

**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

CIV-2021-

UNDER the Declaratory Judgments Act 1908

IN THE MATTER of an application under the Declaratory Judgment Act 1908

BETWEEN **OTAGO REGIONAL COUNCIL**, a body corporate under the Local Government Act 2002

Plaintiff

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**, a duly incorporated society under the Incorporated Societies Act 1908 having its registered office at 205 Victoria Street, Wellington

Defendant

JOINT MEMORANDUM

Dated: 3 September 2021

ROSS DOWLING MARQUET GRIFFIN
SOLICITORS
DUNEDIN

Telephone: (03) 477 8046
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PO Box 1144, DX YP80015

Solicitor: A J Logan

JOINT MEMORANDUM

May it Please the Court:

Introduction

1. This proceeding is brought by the Otago Regional Council (“ORC”) under the Declaratory Judgments Act 1908.
2. The proceeding is subject to Part 18 of the High Court Rules 2016.

Documents filed

3. The following documents have been filed together with this memorandum:
 - 3.1. Statement of Claim;
 - 3.2. Draft Notice of Proceedings;
 - 3.3. Interlocutory Application Without Notice;
 - 3.4. Affidavit of Anita Jayne Dawe; and
 - 3.5. Draft Public Notice.
4. Ms Dawe’s affidavit is unsworn.
5. The Affidavit of Ms Dawe contains the same evidentiary matter as the affidavit complying with Rule 9.73 of the High Court Rules 2016 that the intending deponent would have affirmed had an emergency not existed.
6. An affidavit complying with Rule 9.73 of the High Court Rules 2016 containing the same evidentiary matter as that presented for filing will be filed as soon as circumstances reasonably permit.

Directions Sought

Service

7. The following directions are respectfully sought.
8. Service of the proceedings be effected on the Defendant and all primary

submitters on the proposed Regional Policy Statement 2021 (“PORPS”) by:

- 8.1. sending to each person who gave an email address for service in a submission on the PORPS an email containing a link to a Microsoft OneDrive folder containing the statement of claim, notice of proceedings, affidavit of Anita Jayne Dawe and court directions; or
 - 8.2. Sending by courier to each person who did not provide an email address for service but did provide a postal or physical address for service in a submission on the PORPS to the postal or physical address provided by the submitter copies of the statement of claim, notice of proceedings and court directions but not affidavit of Anita Jayne Dawe, together with written advice that Ms Dawe’s affidavit is available on the plaintiff’s website at which Ms Dawe’s affidavit may be viewed and that a hard copy can be obtained from the plaintiff on request; the written advice must give the link to the website and an email address by which a hard copy of the affidavit can be requested.
9. Public notice of the proceedings, and substituted service on all further submitters, and primary submitters who have not provided an address for service in their submission, be effected as follows:
- 9.1. The Plaintiff publish immediately the public notice approved by the court, statement of claim, Ms Dawe’s affidavit and the Court’s directions, on the proposed Otago Regional Policy Statement 2021 page of its website.
 - 9.2. The Plaintiff publish the public notice approved by the Court in the Otago Daily Times on two occasions, at least one week apart.
10. The plaintiff serve the notice of proceedings in the form approved by the Court.

Hearing

11. A 2-day hearing be held in Dunedin on dates to be fixed by the Court.

Timetabling

12. The time for filing a statement of defence or notice of appearance and any affidavit in support be abridged for persons served to 10-working days after service and otherwise to 5-working days after the second publication of the public notice in the Otago Daily Times.
13. The hearing be conducted on a submission only basis.
14. Submissions, list of authorities and chronology on behalf of the Plaintiff and any person supporting the Plaintiff be filed and served no later than 10 clear working days before the hearing.
15. Submissions, list of authorities and chronology on behalf of the Defendant and any person supporting the Defendant to be filed and served no later 5 clear working days before the hearing.
16. The Plaintiff prepare, file and serve a common bundle and casebook at least 2 clear working days before the hearing.

Leave reserved

17. Leave be reserved for any party to apply on notice for other or further directions.

Issue

18. On 26 June 2021 ORC notified a proposed Otago Regional Policy Statement ("PORPS") as a freshwater planning instrument under section 80A of the Resource Management Act 1991 ("RMA").
19. The Defendant, Royal Forest and Bird Protection Society of New Zealand Incorporated ("Forest & Bird") contends the PORPS is not a freshwater planning instrument in terms of section 80A of the RMA or only parts of it relate to freshwater.
20. The parties have agreed to cooperate in seeking the determination of this Court on that issue.

Service

21. In accordance with Rule 18.4 of the High Court Rules, an application for directions as to service and representation is lodged.

22. While that application is made without notice, the parties are agreed on the proposed directions. As already noted, the PORPS has been publicly notified.
23. Public notification commences the process by which any person can make a submission on the PORPS.
24. Submissions close at 3 pm on Friday 3 September 2021. The plaintiff anticipates several hundred submissions.
25. ORC must then prepare a summary of decisions requested, give public notice of that summary and invite further submissions in support or in opposition to the primary submissions made on the PORPS.
26. Any person who makes a submission is potentially interested in these proceedings because they may impact on the process which must be followed to deal with that submission.
27. Under section 80A different processes are followed depending upon whether the PORPS is a freshwater planning instrument and whether it relates to freshwater wholly or in part.
28. A freshwater planning instrument must undergo the freshwater planning process¹. Under the freshwater planning process, once submissions and further submissions have been received, ORC must, no later than 6 months after it publicly notified the freshwater planning instrument, submit that instrument and other documents required to the Chief Freshwater Commission.
29. In summary, the rest of the freshwater planning process entails:
 - 29.1. The Chief Freshwater Commissioner convening a Freshwater Hearings Panel to conduct the public hearing of submissions on the freshwater planning instrument;
 - 29.2. The Freshwater Hearings Panel must conduct public hearings in accordance with its powers and procedures set out in Part 4 of Schedule 1 of the RMA;
 - 29.3. After the public hearing of submissions is concluded, the

¹ Section 80A(1) of the RMA
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Freshwater Hearings Panel must make recommendations to ORC on the freshwater planning instrument;

- 29.4. ORC may accept or reject any recommendation; and
- 29.5. A person who made a submission on the freshwater planning instrument may make an appeal to the Environment Court in accordance with Subpart 2 of Part 4 of Schedule 1².
30. However, if the PORPS is not a freshwater planning instrument, or part of it does not relate to freshwater, then the standard procedure for making a Regional Policy Statement in Part 1 of Schedule 1 of the RMA must be followed (for that part if only part of the PORPS does not relate to freshwater). In short, the Council, or its delegates, conducts hearings on submissions, makes decisions on those submissions and those decisions are subject to appeal to the Environment Court.
31. It is therefore respectfully submitted that the primary submitters on the PORPS should be given notice of these proceedings and the opportunity of participating.
32. Submitters provide in their submissions an address for service so they can be informed of matters relating to their submissions. In most cases submitters provide email addresses³.
33. It is respectfully submitted that the notice of proceedings and statement of claim can be served on all submitters by being sent to either:
 - 33.1. The email address given by each submitter in the submission lodged on the PORPS; or
 - 33.2. If a submitter does not provide an email address, then sent by courier to the postal or physical address provided by the submitter.
34. Ms Dawe's affidavit in support of the statement of claim is over 800 pages in length.
35. If service can be effected by email, then the email will attach a link to a share file containing the statement of claim, notice of proceedings, court's

² Section 80A(5) of the RMA

³ A Dawe's affidavit

directions and Ms Dawe's affidavit.

36. If service cannot be effected by email, then it is submitted it is unnecessary and unduly onerous to serve a hard copy of Ms Dawe's affidavit in the first instance. It is therefore proposed that if service is effected by courier the package must contain the statement of claim, notice of proceedings, court's directions and written advice that Ms Dawe's affidavit is available on the ORC website and that a hard copy can be obtained from ORC on request. The written advice must provide the link to the ORC website where the proceedings will be uploaded, together with an email address by which submitters are able to request hard copies of Ms Dawe's affidavit.
37. In addition, a direction is sought that ORC must make available the whole of the proceedings (that is to say the notice of proceedings, statement of claim, all court directions and Ms Dawe's affidavit) on its website. There is a webpage on that site devoted to the PORPS to which the proceedings can be added.
38. The RMA provides for persons to make further submissions in support or opposition to the submissions lodged on or by 3 September 2021.
39. Further submitters can include persons who did not make original submissions.
40. It is important that the proceedings be drawn to the attention of prospective further submitters not only by being posted on ORC's website, but by public notice published in the Otago Daily Times newspaper circulating throughout the Otago region. The public notice will provide the link to the ORC website where the proceedings will be uploaded, together with an email address by which submitters are able to request hardcopies of the proceedings.
41. It is respectfully submitted that the public notice replicate, with any necessary changes, the notice of proceedings.
42. ORC has received approximately 1,200 standard form "submissions" prepared by Greenpeace. These submissions do not conform with the Resource Management (Forms, Fees and Procedure) Regulations 2003, in particular the prescribed form for submissions. Among other things, these "*submissions*" do not include an address for service.

43. The ORC has drawn the non-compliances to Greenpeace's attention.
44. Subsequently, over 100 conforming submissions have been received, with otherwise the same or similar substantive content.
45. It is impossible to serve persons who do not provide any address for service.
46. It is likely other persons will fail to provide an address for service.
47. It is respectfully submitted that the proposed public notice to be published on 2 occasions in the Otago Daily Times, and publication on the PORPS page of the ORC website be substituted service on those persons.
48. A draft public notice is filed for the Court's approval.
49. It is also necessary to tailor the notice of proceedings to the circumstances of this case.
50. A draft notice of proceeding is filed for the Court's approval.
51. The public notice should be published on two occasions, one week apart, in the Otago Daily Times.
52. Any person may file a statement of defence or notice of appearance and any affidavit within five working days of the second publication of the notice in the Otago Daily Times.

Urgency

53. The PORPS was publicly notified on 26 June 2021.
54. The RMA requires that the Regional Council must, no later than 6 months after it is publicly notified as a freshwater planning instrument, submit the required documents to the Chief Freshwater Commissioner⁴. The ORC cannot extend that time period⁵.
55. These proceedings are therefore time critical. A hearing and determination by this Court before 26 December 2021 are respectfully requested.

⁴ Section 80A(4)(c) of the RMA

⁵ Section 80A(9) of the RMA

56. The parties suggest that a hearing be allocated and the timetable be set working back from the commencement of the hearing.
57. The parties anticipate that up to two days may be required for the hearing and respectfully request dates be allocated now.

Conclusion

58. Directions are sought in accordance with paragraphs 3 to 12 above.
59. Neither the plaintiff nor the defendant will oppose leniency being afforded to any person who wishes to join the proceedings out of time so long as the hearing dates are not affected.
60. Counsel are available at short notice for a teleconference if the court considers it necessary.



A J Logan/ T M Sefton
Counsel for the Otago Regional Council

3 September 2021

Date



P Anderson
Counsel for the Royal Forest and Bird
Protection Society of New Zealand Incorporated

3 September 2021

Date