

**BEFORE THE COMMISSIONERS APPOINTED ON BEHALF OF
CENTRAL OTAGO DISTRICT COUNCIL**

Under	The Resource Management Act 1991 (the Act)
In the Matter	of an application for resource consent RC230328
Between	J N TREVATHAN and M A TREVATHAN as Trustees of CLUTHA PLAINS TRUST Applicant
And	CENTRAL OTAGO DISTRICT COUNCIL Local Authority

**SUBMISSIONS OF COUNSEL ON BEHALF OF CLUTHA PLAINS
TRUST**

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SUBMISSIONS OF COUNSEL ON BEHALF OF CLUTHA PLAINS TRUST

INTRODUCTION

1. This is an application by Clutha Plains Trust to undertake a 17 Lot subdivision at 5 Maori Point Road, Tarras. The subdivision comprises 16 sections that will be occupied for rural living purposes, whilst the large (approx. ~130Ha) balance lot will be owned in equal shares and will continue to be managed as a large farm block.
2. The proposed configuration is designed to maintain the productive capacity of the wider block whilst also unlocking the rural-residential living opportunities available at the site. It is a relatively unique concept within Central Otago. As discussed in the evidence of Mr Trevathan and Ms Greenslade the subdivision design has been the product of a carefully considered and iterative process. The proposed design has sought to:
 - (a) Avoid the lower terrace which is subject to flood risk, is particularly sensitive due to its proximity to the Clutha River/Mata Au, and the home of the Marsh Family whose property is accessed from Bowman Lane.
 - (b) Preserve, and potentially enhance the productivity of the property by retaining the vast majority in a large farm block. The subdivision also facilitates the realignment of the existing sub-transmission line that transects the property and has limited the extent to which the upper terrace can be developed, particularly through establishment of more efficient irrigation systems. The ability to establish more efficient irrigation will mean that there is no loss, and likely an increase in productivity from the property.
 - (c) Maximise the desirable outlooks and views that the site offers. Since filing, this aspect of the proposal has been further refined reducing the lots along the terrace and establishing some that are orientated towards the wider hills.

- (d) Provide a subdivision layout that can be easily and efficiently serviced in terms of access, water supply and wastewater management.
3. The following evidence has been filed on behalf of the Applicant:
- (a) Evidence from Mr Trevathan explaining the reasons for the subdivision and design approach;
 - (b) Evidence from Ms Greenslade assessing the landscape, natural character and amenity effects of the proposal;
 - (c) Evidence from Ms Albertson providing the planning analysis.
4. It is agreed that the application falls to be assessed as a non-complying activity.

FURTHER AMENDMENTS

5. The Applicant has carefully considered the matters raised in submissions and the section 42A report. As a result of that it has proposed a range of amendments to the subdivision design, proposed mitigations and conditions as a result. Attached with these submissions are a revised suite of conditions and updated scheme plan. The revised landscape plan is attached with the evidence of Ms Greenslade.
6. The proposed changes are:
- (a) Reconfiguration of lot arrangement to place Lots 5, 9, 12 and 15 'behind' the other lots in their respective clusters. This change is designed to consolidate built form and enhance the clustering effect.
 - (b) Extend the ecological landscaping of the terrace face to improve natural character, provide for more biodiversity improvement, and 'nestle' the clusters into the landscape more effectively.

- (c) Amendments to the Landscape Plan conditions to improve clarity and certainty with respect to timing of mitigation and ecological planting.
- (d) Reduction in building height on Lot 16.
- (e) Setbacks of at least 18m from the terrace edge are retained, but managed via building platform conditions rather than a covenant.
- (f) A requirement for all buildings and structures to be within the identified building platforms to consolidate built form on the lots and manage potential domestication.
- (g) It is proposed to utilise a centrally managed water treatment system.

SCOPE OF THESE SUBMISSIONS

- 7. These submissions will traverse the following:
 - (a) Statutory decision-making framework;
 - (i) Section 104D;
 - (ii) Section 104 and Section 104B
 - (b) The permitted baseline
 - (c) The 'environment'
 - (d) Key effects/matters in contention
 - (i) Visual and rural amenity effects;
 - (ii) Cultural matters.
 - (e) Other Matters – Precedent and Plan Integrity
 - (f) Proposed Otago Regional Policy Statement 2021

8. The only other matter I wish to note briefly is the provision of an affected party approval on behalf of Tarras Industries Limited. The submission from that party has also been withdrawn. As a result of that no adverse effects on that property can be taken into account.

SECTION 104D

9. As the application is for a non-complying activity it is necessary for it to pass through the section 104D gateway before you can consider whether consent can be granted.
10. The section 104D gateways are:
 - (a) That effects are no more than minor; or
 - (b) The proposal is not contrary to the objectives and policies of the District Plan.
11. The High Court in *Queenstown Central*¹ highlighted the need to 'ask the right question at the right time' and it pointed out that 'it was an error of law to do the s104 analysis before doing the section 104D analysis'

No more than minor adverse effects

12. The question of what constitutes a 'minor' effect has been well traversed in the Courts. Once again, the High Court in *Queenstown Central* stated:

"However, regard to the scheme and purpose of the Act, and particularly the functioning of s 5, shows there is nothing arbitrary in the term "minor". It is a sensible standard which, understood for its purpose, is designed to give applications which will have only a "minor" adverse effect on the environment but are for other reasons non-complying an opportunity to be approved."

¹ *Queenstown Central v. Queenstown Lakes District Council* [2013] NZHC 817 at [21]

13. The Court in *Saddle Views Estate Limited v. Dunedin City Council*² has also stated:

"Turning to the dictionaries we find that the adjective "minor" is defined in the New Zealand Oxford Dictionary of "lesser or comparatively small in size or importance". According to The Shorter Oxford English Dictionary "minor" means "... lesser ... opposite to MAJOR ... comparatively small or unimportant". We hold that those meanings are what is intended in s104D(1)(a). The reference to "comparatively" emphasises that what is minor depends on context — and at least all the authorities agree on that."

14. With respect to the majority of effects the expert evidence is aligned. That being that effects are minor or less than minor, subject to conditions.
15. The section 42A report relies on the peer review assessment with respect to landscape and concludes that adverse effects on rural character, landscape and amenity values are more than minor. The section 42A report reserves the position with respect to cultural values.
16. The evidence of Ms Greenslade sets out the changes made to the proposal in light of submissions and the feedback provided by the Landscape Peer Review. It is submitted that the effects of the proposal as amended will be no more than minor, subject to the conditions now proposed.

Not contrary to the objectives and policies

17. It is well settled law that that 'contrary to' under section 104D means 'repugnant to' or 'opposed to in nature' or 'opposite' to the objectives and policies considered as a whole³. This is a high threshold and the

² *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243.

³ *Monowai Properties Ltd v Rodney District Council* (Environment Court, Auckland A 215/03, 12 December 2003, Judge Thompson).

Court has acknowledged that non-complying activities will rarely find direct support within the plan provisions.

18. It is also noted that the assessment under section 104D relates to the District Plan provisions only. It does not require an analysis against higher order planning instruments.
19. As the Court of Appeal observes in *Dye v Auckland Regional Council* an application for a non-complying activity is not going to comply with the plan.⁴
20. In *Harris v Central Otago District Council*, the Environment Court sets out how to apply the high 'contrary to' threshold to the District Plan subdivision policy (Policy 4.4.10):

"[31] The subdivision policy largely follows the land use policy on landscape and amenity already discussed in relation to open space, landscape, natural character and amenity values. Further, the policies are obviously designed to work together where both subdivision and land use consents are sought. That cooperation between policies is shown by the words at the end of the subdivision policy" ... particularly through the use of minimum ... lot sizes". In other words the use of minimum lot sizes is not the only method or way of achieving the policy.

[32] The other important point is that the subdivision policy contemplates differences of degree in the adverse effects of subdivision because it directs that those effects are to be avoided or directed [remedied] or mitigated. Which of those is appropriate is driven by the context. What the policy does not say is that adverse effects should simply be avoided." (Footnotes Omitted).

21. Despite not achieving the prescribed 8ha average and 2 ha minimum lot size, Ms Albertson considers any adverse effects of subdivision are appropriately managed through the various measures proposed in the conditions.

⁴ *Dye v Auckland Regional Council* [2001] NZRMA 513 at [23].

22. Ms Albertson and Ms Royce identify the issues associated with a subdivision that 'complies with' the District Plan expectations for subdivision. As noted in the section 42A report the subdivision is an efficient way of managing the productive land and attempts to reduce the effects of land fragmentation⁵.
23. It is submitted that the District Plan policies provide an avenue for a more nuanced approach to be taken where that is more appropriate as highlighted by the Court in *Harris*.
24. The District Plan identifies five reasons why activities locate in the rural resource area which inform the objectives and policies in the Zone. The reasons are:
 - (i) They are reliant upon the resources of the rural area.
 - (ii) They need to be close to an activity that is reliant upon the resources of the area.
 - (iii) They need a large open space where they can generate effects without significantly affecting more sensitive activities
 - (iv) Persons wish to enjoy the lifestyle opportunities offered by its open space, landscape and natural character amenity values.
 - (v) They need to locate directly adjacent to the resource.
25. As set out in the evidence of Mr Trevathan, the applicant has sought to design the subdivision in a way that retains a large balance lot that will continue to operate as a working farm. The joint ownership model will ensure that the owners of the rural living sections have a vested interest in the operation and success of the farm on the balance lot. This will maintain and support its ongoing productive potential whilst

⁵ Section 42A [72].

the subdivision provides an opportunity for people to enjoy the lifestyle opportunities within the rural environment.

SECTION 104

26. Section 104 of the Act sets out the evaluative exercise that must be carried out by the Commission in assessing whether consent should be granted.
27. Section 104(1) requires a consent authority to have regard to the following relevant matters, subject to Part II:⁶
 - (a) any actual and potential effects on the environment of allowing the activity. This includes an evaluation of both positive and negative effects.
 - (b) any relevant provisions of any relevant statutory document. In this case the District Plan is the primary document, although the partially operative Regional Policy Statement 2019 and proposed Regional Policy Statement 2021 are also relevant.
 - (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application; and
 - (d) any measure proposed or agreed to by the Applicant for the purpose of ensuring positive effects to offset or compensate for any adverse effect arising from the application.
28. Having undertaken the evaluative exercise the Commission may grant or refuse consent (Section 104B) and where you elect to grant consent conditions may be imposed pursuant to section 108 and 220.

⁶ Resource Management Act 1991, section 104(1)(a)(b)(c)(ab).

THE PERMITTED BASELINE

29. Section 104(2) of the Act allows a consent authority to disregard an adverse effect on the receiving environment if the plan permits an activity with that effect.
30. I broadly agree with the conclusion in the section 42A report regarding the extent of permitted baseline considerations. Subdivision is not permitted.
31. With respect to concerns raised by some submissions regarding the use of cypress trees for some of the boundary planting. It is noted that the rules associated with shelterbelts/Forestry only (relevantly) control the utilisation of wilding species. Cypress is not a wilding species and to that extent the use of it for boundary planting is permitted, and a likely outcome when the existing Woodlot is replaced even if this consent is not granted.
32. It is submitted that any adverse effects (if identified) associated with the establishment of the boundary shelter planting should be disregarded.

THE ENVIRONMENT

33. Under section 104(1)(a) the assessment of effects must be undertaken against the 'environment' within which the activity will take place. This 'environment' encompasses what we see on the ground today, but also the future state of the environment as it might altered by permitted activities and/or the implementation of existing resource consents that are likely to be exercised. The application, supporting information and evidence have described the environment within which this application takes place.
34. Potential adverse effects are those that are not already impacting on the environment.
35. Where consideration is being given to the future environment, it requires a genuine attempt to envisage that future environment. But

equally, must not stray so far from what can reasonably be predicted, such that the environment becomes artificial.

36. I agree with Ms Royce that the potential Tarras Airport is not part of the existing environment. Equally, the possibility of the cycle trail along the Clutha River/Mata Au is irrelevant. The trail is not sufficiently advanced to be considered part of the environment at this time.

KEY EFFECTS MATTERS IN CONTENTION

Rural Character, landscape and Amenity Effects

37. Ms Greenslade's evidence carefully analyses the concerns raised in submissions and the feedback provided via the landscape peer review. A number of amendments have since been made to the proposal to respond to that feedback.
38. With those amendments in mind Ms Greenslade concludes that the effects of the application will be low to very low when taking into account mitigation measures. The conditions have been amended to ensure that the key mitigation measures are in place prior to section 224(c) approval which responds to the concern in section 42A report regarding the extent of potential temporary effects.
39. As I discussed above, context here is important. Whilst this application does fall to be considered as a non-complying activity, this needs to be assessed with reference to the District Plan. The standards set in the District Plan, are intended to implement the objectives and policies and provide us with a good benchmark for understanding what is anticipated by the Plan.
40. The proposed sites (whilst not meeting the Lot size standards) do meet, and in some cases go further than the other District Plan standards. For example, the proposed maximum building height is 5.5/6m against 7.5m in the Plan, external boundary setback distances are all exceeded. The application also proposes further landscaping to

visually screen development and contain it within the upper terrace of the application site – avoiding the most sensitive parts of the site being the lower terrace, land closer to the Lindis River and the Road boundary.

41. An alternative subdivision design would sprinkle development across the site, require much more in the way of access tracks resulting in reduced openness and more fragmentation.
42. The provisions of the Plan, when read as a whole, provide clear direction about how to assess proposals such as this one. First, they take a tiered approach to rural landscapes, via identification of Outstanding and Significant Landscape Areas. This application does not fall within either category.
43. The key objective, objective 4.3.3 seeks to maintain and where practicable enhance rural amenity values which are created by the open space, landscape, natural character and built environment values in the District.
44. This indicates that the rural amenity values are supported by a combination of things as highlighted above. Different locations and/or different applications will exhibit the range of characteristics to different degrees and may maintain and enhance rural amenity values in any combination of ways. This is also reflected by the provisions which seek to manage land use activities and subdivision to ensure that adverse effects are avoided, remedied or mitigated.
45. The provisions are effects based and contain a lot of nuance depending on the nature of the rural environment that an application is proposed within. This is demonstrated in the following provisions:
 - (a) 4.4.2(a) which calls for particular focus with respect to open natural character of hills and ranges, skylines, prominent places and natural features. This is also reflected in Policy 4.4.10(a), applying the effects management tools to the relevant values.

- (b) 4.4.2(b) which calls for development compatible with the surrounding environment, including the amenity of surrounding properties.
- (c) 4.4.2(g) which once again places emphasis on open natural character of hills and ranges, and landscape and amenity values of prominent hillsides and terraces.

46. The explanation to Policy 4.4.10 states:

“Minimum allotment sizes for subdivision are considered to be the best practicable methods to control adverse effects. In some instances, adherence to an arbitrary minimum is not always the most appropriate approach”.

47. This clearly indicates that the lot size controls are effectively a ‘gate keeper’. But that the Plan anticipates there will be instances when applications that do not comply with those standards will be appropriate. It is submitted that this philosophy is reflected in Policies 4.4.2 and 4.4.3 which take an ‘effects based’ approach seeking to ‘manage’ effects through avoidance, remediation or mitigation.

48. As observed by the Court in *Harris v Central Otago District Council*⁷ the subdivision policy anticipates there being differences in effects because it directs effects to be avoided or remedied or mitigated. Which method is required will depend on the characteristics of the landscape.

49. Policy 4.4.2 identifies a suite of levers for managing effects. This application has pulled all of those levers through:

- (a) controls on the location of dwellings to the top terrace achieving significant setbacks from the Road (to maintain open space), River (in recognition of this as an important natural feature) and adjacent property boundaries (to assist in the maintenance of the amenity of these surrounding properties).

⁷ *Harris v Central Otago District Council* [2016] NZEnvC 52 at [32].

- (b) Limitations on building height relative to the Rural Zone rules to reduce effects from lower perspectives and on openness. This is also supported by the consolidation of buildings within the building platforms that are well set back from the terrace edge, i.e., road and neighbouring properties.
 - (c) Maintaining a large, communally owned balance lot that can continue to be farmed retaining a predominance of open rural land, particularly when viewed from the Roads.
 - (d) Removal of the pine Woodlot which:
 - (i) removes a source of wilding trees and replaces it with a non-wilding species that will be lower in height.
 - (ii) The current woodlot has grown very tall and significantly obscures views to the hills, ranges and skylines beyond the site. Removal of the woodlot will open up views to the hills in the distance and improve the openness of the site. The proposed Cypress will not grow as tall so will retain better visibility to the landscapes beyond the site.
 - (e) Avoiding the lower terrace to ensure that the terrace face is not compromised. The proposed ecological planting will serve to improve the natural character of the terrace over time and enhance local biodiversity, supporting the natural character values of the adjacent river areas and nearby QEII covenant.
50. It is submitted that the application has done exactly what the District Plan expects.
51. The Court in *Harris v Central Otago District Council* recognised that amenity values must be assessed in relation to the part of the landscape in which they occur “because one part of a landscape may be able to absorb many cuts, another none.”⁸

⁸ *Harris v Central Otago District Council* [2016] NZEnvC 52 at [58].

52. The Align Report sets out the characteristics of the surrounding area noting:
- (a) The strong rural character exhibited by the shelterbelts, divided paddocks and irrigation infrastructure, agriculture and viticulture activities.
 - (b) Expansiveness and openness,
 - (c) Views to the wider hills,
53. These characteristics have been responded to in the application by:
- (a) Utilising the upper terrace, albeit with a significant setback to manage the visibility of the proposed development from lower view points.
 - (b) Retention and phased replacement of existing woodlots to screen built form. Replacement planting will reinforce the existing screening, but to a lower level which will 'open up' views to the wider landscape from within the site and from the surrounding roads.
 - (c) Establishment of mixed planting along the road boundary to provide screening quickly and effectively while native vegetation establishes and enhances natural character over the medium to longer term.
 - (d) Keeping built form off the lower terraces which are more visible from sensitive public locations (river and Bowman Road) enabling their existing open character to be maintained.
 - (e) Ecological enhancement planting of the terrace face that will link through to the QEII area within the site and ultimately the Lindis River.
54. It is submitted that this maintains the rural character and amenity of the area.

Cultural Effects

55. The submission from Aukaha raises concerns about the potential effects on the Clutha River/Mata Au. The submission considers that the River is a Wahi Tupuna, with values associated with Mahika kai, ara tawhito and nohoaka. It is acknowledged in the submission that the Wahi Tupuna has not been incorporated into the CODC Plan.
56. If we are to look upriver we can take some cues for how this is likely to be dealt with. It is noted that Wahi Tupuna for the Clutha River identifies an area of land ~100m from the Rivers edge within QLDC. The proposed rural-residential allotments are roughly 700m from both the Clutha and Lindis Rivers and separated by the lower terrace landform.
57. The identified values have not been ignored by the proposal which has been cognizant of the various values present along the river boundaries. For this reason the proposal has maintained significant setbacks from the River boundaries – both the Clutha River / Mata Au and the Lindis River. The development of the land will not compromise the practice of Mahika kai along the Clutha and Lindis Rivers or alter access to nohoaka sites.
58. It is submitted that the ecological planting of the terrace face will support and contribute to the values of the river margins – increasing the natural character of this locally identifiable feature and increasing the biodiversity of the area, supporting indigenous fauna that utilise the wider area.
59. The Applicant has also taken into account the elements of the submission associated with the use of eco-sourced plants, consolidation of the wastewater treatment into a combined system, and the adoption of an accidental discovery protocol and incorporated that into the conditions.

PRECEDENT AND PLAN INTEGRITY

60. Precedent and plan integrity are not 'environmental effects', although they may be a relevant matter pursuant to section 104(1)(c).
61. In *Rodney District Court v Gould* the High Court scrutinises the role of precedent and plan integrity:

*"The Resource Management Act itself makes no reference to the integrity of planning instruments. Neither does it refer to coherence, public confidence in the administration of the district plan or precedent. Those are all concepts which have been supplied by Court decisions endeavouring to articulate a principled approach to the consideration of district plan objectives and policies whether under s 104(1)(d) or s 105(2A)(b) and their predecessors. No doubt the concepts are useful for that purpose but their absence from the statute strongly suggests that their application in any given case is not mandatory. In my view, a reasoned decision which held that a particular non-complying activity proposal was not contrary to district plan objectives and policies could not be criticised for legal error simply on the basis that it had omitted reference to district plan coherence, integrity, public confidence in the plan's administration, or even precedent."*⁹

62. For the reasons set out in evidence filed for the Applicant, the effects of the application will be no more than minor, nor is the application contrary to the District Plan objectives and policies. As such issues of precedent and plan integrity are not material. This is particularly so in light of the District Plan's effects-based policy framework.
63. In relation to plan integrity the majority in *Harris* held that where effects are no more than minor plan integrity is unlikely to be affected.¹⁰
64. Applications yet to be determined or yet to be filed at not part of the 'environment' and are not an effect of this application. On this basis it is

⁹ *Rodney District Council v Gould* [2006] NZRMA 217 at [99]. Sections 105(2A) and 104(1)(d) was replaced, on 1 August 2003, by section 44 of the Resource Management Amendment Act 2003 (2003 No 23) with section 104D and section 101(1)(b) respectively.

¹⁰ *Harris v Central Otago District Council* [2016] NZEnvC 52 at [63].

not appropriate to speculate about what other land users might do in the future. Those applications (if they eventuate) need to be assessed against the environment that exists at the time.

65. The proposed application is a specific response to this application site and its topography – particularly the lower terrace, its proximity to the River and through retention of significant setbacks from the Road boundaries. As opposed to an alternative layout driven by strict adherence to the lot size standards in the plan which would see domestication sprinkled across site resulting in domestication of the lower terrace and much more proximate development on the site towards the Road frontages.
66. These features will not be present in all locations, and the proposed 'farm park' arrangement is unlikely to be considered desirable by everyone.
67. As stated in *Wellington RC (Bulk Water) v. Wellington Regional Council* EnvC W003/98:
"To even consider future applications as a potential effect or a cumulative effect is to make a totally untenable assumption that the consent authority will allow the dyke to be breached without evincing any further interest or control, merely because it granted one consent"
68. The section 42A report concludes that proposals should be assessed on their own merits. I agree.

RELEVANCE OF PORPS 2021

69. The section 42A report concludes that the proposal is not consistent with the Proposed Otago Regional Policy Statement 2021. The RPS is predominantly focussed on directing Plan making and for that reason many of the provisions are of limited relevance to this consent application.

70. Further a number of the provisions referred to in the section 42A report have been amended significantly as a result of the Decision, and are now subject to Environment Court appeals and ongoing mediations.
71. For example, the Decisions Version of LF-LS-O11 now says:
- ‘The availability and productive capacity of highly productive land for primary production is protected now and for future generations’.*¹¹
72. It is submitted that this provision is not relevant given the site does not contain Highly Productive Land.
73. UFD-O4 was also significantly amended via the decision. It now says:
- Development in Otago’s rural areas occurs in a way that:*
- (4) Provides for the ongoing use of rural areas for primary production and rural industry; and*
- (4A) Does not compromise the long viability of primary production and rural communities.*
74. It is submitted that the proposal is clearly consistent with this provision.
75. At the current point in time it is submitted that the now fully Operative RPS 2019 should be given greater weight than the PORPS2021. The section 42A report concluded that the proposal was generally consistent with the Operative RPS 2019.

CONCLUSION

76. The upper terrace enables the proposed development to be well contained using mitigation methods consistent with the existing rural character of the area while maintaining the open character of the majority of the site.

¹¹ Tracked Appeals Version at p159

77. The proposal will allow the majority of the site to be farmed as a contiguous and productive farm block and give residents of the rural sections a strong and vested interest in the ongoing productivity of the balance lot. It is a feature of the application that will manage the potential for reverse sensitivity effects.
78. Proposed conditions related to building height, building platforms and lot arrangement help mitigate potential effects and visibility and when coupled with the comprehensive mitigation planting and ecological enhancement works achieves a result that is consistent with the direction of the relevant District Plan Objectives and Policies.
79. In light of the evidence it is submitted that:
- (a) The proposal passes both limbs of the section 104D gateway;
and
 - (b) that granting consent will achieve the purpose of the Act.



Bridget Irving

Counsel for Clutha Plains Trust

Date: 7 April 2025