29. Perhaps the key issue here is the impact on the landscape values of the site. However, it must be remembered that we are not dealing with an “outstanding landscape” (in terms of section 6(b) of the Act) but only a “landscape conservation area”. These landscapes are generally called “amenity landscapes” and are not afforded any particular status under the Act. Section 7(f) requires you “to have particular regard” to the “maintenance and enhancement of amenity values”. This imposes a duty to be “on enquiry” but does not require you “to recognise and provide for” such values as Section 6(b) does. In this context, there are many other competing issues and it is not appropriate to retain the status quo purely for landscape reasons.

30. Mr Knox, Councils landscape architect, considers there are too many unknowns with this proposal to conclude that adverse landscape effects will be minor and he was concerned that with removal of the woodlots, the dwelling would be more exposed. While no specific dwelling design is proposed, this is not considered necessary given the design parameters proposed. These conditions will ensure that the dwelling will not be visually obtrusive and will blend with the wider bushland setting. Limited earthworks will be required because the access track is existing as is the proposed building platform.

31. There also seems to be some confusion as to how high the building platform is. While the site is elevated, the dwelling will have a landform/vegetation backdrop from all public viewpoints. Visibility of the site is considered to be relatively low. Green Road probably provides the closest public view shaft, and while this is a very minor, unsealed rural road that carries limited traffic, all views here will have a landform backdrop. Furthermore, the views from here are still distant and the design conditions, along with the landform/vegetation background will ensure adverse effects are minor.

32. Views of the site from Mount Cargill Road to the north are distant and again, have a natural background. For amenity purposes (access to views and sunlight) it is imperative that the woodlot trees in front of the building platform are removed. Views from the east are largely screened by the intervening vegetation.

33. For these reasons, the woodlot plantings have not been used as mitigation for the proposal and their removal is not seen as detrimental to the proposal. It is likely that only the woodlot in front of the platform will be removed prior to the establishment of the dwelling but it is not necessary or appropriate to retain any of them in accordance with the planners recommended condition 12. I note that a reasonably wide strip of the woodlot area adjacent to Mount Cargill Road on the eastern boundary is located on Council Road Reserve. This will ensure the screening provided here remains effective.

34. While noting that the site has moderate – high natural landscape values, Mr Moore highlights the fact that *“these values ...are modified by forestry activities and a degree of incoherence in the vegetation patterns, and given the degree of existing modification the area is not highly sensitive to change.”* (see paragraph 17), He concludes that *“overall... any adverse landscape character effects of the proposed development will be minor. In the long term, I believe that regeneration of native bush cover on the higher slopes will have a positive effect on natural landscape values that will outweigh any adverse effects of further domestication associated with the house.”* (see paragraph 19).

35. Mr Moore also responds, at his paragraphs 38 and 39, to the conditions proposed by Ms Shipman to address Mr Knox’s concern. He effectively concludes that they are unnecessary and unworkable.

36. Overall, I agree with Mr Moore’s assessments and consider that the landscape effects of the proposal are largely overstated by Council’s officers.

Transportation

37. The only other issue of concern raised in Ms Shipman’s report relates to the existing access on to Mount Cargill Road. No assessment from Councils Transportation Planning department has been provided so I can only assume the issue with sight distances arises from Ms Shipman’s experience alone. Ms Shipman advises that she has spoken to a Transport Officer but it would appear that the Transport Officer has not visited the site. A condition has been recommended that requires the access to be re-configured to improve sight lines to the south when exiting the property. However as far as I can see, there are no practical changes that could be made to improve sight line visibility here. Mr Fairweather has not experienced any trouble with forestry vehicles using this access in the past. In my experience, the low speed environment, coupled with the relatively low traffic numbers on this road, mitigate any traffic issue. If the Committee is concerned with this issue, signage is perhaps the best solution.

Positive Effects – Indigenous Vegetation Protection

38. The site has existing use rights for the production forestry. As a part of this process, the applicant has promoted a condition to actively maintain and manage all existing areas of predominantly indigenous vegetation (Area A) to protect and enhance their natural character values while also setting aside a further area (Area B) that has already mainly been harvested, to be similarly managed to encourage natural regeneration of indigenous species and to control regrowth or establishment of exotic species. This will involve roughly two thirds of the site. While the applicant does not currently wish to forego the replanting rights for the balance area, it is unlikely that any future purchaser will be interested in replanting these areas.

39. As a consequence of this indigenous vegetation regeneration proposal for the upper part of the property, Mr Moore concludes that there will be positive effects on amenity values in the longer term.

40. I note that Dr Hamel promotes a QEII Trust covenant in favour of a resource consent condition. However, such an approach involves a third party, the QEII Trust, and is therefore ultra vires. There is nothing to stop the applicant from approaching the Trust but this must sit outside the consent process. In my experience, the Trust has limited funding and may not be interested in this particular site.

Conclusion on Environmental Effects

41. In my view, the proposed development will integrate well with the existing environment and will, at worst, have adverse that are no more than minor. Overall, I believe the proposal will in fact have positive effects on the environment in the long term given the proposed protection and management of the indigenous vegetation on the site.

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

42. 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.

43. 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

44. 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.

45. While it does not override the zone provisions in the District Plan, it allows Council to ensure that amenity and environmental quality is maintained (appropriate to the use) regardless of whether it is in conflict with the zone provisions or not. Given the nature of this location, the mitigation proposed and the low level of visibility, I am of the opinion that at both the broader level and at a site-specific level, amenity is at least being maintained by this proposal in the short term but is being enhanced (through the protection and management of the indigenous vegetation) in the long term.

46. Policy 4.3.7 and Policy 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.

47. 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 dwelling will be self-serviced and will utilise an existing access point. Accordingly, the proposal has no impact on infrastructure.

48. Objective 4.2.4 and Policy 4.3.4 deal with the appropriate protection of significant natural and physical resources. The indigenous vegetation within the property is to be protected and enhanced by the proposal and is therefore consistent with this policy suite.

Rural Zone Policy Framework

49. 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 maintenance and enhancement of rural amenity; the sustainable management of infrastructure.

50. 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 the density rule 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.

51. 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 economic sense although it has been used for production forestry purposes. In this regard, I note that Policy 6.3.2 refers to the Rural Zone as a whole. The last paragraph of the explanation states that “To minimise the impact on rural productivity, permitted activity for residential activities in the Rural Zone will require allotments with a minimum area of 15ha.” While this may achieve that outcome in productive areas of the rural zone (for example, the Taieri Plains) there will obviously be areas of land within the Rural Zone that are not particularly productive (for example this location) and it follows that using such land for other purposes is not in conflict with maintaining productivity of the rural zone as a whole. This proposal will ensure that the productivity of the native vegetation will be maintained and enhanced.

52. The ability of land to meet the needs of future generations (Objective 6.2.1) is not limited solely to its productive capacity. Land has many uses and many values, including the ability to provide a rural lifestyle choice. Most land can generally produce primary products and provide a range of lifestyle choices. However, in most cases, the land will have attributes that better suit one or the other. Given the character of the receiving environment and the subject property, this is not an area where it is essential for Council to “provide for productive use” of rural land (Policy 6.3.1). However, consent to this proposal does not negate that outcome in the wider sense. By recognising this, Council can better protect the land that has a high productive capacity from those uses that do not need those attributes to exist. While there may be some elements of inconsistency with this policy suite, I do not believe the proposal can be considered contrary to it. The explanation to Policy 6.3.1 in fact notes that *“controls are needed to protect water quality, the productivity of the land resource, significant landscapes and areas of ecological importance”*. This proposal puts those controls in place and will ensure the productivity of the native vegetation is maintained and enhanced.

53. Related to the productivity policies are the reverse sensitivity policies that seek to minimise conflict between traditional rural activities and other activities to ensure productivity is not affected (Objective 6.2.5, Policies 6.3.3 and 6.3.12). Ms Shipman addresses this issue at page 21 of her report in the context of what can occur on the site. I concur with her view and again the proposal is not contrary to this policy suite. Policy 6.3.3 also discourages land fragmentation, which is not at issue here. The proposal is in fact reversing fragmentation in that the two independent titles are to be amalgamated, which significantly reduces the non-compliance of the property with the 15-hectare density rule.

54. With respect to rural amenity, the relevant 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 are no more than minor (at worst) in the short term and will in fact be positive in the long term when the native vegetation management proposal is taken into account. I consider the development is of "a nature, scale, intensity and location consistent with maintaining the character" of this particular area.

55. 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. Ms Shipman finds some inconsistency with this policy but that seems to be based on the fact the it does not meet the density requirements. Mr Moore notes that "*no neighbours ... will be affected visually*" and Ms Shipman concludes at paragraphs 83 and 84 that other amenity related effects are negligible compared to a complying 15-hectare site. On this basis, I am of the view that the proposal is consistent with Policy 6.3.6.

56. 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.

57. Objective 6.2.4 and Policies 6.3.4 and 6.3.8 address infrastructure issues. The proposal is consistent with this policy framework.

58. The only other relevant policy is Policy 6.3.7 which deals with the maintenance of significant landscapes within the rural zone by limiting density within these areas. Ms Shipman considers the proposal to be inconsistent with the policy but that it is also broadly in accordance with it. I assume that apparent conflict is because the proposal breaches the density (and is therefore inconsistent) but is broadly in accord with the policy because it amalgamates two existing undersized titles and maintains the values of the landscape. If that is Ms Shipman's assessment, I concur with it.

Landscape

59. Ms Shipman discusses this policy framework at her page 21. She considers the proposal to be consistent with this policy suite, subject to conditions. I agree but disagree with the extent of conditions necessary. Mr Moore's evidence has addressed the unnecessary conditions recommended in Ms Shipman's report and I agree with his view on that. In terms of the proposals effect on the values of the Flagstaff Mt Cargill Landscape Conservation Area, Mr Moore concludes as follows at his paragraph 28:

“The visibility of the site is very limited and the controls proposed over the scale and visual character of the proposed building will ensure that where it is seen, it is not visually prominent and that it integrates well with its natural landscape setting. Taking a wider view of its landscape context, it will fit in with the rural houses in the area directly adjacent to the south. Given the proposed controls, the house will have minimal effect on the dominance of the natural landscape elements. In the longer term, the proposal for natural regeneration of the higher slopes of the property will result in greater dominance of natural elements. No skylines or significant views will be impacted. I am not aware of any Manawhenua values that will be impacted.”

60. Mr Moore's assessment confirms that the proposal is consistent with the relevant landscape provisions (remembering that this is not an outstanding landscape).

Conclusion - Objectives and Policies

61. In conclusion, I do not believe that of the proposal is contrary to the objectives and policies of the District Plan and I have found that it is generally consistent with the relevant policy suite. On that basis, it passes through the second limb of the 104D test.

62. 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 traditional productive farm unit and adjoins an area where 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.
- The site does not contain high class soil and the indigenous vegetation on the site is to be protected and enhanced (Productivity and significant resources policies).
- While the site is located within an LCA, the development will integrate well with the landscape and the surrounding rural residential activities. (Landscape, amenity and significant resources policies).
- The site is not unstable. (Hazards policies)
- The sustainability of existing infrastructure will not be compromised. There is ample room to install an on-site effluent disposal system that will meet the requirements of the Otago Regional Council and avoid adverse effects on Cedar Creek. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

63. Ms Shipman also assesses the proposal against the Proposed District Plan policy framework. She's finds it to be consistent or inconsistent with the relevant policies but gives the PDP little weight. The key matter is that the proposal is not considered contrary to the

PDP and the second limb of the 104D test provides no barrier to the consideration of the proposal.

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

Precedent and Plan Integrity Matters

64. 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

65. 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

66. 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”.

67. 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 long term, the effects will be positive because it will enable the enhancement of a large area of indigenous vegetation on the property. At paragraph 104 of her report, Ms Shipman suggests that the proposal is not increasing the area of regenerating native vegetation. That is not in fact the case as Zone B on Mr Moore’s plan is in fact harvested production land which could be replanted. By including this in the regenerating bush area, the applicant is effectively protecting the natural values of the upper, more prominent part of the

site. This reduces the ability to generate an income from the property while maintaining a resource for the public benefit.

68. Ms Shipman addresses the issue of plan integrity at her paragraphs 127 through to 134. She sets out a number of reasons why plan integrity will not be threatened by this proposal. In the main I agree with her assessment although no further mitigation than what was proposed at the outset is necessary. The key factors setting this proposal apart are the proposed reversing of rural fragmentation; the protection of the native vegetation proposed; and the nature of the surrounding environment which contains a number of developed undersized rural allotments. 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.

CONCLUSION

69. When exercising the discretion to grant or refuse the application sought, Part 2 of the Act is normally central to the determination. However, as noted by Ms Shipman, 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 I agree with Ms Shipman's assessment and conclude that Part 2 matters are not compromised by this proposal.

70. The proposal is in keeping with the existing development to the south and will maintain and enhance the natural resources of the site, being the landscape and the native vegetation. The attributes of this property do not align with those needed for traditional rural activities (pastoral farming, large scale 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.

71. Ms Shipman has prepared a set of conditions for consideration should the consent be granted. I attach an amended version of those conditions that reflect the evidence of Mr Moore and myself.

Allan Cubitt
19 June 2017