

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

of an application for subdivision and land use consent
at 111A Cliffs Road, Dunedin.

BY J&A Warburton

Applicants

TO DUNEDIN CITY COUNCIL

The Council

**EVIDENCE OF ALLAN CUBITT
ON BEHALF OF
ANDREW AND JUDITH STEWART**

INTRODUCTION

1. My name is Allan Cubitt. I hold Bachelor of Arts and Law Degrees from the University of Otago. 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.
2. 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 and I am presently involved in preparation of Clutha's second-generation District Plan.
3. I personally act for the Clutha District Council. This involves both resource consent processing (subdivision and land use) and District Plan review work. More importantly for this hearing, a significant portion of my work involves the Dunedin City Council District Plan. The majority of that work involves subdivision and development in both the rural and residential part of the City.
4. I am also a Certified Hearings Commissioner having completed the 'RMA: Making Good Decisions' programme. I have conducted numerous hearings on resource consent applications, designations and plan changes for the Dunedin City Council, the Southland District Council, the Timaru District Council, the Waitaki District Council, the Hurunui District Council and Environment Southland. These hearings have involved a range of resource management issues including subdivision and development issues.
5. I was also the Chair of Environment Southland's Regional Policy Statement Hearing Panel and the Hurunui District Council Hearing Panel that considered the submissions on the proposed Hurunui District Plan.
6. 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.
7. 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

8. My evidence is based on the application material, my visits to the site and the surrounding area, the submissions received and the Council Planner's report. I have reviewed the submission of Andrew and Judith Stewart and concur with their position on the matter.
9. My evidence focusses on the rules and supporting policy framework of the District Plan that restricts development until the appropriate infrastructure is put in place. Mrs Stewart will provide evidence at the hearing on how the continual infringement of those provisions for development in this area affects them.

THE POSITION OF THE STEWARTS

10. The Stewarts do not oppose development. Nor is this a case of 'not in my backyard'. The Stewarts have no issue with residential development in the area provided the appropriate infrastructure is in place. They accept that the proposed subdivision meets the density standard of the District Plan. As passionate Dunedin people, they are very supportive of growth in the town.
11. However they do not consider that development should be at all cost. Rather, it should be undertaken in a coordinated and sustainable manner which ensures the physical limitations of the land and servicing infrastructure are taken into account. In their view this will not occur with this proposal and has not occurred with previous proposals in this area. This has caused a number of amenity related effects for their property at 107 Cliffs Road.
12. Mrs Stewart will provide evidence on these effects at the hearing but in brief the concern relates to a very long, substandard private road that will service 17 sites (if this is granted) but has the potential to service significantly more residential sites. This causes not only safety concerns but also amenity related concerns. St Clair is a reasonably up market suburb and one does not expect to be subject to dust and noise from an unsealed, poorly maintained road surface. There are also safety concerns given the narrow carriageway, lack of passing bays and street lights and the difficulty with access on to Cliffs Road. One would question whether a fire appliance could access parts of this road, which adds to concerns over safety.
13. There are other unforeseen amenity related effects by allowing so many users on a long, substandard private road. Because this is a private road, it is not serviced in the normal way by Council. For example, Council and other waste disposal service providers do not (and physically probably could not) access this road. Hence it is the Stewarts, being at the start of the road, that bear the consequences of the unsightly rubbish bins and rubbish bags, often with their contents strewn about the place, that are dropped at the start of the road for collection.

14. Given the position of the Council staff on this application, the Stewarts fear is that these conditions will only worsen as there is significant potential for further development that can legally utilise this private road. In their view, this application and any further similar application should be declined until such a time as the southern section of Isodore Road is formed to service this area.
15. Having reviewed the application, the history and future potential of this area and the provisions of the District Plan, I agree with the Stewarts position.

THE DCC PLANNERS POSITION

16. Mrs Darby has recommended that the consents sought should be granted (page 32 of the s42A report)). Her position appears to be mostly based on the fact the subdivision meets the density requirements for the zone (the lots are in fact quite generous in size for the Residential 1 zone) and as a consequence the associated effects are anticipated in the zone. Mrs Darby states at paragraph 9(a) that all lots have adequate 'legal' access but notes (at paragraph 9(b)) that not all inadequacies of the access will be rectified but does not consider these inadequacies over the balance of the access should prevent the applicant from subdividing in accordance with the zone provisions (paragraph 9(bc)). In her view the proposal is considered consistent with the relevant objectives and policies of the District Plan.

PLANNING ANALYSIS

17. In normal circumstances Mrs Darby's position would not be queried and in fact this application would not be open for submissions let alone a hearing. However it is different because of the 'road' servicing this particular area. It is not a public road and does not meet the standards of one. As a consequence, the effects it generates are different from a subdivision that would be serviced by a normal suburban street and there is the potential for significant cumulative effects if the plan provisions for this area are administered consistently in the future.
18. In my view Mrs Darby underplays the importance of a plan rule that limits the number of dwellings permitted to access a private road, particularly when it is located in a highly sought after residential suburb. In my experience restrictions are put on the number of properties serviced by private roads for the very reasons that are currently of concern to the Stewarts. I note that Mrs Darby does not appear to have commented on the fact that the Rule 20.5.7(v)(b) does not prescribe a minimum formed width for private roads servicing more than 12 units. Again it is my experience that once a private road has reached a set threshold, Councils require the private road to become a public road (formed to the appropriate standard) or at the very least, a private road formed to the appropriate standard (under NZS 4404:2010 - Land development and subdivision engineering or NRB/MANZ Code of Practice Design for Urban Streets).

19. The experience of the Stewarts suggests that the threshold on this road has already been reached but Mrs Darby has overlooked both the current effects of the situation and the significant potential for cumulative effects. I also disagree with Mrs Darby's policy analysis for similar reasons and will first outline the potential cumulative effects as that has some weight in the policy assessment.

Cumulative Effects

20. Based on the area of the properties that can legally use the private road listed at paragraph 56 of Mrs Darby's report, I have calculated that approximately 99 sections could be created in this location if all sections were developed at the 500m² minimum (leaving aside areas required for roading and the like). Because of the topography and the way some of these sections have already been built on, this is unlikely to ever occur. However there are a number of very large sites in this area (e.g. 109 – 9520m²; 111B – 8457m²; 111C – 8252m²; 111D – 5376m²; 111E – 8250m²) that all could sustain reasonably dense residential development. I note that 109 Cliffs Road has consent for a further three allotments but there is nothing in the plan stopping further development of these sites in the future (unless the consent itself does). The sites outlined above all appear relatively flat and have a combined area of around 39,855. With this land area (leaving aside area for internal roads etc.), this location could yield the following:
- 79 sections at 500m²
 - 40 sections at 1000m²
 - 26 sections at 1500m²
 - 20 sections at 2000m²
21. Either one of these scenarios would have a significant impact on the safety and efficiency of Lyders Lane and its connection with the public road network. Quite clearly the amenity related effects as currently experienced by the Stewarts (and others) would also significantly increase.
22. All sections created under these scenarios would have the right to utilise Lyders Lane. Currently the Councils response to this issue is to allow ad hoc, uncoordinated development in this area with a similar approach to the upgrade of the road, without any recognition that this road is unlikely to ever accommodate the potential development from this area.

The Policy Framework

23. This approach is not supported by the policy framework of the District Plan. There are several key policy threads that relate to this particular issue with the development. These are as follows:
- ***Co-ordinated and sustainable subdivision***: Obj 18.2.1; Pol 8.3.2.

- **Infrastructure provided appropriate to the potential intensity and density of development and amenity values of the area:** Obj 4.2.2; Pol 4.3.5; Pol 8.3.4; Obj 18.2.7; Pol 18.3.3.
 - **Sustainably manage infrastructure, with its provision undertaken in a planned and integrated way:** Obj 4.2.3; Pol 4.3.7; Obj 8.2.4; Pol 8.3.4.
 - **Land suitable for subdivision with physical constraints taken into account:** Obj 18.2.2; Pol 18.3.5.
 - **Maintain and enhance amenity values:** Obj 4.2.3; Pol 4.3.1; Obj 8.2.1; Pol 8.3.1.
 - **Avoid, remedy or mitigate adverse effects of transportation network:** Obj 20.3.1; Pol 20.3.5; Pol 20.3.9.
24. In my view this proposal along with the previous applications that have been consented that exceed the capacity of the private road, do not achieve these policy outcomes. Quite clearly the subdivision activity in this area is not co-ordinated but is ad hoc without any overall plan to develop a roading network that is appropriate to the potential density of development in the area and which integrates with not only the existing roading network but also with the amenity values of the neighbourhood. Continuing to consent these subdivisions does not take into account the physical constraint imposed by the topography and formation of Lyders Lane or the adverse effects the use of this, as a private road, has on neighbouring property owners.
25. The Council's response to this to date seems to be one where it has conceded that the land owners have a right to subdivide down to a certain level and can legally use the private road to achieve that so it is not reasonable to stop them from doing so. And in terms of the standard of the private roads formation, the requirement to upgrade has been piecemeal and as Mrs Darby put it, one property owner should not have to resolve all the access inadequacies when they come to subdivide.
26. But this is the exact purpose of the rule that limits private road access to 12 users and the policy framework outlined above. It is also the purpose of section 106 of the Act that allows Council to refuse consent to a subdivision if sufficient provision has not been made for legal and physical access to each allotment to be created by the subdivision. Mr Fisher suggests the current road has capacity for up to 20 users at which point significantly greater consideration of the transportation effects of subdivision using Lyders Lane will be needed. With all due respect to Mr Fisher, the evidence of the submitters suggests that the road has already reached that point and it is difficult to reconcile the physical state of the road with a street servicing a residential suburb of Dunedin.

SECTION 104D TEST

27. The subdivision is non-complying because it does not have legal frontage. In normal circumstances this is generally treated as a 'technical non-compliance'. But in this case the access is the issue because the private road is not of sufficient width or adequately formed to

service this area. The physical constraints of the road property would appear to make it very difficult to overcome these constraints. These inadequacies, along with its private nature, create both safety and amenity related effects that are more than minor. Cumulative effects are also likely to be significant. Policy 4.3.10 of the District Plan requires Council to take a holistic approach in assessing the effects of development. The explanation notes that these effects may include long term effects and cumulative effects. In my view it fails the effects limb of the section 104D gateway test.

28. The second limb of that gateway test relates to the objectives and policies of the plan and whether an activity is contrary to them. 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 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. It would seem therefore that the correct approach would still require a holistic assessment of the objectives and policies.
29. It is accepted that the density of the subdivision proposal is consistent with the policy provisions of the District Plan. Generally that is enough to not be 'contrary' to the objectives and policies. However in this case the proposal is at odds with the policy threads outlined in paragraph 23 above and ensuring that subdivision is planned and co-ordinated with the appropriate infrastructure put in place is equally as important as density considerations. The subdivision would appear to be contrary to many of the policies that seek this outcome. The Committee must determine whether, overall, the proposal is contrary to 'the purpose and scheme of the Plan', which will require a weighting of the two policy arms (density v infrastructure and cumulative effects).

SECTION 104 ASSESSMENT AND PRECEDENT ISSUES

30. Regardless of where the Committee comes to in its assessment under the section 104D test, the time has arrived to address the constraints to further development in this area. And in this context, whether the subdivision complies with the density provisions or not is irrelevant. I am not a great fan of plan integrity arguments against development proposals. They should generally stand or fall on their merits. But where a consent will exacerbate an existing

infrastructure constraint and the location has significant further potential for development, then precedent does become an issue.

31. Mrs Darby has addressed the 'true exception' test at her paragraph 130 and noted that the non-complying aspect of the subdivision is considered a technicality "as all lots will have adequate legal access via rights of way". She goes on to say that "a compliant access can be formed within the legal corridor at any time and is not reliant on consent from Council. Therefore, the subdivision proposal is not considered to challenge the integrity of the District Plan".
32. Firstly, the current standard of the right of way is not currently 'adequate' to serve a residential suburb within Dunedin. Secondly, as far as I can tell, there is no 'standard' for a private road that exceeds 12 units in the District Plan. Thirdly, while I am not an engineer, my experience in these matters would indicate that the cost of upgrading this road (if it is possible given the physical constraints) to adequately service the current and future development in this location, along with the complexity of legal interests in the road, would make it unlikely. As a consequence, my view is that this subdivision does challenge the integrity of the District Plan. What Council can be reasonably certain of is that others will expect to have their density complying subdivision applications approved in the future if this is granted regardless of the state of the 'road'.
33. On this basis I believe that the purpose of the Act is best served by declining this application. In my opinion the most appropriate way forward for the development of this particular area is for Council and developers to form the southern portion of Isadore Road. This will ensure that infrastructure is provided that is appropriate to the potential density of development in the area. It will also ensure that amenity values of the properties at the Cliffs Road end of the private road are protected.

Allan Cubitt
16 November 2016