

**BEFORE
AND**

**THE OTAGO REGIONAL COUNCIL
THE DUNEDIN CITY COUNCIL**

IN THE MATTER of the Resource Management Act
1991 (**Act**)

AND

IN THE MATTER Resource Consent Applications ORC
RM19.441 and DCC LUC- 2019-658 –
Port Otago Ltd Te Rauone Beach Rock
Groynes and Sand Re-nourishment

LEGAL SUBMISSIONS ON BEHALF OF APPLICANT

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1. Port Otago has applied for coastal permits and land use consents to enable the construction of 3 rock groynes and the deposition of sand for the purpose of beach renourishment at Te Rauone Beach, Dunedin.
2. Although the application is made by Port Otago Ltd and it has undertaken to wholly fund the structures and maintain them for the life of the coastal permit, it is a community project with no commercial advantage for Port Otago Ltd.
3. Port Otago Ltd has provided expert evidence in support of the application and no contrary expert evidence has been provided which demonstrates that the steps taken by Port Otago Ltd have adequately responded to the concerns expressed about the manner in which the project is to be carried out and about the conditions of consent including the draft Environmental Management Plan.
4. It is accepted that each of the consent applications is for a discretionary activity. The applications are discretionary rather than restricted discretionary under the 2GP because of a technicality: although the proposed rock groynes and beach replenishment works are not designed to prevent natural hazards, they have that effect and are therefore subject to rules 8.3.2(3) and 8.3.2(4) because the works will assist with beach erosion remediation.
5. The planning considerations have been accurately and appropriately set out in the evidence of Lezel Botha on behalf of Port Otago Ltd and support the consent being granted.
6. An unresolved issue is what happens at the end of the 20 year consent term. The groynes have a design life of 20 years and Jennifer Hart's evidence is that the long term viability of the structures will need to be considered about 2050 (in 30 years time). While Port Otago Ltd has the obligation to maintain the groynes for the 20 year consent period, it does not now accept any enduring obligation to maintain this community asset and the community needs to take responsibility for the asset at the end of the 20 year period.
7. The original proposed condition 25 was not acceptable and stated:

Unless the replacement consent is applied for and granted, the consent holder, at the consent holder's expense, must remove the structures and all associated materials from the CMA and provide written confirmation of the consent authority, within 40 working days of any of the following events occurring:

- (a) The expiry of resource consent; or

**(b) The consent being surrendered or cancelled;
or**

**(c) The structures becoming derelict or
abandoned.**

8. The condition would be both unfair and unenforceable.
9. It is an unfair condition:
 - (a) Port Otago Ltd is providing a community asset;
 - (b) The obligation to erect the structure and maintain it for 20 years is a significant community contribution and Port Otago Ltd's obligation cannot reasonably be said to go beyond that date;
 - (c) It is the community's responsibility through the two councils to decide and take responsibility for the asset at the expiry of Port Otago Ltd's obligation to maintain the structure;
 - (d) There can be no suggestion of the structures becoming derelict or abandoned during the life of the coastal permits as condition 23 requires Port Otago Ltd to maintain them in "a tidy, safe and structurally sound condition at all times".
10. The condition is unenforceable:
 - (a) Once the structures are erected (and as they are being erected) the boundary of the coastal marine area shifts because mean high water springs (the boundary of the coastal marine area) moves as the introduced sand displaces the coastal marine area with the result that once the structures are erected, only a portion of them will remain in the coastal marine area;
 - (b) While Policy 8.4.8 of the Coastal Plan which requires removal of any structure that is abandoned or redundant by the holder of the consent authorising that structure, the policy relates to private structures which are not for public benefit because the principal reason for the policy is:

“Structures occupy areas of the coastal marine area to the exclusion of the public and can result in a loss of natural character from an area. Where those structures are abandoned or no longer required, they should be removed.”
 - (c) There is no ability to remove those parts of the groynes that remain in the coastal marine area without a resource consent as Rule 8.5.3.2 provides that any demolition or removal of any

structure or part of a structure that is fixed in, on, under, or over foreshore seabed is a discretionary activity;

- (d) Removal of sand from the coastal marine area also requires a resource consent under rule 9.5.2;
- (e) It would not be responsible of Port Otago Ltd to accept an obligation to carry out work that requires a resource consent, particularly when the work is in the costal marine area and Port Otago does not know what onerous conditions may be imposed in 20 years time on such coastal permits;
- (f) The highlighted problems are not avoided by an advice notice attaching to the consent as the only possible reason for such an advice notice is to claim an obligation on Port Otago to remove the structures or obtain a further coastal permit.

Dated 10 December 2020

L A Andersen QC
Counsel for Port Otago Ltd

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