

07 September 2016

MEMORANDUM TO:

MEMBERS OF THE HEARINGS COMMITTEE

Councillors Andrew Noone and Andrew Whiley and
Commissioner Colin Weatherall

**Resource Consent Application LUC 2016-245 and SUB 2016-45, 35, 39, 41 and 49
Dalziel Road, Dunedin**

Please find enclosed the following:

Evidence provided on behalf of the submitter–

- a) Evidence from Conrad Anderson, Director of Conrad Anderson and Co Resource Management.

Thank you

Wendy Collard
GOVERNANCE SUPPORT OFFICER

Encl

BEFORE THE DUNEDIN CITY COUNCIL

SUB-2016-45

LUC-2016-245

IN THE MATTER

**of the Resource management Act
1991**

AND

IN THE MATTER

**A resource consent by RPR
Properties Ltd & Krenford Holdings
Ltd for subdivision and residential
activity at 35, 39, 41 and 49 Dalziel
Road, Dunedin**

PLANNING EVIDENCE – CONRAD ANDERSON

DATE: 6 AUGUST 2016

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1 Introduction

- 1.1 My name is Conrad Anderson. I am a Director of Anderson and Co Resource Management and since mid 2012 I have been a resource management planner with Anderson and Co Resource Management.
- 1.2 I have completed the required academic papers for the Masters of Planning at the University of Otago, and I am currently completing my thesis.
- 1.3 I confirm that I have read and agree to comply with, the Code of Conduct for Expert Witnesses, as set out in the Environment Court's Consolidated Practice Note. I can confirm that this evidence is within my area of expertise.
- 1.4 I have read the application, the s42a report, the DCC department reports, the submissions received by Council, and the post application evidence from the Applicant.
- 1.5 I will address the following matters:
 - The Proposal
 - Activity Status
 - Permitted Baseline
 - Mitigation Offered
 - Assessment of Effects
 - Objectives and Policies
 - Other Matters
 - Conclusion

2 The Proposal

- 2.1 The application promotes itself as a 'boundary adjustment' (page 25 of the agenda, page 1 of the Applicants evidence dated 30 August 2016) with the principle reason given being to satisfy the sale and purchase agreement(s) that the Applicant has entered into (page 26 of the agenda, page 1 of the Applicants evidence dated 30 August 2016).

With regards to the rationale for the application:

- 2.2 It is acknowledged that it is common practice to 'pre-sell' sections, but the fact that the Applicant offered sites for sale that were not subsequently consented was a decision of the Applicant/Purchaser. That decision has little, if anything, to do with the resource consent application now before us.
- 2.3 No further rationale is provided by the Applicant in either the application or the further evidence submitted. Granting consent for lots in an earlier subdivision application that

Council has refused its consent and is subject to appeal to the Environment Court, would undermine the statutory process.

2.4 For the record, I note:

- There are two consented titles that are still owned by the Applicant, which the Applicant could make available to the interested party.
- However, the Applicant concedes that those existing titles (Lots 8 and 9) are less desirable than the proposed new lots (page 2 of the Applicants evidence dated 30 August 2016).

Based on the additional information provided on 30 August 2016, one of the original purchasers has withdrawn from the original sale and purchase agreement and the other purchaser is not interested in the purchase of either existing lot (Lot 8 or Lot 9).

With regards to the proposed boundary adjustment:

2.5 The consented environment consists of 9 lots. The proposal, as amended by the Applicants evidence, seeks consent to create two entirely new lots, that are shown as Lots 18 & 19 on the plan of subdivision that Council refused its consent to. The creation of new lots can not be a boundary adjustment.

2.6 Further, the application before you will result in:

- Creating new lots that are smaller than any of the existing consented lots, and
- the relocation of the residential activity well within the required side and rear yards and immediately adjoining the boundary with an external neighbour.

2.7 Given the above, the proposal must be considered a subdivision of rural land for residential activity, rather than a straight forward boundary adjustment associated with the existing lots.

2.8 As a subdivision, this raises a procedural question regarding notification. The resource consent application that created the subject area (SUB2012-92), and in deed the application prior to that, were both notified.

2.9 My prior experience with the Dunedin City Council has indicated that resource consent applications seeking residential activity on undersized rural lots are publically notified.

2.10 The rationale for opting for limited notification is confusing:

- Paragraph 32 of the s42a report (page 6 of the agenda) states that “after initial consideration” the adverse effects of the proposal **would be no more than minor**, after having regard to the surrounding environment and the mitigation measures proposed.
- However, the effects sections of the s42a report identifies that the effects include a number of matters, but specifically concerning the adjoining neighbour and the required esplanade reserve.

With regards to the neighbour:

- 2.11 At paragraph 87 of the s42a report (page 13 of the agenda), it concludes there is insufficient information to determine the mitigation of effects. The post application evidence provided by the Applicant outlines the proposed mitigation, and I will comment on that later.

With regards to the effects of not including the required esplanade reserve:

- 2.12 The s42a report considers the matter of the esplanade reserve relevant in terms of both effects and the decision.
- 2.13 The required esplanade reserve would effectively create public access from Three Mile Hill Road to the Council owned reserve at Frazers Gully, which is connected to the southern end of Dalziel Road, as well has a substantial number of properties in Brockville, around Taieri Road and Kaikorai Valley Road. More directly, the reserve would back onto almost 20 residential sections on Ashmore Street, Halfway Bush.
- 2.14 As the Applicant is seeking not to include the required esplanade reserve that would have direct public interest to those in Ashmore Street, and wider public interest in terms of general access and connections, wider notification may have been more appropriate.
- 2.15 It seems from reading the s42a report that neither of the following were considered in terms of the notification decision:
- those directly affected by not requiring the esplanade reserve, nor
 - the general public who may have an interest in the required required esplanade reserve.

Effects relevant to notification, but not included in Section 6 of the S42a Report:

- 2.16 **Section Size:** In addition to the direct effects on the neighbour and effects associated with the esplanade reserve, the proposal has potential effects in terms of section size in the rural zone. The creation and use of a 2,000m² section in the rural zone by way of subdivision, with the only rationale of satisfying a sale and purchase agreement, must have potentially wider implications. Thus further supporting the need for publically notification.
- 2.17 **Creation of a buffer:** The location of the proposed Lot 3, if approved, will essentially result in a buffer between 31 Dalziel Road and the balance of the Applicants land. That buffer along with the s42a report decision to utilise limited notification, could provide the opportunity for the owners of the balance of the site to seek few, if any, affected party approvals to future subdivision applications. Thus paving the way for further subdivision via the creation of additional 2,000m² sections within the rural zone via limited notified applications.

Proposal Summary:

- 2.18 In summary, the proposal is assessed as being a subdivision, including the creation of a lot approximately 50% smaller than the Lots to be replaced. Prior subdivision applications associated with site have all been publically notified, and the reluctance of the Applicant to provide the required esplanade reserve increases the likelihood of public interest in the application. The effects associated with the lack of an esplanade reserve, the creation of a buffer and the reduced section support the need for public notification.

3 Activity Status

- 3.1 The s42a report sets out that the application is deemed to be a non-complying activity, as the proposal involves subdivision and Residential Activity on sites less than 15ha.
- 3.2 I agree with that activity status assessment.
- 3.3 In addition, the application does not comply with the yard rules nor the esplanade reserve requirements.
- 3.4 As a non-complying activity, the Hearings Committee is free to consider **all adverse effects**.

4 Permitted Baseline

- 4.1 SUB-2012-92 granted consent for 9 lots on the subject site.
- 4.2 LUC-2012-504 granted consent for the establishment of Residential Activity associated with the lots created by SUB-2012-92. In terms of the current application, paragraph 40 of the s42a report (page 7 of the agenda) states:

"The existing environment in this case includes the implemented 2012 subdivision and land use consent. The 2012 subdivision has been given effect to and three dwellings have been constructed and a fourth is under construction".

- 4.3 While residential activity has been granted for each lot, not all lots have implemented that activity. The ability to establish residential activity on the undeveloped lots will expire in early 2018 unless substantial progress has been made to implement the consent.
- 4.4 Lots 8 and 9 are currently not developed with residential activity. The application evidence, notes the proposal will create lots that are more desirable than Lots 8 and 9, and indeed the application before us now seeks to remove both the consented lots.
- 4.5 The application does not explain why Lot 8 and 9 have failed to sell.
- 4.6 The above is raised because the baseline requires consideration of non-fanciful effects. While it would seem logical to use a baseline with all existing lots having residential activity, the underlying rationale for the application may provide an alternative view.

- 4.7 The application will result in the removal of two lots (Lots 8 & 9) which are consented for residential activity and create two smaller sections for residential activity. (Lots to be removed: Lot 8: 4,000m². Lot 9: 5,190m². New lots to be created: Proposed Lot 3: 2,020m². Proposed Lot 2: 2,480m²). If the two existing lots (Lots 8 & 9) were readily desirable, then it is rational to believe they would have been sold, and the purchasers either built, building, or seeking to build upon them - as has happened on the other lots. Also, it would be more straightforward and logical to sell Lots 8 and 9. It seems unusual that the Applicant has submitted a further resource consent application, just to reposition and reduce the size of the sites. The Applicant could seek to reduce the size of Lots 8 and 9 via a true boundary adjustment, or alternatively the section prices could have been reduced rather than incurring resource consent costs. The Applicant has provided no details why Lots 8 and 9 have not been developed, and the Applicant is now willing to forgo both Lots 8 & 9.
- 4.8 I note that a number of the existing sites are subject to restricted building platforms due to land instability, and this extends to the existing undeveloped lots (Lots 8 and 9) – that may relate to the current lack of development on those sites. The lack of sale of Lots 8 & 9 and the outcome sought by the current application, would suggest that there is limited interest in the existing vacant lots, and that residential activity on those lots, while consented, could be assessed as being fanciful.
- 4.9 The Hearings Committee has the option of applying, or not, the permitted baseline, as well as the ability to determine what the baseline should be.
- 4.10 I note, in other DCC resource consent hearings, the s42A officer has requested evidence from the Applicant to support the notion that a permitted baseline activity is indeed non-fanciful. Without the pre-circulated information from the Applicant, it is impossible to clarify this position; hence a cautious approach in considering the baseline is suggested.
- 4.11 Irrespective of the above, the proposal seeks to shift residential activity from the mid area of the site to the boundary of an external party. That will create a number of undesirable effects to that neighbour over and above the situation if the existing consents were implemented. The baseline includes larger lots, in a centralised location. I refer to my earlier comments regarding effects associated with proposed sections sizes, the creation of a buffer, and the potential implications of that buffer.

5 Mitigation Offered

- 5.1 As noted above, at paragraph 87 of the s42a report (page 13 of the agenda), the s42a report concludes there is insufficient information to determine the mitigation of effects. The application evidence now outlines the proposed mitigation.
- 5.2 The mitigation now proposed within the application evidence is:
- Removal of Proposed Lot 4
 - Fencing and planting

- Proposed height restriction
- Proposed dwelling size restriction
- Proposed Provisional No Build areas.

Commenting of each of the above:

Removal of Proposed Lot 4

- 5.3 I agree the removal of proposed Lot 4 does reduce the effects to the neighbour. However, in terms of a rural aspect from 31 Dalziel Road, it will continue to create a wall of development.
- 5.4 While the 'wall' will be reduced, the application will still result in two dwelling (existing Lot 3 and proposed Lot 3) in close proximity to each other, both on the boundary of an external party.
- 5.5 In terms of rural amenity, the 'wall' is largely out of character for the rural zone which requires side yards of at least 40m per site (80m between dwellings) and not what was contemplated by the 2012 resource consent.
- 5.6 In terms of the external neighbour, while the effects are reduced, they are assessed as being more than minor. Refer effects in the following section.

Fencing and planting

- 5.7 The additional details associated with fencing and planting are appreciated.
- 5.8 However, the proposal continues to place a residential section beside a sizeable lifestyle lot, thus continuing the high risk of reverse sensitivity. The existing use of 31 Dalziel Road in terms of use of the land at or near the boundary, could conceivably include different sorts of rural activity. The 10m yard, along with the proposed fencing and planting do not provide sufficient mitigation in terms of reverse sensitivity.
- 5.9 For example: The containment of livestock, such as chickens or pigs, close to the boundary would more than likely result in reverse sensitivity to a residential home on a 2,000m² section, irrespective of boundary fencing and planting.

Proposed height restriction

- 5.10 The application notes that the potential purchasers of proposed Lot 3 have had their future dwelling already designed, and plans of such were included in the application evidence.
- 5.11 The plans provided show that the potential owners of proposed Lot 3 are considering a single level dwelling.
- 5.12 The rationale for the application is to allow an existing sale and purchase agreement to be settled, thus allowing the purchasers of proposed Lot 3 to building their already designed

house – a single level dwelling. If that is the ultimate outcome, the proposed height restriction carries little weight.

Proposed dwelling size restriction

5.13 Same as above.

Proposed Provisional No Build Region

5.14 The 'provisional' nature of the No Build areas severely limits its effectiveness as mitigation.

Mitigation Summary:

5.15 Of the mitigation proposed, only the removal of Lot 4 can truly be considered mitigation.

5.16 Further, the mitigation does not alleviate the wider concerns nor the potential effects regarding the general subdivision of rural land into 2,000m² sections, the effects of not including the esplanade reserve, and likelihood that further subdivision will be sought within the subject area.

6 Assessment of Effects

6.1 The s42A report identifies concerns under the following headings:

- Bulk, Location, Design, Appearance and Amenity Values.
- Esplanade reserve.
- Cumulative effects.

In addition, Section 6 of the s42a report identifies positive effects of the proposal.

6.2 After reviewing the application, the s42a report, and the application evidence, I assess the material effects to include:

- Bulk, Location, Design, Appearance and Amenity Values.
- Esplanade reserve.
- Reverse sensitivity.
- Cumulative Effects.
- Density
- Positive Effects

Most are discussed above, but I note the following:

Reverse Sensitivity:

6.3 In addition to the comments above, I suggest that additional weight be placed on this matter, as the proposal will result in the permitted rural activity on the neighbouring site to be pitted against what is effectively a residential section, which will be seeking to enjoy a semi rural outlook, while not being part of the rural/large lifestyle block.

Cumulative Effects:

- 6.4 The cumulative effects of the proposal includes the clustering of houses as identified in the s42a report, along with the almost 50% reduction in section size, and very real likelihood of setting a precedent.
- 6.5 The s42a report places limited weight on the proposed section size, nor on the likelihood of further applications for subdivision.

Density:

- 6.6 Depending on the view taken by the Committee, if development of the existing undeveloped sites are considered unlikely (refer baseline discussion above), then the proposal will essentially create additional residential activity on the subject site. Thus the additional effects of that additional density are available for consideration.

Positive Effects:

- 6.7 The s42a report notes (para 83, page 12 of the agenda) that the proposed smaller lots will provide for the needs of those seeking smaller residential lots in the Rural Zone. There are already 2 lots that are consented and titled. The proposal only creates smaller sites that currently available. Hence, the positive effects should be limited to those effects over and above the sites currently available.

Effects Summary:

- 6.8 Overall, the effects, when taking into account: not creating the required esplanade reserve, the potential for reverse sensitivity, the creation of a 'wall' of development, the reduced section sizes, the limited positive effects, the effects of the proposal are assessed as being more than minor.

7 Objectives and Policies

- 7.1 Before reviewing the objectives and policies, the following two points are noted:
- One of the submissions received, raises the matter of the Environment Court decision of Variation 9A, which concluded undersized rural lots were contrary to the District Plan Objectives and Policies. The s42a report does not refer to that decision, which is from a higher authority. As the proposal is assessed as being a subdivision that will create under sized lots, and that the lots are less than the consented environment (notwithstanding the comments above re baseline), the Hearings Panel are encouraged to explore this matter further.
 - When reviewing the relevant objectives and policies, the s42a report seems to rely on the assumption that the proposed section rearrangement is a simple 'like for like', with the exception of location. The reality is the proposal is seeking to remove much larger lots (Lots 8 and 9, to be removed, average 4,595m²) and replace them with smaller sections (proposed Lots 3 & 2, to be created, average 2,250m²). The proposed Lots are less than 50% of the Lots to be removed. That change needs to be considered within the review of the Objectives and Policies.

- 7.2 Objective 4.2.1 is to “Enhance the amenity values of Dunedin”. The Applicant is required to provide an esplanade reserve, but is preferring not to. The creation of the esplanade reserve would provide for an enhancement of amenity values in Dunedin. The decision not to include the required reserve, therefore must result in a reduction of amenity values, when compared to what Rule 18.5.4 is seeking to achieve. Thus the application is assessed as being contrary to this Objective.
- 7.3 Objective 6.2.2 seeks to maintain or enhance the amenity values and character of the rural area. Hence, the application at a minimum must at least maintain these values. The proposed reduction in section size, along with the formation of a wall to the neighbouring property are assessed as not maintaining these values. Thus the application is assessed as being contrary to this Objective.
- 7.4 Policy 6.3.3 seeks to avoid potential conflict between incompatible and sensitive land use...by limiting density. Residential Activity on a 2,000m² section is assessed as being a sensitive land use in the rural zone, and placing that land use beside a large lifestyle block is more than likely going to result in conflict. Thus the application is assessed as being contrary to this Objective. The s42a relies on density in terms of the number of sections, but in reality, the section size (and reduced yards) also impacts on density of activity in an area.

8 Other Matters

- 8.1 Due to the findings of the s42a report, there is no attempt to establish if the application is a true exception. As discussed above, the application could result in the setting of an undesirable precedent, hence I believe the matter of a ‘true exception’ is relevant.

9 Conclusion

- 9.1 The application is a subdivision in the rural zone to create residential activity on sections as small as 2,020m².
- 9.2 The application has elements that may be of public interest, such as reduced section sizes in the rural zone and the request not to implement the required esplanade reserve. The reserve could be of interest to the wider public and/or specifically to the neighbouring properties in Halfway Bush. For these reasons, public notification may have been more appropriate.
- 9.3 The baseline for the proposal may consist of 9 lots, with a lesser amount of residential activity, due to the fanciful nature of residential activity on Lots 8 and 9. If that approach was used, then the application resulted in increased levels of residential activity over the baseline, thus producing additional effects which have not been considered.

- 9.4 The effects associated with the following may not have been fully consider in the application nor in the s42a report:
- The proposed reduction in section sizes.
 - Not implementing the required esplanade reserve, in terms of effects and amenity.
- 9.5 The review of the Objectives and Policies may not have fully considered the prior ruling of a higher authority.
- 9.6 Notwithstanding the above, the s42a Report recommends declining the application, subject to receipt of further mitigation information. The application evidence provided little in terms of mitigation.
- 9.7 For the above reasons, the conclusion of this assessment is that the application should be refused.

Conrad Anderson
6 August 2016

Attached: Copy of letter from O'Neill Devereux to Paterson Pitts Group, dated 11 February 2016

O'NEILL DEVEREUX LAWYERS

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11 February 2016

Paterson Pitts Group
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Attention: Kurt Bowen

Email: Kurt.Bowen@ppgroup.co.nz

Dear Mr Bowen

**RE: RPR PROPERTIES LIMITED APPLICATION FOR RESOURCE CONSENT WESTACOTT
HEIGHTS RESIDENTIAL DEVELOPMENT**

We refer to your letter dated 18 December 2015 addressed to the Dunedin City Council regarding the Resource Consent Application for the above matter.

We act for Chris Rietveld and Alice Wouters who own the property at 31 Dalziel Road, Dunedin and are referred to on page 30 of your letter as the owner of Lot 1 DP 453493.

It is acknowledged that our clients purchased their property from RPR Properties Limited ("RPR") pursuant to agreement dated 14 May 2012, with settlement being completed on 11 October 2012. It is also accepted that the agreement for sale and purchase contained the clause:

"The purchaser warrants that it will not unreasonably withhold consent to any application by the vendor in respect of development of the vendor's land which will form the balance land after subdivision of the land which is the subject of his agreement".

It is relevant to record that this clause was agreed to by RPR and our client at the suggestion of our client in preference to an initial clause proposed by RPR which provided that:

"The purchaser agrees to the registration of:

- (a) a covenant preventing the purchaser from making an opposing submission against or lodging an appeal against, or being in any way involved in any such activities, any development undertaken by the vendor on the balance title(s) resulting from the subdivision of the balance of the Land."

We are instructed by our clients that initially they were looking at purchasing a 2 hectare block from RPR which was part of the land now subject to the current application for subdivision by RPR. Our clients were aware of RPR's intention at that time to subdivide the property into nine 2 hectare rural residential lots as well as transferring by way of boundary adjustment two smaller parcels of land to neighbouring owners in Ashmore Street. Our clients were then introduced to the neighbouring property owned by RPR which included the existing dwelling now owned by our client. When considering purchase of this property, one concern of our clients was that dwellings could be built on the land retained by RPR for further subdivision close to the eastern boundary of the property then being purchased by our client. However they were assured by RPR that with a single 2 hectare lot proposed on that boundary it would

be unlikely that a purchaser would build close to the boundary where they had 2 hectares within which to site a new dwelling. We are instructed that our clients proceeded with the purchase of 31 Dalziel Road from RPR with the knowledge and understanding that RPR's proposed development for the neighbouring property was of a rural residential nature in which they would have only one 2 hectare property on their eastern boundary and with access ways or right of way access on their northern and southern boundaries (and Dalziel Road on their western boundary).

We are instructed that the RPR's current proposal is for 38 lots which includes five residential lots being developed close to our clients' eastern boundary instead of one rural residential lot which was our clients' original understanding of the proposal by the vendor.

Your letter states:

"The question of whether consent for the proposed development has been unreasonably withheld by the adjoining owners is somewhat subjective, however it is very clear that the adjoining owner has been well aware, and agreeable to, further development occurring within the application land. Had this not been that case, then adjoining owner simply would not have purchased the land. Furthermore, it is the applicant's firm view that the purchaser was well aware at the time of the sales agreement that the intended future development was that of an intensified residential format across the whole of the balance land, excluding the gully areas, wholly consistent with what is now proposed."

On the contrary, we believe that on any objective assessment of RPR's current 38 lot "intensified residential format" proposal it would be acknowledged that the proposal is manifestly different from the 9 lot rural residential subdivision proposal as understood by our clients' at the time of their purchase from RPR, and that it is not unreasonable that our clients' withhold their consent to the current application by RPR. On the basis that our clients purchased the property for its rural ambiance, that their purchase contract from RPR specifically removed a clause preventing them from opposing a subdivision application by RPR but with provision not to unreasonably withhold consent to what was understood by our client to be a 9 lot rural residential development of the remaining land, and the fact that the current application by RPR is for a 38 lot "intensified residential format" subdivision, our clients firmly believe that it is not unreasonable that their consent to RPR's application be withheld and our clients will be submitting in opposition to the application accordingly.

Yours faithfully
O'NEILL DEVEREUX

per:
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