

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of an application for resource consent to
Establish a Rural Tourist Activity at 261
Tomahawk Road (LUC-2018-219)

BY LOCHEND LIMITED

Applicant

TO DUNEDIN CITY COUNCIL

The Council

**EVIDENCE OF ALLAN CUBITT
ON BEHALF OF LOCHEND LIMITED**

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, the Grey District Council, the Westland Regional 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. I am currently the Chair of the Panel considering the submissions on Plan Change 1 to the Westland Regional Councils Land and Water plan.
4. I am familiar with the Dunedin City District Plans (being the operative 2006 plan and the second-generation 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
 - Assessment of the proposal
 - The policy frameworks relationship to the conditions
 - Summary and Conclusion
7. My evidence is based on the application material, my visits to the site and the surrounding area, the submissions received, and the Consultant Planner's report.

THE SITE AND THE PROPOSAL

8. The site has been fully described in the application documentation and the planners report but I briefly set out the key points here:
 - The property is a small working farm (42 hectares) located between the Upper (west) and Lower (east) Tomahawk Lagoons at Ocean Grove, Dunedin. The legal boundary of the property in fact extends into the lagoons.
 - The property comprises mainly pasture and rises up from the edge of the Lagoons (at sea level), through steeper foot slopes up to more easily contoured, undulating to easy rolling pasture land. There are several exotic plantings including a small woodlot of macrocarpa and eucalyptus, while the gullies and fringes of the two lagoons have been retained in native vegetation that is protected by way of QEII covenant (approximately 3.8 hectares).
 - The property contains an early 1900's villa styled homestead along with a triple brick woolshed of around 280m² in area. A set of stock yards and associated loading ramp is located near the woolshed. There are also a number of tracks throughout the property.
 - Despite being close to the city, the site is relatively isolated with legal access from an unnamed legal road that heads north east off Tomahawk Road proper. While this roadline continues on through the property, the physical alignment of the access crosses a short 40 metre section of Department of Conservation land before connecting with the main internal access road of the property, which follows along the edge of the upper lagoon. The access across the DoC land is provided for by way of a concession. The access, including the legal road section, is not sealed.

9. The beauty, ambience and views from the site are such that the property is an ideal location for those who wish to hold functions and ceremonies in rural locations, particularly given it is relatively isolated from neighbouring residences. To facilitate this, the applicants are seeking consent to use of the woolshed and surrounding grounds as a function venue. The details of the proposed operation will be discussed below in the context of the conditions recommended by the planner.

ASSESSMENT OF THE PROPOSAL

10. The property is zoned Rural in the Dunedin City District Plan. The site is located within "Peninsula Coast Outstanding Natural Landscape.
11. The consent application was framed on the basis that the proposal is defined by the operative District Plan as a Rural Tourist activity. The definition of 'Rural Tourist Activity' is:
...the use of land and buildings for the purpose of attracting visitors, provided that the activity is complementary to a permitted activity of the Rural Zone or a natural feature of the rural area
12. As I noted in the application, the Court in *PW and J Lindsay* (ENC-2012-CHC-112) considered the definition of this activity in detail. That case confirmed that the definition of 'Rural Tourist Activity' cannot be confined to '*tourists*' but the more encompassing '*visitors*' term used in the definition must be used. The reason behind this is that it is the congregation of people, not whether they are on holiday, which gives rise to the effects on the environment. While the Court in *Lindsay* did not need to decide what constituted a natural feature in that particular case, it did go on to say that the phrase should probably be read with section 6(b) of the Act in mind, although without the reference to "outstanding". In this case the function centre is complementary to the natural features of this particular rural area, being the outstanding natural landscape and the Tomahawk Lagoon and its environs.
13. After some discussion around this with Council, it was eventually accepted that this is in fact a 'Rural Tourist Activity' as defined by the plan and the Environment Court. This is significant because section 104A(a) of the Act states that Council must grant consent to a controlled activity. The only discretion Council has is whether or not it chooses to impose conditions in relation to the matters it has reserved its control over. Hence, the only matters relevant to the Hearing's Panel consideration of this proposal, are matters pertaining to conditions.

14. This also relates to your consideration of the policy framework. The planning report contains a particularly detailed assessment of all manner of objectives and policies from various planning documents. However, these provisions are only relevant insofar as they relate to your ability to impose condition. An assessment of whether the proposal is consistent or not with these documents is not necessary. It is implied by their controlled activity status that they are in fact consistent with the relevant plan provisions.
15. In this case we have the unusual circumstance of the activity being controlled under the operative District Plan but non-complying under the proposed District Plan. However, for the purposes of this hearing, the activity remains a controlled activity (See section 88A of the Act). I am rather bemused why an activity such as this, which is clearly sought after by the community, would be a non-complying activity under the new plan. However, nothing turns on that here as the proposed District Plan rules are largely irrelevant in this hearing. The Act does require consideration of the proposed Plan in your consideration so the question is how much weight should be applied to the provisions of that plan, given the rules don't apply. In my view, very limited weight can be given to the policy framework of that plan because it does not relate to a controlled activity.
16. It would be entirely inappropriate to use that 2GP policy framework to restrict the viability of the activity because it is non-complying under that plan. It is well understood in law that conditions cannot be imposed that effectively render a consent unusable. Unfortunately, some the conditions recommended by the planner have that effect, given the nature of the activity. Contrary to popular opinion, the financial viability of the facility is a relevant consideration when considering a resource consent application. The Court in Imrie Family Trust v Whangarei DC (1994) 1B ELRNZ 274, [1994] NZRMA 453 found that in the context of enabling economic well-being under Section 5, the purpose of the Act, both the broader economic aspects and the narrower aspects (including viability of a project and/or the benefits to a developer) are relevant. The Court in both PVL Proteins Ltd v Auckland RC A06/01 and the Director General of Conservation v Wairoa DC W081/01 also found the economic effects on the consent holder and on the wider community, in terms increased employment and expenditure in the community, to be relevant factors in that context. Hence, conditions that severely restrict the competitiveness and operating efficiency of a business effectively render the business unviable and the consent would therefore become meaningless.

17. This needs to be borne in mind by the Panel when considering the need for conditions. This is particularly so in relation to any conditions around the hours of operation and the numbers that can attend a function. This has been a particularly long and frustrating process for the applicants, who have gone as far as they can to limit their proposal without impacting on its viability. The planner has recommended a wide range of conditions, many of which severely impact on the viability of the proposal. I deal with the conditions below but first touch on the policy context for those conditions.

THE POLICY FRAMEWORKS RELATIONSHIP TO THE CONDITIONS

18. As I noted above, the policy framework is only relevant in the context of controlled activities when conditions are being considered. Conditions can only be imposed in relation to the following:

- (a) The scale of the activity.
- (b) Vehicle access and parking.
- (c) Signs.
- (d) The size and location of structures.
- (e) The performance standards of the Environmental Issues Section.

19. Policies such as 6.3.11, 6.3.12 and 6.3.14 (which relate to suitability of activities within the zone) are not relevant to this proposal as it is provided for as a controlled activity so is already deemed suitable in the rural zone. In terms of the Rural zone provisions, the only relevant policy suites are as follows:

Objective 6.2.2: *Maintain and enhance the amenity values associated with the character of the rural area.*

Objective 6.2.7: *Maintain and enhance the natural character and amenity values of the margins of water bodies and the coastal environment.*

Policy 6.3.5: *Require rural subdivision and activities to be of a nature, scale, intensity and location consistent with maintaining the character of the rural area and to be undertaken in a manner that avoids, remedies or mitigates adverse effects on rural character. Elements of the rural character of the district include, but are not limited to: (a) a predominance of natural features over human made features, (b) high ratio of open space relative to the built environment, (c) significant areas of vegetation in pasture, crops, forestry and indigenous*

vegetation, (d) presence of large numbers of farmed animals, (e) noises, smells and effects associated with the use of rural land for a wide range of agricultural, horticultural and forestry purposes, (f) low population densities relative to urban areas, (g) generally unsealed roads, (h) absence of urban infrastructure.

Policy 6.3.6: *Avoid, remedy or mitigate the adverse effects of buildings, structures and vegetation on the amenity of adjoining properties.*

Policy 6.3.15: *In the management of the margins of water bodies and the coastal marine area, have particular regard to the maintenance of natural character, amenity and the provision of reasonable public access for recreation.*

20. This proposal has little impact on rural character as the property will continue to be farmed and no new structures will be established. The isolated nature of the venue site avoids adverse effects on adjoining properties – there will be no impact on the privacy or amenity values of neighbouring properties or submitters. For similar reasons, the natural character of the wetland margin will not be affected by the proposal. While there will be additional traffic on the internal access road around the wetland fringe, the road is existing and traffic will be limited in duration.
21. I note that the planner also finds the proposal to be ‘consistent’ with these policy provisions. As a consequence of these assessments, there is no rural zone policy basis for the imposition of any conditions on the proposal. Conditions can therefore only be imposed after considering “any actual and potential effects on the environment of allowing the activity” under s104(1)(a). This makes no reference to a requirement that there be no adverse effects or that these effects are to be no more than minor. The Act in fact anticipates that consent can and will be granted for activities that generate adverse effects. This is reflected in Section 5, the purpose of the Act, which enables people and communities to provide for their social, economic and cultural wellbeing while avoiding, remedying or mitigating adverse effects on the environment. This does not require total avoidance of adverse effects or reduction of the effect to “minor”. And due weight must be given to the enabling nature of the Act and the applicants ability to provide for their wellbeing when setting any conditions.

THE PROPOSED CONDITIONS

22. Turning to those conditions now, the conditions of most concern proposed by the planner are those that relate to scale and intensity as follows:

Scale and Intensity of the Activity

- *The maximum number of guests permitted on the property must not exceed 150 during the hours of 9am to 9pm. Outside of those hours, the maximum number of guests must not exceed 75.*
- *No more than 8 events per month is allowed on the site.*
- *No events [over 75 guests] are permitted to occur on consecutive days of the week (Monday to Sunday).*
- *Events exceeding 75 guests must not occur more than once on any day.*
- *No event is permitted to exceed 7 hours on any day.*

- 19 Restricting guest numbers to 75 after 9pm is unrealistic and not viable for any function venue that caters for weddings. No other venue I know of is restricted to that number, and most, if not all of them are located in more sensitive locations than this. Most weddings range between 80 to 120 guests, with the occasional event up to 150.
23. The concern of the submitters and the justification for the restrictions proposed by the planners seem to be based on the premise that the people on Tomahawk Road should not expect any change in the current levels of amenity values they experience in this area from use of the road. Where capacity and safety issues are not compromised, I have never known a consent to be refused because of increased traffic on an urban road. That is the purpose of a road – to carry traffic. It is part of the enabling infrastructure that allows people to provide for their well-being as required by the Act.
24. This road is in fact located in the Residential zone and roads within residential zones generally carry significantly higher volumes of traffic than do rural roads. There are currently three developed residential sites that can access this road now (including the submitters properties), over and above the subject property and the people that access the lagoon. However, there is significant development potential adjoining this road. The submitters property at 257 Tomahawk Road contains 2 dwellings but at 1.5 hectares, it has the potential to contain a further 28. The

property at 263 Tomahawk Road contains an area of 3276m², which would enable the development of a further 6 allotments. The property at 265 Tomahawk Road is owned by DoC and does appear to contain some of the lagoon. However, at 3545m², it could feasibly be subdivided to create 3 further residential allotments away from the lagoon.

25. The upshot of this is that under the permitted density baseline for this zone, this cannot be considered a 'quiet rural road'. It could quite feasibly accommodate an additional 25 to 35 allotments in the future (notwithstanding the fact that the submitter owner of 257 Tomahawk may not wish to subdivide), which is not fanciful given the current growth being experienced by Dunedin. Standard residential development under the proposed District Plan includes short-term house rental, boarding houses, supported living accommodation (with 10 or fewer residents) ; and emergency and refuge accommodation. 'Working from home' is also permitted by the proposed plan and this includes visitor accommodation. Given the nature of this location, it is not fanciful to suggest that a number of these properties could be developed along these lines.
26. Notwithstanding that position, we maintain that the submitters will not be greatly impact on by vehicles using this road. The majority of the traffic generated by this proposal will arrive and leave during two reasonably short windows. For wedding functions, people arrive around mid-afternoon and then leave at the end of the function. The traffic windows for daytime functions will depend on the nature of the function. This will not create a major nuisance for the people who live near the road.
27. The only time that noise is potentially an issue would be at night time (and for this reason, a time limit on functions is not necessary). However, in my experience, the noise generated by vehicles at the speed that a road of this nature requires (i.e. very low), will be minimal and unlikely to exceed the District Plan standards, even though noise is not controlled by the District Plan. This is particularly so for the submitters who live at the intersection of the two roads, where vehicle speeds will be at their lowest (and therefore noise will also be at its lowest). The dwelling at 267 Tomahawk Road would appear to be around 20m from the carriageway while the main dwelling on 257 Tomahawk is around 25m from the carriageway. Both these dwellings are significantly closer to Tomahawk Road proper so will be more affected by that road, and will have a higher ambient noise background accordingly. The smaller dwelling on 257 Tomahawk Road is located 10m from the road, which is

over twice the setback required to roads in the residential zone. This dwelling also orientates north and as a consequence, there does not appear to be many windows facing the road.

28. However, the applicant is proposing a number of conditions to further mitigate any adverse effects that might occur. These include sealing the first 70m of the road from the end of the existing seal to remove the possibility of any nuisance type noises than might arise from vehicles running over an uneven surface and the implementation of a traffic management (TMP). The TMP will promote the use of coaches to transport people to and from events and ensuring speed limits remain low. The use of coaches greatly reduces traffic numbers with experience from other venues of a similar size indicating that the requirement to use coaches will only see, on average, around 15 to 20 odd cars attending a function. The proposed wording for the TMP is as follows:

A Travel Management Plan shall be submitted to and approved by the Resource Consents Manager. This plan shall be implemented prior to the activity commencing. This Travel Management Plan shall include the following:

- a. How the applicant intends to promote and encourage the use of coaches for drop off/pick up in their venue hire documents.*
- b. Management of guests and staff and how the consent holder will contain their activities within the site including a procedure to educate guests about what is considered acceptable in terms of noise when leaving the venue.*
- c. The use of temporary speed restrictions during events.*

29. Sealing the road will also avoid the perceived dust issue.

30. The applicants are also promoting some modification to the scale of the proposal and the hours of operation as originally proposed but not to the extent recommended by the planner. Our recommended conditions are as follows:

Scale and Intensity of the Activity

- The maximum number of guests permitted on the property must not exceed 150 ~~during the hours of 9am to 9pm. Outside of those hours, the maximum number of guests must not exceed 75.~~*
- No more than 8 events per month is allowed on the site.*
- ~~No events [over 75 guests] are permitted to occur on consecutive days of the week (Monday to Sunday). The number of functions that can be held on consecutive days shall not exceed two.~~*

- ~~Events exceeding 75 guests must not occur more than once on any day.~~
- ~~No event is permitted to exceed 7 hours on any day.~~

Noise management

...

Hours of operation must be limited to the following hours:

~~Thursday to Saturday: 9.00am – 1am (Monday to Saturday) Possible exclusion from Sunday operation? All guests are required to leave the site by 12.30am. Staff must leave the premises by 1.00am~~

~~Sunday to Wednesday: 9am to 11.00pm~~

~~All guests are required to leave the site by 10.30pm. Staff must leave the premises by 11.00pm~~

31. The proposed amendments are consistent with other function venues, both here and around the country in urban environments, and will ensure the facility can be financially viable while appropriately mitigating the perceived adverse effects of people using the legal road.
32. A number of other smaller changes have been made to the conditions proposed by the planner. These include:
 - (a) Delete condition 7 as the proposed condition 17 specifically deals with noise standards. I have also added a note to that rule stating that noise levels do not apply to vehicles on a legal road.
 - (b) The conditions relating to the passing bays have been amended to provide flexibility in relation to their location so that the optimal location can be selected while also requiring the margin of the wetland not to be disturbed. This will also serve as the earthworks consent, if one was needed, as earthworks are likely to be minimal. Advice note 1 has been amended accordingly. The second part of that advice note is not needed as the previous earthworks referred to were undertaken as permitted activities.
 - (c) A new condition is added requiring plans of the roading upgrade.
 - (d) Delete condition 24 to demarcate the car parking. While 40 parks are to be provided, in all reality only about 20 parks are likely to be used at any one time. The objective is to maintain the car park as a rural yard, without the provision of additional infrastructure that would be required to achieve this condition.

- (e) Delete condition 38. It would be difficult for a lay person to know when this wind speed is met and I question why it is needed and who would be affected, particularly given there is no control on cultivation activities on the farm
- (f) Delete condition 40: what is this achieving?
- (g) Delete 41. It is unlikely that guests will visit these areas, although there may well be photo opportunities for the wedding party. I question how a condition of this nature can imposed under the matters of control and what it is trying to achieve.
- (h) Amend condition 43 to be consistent with consistent with condition 45.
- (i) Add a new condition that allows flexibility in the cladding of the replacement lean-to (to enable the use of natural timber finish).
- (j) Delete condition 47 as this matter is dealt with in condition 42.
- (k) Delete condition 49. The plantings around the venue are currently all exotic and the facility sits within improved pasture, well separated from the lagoon and the areas of native vegetation on the property. There is no reason to restrict plantings to natives in this location.

33. The planner also makes the comment at paragraph 65 that the applicant will need to re-obtain DoC's written approval for the proposal given the amendment relating to the passing bays. This is not considered necessary for the purposes this consent now that the passing bay condition has been modified to allow flexibility in their location. It will now be a matter for the applicant to discuss this issue with DoC, although we do not anticipate a problem with the installation of a passing bay in the location proposed.

34. A full set of the amended conditions are attached as Appendix 1.

SUMMARY AND CONCLUSION

35. The activity meets the definition of 'rural tourist activity' under the operative District Plan 2006. A rural tourist activity is a controlled activity. Pursuant to Section 88A, the activity must be considered under that activity status. Controlled activities cannot be refused. Council can only impose conditions in relation to the matters over which it has reserved control.

36. Conditions cannot be imposed that effectively render consent unusable. A number of conditions promoted by the Council planner effectively defeat the purpose of the

consent. The conditions proposed by the applicant will ensure any adverse effects are appropriately mitigated while maintaining the viability of the business.

37. On this basis I believe the purpose of the Act will be best served by granting consent to the proposal subject to the conditions contained in the appendix to my evidence.

Allan Cubitt
29 November 2018