

**IN THE ENVIRONMENT COURT
AT CHRISTCHURCH
I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI**

Decision No. [2021] NZEnvC 20

IN THE MATTER

of the Resource Management Act 1991

AND

of a notice of motion under section 149T(2) to decide proposed Plan Change 8: Water for Otago (referred to the Environment Court by the Minister for the Environment under section 142(2)(b) of the Act)

OTAGO REGIONAL COUNCIL

(ENV-2020-CHC-128)

Applicant

Court: Environment Judge J E Borthwick
Environment Judge P A Steven

Hearing: In Chambers in Christchurch on the papers

Last case event: Submission received 22 February 2021

Date of Decision: 4 March 2021

Date of Issue: 4 March 2021

**DECISION OF THE ENVIRONMENT COURT ON APPLICATION
FOR WAIVER AND S 274 STATUS TO JOIN PLAN CHANGE 8**

A: Under s 281(1)(a)(iia) of the Resource Management Act 1991 the application for waiver of time by Willowridge Developments Limited is granted.



Willowridge waiver application to join PC8

B: Pursuant to s 274(1)(d) Willowridge Developments Limited is joined as a party to this proceeding.

C: Costs are reserved.

REASONS

Introduction

[1] On 7 December 2020, Willowridge Developments Limited (Willowridge) filed a s 274 notice, which was accompanied by memoranda of counsel stating that Willowridge:

- (a) makes its application under s 274(1)(d);
- (b) is not a trade competitor for the purpose of s 308A;
- (c) seeks to join in relation to two proposed rules addressing permitted and restricted discretionary earthworks (rules 14.5.1 and 14.5.2), and that it supports their deletion; and
- (d) it has an interest greater than the public generally.

[2] The notice was filed some three weeks out of time and was accompanied by a request for a waiver of time under s 281 RMA.

[3] Neither application was opposed by Otago Regional Council (ORC).

Background

[4] Willowridge is an Otago based residential land development company which undertakes both residential and commercial subdivision development. Together with related companies, Willowridge has brought on average between 50-100 residential sections to the market annually, with new subdivisions on foot in Wanaka, Dunedin and Hawea.

[5] Willowridge supports its case with an affidavit of Alison Devlin, general manager – planning and development of the company.¹

[6] Due to the scale of its developments, all of Willowridge’s residential subdivisions to date have involved earthworks triggering the volumetric threshold in proposed rules 14.5.1 and 14.5.2 of Plan Change 8 (PC8), in circumstances where similar rules regulating earthworks in either the Queenstown Lakes District Council and/or Dunedin City District Plans will also have been triggered.

[7] Ms Devlin explains that the duplicated conditions require the same ongoing notification and reporting to occur to both authorities, resulting in additional administrative time, cost and complications during earthworks construction. Ms Devlin attached examples of the earthworks consents to illustrate this duplication.

[8] Willowridge distinguishes itself from persons with lesser interests, even those who live and work the land, “... such as a farmer or agricultural contractor...”.

[9] Although Willowridge did not lodge a submission of its own, other submitters have sought that the earthworks rules be deleted. Submitters are identified in the memorandum of counsel on behalf of Willowridge² and appear to include other property development interests.

The law

[10] By s 149T(6), the s 274 route to participation will apply where, by s 149T(3)(a), the matter has been referred to the court by a notice of motion. The notice of motion filed by the ORC seeks decisions on submissions to PC8 under cl10(1) of the First Schedule. If the requisite interest exists, s 274 affords

¹ Affidavit of Alison Devlin on Behalf of Willowridge Developments Limited, affirmed 12 February 2021.

² Dated 23 December 2020.

Willowridge the right to be heard in support of (or opposition to) submissions that are to be decided by the court albeit it can ask for no other decision.³

[11] The circumstances in which an interest in proceedings might be greater than that of the public generally is not closed or prescribed; and nor is it restricted to the holding of a property interest, which would otherwise be enough (if sufficiently proximate) to establish standing (*Purification Technologies Ltd v Taupo District Council*⁴ and *Gargiulo v Christchurch City Council*).⁵

[12] It is the relationship between the interest and the consequent effect of the proceedings on the interest, rather than the actual interest itself, which is important. The question is whether there is an advantage or disadvantage that is direct and not just emotional or intellectual.⁶

[13] In *Trustees of the Neville Crawford Family Trust v Far North District Council*⁷ the Society's aims and objectives gave it a specific interest in Russell and development in the area that was greater than that which the general public had, whether as a cross section of New Zealand, or as general public living in the Russell area.

[14] Moreover, it was irrelevant that another party already involved in the proceeding had similar issues to the Society, a factor that has some relevance in the present situation.⁸ As to that, the decision in *Sandspit Yacht Club Marina Soc v Auckland Council*⁹ is of some assistance as in that case, the court was required to consider whether a society had an interest that is greater than the public generally

³ In that regard we generally accept the advice of the Special Advisor, Barrister, Ian Gordon in submissions dated 22 February 2021 at [16]-[25] and [29]-[30].

⁴ *Purification Technologies Ltd v Taupo District Council* [1995] NZRMA 197 at 204.

⁵ *Gargiulo v Christchurch City Council* EnvC C47/1999.

⁶ *Treble Tree Holdings Ltd v Marlborough District Council* [2012] NZEnvC 88, [2012] NZRMA 497.

⁷ *Trustees of the Neville Crawford Family Trust v Far North District Council* [2013] NZEnvC 141.

⁸ Noting that in the decision *Ahuareka Trustees (No 2) Limited v Auckland Council* [2020] NZHC 2303 at [19], the High Court has observed that a party joining under s 274(1)(d) need not establish that their involvement would be of assistance to the court as would a person seeking to join a civil proceeding as an intervenor.

⁹ *Sandspit Yacht Club Marina Soc v Auckland Council* [2011] NZRMA 300 at [9].

in circumstances where some of its members had lodged submissions. Judge Smith held that the society did have an interest that is greater than the public generally and stated:¹⁰

This is not to be compared with the members who have already filed submissions, but the general public. Given that individuals within it clearly are being disadvantaged, it follows that the group representing those persons is similarly disadvantaged. I do not think it is an answer ... that that interest is already represented through the individual submissions.

[15] In *Beresford v Queenstown Lakes District Council*,¹¹ Bike Wanaka Incorporated sought to join an appeal as a s 274 party. Mr Beresford's appeal sought a rezoning of part of the land known as Sticky Forest. Bike Wanaka represented the interests of cyclists in the Lake Wanaka/Upper Clutha Region including as to mountain biking, whilst maintaining the trails within and around Sticky Forest for the benefit of its members and community. The group supported the enablement of recreational opportunities at Sticky Forest being a possible outcome of the appeal by Mr Beresford.

[16] The court considered the advantages and disadvantages that would accrue to Bike Wanaka in terms of the potential outcomes of the appeal to the proposed District Plan provisions in issue. Having considered the range of potential appeal outcomes, the court concluded that there would be both "genuine significant advantage [and] disadvantage to Bike Wanaka such as would make it eligible to be a party under s 274(1)(d)".¹²

[17] In the present case, Willowridge stands to gain if the proposed earthworks rules in PC8 are deleted in the sense that the consenting requirements will be reduced if duplication is avoided; conversely, it will be disadvantaged if the

¹⁰ At [18].

¹¹ *Beresford v Queenstown Lakes District Council* [2020] NZEnvC 126.

¹² *Beresford v Queenstown Lakes District Council* [2020] NZEnvC 126 at [50].

duplication of control over earthworks activity continues.

[18] While other specific industry sectors may be affected in similar ways, that is not fatal to Willowridge, as the comparison is to be made with the interests of a cross-section of the general public and not with other specific sectors of the public. The interest of Willowridge, as explained by Ms Devlin, is sufficiently specific when compared to that of the general public.

[19] We are satisfied that this gives rise to a qualifying interest for the purpose of s 274(1)(d) and so now consider the application for waiver.

Section 281 discretion to waive time limits

[20] Section 281(1)(a)(iia) RMA provides, relevantly, that a person may apply to the Environment Court to waive a requirement of this Act or another Act or a regulation about the time within which a person must give notice under s 274 that the person wishes to be a party to the proceedings. Section 281(2) states that the court shall not grant an application under this section unless it is satisfied that none of the parties to the proceedings will be unduly prejudiced. When considering a waiver application, the court is required to consider whether any of the parties to the proceeding would be unduly prejudiced should the waiver be granted, in the sense of “having lost a position of advantage ...”.¹³

[21] If no party is unduly prejudiced, the court must determine whether to exercise its discretion to grant the waiver. Relevant factors were identified in *Omaha*¹⁴ and include:

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the scheme of the RMA relating to public participation;

¹³ *Omaha Park Limited v Rodney District Council* EnvC A46/2008 at [6].

¹⁴ *Omaha Park Limited v Rodney District Council* EnvC A46/2008 at [7].

- (d) what has occurred in the proceeding; and
- (e) what effect introducing new parties might have on progressing the appeal to resolution.

[22] The Council has not opposed the waiver application. While that is not determinative, it is a relevant factor; no undue prejudice is raised by the Council and we find the delay is of no real moment given the stage of the proceeding where a referral to alternative dispute resolution processes or timetabling directions for evidence exchange have yet to be made.

[23] In saying that, the reasons for the delay are hardly persuasive: Willowridge says it was not aware of the plan change until after the period for filing submissions and further submissions had ended. When it sought to file a late submission, it learned that the plan change had been called-in by the Minister for the Environment and referred to the court.¹⁵

[24] Even so, given the importance of public participation under the scheme of the Act, the fact that there is no opposition to the application and that the Regional Council consents to the same, we are satisfied that this is an appropriate case in which to exercise our discretion and grant the waiver extending the time by which Willowridge is to file notice under s 274 of the Act.

Outcome

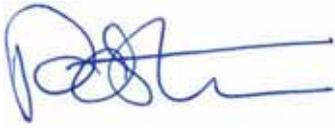
[25] For all of the foregoing reasons we intend to exercise our discretion to grant

¹⁵ Willowridge Developments Ltd, memorandum of counsel dated 9 December 2020.

the application for waiver of the time limit for Willowridge to join this proceeding as a party pursuant to s 274(1)(d) of the Act.

Jane S.

J E Borthwick
Environment Judge



P A Steven
Environment Judge

