

THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Of applications for land use and subdivision consent
(LUC 2017-407, LUC-2017-548, LUC-2017-555 and
SUB 2017-74 at 34 Gorman Street, Macandrew Bay.

BY ALISTAIR AND SAMANTHA MONTGOMERIE

Applicant

TO DUNEDIN CITY COUNCIL

The Council

EVIDENCE OF PETER ALLAN CUBITT
ON BEHALF OF ALISTAIR AND SAMANTHA MONTGOMERIE

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
 - Environmental effects
 - The objectives and policies of the District Plan
 - Proposed District Plan
 - National Policy Statement on Urban Development Capacity 2016
 - Section 104D and Plan Integrity

- Part II matters and 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 Forsyth.

THE SITE AND THE PROPOSAL

8. The site has been fully described in the application documentation (both the AEE and Mr Forsyth's report) and the planners report but I briefly set out the key points here:
 - The site is 18.5 hectares in area and is held in CFR 271/67. Legal and formed frontage is provided by Gorman and Porterfield Streets. There is also legal access via a right of way over 37 Wharfdale Street.
 - The property is located on the slopes directly behind Macandrew Bay, rising up to an altitude of 154m above sea level. Two ridge systems define the topography of the site with the existing dwelling being located in the lower north west corner of the northern most ridge.
 - The applicants have established a large area of native planting around the dwelling as part of the original consent for the existing dwelling. The remainder of the property is in rough pasture, with the best being located on the upper slopes, along with a number of pine shelter belts. There are also areas of self-sown (wilding) pines around the western (residential) boundary of the property. The gully that separates the two ridges contains an area of exotic and native vegetation and a small water course.
 - A group of farms buildings are located adjacent to the lower south west boundary. An existing track provides access to these buildings. A DCC constructed culvert has been installed where this track crosses the water course. There are a number of other farm access tracks throughout the property.
 - The Macandrew Bay residential zone lies directly to the west of the site with the land on all other boundaries being rural pasture land. The adjoining rural property to the south is only 13.79has. Directly to the north east of the site is a cluster of small rural sites ranging from 4 to 8.8hectares.
9. While the subject site meets the 15-hectare minimum of the District Plan, it is effectively a large lifestyle block and not easily managed given its topography. However, it has characteristics that would make it a highly valued lifestyle option given its northerly aspect and stunning harbour views. As a consequence of this, the applicants have lodged a submission on the proposed District Plan seeking a large lot residential zoning along the western fringe of the property where it adjoins the residential zone. The rationale behind this approach is that it utilises the least favourable land for grazing while largely avoiding hazard and landscape issues. The site can be easily accessed (via two legal roads) and serviced from the adjoining residential zone while the rural balance parcel would largely

comply with the current 15-hectare minimum. This approach is also consistent with the Proposed Plans zoning of other locations in this area where Large Lot Residential has been proposed (in particular, there is one proposed approximately 400m north of this property).

10. Obviously, there is no guarantee of that outcome and upon assessing the site for the applicants, while agreeing some extension of urban development was appropriate at this location, I consider the best fit for this location to be rural, given the challenges the topography would present for development at a density of 2000m². Hence the proposal before you today.
11. The 18.5-hectare title is proposed to be subdivided into three allotments to enable two new dwellings to be built within the property. The existing dwelling will be held in a 2-hectare allotment (Lot 1), with one further 2-hectare allotment (Lot 2) being created to the south of that. The proposed dwelling will be sited on an existing benched area and would be accessed from Porterfield Street. A number of design controls are proposed by Mr Forsyth. The second new dwelling will be located further south, in the location of the existing farm sheds, on an allotment that largely complies with the current rural minimum, being 14.5-hectares. Design controls are also proposed for this dwelling.
12. The design philosophy is to retain all the best grazing land in one site, but maintain the smaller lots at the usual rural residential site density of 2-hectares, while ensuring any new built development stayed connected to, and was seen in the context of, the adjoining residential zone. Ideally the dwelling on Lot 3 (the 14.5-hectare lot) would also be held on a 2-hectare lot with all the remaining rural land being sold to the adjoining neighbours at either 26 Dickson Street (currently an undersized rural lot) or better still, to the owner of the large grazing property (121-hectares) at 172 Castlewood Road. This would achieve a better land management outcome, from both a rural productivity and landscape perspective, but of course involves negotiations with third parties. However, if this application was approved, then that option could be pursued at a later date.
13. Mr Forsyth has also recommended that a number of additional wilding pines be removed near the proposed building plantings. Further mitigation and offsetting planting has also been proposed which will enhance the natural character and ecological values of the site.

STATUS OF THE PROPOSAL AND SECTION 104

14. The site is zoned Rural in the Operative District Plan (“ODP”) and most of the site is also located within the North-West Peninsula Landscape Conservation Area (LCA). The site is zoned Rural Hill Slopes in the PDP and is also mostly in North-West Peninsula Significant Natural Landscape overlay. 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.

EFFECTS ON THE ENVIRONMENT

16. Ms Young addresses a wide range of issues in her environmental effects assessment of the proposal. However, the suitability or otherwise of a proposal generally comes down to one or two key issues. In this case, the key issues in the determination of this proposal are the potential effects on amenity and landscape values, together with rural productivity matters. Once these issues have been determined then matters of site suitability (geo-technical, storm water and effluent disposal matters); transportation and earthworks become relevant but are generally addressed through appropriate conditions.
17. Ms Young finds the landscape effects to be minor but considers the loss rural land and the cumulative effects of the proposal to be more than minor because of the size of the allotments. I have often expressed my concern that Council planners are unduly influenced by the density controls in District Plans when assessing environmental effects, with most tending to hold the position that any non-compliance with the density rules will automatically have an adverse effect on rural productivity and character. Given that the 'zoning' of land is a legal construct, neither a natural nor a physical resource, I consider this approach to be flawed.
18. In this context, I think it is important to remember that the Act is an effects-based piece of legislation. Judge Fogarty in his High Court *Foodstuffs* judgment reiterated that the first gateway test "does not refer in any way to the operative or proposed plans". That judgement also reinforced that the RMA was intended to introduce effects-based decision making and that rules are merely the starting point to determine what may be acceptable in any given circumstance. They are not the final arbiter.
19. Justice Fogarty also highlighted the fact that it is not the effects, or major effects, of an activity that are in question – it is recognised that all activities have effects. The question is whether they are adverse and if so, the degree to which they are adverse. In other words, while there may be quite a significant change in an environment due to a development, that change is not necessarily adverse.
20. Before I address the relevant effects, I will briefly address 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.

21. I agree with Ms Young that there is limited baseline for this site because of the landscape overlay and the restricted discretionary nature of subdivision. However, as the application noted, the existing farm buildings in the south west corner of the site effectively sit on the residential zone boundary. These buildings can be used for range of activities that one might expect to find in the rural environment and can generate a range of amenity effects, including noise and odour. A number of these sheds are set up for the housing of animals, in particular pigs. These buildings are likely to be removed if consent is granted so such amenity related effects are unlikely to occur so close to the residential zone boundary under this proposal.
22. From a landscape perspective, it is also worthy to note that production forestry could occur on a large portion of this property, as only a small portion of it is located within the visually prominent overlay. The visual and other amenity related effects of earthworks and harvesting activities associated with forestry can be significant although it is acknowledged that it only occurs at the beginning and end of each cycle.

Amenity and Landscape Effects

23. As the application noted, the landscape we are dealing with here is not an “outstanding landscape” in terms of section 6(b) of the Act but is what is commonly referred to as an “amenity landscape”. The District Plan describes such areas as “... *areas which have particular impact on landscape quality due to high levels of visibility from major public viewing locations and/or the presence of particular landscape character and values. The areas are generally the higher land visually containing the most densely settled urban and rural areas of Dunedin.*”
24. Such landscapes 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 the context of these LCA’s, this is important as given their location (*the higher land visually containing the most densely settled urban and rural areas of Dunedin*) there are many other competing issues and it is not appropriate to retain the status quo purely for landscape reasons.
25. Ms Young considered amenity and landscape together, and concluded that the effects on landscape values will be no more than minor if the proposed mitigation controls are

adopted. She also agrees with Mr Knox that the elevation of the buildings is critical. It is unclear what her position is in relation to the wider amenity issue.

26. The building platforms have been specifically chosen to avoid the elevated parts of the site. The applicants did initially identify a number of building sites further up the slope and while these would have provided rather stunning views, they were quickly discarded because of the potential for adverse landscape effects was significantly greater. The two proposed sites were chosen because they would have little, if any, adverse landscape effects on either the specific location itself or the wider LCA values. The platform on Lot 3 is in fact largely outside the LCA boundary. Referring back to the *Foodstuffs* case, while there will be a change in the environment here, it is not considered adverse.
27. Mr Forsyth's assessment confirms this. In his opinion landscape effects will be less than minor. He says *"The Landscape Report contains an assessment of effects that considers the characteristics sought in the rural environment within Dunedin City boundaries and the features and characteristics to be protected in the NWLCA. My conclusion was that the proposal would not detract from present rural values and that potential adverse landscape and visual effects would be 'less-than-minor'. This remains my assessment and which is underpinned by the restrictions on off-site visibility that the site provides and the positive effects that I consider will result from the implementation of this proposal. "*
28. Mr Forsyth's assessment also finds that site specific amenity values will be enhanced, a position that is supported by two positive submission from neighbours in the adjoining residential zone. The removal of a number of wilding pines will have positive amenity and health and safety effects for the neighbours in the adjoining residential zone. The native planting proposed will also enhance the natural character and amenity values of the area. Mr Forsyth says *"The positive landscape effects that I anticipate include the development of the some of the elements of natural character that the site does not possess at present. This will be exhibited in a growing diversity of native vegetation, and subsequent increase in insect and bird life. The removal of the pine trees and introduction of native trees and shrubs will also bring a more human scale to this part of the site and allow for greater visual diversity".*
29. I agree with Mr Forsyth's assessments that any adverse effects on amenity and landscape values, both at the site specific and the broader level, will be less than minor and are likely to be viewed as positive by many. In my view, this is a significant step in passing through the effects limb of the s104D test.

Rural Productivity

30. Ms Young seems to consider this matter in relation to the sustainability assessment criteria, which is more of a policy consideration in my view. Ms Young notes that the relevant plans do not require a rural zoned site to be economic. That is correct but she then goes on to

state that *“rural land is zoned for the main purpose of primary production, economic wellbeing and economic stability is an important contributor to the economy locally and nationally”* and that *“land fragmentation in the rural zone reduces the ability for the rural zone areas of Dunedin to remain viable and sustainable.”* This site does not make an important contribution to the economy but this proposal will have very little impact on its actual productivity or that of the wider rural zone.

31. As I noted above, the subdivision has been designed so that built development occurs at the lower, less intensively used part of the property with the bulk of the better grazing land (the upper slopes) being retained in one allotment (Lot 3). The small area of supposedly high-class soil located on the property is within this lot and is not compromised by the subdivision proposal. This lot is essentially a complying rural allotment (and at 14.5 ha, is larger than the adjoining property at 26 Dickson Street) and the dwelling proposed here will merely replace a group of disused farm buildings on the western edge of the site. Hence, land area occupied by buildings will be similar. Native planting is also to be established below the building platform on this site.
32. Lot 1 follows the boundary of the existing dwelling and its curtilage, which equates to 2ha. This part of the property isn't grazed, so no traditional rural productivity is lost, but the site does contain a large area of native plantings which will continue to be maintained and enhanced.
33. Lot 2 does contain an area of pasture but only limited grazing occurs within this site. A reasonably significant area of this site is occupied by a small gully (roughly a third) which runs along the southern border of this proposed allotment. The gully contains an extensive area of hawthorn and native shrubs, and a small water course. Native plantings will be established at the western edge of this site, linking into the gully vegetation. This has been extended further south (and below the building platform) from the original application. An additional area of planting will be established north of the driveway which will flow into Lot 1 to link with the existing planting on that site.
34. Ms Young's assessment overlooks the fact that in addition to primary production, the Rural zone also seeks to maintain the productivity of ecological values (see Issue 6.1.8 and the associated policy framework). The areas proposed for native planting have limited, if any value, for grazing. Hence, these plantings can be seen as assisting in that objective and in that sense can be considered a productive rural use.
35. Overall, I consider any adverse effect on traditional rural productivity to be minor at worst but that the proposal will have a positive effect on ecological productivity of the zone.

Geo-technical Issues

36. Because the current Council Hazard Register and the PDP identify land stability hazards over parts of this property, the applicant commissioned GeoSolve Geotechnical Engineers

to assess the proposal to ensure no issues arise. They did not find any reason to recommend against the proposal subject to a number of conditions, which are set out at page 142 of the agenda. I note Councils engineering consultants also recommended a number of conditions (at page 173) but did not recommend declining it on the basis of instability issues.

37. The hazard overlay on this property has been further considered under the PDP process and is likely to be removed from the site. This is consistent with GeoSolves findings and the observations of the applicant. No stability issues have been experienced during a number of recent large rainfall events.
38. Ms Young is concerned that no information has been provided on the earthworks needed. That is simply because both of the platforms (to a lesser extent on Lot 3) and the access are largely already formed, so we do not anticipate the volumes being great. In my view it is best to address this issue when you have a specific proposal, either by a further consent or by a condition of consent. Neither engineer seems to be overly concerned with this but I did note the reference to Mr Forsyth's comment in his s92 response that a new culvert was required on the Lot 3 access. This is not the case as the DCC installed a more than adequate culvert on this track when the water main was laid through the property.
39. Mr Walrond will be available at the hearing to present a brief overview of the work he has done to date (already in the application documentation) and to answer any questions the panel may have.

Cumulative Effects

40. Ms Young deals with cumulative effects at her paragraphs 130 to 133 of her effects assessment and at page 31 of her policy assessment. She appears to be confusing cumulative effects with precedent effects, which are entirely different matters. Mr Forsyth has assessed landscape effects as less than minor and amenity related effects as potentially positive. I have also assessed the actual physical effect on rural productivity to be minor. While the two smaller lots are well under the density standards, I do not believe they are incongruous with the rural land use pattern as the subdivision pattern better reflects the physical characteristics of the site, retaining the higher land (which is more significant from both a landscape and a productivity perspective) as open pasture and locating the dwellings in the lower, less productive and more enclosed area that is already domesticated to a degree.
41. Under this scenario, it is difficult to see how any cumulative effects of the development, when constructed, would have "any gradual build up of consequences". If anything, these would be positive as the native plantings take hold and establish.

Positive Effects

42. Ms Young agrees that the proposal will have positive effects in relation to the ecological enhancement proposed and the removal of nuisance wilding pines. In my view, the provision of two new building sites in a sought-after location that retains a northerly aspect and stunning harbour views, is also a positive effect of this proposal.
43. Dunedin's housing stock is ageing and new housing stock is needed. The evidence of Mr Kelvin Collins for the City at the recent PDP hearings on urban capacity was very enlightening in this context. He stated that Dunedin has experienced an increase in demand for homes over the last 18 months and that in 2016 there were 2590 house sales and 158 section sales. In his professional opinion, there simply has not been enough homes to satisfy the demand of the two main groups driving demand and one of the main reasons for this is that there is a lack of suitable homes for those who already own these homes to upgrade into. These properties would assist in satisfying that demand.

Conclusion on Environmental Effects

44. In my view the site is well suited to the use proposed and the development will integrate well with the existing environment. The proposal will have less than minor adverse effects on landscape values and no more than minor effects on rural productivity. On that basis, I have concluded that it passes through the first gateway test of section 104D.

OBJECTIVES AND POLICIES OF THE DISTRICT PLAN

45. 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.
46. It would seem therefore that the correct approach would still require a holistic assessment of the objectives and policies and it is on this basis that I have assessed the proposal under section 104D(b). The objectives and policies of a number of the District Plan sections are relevant to this proposal. These are the Sustainability, Rural Zones, Landscape, Hazards and Subdivision. The relevant objectives and policies of each are considered below.

47. Ms Young's report contains a comprehensive assessment of the objectives and policies she considers relevant. Overall, she concludes that the proposal is contrary to many of the provisions relating to rural productivity, and rural character and amenity (in both plans) due to the density of the residential activity proposed. Because the policy framework is essentially effects based, I disagree with this position and will focus on the areas where she finds the proposal contrary.

Sustainability Section

48. 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.
49. 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. This proposal has a less than minor adverse effect on landscape values and will have positive effects on the amenity of some neighbouring properties. Extensive native plantings are proposed that will enhance natural character and ecological values. The vast majority of the sites existing productive grazing land will be held in an allotment that essentially complies with the 15-hectare minimum of the ODP, while the new dwellings will adjoin the neighbouring residential zone. At both the broader level and at a site-specific level, amenity is at least being maintained by this proposal.
50. Also of significance is the provision of a wider range of high quality rural residential living sites within the City. The sites created by this proposal will retain a high-quality amenity with an excellent northerly aspect and a stunning harbour outlook, and will be highly sought after. The addition of such sites to Dunedin's living environments should be encouraged, not discouraged.
51. 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. In her effects assessment, Ms Young concluded that conflict and reverse sensitivity issues would arise in this environment. I agree.

52. Objectives 4.2.2 and 4.2.3 and Policies 4.3.2 and 4.3.5 deal with the provision of infrastructure at an appropriate level and without compromising the sustainability of existing infrastructure. The new lots will be self-serviced and will utilise existing roading infrastructure. Accordingly, the proposal has no impact on infrastructure.
53. Objective 4.2.4 and Policy 4.3.4 deal with the appropriate protection of significant natural and physical resources. The landscape of the site is not outstanding but merely requires consideration as an amenity landscape. Mr Forsyth considers any landscape effects will be less than minor. The high-class soils of the site will not be affected by the proposal while the ecological values of the site will be enhanced. The proposal is therefore consistent with this policy suite.

Rural Zone Policy Framework

54. The policy framework of the Rural section contains a number of themes relevant to this proposal. They include sustaining the productive capacity of the rural zone; the provision for rural residential development in appropriate locations; the maintenance and enhancement of rural amenity; the sustainable management of infrastructure.
55. I will address each of these themes below but would first comment that just because a proposal does not conform to the “rules” does not mean that it offends the main thrust of the District Plan. It is not in contention that lot size is one of the key mechanisms used by the plan to achieve the zone objectives and policies. But in my experience, what is often overlooked is that this approach does not fit all circumstances and that there are other ways of achieving sustainable management and the outcomes sought by the plan.
56. 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. Ms Young believes the proposal is contrary to Policy 6.3.2 (sustain productive capacity by controlling adverse effects) because 15 hectares per residential activity is required to minimise impact on rural productivity. The selection of 15 hectares as the tool to protect rural productivity is rather arbitrary and does not reflect the reality. The policy refers to the rural zone as a whole, and this particular location is not significant in the overall productivity of the zone. Allowing the land within the property with less productive potential to be used for other purposes is not in conflict with maintaining productivity of the rural zone as a whole. While the site is not an economic farm unit, the subdivision has been designed to ensure the vast majority of productive land is retained for primary produce activities. The lower land of lesser quality for primary production will be used for lifestyle and ecological purposes without affecting the overall productive capacity of the zone.

57. Ms Young also says the proposal is contrary to Objective 6.2.1 because the undersized lots do not promote the use of the land for primary production. However, this objective seeks to maintain the ability of land to meet the needs of future generations. In my view, this 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. The explanation states that it *“will be necessary to ensure that the spread of residential activity into the rural areas of the City is carefully managed”*. For the reasons already outlined above, this proposal does that. The land to be held in the two 2-hectare sites is not land 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 offers significant ecological benefits.
58. Ms Young also considers the proposal contrary to the policy suite that deals with the provision of rural lifestyle choices, Objective 6.2.3 and Policy 6.3.4. While Policy 6.3.4 deals with the Rural Residential zones themselves, it does give a useful guide as to what areas should be avoided. The criteria require rural residential development to avoid, as much as practicable, locations that:
- are affected by natural hazards;
 - are within landscape management areas (which include LCA’S);
 - contain high class soil;
 - may lead to unsustainable provision of infrastructure
59. The proposal avoids the area of high class soil in the site and does not involve the unsustainable extension of infrastructure. Mr Walrond, the applicants geotechnical engineer, has confirmed that the building sites are suitable subject to some specific recommendations in relation to Lot 3. Furthermore, the site is unlikely to be tagged with a natural hazard overlay when the final PDP decisions are released. With respect to the LCA, the dwelling on Lot 1 is existing while the platform on Lot 3 is mostly outside the LCA boundary. Mr Forsyth has concluded that adverse landscape effects are less than minor.

60. Part of the explanation to Policy 6.3.4 states that *“In order to avoid adverse effects on rural character and amenity values, where opportunities for rural residential living are to be provided they need to be focused on specific locations which have the characteristics and capacity to absorb the effects on rural character and where the potential conflicts over amenity expectations can be minimised.”* Mr Forsyth's evidence confirms that this area has those characteristics and that capacity.
61. In my view the proposal is not contrary to this policy suite.
62. Related to the provision for rural residential living is the issue of rural amenity. The specific rural zone amenity policy is 6.3.5 and it refers to the character of the rural area and requires activities to avoid, remedy or mitigate adverse effects on rural character. Ms Young considers the proposal inconsistent with this policy because the minimum lot size is not maintained. In my view, the proposal's adverse effect on amenity values will be no more than minor based on Mr. Forsyth's assessment (refer section 5.10 – 5.18 of his evidence).
63. Ms Young goes further in relation to the individual amenity values of adjoining properties provided for in Policy 6.3.6, where she considers the proposal to be contrary, again because of the density breach. This policy is to avoid, remedy or mitigate the adverse effects of buildings and vegetation on neighbouring properties. Mr Forsyth is of the view that the removal of a number of wilding trees will have positive effects on amenity values as will the extensive native plantings proposed along the residential boundary. This also appears to be the view of at least two neighbours who have submitted in support. On this basis, I am of the view that the proposal is consistent with Policy 6.3.6.
64. Overall, I do not find the proposal to be contrary to the objectives and policies relating to amenity values. 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.
65. Rather strangely, Ms Young finds the proposal contrary to Policy 6.3.7 (maintain significant landscapes by limiting density in LCA's) despite considering adverse effects on landscape to be minor and the proposal to be consistent with all (except one) of the landscape provisions. On that basis alone, the proposal cannot be contrary to this policy. This view is again based on the density breach but Mr Forsyth has confirmed that despite this, the LCA values are maintained. The proposal is at worst inconsistent with this policy.
66. Ms Young also considers the proposal contrary to Policy 6.3.14 which deals with adverse cumulative effects. However, Ms Young seems to confuse this issue with precedent effects in her discussion on the issue. They are not the same thing. Precedent is not an environmental effect as such and cannot be assessed with any certainty. I have considered cumulative effects above and concluded that these will be minor or less.

Landscape

67. Ms Young discusses this policy framework at her page 32. She considers the proposal to be considered consistent with this policy suite with the exception of Policy 14.3.3 where she finds some inconsistency. (However, I do note here that she refers to Objective 14.2.1 and Policy 14.3.1 which are irrelevant to this proposal because they refer to outstanding landscapes, which is not what we are dealing with here). The values listed in her discussion do not appear to be compromised by this proposal so I question whether the proposal is inconsistent with this policy.

Natural Hazards

68. Mrs. Young considers that the proposal is expected to be consistent with the hazards policy suite. I agree as this raft of policy merely requires the effects of hazards to be avoided, remedied or mitigated (Objective 17.2.1) while ensuring building and vegetation removal is “controlled” in areas identified as being or is likely to be, prone to erosion, falling debris, subsidence or slippage (Policy 17.3.2). This policy suite will be given effect to by the conditions proposed.

Subdivision

69. The objectives and policies of the Subdivision section seek to ensure that subdivision is co-ordinated and sustainable, with physical limitations and potential land uses taken into account to ensure that adverse effects are avoided, remedied or mitigated.
70. Mrs Young considers the proposal contrary with Objective 18.2.1 because it jeopardises the potential for future development. It is unclear what Ms Young means here because the application seeks consent for the subdivision and the future land use activity on all allotments and is therefore coordinated. We have also assessed it as a sustainable proposal. She also considers it contrary to Objectives 18.2.6, again because the lots are undersized. However, we believe the effects of the proposal have been adequately mitigated so that they are no more than as minor. The proposal is not contrary to this objective.
71. Overall, I have assessed the proposal as consistent with the objectives and policies of the Subdivision section.

Conclusion - Objectives and Policies

72. 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.

73. 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 proposal will not impact on the productivity of the rural zone and is compatible with surrounding land uses. (Productivity and reverse sensitivity policies).
 - The high-class soil on the site will not be affected and the indigenous vegetation on the site will be increased so that ecological values of the site are enhanced (Productivity and significant resources policies).
 - While part of the site is an LCA, the development is attached to and integrates well with the adjoining residential activities. Landscape effects are less than minor. (Landscape, amenity and significant resources policies).
 - Unstable areas will be avoided. (Hazards policies)
 - The attributes of the building sites align more with the values people seek in lifestyle properties. They afford views, sun and space but are not isolated, being located adjacent to an existing residential zone, negating the need for long vehicle trips. (Rural-residential, infrastructure, transportation and efficiency policies).
 - The sustainability of existing infrastructure will not be compromised. (Infrastructure, transportation and environmental issues policies).

PROPOSED DISTRICT PLAN

74. Ms Young also assesses the proposal against the Proposed District Plan policy framework. She finds it contrary to this plan for the same reasons she identified in relation to the PDP. I do not propose to work through this plan given it is not yet operative but for the reasons I have already expressed I do not consider the proposal contrary to the effects-based policies of PDP although it does appear contrary to Policy 16.2.1.7 which refers to avoiding residential activity that doesn't comply with the density standards unless it's a surplus dwelling. Policies of this nature are under challenge in the PDP while the actual zoning of this site is also under challenge. Hence, little weight should be given to the PDP.

NATIONAL POLICY STATEMENT ON URBAN DEVELOPMENT CAPACITY 2016

75. Section 104(1)(b)(iii) requires decision makers to have regard to any relevant provisions of National Policy Statements. This application is concerned with providing choice in the housing market, albeit at a rural residential scale, and hence the provisions of the NPS on Urban Development Capacity 2016 could be considered relevant. The NPS states that *"local authorities need to provide for the wellbeing of current generations, and they must also provide for the wellbeing of the generations to come"*. The preamble provides an

overview of the direction and outcomes sought by the NPS, and states that development capacity “... includes both the total aggregate demand for housing and business land, and also the **demand for different types, sizes and locations**. ...”.

76. In relation to that issue, the key objectives and policies of the NPS are as follows:

Objective Group A – Outcomes for planning decisions

OA1: Effective and efficient urban environments that enable people and communities and future generations to provide for their social, economic, cultural and environmental wellbeing.

*OA2: Urban environments that have sufficient opportunities for the development of housing and business land to meet demand, **and which provide choices that will meet the needs of people and communities and future generations for a range of dwelling types and locations**, working environments and places to locate businesses.*

....

***PA3:** When making planning decisions that affect the way and the rate at which development capacity is provided, decision-makers shall provide for the social, economic, cultural and environmental wellbeing of people and communities and future generations, whilst having particular regard to:*

*a) Providing for choices that will meet the needs of people and communities and future generations **for a range of dwelling types and locations**, working environments and places to locate businesses; ...*

77. This proposal assists in achieving the outcomes sought in relation to providing a range of dwelling types and locations. As Mr Montgomerie will state in his evidence, he has fielded numerous enquiries regarding the potential to purchase and develop parts of his land. This is not surprising given the aspect and views which make this location a stunning place to live. This can be achieved with minimal environmental effect.

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

Precedent and Plan Integrity Matters

78. 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
79. 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

80. 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”.
81. There are a diverse range of environments within the rural zone and individual resource consent applications allow the Council to assess, on a case by case basis, whether the approach of the plan (i.e. the zoning and minimum allotment size approach) is appropriate in all circumstances. Here I believe it is not necessary to adhere to that approach. There are quite possibly some areas that may retain similar characteristic to this site but it must be remembered that the Court in *Russell* actually stated that the “true exception” does not mean that a proposal needs to be unique. This statement in itself renders any argument that such areas are not a true exception merely because there are similar areas around the City is redundant.
82. 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. The proposal will also have positive effects in terms of enhancing the ecological values of the site. On that basis, I find it hard to accept that an undesirable precedent would be created. In fact, allowing the creation of such stunning building sites that do not compromise rural productivity or landscape values would be a very positive precedent for Dunedin, which is becoming increasingly popular with New Zealanders returning home from overseas and people moving south from the North Island.
83. However, the site does possess a history that is rather unusual. Mr Montgomerie will deal with the history of the site in his evidence to you at the hearing. What he will confirm to you is that the strip proposed for the dwelling sites has been used in conjunction with the adjoining settlement as a golf course in the past. It would appear from historical photos that the platform associated with Lot 2 was in fact created as part of that activity. The buildings associated with the course were located in the property at the Porterfield Street entrance. The historical reference to this course refers to the site as the “*steep and stony part of the Porterfield’s farm called ‘waste land’*”, an early recognition of its limited productive values and the fact that it is better used as part of the community’s urban environment. This early domestication of this part of the site sets it apart from any other site I can think of in this area.

PART 2 CONSIDERATIONS AND CONCLUSION

84. When exercising the discretion to grant or refuse the application sought, Part 2 of the Act is normally central to the determination. However, 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 Part 2 matters are not compromised by this proposal.
85. As I have noted earlier, the ability of land zoned rural to meet the needs of future generations is not limited solely to its rural productive capacity. The RMA is an enabling piece of legislation and allows for people to provide for their own welfare without unnecessary restriction by local government. Many people desire to live in locations that afford them space and views, with good access to sunlight but within reasonable proximity to urban areas which contain the infrastructure and services necessary in today's life. Most rural land can generally produce primary products and provide a range of lifestyle choices. However, in most cases, the land will have attributes that better suit one or the other. By recognising this, consent authorities can better protect the land that has a high productive capacity from those uses that do not need those attributes to exist.
86. The design of this proposal has recognised this by maintaining the productive land in one large allotment and providing for lifestyle opportunities in the areas that are not overly productive. The amenity values of the adjoining residential properties will be enhanced while ecological values will also be enhanced. On this basis, I believe the purpose of the Act will be best served by granting consent to the proposal subject to the conditions promoted by Mr Forsyth and Mr Walrond.

Allan Cubitt
21 February 2017