

Before the Otago Regional Council

Under the Resource Management Act 1991 (**RMA**)

In the matter of The Otago Regional Policy Statement – Non-Freshwater Parts

Dunedin City Council

Submitter

Legal submissions on behalf of Dunedin City Council

15th September 2023

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May it please the Hearing Panel:

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

DCC's position

- 2 As previously submitted on behalf of DCC, a key issue has been the use of "avoid" as a policy setting in the notified RPS in various contexts. Most notably in terms of avoiding effects on the environment.

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

- 3 The Supreme Court has determined that tensions within, and I submit 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.

...

- 4 From the DCC's point of view this means that the RPS, where it can anticipate situations where conflict within or between national policy instruments exists, should, as far as possible, appropriately resolve those tensions or create a set of principles for the resolution of conflict at the consent stage.
- 5 One matter traversed by much of the expert evidence, including by the DCC's own planning witnesses, was the degree to which either: (1) policies that use directive language such as 'avoid' or 'enable' should include appropriate qualifiers such as 'avoid... unless', to direct situations where avoidance or enablement is not required; or (2) that policies should be read as a whole, meaning that balancing matters do not need to be included.
- 6 I submit that given the Supreme Court's recent decision it would be inappropriate to rely on policies being read as a whole and that either: the conflict must be resolved in the wording of the policy, the need for directive language reconsidered, or that principles be provided to resolve the conflict that will appropriately give effect to all national instruments.
- 7 One such tension the DCC has submitted about is the need in Dunedin City for urban land supply with a margin, and the associated infrastructure to support that urban growth. Such provision for housing is mandated by the NPS-UD.
- 8 Provision for such infrastructure to support urban growth such as roading or stormwater management for example, must proceed to accommodate growth to give effect to the NPS-UD. Such work can have effects on the environment in their locality. This is where a tension with the notified provisions of the RPS, where it sought in places to avoid certain effects, creates an unreconcilable tension. Likewise, the policy direction to support growth options, if it uses directive language, must address the need for any associated infrastructure to meet the environmental objectives of the RPS.
- 9 It is noted that the s42A report of Ms White has responded to this issue and promoted a number of changes to amend the language of policies to ensure the RPS does not create unresolved conflicts between its own policies and objectives, particularly where they are giving effect to national instruments. This shift is supported and is more consistent with the direction from the Supreme Court to resolve such tensions rather than leaving them in direct conflict.
- 10 Overall it is therefore submitted that the principles cited above from the Supreme Court support the DCC's position. This is to temper the avoid language in the RPS where it relates to urban growth needs for the City of Dunedin and the essential infrastructure needs to support that growth.

Dated this 15th day of September 2023



Michael Garbett
Counsel for the Dunedin City Council