

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

IN THE MATTER	of the Resource Management Act 1991
AND	an appeal under clause 14 of the First Schedule of the Act in relation to the proposed Second Generation Dunedin City District Plan
BETWEEN	OTAGO REGIONAL COUNCIL  (ENV-2018-CHC-290)  Appellant
AND	DUNEDIN CITY COUNCIL  Respondent

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**MINUTE OF THE ENVIRONMENT COURT  
(18 January 2023)**

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[1] The court has received a joint memorandum of counsel filed on behalf of Otago Regional Council ('ORC') and Dunedin City Council ('DCC') (collectively referred to as 'the Councils') in relation to an application made under s293, Resource Management Act 1991 ('RMA' or 'the Act').

[2] The s293 application relates to the appeal by ORC to the hazard 1 (Flood) Overlay Zone at North Taieri (Gordon Road) Spillway (DCC Reference number 94) in the proposed Second Generation Dunedin City District Plan ('2GP').

[3] In its appeal, ORC seeks to remove the North Taieri (Gordon Road) Spillway from the Hazard 1 (Flood) Overlay Zone and include it in the Hazard 1A



(Flood) Overlay Zone, so that natural hazard sensitive activities would be prohibited in this area, rather than non-complying. There are no s274 parties to this appeal.

[4] The Councils consider that scope exists for the change sought by as:

- (a) Rule 16.3.6 of the notified 2GP applied a non-complying status for sensitive activities in the Hazard 1 Overlay Zone and this included the North Taieri (Gordon Road) Spillway;
- (b) ORC's submission on the 2GP sought that Rule 16.3.6 be amended so that sensitive activities are prohibited instead of non-complying in the Hazard 1 (Flood) Overlay Zone at several locations, including the North Taieri Spillway (the Councils note that this is referred to as the North Taieri Floodway on page 19 of ORC's submission);<sup>1</sup>
- (c) the Hearing Panel accepted ORC's submission in part and included an amendment which created the new Hazard 1A (Flood) Overlay Zone, where new natural hazards sensitive activities are prohibited. However, the Gordon Road Spillway remained in the Hazard 1 (Flood) Overlay Zone.

### **The issue**

[5] The joint memorandum explains the issue giving rise to the applications as follows:

The issue that the parties are concerned with here is that of fairness in relation to the registered owners and occupiers in the North Taieri (Gordon Road) Spillway not represented in these proceedings.

The Hazard 1A (Flood) Overlay Zone was not included in the notified version to the 2GP, rather it was created by the Natural Hazards Hearing Panel (**Hearing Panel**) in response to the submission of the ORC. Council considers that because

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<sup>1</sup> Otago Regional Council submission, 24 November 2015, p 19.

the Hazard 1A (Flood) Overlay Zone was not in the notified 2GP, the registered owners in the North Taieri (Gordon Road) Spillway area, may not have been aware of the prohibited activity status relief sought in ORC's submission.

The parties mediated this appeal on Wednesday 7 September 2022 and agreed in principle to resolve DCC Reference number 94 by consulting with the registered landowners and occupiers of the North Taieri (Gordon Road) Spillway area, and including all or some of the area in the Hazard 1A (Flood) Overlay Zone. This was subject to the parties filing a joint application to the Court respectfully requesting that the Court make directions, including consultation with the registered landowners and occupiers within the appeal area (i.e. the North Taieri (Gordon Road) Spillway), pursuant to section 293 of the RMA.

[6] Accordingly, the Councils request directions that DCC is to consult with the registered owners and occupiers on the proposed prohibited activity status for sensitive activities in the North Taieri (Gordon Road) Spillway.

[7] The registered owners and occupiers within the appeal area that the parties consider should be consulted on are identified in Annexure B to the affidavit of Paul Freeland on behalf of the DCC. That annexure is attached as Annexure A to this Minute.

### **The North Taieri (Gordon Road) Spillway**

[8] The North Taieri (Gordon Road) Spillway is described in detail in the affidavits filed in support of this application from:

- (a) Paul James Freeland;
- (b) Gary Michael Bayne;
- (c) Michelle Ellen Mifflin;
- (d) Matthew Stuart Alley;
- (e) Bikesh Shrestha;
- (f) Tom Bassett; and
- (g) Dr Jean-Luc Payan.

[9] Very briefly, the affidavits explain that the Spillway is a designed and engineered feature on the true right bank of the Silver Stream immediately downstream of the Gordon Road Bridge at Mosgiel.

[10] It creates a preferential overflow point to try to avoid flooding from the river of part of Mosgiel on the true left bank. The area includes the overland flow path and ponding area for floodwaters.

### **Background**

[11] The court has also been given a background to the ORC appeal which is explained in the affidavit of Paul Freeland, Principal Policy Advisor City Development, on behalf of DCC.

[12] Counsel for the Councils note a dispute between DCC and ORC as to whether the whole of the North Taieri (Gordon Road) Spillway area should have prohibited activity status for natural hazard sensitive areas as sought by ORC in its original submission, or whether non-complying activity status should be retained for identified sub-areas within the Spillway area.

[13] In light of the information in the affidavits of Dr Payan and Ms Mifflin on behalf of ORC, DCC supports consultation with the registered owners and occupiers of the North Taieri (Gordon Road) Spillway area to identify whether all or some of the Taieri (Gordon Road) Spillway area is to be included in the Hazard 1A (Flood) Overlay Zone.

[14] This consultation is said to be justified in the interests of natural justice, given that prohibited activity status for 'natural hazards sensitive activities' in the Hazard 1A (Flood) Overlay Zone under Rule 16.3.6 would mean that the registered owners in the appeal area are unable to obtain resource consent for several activities, including residential activities.

## Section 293 RMA

[15] Section 293 RMA empowers the court to direct changes to a proposed plan or plans that are not otherwise within the court's jurisdiction due to the scope of the appeal before it, or where further consultation is warranted on natural justice and fairness grounds.

[16] Section 293 RMA is as follows:

293 The Environment Court may order change to proposed policy statements and plans

- (1) After hearing an appeal against, or an inquiry into, the provisions of any proposed policy statement or plan that is before the Environment Court, the court may direct the local authority to—
  - (a) prepare changes to the proposed policy statement or plan to address any matters identified by the court;
  - (b) consult the parties and other persons that the court directs about the changes;
  - (c) submit the changes to the court for confirmation.
- (2) The court—
  - (a) must state its reasons for giving a direction under subsection (1); and
  - (b) may give directions under subsection (1) relating to a matter that it directs to be addressed.

### *Consultation and natural justice*

[17] The issue giving rise to the application concerns natural justice and fairness to the residents in the North Taieri (Gordon Road) Spillway who are not (presently) represented in these proceedings.

[18] The court was referred to the Environment Court decision in *Taranaki Energy Watch Incorporated v South Taranaki District Council*<sup>2</sup> where principles of natural

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<sup>2</sup> *Taranaki Energy Watch Incorporated v South Taranaki District Council* [2020] NZEnvC 96.

justice in the context of a s293 application were discussed as follows:

[34] It follows that our approach is necessarily one that is multi-layered, with any consequential changes being premised on the “reasonably and fairly” orthodoxy and adequately responding to the natural justice.

[35] As we are concerned principally with issues of natural justice fairness, including in relation to rural residents and petroleum operators not represented in these proceedings, the observation made in the Environment Court decision of *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* is apposite: [38]

It is also worth noting that reasonableness and fairness may work against each other in this context. There is a tension between a reasonable interpretation of a submission – which tends to widen the express words – and fairness, which tends to read them closely so that members of the public are not surprised.

[19] Having read the joint memorandum of counsel, the court is satisfied that s293 is available to the court to direct DCC to consult with the landowners and occupiers in the appeal area in this instance given that the court has heard from the Councils (on the papers) and has been provided sufficient information to enable the court to consider the amendments sought by the parties via the s293 application.<sup>3</sup>

[20] The court agrees with the Councils that it would be appropriate for the court to exercise its discretion under s293 as sought.

[21] It is noted that a draft consultation notice was included in the joint application. The court approves the content of the notice provided that the information to be provided on the DCC’s 2GP website for persons who are to be

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<sup>3</sup> *Federated Farmers of New Zealand Incorporated v Otago Regional Council*, C40/2001 at [8] and *Porter Developments Limited v Hamilton City Council* [2016] NZEnvC at [24].

consulted is available on the website when the notices of consultation are issued.

## Directions

[22] Accordingly, the court makes the following directions:

- (a) that DCC and ORC agree to resolve DCC Reference number 94 by consulting with the registered landowners and occupiers located within the North Taieri (Gordon Road) Spillway as affected persons and including some or all of the North Taieri (Gordon Road) Spillway in the Hazards 1A (Flood) Overlay Zone to the 2GP;
- (b) that DCC is to consult with the registered landowners and occupiers of the properties located within the North Taieri (Gordon Road) Spillway in the Hazards 1A (Flood) Overlay Zone to the 2GP within three months of the date of this application using the process set out in the notice of consultation;
- (c) that DCC and ORC are to jointly report back to the court (and serve on registered landowners and occupiers consulted) with the equivalent of a s42 report on any positions expressed by the parties and recommendations for the court to consider within two months of the consultation period ending; and
- (d) that DCC is to advise all consulted registered landowners and occupiers of land within the North Taieri (Gordon Road) Spillway area that if they wish to become a party to the Environment Court proceedings for this appeal they must lodge a s274 party notice within 15 working days of DCC and ORC reporting back to the court.



**P A Steven**  
**Environment Judge**



Issued: 18 January 2023

## **Annexure A**



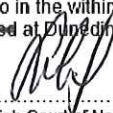
## Appendix B – Landowners within the North Taieri (Gordon Road) Spillway area

Property Address	Owners
69 Dukes Road Sth Taieri	Darren Stanley Palmer and Melanie Rae Palmer
101 Dukes Road Sth Taieri	James Robert Reid and Jillian Moirene Reid
113 Dukes Road Sth Taieri	Geoffrey Philip Thompson and Jenny-Lee Burt and O N D Trustees Limited
115 Dukes Road Sth Taieri	Jonathan Francis Rout and Bernadette Maria Rout
117 Dukes Road Sth Taieri	Jennifer Ann Quelch and Richard Aidan Quelch and Kam Niak Trustee Company Limited
127 Dukes Road Sth Taieri	John William McLaren and Ronda Margaret Owens and Albert Alloo and Sons Trustee Company Limited
133 Dukes Road Sth Taieri	Abraham Oskam and Dini Jeanette Irene Oskam
137 Dukes Road Sth Taieri	Craig Andrew Struthers and Julie Struthers
145 Dukes Road Sth Taieri	Allan John Ross
147 Dukes Road Sth Taieri	Raymond Alexander Wilson and Janice Heather Wilson and Downie Stewart Trustee Limited
149 Dukes Road Sth Taieri	Garth Alexander Thomson and Christine Ann Oliver
155 Dukes Road Sth Taieri	Brian Alister Bennett and Jill Anna Bennett
161 Dukes Road Sth Taieri	Jason Alan Breen and Lisa Jane Breen
169 Dukes Road Sth Taieri	Margaret Eileen Pollitt and Terence Vincent Pollitt
209 Dukes Road Sth Taieri	Pamela Joan Bain
269 Dukes Road Sth Taieri	Philipp Daniel Haas and Preston Russell Trustees (No 3) Limited

### EXHIBIT NOTE

This is the annexure marked "B" referred to in the within affidavit of Paul James Freeland and sworn/affirmed at Dunedin this 22<sup>nd</sup> day of December 2022 before me:

**SHONA MICHELLE SQUIRES**  
SOLICITOR  
DUNEDIN

Signature:   
A Solicitor of The High Court of New Zealand  
(Solicitor to sign part on Exhibit)

Property Address				Owners
270 Dukes Road Sth Taieri				Henderson Hunter Cook and Fiona Daphne Cook and G C A Legal Trustee 2012 Limited and Others.
257 Gordon Road Mosgiel				Total Harvesting Limited
234	Riccarton	Road	West Mosgiel	Earthworx Limited
245	Riccarton	Road	West Mosgiel	Airways Corporation of New Zealand Limited
248	Riccarton	Road	West Mosgiel	Ivan Walter Glass and Belinda Christine Elizabeth Glass
255	Riccarton	Road	West Mosgiel	Belinda Jane Horne and Franklin Ferguson Horne and Carey John Weaver
264	Riccarton	Road	West Mosgiel	Mark Kerry Jenkins and Rebekah Marie Jenkins
293	Riccarton	Road	West Mosgiel	Alice Frances Sinclair
323	Riccarton	Road	West Mosgiel	Shayne William King and Andrina Irene King
325	Riccarton	Road	West Mosgiel	Andrew Clive Maydon and Sarah Rachael Maydon
327	Riccarton	Road	West Mosgiel	Stephen Robert Watkins and Nicola Jane Grant
331	Riccarton	Road	West Mosgiel	Kristen Leigh Slocombe and Lee Ann McGuirk
345	Riccarton	Road	West Mosgiel	Andrew James Stout

Property Address				Owners
347	Riccarton	Road	West Mosgiel	Rey Graham Murphie and Katherine Murphie
349	Riccarton	Road	West Mosgiel	Gilbert Noel Black and Judith Isobel Black and Samuel Richard Crush
351	Riccarton	Road	West Mosgiel	Black Kestrel Trustees Limited
353	Riccarton	Road	West Mosgiel	Bronwyn Anne Miles and Laurence William Ashworth
355	Riccarton	Road	West Mosgiel	Barry Patrick Dougherty and Cindy Jane Davies and Anthony Samuel Davies and Janet Heather Davies
357	Riccarton	Road	West Mosgiel	Samuel George Smith and Freya Margaret Smith and Cook Allan Gibson Trustee Company Limited
359	Riccarton	Road	West Mosgiel	Eric Patrick Johnston and Moyra Jane Johnston and Practice Management Trustee Limited
371	Riccarton	Road	West Mosgiel	Gail Carol Heenan and Arthur McNicoll Heenan
383	Riccarton	Road	West Mosgiel	Southern Light Farms Limited
389	Riccarton	Road	West Mosgiel	Nicola Jayne Brown and Timothy Robert Brown
413	Riccarton	Road	West Mosgiel	Gary John Reed and Lorraine Elizabeth Anne Reed

