

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

LEGAL SUBMISSIONS ON BEHALF OF PORT OTAGO LIMITED
IN RELATION TO PORT OTAGO'S SUBMISSIONS
Dated Tuesday the 9th of May 2023

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. INTRODUCTION

- 1.1 Kevin Winders, the CEO of Port Otago Limited, is unfortunately not able to attend today. His evidence deals with the operation of the port and the necessity for the economic health of Otago that it is able to operate safely and efficiently.
- 1.2 I am grateful that the commissioners delayed this hearing as long as possible in the hope the Supreme Court decision on Port Otago's appeal on the previous RPS would be delivered. Enquiry has been made of the Supreme Court and the response is that the decision is not yet available but "work on the judgment is in hand".
- 1.3 I agree with the legal submissions of Alastair Logan. However, while technically correct, paragraphs 43 to 47 do not fully identify the problems faced in being permitted to carry out an activity that breaches the values protected by the avoidance policies:
 - (a) While avoidance policies do not require prohibited activity status, that is still their effect unless there is a permissible countervailing policy that is not subject to the avoidance policies because where the avoidance policy is the only relevant policy:
 - (1) There cannot be a rule that permits an activity that has effects that are contrary to values protected by an avoidance policy; and
 - (2) It is not possible to obtain consent for an activity that has effects contrary to the values protected by an avoidance policy unless the effects are minor or temporary;
 - (b) While activity status cannot be prejudged at the policy statement level, the current state of the law is that "avoid" means "avoid" and rules must accord with policies so any activity that has effects that impinge on an avoidance policy in a way that is more than minor cannot be permitted whether or not it is prohibited and, even if Port Otago is successful on appeal, that will remain the position where there is no enabling policy that can be relied upon to create an exception to the general prohibitory effects of the avoidance policies;
 - (c) It does not help Port Otago to say that whether an activity has an adverse effect, whether that effect can be avoided and how it can be avoided depends on the specific proposals and their locations:
 - (i) It is clear that the Aramoana Salt marsh will be given the highest level of protection and there are other areas

within the port's area of operations likely to obtain the same protection;

- (ii) Port Otago will avoid adverse effects unless it is unable to do so;
- (iii) The avoidance policies required by NZCPS will prevent activities by Port Otago that have adverse effects on the values protected by the avoidance policies that are more than minor or temporary or cannot be avoided by adaptive management unless Port Otago is successful in the Supreme Court and can rely on the enabling policy requiring a safe and efficient transport system.

1.4 Port Otago is calling planning evidence from Mary O'Callahan.

2. THE MAIN ISSUE

- 2.1 Port Otago operates in a very sensitive environment and there is no doubt that areas such as the Aramoana Saltmarsh (immediately adjacent to the channel) will obtain protection meaning there is conflict between the empowering policy that the port operates safely and efficiently and the policies to protect areas such as the Aramoana Saltmarsh.
- 2.2 Policy EIT-TRAN-P23 implements Policy 9 of the NZ Coastal Policy Statement and recognises the national and regional significance of the commercial port activities.
- 2.3 An example of policy conflict occurs because of Cruise ships visits to Dunedin. These are important to the Dunedin economy. However, the difficulty that very large cruise ships have negotiating the Harrington Point bend may require some excavation into the Aramoana Saltmarsh to ensure that shipping is safe and efficient. This might not be possible if policy EIT-TRAN-23 is subject to avoidance policies protecting the Aramoana Saltmarsh. This demonstrates how narrow the protection for existing activities is as expansion of activities or renewal of a resource consent will be against the background of the prohibition created by the avoidance policies.
- 2.4 A further example is if there was a collapse of the channel adjacent to the Aramoana Saltmarsh. Under section 330 RMA Port Otago is entitled to reinstate the channel without obtaining a resource consent. This is because Port Otago is a Lifeline Utility under schedule 1 Civil Defence Emergency Management Act 2002. However, once Port Otago has restored the channel, it is required to obtain a resource consent for the work that it has carried out. That may not be possible if the avoidance policies do not permit the necessary repair of the channel to impinge on the Aramoana Saltmarsh

- 2.5 The underlying problem results from the King Salmon decision and its treatment of policies as rules. Port Otago's submission to the Supreme Court is that a policy is not a rule and it is possible for an empowering policy (such as the policy for the safe and efficient operation of the port) to prevail over a conflicting avoidance policy in particular circumstances where the purposes of RMA require it. This would occur if the only way that Port Otago can operate safely and efficiently is by an activity that breaches a policy that protects the environment and its effect would be that Port Otago is not precluded from seeking a resource consent and arguing that, in this particular situation, the empowering policy has more strength than the relevant avoidance policy. This is hoped to be the outcome of the Supreme Court decision and forms the basis of the proposed subsection (4) in ET-TRAN-P23 (Option 2) at p15 of Mary Callaghan's evidence:

If the operation or development of Port Otago may cause adverse effects on values that are protected by this policy statement then such activities may be evaluated following a resource consent process that considers those effects and whether they are caused by safety considerations, which are paramount, or by transport efficiency considerations and if resource consent is to be granted, ensure that such adverse effects are avoided as much as possible and are otherwise remedied or mitigated (through adaptive management or otherwise).

- 2.6 Port Otago's submission at this hearing in relation to this issue is:
- a. The inter-relationship between the port policy and conflicting policies should be spelt out in EIT-TRAN-P23
 - b. If the Supreme Court decision is available (and allows it) clause (4) in option 2 should be included in EIT-TRAN-P23.
- 2.7 If the Supreme Court decision is not available not or does not allow option 2, then the Court of Appeal decision (which is the one that is currently law) would be given effect to by a modified option 1 subclause (4). The proposed clause at page 26 of Mary Callahan's evidence permits activities that are contrary to other policies in this policy statement where the activities:
- a. Are essential for the efficient and safe operation of the port; or
 - b. Essential for the effective connections with other transport modes; and
 - c. Have a minor or temporary adverse effects on the protected values.

There is a fourth additional provision that needs to be added as the Court of Appeal specifically provided that adaptive management can be used to avoid adverse effects::

- d. Have effects that can be avoided through adaptive management
- 2.8 The importance of spelling out the relationship between EIT-TRAN-P23 and the conflicting policies is that the policy then makes it clear that Port Otago is entitled to argue that a particular use or particular activity should be permitted where it has a minor or temporary adverse effects on protected values or the adverse effects can be avoided by adaptive management. An example of such a minor effect is the placing of a beacon for the channel on the Aramoana Saltmarsh.
- 2.9 The Commissioners are asked to wait until the last possible moment before making their decision because the inclusion of the policy based on the Court of Appeal decision will create real difficulties for Port Otago if the ORC policy is more restrictive than that permitted by the Supreme Court.

3. OTHER MATTERS

- 3.1 Mary O’Callaghan will give evidence on specific matters where Port Otago’s submissions have not been accepted by the s42A reporting officers. The proposed changes are all at Appendix 1 of her evidence and include:
- a. The failure to specifically include the commercial port in all definitions of infrastructure because Port Otago is a lifeline utility and nationally and regionally significant;
 - b. The relationship of the integrated management objectives and policies with the direction in section 5 of the RMA with alternative wording suggested for IM-O1 and IM-PI;
 - c. The use of the terms “environmental limits” or “limits” throughout the plan (including within EIT-TRAN-P23) with the term being meaningless unless the limit is specified with sufficient certainty to give the policy meaning;
 - d. The lack of certainty in identification of “highly valued natural features and landscapes” as it does not provide any methodology which, as a result of the avoidance policies, is likely to result in considerable argument about criteria used, particularly if the policy is seeking to extend the protection given by NZCPS to “outstanding” natural character, features and landscapes to those which are highly valued, but not outstanding;

- e. The mapping of regionally significant surf breaks without guidance as to how they will be identified or where they are to be located is problematic and may create other difficulties with a relevant question being what effect would creating a protected regional surf break at St Clair have on the ability to carry out remedial work as a result of coastal erosion or global warming;
- f. Concern about the restructure of the policies relating to managing ecosystems and indigenous biodiversity in the coastal environment because the proposed clauses (g) and (h) in policy EL0-P7 do not adequately set out the criteria for evaluation in these provisions;
- g. It is unnecessarily complicated to have an area subject to coastal hazards and natural hazards for existing activities and the recommendation is that the “no increase in risk” test is changed to “a more than minor increase in risk” in HAS-NHP-7;
- h. Reconsideration of the relationship between the provisions in the Infrastructure Chapter and the Coastal Environment Chapter.

Dated 9 May 2023

A handwritten signature in blue ink, appearing to read 'L A Andersen KC', is written over a dotted line.

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