

**BEFORE THE ENVIRONMENT COURT  
CHRISTCHURCH REGISTRY**

ENV-2018-CHC-

**UNDER** the Resource Management Act  
1991

**IN THE MATTER** Of an appeal pursuant to section  
120

**BETWEEN** **OTAGO HARBOUR  
PRESERVATION  
UNINCORPORATED GROUP**  
  
**Appellant**

**AND** **DUNEDIN CITY COUNCIL**  
  
**Respondent**  
  
**OTAGO REGIONAL COUNCIL**  
  
**Respondent**

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**NOTICE OF APPEAL**

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**GALLAWAY COOK ALLAN  
LAWYERS  
DUNEDIN**

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TO: The Registrar  
Environment Court  
Christchurch

1. The Appellant appeals against a joint decision of the Dunedin City Council and the Otago Regional Council ("The Councils") to grant the following resource consents ("the Resource Consents"):
  - (a) Coastal Permit Application ORC RM17.229.01 to place a pontoon structure within the Coastal Marine Area;
  - (b) Coastal Permit Application ORC RM17.229.02 to occupy the Common Marine and Coastal Area with a floating pontoon;
  - (c) Coastal Permit Application ORC RM17.229.03 to disturb the Coastal Marine Area while striking golf balls and to recover golf balls; and
  - (d) Land Use Consent DCC LUC 2017-408 to establish and operate a recreational tourism activity.

Collectively referred to as "The Decision".

The applicant applied to the Dunedin City Council and the Otago Regional Council for the Resource Consents in order to establish and operate a tourism business in a local purpose reserve adjacent to Portobello Road. The proposed activity comprises a golf "hole in one challenge" onto a pontoon green located 95 metres off shore. The land based portion of the proposed activity is zoned Residential 1 in the Operative Dunedin City District Plan.

2. The members of the Otago Harbour Preservation Unincorporated Group made submissions on the application for the Resource Consents (DCC submission numbers: 1, 3, 10, 11, 14 15 and 17; ORC submission number 8). The submitters now comprising the Otago Harbour Preservation Unincorporated Group are as follows:
  - (a) Johnny Van Leeuwen;
  - (b) Haley Van Leeuwen;
  - (c) Adam Cullen;
  - (d) Kathryn Cullen;
  - (e) Craig Latta;
  - (f) Phil Hudson;
  - (g) Tracey Hudson;

- (h) Durham Throup;
  - (i) Patricia McNaughton;
  - (j) Craig McEwan;
  - (k) Jean Sutherland; and
  - (l) Claas Damken.
3. The Appellant received notice of the Decision on 29 May 2018.
  4. The decision maker was the Dunedin City Council and the Otago Regional Council by way of a joint decision.
  5. The Appellant has the right to appeal this decision under section 120 of the Resource Management Act 1991 ("RMA"). The decision to which this appeal relates is not one of those activities excluded by section 120(1A) or (1B) of the RMA.
  6. The Appellant is not a not trade competitor for the purposes of section 308D of the RMA.
  7. The Decision the Appellant is appealing is:
    - (a) The entire decision to grant the Resource Consents outlined in paragraphs 1(a)-(d) above.
  8. The land affected is:
    - (a) 139 Portobello Road, Vauxhall, being that land legally described as Section 1, 5 Survey Office Plan 394230, held in Computer Interest Register 403802. It is a local purpose reserve adjacent to Portobello Road immediately to the south of the reserve containing the Vauxhall Yacht Club.
  9. The resource affected is:
    - (a) The Common Marine and Coastal Area in Vauxhall, approximately 400 metres south west of the intersection of Doon Street and Portobello Road.
  10. The reasons for the appeal are as follows:
    - (a) The Councils erred in relation to the status of the reserve by:
      - (i) Accepting that with the conditions placed on the Resource Consents reduced the adverse effects of the proposed activity to be minor;
      - (ii) Failure to give adequate consideration to the residential character of the area, and associated

objectives and policies within the Dunedin City Council Operative District Plan (“ODP”);

- (iii) Placing too greater weight on Objective 8.2.6 and Policy 8.3.11 to support the establishment of a commercial recreational activity within the residential zone.
  - (iv) Failing to impose appropriate conditions to manage the adverse effects of the operation on residential amenity.
- (b) The Councils erred in relation to parking and access to the site by:
- (i) Finding that the proposed activity is consistent with the objectives and policies of the ODP for transportation, and in particular objective 20.2.2 and policy 20.3.;
  - (ii) Accepting that the traffic generated by the proposed activity will be similar in effect to what is currently undertaken on the site;
  - (iii) Giving inadequate consideration given to the traffic safety implications of the coffee cart on Portobello Road, particularly during the morning commute.
- (c) The Councils erred in relation to noise effects by:
- (i) Failing to consider noise effects from properties beyond the properties at 141 and 134 Portobello Road;
  - (ii) Not giving adequate consideration to the characteristics of noise from the proposed activity and it’s compatibility with residential amenity. Particularly during times of the day and year when residents are most frequently using their outdoor amenity areas.
  - (iii) Failing to impose appropriate conditions to ensure that predicted noise levels are achieved once the activity becomes operative.
  - (iv) Failing to put in place appropriate management regime to ensure noise effects are minimised to the extent practicable on an ongoing basis.
- (d) The Councils erred in relation to visual effects by:
- (i) Accepting the modifications and conditions proposed resolves the issues of signage;
  - (ii) Finding that the pontoon will not be visually intrusive and failing to put in place appropriate conditions to manage visual effects, particularly in the event that the activity ceases either permanently or temporarily.

- (e) The Hearing Panel erred in relation to effects on recreation activities by:
- (i) Finding that the nature of the physical effects on the environment will be the same as what already occurs on the subject site;
  - (ii) Accepting that golfing operations starting after 9am and the conditions requiring a spotter, are sufficient to allow the public to freely use the space occupied by the strike zone;
  - (iii) Accepting that even if people perceive the strike zone as a prohibited area for recreation that due to the relatively small size of the area (1.06 ha) people can instead navigate around the strike zone and pontoon area. This demonstrated a mis-understanding about the importance of the proposed site to harbour users due to it being sheltered from prevailing winds;
  - (iv) Accepting that the applicant had carefully selected the subject site out of a range of alternative sites.
- (f) The Hearing Panel erred in relation to effects on wildlife and seabed by:
- (i) Accepting the evidence of Mr Dodds in relation to the trial ball retrieval test given that the methodology did not reflect that being promoted by the Applicant for operational purposes;
  - (ii) Accepting that all the golf balls can and will be retrieved as this is necessary for the viability of the proposed activity;
  - (iii) Failing to take into account the toxicity of golf balls remaining in the ocean, or the risk that they may pose to wildlife if left in the water.
  - (iv) Failing to give due consideration to the cumulative effects of balls being left on the sea floor over the 25 year duration of the consent.
  - (v) Failing to impose appropriately robust conditions to ensure that ball retrieval occurs at satisfactory rates and frequency.
- (g) In light of the errors identified in paragraphs (a)-(f) above there is potential for significant adverse effects on the coastal environment. Section 6 requires that the coastal environment is protected from inappropriate use and development. Further, without appropriate conditions the proposed activity will not maintain residential amenity values. As such, the purpose of the Act is not achieved.

11. The appellant seeks the following relief:

- (a) In relation to the Coastal Permit Application ORC RM17.229.01 to place a pontoon structure within the Coastal Marine Area the appellant seeks conditions added to the effect that:
- (i) The bird deterrent device to be placed on the pontoon must not be easily visible from a residential area;
  - (ii) The bird deterrent device must be reviewed within 3 months of the anniversary of the commencement of the proposed activity to ensure that it is not interfering with the peace and enjoyment of residents in the residential area and to ensure it is effective at deterring birds;
  - (iii) The pontoon must be painted in natural colours with an LRV of no more than 15%;
  - (iv) No lighting be placed on the pontoon other than Navigational lighting installed pursuant to advice from the Otago Regional Council Harbourmaster and Maritime Rules Part 40C;
  - (v) Any signage on the pontoon must not use bright colours and must have a LRV of no more than 25%;
  - (vi) Lettering on the pontoon not exceed 30cm in height.
- (b) In relation to the Coastal Permit Application ORC RM17.229.02 to occupy the Common Marine and Coastal Area with a floating pontoon the appellant seeks conditions added to the effect that:
- (i) The bird deterrent device to be placed on the pontoon must not be easily visible with plain sight from a residential area;
  - (ii) The bird deterrent device must be reviewed within 3 months of the anniversary of the commencement of the proposed activity to ensure that it is not interfering with the peace and enjoyment of residents in the residential area and to ensure it is effective at deterring birds;
  - (iii) The pontoon must be painted in natural colours with an LRV of no more than 15%;
  - (iv) Any signage on the pontoon must not use bright colours and must have a LRV of not more than 25%;
  - (v) Lettering on the pontoon not exceed 30cm in height.
  - (vi) No lighting be placed on the pontoon other than Navigational lighting installed pursuant to advice from the Otago Regional Council Harbourmaster and Maritime Rules Part 40C;

- (vii) The pontoon must be removed if the Golf activity ceases for 6 months.
  - (viii) Signage be placed at all nearby boat ramps advising water users that the strike zone is not a prohibited area and may continue to be used by water users.
- (c) In relation to the Coastal Permit Application ORC RM17.229.03 to disturb the Coastal Marine Area while striking golf balls and to recover golf balls the appellant seeks conditions added to the effect that:
- (i) A Golf Operation Plan be prepared, approved and implemented that addresses the following:
    - (1) Method of ball retrieval;
    - (2) Frequency of ball retrieval, being not less than weekly (except where no balls have been hit in the preceding week).
    - (3) Requirement to record the number of balls hit into the CMA;
    - (4) Requirement to record any balls hit outside of the strike zone;
    - (5) Requirement to record the number of balls retrieved and report to consent authority if retrieval target is not met for more than 4 weeks in a row.
    - (6) Obligation to have spotter in place at all time when customers are striking balls. Details of the spotter's obligations to halt activities when the following are within the strike zone:
      - (a) Other water users;
      - (b) Wildlife including birds, seals, sealions, dolphins.
  - (ii) Consent holder to achieve ball retrieval target of no less than 100%;
  - (iii) Report quarterly to the Council on the ball retrieval rates relative to the ball retrieval target and what steps are taken to improve recovery rates if the target is not met.
  - (iv) Obligation to cease operation if ball retrieval target is not met over 12 month period.
  - (v) Before the proposed activity commences, photographs of the sea bed within the strike zone and the area occupied by the proposed activity on the reserve to be taken a baseline before the proposed activity

commences. Within 3 months of the first anniversary of commencement the consent holder must take new photographs of the same area to compare any effects of the activity on the environment and repeat this on a quarterly basis. Photographs and review must be undertaken by an suitably qualified and independent expert;

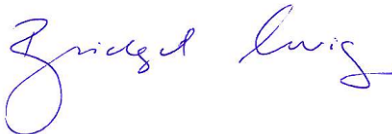
- (vi) Any rubbish and/or waste that the diver and/or wader come into contact with while retrieving the golf balls must be removed from the sea bed and deposited in an appropriate recycling facility or waste facility if the rubbish cannot be recycled.
  - (vii) Conduct daily checks of the seashore and retrieve any rubbish and golf balls washed up 200m either side of the caravan.
  - (viii) Use low toxicity golf balls.
- (d) In relation to Land Use Consent DCC LUC 2017-408 to establish and operate a recreational tourism activity the appellant seeks conditions to address the following:
- (i) Noise Management including
    - (1) Noise levels from the consented activities at the notional boundary of residential dwellings does not exceed  $46\text{dB}_{\text{Leq15}}$  measured in accordance with NZS 6801:2008 Acoustics – Measurement of environmental noise.
    - (2) Monitoring of noise levels to be completed by a suitably qualified and independent professional within 6 months of becoming operational. With the results to be provided to Council;
    - (3) Details of the golf clubs and balls to be used to minimise noise generation;
    - (4) Complaints procedure, including information to be recorded by the consent holder the steps taken in response to complaints.
    - (5) Steps to be taken by the consent holder to manage customer behaviour in order to minimise noise and negative effects on residential amenity.

The Noise Management Plan must be reviewed by a suitably qualified and independent expert annually for the first 3 years of operation and 5 yearly following that. Result of the review to be submitted to Council within 1 month of anniversary of commencement of the activity.



- (ii) The hours of operation for any golfing activity be from 9am to 5pm 7 days a week;
  - (iii) The hours of operation for the sale of coffee on the reserve be from 9am to 3pm 7 days a week;
  - (iv) No golfing activity to occur on public holidays;
  - (v) No lighting is to be installed on the pontoon (except for navigational lighting) or on any area of the reserve;
  - (vi) Consent holder to remove any rubbish and/or waste within a 25m of the perimeter application site and deposit it in an appropriate recycling facility or waste facility if the rubbish cannot be recycled;
  - (vii) Consent holder to ensure that any rubbish produced from the sale of coffee be recycled where possible in order to reduce waste being put into landfills;
  - (viii) Include details on any permitted signage as to the location of nearby toilets and that the reserve area and CMA can be used freely by the public;
  - (ix) Limit the colour of signs to natural tones, black fonts and have a light reflective value ("LRV") of less than 25%;
  - (x) Limit the area of land occupied on the reserve to what has been prescribed in the application for the proposed activity and prohibiting the addition of seating and/or picnic tables not already provided in the reserve;
  - (xi) But measures in place to limit the ability for the teeing off area to be used by the public outside of operating hours;
  - (xii) Before the proposed activity commences submit the proposed bird deterrent devices to be reviewed by the Council to ensure they are effective at deterring birds and do not adversely effect visual amenity in the residential zone;
- (e) Any other conditions required to give effect to the relief above;  
or
  - (f) In the alternative, if the above matters are not or cannot be addressed by conditions of consent the appellant seeks that consent be refused; and
  - (g) Cost of an incidental to this appeal.
12. The Appellant attaches the following documents to this notice:
- (a) A copy of the appellants original submissions (**attachment A**);

- (b) A copy of the Decision of the Respondents (**attachment B**);  
and
- (c) A list of names and addresses of persons to be served with a  
copy of this notice (**attachment C**).

Signed: 

B Irving

Solicitor for the Appellant

**DATED** this 20<sup>th</sup> day of June 2018

Address for service

of Appellant: C/- Gallaway Cook Allan  
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Contact person: Bridget Irving / Simon Pierce

### **Advice to recipients of copy of notice of appeal**

1. How to become a party to proceedings

If you wish to become a party to the appeal, you must, -

- (a) within 15 working days after the period for lodging a notice of appeal ends, lodge a notice of your wish to be a party to the proceedings (in form 33) with the Environment Court and serve copies of your notice on the relevant local authority and the appellant;
- (b) within 20 working days after the period for lodging a notice of appeal ends, serve copies of your notice on all other parties.

Your right to be a party to the proceedings in the Court may be limited by the trade competition provisions in section 274(1) and Part 11A of the Resource Management Act 1991.

You may apply to the Environment Court under section 281 of the Resource Management Act 1991 for a waiver of the above timing or service requirements (refer form 38).

2. How to obtain copies of documents relating to appeal

The copy of this notice served on you does not attach a copy of the relevant application and the relevant decision. These documents may be obtained, on request, from the appellant.

3. Advice

If you have any questions about this notice, contact the Environment Court in Christchurch.

**Attachment A – Copy of the appellants original submissions**

**Attachment B – Copy of Respondents’ Decision**

**Attachment C – Names and addresses of persons to be served with a  
copy of this notice**

Name	Address	Email
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Save The Otago Penninsula Inc Society	PO Box 23, Portobello, Dunedin, 9048	<a href="mailto:stopcsoc@gmail.com">stopcsoc@gmail.com</a>