

Under the Resource Management Act 1991 (**RMA**)  
In the matter of The Otago Regional Council Proposed Otago Regional Policy Statement 2021 (excluding parts determined to be a freshwater planning instrument)

**Submission by Dunedin City Council**

---

**Submissions of Counsel for Dunedin City Council**

24 January 2023

---

**Dunedin City Council solicitors:**

Michael Garbett  
Anderson Lloyd  
Level 12, Otago House, 477 Moray Place, Dunedin 9016  
Private Bag 1959, Dunedin 9054  
DX Box YX10107 Dunedin  
p + 64 3 477 3973  
michael.garbett@al.nz

**anderson  
lloyd.**

**May it please the Commissioners:**

- 1 These legal submissions support the legal issues arising from the submission by DCC, and support the evidence provided by planners engaged by Dunedin City Council.
- 2 DCC has made a wide-ranging submission that touches on many of the issues that it as a territorial authority has the function to address under the RMA.
- 3 The role of DCC is to both develop, monitor and implement a district plan in the city of Dunedin, as well as being a significant infrastructure provider for the residents of Dunedin.
- 4 In terms of the District Plan, this must give effect to the RPS (section 75(3)(c) RMA). The DCC has also just about completed development of its 2GP, which remains subject only to a handful of site specific appeals to be resolved in the Environment Court. This is a contemporary District Plan, and DCC sees the RPS in part through its experience resolving many of the issues addressed in the 2GP.
- 5 This makes it critically important for the RPS to integrate appropriately and set appropriate policy for DCC to give effect to. DCC consider that the RPS is the time to resolve any such policy tensions and set appropriate direction that can be properly implemented via the district plan.

**"Avoid"**

- 6 One of the consistent and overarching themes raised by DCC that affect multiple chapters of the RPS is the use of the phrase avoid. This arises initially in the MW chapter, but also in others to follow.
- 7 The RPS has deliberately used the word "avoid", or variations on it such as "avoid as a first priority" in a variety of chapters and Policies.
- 8 The word "avoid" has been considered in the context of section 5 of the Act and the NZ Coastal Policy Statement by the Supreme Court. The Supreme Court has determined avoid in this context is to be interpreted as having its ordinary meaning of "not allow" or "prevent the occurrence of" (see the decision of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 28 at paragraph 96).
- 9 It is submitted that where the RPS has adopted "avoid" as a policy setting, this term will be interpreted and applied with this same meaning. That is something to be avoided, is to not be allowed, or to prevent the occurrence

of. This does foreclose that activity from occurring, potentially in all circumstances. It is a very strong and inflexible directive.

- 10 This avoid language therefore needs to be tested for its suitability in its various contexts to ensure that this is the intended and deliberate meaning given its significance.
- 11 Avoid as a first priority, does not seem to temper the avoid directive. This is because as a first priority, any such activity can be prohibited, or refused consent "as a first priority". If this occurs, there is no second priority that arises.
- 12 The planners for DCC have identified the parts of the RPS where this issue arises in a manner that is of direct relevance to DCC functions and recommendations are made where it is considered appropriate.
- 13 It is noted that this current meaning of "avoid" as interpreted by the Supreme Court may further be refined or altered in the pending decision of the Supreme Court on the Port Otago case (as mentioned by Mr Logan in his opening). If such a decision is issued during the course of this hearing, the proposal for further legal submissions and evidence limited to the implications arising from that decision is supported.
- 14 DCC otherwise supports the recommendations made by its planning witnesses to the content of the RPS.
- 15 It is noted that the DCC planning witnesses who have provided evidence are:

Mr Keith Frentz;

Mr James Taylor;

Ms Emily McEwan; and

Mr Paul Freeland.

Dated this 24<sup>th</sup> day of January 2023

A handwritten signature in black ink, appearing to read "Mr. Garbett", is written above a solid horizontal line.

Michael Garbett  
Counsel for Dunedin City Council