

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

Under The Resource Management Act
1991 (the **Act**)

In the Matter of an application for subdivision
and land use consents to
undertake a two-lot subdivision
and a building platform and
residential dwelling (RM260040)

Between **KEVIN JOHN PAULIN**
Applicant

And **CENTRAL OTAGO DISTRICT
COUNCIL**
Local Authority

SUBMISSIONS OF COUNSEL ON BEHALF OF KEVIN JOHN PAULIN

DATED 31 JULY 2026



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May it please the Panel:

1. The Applicant has applied for resource consent for the following activities at their property at 1043 Earnsclough Road (**Site**):
 - (a) Subdivision of the ~4ha allotment into two approximately 2ha allotments.
 - (b) Establishment of a residential building platform and construction of a dwelling within the platform.
2. The application is assessed as a non-complying activity due to the subdivision creating allotments with an average area of less than 8ha. The Site comprises of two undersized allotments, one being approximately 3ha and the other being 1.3ha, currently held within one record of title.
3. The section 42A officer concluded the effects of the subdivision and second residential land use to be no more than minor.¹ To that extent, there is consensus between the Applicant and the section 42A officer.
4. Where there is no consensus is whether the subdivision is consistent with the objectives and policies of the District Plan. The Applicant's evidence establishes that the environmental outcomes anticipated by the Rural Resource Area provisions are achieved. The only non-compliance arises from the proposal's inability to satisfy the 8ha averaging requirement, which is a method utilised by the Plan to achieve the Plan's outcomes. This 'breach' is a consequence of the existing undersized lot.

¹ At [97].

5. These legal submissions will address the following issues:

- (a) Statutory framework,
- (b) Effects,
- (c) Productive capacity and rural fragmentation,
- (d) Plan integrity and precedent.

STATUTORY FRAMEWORK

Section 104D

1. As the application is for a non-complying activity it must pass through the section 104D gateway before the Commission can consider whether consent can be granted.
2. The section 104D gateways are:
 - (a) That adverse effects are no more than minor; or
 - (b) The proposal is not contrary to the objectives and policies of the District Plan.
3. The High Court in *Queenstown Central*² 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

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

² *Queenstown Central v. Queenstown Lakes District Council* [2013] NZHC 817 at [21]

“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.”

5. The Court in *Saddle Views Estate Limited v. Dunedin City Council*³ 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.”

6. There is consensus between the Applicant’s witnesses and the Section 42A officer that the effects of the proposal are no more than minor.

Not contrary to the objectives and policies

7. It is well settled law that ‘contrary to’ under section 104D means ‘repugnant to’ or ‘opposed to in nature’ or ‘opposite’ to the objectives and policies considered as a whole⁴. This is a high threshold and the Court has acknowledged that non-complying activities will rarely find direct support within the plan provisions.
8. 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.

³ *Saddle Views Estate Ltd v Dunedin City Council* [2014] NZEnvC 243.

⁴ *Monowai Properties Ltd v Rodney District Council* (Environment Court, Auckland A 215/03, 12 December 2003, Judge Thompson).

9. 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.⁵
10. 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).

11. Despite not achieving the prescribed 8ha lot size, Ms Copeland considers any adverse effects of subdivision are appropriately managed through the various measures proposed in the application.
12. It is submitted that the District Plan policies provide an avenue for a more nuanced approach to be taken where the consent triggers in the District Plan (being the 8ha average and 2ha minimum) are tripped. The Court's discussion in *Harris* confirms that there may be cases where strict adherence to those standards may not be appropriate, and that the plan provisions contemplate that.

⁵ *Dye v Auckland Regional Council* [2001] NZRMA 513 at [23].

13. The District Plan identifies five reasons why activities locate in the rural resource area which inform the objectives and policies in the Rural Resource Area. 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.
14. As set out in the evidence of Messrs Paulin, the Applicant is proposing the subdivision to support the social, economic and cultural wellbeing of their family and business by providing an intergenerational living opportunity in close proximity to the family's established orcharding business.
15. We noted by Robert Paulin, the subdivision is necessary to enable adequate financing to construct the proposed house. As outlined by Kevin Paulin the subdivision does not compromise the productive potential of the land. It retains the existing orchard, and there will continue to be options for utilising the lower terrace which is not suitable for fruit. This will maintain and support its ongoing productive potential whilst the subdivision provides an opportunity for the Paulin family to provide for their wellbeing.
16. It is submitted that this proposal comfortably passes through both section 104D gateways. The Applicant does not agree that the

proposal is contrary to any of the policies of the District Plan, as discussed in Ms Copeland's evidence.

SECTION 104

17. 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.
18. 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 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.
19. 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 sections 108 and 220.

Effects

6. The starting point for the Panel's assessment is the effects assessment under s 104(1)(a) of the Act.

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

7. Both the Applicant and the section 42A officer agree that the environmental effects of this application are not more than minor. The section 42A officer concluded that the effects of the proposal on rural productivity, open space, landscape character, and rural amenity are minor.⁷ The effects on transport, access, servicing, earthworks, and reverse sensitivity are less than minor.⁸
8. These conclusions are significant. We mustn't lose sight of the fact that the Resource Management Act is fundamentally an effects-based statute.
9. Policy 4.4.2 in the Rural Resource Chapter requires land use activities and subdivision ensure that adverse effects on open space, landscape, natural character and amenity values of the rural environment are avoided, remedied or mitigated. Ultimately this comes down to effects.
10. Policy 4.4.10 also illustrates the Rural Resource Chapter's focus on the effects of an activity, it says:

To ensure that the subdivision and use of land in the Rural Resource Area avoids, remedies or mitigates adverse effects on:

- a. The *open space*, landscape and natural character amenity values of the rural environment in particular the hills and ranges,
- b. The natural character and values of the *District's* wetlands, lakes, rivers and their margins,
- c. The production and amenity values of neighbouring *properties*,
- d. The safety and efficiency of the roading network,
- e. The loss of soils with special qualities,
- f. The ecological values of significant *indigenous vegetation* and significant habitats of *indigenous* fauna,
- g. The heritage and cultural values of the *District*,
- h. The water quality of the *District's* surface and groundwater resources, and

⁷ At [97].

⁸ At [98].

i. Public access to or along the rivers and lakes of the *District*, particularly through the use of minimum (and average) *allotment* sizes.

11. The structure of this policy is important. The policy identifies minimum and average allotment sizes as a mechanism by which those environmental outcomes may be achieved, but it is clear that these are not the only methods that may achieve the desired outcomes.
12. This application does not meet the 8ha averaging rule. Despite this departure, the Applicant's evidence demonstrates that the environmental outcomes sought by the Plan are still achieved.
13. The landscape evidence demonstrates that the proposal maintains open space values, landscape character and rural amenity. The proposed dwelling is located away from the road and utilises the existing vegetation, topography, and additional landscape planting to achieve this. These matters led the section 42A officer to conclude the landscape and visual effects were no more than minor.
14. The concerns regarding productive capacity and fragmentation have been addressed through Kevin Paulin's evidence. Mr Paulin's evidence addresses the information gap identified by the section 42A officer regarding "specialist information to confirm quality of the soils".⁹ Mr Paulin's evidence explains his family's long history with the Site and repeated unsuccessful attempts to establish horticultural use. This evidence demonstrates that the subdivision would not reduce in a loss of soils with special qualities, nor a loss in productive capacity.
15. Whilst Mr Paulin is not an independent expert, his long relationship with the site and significant horticulture experience lend weight to his evidence. It is submitted the Commission can place weight on this evidence.

⁹ At [72].

16. In this case, there are no environmental effects to justify a strict adherence to the averaging requirements. There is no evidential basis for a concern that the proposed subdivision will lead to fragmentation that will reduce rural productivity.
17. It is acknowledged that the Panel's assessment is not confined solely to an assessment of effects under section 104. However, where a proposal has been assessed as resulting in no more than minor adverse effects, and where the environmental outcomes sought by the District Plan are achieved, considerable weight should be given to those findings when undertaking the overall assessment.

Productive capacity and rural fragmentation

18. The principal concern identified in the s 42A report is that the proposed subdivision may further fragment the rural resource and diminish its productive capacity.¹⁰
19. It is acknowledged that the Site is identified in the Plan as a Special Land Resource. However, the broad planning classification is not indicative of the Site's productive capacity as explained in Kevin Paulin's evidence.
20. Mr Paulin is a third-generation orchardist, his evidence describes his family's history with the Site and repeated attempts to establish a horticultural use over an extensive period. Apricots, apples and nectarines have all been planted on the property at various times. Those attempts were unsuccessful due to the combination of poor cold air drainage, frost susceptibility and soil limitations affecting the lower terrace of the Site.

¹⁰ At [108].

21. Mr Paulin also explains that while the Site falls within an area identified by the District Plan as having favourable growing degree days, that mapping does not account for the site-specific topography and microclimatic conditions that ultimately determine productive capability on individual properties.¹¹
22. The proposal does not result in the loss of the existing productive orchard. The existing orchard will remain preserving the productive use of the upper terrace. Both allotments will retain access to irrigation water and the proposed dwelling has been located so as to minimise effects on any continuing productive use of the Site. As Mr Paulin states, the lower terrace may still have some potential for vegetables or nuts and that can continue to be pursued if the land is subdivided.
23. In light of this information The proposal meets objective 4.3.7 in the Plan and maintains the life-supporting capacity of the District's soil resource to ensure that the needs of present and future generations are met. It is submitted that there is no justification for a conclusion that the proposal is contrary to any provisions in the District Plan.

Plan integrity and precedent effects

24. The s 42A officer concluded the following:
 - (a) The proposal would represent a challenge to the integrity of the planning instruments, particularly the CODC Plan and the ORC partially operative regional policy statement 2019.¹²
 - (b) that there were no distinguishing or extenuating factors applying to the site or application that would set it apart from other sites in

¹¹ Brief of Evidence of Kevin Paulin at [13].

¹² At [115].

the Rural Resource Area, this would therefore have an undesirable precedent effect.¹³

25. The Otago RPS 2021 became operative on 9 July 2026, prior to the completion of the section 42A report. Therefore the 2019 Regional Policy Statement is irrelevant. Further to that, matter of 'integrity' are not relevant to Policy Statements which are given their statutory effect through District Plans. If integrity is relevant at all it is in relation to the District Plan alone.
26. The case law in relation to plan integrity and precedent is well settled. In *Dye v Auckland Regional Council* the Court of Appeal confirmed that there is no true concept of precedent in resource management law in the strict sense.¹⁴
27. The Court held that the precedent effect of granting a resource consent (in the sense of like cases being treated alike) is a relevant factor for a consent authority to take into account when considering an application for a non-complying activity.¹⁵
28. Taking precedent plan integrity effects into account may be a relevant consideration under s 104(1)(c). It is not mandatory for the Panel to consider such effects.
29. In *Beacham v Hastings District Council*, Judge Thompson applied the approach in *Rodney District Council v Gould* to determine if plan integrity would be imperilled to the point the application should be refused. The two key considerations are:
 - (a) The proposal irreconcilably clashes with important provisions of a district plan, and

¹³ At [117].

¹⁴ CA86/01, 11 September 2001 at [32].

¹⁵ At [49].

- (b) It is likely that further applications will follow, with are both materially indistinguishable and equally incompatible with the plan.¹⁶

30. These considerations have been consistently endorsed by the Courts. The Court has emphasised that plan integrity arguments are somewhat overused and need to be treated with some reserve.¹⁷ Each proposal must be considered on its own merits.

Irreconcilable clash

31. In *Beacham* the Court held at [25]:

“Only in the clearest of cases involving an irreconcilable clash with the important provisions, when read overall, of the District Plan and a clear proposition that there will be materially indistinguishable and equally clashing further applications to follow, will it be that Plan integrity will be imperilled to the point of dictating that the instant application should be declined.”

32. The s 42A report treats the breach averaging requirements as determinative, characterising the proposal as a “significant departure” from the 8ha average allotment size requirements prescribed under Rule 4.7.4.iii.b.¹⁸
33. That approach elevates a method of implementation above the Plan’s underlying objectives and policies. The Plan itself acknowledges that assessing subdivision in the RRA allows the Council to assess the effect of the subdivision in terms of the objectives of the Plan.¹⁹ The Plan retains flexibility by acknowledging the averaging requirement as a method to achieve the objectives and policies. It is difficult to see

¹⁶ ENC Wellington W075/09, 5 October 2009 At [25], also in *Blueskin Bay Forest Heights Ltd v Dunedin City Council* [2010] NZEnvC 177 at [48].

¹⁷ *Blueskin Bay Forest Heights Ltd v Dunedin City Council* at [45].

¹⁸ At [115].

¹⁹ Explanation for Policy 4.4.10.

how a proposal that gives rise to only minor effects could lead to an 'irreconcilable clash' with the effects based provisions of the District Plan.

Assessment of Plan provisions

34. As described in the effects section above, the s 42A report accepts that the overall adverse effects of the application are no more than minor.
35. Objective 4.3.1 seeks to recognise that communities need to provide for their social, economic and cultural wellbeing [...] at the same time as ensuring environmental quality is maintained and enhanced. Both Kevin and Robert Paulin's evidence identify the Site will be utilised for intergenerational living. The subdivision will also allow Robert Paulin to obtain finance to proceed with the second residential dwelling .²⁰
36. Policy 4.4.2(b) provides context around the pattern of development the Plan anticipates in the rural zone:

To manage the effects of land use activities and subdivision to ensure that adverse effects on the open space, landscape, natural character and amenity values of the rural environment are avoided, remedied or mitigated through:

[...]

(b) Development which is compatible with the surrounding environment including the amenity values of adjoining properties,
37. This Policy does not prescribe a specific environmental outcome independent of the surrounding context. The Site sits immediately adjacent to the Rural Residential Area. In that context, the proposed allotment pattern is compatible with the surrounding environment and does not undermine amenity or character.

²⁰ Brief of evidence of Robert Paulin at [9].

38. When seen in the context of 4.4.2(b), the flexibility inherent in the averaging rule makes sense. Some locations will suit smaller lots better than others. That is a factual enquiry that does not give rise to questions of Plan integrity. That contextual effects-based thinking is also reflected in policy 4.4.10(c), as explained in Ms Copeland's evidence.²¹
39. Finally, it is noted that if Ms Banks approach to the averaging provision is to be followed it perversely encourages subdivision of larger allotment that would be able to offer an 8ha average. It is submitted that this would lead to greater consequences for rural land fragmentation than a proposal such as this which subdivides an existing lot of less than 8ha into lots that comply with the minimum lot size for the rural zone.
40. It is also important to acknowledge that the District Plan provisions are old. The Council has signalled that it has interest in reviewing the chapter.²² In *Ahuareka Trustees (No 2) Ltd v Auckland Council* the Court held that integrity considerations for "newly minted plans" may hold greater importance because the plan provisions have not become dated or overtaken by other circumstances.²³ The Rural Resource Area provisions are old and overdue for review. Clyde is a very different place from when the Plan was made operative on 1 April 2008. Not least of which is the Picnic Creek Subdivision.

Precedent effect

41. Given the absence of any irreconcilable clash with the Plan, there is no need to consider the second limb of the *Gould* test. However, we address it below for completeness.

²¹ Brief of Evidence of Tanya Copeland at [43]

²² Central Otago District Council *District Plan review moves to stage 2* <https://www.codc.govt.nz/your-council/news?item=id:2szopfhs817q9sqi4yj2>

²³ [2017] NZEnvC 205 at [116].

42. Cases such as *Rodney District Council v Gould* show that it is not necessary for a site to be unique before plan integrity ceases to be an important factor.²⁴ Nevertheless a decision-maker should consider whether there are factors which take the proposal outside the generality of cases.
43. It is submitted that the second limb is comfortably satisfied. The Site has several distinguishing characteristics which take it outside the generality of Rural Resource Area subdivision applications.
44. The unique factors of this application are set out in Ms Copelands evidence at paragraphs [28] and [29]. The key distinguishing factors of this proposal are:
- (a) the Site shares a boundary with the Rural Residential Resource Area in Clyde,
 - (b) the productive capacity of the Site will not be affected by the subdivision, and
 - (c) the Site is comprised of existing undersized allotments, held in a common title.
45. The combination of these factors is unique to this Site and proposal. Granting consent would not establish a precedent requiring approval of future subdivision applications within the Rural Resource Area, each would need to be assessed on its own merit against the Plan provisions. For example, if we look to the site immediately adjacent there are a number of distinguishing features. It is not adjacent the rural residential zone and it does not include two existing allotments.

Conclusion

²⁴ Referred to in *Beacham v Hastings District Council* at [25].

46. The Applicant's evidence establishes that the proposal will give rise to no more than minor adverse effects. The proposal achieves the outcomes sought by the Plan and is not contrary to the objectives and policies of the Plan. The proposal does not give rise to plan integrity or precedent concerns.
47. It is submitted that the Council grant consent to allow subdivision and establishment of a residential activity. To do so will support the Paulin family in achieving their social, economic and cultural wellbeing now and into the future. Such an outcome achieves the purpose of the Act.

Dated 31 July 2026

A handwritten signature in blue ink, appearing to read 'Bridget Irving', with a stylized, cursive script.

Bridget Irving / Hannah Perkin

Counsel for Kevin John Paulin