

**BEFORE THE COMMISSION
APPOINTED BY THE OTAGO REGIONAL COUNCIL**

UNDER the Resource Management
Act 1991 (RMA)

IN THE MATTER Of an application by Dunedin
City Council for resource
consent being processed with
reference RM20.280

BY **DUNEDIN INTERNATIONAL
AIRPORT LIMITED**

Submitter

**SUBMISSIONS OF COUNSEL FOR DUNEDIN INTERNATIONAL
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DATED 13 MAY 2022



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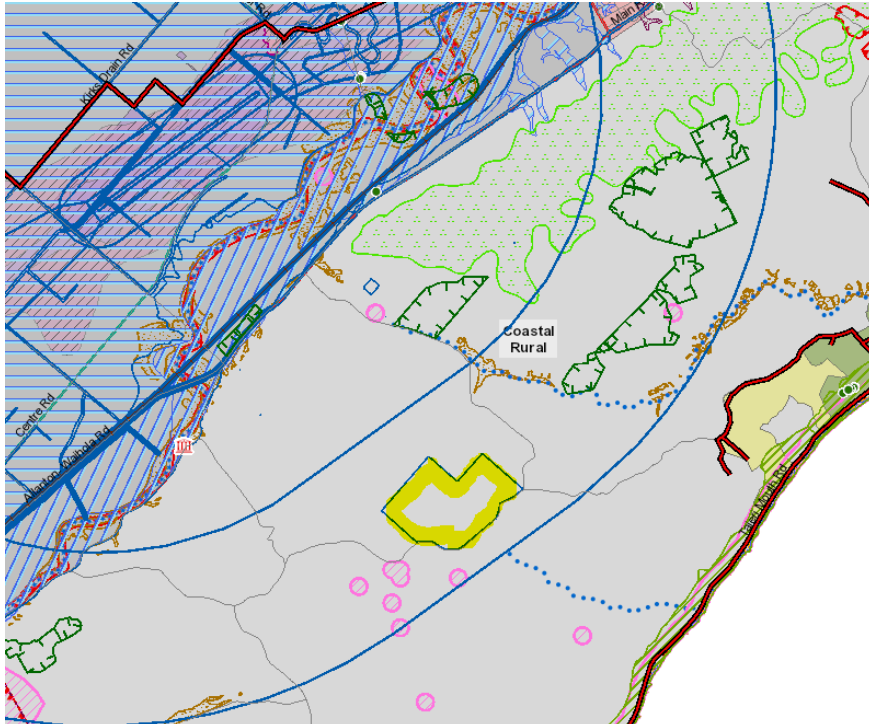
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SUBMISSIONS OF COUNSEL FOR DUNEDIN INTERNATIONAL AIRPORT LIMITED

May it please the Commissioners:

1. Dunedin International Airport Limited (**DIAL**) is a Council-Controlled Organisation under the Local Government Act 2002. It is 50% owned by the Dunedin City Council and 50% owned by the Crown.
2. DIAL is an airport authority established under the Airport Authorities Act 1966 and is a requiring authority under the Resource Management Act 1991 (**RMA** or **Act**).
3. DIAL holds two designations for Dunedin Airport, designation D273 in relation to airport operations at the aerodrome, and designation D274, which are aviation obstacle limitation surfaces.
4. The Smooth Hill designation site is shown in the Dunedin District Plan (**2GP**) as subject to the Conical Surface within the Obstacle Limitation Surface (**OLS**) controls in designation D274. Designation D274 is earlier in time to the Dunedin City Council's designation for Smooth Hill which is subject to and must comply with DIAL's designation unless written approval is given.¹ No written approval has been given.
5. An excerpt from the 2GP map showing the Smooth Hill designation site (highlighted in yellow below by counsel) within the D274 Obstacle Limitation Surface control is set out below.

¹ Section 177(1) of the Resource Management Act 1991 (**RMA**).



6. There is a live issue about whether the presence of black-backed gulls in the airspace above Smooth Hill is, or presents, an encroachment of a penetrating obstacle for the purposes of designation D274. The reasoning is this:

(a) The OLS designation is designed to give effect to Civil Aviation Authority Advisory Circular AC139-6 Aerodrome Design Requirements for all aeroplanes conducting air transport operations and all aeroplanes above 5700 kg:
<https://www.aviation.govt.nz/assets/rules/advisory-circulars/ac139-6.pdf>.

(b) The definitions section of circular AC139-6 says (underlining added):

“Conical surface” means a specified surface sloping upwards and outwards from the periphery of the inner horizontal surface. It establishes the vertical limits above which it may be necessary to restrict the creation of new obstacles, or remove or mark existing obstacles, to ensure the safety of aircraft manoeuvring by visual reference in the aerodrome circuit prior to landing.

“Obstacle” means all fixed (whether temporary or permanent) and mobile objects, or parts thereof, that are located on an area intended for the surface movement of aircraft or that extend above a defined surface intended to protect aircraft in flight.

- (c) And the Oxford English Dictionary defines an “object”:

Object- noun, /'ɒbdʒekt, 'ɒbdʒɪkt/

a material thing that can be seen and touched. "he was dragging a large object".

7. Black back gulls in the airspace protected by the OLS in D274 are potentially a penetrating obstacle. If they are present as a result of the Smooth Hill landfill, then the landfill may breach designation D274. Thus DIAL’s position is that if there is any risk that the landfill will attract birds within the protected airspace, the Smooth Hill designation cannot be exercised without DIAL’s written approval.
8. But DIAL’s case on this application does not turn on whether birds above Smooth Hill might constitute a breach of D274. What the issue does is draw attention to why that airspace is so important to DIAL, and why any increase in aviation hazard in that airspace is intolerable and must be avoided.
9. Dunedin Airport is a Part 139-certified aerodrome under the Civil Aviation Rules², as discussed in the evidence of Mr Sean Rogers of the CAA, and Mr Daniel Debono, the Operations Director at DIAL. It is part of DIAL’s responsibility under Part 139 to advocate for the avoidance of aviation hazard from wildlife within 13km of the Dunedin Airport aerodrome. That explains DIAL’s function in this hearing.
10. It is DIAL’s position that no increase in bird hazard to aviation is acceptable. DIAL’s goal in this proceeding is to ensure that either

² Made by the Minister of Transport under Part 3 of the Civil Aviation Act 1990.

Smooth Hill does not proceed, or it proceeds on conditions that ensure that increase in aviation hazard is avoided. The use of “avoided” as opposed to “remedied or mitigated” is deliberate for reasons set out in the planning evidence of Mr Matthew Bonis.

11. The original application did not include an assessment of risk by a recognised aviation bird hazard expert. Dunedin Airport advocated strongly for the Dunedin City Council to retain the services of aviation bird hazard expert Mr Phil Shaw, of Avisure in Australia. At DIAL’s request, Mr Shaw completed an aviation hazard report. DIAL accepts Mr Shaw’s view that a zero increase in aviation hazard is the appropriate test for the acceptability of Smooth Hill.³
12. Although Mr Shaw expresses confidence that such an outcome is achievable, DIAL remains concerned that the proposal set out in the amended conditions to Mr Maurice Dale’s evidence does not align with Mr Shaw’s evidence. It is not at all clear that Mr Shaw understands that DCC proposes to receive truckloads of fish waste, offal, abattoir waste, general waste from commercial operators and contaminated general waste from Dunedin’s municipal waste stream from his paragraph 67-68 and 77.
13. Mr Shaw’s advice in his paragraph 77 is “ideally zero putrescible waste would be achieved, but I am informed that this cannot be guaranteed.” That is nonsense. It is perfectly possible to guarantee that commercial truckloads of highly odorous waste (condition 43) and contaminated general waste (condition 75 and attachment 3) is not received. DCC has simply chosen not to offer that guarantee. We are left to wonder why, when it has committed to sort that waste at an off-site bulk waste transfer station (Attachment 3)⁴. That sort of waste is exactly what DIAL is worried about.

³ Evidence of P Shaw at 43.

⁴ Paragraph 6 of counsel for the applicant’s opening submissions suggests that bulk commercial waste will not be inspected and sorted at the Bulk Waste Transfer facility before trucking to Smooth Hill. It is not at all clear whether out-of-district waste will be sorted at the Bulk Waste Transfer facility either. Whether out of district waste is

14. For DIAL, bringing putrescible waste to Smooth Hill is completely unacceptable. And that includes highly odorous waste contemplated by proposed condition 43.
15. The reason for DIAL's position is that putrescible and highly odorous waste will inevitably attract birdlife to Smooth Hill which is not currently present in the airspace above the site.
16. It is not birds on the ground which are of concern to DIAL, but birds on the wing in the airspace in circumstances where they present a hazard to flying aircraft. The evidence of Mr Debono presents Airways aviation tracking data that demonstrates conclusively why DIAL is concerned about the potential interaction of birds with aircraft below 5000ft in altitude directly above the Smooth Hill site.
17. The evidence of Mr Debono and Mr Bonis explains why the conditions proposed by the City Council through Mr Dale's evidence are insufficient to avoid increase in aviation hazard. One reason is the inevitable time lag in management responses to gulls arriving on site. A single gull flying above the site is an aviation hazard. Bird hazard to aviation is highly dynamic and the time lag between identification of birds (especially black-backed gulls) at the site and management responses to eliminate those birds (especially given Ngai Tahu's objections to lethal methods⁵), will inevitably leave a period of time in which gulls in the airspace above Smooth Hill present a danger to aircraft that nobody knows about or can respond to. That is not an acceptable situation. It also informs the appropriateness of adaptive management conditions which we will return to below.

Consideration of Alternatives

18. There is no evidence that the potential risk to aviation arising from development of the Smooth Hill site influenced the site selection

culturally appropriate at all seems to be an unresolved issue, per counsel for the applicant's submissions at paragraphs 111 and 122.

⁵ Evidence of Yvonne Takau on behalf of Te Runanga o Otakou at paragraph 42.

process when Smooth Hill was originally designated in the early 1990's. The most we have is the evidence of Christopher Henderson at paragraph 38(a) where he refers to "bird strike, and the airfields exclusion zone". We don't know how bird strike risk was competently considered by DCC without consulting with the party who has the function under its Part 139 certification to manage bird strike hazard! There is no evidence of what was known or understood by DCC at the time.

19. At paragraph 39 Mr Henderson explains that the Council whittled the choice from 32, to 11, to five, then to two sites: Smooth Hill and Green Island. One presents an aviation hazard (Smooth Hill), and one does not (Green Island). We do not know why aviation hazard did not influence the choice away from of Smooth Hill. We have no idea whether the aviation hazard was even properly understood because the aviation stakeholders were not consulted.⁶
20. DIAL has no record that it was ever consulted by the Dunedin City Council in relation to the Smooth Hill designation either originally, or in the rollover of the designation into the 2GP. This is a remarkable situation not only because of the coincidence in ownership but because the Smooth Hill site is shown in the District Plan maps as within the Conical Obstacle Limitations Surface Control in designation D274, and that was always so.
21. The impression gained from reading the application and the evidence is that since 1995 (the original designation date), DCC has been committed to Smooth Hill as its landfill option and it has never fundamentally reconsidered alternative sites since then. Indeed, that is confirmed by DCC's response to Ms Lennox's section 92 request seeking details of DCC's alternatives assessment. But our understanding of aviation safety and landfill construction and design has changed fundamentally since 1995. The world has moved on. DIAL's submission is that the DCC was obliged to start afresh with its alternative site analysis to support

⁶ Evidence of R Roberts at paragraph 7.

this application. It did not do so. DIAL says that an alternative site analysis that comprehensively understood aviation hazard issues could not have arrived at a decision that Smooth Hill is an acceptable (let alone preferred) option. DCC cannot now rely on a decision taken in 1995.

22. Assessments of Environmental Effects must include an assessment of alternatives, including into another receiving environment, if there is an application for a discharge consent which includes discharging a contaminant.⁷ If an activity is likely to result in any significant adverse effects on the environment, a description of possible alternative locations or methods for undertaking the activity must be included in the AEE.⁸ The AEE must include such detail as corresponds with the scale and significance of the effects the activity may have on the environment.⁹
23. Consideration of alternatives may be a relevant matter where there is likely to be a significant adverse effect under s 104(1)(c) of the RMA.
24. In *EDS v King Salmon*¹⁰ the Supreme Court framed the question as:

Was the Board obliged to consider alternative sites when determining a site specific plan change that is located in, or does not avoid significant adverse effects on, an outstanding natural landscape or feature or outstanding natural character area within the coastal environment?
25. In the context of a plan change application the Supreme Court determined that whether the consideration of alternative sites may be necessary will be determined by the nature and circumstances of the particular application. As an example, the Court stated that an applicant may claim that a particular activity needs to occur in

⁷ Schedule 4 cl 6(1)(d), RMA.

⁸ Schedule 4 cl 6(1)(a).

⁹ Schedule 4 cl 2(3)(c).

¹⁰ [2014] NZSC 38

part of the coastal environment. If that activity were to adversely affect the preservation of natural character in the coastal environment, the decision maker ought to consider whether the activity does in fact need to occur in the coastal environment. Almost inevitably, this will result in a consideration of alternative localities.

26. Even where it is clear that an activity must occur in the coastal environment, if the applicant claims that a particular site has features that make it uniquely, or even especially, suitable for the activity, the decision-maker will be obliged to test that claim and that may well involve consideration of alternative sites, particularly where the decision-maker considers that the activity will have significant adverse effects on the natural attributes of the proposed site.
27. Here, DCC claims particular suitability for the Smooth Hill site and yet it puts at risk aviation safety. The Commission is obliged to test the suitability claimed for the site by considering whether there are alternatives. Enabling the Commission to understand whether alternatives exist was the point of calling evidence from Ciaran Keogh.
28. The Supreme Court's approach in *King Salmon* (a plan change case) was considered by the High Court in a resource consent context: *Tauranga Environmental Protection Society Incorporated v Tauranga City Council*¹¹. In that case, Ngāti Hē was dispossessed of most of its ancestral lands but retained the Maungatapu Marae and beach at Rangataua Bay, on Te Awanui Tauranaga. Ngāti Hē has a long-standing grievance about the location of electricity transmission lines across the Bay from the Maungatapu Peninsula to the Matapihi Peninsula. Some of the transmission poles will soon require replacement.

¹¹ [2021] NZHC 1201

29. In 2016 to address the grievance, Transpower initiated consultation with iwi about realignment of the transmission lines, including at Rangataua Bay. Ngāti Hē supported the removal of existing lines and initially did not oppose their proposed new location. But when it became clear that a large new pole, Pole 33C, would be constructed right next to the Marae, Ngāti Hē concluded the proposed cure would be worse than the disease and opposed the proposal.
30. Consents were granted for the proposal realignment which the Environment Court upheld. The decision was appealed by the Tauranga Environmental Protection Society Inc supported by the Maungatapu Marae Trustees from Ngati Hē.
31. From paragraph [131] onwards the High Court addresses whether the Environment Court had been wrong in its assessment of alternatives. The issues were whether the Court erred in failing to adequately consider alternatives and whether it erred in law in considering the status quo was the obvious counterfactual.
32. In so doing the High Court considered whether it was required to follow *EDS v King Salmon*. The High Court held in a resource consent context that given the nature of the application the Environment Court was legally required to examine the alternatives in order to determine whether they were practicable and possible alternatives with respect to the meaning of those terms in the planning framework.
33. Does the planning framework indicate that consideration of alternatives is required here?
34. The starting point must be the partially operative and proposed Regional Policy Statements. Neither document is implemented by the operative Regional Plan Waste (because they post-date it). Direct regard must be had to them. As Mr Bonis explains, those documents recognise Dunedin Airport as infrastructure of national significance, and require avoidance of the establishment of

activities that might compromise the function of the Airport.¹² The evidence of Mr Rogers of the Civil Aviation Authority shows that increased bird hazard may result in the CAA exercising regulatory control to constrain Dunedin Airport.¹³ Since such effects are to be avoided, then the potential to avoid them by requiring alternatives to be used must be relevant.

35. Another clue to the relevance of alternatives is Plan Change 1 of the Regional Plan Waste. That Plan Change is not yet operative (there are draft consent orders awaiting issue). Proposed Policy 7.4.11 (a) says (underlining added):

7.4.11 To minimise the adverse effects of discharges from new and operating landfills by requiring that:

(a) the siting, design, construction, operation and management of new and operating landfills is in accordance with the Waste Minimisation Institute New Zealand's Technical Guidelines for Disposal to Land (August 2018) and...

36. The WasteMINZ Guidelines 2018 in turn has chapter 4 dealing with landfill siting. At page 57 the WasteMINZ Guidelines address compatibility with surrounding land uses and say that an assessment of suitability should consider

- “Airport Safety”

37. “Airport Safety” in turn has a footnote that refers readers to the CAA document “Material for land use at or near airports” (2008) and notes ICAO advice that municipal solid waste landfill sites be located no closer to 13km from the airport property.
38. Plainly, the Smooth Hill site selection has not followed Policy 7.4.11 of Plan Change 1, nor complied with the WasteMINZ Guidelines 2018 nor even the CAA's 2008 circular. In the last 15 years the aviation safety issue has not caused the consideration of alternatives to be revisited. None of that material seems to have had any influence in the Council's site selection process. In the

¹² Evidence of M Bonis at 15-23.

¹³ Evidence of Sean Rogers at 33-35.

light of the policy framework, and applying *King Salmon* and *Tauranga Environmental Protection Society*, the failure to reconsider alternatives afresh in this application has resulted in the policy protections for DIAL in the PORPS, pORPS, and Plan Change 1 being bypassed. The result is that this application lacks the necessary foundation to be granted. Which ought to be of little concern to the Commission, as Mr Keogh explains, there are commercially available alternatives for municipal waste.

39. The City has alternative options commercially available. One of those options is that the Southern Regional Landfill at Winton can take the lot. It already takes a significant proportion of Dunedin's waste and all of Waitaki District's.

What is an acceptable aviation hazard?

40. The applicant's evidence does not explain what it considers an "acceptable" aviation risk to be. The term is used four times in the evidence of Mr Shaw¹⁴, and not less than 25 times in the joint Avisure/Boffa Miskell Bird Management Draft Management Plan dated 4 June 2021 appended to Mr Shaw's evidence. Numerous examples of the problem can be found in section 1.1.1 on pages 4-5 of the Draft Management Plan. At no point do the authors quantify or even attempt an explanation of what they mean by risk being managed to "acceptably low levels." Acceptable to who? DCC, ORC as consent authority, DIAL as the aerodrome certificate holder, CAA as DIAL's regulator, or the travelling public in aircraft passing over Smooth Hill?
41. From DIAL's point of view, the test for acceptable hazard is determined by its regulator, Civil Aviation Authority. That is because in the event that the Civil Aviation Authority considers that the wildlife hazard to aviation at Dunedin Airport requires reduction, the Civil Aviation Authority can do nothing other than

¹⁴ Evidence of P Shaw at paragraphs 17, 50, 94, and 114.

impose restraints on the functioning of Dunedin Airport. This is exactly what the PORPS and the pORPS seeks to avoid.

42. The Civil Aviation Authority need not pay any attention to the Consent Authority's evaluation of acceptable aviation risk. Nor of Avisure's or Boffa Miskell's. Their opinion on the matter is irrelevant to the exercise of CAA's functions.
43. The mind-focusing scenario for DIAL is black-backed gulls bringing down a commercial aircraft. The Commissioners may remember video footage of an A320 being brought down by Canada Geese on departure from JFK Airport, and landing in the Hudson River in New York. It was a miracle that no-one was killed. That is DIAL's nightmare scenario. And given the aircraft tracking data presented by Mr Debono, it is a plausible scenario.
44. Section 3(f) of the Act includes in its definition of "effect" an adverse effect that has low probability of a high potential impact. That is the situation here. Although it is likely to be the case (whether Philip Shaw's evidence is accepted or not) that the loss of an aircraft above Smooth Hill due to bird strike is an effect of low probability, its impact is about as high as it is possible to imagine. This informs the Commissioners' evaluation of the Council's evidence. How can the Commissioners be satisfied that it knows what level of risk is "acceptable"? There is nothing quantitative which identifies how much risk to civil aviation above the Smooth Hill site is acceptable, and what methodology should be deployed to arrive at a probability multiplied by consequence assessment. No evidence has been produced in favour of Smooth Hill which allows any kind of quantitative analysis of risk which allows the Commission to draw a conclusion as to what is acceptable and what is not. There is simply nothing to go on.

Is adaptive management an appropriate response to aviation hazard?

45. Adaptive management is a useful and appropriate tool in circumstances where a risk assessment shows that non-

compliance with trigger levels will not result in an adverse effect that is unable to be reversed by management responses.

46. The leading case is *Sustain Our Sounds Inc v New Zealand King Salmon Company Ltd* [2014] NZSC 40. At [95]-[141] the Supreme Court discusses the issue of when an adaptive management approach can legitimately be considered a part of a precautionary approach, in that context Policy 3 of the NZCPS. The Supreme Court considered what must be present before an adaptive management approach can even be considered and what an adaptive management regime must contain in any particular case before it is legitimate to use such an approach rather than prohibiting the development until further information becomes available.
47. To answer the threshold question of whether an adaptive management regime can even be considered, there must be an adequate evidential foundation to have reasonable assurance that the adaptive management approach will achieve its goals of sufficiently reducing uncertainty and adequately managing any remaining risk. The threshold question is an important step and must always be considered.
48. At paragraph 121, The Supreme Court noted the Australian case *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council*¹⁵ recognised that:

“Adaptive management is a concept which is frequently invoked but less often implemented in practice. Adaptive management is not a “suck it and see”, trial and error approach to management, but it is an iterative approach involving explicit testing of the achievement of defined goals. Through feedback to the management process, the management procedures are changed in steps until monitoring shows that the desired outcome is obtained. The monitoring program has to be designed so that there is statistical confidence in the outcome. In adaptive management the goal to be achieved is set, so there is no uncertainty as to the outcome and conditions requiring adaptive management do not lack certainty, but rather they establish a regime

¹⁵ [2010] NSWLEC 48.

which would permit changes, within defined parameters, to the way the outcome is achieved.”

49. The secondary question of whether the precautionary approach requires an activity to be prohibited until further information is available, rather than an adaptive management or other approach, will depend on an assessment of a combination of factors:¹⁶
- a) *the extent of the environmental risk (including the gravity of the consequences if the risk is realised);*
 - b) *the importance of the activity (which could in some circumstances be an activity it is hoped will protect the environment);*
 - c) *the degree of uncertainty; and*
 - d) *the extent to which an adaptive management approach will sufficiently diminish the risk and the uncertainty*
50. In *Sustain Our Sounds*, while a change in trophic state would have been grave, the experts were agreed it was unlikely. Further, remedial action would be taken if there was any significant shift in water quality. Unexpected changes in water quality were fixable.
51. The key difference here is that you cannot un-crash an aircraft. Remedial action is not available. Therefore, the Commission has to be satisfied that there is no risk of that happening before it can approve an adaptive management response to birds arriving at Smooth Hill.
52. Although the DCC is to be commended for the work it has done with DIAL to try to find a solution (represented in Mr Dale’s amended conditions), in the end DIAL is not satisfied that the residual aviation risk has been avoided.
53. DIAL’s position is that no increase in its current bird hazard risk can be regarded as acceptable. Aviation hazard risk must

¹⁶ *Sustain our Sounds* at [129]

continue as if Smooth Hill did not exist. Because it should not exist. That is not the outcome which is achieved by the conditions presented by Mr Dale on behalf of the Council. DIAL therefore opposes consent being granted.

Dated 13 May 2022

A handwritten signature in blue ink, appearing to be 'Phil Page', with a stylized, cursive script.

Phil Page

Partner

Counsel for Dunedin International Airport Limited