In the Environment Court of New Zealand
Christchurch Registry

I Te Koti Taiao o Aotearoa
Ōtautahi Rohe

ENV-2018-CHC-285

Under	the Resource Management Act 1991 (**RMA**)
In the matter of	an appeal under clause 14(1) of the First Schedule of the RMA in relation to the proposed Second Generation Dunedin City District Plan (**2GP**)
Between	**The Preservation Coalition Trust**
	Appellant
And	**Dunedin City Council**
	Respondent

Submission of Counsel for Dunedin City Council in relation to jurisdiction on appeal point 71 – minimum lot size for residential activity in Hill Slopes

~~18 December 2019~~ Updated 3 April 2020

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May it please the Court

1 These legal submissions address whether the Preservation Coalition Trust's (**PCT**) appeal (appeal point 71) on Dunedin City Council's (**Council** or **DCC**) proposed Dunedin City Second Generation District Plan (**2GP**) is within scope and therefore whether the Environment Court has jurisdiction to consider this part of PCT's appeal, and/or whether a waiver to amend the appeal should be granted.

Subdivision Rule – 16.7.4.1.d

2 PCT's amended Notice of Appeal expressly appeals the minimum subdivision lot size in Rule 16.7.4.1.d (appeal point 71). This appeal is on page 4 and 5 of the appeal, and is based on the Submission made on this rule on page 33 of the Submission. This rule sets the minimum site size standard in the Rural Zone – Hill Slopes for subdivision (currently 25 hectares). The Dunedin City Council has no issue that this is clearly in scope and an appeal point that needs to be addressed.

Land use rule for Residential Activity in Rural Zone – Hill Slopes – Rule 16.5.2.1.d

3 The issue is whether the appeal does, or should, be amended to also allow a challenge to the land use rule applying to residential activity in the Rural Zone – Hill Slopes (Rule 16.5.2.1.d).

4 The relief sought for appeal point 71 in the amended Notice of Appeal is as follows[1]:

> For the Hill Slope rural zone we seek a 40ha. MSS for one residential activity, 80ha. for two residential activities and 120ha. for three residential activities.

5 PCT subsequently applied for a waiver on 26 October 2019 for the following:

> (a) Waiver of the time limit for filing an appeal against Rule 16.5.2.1(c) density rule for the Hill Slopes Rural zone);
>
> (b) Amendment of the Notice of Appeal to identify Rule 16.5.2.1(c) (density rule for the Hill Slopes Rural zone).

6 This relief in the amended Notice of Appeal reads like it is a challenge to the land use rule 16.5.2.1.d (although this is not clear).

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[1] Notice of Appeal, page 5

7 It is Council's position that:

(a) PCT specifically submitted on, and appealed the minimum lot size rule for subdivision in the Rural Zone – Hill Slopes (Rule 16.7.4.1.d);

(b) The relief sought by PCT now also seeks to challenge Rule 16.5.2.1.d which sets the minimum site size for Residential Activity in the Rural Zone – Hill Slopes; and

(c) PCT did not in its submission (via its predecessor, the Harbourside and Peninsula Preservation Coalition (**HPPC**)), challenge the land use rule (Rule 16.5.2.1.d). The first time this challenge appears is (possibly) in the amended Notice of Appeal and Statement of Issues dated 16 April 2019 and now expressly in the waiver application.

8 Council's position is that a challenge to the minimum lot size for residential activity in the Rural Zone – Hill Slopes in Rule 16.5.2.1.d was not sought in the original submission. This is a material challenge which could affect a number of property owners who may rely on the 2GP provisions to authorise residential activity on existing lots in the Rural Zone – Hill Slopes.

9 It is therefore submitted the Court should not allow such a challenge to Rule 16.5.2.1.d to be mounted by waiver, nor is it considered this can validly be pursued in the amended Appeal as it is.

Statutory basis and legal test for waiver

10 Section 281 of the RMA provides the Environment Court the power to consider waivers. In particular, section 281(1)(a) and (2)-(3) states that:

> (1) A person may apply to the Environment Court to—
>
> (a) Waive a requirement of this Act or another Act or a regulation about—
>
> …
>
> (ii) the time within which an appeal or submission to the Environment Court must be lodged;…
>
> (2) The Environment Court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced.
>
> (3) Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the

> court (to which subsection (1)(a)(ii) applies) unless it is satisfied that—
>
> (a) the appellant or applicant and the respondent consent to that waiver; or
>
> (b) any of those parties who have not so consented will not be unduly prejudiced.

11 It is my submission that there are two tests to section 281 of the RMA that must be met by the Appellant relying on that section, being:

(a) Whether the Environment Court is satisfied that there is no undue prejudice to the parties to the proceeding[2]; and

(b) Whether the Environment Court should exercise its discretion to grant the waiver[3].

12 This test is helpfully set out in paragraphs 15 and 16 of the Environment Court's decision in *Waikato Regional Council v Thames-Coromandel District Council*[4].

Statutory basis for scope

13 One of the complicating factors in this waiver application is also whether the relief now sought in the updated appeal was even sought in the Appellant's original Submission. Council do not consider that it was.

14 The starting point for considering issues of scope is clause 14 of Schedule 1 to the RMA. This clause provides for the right to appeal to the Environment Court in respect of a provision included in a proposed plan:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or

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[2] Resource Management Act 1991, section 281(2) and (3)

[3] Resource Management Act 1991, section 281(1)

[4] *Waikato Regional Council v Thames-Coromandel District Council* [2017] NZEnvC 1, at [15]-[16]

> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if—
>
> (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
>
> (b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.
>
> …

15 It is my submission that clause 14(2)(a) of Schedule 1 to the RMA provides that the Environment Court has the jurisdiction to consider an appeal point only if PCT has reasonably and fairly referred to the relevant provision, or the matter, in PCT's submission on the 2GP. This question needs to be approached in a "realistic workable fashion, rather than from the perspective of legal nicety". These principles are derived from the following cases.

Legal test for scope

16 The leading cases on the issue of scope are the High Court's decisions in *Countdown Properties (Northland) Ltd v Dunedin City Council*[5] (**Countdown**) and *Royal Forest and Bird Protection Society Inc v Southland District Council*[6] (**Royal Forest and Bird**)[7].

17 In *Countdown* the Court concluded at paragraph 166 that in deciding whether a plan amendment was properly made (**emphasis added**):

> The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is **reasonably and fairly raised in submissions** on the plan change. In effect, that is what the Tribunal did on this occasion. It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

[5] *Countdown Properties (Northland) Ltd v Dunedin City Council* [1994] NZRMA 145

[6] *Royal Forest and Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC)

[7] These principles were recently discussed by the Environment Court in relation to clause 7 of Schedule 1 to the RMA in *Arthurs Point Outstanding Natural Landscape Society Incorporated v Queenstown Lakes District Council* [2019] NZEnvC 150, at [60]-[71]

18 In *Royal Forest and Bird* the Court adopted *Countdown* and stated at page 413:

> [T]he assessment of whether any amendment was reasonably and fairly raised in the course of submissions, should be approached in a realistic workable fashion rather than from the perspective of legal nicety.

19 These decisions were cited with approval in the Environment Court case *Re an application by Vivid Holdings Limited*[8]. The Court in this case stated at paragraph 19 that:

> …in order to start to establish jurisdiction a submitter must raise a relevant resource management issue in its submission in a general way. Then any decision of the Council or requested of the Environment Court in a reference must be:
>
> a) Fairly and reasonably within the general scope of:
>
> i) an original submission: or
>
> ii) the proposed plan as notified; or
>
> iii) somewhere in between:
>
> b) Provided that:
>
> i) the summary of the relevant submissions was fair and accurate and not misleading.

20 The Environment Court considered whether the relief sought by the Appellant in *Campbell v Christchurch City Council*[9] was "fairly and reasonably raised" in the submission. After considering previous High Court cases the Court held that when considering what relief could be granted, even if not expressly sought as such in a submission, or when considering if the submission clearly expressed certain relief, the test was the same namely "*does the submission as a whole fairly and reasonably raise some relief, expressly or by reasonable implication, about an identified issue?*"[10]

21 In considering whether a submission "reasonably" raises any particular relief, the Environment Court stated that the following factors need to be considered[11]:

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[8] *Re an application by Vivid Holdings Limited* [1999] NZRMA 468

[9] *Campbell v Christchurch City Council* [2002] NZRMA 332

[10] *Campbell v Christchurch City Council* [2002] NZRMA 332 at [18]

[11] *Campbell v Christchurch City Council* [2002] NZRMA 332 at [42]

> The submission must identify what issue is involved (***Vivid***[12]) and some change sought in the proposed plan;
>
> The local authority needs to be able to rely on the submission as sufficiently informative for the local authority to summarise it accurately and fairly and in a non-misleading way (***Montgomery Spur***[13]); and
>
> The submission should inform other persons what the submitter is seeking, but if it does not do so clearly, it is not automatically invalid.

22 The Environment Court held at paragraph 53 that in undertaking this test the correct approach is to "…look at the submission in light of Council's summary of submissions..." The Court found that the appeal was within scope for the following reasons:

(a) The council officers, in summarising the submissions, had managed to spell some coherent relief out the Appellant's submission; and

(b) The references to locations in the original submission had been translated into the summaries of the relevant planning maps.

23 The Environment Court in *Cook Adam Trustees Ltd v Queenstown Lakes District Council*[14] (***Cook Adam Trustees***) took a more flexible approach to scope. The Court stated[15]:

> How far can a decision diverge from a submission or appeal? In *Countdown Properties (Northlands) Ltd v Dunedin City Council*[16] the Full Court wrote of submissions[17]:
>
> > … The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change.

24 The Environment Court in *Cook Adam Trustees* observes that councils customarily face multiple submissions, often prepared by persons without professional help. To reflect this, councils need scope to deal with the realities of

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[12] (1999) 5 ELRNZ 264 at para 19.

[13] (1999) 5 ELRNZ 227.

[14] *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156

[15] *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156 at [28]

[16] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 165.

[17] *Countdown Properties (Northlands) Limited v Dunedin City Council* [1994] NZRMA 145 at 166.

the situation. The Court again refers to, and agrees with, the High Court in *Countdown* which states[18]:

> … To take a legalistic view that a council can only accept or reject the relief sought in any given submission is unreal. As was the case here, many submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the council in its decision.

25 The Environment Court in *Progressive Enterprises Ltd v Hastings District Council*[19] cited *Environmental Defence Society v Otorohanga District Council*[20] where the Environment Court in that case stated that[21]:

> A careful reading of the text of the relevant clauses of Schedule 1 shows how the submission and appeal process in relation to a proposed plan is confined in scope. Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks a change to the proposed plan, then the submission should set out the specific amendments sought…The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of identified provisions or matters.

Original submission: Rule 16.7.4.1

26 The Appellant's original submission (contained on page 33 of the original submission included in the agreed bundle as Attachment 1) specifically challenges the minimum site size for subdivision in Rule 16.7.4.1 and expressly sought:

> 16.7.4.1.d Minimum Site Size: CHANGE the minimum on the Hill Slopes Rural Zone from 25ha. to 40ha.
>
> 16.7.4.1 ADD the following: *4. A subdivision that does not comply with 16.7.4.1 or 2 or 3 becomes a non-complying activity.*

27 There is no question from Council that the subdivision rule (16.7.4.1.d) was sought to be increased from 25 hectares to 40 hectares.

28 The 2GP distinguishes between subdivision, and land use for establishing a residential activity. Residential density is deliberately a different standard to the

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[18] *Cook Adam Trustees Ltd v Queenstown Lakes District Council* [2013] NZEnvC 156 at [28]

[19] *Progressive Enterprises Ltd v Hastings District Council* [2015] NZEnvC 187

[20] *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 70

[21] *Progressive Enterprises Ltd v Hastings District Council* [2015] NZEnvC 187 at [12]

lot sizes for subdivision, and is addressed in Rule 16.5.2. The Appellant in its submission did challenge aspects of Rule 16.5.2 by seeking that a breach of this rule for land use will become a non-complying activity, and to reduce the lot size on the Peninsula Coast from 20 hectares back to 15 hectares. On page 29 of the original submission the Appellant sought:

> D.16.5.2 Density: AMEND. ADD the words … *The activity status becomes non-complying for failure to meet this performance standard.*
>
> 16.5.2.1.f: CHANGE the following maximum density for standard residential activities on the Peninsula Coast from 20ha. back to the original Plan figure of 15ha.

29 It is relevant to note that the distinction between land use in Rule 16.5.2.1 and subdivision in Rule 16.7.4.1 was identified and submitted on by the Appellant, but in relation to the Peninsula Coast only. Rule 16.5.2.1.f was challenged to actually reduce the lot size from 20 hectares to 15 hectares in the Peninsula Coast.

30 There was no submission from the Appellant to increase the lot sizes in Rule 16.5.2.1 in any zone. This appears to be accepted by the Appellant in paragraph 3 of its submissions dated 3 December 2019.

Hearing Panel's Decision

31 The Hearing Panel's decision on the submissions to increase minimum site sizes for subdivision is set out in pages 31-35. The decision on submissions on the residential density performance standard is in pages 59-70. These pages are included in the agreed bundle as Attachment 2.

32 In regards to the Appellant's submissions (via HPPC) on minimum site sizes for subdivision (Rule 16.7.4.1) the Hearing Panel considered the following:

> 65. Mr Craig Werner, appearing for *HPPC*, tabled a statement and spoke at the hearing. With regard to the Minimum Site Size performance standard for the Hill Slopes Rural Zone (Rule 16.7.4.1.d) he considered that there were other factors more important in setting minimum site size than the average site size, including rural character and amenity and visual impact and that the argument about Hill slopes Rural Zone being fragmented was not valid if most fragmented sites are vacant.

33 The Hearings Panel rejected the Appellants' submission seeking increases in the minimum lot sizes for rural subdivision on the basis that:

> 78. We reject the submissions seeking increases in the minimum lot sizes for rural subdivisions: *Scroggs Hill Farm* (OS1052.4), *HPPC* (OS447.93), and *STOP* (OS900.126) (opposed by *Pigeon Flat Road Group* (FS2416.52).

…

80. The objectives, policies and rules relating to minimum site sizes for subdivision and the construction of new dwellings are a package designed to promote the purpose and principles of the Act, set out in Part 2 of the Act, having regard to the particular circumstances of each rural zone in Dunedin City. We accept that controlling subdivision and housing will inhibit the ability of some people to develop their land as they wish as explained by submitters seeking reduction in the minimum lot size, but the Council evidence included a detailed analysis showing that large parts of the rural area are already fragmented into lots that are too small to sustain farming on their own. The demand for lifestyle farming and intensive farming requiring only small areas is amply catered for with existing rural residential zoning (as discussed in the Rural Residential Decision Report). In our assessment, further fragmentation would be in conflict with the Plan's strategic objectives, particularly Objective 2.3.1 related to rural productivity, and several Part 2 of the Act matters relating to landscape, rural amenity, and the efficient use of natural and physical resources.

81. We are satisfied from the Reporting Officer's evidence that the approach that has been taken to identify minimum site sizes in each rural zone has been thorough. We have visited most of the areas discussed in submissions. We conclude that the minimum site size for subdivision rules are necessary to achieve the relevant objectives and policies in the Plan, which are in turn founded on recognition of Part 2 matters, and therefore reject the submissions opposing or seeking amendment to the subdivision minimum site size rule (Rule 16.7.4.1).

34 The Appellant's submission (via HPPC) on aspects of Rule 16.5.2 was separately considered by the Hearings Panel as follows:

231. *HPPC* (OS447.88) sought to amend Rule 16.5.2.1.f so that the minimum site size for Residential activity in the Peninsula Coast Rural Zone is 15ha. The submitter stated that "Land MSS changes are like zoning changes and these are far more disruptive and damaging to the future of current residents than are rules regarding alternations in building and structure design, location, etc… The site may have been intentionally subdivided originally to the 15 ha size and also may have been owned for a long time to fulfil an owner's plans." (HPPC submission, p. 29).

> 232. *HPPC* (OS447.87) sought to amend Rule 16.5.2 (density) as the submitter considered that failure to meet performance standards should lead to 'full scrutiny' of RMA 104D. The submitter also sought to add a new point (j) to allow development on "legacy holdings" of at least 2ha owned by direct descendants of those that subdivided the site at least two generations previously, with the site being in continual family ownership since.

35 The Hearings Panel rejected the Appellants' submission on the basis that:

> 283. We reject the submissions requesting a decrease in the minimum site size for residential activity in each of the rural zones for the reasons explained by the Reporting Officer. The evidence was that the 2GP standards are based on a rational methodology, as discussed in the s42A Report, designed primarily to reflect the median property size used for farming in each zone. We do not consider that there was compelling evidence for the proposed reductions provided by any of the submitters. The Panel visited all the areas discussed in submissions, in many cases identifying the submitters' properties. The submitters' presentation focussed mainly on the benefits for some property owners of less stringent standards (which we acknowledge), with little discussion of how this could meet the objectives and policies for the Rural Zones.
>
> 284. In alignment with our decision on the subdivision minimum site size performance standard (Rule 16.7.4), we consider that the non-complying activity status signals that residential activity on sites below the minimum site size is not anticipated in the rural zones and should only be considered for true exceptions that will not create any precedent that could lead to cumulative adverse effects. We therefore reject the submissions seeking that contravention of the performance standard is a discretionary activity.

36 This decision did not address the issue of an increase in the lot size in the Hill Slopes, because this was not sought in a submission.

Amended Notice of Appeal

37 On page 4 and 5 of the amended Notice of Appeal (included as Attachment 3 to the agreed bundle) the Appellant has appealed the subdivision rule 16.7.4.1.d. This sought to increase the minimum site size in the subdivision rule for residential activities on the Hill Slope Rural zone. The following was sought:

> **The decision we are appealing is:**

> Rule 16.7.4.1.d The Hill Slope rural zone minimum site size density standard. 15ha for 1 residential activity; 50ha for 2 residential activities; 75ha for 3 residential activities; 25ha subdivision.
>
> …
>
> **We seek the following relief:**
>
> For the Hill Slope Rural Zone we seek a 40ha MSS for one residential activity, 80ha for two residential activities and 120ha for three residential activities.

38 It is submitted that this specifically challenged the subdivision rule 16.7.4.1.d. The language in this amended Notice of Appeal for the first time seems to also seek an increase in the minimum site size for "residential activity" in the Rural Zone - Hill Slope, as if this related to Rule 16.5.2.1.d, which is not clear.

List of key issues

39 In the list of Key Issues dated 16 April 2019 this issue is addressed under the heading "Issue 3: Zoning" on page 5 and in paragraph 11. The following is sought, essentially repeating the amended Notice of Appeal on this issue:

> The following relief is sought:
>
> - Increase minimum site size density standard for Hill Slope Rural Zone: 40ha. for one, 80ha. for two and , 120ha. for three residential activities (dwellings).

Waiver

40 PCT's waiver application seeks the following[22]:

> (a) Waiver of the time limit for filing an appeal against Rule 16.5.2.1(c) density rule for the Hill Slopes Rural zone);
>
> (b) Amendment of the Notice of Appeal to identify Rule 16.5.2.1(c) (density rule for the Hill Slopes Rural zone).

Council's position

41 Council considers that the amended Notice of Appeal appears to have been drafted with a challenge to the minimum site size for residential activity in the Rural Zone – Hill Slopes under Rule 16.5.2.1.d in mind. The amended Notice of Appeal though did not specifically identify this Rule.

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[22] Waiver application by Preservation Coalition Trust, 29 October 2019

42 This has become clear in the waiver that is now sought to amend the amended Notice of Appeal to expressly refer to increasing the minimum lot size in Rule 16.5.2.1.d (incorrectly referred to as c in the waiver application).

43 It is Council's position that the challenge to Rule 16.5.2.1.d to seek an increased minimum lot size for residential activity now sought by waiver to this Rule, was never sought in the original submission.

44 It is therefore considered that it is beyond the jurisdiction of the Court to accept an appeal that purports to challenge Rule 16.5.2.1.d which was never challenged in the submission.

45 It is also submitted that because this rule could not have been challenged in the appeal originally (having not been submitted on) it should not now been allowed in by waiver. This would in my submission go beyond what was fairly and reasonably raised in the submission and decided on by Council in its decision.

46 Council does raise that there are likely to be a number of property owners in the Rural Zone - Hill Slopes who would be unaware of a challenge seeking to increase the size of lots in the rule providing for the minimum site size for residential activity in this zone.

Conclusion

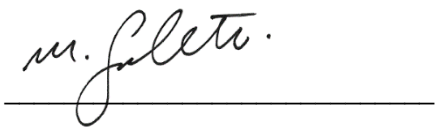
47 Overall Council consider that amending the amended Notice of Appeal to challenge Rule 16.5.2.1.d now for the first time in the appeal is not an approach that the Court should adopt. This is because:

(a) The issue was not fairly and reasonably raised in the submission of PCT or its predecessor;

(b) To now allow a waiver to expressly challenge this rule, could affect a number of property owners who are unaware of this challenge to this rule and this does raise process issues in the public interest. It is difficult to identify these people and whether they might have joined this appeal if they knew about this challenge, or whether they are prejudiced; and

(c) From the Council's perspective as Respondent it does not have a decision on this issue to form its position. In this sense a waiver at this late stage in the process will prejudice it by having another appeal point to work on without the benefit of expert evidence having been prepared for the Council hearing, or a decision to form its position.

Dated this ~~18th~~3rd day of ~~December 2019~~ April 2020



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