



DUNEDIN CITY

COUNCIL

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2 May 2013

Veggie Boys Ltd
PO Box 5933
Moray Place
Dunedin 9058

Dear Sir,

RESOURCE CONSENT APPLICATION: LUC-2012-563
58 Ayr Street
Mosgiel

The above application for resource consent to authorise the operation of a retail sales outlet at the existing Wallis's Nursery retail outlet and Fun Land recreation park, located on the site at 58 Ayr Street, Mosgiel, was processed on a notified basis in accordance with sections 95A to 95H of the Resource Management Act 1991 (the Act).

The Hearings Committee, comprising Commissioner David Benson-Pope (Chair) and Councillors Paul Hudson and Andrew Noone, heard the application in public on 10 April 2013.

At the end of the public part of the hearing, the Committee resolved to exclude the public in accordance with section 48(1) of the Local Government Official Information and Meetings Act 1987. Following the public hearing, the Committee carried out a site visit and then deliberated on the application.

The Committee **granted** consent to the application on 10 April 2013. The full text of the decision commences below.

The Hearing and Appearances

The applicant was represented by:

- Simon Anderson (Solicitor) – Ross Dowling Marquet Griffin.
- Don Anderson (Anderson and Co) – Consultant Planner.
- Marty Hay – Co-Owner – Veggie Boys Limited.
- Clive Wallis – Owner – Wal's Nursery and Fun Land.

In total, 11 submissions were received that indicated a wish to be heard. The following submitters appeared at the hearing:

- Brian Miller.
- Elizabeth Kerr.

- Louise Ardley.
- Eric McLachlan.

The Council staff attending were:

- Jeremy Grey (Planner/Handling Officer);
- Campbell Thomson (Senior Planner/Committee Adviser);
- Jenny Lapham (Governance Support Officer).

Procedural Issues

No procedural issues were raised at the beginning of the hearing or during the hearing process.

Principal Issues of Contention

The principal issues in contention were:

- The integrity of the District Plan and its consistent administration with respect to the use of land zoned for rural purposes.
- Precedent of consent for other commercial activities being established 'out of zone'.

Summary of The Evidence Heard

Introduction from Handling Officer

Jeremy Grey provided an overview of his report, summarising the details of the proposal and the notification of the application. He also noted that the application was considered to be retrospective, given the applicant had begun operating.

Mr Grey noted that, in his opinion, the actual and potential effects associated with the proposed activity will be no more than minor and considered that the proposal was not contrary to the key objectives and policies of the District Plan. He noted that in this respect, each of the two gateway tests of section 104D of the Act could be met and, therefore, the Committee had the discretion to consider granting consent.

Mr Grey said that, overall, the key consideration related to the issue of District Plan integrity and that there was a risk the proposal would undermine the integrity of the District Plan.

On this basis, Mr Grey recommended that the application be declined.

The Applicant's Case

Mr Simon Anderson spoke to his evidence, which was tabled. He wished it noted that the Applicant began operating in good faith and did not intentionally breach the rules of the District Plan by beginning the operation without resource consent. Mr Anderson noted that the applicant's operation is primarily a fruit and vegetable shop, with most of their produce grown in New Zealand. Some of the produce is to be grown on the site itself. Mr Anderson noted that he considered the activities on the site to be complementary and that the applicant's decision to locate on the site was to draw patrons visiting the existing activities on the site. He further noted that had the other activities not been present on the site, the applicant would not have located there.

Mr Anderson then addressed the matter of District Plan integrity, noting that this was an important consideration. He then noted that in this instance, it had been found that adverse effects were considered to be no more than minor and that the application was not considered contrary to the objectives and policies of the District Plan, passing the threshold tests of section 104D of the Act. Mr Anderson noted that the risk to District Plan integrity flows from the precedent effect and the expectation that like cases will be decided in a like manner and consents being sought for materially the same thing. Mr Anderson then discussed integrity where it had been dealt with by case law, noting that there must be other materially indistinguishable applications to follow, which must lead to an irreconcilable clash with District Plan provisions.

In conclusion, Mr Anderson considered that there would not be materially similar applications to follow and that there will be no irreconcilable clash with District Plan provisions. He also concluded that any future applications for non-complying activities in the Rural zone would need to satisfy the threshold tests of section 104D of the Act and be assessed on their own merits.

Mr Marty Hay then spoke to his evidence, which was tabled. Mr Hay presented an overview of the Veggie Boys business operations and the process the applicant embarked upon in selecting an appropriate site in the Mosgiel area. He then gave a detailed description of the operation at 58 Ayr Street. He asked that Committee acknowledge the support of the operation shown by the public and grant consent.

Mr Don Anderson spoke to his evidence, which was tabled. Mr Anderson noted that both of the Threshold tests of section 104D of the Act were satisfied. He then addressed the concerns raised by submitters such as the use of valuable rural land, the encroachment of retail use into the rural zone, and that the range of goods sold has more in common with a supermarket. Mr Anderson went on to discuss the issue of District Plan integrity and concluded that there is no other site within the Rural zone that had been granted consents for such a range of activities, indicating that he considered the application met the true exception test and would not undermine District Plan integrity.

Mr Clive Wallis spoke to his evidence, which was tabled. Mr Wallis gave an overview of the Wal's Nursery and Fun Land operation and explained how the applicant's activity fitted within that context.

The Submitters:

Mr Brian Miller spoke to his submission, which was tabled. Mr Miller was concerned in regard to the activities already being undertaken on the site. He also raised concerns regarding the setting of a precedent in respect of retail activities within the rural zone.

Elizabeth Kerr then spoke to her submission, which was tabled. Elizabeth noted that she agreed with the recommendation to decline consent on the basis of District Plan integrity, but disagreed with Mr Grey's conclusion that potential adverse effects would be no more than minor. She discussed her rationale for this position and requested that consent be declined in its entirety.

Mrs Louise Ardley spoke to her submission, which was tabled. Mrs Ardley noted the benefits that having the applicant's operation at the subject site would have for the area and supported the granting of the application.

Mr Eric McLaughlin then spoke in support of his submission, which encouraged consent to be granted.

The Handling Officer's Review of his Recommendation

Mr Grey reviewed his recommendation in light of the evidence presented at the hearing and maintained the recommendation to decline consent. However, he wished to acknowledge the support shown of the operation by the public and noted that the growing of some produce on site would alleviate the situation in respect of District Plan integrity.

The Applicant's Right of Reply

Responding for the applicant, Mr Simon Anderson noted that only those products defined in the application are to be sold. He noted that produce had been grown on the site previously and sold at Veggie Boys. Mr Anderson went on to say that the applicant had not planted any further crops as they were awaiting the outcome of the consent. However, Mr Anderson noted that not all items sold would be sourced on site.

Mr Anderson then addressed the issue of precedent. He noted that a key point is that granting consent is not a precedent for effects that are greater than minor and that case law is quite clear in that an activity needs to be something that clashes with District Plan provisions. Mr Anderson noted that the conclusion of the section 42A report is that the activity is not contrary to these provisions.

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. These statutory provisions included the following Part 2 matters of the Resource Management Act 1991: sections 5, 7(c) and 7(f). Regard was also given to the relevant provisions of the following chapters of the Dunedin City District Plan: Sustainability (4), Manawhenua (5), Rural (6) and Transportation (20) and Environmental Issues (21).

Main Findings of Fact

The Committee considered the evidence heard, the relevant statutory and plan provisions, the principal issues in contention and the main findings of fact. The main findings of fact 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.

*Pursuant to sections 34A and 104B and after having regard to Part 2 matters and sections 104 and 104D of the Resource Management Act 1991, the Dunedin City Council **grants** consent to a **non-complying activity** being the authorisation of a Veggie Boys retail outlet and associated signage at 58 Ayr Street, Mosgiel, legally described as Part Sections 9 - 11, Block III East Taieri Survey District, held in Computer Freehold Register OT11B/687, subject to conditions imposed under section 108 of the Act, as set out in the attached certificate.*

Reasons for this Decision

- 1) The Committee considers the effects of the proposal will be no more than minor in all respects. In particular, the Committee is satisfied that the granting of the proposal will not give rise to any adverse cumulative effects and will not detract from the value

of any high class soils. The Committee noted that business premises are set well back from the road, amongst the buildings structures comprising Wal's Nursery and Fun Land and are surrounded by farm land within the site. Further, they consider that the physical effects are internalised with the exception of traffic movement, which is able to be managed by consent conditions. It is considered essential to this determination that access and egress should be upgraded to a standard appropriate to Council. They also consider that the number of car parks available is satisfactory. The area of land where the activity is occurring is a long standing platform developed many years ago. Therefore, no high class soils are being taken out of production as part of this application.

- 2) The Committee considers the proposal is not contrary to the objectives and policies of the District Plan. This conclusion was reached after consideration of the receiving environment and the extent to which it is already characterised by a variety of activities associated with Wal's Nursery and Fun Land, including commercial operations and recreational activities. Some of these are rural in nature and some are not. The Committee notes that the primary focus of the retail activity is the sale of fruit and vegetables and the applicant has stated an intention to grow some of its produce on site. To this extent, the activity will be making use of the surrounding land associated with the site, such that not all products sold will be sourced from elsewhere. The limitations offered on the range and extent of products sold were also important considerations in the Committee's determination.
- 3) Integral to the Committee's favourable view of the proposal is that it will result in a sustainable use of the land and physical resource on the site. The Committee noted that the District Plan seeks to provide for development of commercial activities within distinct areas defined as Activity Zones. The Committee notes also, that some retailing in the form of farm produce outlets is provided for as a controlled activity, along with tourist activities such as a visitor shop for a recognised tourist attraction. They note that these forms of commercial activity are usually site specific and do not detract from activity within established town centres. In respect of the subject site, a range of commercial activities has been authorised and the Committee considers that the activity is reliant on the presence of the other activities at Wal's Nursery and Fun Land to enable its operation.
- 4) The Committee considered the issue of District Plan integrity, and the impact the granting of consent may have on the effectiveness of both the Rural and Activity Zones. The Committee considers any precedent perceived to arise from the granting of consent is very limited, as there are no other instances where the same range of authorised activities exists on a single site. It is considered that granting consent to this application would be unlikely to promote a like proposal on a site in another area with similar physical circumstances. The Committee was mindful of the extent to which the site had already been developed. As such, they were satisfied that the proposal will not be out of keeping with the existing environment.
- 5) The Committee noted that while the Spatial Plan is an important document for the Council, it can be given only limited weight in respect of the consideration of a resource consent application. The Committee notes that the Spatial Plan is a non-statutory document and while it represents a proposed statement of Council policy and signals the possible direction of future District Plan provisions, there is no certainty at present concerning the detail of the Spatial Plan and how it will be given effect. That notwithstanding, the Committee acknowledged that the Spatial Plan does not support any changes to the Mosgiel commercial centre. In this respect, the Committee does not consider that by granting consent, this will lead to an 'out of zone' commercial centre based around the Wal's Nursery and Fun Land Operation.

- 6) The Committee considers the proposal to be consistent with the sustainable management of natural and physical resources as contained in Part 2 of the Resource Management Act 1991, for the reasons discussed above.
- 7) Overall, the Committee views the proposal as being in character with the existing receiving environment, where commercial retail and recreational activities already exist. In the absence of adverse effects of any concern and that the proposal is considered a sustainable use of the land and the physical resource on the site, the Committee considers it appropriate for consent to be granted.

Commencement of Consent

As stated in section 116 of the Resource Management Act 1991, this consent shall only commence once the time for lodging appeals against the granting of the consent expires and no appeals have been lodged, or the Environment Court determines the appeals or all appellants withdraw their appeals, unless a determination of the Environment Court states otherwise.

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

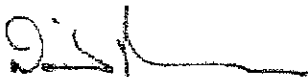
Any appeal must be served on the following persons and organisations:

- The Dunedin City Council
- The applicant
- Every person who made a submission on the applications.

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 Jeremy Grey at the telephone number detailed above.

Yours faithfully



David Benson-Pope (Commissioner)

**CHAIR
HEARINGS COMMITTEE**



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Consent Type: Land Use Consent

Consent Number: LUC-2012-563

*Pursuant to sections 34A and 104B and after having regard to Part 2 matters and sections 104 and 104D of the Resource Management Act 1991, the Dunedin City Council **grants** consent to a **non-complying activity** being the authorisation of a Veggie Boys retail outlet and associated signage, subject to the conditions imposed below, under section 108 of the Act.*

Location of Activity: 58 Ayr Street, Mosgiel.

Legal Description: Part Sections 9 - 11, Block III East Taieri Survey District (Computer Freehold Register OT11B/687).

Lapse Date: 2 May 2018, unless the consent has been given effect to before this date.

Conditions:

1. *The proposed activity shall be undertaken in general accordance with the information submitted as part of Resource Consent Application LUC-2012-563, lodged by Council on 12 December 2012, except as modified by the following conditions.*
2. *The product sold at the retail outlet shall be limited to the following:*
 - *Fruit and vegetables, pre-packaged and in bulk that are grown both on and off the site;*
 - *Pre-packaged chilled meat and meat-based products limited to not more than one 3m by 1.5m display space, comprising a single-sided chiller unit;*
 - *Food condiments including tinned products and confectionary limited to not more than one 3m by 1.5m display space, comprising a double-sided and double-ended free standing shelving unit; and*
 - *Milk, bread, speciality cheese and honey, eggs and bakery products, limited to not more than one 3m by 1.5m display space, comprising a single-sided shelving and/or chiller unit.*
3. *The final design of any signage to be applied to the building facades and frontage to Bush Road shall be subject to the prior approval of the Resource Consents Manager, Dunedin City Council, prior to installation.*
4. *Any subsequent change to signage or colour treatment of the building shall be subject to the prior approval of the Resource Consents Manager, Dunedin City Council.*
5. *The existing vehicle access shall be hard surfaced from the edge of the seal of Bush Road to a distance of no less than five metres inside the property boundary.*
6. *That portion of the vehicle access located within the legal road reserve is required to be constructed to a heavy-duty standard.*

7. *All vehicle access to the site shall be from Bush Road.*
8. *Any party responsible for exercising this consent shall consult with the Water and Waste Services Business Unit's Trade Waste Officer to determine any trade waste disposal requirements.*

Advice Notes:

1. It is advised that the applicant should be aware of its responsibilities under the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011, whereby resource consent may be required to change the use of the site or disturb the soil, if it is deemed that the site is on the Hazardous Activities and Industries List.
2. It is advised that the vehicle access, from the carriageway to the property boundary, is over road reserve and is therefore required to be widened in accordance with the Dunedin City Council Vehicle Entrance Specification (available from Transportation Operations).
3. The requirements of the Hazardous Organisms and New Substances Act 1996 should be complied with at all times.
4. In addition to the conditions of resource consent, the Resource Management Act establishes through sections 16 and 17 a duty for all persons to avoid unreasonable noise, and to avoid, remedy or mitigate any adverse effect created from an activity they undertake.
5. Resource consents are not personal property. This consent attaches to the land to which it relates, and consequently the ability to exercise this consent is not restricted to the party who applied and/or paid for the consent application.
6. The lapse period specified above may be extended on application to the Council pursuant to section 125 of the Resource Management Act 1991.
7. It is the responsibility of any party exercising this consent to comply with any conditions imposed on their resource consent prior to and during (as applicable) exercising the resource consent. Failure to comply with the conditions may result in prosecution, the penalties for which are outlined in section 339 of the Resource Management Act 1991.

Issued at Dunedin this 2nd Day of May 2013



David Benson-Pope (Commissioner)
Chair
Hearings Committee