

IN THE MATTER of the Resource Management Act
1991

AND

IN THE MATTER of Proposed Regional Policy
Statement for Otago

FOR SUBMITTER **PORT OTAGO LTD**

Submitter 0301

PRELIMINARY JURISDICTIONAL LEGAL ISSUE RAISED BY
PORT OTAGO LIMITED RELATING TO THE MATTER BEFORE
THE SUPREME COURT
Dated 9 December 2022

LEN ANDERSEN KC
BARRISTER
P O Box 5117
DUNEDIN 9054
Phone (03) 477 3488
Fax (03) 474 0012
len@barristerschambers.co.nz

MAY IT PLEASE THE HEARING COMMISSIONERS

1. Port Otago Limited raises as a jurisdictional issue the fact that the Court of Appeal interpretation of New Zealand Coastal Policy Statement 2010 (“NZCPS”) in [2021] NZCA 638, [2022] NZRMA 165 is a subject of an appeal to Supreme Court of New Zealand under number SC6-2022. The appeal was heard in May 2022 and the decision was reserved.
2. This appeal relates to the proposed Otago Regional Policy Statement 2019 and the same issues arise with the Proposed Otago Regional Policy Statement 2021.
3. The decision of the Supreme Court will determine the relationship between Policy 9 (“the Port Policy”) of NZCPS and Policies 11, 13, 15 and 16 of the NZCPS (“the Avoid Policies”).
4. The pORPS 2021 policies that give effect to the Avoid Policies are specified in the plan to take priority over the port policy (ET-TRAN-P23) which generally accords with the hierarchy set out in the Court of Appeal decision.
5. The Hearing Commissioners have jurisdiction to determine the matter in accordance with the Court of Appeal decision but that necessitates a subsequent appeal if the Supreme Court decision is not released before the decision is made by the Hearing Commissioners. This is a distinct issue that does not need determination by the Hearing Commissioners before the Supreme Court decision.
6. The hierarchy has real significance for Port Otago Ltd because of the sensitive areas in Otago Harbour including, but not limited to, the Aramoana Salt Marsh. For example, any further extension of the shipping channel would encroach on the Aramoana Salt Marsh (as has happened previously) and even a small incursion is unlikely to be permitted without legislation unless the appeal to the Supreme Court is successful.
7. Port Otago Ltd’s position (accepted by the Environment Court but rejected by the High Court and Court of Appeal) is:
 - (a) If Port Otago Limited cannot both operate safely and efficiently and comply with the Avoid Policies then it should not be precluded from seeking a resource consent to make a case that a resource consent should be granted for the minimum necessary infringement on the values protected by the Avoid Policies in order for the port to be able to operate safely and efficiently;
 - (b) Port Otago Ltd must comply with the Avoid Policies if it can do so without affecting its ability to operate safely and efficiently;

- (c) The Regional Policy Statement should specify the relationship between those provisions that give effect to the avoid policies and the port policy so the position is clearly understood by all submitters when rules are being considered including specification of prohibited activities.
8. Port Otago Ltd seeks that once the Supreme Court decision is available then all affected parties have the opportunity to reconsider their evidence as to the relationship of the policies in pORPS 2021 affected by the decision if it does not uphold the Court of Appeal decision.

Dated 9 December 2022



.....
L A Andersen KC
Counsel for Port Otago Ltd