

In the High Court of New Zealand
Dunedin Registry

I Te Kōti Matua O Aotearoa
Ōtepoti Rohe

CIV-2021-412-000089

Under the Declaratory Judgments Act 1908

Between **Otago Regional Council**

Plaintiff

And **Royal Forest and Bird Protection Society of New Zealand
Incorporated**

Defendant

And **Dunedin City Council**

Third Party

Affidavit of Dr Anna Louise Johnson for Dunedin City Council

30 November 2021

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lloyd.**

I, **Dr Anna Louise Johnson** of Dunedin, City Development Manager, hereby solemnly and sincerely affirm:

- 1 I am the City Development Manager at the Dunedin City Council (**Council** or **DCC**).
- 2 I hold the qualifications of Bachelor of Science majoring in political science and environmental studies received from the University of Oregon; Postgraduate Certification (Ecology) received from Otago University and PhD received from the Otago University (Thesis title: Public Involvement in Environmental Impact Assessment: An examination of public involvement in the resource consents process of the Resource Management Act 1991). I am an Associate Member of the New Zealand Planning Institute.
- 3 I have over 18 years' experience in the areas of RMA planning, growth management planning, community engagement, and planning research, including 12 years as City Development Manager at Dunedin City Council. I led work on the Dunedin Spatial Plan, completed in 2012, the proposed second generation Dunedin City District Plan (2GP), notified in 2015, and was involved in the previous proposed RPS in 2015.
- 4 I have read the High Court Code of Conduct for Expert Witnesses. My evidence complies with the Code in all respects and the opinions herein are within my area of expertise.
- 5 In this affidavit I:
 - (a) Discuss the impact of progressing the full pRPS through the streamlined freshwater process on the DCC and the potential impact on the content of pRPS of most concern to the DCC in its submission.
 - (b) Identify those chapters of the PORPS that I consider should be treated as freshwater planning instruments and those that should not.

Background context to my opinions

- 6 Critical context for my opinions expressed in this affidavit are:
 - (a) my understanding of the drivers for reviewing the operative RPS, in an unusually short time frame,
 - (b) my experiences with the previous pRPS in 2015,
 - (c) the opportunities provided for pre-engagement on this pRPS; and
 - (d) my experience with the potential effect of the pRPS on district plan changes.

- 7 My understanding is the key driver for reviewing the RPS was the need to add improved content related to freshwater planning in order to give effect to the National Policy Statement for Freshwater Management 2020 (NPS-FM)
- 8 However, rather than progress a partial review of the RPS with focused changes around freshwater content, in particular new content required under the NPS-FM, the ORC chose to complete a full review of the RPS despite the tight timeframes for preparation.
- 9 Once the choice was made to complete a full review of the RPS, the RPS was required to give equal attention to giving effect to the National Policy Statement on Urban Development 2020 (NPS-UD). There has been limited engagement with the DCC on growth issues facing the city and the content of the RPS does not give adequate policy attention to the need for environmental outcomes to be balanced against the need to provide for growth. Importantly, the need to provide for housing and business land capacity, and the social impacts of the current unsustainable house price growth in Otago are not currently recognised as significant regional issues.
- 10 Based on my own experience in plan-making, I understand the unrealistic time pressures that can be put on plan development processes and have sympathy for the challenges that the policy staff at the ORC faced in having to prepare this pRPS in the timeframe they had. That timeframe, in my opinion, has resulted in an pRPS with considerable shortcomings that need to be addressed. However, plan development processes, even with reasonable timeframes, will inevitably result in imperfect planning instruments. That is why the Resource Management Act 1991 (RMA) sets up a process in Schedule 1 by which plans are subject to scrutiny through a public submission process and tested and improved through the hearings process, which gives the opportunity for panels, which should include suitably qualified commissioners, to hear and weigh up evidence from suitably qualified experts, as well as laypeople and mana whenua.
- 11 The hearing process, in my experience, results in an improved plan or policy statement. Given the complexity of policy and planning instruments sometimes changes introduced by panels in response to submissions are also imperfect and can be improved further through appeals. In my opinion, the appeals process enables, and sometimes is necessary for, the creation of effective planning instruments. From my own experience, much of that improvement occurs through mediation and often very few matters need to progress to Court. Perhaps not true everywhere, but in my experience in Otago most appellants and almost all their counsel and experts enter mediation with a positive attitude and open mind and seek to resolve differences. This creates an opportunity for experts and counsel for various parties to work together to create workable and effective policy and

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planning instruments that are appropriate to achieve plan (or policy statement) objectives.

- 12 I was involved in the mediation on the current operative RPS and, though time consuming, the process was worthwhile in creating a better, though still imperfect, RPS.
- 13 Given the relatively recent development of the RPS, there is a lot of change in the new proposed RPS, despite the time spent by all parties to reach agreement on the previous RPS provisions. It was even more surprising that there was virtually no targeted pre-engagement on the pRPS with territorial authorities or re-analysis of previous submissions and mediation outcomes to ensure issues and concerns that were recently resolved to ensure that the new content reflected those outcomes where not in conflict with giving effect to the new changes in national policy direction.
- 14 Another important aspect of background context that has influenced my opinions, is my experience with how the ORC and other parties have sought to apply the RPS in making their case as submitters and appellants on Dunedin's second generation District Plan (2GP), which is nearing the end of its appeal stage. As a result of the *King Salmon* decision, the practice of objective and policy interpretation has changed fundamentally. The key changes relate to (1) how people seek to have directive policies interpreted, with most agreeing that they need to be interpreted literally with 'avoid' meaning avoid; and (2) arguments around how competing objectives or policies should be weighed against each other based on the relative language used in them.
- 15 In my opinion, the direction in *King Salmon* is a positive change for the role of plans and plan interpretation but it does create an environment where significantly more attention needs to be paid to drafting and how the policy framework directs the weighing of matters. In particular, I believe best practice plan drafting requires: creating clear linkages between topic areas; a drafting protocol; and other drafting techniques and content that makes it clear how objectives need to be balanced.
- 16 My opinions below reflect my analysis, based on my past experience, of how the ORC will seek to implement the RPS and how various interests may seek to influence district plan changes or the assessment of resource consents based on the language used, and the methods used to direct the weighting of matters. The discussion herein goes to the potential impact that the change of process may have on both:
 - (a) the procedural fairness of the process for the DCC, and
 - (b) the quality of the policy instrument that comes out of the process, which itself has impacts on people's wellbeing and the environment.

DCC's submission on the PORPS

- 17 The DCC submitted on a wide range of the provisions in the pRPS but its key concern centred around whether the pRPS gave effect to the National Policy Statement for Urban Development (NPS-UD) and adequately provided for housing, and the infrastructure to support housing, in Dunedin. This key position was outlined in the introduction to its submission as follows.
- 18 *Overall, the DCC considers that the proposed RPS, as currently drafted, is quite restrictive and does not adequately provide for all the activities necessary for the wellbeing of people and communities, including access to housing or the ability to be affordably serviced for infrastructure. The proposed RPS has a strong emphasis on protection of the environment and in many circumstances seeks to require the total avoidance of certain adverse effects on the environment. While the DCC supports environmental protection outcomes, there is a lack of recognition that in some circumstances a level of effect (e.g. remedying or mitigating effects) should be acceptable when these residual effects are balanced against positive effects or outcomes, for example providing for new housing or infrastructure to meet growth demands.*
- 19 *To a large extent this problem is due to the lack of objective cross-referencing within policies and the attempt to address the balancing of objectives through the content in the Integrated Management section, the content of which exacerbates rather than helps with this issue. This is discussed in more depth later in this submission. It is also due to the policy wording chosen which is also discussed more below.*
- 20 *Some more work is required to achieve the appropriate balance necessary to promote 'sustainable management', and the wellbeing of people and communities, and the environmental bottom lines. This policy evaluation must include consideration of the costs of improved environmental outcomes and the ability of communities to pay (appropriately weighing the costs and benefits of regulation) as required by Section 32 of the Act.*
- 21 *In this regard, DCC considers that the RPS does not fully give effect to the NPS-UD in that it does not appropriately provide for the infrastructure required to support urban growth and development nor create an appropriate policy framework to direct an adequate range of options for accommodating housing demand to be pursued through plan changes.*
- 22 *Dunedin, along with other parts of Otago, is growing rapidly, and growth will inevitably result in some environmental effects. While these effects must be managed and some environmental bottom lines should be set, there appears to be*

too high a priority on preventing any adverse effects rather than determining what levels of effects are acceptable to support this growth. The DCC would like the RPS to give greater consideration to how these potential adverse effects may be otherwise mitigated or remedied. Care must be taken to avoid a situation where servicing this growth or providing for people's health and wellbeing through appropriate infrastructure and opportunities for housing is an impossibility within the RPS framework.

- 23 Many of the changes sought in the DCC submission to address these concerns were changes to the objective and policy language used, so that policies with directive language did not require no effects when that was not possible while allowing for planned urban development (unqualified policies that used the terms 'avoid' or 'maintain'). It also seeks the use of more cross-linkages and qualifiers to enable a tolerance for some effects in order to provide housing and infrastructure in appropriate locations. In summary, the DCC sought clear policy support for district plans to identify appropriate opportunities and planning pathways for housing and business land and associated infrastructure.
- 24 The DCC's submission also raises fundamental and significant concerns about the inadequacy of the process to prepare the RPS (including the lack of section 32 analysis and the lack of appropriate engagement with local authorities on the content). The submission contends the pRPS fails to give due attention to the NPS-UD or create an RPS framework that will enable the DCC to give effect to the NPS-UD.
- 25 The DCC applies this overarching submission to the entire pRPS but the sections of the RPS that are most linked to these concerns are:
 - (a) Interpretation – Definition of "Well-functioning urban environments"
 - (b) SMMR – Significant resource management issues for the region - absence of identification of addressing housing need and infrastructure provision to support well-being as a significant regional issue
 - (c) IM – Integrated management – the absence of providing for people's well-being in the objectives for the RPS
 - (d) LF-LS – Land and Soil – the use of strongly worded directive policies about maintaining soil quality and maintaining the availability of productive land without balancing content with respect to the need to also meet housing and business land capacity outcomes
 - (e) EIT-INF Infrastructure – the relatively weak policy wording around providing for infrastructure and the lack of attention to the operation of infrastructure to balance strongly and directive policies around environmental outcomes

- (f) UFD – Urban Form and Development –the lack of balancing and linking content to the rest of the RPS that might create a framework that provides clear guidance on how to reconcile the need to provide for housing and business land capacity (and the development, upgrades to and operation associated infrastructure) with other very strongly worded objectives and policies in the RPS.
- 26 The DCC has also submitted on other matters related to the UFD section. These concerns relate to:
- (a) the degree of prescriptiveness that the RPS is proposing to include with regard to urban form, which does not appear to be driven by any identified regionally significant issues and in some instances conflicts with the strategic directions of the DCC 2GP and, in my opinion, does not reflect good urban planning practice.
- 27 The DCC has also submitted on several other provisions unrelated to the above key concerns. Many of these submission points are not seeking substantive changes, or the change sought is to do again with concerns about the use of directive policy wording (the use of the word ‘avoid’) when it may not always be appropriate or are relatively minor, such as seeking changes to improve the clarity of provisions.
- 28 Many of the DCC’s submission points go to the need for the pRPS to be more clearly drafted. On this matter I wish to emphasise the importance of processes that enable parties to get together and work through plan provisions together. As highlighted earlier I was involved in the 2015 pRPS mediations and have been involved in mediations on the DCC 2GP since 2019. Mediation or other forums that enable expert discussion, in my opinion, are the most important and effective mechanisms in the planning process to improve the quality of plans. If run well, they can enable experts to work together to reach agreement or even consensus on substantive matters and can allow ‘drafting’ experts (which can be both planners as well as legal professionals with skill in this area) to improve a plan’s clarity so it will be implemented as hoped and thereby limit the risk of perverse or unintended outcomes. This process is particularly critical where pre-engagement as part of plan preparation has not been done thoroughly (which can often be the case due to time pressures to notify plans).

Opinion on which aspects of the RPS related to freshwater

- 29 It is my opinion that the aspects of the pRPS that relate to freshwater management are in the following sections: LF-WAI and LF-VM, LF-FW and any ancillary content found in Part 1, SRMR and RMIA, Part 4 and Part 5.
- 30 I accept that the IM section sits across the pRPS so it relates to (and sits above) all aspects of the pRPS and, in particular, the prioritisation hierarchy of natural



environment values above human health and wellbeing (LF-WAI-P1-Prioritisation) has been carried through to the integrated management section, so has a particularly close relationship.

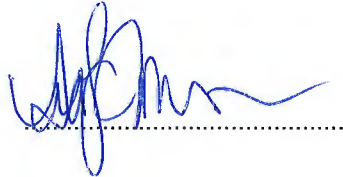
- 31 For the purposes of ensuring effective plan making and natural justice, in my opinion, overarching content as is included in the IM section should be subject to the more thorough and robust full Schedule 1 process, rather than captured as related content and subject to the more streamlined planning process.

Conclusion – Implications of Treating the Entire PORPS as a Freshwater Planning Instrument


- 32 In my opinion, the content in the RPS as discussed in paragraph 29 above, that is directly and clearly related to freshwater management, is appropriately progressed through the freshwater planning process. I have considered whether the rationale that the natural environment is an integrated system should be the basis for considering that all of the RPS is a freshwater planning instrument but I do not consider this to be correct. The DCC submission covered a broad range of issues with a focus on topics related to growth and infrastructure, which are distinct topics from freshwater or freshwater management. Further, in my opinion given the pRPS was also required to be updated to give effect to the NPS-UD 2020 part of its purpose was not to do with freshwater therefore section 80A(3) of the RMA should have been applied to reflect this dual purpose.
- 33 Treating the entire PORPS as a Freshwater Planning Instrument and using the streamlined provisions in section 80A creates the risk that the final RPS may continue to give inadequate attention to implementation of the NPS-UD and issues related to growth. It also does not create a fair process for the DCC, which must prepare its district plans in accordance with the RPS as well as deliver infrastructure to support growth under the planning framework created by the RPS.
- 34 Based on my previous experience with the 2015 pRPS, the appeal process (and the opportunities it created for mediation between the parties) was essential for creating a more workable RPS. These opportunities would not be afforded where appeals are only allowed on points of law.
- 35 In my opinion, the normal Schedule 1 process would create more appropriate opportunities to address some of the critical issues submitted on in the pRPS with respect to creating a RPS framework that gives effect to the NPS-UD. As an alternative, if a stream-lined process is to be followed, the process should:
- (a) be 'front-loaded' with requirements for expert caucusing and mediation to seek to resolve and narrow the issues ahead of hearings; and

(b) ensure hearings panel members with specific expertise in strategic spatial and growth planning and infrastructure delivery.

Affirmed at Dunedin)
By **Dr Anna Louise Johnson**)
this 30 November 2021)
before me:)



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A Solicitor of the High Court of New Zealand

Peter Benjamin Williams
Solicitor
Dunedin