

**BEFORE THE COMMISSIONERS APPOINTED BY THE
DUNEDIN CITY COUNCIL**

IN THE MATTER

Of a submission pursuant to
clause 5, Schedule 1 of the
Resource Management Act
1991 (the **Act**)

AND

Variation 2 to the Dunedin
City Council Second
Generation District Plan
(**Variation 2**)

BETWEEN

Aurora Energy Limited

Original Submission 217

**SUBMISSIONS OF COUNSEL ON BEHALF OF AURORA ENERGY
LIMITED**

DATED 6 DECEMBER 2021



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SUBMISSIONS OF COUNSEL ON BEHALF OF AURORA ENERGY LIMITED

May it please the Commissioners:

Introduction

1. Counsel acts for Aurora Energy Limited (**Aurora**) who appeared before the commission with respect to the first hearing on Variation 2. For completeness, these submissions repeat many of the introductory and background matters relevant to Aurora's network and the higher order planning provisions.
2. Aurora owns and operates electricity distribution infrastructure that supplies electricity to more than 92,000 homes in the Queenstown Lakes, Dunedin and Central Otago Districts.
3. Aurora is the electricity distribution network provider for Dunedin City. Its network comprises an extensive network of sub-transmission conductors, underground cables, lines and supporting structures, transformers, zone substations and other infrastructure which connects Transpower's Transmission Network and provides individual connections to customers.
4. Aurora's has been involved with the review of the Dunedin City Council Second Generation District Plan (**2GP**) for some time. It lodged an original submission when the 2GP was notified in 2015 and an appeal to the Environment Court (and various s 274 notices) in late 2018. That appeal has been resolved by the parties and a consent memorandum is expected to be lodged with the Court in the coming months.
5. Aurora's involvement in the 2GP has focussed on recognising and providing for the effective and efficient operation of its network. A critical aspect of the operation of Aurora's network includes management of other land use activities which may locate near overhead conductors which have the potential to create reverse sensitivity effects. The effects are two-fold:

- (a) Potential adverse effects on the health and safety and wellbeing of people in proximity to overhead conductors; and
 - (b) The proximity of buildings and structures to conductors which affects Aurora's ability to access its infrastructure for the purpose of operating and maintaining its network.
6. The particulars of Aurora's submission for the purpose of this hearing are listed below:
- (a) **OS217.002** (F1-3) Amend 9.2.1.3.X by removing the words 'National Grid'.
 - (b) **OS217.003** (F1-1) Retain Rule 9.3.7.2 (Service Connections) as notified.
 - (c) **OS217.004** (F1-1) Amend Rule 9.3.7.X.a (Telecommunications and power), as follows (the amendment shown in underlined text below):
 - a. Subdivision activities must provide all resultant sites with telecommunication (including UltraFast Broadband where available) and power supply, and associated easements, to the site boundary.
 - (d) **OS217.005** (F1-1) Amend Rule 9.3.7.X (Telecommunications and power) by adding an additional advice note below this rule, framed as 9.3.7.XA, as follows:

Note 9.3.7.XA General advice and requirements that sit outside the District Plan

 - a. The provision of electricity to resultant sites is controlled by electricity related legislation and regulations. Electricity providers are required to take ownership of new and existing electricity infrastructure up to a "point of supply" as defined by section 2(3) of the Electricity Act 1992.b. In relation to existing electricity infrastructure up to a point of supply, an electricity provider may require information about the location, age, of the infrastructure, including any certificate of compliance issued by an electrician as required by Section 65 of the Electricity (Safety) Regulations 2010.

- (e) **OS217.006** (F1-3) Amend Rule 9.5.3.12.X Assessment of performance standard contraventions - Service connections, by removing the words 'National Grid'.
7. The s 42A Report Author recommends that Aurora's submission on F1-3 (described at (a) and (e) above) be accepted on the basis that electricity connections to consumers can only be obtained from an electricity distribution network as opposed to the National Grid electricity transmission network. Given the support from the s 42A Report Author on these points, we do not consider them further, except to the extent that they provide tangential scope for change F1-1.
 8. We also do not consider OS21.003 on the basis that it is proposed to be retained, consistent with that submission.
 9. The matters addressed by evidence and submission with respect to this hearing are focused on Change F1-1, and in particular OS217.004 and OS217.005. Those submissions are supported by the evidence of Ms Joanne Dowd (Planning Property & Environment Manager at Aurora) dated 30 November 2021.
 10. These submissions are structured as follows:
 - (a) Background
 - (b) Council functions and statutory considerations
 - (i) Regionally Policy Statement (2019 and 2021)
 - (ii) District Plan Provisions
 - (c) "On the plan"
 - (d) Conclusion

Background

11. The impetus to Aurora lodging a submission on Variation 2 is deeply seeded in the property rights, access and the practical aspects that come along with the provision of electricity supply to the community. In essence, Aurora's submission seeks a consistent approach to the

provision of easements in gross in circumstances where an infill-subdivision is created and a new “point of supply” (as described in the evidence of Ms Dowd) is created within private property.

12. Council and surveying firms have provided easements in gross to Aurora in the case of infill subdivisions. However, Aurora does not know (and cannot know) whether easement are provided in all instances, or not. In light of the higher order policy framework, it is important to ensure certainty of access for the purpose of enabling Aurora to access the electricity infrastructure if required in future.

Council Functions and Statutory Considerations

13. Counsel submits that the question of weight as between the PDP Strategic Direction Chapters, higher order planning instruments and part 2 of the RMA is a matter for the Panel’s discretion. The Environment Court in *Colonial Vineyard Limited v Marlborough District Council*¹ clarified the legal considerations in which the evidence on a plan change should be considered. The Environment Court in that case provided a comprehensive list of considerations to apply or have regard to when deciding a plan change. It is anticipated that those principles are well-known to this panel so I will not reiterate them here.

Regional Policy Statement

14. The Panel must have regard to any proposed Regional Policy Statement when preparing and changing its District Plan and must give effect to any operative Regional Policy Statement and must also have regard to any matter of regional significance.³ The Regional Policy Statement for Otago 2019 (**RPS19**) was made partially operative in March 2021. For the purpose of Aurora’s infrastructure all provisions of RPS19 are operative. Accordingly, we have not given any consideration to the 1998 Regional Policy Statement.
15. However, since Variation 2 was notified Otago Regional Council has notified the Proposed Regional Policy Statement for Otago June 2021

¹ [2014] NZEnvC 55, more recently summarised in *A & A King Family Trust v Hamilton City Council* [2016] NZEnvC 229.

(RPS21). Therefore, as a proposed regional policy statement, it is relevant to the Panel's determination. The relevance of the RPS19 and RPS21 to these submissions are where they seek to provide for the functional needs of network utilities.

16. There is no statutory guidance on how a weighting exercise is to be carried out. The relevant principles are established in case law. The leading case is *Keystone Ridge Ltd v Auckland City Council*²:

...In considering the weight that we give to it we take into account the following principles which arise from the various cases:

The Act does not accord proposed plans equal importance with operative plans, rather the importance of the proposed plan will depend on the extent to which it has proceeded through the objection and appeal process.

The extent to which the provisions of a proposed plan are relevant should be considered on a case by case basis and might include:

- (i) the extent (if any) to which the proposed measure might have been exposed to testing and independent decision-making.
- (ii) circumstances of injustice.
- (iii) the extent to which a new measure, or the absence of one, might implement a coherent pattern of objectives and policies in a plan.

In assessing the weight to be accorded to the provisions of a proposed plan each case should be considered on its merits. Where there had been a significant shift in Council policy and the new provisions are in accord with Part II, the Court may give more weight to the proposed plan.

17. In *Queenstown Central Ltd v Queenstown Lakes District Council*, Fogarty J said:³

[9] It is the scheme of the RMA that there is always an operative plan, and often a proposed plan. Before any consents are granted, the

² *Keystone Ridge Ltd v Auckland City Council* HC Auckland AP24/10, 3 April 2001, at [16] and [37].

³ *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [9].

operative plan has to be applied, and regard must be had to the proposed plan, s 104. The jurisprudence is that the closer the proposed plan comes to its final content, the more regard is had to it. Consent has to be given under both plans. The extent that the plan has progressed through the plan-making process (the closer the proposed plan comes to its final content; generally more regard may be had to it).

18. We address each of the Keystone factors below:
19. RPS21 was only recently notified and the submission and further submission period recently closed. The Freshwater Commission is expected to receive a report on this process by the end of this year and a hearing process commenced in 2022.
20. Counsel assisted Aurora in preparing a submission on RPS21 and consulted with other infrastructure providers on similar provisions, including Transpower and Spark. Considerable submission points were received on the infrastructure chapter of the RPS21. In particular Aurora and Transpower seek stronger recognition of the functional needs of infrastructure, particular because of the integral nature of those activities to the health and wellbeing of people and communities, including the safety of vulnerable persons.
21. There is an element of injustice with respect to the timing of RPS19 becoming partially operative and RPS21 being notified - the latter document being notified only 3 months after the former was made partially operative. Furthermore, the national and ministerial direction that required the RPS21 to be notified related to concerns about the management of freshwater resources in Otago, and in particular to implement the National Policy Statement for Freshwater Management 2020 and the National Policy Statement on Urban Development 2020. That direction did not require a wholesale review of the infrastructure provisions of RPS19, which is what RPS21 has done.
22. Given the above, Counsel submits that RPS19 is to be afforded greater weight than the provisions of RPS21. Given that both documents are relevant, we set out the key provisions that Counsel submit support inclusion of a stronger approach to managing land use activities in proximity to electricity distribution infrastructure.

Partially Operative Regional Policy Statement 2019

23. Below is a summary of the key provisions of RPS19 with respect to the management of activities on Aurora's electricity distribution network. Counsel has approached the assessment of the relief sought in the context of the extent to which it is to be provided for, or is supported by the provisions of PRPS19 (and PRPS21).

Objective 4.3 Infrastructure is managed and developed in a sustainable way

Issue:

Social and economic wellbeing depends on having adequate infrastructure. Failing to provide for its functional needs can result in adverse effects.

24. Objective 4.3 identifies the importance to provide for the functional needs of infrastructure and how failing to provide for it can lead to adverse effects. In terms of the 2GP, failing to consider the electricity distribution network for activities that protrude beyond anticipated height plane levels and may lead to reverse sensitivity effects or create health and safety risks.

Policy 4.3.1 Managing infrastructure activities

Recognise and provide for infrastructure by all of the following

- (a) *Protecting and providing for the functional needs of lifeline utilities and essential emergency services;*
- (b) *Increasing the ability of communities to respond and adapt to emergencies, and disruptive or natural hazard events;*
- (c) *Improving efficiency of natural and physical resource use;*
- (d) *Minimising adverse effects on existing land uses, and natural and physical resources;*
- (e) *Managing other activities to ensure the functional needs of infrastructure are not compromised.*

[Emphasis added]

25. Aurora is a “lifeline utility” as defined by the Civil Defence Emergency Management Act 2002⁵ being an entity that distributes electricity through a network. Notably, that includes the entirety of Aurora’s network, not just those parts that RPS21 deems to be regionally significant. As set out in the evidence of Ms Dowd, maintaining the electricity supply to a property provides for the health and wellbeing of people and communities.
26. Furthermore, there may be particularly vulnerable people or groups that may have their health and wellbeing jeopardised in the event of a fault in their electricity supply through private property. The risk/consequences of not being able to access the cable within private property is increased where Aurora does not have an easement over that cable as negotiating access may cause delay or access refused. Certainty of access is required to ensure this risk is avoided.
27. Policy 4.3.1 also seeks to minimise adverse effects on existing land uses, including all of Aurora’s existing infrastructure, as well as to manage any other activities not covered by (a) to (d) to ensure that the functional needs of infrastructure are not compromised. This is relevant with respect to the need for Aurora to have some oversight in relation to what land use activities can on the land over which an electricity cable is located, including managing buildings, structures and planting to ensure that the integrity of that electricity supply is maintained as well as providing for Aurora’s ability to access that electricity for the purpose of maintenance or repair.
28. The term “functional needs” has the same definition in the PRPS and the PDP and means: the locational, operational, practical, or technical needs of an activity, including development and upgrades.⁶ Functional needs. The technical and operational needs of an activity necessarily include its ability to adequately provide electricity supply to a property. That ability is comprised in the event of a fault.⁷ The functional needs of infrastructure are provided for in the following PRPS provisions:

Policy 4.3.3 Functional needs of infrastructure that has national or regional significance

Provide for the functional needs of infrastructure that has regional or national significance, including safety.

Policy 4.4.5 Electricity Distribution Infrastructure

Recognise and provide for electricity distribution infrastructure, by all of the following:

Recognising the functional needs of electricity distribution activities;

- (a) *Restricting the establishment of activities that may result in reverse sensitivity effects;*
- (b) *Avoiding, remedying or mitigating adverse effects from other activities on the functional needs of that infrastructure;*
- (c) *Minimising adverse effects of new and upgraded electricity distribution infrastructure on existing land uses;*
- (d) *Identifying significant electricity distribution infrastructure and managing effects of potentially incompatible activities through methods such as corridors.*

[Emphasis added]

29. Method 4.1 provides that all objectives and policies of the PRPS must be considered and given effect to when preparing district plans. That necessarily includes the provisions referred to above. Method 4.1 says:

Policy 4.3.1: by providing controls adjacent to infrastructure where necessary to ensure the functional needs of infrastructure are not compromised

30. The evidence of Ms Dowd outlines Aurora's requirements for access to electricity cables up to a point of supply where the said cable is located within private property (not owned by the person whom the electricity cable supplies). Ms Dowd's evidence is that Aurora has observed an inconsistent approach to the provision of easements in its favour in cases of infill subdivision. In cases where easements are not offered, then Aurora has no legal rights of access to that property.

31. Although it will largely be the case that private easements are granted between landowners they may be on terms that are not generally acceptable or appropriate to Aurora. Additionally, even where the implied rights under the Land Transfer Regulations 2018 are adopted they do not necessarily provide recourse for the damage or removal of significant improvements that has been made by the landowner over the electricity cable.

Proposed Otago Regional Policy Statement 2021

32. Below is a summary of provisions of RPS21 relevant to the management of land use activities and infrastructure.

EIT-INF-P10 – Recognising resource requirements

Decision making on the allocation or use of natural and physical resources must take into account the needs of nationally and regionally significant infrastructure.

33. EIT-INF-P10 recognises the relationship between the effects of and on regionally significant infrastructure from the allocation and use of natural and physical resources. The allocation of natural and physical resources is realised through subdivision and land use consents. Counsel submits that in determining the grant of a subdivision consent for an infill subdivision it is important to consider whether the maintenance and operation of the resultant lots electricity supply is provided for.

District Plan Provisions

34. The 2GP goes some way to recognise and provide for Aurora's network, particularly in terms of its functional or operational needs. Strategic Objective 2.3.1 is directive in that regard, providing

Strategic Objective 2.3.1

Land, facilities and infrastructure that are important for economic productivity and social well-being, which include industrial areas, major facilities, key transportation routes, network utilities; and productive rural land:

- (a) are protected from less productive competing uses or incompatible uses, including activities that may give rise to reverse sensitivity; and
 - (b) in the case of facilities and infrastructure, are able to be operated, maintained, upgraded and, where appropriate, developed efficiently and effectively.
35. SO 2.3.1 seeks to *protect* infrastructure from incompatible land use that may give rise to reverse sensitivity, which, in Counsel's submission gives effect to (inter alia) RPS21 EIT-INF-P15 and RPS19 Policy 4.3.1(e). Counsel submits that this direction provides a basis upon which to include additional guidance in the 2GP as to the provision of easements and the types of information required by Aurora to support it taking over maintenance and operation of the electricity cable within private property up to the point of supply.
36. Objective 5.2.2 implements SO 2.3.1 and says:

Objective 5.2.2

The operational efficiency and effectiveness of network utilities is not compromised by development locating near these activities.

37. Aurora's standard easement instrument includes terms that limit a landowners ability to locate buildings, structure or plantings within the proposed electricity easement area without first seeking Aurora's consent. This has an important function in terms of ensuring that the operational efficiency and effectiveness of Aurora's electricity network is not compromised up to a point of supply.

"On the plan"

38. With respect to Change F1-1, the s 42A Report Author concludes that:

"20 original submissions were received on Change F1-1 with two in support of the changes and 18 seeking changes. No further submissions were received to submissions on Change F1-1. All submissions seeking changes are substantive in nature and cannot be considered as part of Change F1-1."

[Emphasis added]

39. The Author goes further to note:

I recommend that Change F1-1 be retained as notified because all requests for amendments are beyond the scope of the purpose of this change.

40. Counsel accepts the case law authorities relating to whether a submission is “on a plan change” including the summary contained in the decision of the Independent Hearings Panel dated 31 May 2021 which, for convenience, is produced below:⁴

We received advice on relevant case law from the reporting officer, which she stated had informed the approach to her assessments and recommendations. In particular, the s42A Report referred to the recent Environment Court decision *Calcutta Farms Limited v Matamata-Piako District Council*⁵; the High Court case *Palmerston North City Council v Motor Machinists Limited*⁶; and the High Court decision in *Clearwater Resort Limited v Christchurch City Council*⁷.

The Panel agrees that the s42A Report has accurately summarised the key points of these cases. We agree that to be regarded as ‘on’ a variation, and in scope, a submission must:

- (i) Address the extent to which the variation changes the plan;
- (ii) Not be coming out of ‘left field’;
- (iii) Reasonably be said to fall within the ambit of the variation, with incremental or consequent extensions to zoning changes requiring no additional section 32 analysis; and
- (iv) Not carry a risk that people affected by the variation (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.⁸

41. We understand this to be the Panel’s interpretation of the *Clearwater test*. For completeness, we outline the *Clearwater test* below:⁹

⁴ Decision of independent hearing panel dated 31 May 2021 of a determination of ‘out of scope’ submissions lodged in relation to proposed Variation 2 to the Proposed Second-Generation Dunedin City Plan.

⁵ [2018] NZEnvC 187.

⁶ HC, Palmerston North, Kos J, 3 May 2013.

⁷ AP34/02, 14 March, Young J.

⁸ Decision at para 11.

⁹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34-02, 14 March 2003 at [66]

- (a) A submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.
- (b) But if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against any argument that the submission is truly “on” the variation.

42. Change F1-1 is summarised as follows:

- (a) Purpose statement: Review the layout of Rule 9.3.7 to enable other changes to be made.
- (b) Description of change: Makes a minor change to the layout of the service connections performance standard (Rule 9.3.7) to enable other changes to be made through Variation 2.
- (c) Provisions affected by change: Amend Rule 9.3.7, including adding new sub-headings (9.3.7.X, 9.3.7.Y, 9.3.7.Z).

43. The purpose statement sits within the broader context of the s 32 Report, in which the Author records the matters which Variation 2 addresses as follows:

Variation 2 addresses the shortfall in housing over the short and medium term by zoning more land for housing (adding new residential areas, known as ‘greenfield’ development, through new General Residential 1, Township and Settlement and Large Lot Residential 1 zoning), enabling a higher density of housing in parts of the city through new General Residential 2 zoning, and changing rules and policies to allow increased development density and flexibility of development in many residential areas of the city.

44. One of the primary mechanisms that Variation 2 seeks to address the shortfall in housing is through ‘upzoning’ large areas of residential zoning, to enable greater housing density on a site, or by enabling subdivision of sites into smaller parcels which may then be developed. This is typically referred to as “infill” subdivision and has driven the relief sought with respect to Change F1-1.

45. The provision of services is integral to utilising the development yield created by Variation 2. Although Variation 2 goes some way to provide for service connections in terms of infrastructure that Council provides (3 Waters) it does little in the way of providing for other services such as telecommunications and electricity. For example, Variation 2 provides a requirement for easements as general assessment guidance with respect to the effectiveness and efficiency of stormwater infrastructure (Rule 9.5.11.b.AA and Rule 9.5.Z.a.v). Counsel presumes that such as rule stems from Objective 5.2.2 which applies to all network utilities, including the provision of electricity. Aurora's submissions with respect to F1-1 go some way to address that inconsistency.
46. The s 42A Report Author appears to have taken a narrow view that the extent to which the variation changes the 2GP with respect to Change F1-1 is determined by the purpose statement outlined above. Counsel submits that approach should not be considered in isolation to the ambit of the submission itself, in terms of its consequential effect on the 2GP and the extent to which that introduces risk that parties may have wished to be heard on that submission and whether any further s 32 analysis may be required. Counsel submits that the impact of Aurora's submission on Change F1-1 is slight. It seeks to regularise, by way of an incremental amendment to the 2GP a practice that is understood to be implemented by Council staff and surveying firms throughout Dunedin. The need for the change, from an operational point of view, is explained in Ms Dowd's evidence which is that such a practice is not consistent and indeed Aurora cannot know the instances in which conditions have not been included in resource consents to require easements as it is necessarily not involved in registering any easements or constructing any works.¹⁰
47. Counsel submits that the submission does not 'come out of left field' because it addresses a key factor relevant to the provision of services. Furthermore, the provision of easements is already commonplace through a subdivision and land use consent process. The submission

¹⁰ Evidence of Joanne Dowd at [28].

seeks to ensure that this is enshrined as a key consideration in the 2GP.

48. Furthermore, Variation 2 seeks to increase the number of instances of infill subdivision. A corollary (or consequential) effect of increasing the instances of infill subdivision is that easements may not be offered to Aurora (in gross) where a point of supply is shifted to private property.
49. The additional advice note sought by OS217.005 is just that – advice. It does not introduce a new rule to the 2GP that might require compliance with. However, a consequence of the provision of easements (whether mandated by the 2GP or otherwise) is that Aurora must gather relevant information to assess the location and quality of the cable that has been previously installed. This assists Aurora to carry out its obligation to maintain and operate electricity within private property.
50. It is submitted that there is negligible risk that people affected by the variation would be denied an effective opportunity to participate in the plan change process. Whether the advice is included in the 2GP will not stop Aurora from requesting this information where easements are offered. For that reason, it is considered to be useful and material to plan readers in terms of considering service connections to their property.
51. For these reasons, Counsel submits that OS217.004 and OS217.005 are “on the plan”.

Conclusion

52. Counsel submits that the higher order planning instruments, including the strategic directions of the 2GP, requires lower order provisions of the 2GP recognise and provide for Aurora to maintain and operate electricity infrastructure, where, as a result of an infill subdivision the point of supply has been shifted from the road, to within private property.

53. Given the extent to which Variation 2 encourages infill subdivision throughout Dunedin it is appropriate to consider whether the ability to maintain and repair electricity infrastructure (by way of underground electricity cables) is provided for. The consequences of failing to provide access is outlined in the evidence of Ms Dowd.
54. The changes requested to F1-1 are sought to regularise an existing (albeit inconsistent) practice by Council staff and surveyor for the provisions of easements and are considered to be consequential to the purpose of the change when considered in light of what is being enabled through Variation 2.

Dated 6 December 2021

A handwritten signature in blue ink, appearing to read 'S R Peirce', with a large, stylized initial 'P'.

S R Peirce

Counsel for Aurora Energy Limited