

Before the Otago Regional Council

Under the Resource Management Act 1991 (**RMA**)
In the matter of The Otago Regional Policy Statement - Freshwater Parts
Dunedin City Council
Submitter

Legal submissions on behalf of Dunedin City Council

4 September 2023

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May it please the Hearing Panel:

- 1 These submissions are presented on behalf of the Dunedin City Council (DCC) in relation the Otago Regional Policy Statement 2021 (freshwater parts).

DCC's position

- 2 The DCC provides reticulated water supply, wastewater and stormwater services to domestic and non-domestic users across Dunedin City. The DCC's 3 waters group manages the delivery of these services. The provision of well managed water supply, wastewater and stormwater services promote the health and wellbeing of communities and the environment.
- 3 The DCC takes, treats and supplies water to consumers for drinking water. The RPS should appropriately prioritise this water take to recognise its importance to the health and well-being of consumers. In the Taieri FMU this should be recognised as a tier 2 priority take.
- 4 The DCC is undertaking a holistic, system wide strategic planning exercise to inform future investments in its' 3 waters systems. An overarching purpose of this strategy is to ensure that the investments in 3 waters systems are properly prioritised to achieve optimal outcomes. DCC seek that the RPS incorporate reference to a co-ordinated strategy for progressive three waters upgrades that is designed to achieve the objectives of the RPS as an important guidance document. This can be an optional policy setting rather than being forced as mandatory (to overcome concerns about legality).
- 5 Policy to manage stormwater and wastewater has been separated by the section 42A report, which is appreciated and a good improvement to the RPS. DCC seek that these provisions consistently require progressive upgrades to the greatest extent practicable (and preferably in line with the co-ordinated strategy referred to above).
- 6 Mr Taylor has made further recommendations to provisions of the RPS. DCC is comfortable to align its position to that expressed by Mr Taylor in his brief of evidence to better balance the objectives and policies of the RPS with other legislative, regulatory and policy requirements as they relate to the provision of 3 waters services.

Appropriate prioritisation of water allocation for Community Water Supply

- 7 This submission relates to LF-VM-O4 and LF-FM-P7A(1). DCC seeks additions as set out in the evidence of Mr Taylor (paragraphs 39 and 53).
- 8 The main point is that when DCC takes water to supply the community from the Taieri catchment it does so as a drinking water supplier. The water taken is all treated to drinking water standards. It is then reticulated and provided to consumers at the point of supply to each property that is supplied.
- 9 DCC has no way to manage or control the end use of consumers. DCC has to assume that the take and supply of drinking water to the community is, or could all be used for drinking, cooking, washing food, washing or the like. Its' legal obligation is to provide potable water to all consumers on the network.
- 10 DCC also has a statutory obligation to maintain its capacity to continue to supply such potable water.
- 11 It also has to make provision (currently and until the 3 waters entities take over community water supply in 2025) for urban growth to ensure there is sufficient "infrastructure ready" growth in Dunedin City to meet the requirements of the NPS-UD.
- 12 Therefore, DCC considers that its' water takes for community water supply should be recognised as being a tier two priority take under the provisions of the RPS.

The law relating to drinking water supply

- 13 The Local Government Act 2002 (LGA 2002) requires DCC to maintain its capacity to supply water services. It is also unable to restrict or stop the provision of community water supply (except in prescribed limited circumstances). Section 130(2) of the LGA 2002 states:
 - (1) This subpart applies to a local government organisation that provides water services to communities within its district or region—
 - (a) at the commencement of this section:
 - (b) at any time after the commencement of this section.
 - (2) A local government organisation to which this section applies must continue to provide water

services and maintain its capacity to meet its obligations under this subpart.

(3) In order to fulfil the obligations under this subpart, a local government organisation must—

(a) not use assets of its water services as security for any purpose:

(b) not divest its ownership or other interest in a water service except to another local government organisation:

(c) not lose control of, sell, or otherwise dispose of, the significant infrastructure necessary for providing water services in its region or district, unless, in doing so, it retains its capacity to meet its obligations:

(d) not, in relation to a property to which it supplies water,—

(i) restrict the water supply unless [section 193](#) applies; or

(ii) stop the water supply unless [section 25](#) of the Water Services Act 2021 applies.

14 The Water Services Act 2021 (WSA 2021), section 25 is also relevant. This imposes an ongoing obligation to supply drinking water, except in very limited circumstances. This provides:

(1) A drinking water supplier (other than a water carrier) must ensure that a sufficient quantity of drinking water is provided to each point of supply to which that supplier supplies drinking water.

(2) in this Act, sufficient quantity, in relation to the drinking water supplied to a point of supply, means—

(a) the quantity of drinking water that is sufficient to support the ordinary drinking water needs of consumers at the point of supply; or

(b) if compliance rules have been made prescribing the quantity of drinking water or a formula for determining the quantity of drinking water that is sufficient to support the ordinary drinking water needs of consumers at a point of supply, the amount specified in, or calculated according to the formula set out in, those rules.

(3) Subsection (1) does not prevent a drinking water supplier restricting or interrupting the provision of

drinking water to a point of supply if, in the opinion of the supplier, the action is necessary because of—

(a) maintenance, improvement, or repairs to the drinking water supply or related infrastructure; or

(b) risks to public health; or

(c) environmental factors affecting a source of a drinking water supply; or

(d) an emergency; or

(e) cultural factors affecting a source of a drinking water supply (for example, a rāhui).

...

(6) In any event where the restriction or interruption of the supply of drinking water exceeds 8 hours, the drinking water supplier must make arrangements to ensure that a sufficient quantity of drinking water is available to affected consumers through an alternative supply (for example, by water carrier).

- 15 Should there be any factor affecting the source water or the network requiring a restricted or interrupted supply, then there is a duty on DCC to provide an alternative supply. Section 25(6) gives the example of provision of water from a water tanker.
- 16 In summary the duty to provide ongoing potable water to points of supply on the network is a core and routine function of DCC. It has no ability to reduce or interrupt such supply except in the listed temporary circumstances. Even then an alternative temporary supply needs to be provided.
- 17 This all means that the supply of potable water from DCC is a mandatory statutory function. It is submitted this should be recognised in the prioritisation that the RPS affords to community water supply by DCC.
- 18 In addition to these statutory obligations DCC also has a duty to comply with the National Policy Statement for Urban Development 2020 (NPS-UD). This relevantly provides:

3.2 Sufficient development capacity for housing

(1) Every tier 1, 2, and 3 local authority must provide at least sufficient development capacity in its region or district to meet expected demand for housing:

(a) in existing and new urban areas; and

(b) for both standalone dwellings and attached dwellings; and

(c) in the short term, medium term, and long term.

(2) In order to be sufficient to meet expected demand for housing, the development capacity must be:

(a) plan-enabled (see clause 3.4(1)); and

(b) infrastructure-ready (see clause 3.4(3)); and

(c) feasible and reasonably expected to be realised (see clause 3.26); and

(d) for tier 1 and 2 local authorities only, meet the expected demand plus the appropriate competitiveness margin (see clause 3.22).

- 19 This requires infrastructure-ready capacity to be provided. This is defined as in the short term having infrastructure provided, or in the medium and long term, planned.
- 20 Under the current Regional Plan: Water for Otago, under rule 12.1.3 consenting surface water takes for community water supplies established prior to 1998 is controlled activity. This is appropriate given the mandatory obligation on DCC as outlined above. This is limited though to the volume authorised as at 1998, and does not allow for any population or other growth in demand.
- 21 It is submitted therefore that community water supply should be identified as a tier two priority water take in the Taieri FMU. The changes Mr Taylor recommends to the RPS in his paragraphs 39 and 53 are designed to ensure this is the case.

End Use

- 22 When DCC supplies treated potable water to consumers it has no way to know whether an end user is to use the drinking water for drinking or some other use, such as washing their car, or in fact both if they drink from the hose. It has to be assumed that all treated water supplied could be used by a consumer to drink it at any time. Other uses by consumers also need the water to be treated such as washing dishes, washing food, showering, cleaning clothes/towels etc and a variety of other uses. All such water is required to be treated and supplied to the same standard as fit for safe human consumption. This contributes to the health and wellbeing of all consumers and is required by law.

- 23 Therefore, it is submitted there is no principled or practical basis to differentiate between the importance of water take by DCC for water supply. The whole take is treated and supplied for potable use at the point of supply. The RPS should therefore not attempt to treat parts of the supply as more important than others. The whole supply being a community water supply through the network is to provide for the health and wellbeing of the community.

Supreme Court Decision – Port Otago Limited v EDS and ORC [2023] NZSC 112

- 24 This decision has already been brought to your attention by Counsel for ORC. While it addresses policy tensions under the NZCPS there are principles of relevance to the RPS in the context I have submitted about above.
- 25 For community water supply the NPS-UD requires provision of infrastructure to be ready for urban growth with a margin, in Dunedin City. This includes provision of reticulated water supply. As set out above this is mandatory and directive policy for DCC to adhere to. This needs to be reconciled with any competing provisions of the NPS-FW.
- 26 In relation to this tension the Supreme Court has indicated that tensions within, and I say by extension, between higher order instruments should be resolved at the RPS (and plan level) as far as possible. The Supreme Court conclude:

...

[72] We accept Port Otago’s submission that reconciliation of any conflict between the NZCPS avoidance policies and the ports policy should be dealt with at the regional policy statement and plan level as far as possible. This means those considering particular projects will have as much information as possible to allow them to assess whether it may be worth applying for consent and, if so, what matters should be the subject of focus in any application. Equally, decision-makers at the consent level will have as much guidance as possible on methods for addressing conflicts between policies.

[73] Leaving resolution of all possible conflicts to the consent stage would be unsatisfactory, given the large degree of uncertainty (and possible inconsistencies of methodology and results) that would ensue. Having said that, the extent to which a plan can anticipate conflicts and the means of resolving them may be limited by the amount of information available to the drafters of a regional planning instrument. It might not be possible or desirable for a regional planning instrument to do more than identify, where it can, the location and activities that may generate

conflicts in the region and set out general principles for addressing the conflict, leaving particular cases to be dealt with at resource consent level.

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- 27 From the DCC's point of view this all means that the RPS should appropriately recognise that a mandatory policy obligation from the NPS-UD for DCC to provide community water supply should be recognised as a tier two priority take, as has been sought.

Coordinated Strategy for Progressive Improvements to 3 Waters Infrastructure

- 28 DCC seek the introduction of changes to the RPS to require progressive upgrades to 3 waters regionally significant infrastructure to be in accordance with a co-ordinated strategy.

- 29 The reasons why this is pursued are:

- (a) The 3 waters networks have been developed and inherited across Dunedin City over 150 years. Parts are aging and require maintenance and upgrading.
- (b) This is a complex system involving:
 - (i) drinking water provided by reticulation to over 40,000 properties and involving over 50 resource consents;
 - (ii) Stormwater is reticulated from over 40,000 properties, with discharges consented into the Otago Harbour, Pacific Ocean, to land where it may enter Tomahawk lagoon, and numerous permitted discharges;
 - (iii) Wastewater is reticulated from over 40,000 properties, treated in seven wastewater treatment plants which rely on 15 resource consents (evidence of Ms Moffat paragraphs 4.2 – 4.4);
- (c) It is physically and financially impossible to upgrade all aspects of these systems at once. The 2021 LTP provided \$561 million of capital spending to upgrade the assets over a 10 year period (Mr Taylor paragraph 32);
- (d) Resource consents for components of these networks come up for renewal at various times in the future, depending on when they were granted and their respective terms;

- (e) It is far more effective to upgrade or renew those parts of the network where the best gains can be achieved. This is most effective both from the perspective of improving effects on the environment and financially (Ms Moffat paragraph 54);
- (f) To achieve a system wide view and to optimise investment, DCC is working on 3 waters strategic planning. This is being worked on with mana whenua (Ms Moffat paragraph 55);
- (g) A co-ordinated strategy such as this is the best way to plan upgrades where they can best deliver results for the environment, mana whenua, DCC and its customers/ratepayers;
- (h) This is why DCC consider this approach should be referenced as appropriate in the provisions of the RPS. This will help guide consenting decisions to ensure they are informed by a co-ordinated strategy that outlines improvements to the networks to achieve the objectives of the RPS.

30 Mr Taylor has set out recommended wording to achieve this being changes to the following provisions:

RPS Provision	Mr Taylor's evidence paragraph
LF-VM-04	37
LF-VM-05(1A)	44
LF-FW-P15(2)(ab)	61
LF-FW-P16(1)	72
LF-FW-P16(2)(f)	84
LF-FW-M11 (being a new method)	89

ORC Opening Legal Submissions

31 Mr Anderson in his opening for the Otago Regional Council discusses the DCC submission and evidence at paragraphs 117-131. In particular he raises that a co-ordinated strategy requirement seeks to create a mandatory obligation which is ultra vires (paragraph 129).

32 This is a point well made by Mr Anderson and is accepted. It was never intended to create an ultra vires provision, with DCC volunteering this obligation. To overcome any legal concern about invalidity, it is now proposed to modify the relief sought to ensure that a co-ordinated strategy

is a discretionary option rather than being mandatory. Wording to achieve this is recommended by Mr Taylor in his summary statement.

- 33 Mr Anderson also raised that it would be contrary to the NPS-FM and unlawful to leave development of the "visions" for future development by a third party. This principle is accepted as correct, however the intention of a co-ordinated strategy is not to take the place of visions, objectives, and policies in the RPS. Rather it is seen by DCC as a strategy by which it is to achieve these visions, objectives and policies. This is expressly referred to in the wording that DCC has put forward to ensure that it is clear that a strategy is to achieve the objectives of the RPS. DCC's proposal is not an unlawful delegation of functions, rather it is a method by which there can be an optional and co-ordinated strategy to best achieve the objectives of the RPS in a structured manner over time.

To the Greatest Extent Practicable

- 34 The Section 42A report has agreed with the DCC submission to separate policy on stormwater management from wastewater. This is appreciated and makes the RPS much clearer and more focussed.
- 35 The remaining issue for DCC is that Policy LF-FW-16 dealing with wastewater inconsistently uses the phrase to the greatest extent practicable. DCC considers this is a strong directive, but one that recognises that upgrades to large reticulated networks such as stormwater and wastewater need to be upgrades to the greatest extent practicable (and preferably in line with a coordinated strategy as previously addressed).
- 36 Mr Taylor has recommended changes to Policy LF-FW-16(1) and (2) to align this wording (paragraphs 71 and 72). Currently the recommendation of the section 42A report is for:
- (a) LF-FW-16(1) to require phasing out of existing discharges to water "to the greatest extent possible";
 - (b) LF-FW-16(2) has no such phrase simply "requiring...";
 - (c) LF-FW-16(3) does require reticulation of wastewater in urban areas "to the greatest extent practicable".
- 37 It is submitted all these policies should be predicated on consistently achieving the outcomes to the greatest extent practicable. To the extent "possible" seems to imply at any cost, and may have no regard to what may be affordable for a community.

Other Matters

- 38 There are a number of smaller tidy-up and recommended changes Mr Taylor has recommended in his evidence. DCC take the position it supports these and requests them to be made to the RPS as set out by Mr Taylor, or changes to like effect.

Dated this 4th day of September 2023



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