BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH

I MUA I TE KŌTI TAIAO O AOTEAROA
KI ŌTAUTAHI

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 to the Regional Plan: 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

MINUTE OF THE ENVIRONMENT COURT
PLAN CHANGE 8

Willowridge Developments Ltd
(22 February 2021)

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[1] The court having considered the submission of Mr Ian Gordon, Barrister[1] and the affidavit of Allison Devlin,[2] is now satisfied that Willowridge Developments Ltd has standing under s 274(1)(d) of the RMA to become a party to Plan Change 8 and that its application to waive the time for giving notice to join the proceeding be granted.

[2] That being the case, unless any party opposes the same, I propose to cancel the hearing set down for Friday 26 February 2021. A decision on the application will follow in due course.

THE SEAL OF THE ENVIRONMENT COURT NEW ZEALAND

[1] Dated 22 February 2021.
[2] Affirmed 12 February 2021.

[3] Any party opposing the cancellation of the hearing is to advise the Registry by **9 am Tuesday 23 February 2021.** If no opposition is received the hearing is cancelled without any further notice being issued.

J E Borthwick
Environment Judge
Issued: 22 February 2021

IN THE ENVIRONMENT COURT
AT CHRISTCHURCH

ENV-2020-CHC-128

I TE KÓTI TAIAO
KI OTAUTAHI

UNDER the Resource Management Act 1991

IN THE MATTER of Otago Regional Council Proposed Plan Change 8

SUBMISSIONS OF SPECIAL ADVISOR

22 FEBRUARY 2021

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MAY IT PLEASE THE COURT:

Introduction

1. These submissions are made at the invitation of the Court to assist with the issues raised in the Court's Minute dated 26 January 2021. Those issues are the proper interpretation and application of s 274(1)(d) of the Resource Management Act 1991 (**RMA**) to:

   a. a plan change called-in by the Minister of the Environment (**Minister**) and referred to the Environment Court for decision under ss 142, 149T and 149U;[1] and

   b. a person who was not a submitter on the plan change.

2. In preparing these submissions, counsel has reviewed the documents (i) to (viii) listed at paragraph [10] of the Court's Minute of 26 January 2021, and the affidavit (and exhibits) of Alison Devlin dated 12 February 2021.

3. The proceeding is proposed Plan Change 8 to the Otago Regional Plan. It was commenced by way of notice of motion under s 149T(2) of the RMA, following a direction by the Minister for the Environment under s 142(2)(b) that the matter be referred to the Court.

4. Willowridge Development Ltd (**Willowridge**) has filed a s 274 Notice dated 17 December 2020 (**Notice**). The Notice was out of time by some three weeks and was accompanied by a request for waiver of time under s 281 of the RMA.

5. In its Notice and subsequent memoranda, Willowridge states:

   a. it applies under s 274(1)(d);

   b. it is not a trade competitor for the purpose of s 308A;

   c. its proposed joinder is confined to its interests in two proposed rules in relation to permitted and restricted discretionary earthworks (rules 14.5.1 and 14.5.2, together the **Rules**) and that it supports the deletion of those Rules; and

   d. it has an interest in the proceedings greater than that of the general public.

6. Willowridge describes itself as follows:

> Willowridge carries on business as a residential land developer and undertakes a number of large-scale development projects in the Otago region. The vast majority of earthworks associated with its developments are in excess of 2,500m², triggering the restricted discretionary activity status. It is and will be directly affected by the two rules it is interested in.

[1] Part 6AA RMA

7. Counsel for Willowridge submitted that, as a residential land developer, Willowridge has an interest in developing land and carrying out the requisite activities, including obtaining resource consents. Willowridge submitted that there is a consequential effect of this interest of Plan Rules that restrict residential development. In this way, Willowridge seeks to distinguish itself from persons with lesser interests, even those who live and work the land, "… such as a farmer or agricultural contractor ….".

8. Willowridge was not a submitter on the Rules or any related provisions of Plan Change 8, but other submitters have sought the removal of the Rules.[2]

9. The Otago Regional Council does not oppose Willowridge's ss 274 and 281 applications. The Council does not consider it will be prejudiced by Willowridge joining the proceedings.[3]

Statutory context

10. Part 6AA of the RMA provides for an alternative process for making decisions on proposals of national significance. In short, the Minister may call in a matter if it is considered a proposal of national significance, and direct it be heard by either a Board of Inquiry or the Court.[4] Part 6AA sets out the process by which the matter then proceeds, including the way in which the Board or the Court can determine the matter.

11. "Matter" is defined broadly: it includes, for example, resource consents, notices of requirement, and plan changes.[5]

12. Prior to being called in, a matter may have been the subject of submissions to the local authority.[6] Once the Minister calls in a matter, the Environmental Protection Authority (**EPA**) carries out various administrative tasks. Those tasks include:

    a. giving public notice of the Minister's direction, which must (inter alia) state the due date for submissions;[7]

    b. receiving submissions under s 149E from any person irrespective of whether they made submissions to the local authority;[8]

    c. in the context of plan changes, plan variations, or matters relating to regional policy statements:

        i. providing a summary of the submissions received under s 149E; and

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2 MOC on behalf of Otago Regional Council, 16 December 2020 at para 4.
3 At 6.
4 RMA, s 142.
5 RMA, s 141, definition of "matter".
6 Under s 149B(2)(c), the local authority must provide these to the EPA. Section 149E(10) provides they are treated as submissions made to the EPA.
7 Sections 149C(1) and (3)(e).
8 Sections 149E(1) and (2). There are restrictions on submitters who are in trade competition that do not apply here.

ii. receiving further submissions under s 149F from the local authority, or persons who either represent a relevant public interest or have an interest greater than the public.[9] Further submissions received under s 149F are limited to support or opposition to those submissions already made under s 149E;[10] and

d. providing to the Board or the Court the submissions it has received.[11]

13. The process by which the EPA receives submissions starts with a wide ambit: anyone can make submissions on any relevant issue under s 149E, irrespective of whether they have previously submitted. Further submissions are allowed in the context of plan changes. However, the ambit of such submissions are narrowed: only specified persons can make further submissions, and only in support or opposition of submissions already made.

14. This process reflects a compromise between the greater significance—and likely heightened interest—matters such as plan changes often entail (on the one hand), and the need for administrative efficiency in the context of the calling-in procedure (on the other).

15. At this point, the process diverges between matters that proceed to the Board and matters that proceed to the Court. One distinction is the application of s 274, which applies to the Court, but not to matters before a Board.

Section 274 in context

16. The High Court has recently recognised s 274 as providing a "clear derogation from the usually restrictive approach adopted to preserving the privity of litigation".[12] With that in mind, the distinction noted above is important: the application of s 274 to matters before the Court recognises the distinct nature of that forum and the status of parties within it. Boards of Inquiry are not structured in the same way: party status does not exist in that context, and s 274 is therefore not necessary to protect the interests of those before the Board in the same way it would operate before the Court.

17. The list of persons who may apply to be joined as a party under s 274(1) is broad. It includes, for instance, the Minister, the local authority, and the Attorney-General (representing a relevant public interest).[13] It also includes those who have an interest greater than that of the general public.[14] The latter is recognised as having a natural

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9 Sections 149F(2) and (3).
10 Section 149F(4).
11 Section 149G.
12 *Ahuareka Trustees (No 2) Ltd v Auckland Council* [2020] NZHC 2303 at [15].
13 Sections 274(1)(a), (b) and (c) respectively.
14 Sections 274(1)(d) and (da).

justice dimension if the decision to be made by the Court will have direct consequences for a person.[15]

18. Although the local authority is defined as an applicant for the purpose of pt 6AA in some scenarios,[16] in others it is not. Section 274 therefore contemplates scenarios where persons with significant roles in the resource management context may have to rely on the terms of that provision in order to be involved in a proceeding before the Court.

19. Section 274 also draws an internal distinction between those who have previously submitted on the matter, and those who have not. The latter are either:

    a. persons who are assumed to have an interest to protect or particular expertise (the Minister, the Attorney-General, and the local authority); or

    b. persons who are required to have an interest greater than the public.

20. Persons who have previously submitted are subject to specific limitations. In particular, they cannot join unless their previous submission was about the subject matter of the proceeding.

21. In any event, all s 274 parties are subject to limitations in terms of the evidence they can call, in order to focus the issues before the Court. [17]

22. If, in the context of a called-in matter, s 274 were limited to those who had previously submitted on that matter, a large part of s 274 would have no effect. In that example, only those who previously submitted could become parties. It is possible to imagine a scenario where the Minister, the Attorney-General, or the local authority had failed to make submissions to the EPA. Taking a narrow view of s 274's operation would mean, were it necessary, they could not make use of s 274 to become parties and perform their public functions before the Court.

23. It is submitted that, in light of both s 274's purpose and the compromise reached between community participation in plan changes and streamlining in the call-in provisions, the better interpretation is that s 274 allows persons to join as parties on the terms of that provision - within one of the s 274(1) subsections - and who is not otherwise prevented from joining by virtue of trade competition.

24. Internal to s 274 are provisions that preserve the compromise between participation and streamlining. For instance, under s 274(1)(d) a person has to demonstrate an

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15 *Mt Christina Ltd v Queenstown Lakes District Council* [2018] NZEnvC 190 at [64]–[66]. See also at [30], where Judge Hassan considers questions of whether s 274 applies should be viewed not with a view to legal nicety, but with the view that submitters and intended parties are "intended to be given a fair opportunity to continue to be heard in plan appeals related to the matters or topics that their submission addresses". This view is supported by earlier High Court authority albeit in respect of different provisions: see *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 at 167; and *Simons Hill Station Ltd v Royal Forest & Bird Protection Society of New Zealand Inc* [2014] NZHC 1362, [2014] NZRMA 501 at [39].

16 RMA, s 141, definition of "applicant".

17 Sections 274(a), (4A) and (4B)

interest greater than that of the public and, by virtue of s 274(4A) is limited as to the scope of its contributions to the proceeding.

25. Possible arguments against this interpretation include, that submitters on plan changes initiated by the local authority are limited under s 149E(7) by the following:

> (7) If the matter is a change to a plan proposed by a local authority under clause 2 of Schedule 1, a variation to a proposed plan, a change to a regional policy statement, or a variation to a proposed regional policy statement, the person—
>
> (a) must not make a submission if the person could gain an advantage in trade competition through the submission; and
>
> (b) may make a submission only if directly affected by an effect of the change or variation that—
>
> (i) adversely affects the environment; and
>
> (ii) does not relate to trade competition or the effects of trade competition.

The limitation being that submissions to the EPA on a plan change may only be made where a person can show they are directly affected by an adverse effect on the environment as a result of the plan change.

26. That is a narrower test than that which applies under an ordinary application of s 274. While it is a somewhat peculiar result that a narrow gateway applies for submitters to the EPA and a wider one applies to joining the proceeding before the Court, this is not a persuasive reason to read s 274 down in a way that frustrates its terms. Reading it down would, as noted above, potentially prevent the Minister, the Attorney-General and the local authority from joining. If Parliament had intended that outcome, it would have drafted a clear proviso to s 149T.

27. Another argument against the interpretation is the terms of s 149U. Section 149U requires the Court to have regard to or consider certain specified matters. In the context of the present proceeding, the Court is directed by s 149U(6)(a) to apply cls 10(1)-(3) of sch 1 as if it were a local authority. Clauses 10(1)–(3) provide:

> **10 Decisions on provisions and matters raised in submissions**
>
> (1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned.
>
> (2) The decision—
>
> (a) must include the reasons for accepting or rejecting the submissions and, for that purpose, may address the submissions by grouping them according to—
>
> (i) the provisions of the proposed statement or plan to which they relate; or

(ii) the matters to which they relate; and

(ab) must include a further evaluation of the proposed policy statement or plan undertaken in accordance with section 32AA; and

(b) may include—

(i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and

(ii) any other matter relevant to the proposed statement or plan arising from the submissions.

(3) To avoid doubt, the local authority is not required to give a decision that addresses each submission individually.

28. However, I do not consider that s 149U acts to limit the operation of s 274. Although the Court is required to make a decision on only the "provisions" and the "submissions", I do not consider this limits the ability of the Court to otherwise take into account any contributions by a s 274 party who has not previously provided submissions. The scope for decision-making under cl 10(1) in the context of a called-in matter where the Court is making the first instance decision can sensibly take that context into account.

29. This can be analysed in two ways:

a. First, when the Court makes a decision on the provisions, it will take into account (as relevant considerations) the contributions made by a s 274 party even if these are limited to the provisions at issue, in which the party has demonstrated an interest.

b. Secondly, Contributions made to the Court by a s 274 party can arguably fall within the definition of submissions because a s 274 notice is intended to be a de facto submission.

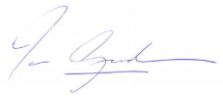
30. In conclusion, although there are arguments in favour of a limited application of s 274 in the context of called-in plan changes, these are not persuasive. For the reasons stated, it is submitted that s 274 can be applied on its terms to join a person who has an interest greater than that of the public, even in circumstances where that person has not submitted on the matter previously.

Summary of conclusions

31. It is submitted that, in the context of a plan change called-in by the Minister and referred to the Court for decision, s 274(1)(d) applies to allow a person to join the proceedings in the ordinary way, should their interest be greater than that of the public.

32. It is also submitted that s 274(1)(d) allows a person to apply to be joined as a party to a plan change called-in to the Court in circumstances where the person did not submit on the plan change before the local authority or before the EPA.

33. In light of those conclusions, it is respectfully submitted that the Court has jurisdiction both to grant Willowridge's applications, and to make a decision under s 149U(6) that includes consideration of Willowridge's submissions and evidence to the Court.



I M Gordon

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