

Otago Regional Council

Proposed Otago Regional Policy Statement 2021

THIRD MINUTE AND DIRECTIONS OF HEARINGS PANEL

On preparation for hearing of submissions

Minute 3

INTRODUCTION

1. On 28 February 2022, the panel issued its first Minute and Directions, which included a Notice of Hearing (commencing Monday 30 May 2022), and directions for preparation for hearing.
2. Minute 1 recorded our understanding of the task of the panel under section 80A(5) of the Resource Management Act 1991, (“RMA”) to conduct the public hearing of submissions in accordance with its powers set out in Part 4 of Schedule 1 RMA , and subsequently make recommendations to the ORC on this instrument as a freshwater planning instrument.
3. Under the heading “Hearing plan”, we recorded in paragraph 5 that current directions might be subject to change depending on the outcome of the recent High Court hearing concerning the status of the pORPS as a freshwater instrument. That remains an important consideration.
4. On 15 March 2022, counsel for the Council filed a memorandum for the panel which attached a copy of an undated memorandum of counsel for all parties in the High Court matter, to the Judge in that case, respectfully enquiring about timing of a decision, and expressly noting our above-mentioned paragraph 5. The 15 March memorandum to us also attached a Minute of Justice Nation of the same date in response, indicating that pressure of caseload pointed to the judgment being unlikely to be available before the end of June 2022.

5. On 18 March 2022 we issued our Second Minute and Directions, in which we discussed in detail potential problems for the hearing timetable depending on timing and outcome of the High Court decision. We canvassed some possible approaches to maintaining momentum and asked the parties to consider them and provide us with their responses by midday Wednesday 13 April 2022.
6. On 13 April we received 15 memoranda from parties. Most of them were very constructive in examining our ideas for progressing hearings or offering variations on the theme.
7. A notable common feature of many of the memoranda was a reluctant preference for progress towards hearings to await the outcome of the High Court case mentioned above. Earlier progress in various defined ways featured as a lesser second option or was opposed. The Otago Regional Council was almost alone in focussing on early progress as the preferred way forward. It worked hard and constructively in proposing a means of achieving that.
8. Some other parties endeavoured to assist in a similar way, but from an holistic consideration of their memoranda it became apparent that there exists dispute about what issues or topics could proceed to hearing in the early stages. There was even a challenge to our direction to work chapter-by-chapter through the whole process. That party proposed a topic-by-topic approach. We are not sure at this stage that such comparative approaches need to be seen as having irreconcilable let alone black and white differences.
9. Regrettably, the disputes point to potential pitfalls from pushing on with a brave attempt to maintain momentum. Time and cost to parties and the council have come more into focus for us than previously, because a key risk seems to be possibly having to back-track and repeat processes or start again in certain circumstances, which could wipe out the gains we had hoped for in starting soon.
10. We have therefore resolved to await the decision of the High Court on the status of the instrument. Some of the recommendations of the Horticultural/Agricultural parties are helpful in that circumstance, even though we disagree with some of their reasons. In particular the difficulty

they perceive in the council delegating hearing functions to us as a second identically-comprised panel under tradition Schedule 1 processes. We find more favour with others of their reasons, including that concerning the desirability of hearings following the logical structure of the pORPS.

11. We find favour as well with most of their proposed draft timetable to reflect the known possible timing of the High Court decision. It also accurately reflects an earlier view we expressed that it would be better practice for all evidence to be received “upfront” as they term it, rather than on a rolling basis.

12. There is an inconsistency between their paragraphs 6 and 7. We support their submission in 6 that the forthcoming s42A report is likely to be an extensive document that parties [and, we add, the panel] should have good time to consider. Their suggestion in 7(a) that it be made publicly available in late June makes less sense in consequence. ORC has offered in paragraph 19 of its memorandum to publish it on 27 April 2022, and that offer is accepted by the panel.

13. We **direct** new preparation dates and hearings commencement as follows:

- (a) The s42A report be posted on the website of these proceedings on 27 April 2022;
- (b) All parties’ evidence in chief be filed by 5pm 29 July 2022;
- (c) All evidence in chief to be posted on the website by 5 August 2022;
- (d) All rebuttal evidence to be filed by 5pm 26 August 2022;
- (e) All rebuttal evidence to be posted on the website by 2 September 2022;
- (f) Hearings to commence on 19 September 2022 (3 weeks after rebuttal evidence posted on website, noting it is one week later than suggested by the Horticultural/Agricultural parties).

14. The question of whether the ORC needs to delegate “non-freshwater” matters to us as a second but identically comprised panel can await the outcome of the High Court proceedings.

15. We **direct** also that parties make use of the extra time created by the delay, to engage in meaningful negotiations or other alternative dispute resolution to settle or at least narrow matters in dispute. We ask the

council to lead that process. If any parties seek a more formal approach to ADR or conferences of experts, they have leave to approach the panel for directions. We hope however that responsible counsel and parties can move into this area without the need for formal direction.

For the panel,

A handwritten signature in blue ink, appearing to read "L. Newhook", with a large, stylized initial "L" and a small mark at the end.

Judge Laurie Newhook,
Chair and Chief Freshwater Commissioner.

14 April 2022.