

**IN THE ENVIRONMENT COURT  
AT CHRISTCHURCH**  
**I TE KŌTI TAIAO O AOTEAROA  
KI ŌTAUTAHĪ**

**Decision No. [2024] NZEnvC 197**

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under clause 14 of the First Schedule of the Act
BETWEEN	OTAGO REGIONAL COUNCIL
	(ENV-2018-CHC-290)
	Appellant
AND	DUNEDIN CITY COUNCIL
	Respondent

Court:	Environment Judge P A Steven Sitting alone under s279 of the Act
Hearing:	In Chambers at Christchurch
Last case event:	15 August 2024
Date of Decision:	21 August 2024
Date of Issue:	21 August 2024

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**DETERMINATION OF THE ENVIRONMENT COURT**

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A: Under ss 279(1)(b), 290(2), and 293 Resource Management Act 1991, directions are made for the Dunedin City Council to make the amendments to the provisions of the proposed Dunedin City Second Generation District Plan as set out in Annexure 1.



- B: The appeal, allocated as DCC reference 94, is otherwise dismissed.
- C: Under s285 of the Resource Management Act 1991, there is no order as to costs.

## **REASONS**

### **Introduction**

[1] This proceeding relates to the appeal by Otago Regional Council ('ORC') in the proposed Second Generation Dunedin City District Plan ('2GP'). ORC appealed the decision of Dunedin City Council ('DCC') in relation to the natural hazard overlay zone for the North Taieri (Gordon Road) Spillway ('Spillway').<sup>1</sup> The Spillway is a designed and engineered feature on the true right bank of the Silver Stream immediately downstream of the Gordon Road Bridge at Mosgiel. It creates a preferential overflow point to try to avoid flooding from the river of part of Mosgiel on the true left bank. The area includes the overland flow path and ponding area for floodwaters.

[2] ORC sought that the Spillway be removed from the Hazard 1 (Flood) Overlay Zone and instead included in the Hazard 1A (Flood) Overlay Zone, prohibiting natural hazard sensitive activities in that area.

[3] Several parties joined the appeal under s274 of the Resource Management Act 1991 ('RMA'), however none of those parties had a relevant interest in this aspect of ORC's appeal.<sup>2</sup>

### **Section 293**

[4] The Hazard 1A (Flood) Overlay Zone was not included in the notified

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<sup>1</sup> The appeal was allocated DCC reference number 94.

<sup>2</sup> This was confirmed by joint memorandum dated 15 August 2024.

version to the 2GP, rather it was created by the Natural Hazards Hearing Panel in response to the submission of ORC. By joint memorandum,<sup>3</sup> DCC and ORC raised the issue of fairness to the registered landowners and occupiers located within the North Taieri (Gordon Road) Spillway as they were not represented in the proceeding and may not have been aware of the prohibited activity status relief sought by ORC. That relief would prevent the registered owners obtaining resource consent for several activities, including residential activities.

[5] The court agreed it would be appropriate to exercise its discretion under s293 RMA and the relevant directions were made by Minute dated 18 January 2023. The directed consultation period ended on 20 April 2023. A s42A report<sup>4</sup> was filed on 28 July 2023, this was served by DCC to all consulted registered landowners and occupiers of land within the Spillway who were also informed of their ability to join the proceeding under s274 RMA. The Gordon Road Spillway Residents Group ('GRSRG') joined as parties to the proceeding on 17 August 2023, opposing ORC's relief.

### **The agreement reached**

[6] A consent memorandum dated 4 July 2024 was filed outlining the agreement reached between the parties to resolve the appeal. The memorandum detailed that the parties have agreed to identify the higher risk part of the appeal site as a new overlay named 'Gordon Road Floodway mapped area'. Within that area prohibited activity status will apply to new natural hazards sensitive activities, while non-complying activity status will apply to any expansion or recommencement of natural hazards sensitive activities. This involves:

- (a) updates to the planning maps identifying the new Gordon Road Floodway mapped area as a Hazard 1A (Flood) Overlay Zone;

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<sup>3</sup> Dated 22 December 2022. The s293 application was accompanied by supporting affidavits of Paul Freeland, Dr Jean-Luc Payan, Michelle Mifflin, Matthew Alley, Bikesh Shrestha, Tom Bassett and Gary Bayne.

<sup>4</sup> Authored by Katie Sunley James and Andrew MacLennan, reviewed by Paul Freeland.

- (b) policy amendments applying prohibited activity status to new natural hazards sensitive activities;
- (c) policy amendments catering for the expansion or recommencement of natural hazard sensitive activities within the Gordon Road floodway mapped area as a non-complying activity; and
- (d) consequential changes to notes and to assessment guidance for restricted discretionary activities and non-complying activities in the Hazard 1 and Hazard 1A Flood Overlay Zones.

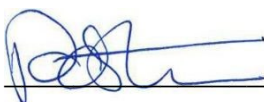
### **Outcome**

[7] Having now considered the consent memorandum, the further memorandum dated 15 August 2024 and Mr Maclellan's affidavit explaining the rationale for the agreed changes, I am satisfied that the amendments sought are appropriate. For completeness, I record the parties' attestation that the parties are satisfied that all matters proposed for the court's endorsement fall within the court's jurisdiction, and conform to the relevant requirements and objectives of the RMA, including Part 2. I also record the assurance that the proposed amendments have been drafted in keeping with the 2GP Style Guide. Directions are made accordingly.

### **Directions**

[8] Under ss 279(1)(b), 290(2) and 293 RMA, DCC is directed to make the amendments to the provisions of the proposed Dunedin City Second Generation District Plan as set out in Annexure 1.

[9] The parties agree that costs should lie where they fall. Accordingly, there is no order of costs.



**P A Steven**  
**Environment Judge**



## Annexure 1

1. Amend the 2GP planning map to:
  - a. Apply a new mapped area, the 'Gordon Road Floodway mapped area' over the area of North Taieri, Dunedin, shown in Figure 1 below; and
  - b. Change the zoning of the land within the new Gordon Road Floodway mapped area from Hazard 1 (flood) Overlay Zone to Hazard 1A (flood) Overlay Zone as shown in Figure 2 below.



Figure 1: Gordon Road Floodway mapped area



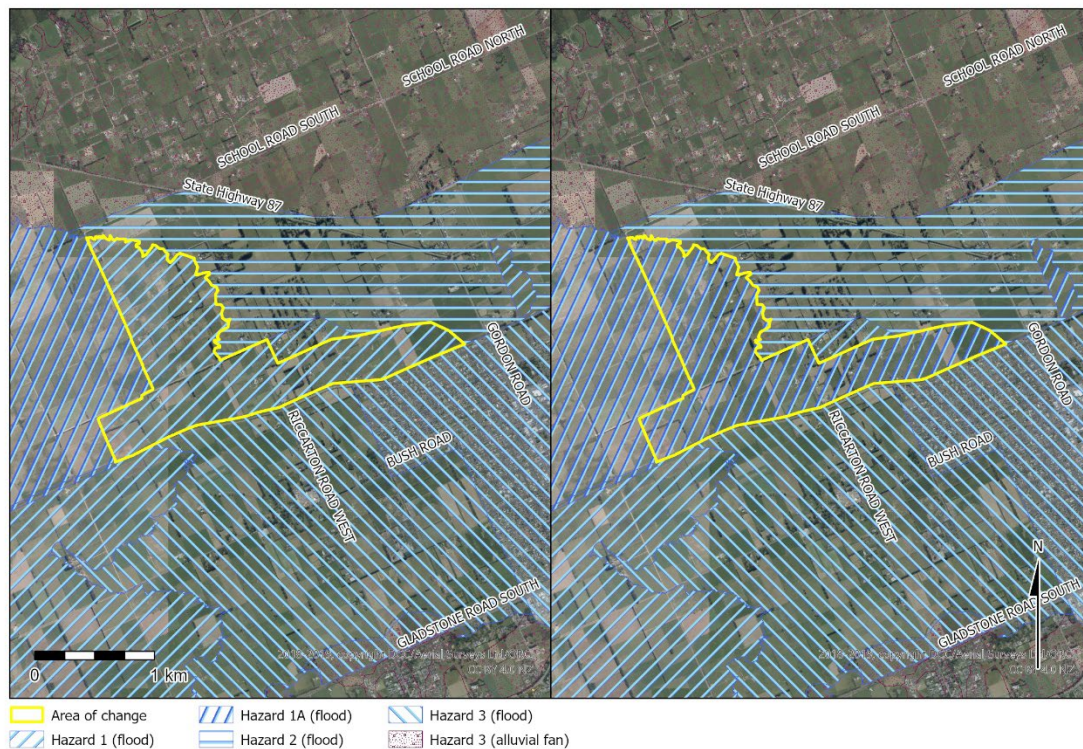


Figure 2: Change of zoning showing current 2GP hazard overlay zoning on the left, and proposed new hazard overlay zoning on the right.

2. Amend Policy 11.2.1.2 as follows:

Policy 11.2.1.2

In the Hazard 1A (flood) Overlay Zone (outside the **Gordon Road Floodway mapped area**) avoid natural hazards sensitive activities.

3. Insert new Policy 11.2.1.X as follows:

Policy 11.2.1.X

In the Hazard 1A (flood) Overlay Zone within the **Gordon Road Floodway mapped area**, avoid natural hazards sensitive activities unless:

- a. the activity involves the expansion of an existing natural hazards sensitive activity or the recommencement of a natural hazards sensitive activity that was undertaken within the previous 5 years; and
- b. the risk from natural hazards is avoided, or is no more than low.

4. Amend Rule 16.3.6 as follows:

16.3.6 Activity Status in Hazard 1 (Flood), Hazard 1A (Flood) and Hazard 2 (Flood) Overlay Zones

Activity		Activity status			
		a. Haz1A (flood) outside the Gordon Road Floodway mapped area	x. Haz1A (flood) within the Gordon Road Floodway mapped area	b. Haz1 (flood)	c. Haz2 (flood)
Land Use Activities					
1.	<del>New</del> Natural hazards sensitive activities	Pr	<del>Pr</del>	NC	RD
X.	Expansion of an existing natural hazards sensitive activity or the recommencement of a natural hazards sensitive activity that was undertaken within the previous 5 years	Pr	NC	NC	RD
2.	<del>New</del> Natural hazards potentially sensitive activities	NC	NC	NC	RD
3.	New buildings and additions and alterations to buildings that create within any two calendar-year period: more than 36m <sup>2</sup> of new ground floor area in the <b>Henley mapped area</b> , or more than 60m <sup>2</sup> of new ground floor area outside the <b>Henley mapped area</b> . <u>For the sake of clarity, this includes</u>	RD	RD	RD	RD

	relocation of existing buildings within the same site.				
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#### **Note 16.3.6A - Other RMA considerations**

1. Section 10 of the RMA (existing use rights) provides for land to be used in a manner that contravenes a rule in a district plan if the use was lawfully established before the rule became operative or the proposed plan was notified, and the effects of the use are the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified. This right only exists where the activity has been discontinued for no more than 12 months, unless the Dunedin City Council has granted an extension in accordance with the requirements of Section 10.
2. Accordingly, activities that are shown to have effects that are the same or similar in character, intensity and scale to those which existed before the rule became operative or the proposed plan was notified will not usually trigger the provisions for natural hazards sensitive activities and natural hazards potentially sensitive activities in Rule 16.3.6. However, Council will consider specific circumstances associated with the development and how this affects the character, intensity and scale of effects from the land use activity. Where there is an increase in intensity or scale of effects from an existing land use activity this will be considered to be an expansion of that activity.
3. For the sake of clarity, where the location of an existing land use activity within a site has changed, this will not be treated as a 'new' activity provided the effects of the use are the same or similar in character, intensity and scale to those which existed before the location was changed.

#### **Note 16.3.6B - Other requirements outside the District Plan**

1. ...
4. Areas of Hazard (flood) overlay may also be subject to an ORC designation for flood protection under Section 176 of the RMA. The Planning Map shows the extent of ORC designations in relation to flood management. Approval is required from the ORC as the requiring authority for doing anything in relation to land subject to a designation that would prevent or hinder the work or project to which a flood protection designation relates.

#### **Note 16.3.6C – General advice**

1. Where rules 16.3.6.X and 16.3.6.3 refer to an 'existing' activity or building, that term includes any unimplemented resource consent, issued before March 2024 for an activity or building, that has not lapsed.



5. Amend Rule 11.5.2 as follows:

11.5.2 Assessment of all restricted discretionary activities		
Activity		Matters of discretion
2	<p>In a hazard 1 (flood), 1A (flood) or 2 (flood) overlay zone:</p> <ul style="list-style-type: none"> <li>New buildings and additions and alterations to buildings that create within any two calendar-year period: more than 36m<sup>2</sup> of new ground floor area in a residential zone or in the <b>Henley mapped area</b>, or more than 60m<sup>2</sup> of new ground floor area in all other locations</li> </ul>	<p>a. Risk from natural hazards</p>
		<p>Guidance on the assessment of resource consents</p> <p><i>Relevant objectives and policies:</i></p> <ol style="list-style-type: none"> <li>Objective 11.2.1</li> <li>The scale, location and design of the building or other factors mean risk is avoided, or is no more than low (Policy 11.2.1.4).</li> </ol> <p><u>General assessment guidance:</u></p> <ol style="list-style-type: none"> <li><u>In assessing options for the appropriate location for the relocation of a building associated with a natural hazards sensitive activity in the <b>Gordon Road Floodway mapped area</b>, Council will consider the most up to date available information on hazard risk for the site.</u></li> </ol> <p><u>Conditions that may be imposed include:</u></p> <ol style="list-style-type: none"> <li><u>Restrictions and conditions, including by way of consent notice, on development activities in the <b>Gordon Road Floodway mapped area</b> including:</u> <ol style="list-style-type: none"> <li><u>location of residential building;</u></li> <li><u>minimum floor level;</u></li> <li><u>relocatable building requirements;</u></li> </ol> </li> </ol>

			<u>4. stormwater management systems;</u> <u>5. establishment, enhancement, or retention of vegetation;</u> <u>6. design of earthworks;</u> <u>and</u> <u>7. the location and design of driveways and vehicle tracks.</u>
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6. Amend Rule 11.7.2 as follows:

11.7.2 Assessment of non-complying activities		
Activity		Guidance on the assessment of resource consents
1.	<p>In the hazard 1 (flood) Overlay Zones:</p> <ul style="list-style-type: none"> <li>Natural hazards potentially sensitive activities</li> <li>Natural hazards sensitive activities</li> </ul> <p>In the Hazard 1A (flood) Overlay Zone:</p> <ul style="list-style-type: none"> <li>Natural hazards potentially sensitive activities</li> </ul> <p><u>In the Hazard 1A (flood) Overlay Zone within the Gordon Road Floodway mapped area</u></p> <ul style="list-style-type: none"> <li><u>Expansion or recommencement of a</u></li> </ul>	<p><i>Relevant objectives and policies (priority considerations):</i></p> <p>a. Objective 2.2.1, Policy 2.2.1.8</p> <p>b. Objective 11.2.1</p> <p>c. In the Hazard 1 (flood) Overlay Zone, natural hazards sensitive activities and natural hazards potentially sensitive activities are avoided unless:</p> <p>i. the risk from natural hazards is avoided, or is no more than low; and</p> <p>ii. the activity has a critical operational need to locate within the Hazard 1 (flood) Overlay Zone and locating outside it is not practicable (Policy 11.2.1.1).</p> <p>d. In the Hazard 1A (flood) Overlay Zones, natural hazards potentially sensitive activities are avoided unless:</p> <p>i. the risk from natural hazards is avoided, or is no more than low; and</p> <p>ii. the activity has a critical operational need to locate within the Hazard 1A (flood) Overlay Zone and locating outside it is not practicable (Policy 11.2.1.3).</p> <p>X. <u>In the <b>Gordon Road Floodway mapped area</b>, natural hazards sensitive activities are avoided unless:</u></p>

### 11.7.2 Assessment of non-complying activities

Activity	Guidance on the assessment of resource consents
<p><u>natural hazards sensitive activity.</u></p>	<ol style="list-style-type: none"> <li>1. <u>the activity involves the expansion of an existing natural hazards sensitive activity or the recommencement of a natural hazards sensitive activity that was undertaken within the previous 5 years; and</u></li> <li>i. <u>the risk from natural hazards is avoided, or is no more than low.</u></li> </ol> <p><i>General assessment guidance:</i></p> <ol style="list-style-type: none"> <li>e. In assessing whether the risk is no more than low, Council will consider the guidance provided in Section 11.1.2 and will generally require a report by a suitably qualified person (see Special Information Requirements - Rule 11.8.1) to confirm that the risks to the development, or resulting from the development, will be no more than low.</li> <li>f. In assessing the risks from natural hazards, Council will consider: <ol style="list-style-type: none"> <li>i. <u>the most up to date available information on hazard risk for the site and existing hazards assessment reports on the DCC's Hazard Information Management System;</u></li> <li>ii. the Otago Regional Council's Otago Natural Hazards Database;</li> <li>iii. any new hazard assessment or engineers' reports provided as part of an application;</li> <li>iv. site or area specific factors, including the elevation of the site, or topography and geology of the area;</li> <li>v. the type, nature and scale of the activity, and how this affects its sensitivity to natural hazards;</li> <li>vi. short to long term effects, including effects in combination with other activities;</li> <li>vii. risk to activities proposed on a site, as well as risk that is created, transferred, or exacerbated on other sites;</li> <li>viii. the potential for cumulative adverse effects arising from similar activities occurring as a result of a precedent being set by the granting of a resource consent;</li> <li>ix. evacuation routes, and/or alternate means of maintaining access during a natural hazard event;</li> </ol> </li> </ol>

### 11.7.2 Assessment of non-complying activities

Activity	Guidance on the assessment of resource consents
	<ul style="list-style-type: none"> <li>x. cumulative effects of natural hazards, including from multiple hazards with different risks;</li> <li>xi. The creation, transference or exacerbation of risk off-site by the proposed activity, or future proposed activities, for example risk from redirected floodwaters, or risk from landslide on another site will generally not be seen as appropriate; and</li> <li>xii. how the risk from natural hazards may worsen over time due to climate change.</li> </ul> <p>g. In assessing risk, Council will also consider the policies of the New Zealand Coastal Policy Statement 2010 in terms of acceptable levels of risk.</p> <p>h. Council will consider whether the proposal could make the DCC or Otago Regional Council subject to claims for protection, compensation, reinstatement, or rectification of buildings or structures intended for natural hazards sensitive activities, or natural hazards potentially sensitive activities, undertaken in hazard overlay zones, and whether a mechanism is proposed to protect the DCC or ORC from these claims.</p> <p>i. In assessing the appropriateness of mitigation measures (other than those prescribed in performance standards):</p> <ul style="list-style-type: none"> <li>i. consideration will be given to its potential effectiveness, in the short to longer term;</li> <li>ii. preference will be given to non-structural solutions, over engineering or structural solutions, where practicable;</li> <li>iii. mitigation measures that rely on significant capital investment or requirements for ongoing maintenance by the DCC or Otago Regional Council will generally not be seen as appropriate; and</li> <li>iv. any mitigation measures that may result in more than negligible adverse effects on biodiversity values, more than minor effects on access to the coast, or significant effects on amenity or natural coastal sedimentation processes, will generally not be seen as appropriate.</li> </ul>

### 11.7.2 Assessment of non-complying activities

Activity	Guidance on the assessment of resource consents
	<p>j. <u>For the expansion or recommencement of a natural hazards sensitive activity in the <b>Gordon Road Floodway mapped area</b>, when determining whether the risk is no more than low (Policy 11.2.1.X), Council will consider any reduction in risk from the flood hazard achieved by the proposal.</u></p>

7. Amend Rule 16.12.3.3 as follows:

#### 16.12.3.3

3.	<p>In the Hazard 1A (flood) Overlay Zone:</p> <ul style="list-style-type: none"><li>Natural hazards potentially sensitive activities</li></ul> <p><u>In the Hazard 1A (flood) Overlay Zone within the <b>Gordon Road Floodway mapped area</b></u></p> <ul style="list-style-type: none"><li><u>Expansion or recommencement of a natural hazards sensitive activity</u></li></ul>	<p><i>Relevant guidance from other sections (priority considerations):</i></p> <p>a. See Section 11.7 for guidance on the assessment of resource consents in relation to Objective 11.2.1 and effects related to the risk from natural hazards.</p>
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8. Make any consequential changes to plan numbering as required as a result of the above amendments. Minor referencing and style changes may also be made for consistency with the 2GP formatting.

