

1 September 2014

Brougham Park Trust
C/o T L Survey Services Ltd
Attention: Mr John Willems
PO Box 901
Dunedin 9054

Dear Sir/Madam

**RESOURCE CONSENT APPLICATION SUB2014-28, LUC 2014-165
326 FACTORY ROAD, MOSGIEL**

The above application for a two lot subdivision and landuse consent for the consequential use of the existing dwelling on Lot 1 and also landuse consent for a new dwelling on Lot 2, was processed on a Notified basis in accordance with Section 95 of the Resource Management Act 1991. The Consent Hearings Committee comprised the following Councillors.

Councillor David Benson-Pope (Chairperson), Councillor Lee Vandervis, and Mr Bill Feather (Mosgiel Taieri Community Board), heard and considered the application at a hearing on Friday 8 August 2014 starting at 9.00am. Councillor Kate Wilson was unable to attend as the road between Middlemarch and Outram was closed due to snow.

At the end of the public part of the hearing, the Committee, in accordance with Section 48(1) of the Local Government official Information and Meetings Act 1987, resolved to exclude the public.

A site visit was undertaken by the Hearings Committee, on Wednesday 13 August 2014 and at its conclusion the hearings committee reconvened and resolved to decline consent to the application. The full text of this decision commences below.

The Hearing and Appearances

The applicant was represented by:
Mr Don Anderson and Claire Toomey (9.30am arrival due to weather). Mr Stephen Johnston was also present.

Council staff attending were:
Phil Marshall (Advisor to the Committee), Mr Shane Roberts (Consultant Planner), and Wendy Collard (Governance Support Officer).

There were no submitters at the Hearing.

Procedural Issues

The matter of snow possibly affecting the ability of submitters to reach the hearing was raised. It was noted that Mr Bill Feather from Mosgiel had been able to drive into Dunedin from Mosgiel earlier in the morning. Although conditions were not good on roads between Mosgiel and Dunedin, it was decided that the hearing should proceed as the applicant's representatives and other key parties were present.

The Chair, after asking if there was any objection from the applicant or Council staff, advised that he was happy to continue as all necessary parties were present and the Committee had read all the written submissions.

Towards the end of the hearing it was noted there had been no phone calls from submitters indicating that they had been unable to attend the hearing due to weather conditions.

Principal Issues of Contention

The principal issues of contention are as follows:

- Integrity of the District Plan where the proposal to create Lot 1 of 2.9021 hectares surrounding the existing dwelling and proposed Lot 2 of 2.1013 hectares is well below the 15 hectare minimum specified by the District Plan in the Rural zone. Land use consent for a dwelling on proposed Lot 2 is part of the application.
- The lack of details for the proposed dwelling on Lot 2. These details were not contained in the application, nor were they forthcoming at the hearing. A diagram outlining a theoretical space in which a dwelling could be placed having regard to permitted distances from boundaries but unsupported with topographical evidence was tabled at the hearing.

Summary of Evidence

Mr Shane Roberts introduced his report and made clear that in his view the proposed dwelling on Lot 2 should have been supported by a plan showing the location of the dwelling, along with concept elevations and colour details.

Mr Roberts also made the point that granting of this application would make it very difficult for Council to decline subdivision and landuse applications which sought to fragment land in the Rural zone.

The Applicant's Case

Mr Don Anderson and Ms Claire Toomey presented the case on behalf of the applicant.

Mr Anderson went into the detail as to the subdivision history of the area which, under the Counties Act, had been subdivided into allotments of 10 acres or greater a few decades ago. This was because under the Counties Act subdivisions of 10 acres or more did not require subdivision consent from the county.

Mr Anderson read Claire Toomey's evidence prior to her arrival, which related to the personal circumstances of Christine Wilson, who was the owner of the site. This background related to the poultry farm operation contained in two large sheds on the property which had been run by Mr and Mrs Wilson until recent times. Mr Wilson had suffered serious health issues in the 1990's and passed away in July 2011. Mrs Wilson is now of an age such that she cannot continue on with the poultry operation.

The property was offered for sale in March 2013, but there was no interest in the poultry farm operation.

Mr Don Anderson then spoke to his evidence which was circulated to the Committee. The main thrust of his submission related to the need by the Hearings Committee to treat this application as it has treated similar proposals. In particular, Mr Anderson referred to the Botting Decision (SUB 2011-12) which was located in the Rural zone some 1.2 km away from the current site. Reference was also made to the Dougherty Decision (C6/2004 – B F Dougherty vs DCC) being an Environment Court decision on a landuse matter near Outram dating from 2003.

Mr Anderson emphasised that "it is a fundamental principle that like should be treated with like", this statement coming from the judgement in the Dougherty case.

Mr Anderson further made the point, that in his view, the current application for Brougham Park Ltd could not be distinguished from the Botting case and as a result should be granted by the Hearings Committee.

Evidence of Submitters

No submitters were present. Four submissions opposing the application had been received by Council along with one neutral submission from the NZ Fire Service. These submissions were included in the Agenda paper to the Hearings Committee and had been summarised by Mr Roberts in his report to the Committee.

Processing Planner's Review of Recommendation

Mr Roberts reviewed his recommendation in light of the evidence presented at the hearing, maintaining his recommendation to decline consent.

Mr Roberts distinguished the current application from the Botting Decision, the important difference being that the Botting site in Rutherford Road was very close to a Rural Residential zone. In addition to this, both Industrial and Residential zonings were close by, such that the Botting site was surrounded by non-Rural zonings. A further point to note was that all the neighbours had granted their written approval to the Botting subdivision.

With respect to the Dougherty Decision, Mr Roberts pointed out that this land use consent for a discretionary activity had been declined, even though Council had approved an almost identical development just across the road.

In questioning from the Committee, Phil Marshall replied that the Invermay Research Station had not been circulated with the copy of the application. Nevertheless, the application had been publicly notified and no submission had been received from Invermay. Further questions from the Committee to the applicants revealed that Mrs Wilson, the owner of the property, had closed down poultry operations.

Shane Roberts, as a result of questioning from the Committee, confirmed his recommendation in that while there were some similarities between this application and Botting, there were plenty of differences particularly in terms of the Botting surrounding zoning layout.

Shane Roberts confirmed, in his view, neither of the 104D gateway tests were met.

Applicant's Right of Reply

Mr Anderson re-iterated the positive aspects of the application and asked for a consent to be granted.

Mr Anderson made it clear that should consent to the application be granted then the poultry farm operation would not have any existing use rights. This is because existing use rights are lost due to the scale, intensity and character considerations on the two proposed allotments which are smaller in size than the existing parcel.

With respect to the lack of information in the application about a future dwelling, Mr Anderson suggested that a Condition could be imposed such that building footprint and cladding details would be submitted to Council's Consent Manager for approval.

Mr Anderson then went on to re-iterate that he had given Council's consultant planner the opportunity to change his recommendation as about a week before the hearing he had indicated to Phil Marshall that he would be raising the issue of the Dougherty and Botting Decisions.

Mr Anderson referred to the fact that the Botting application did not attract any opposing submissions. His view was that while the current application had been opposed by four submitters, it was evident in his view that submitters in the Puddle Alley area did not like change as they had also opposed an application for a dog boarding facility to the north of Puddle Alley Road approximately two years ago.

Statutory and Other Provisions

In accordance with Section 104 of the Resource Management Act 1991, the Planner's Report detailed in full the relevant statutory provisions and other provisions the Committee considered. Regard was given to the relevant provisions of the following chapters of the Dunedin City District Plan: 4 Sustainability, 6 Rural and Rural Residential and 20 Transportation. Statutory provisions considered included Sections 5, 7(c) and 7(f) within Part 2 of the Act. Regard was also given to the Regional Policy Statement for Otago.

Main Findings on Principal Issues of Contention

The Hearings Committee has considered the evidence heard, the relevant statutory and plan provisions, the principle issues in contention. The main findings on the principal issues have been incorporated within the reasons discussed below.

Decision

The final consideration of the application, which took into account all information presented at the hearing, was held during the public-excluded portion of the hearing. The Committee reached the following decision after considering the application under the statutory framework of the Resource Management Act 1991. In addition, a site visit was undertaken during the public-excluded portion of the hearing, the Committee inspected the site and this added physical reality to the Committee's considerations.

*That, pursuant to Sections 34A and 104C and after having regard to Part 2 matters and Section 104 of the Resource Management Act 1991, the Dunedin City Council **declines** consent to the **non-complying activity** to subdivide 326 Factory Road, Mosgiel into a proposed Lot 1 of 2.9021 hectares and a proposed Lot 2 of 2.1013 hectares on the site at 326 Factory Road, Dunedin, being that land legally described as Lot 2 DP12108 and Section 41 Block 5 East Survey District held in Certificate of Title CT51980*

Reasons for this Decision

1. With respect to 104D of the RM Act, the Committee accepted the Processing Planner's advice that the application fails both gateway tests, such that the subdivision is not in line with the policies and objectives of the Rural zone and insufficient information has been supplied with the application, or during the Hearing to assess whether the effects of the proposal are less than minor.
2. Although the current proposal is only 1.2km away from the land in the Botting Decision, it is evident that the two applications can be distinguished by the very different zoning patterns. The current application is surrounded by rural zoning, while the Botting Decision is in a small piece of Rural zone surrounded by Industrial, Residential and Rural Residential land.
3. The Botting Decision resulted from an application which did not attract any objections. In fact all surrounding landowners had given their consent to the application. In contrast two nearby owners submitted in opposition along with another two submitters who do not live in the area.
4. Due to the historical pattern of subdivision in the area, many of the allotments are well below 15 hectares. Nevertheless, the pattern of historical development does not support further subdivision in this case down to 2.9 and 2.1 hectares and as a result, approval to this application would create a considerable precedent in the Puddle Alley/ Factory Road/Wingatui Road area.

5. From the site visit it was evident to the Committee that the topography of the site falls into two distinct portions. Proposed Lot 1 surrounds the existing dwelling which was elevated by approximately five metres above Proposed Lot 2. Lot 2 is much more low-lying than Lot 1 and on the day of the site visit contained surface water in the wet, winter conditions which prevailed at the time. The submission from the Otago Regional Council indicated a small risk of flooding. The Committee, therefore, felt that maintaining the site in its current form was desirable as the existing dwelling is well elevated above the potentially more flood-prone Proposed Lot 2.
6. Legal advice regarding the Spatial Plan is such that little or no weight can be given to it at the present time as the new District Plan is yet to be publicly notified. Nevertheless, the Committee notes maps on page 39 and page 57 of the Spatial Plan relating to potential areas of new Rural Residential zoning, do not propose any change to the Rural zoning in the vicinity of the current application.

Right of Appeal

In accordance with Section 120 of the Resource Management Act 1991, the applicant and/or any submitter may appeal to the Environment Court against the whole or any part of this decision within 15 working days of the notice of this decision being received. The address of the Environment Court is:

The Registrar
Environment Court
PO Box 2069
Christchurch 8140

Any appeal must be served on the following persons and organisations:

- The Dunedin City Council
- The applicants
- Every person who made a submission on the application.

Failure to follow the procedures prescribed in Sections 120 and 121 of the Resource Management Act 1991 may invalidate any appeal.

Please direct any enquiries you may have regarding this decision to Phil Marshall whose address for service is:

City Planning
Dunedin City Council
PO Box 5045
Moray Place
Dunedin 9058

Yours faithfully



Councillor David Benson-Pope
Chairman
Hearings Committee