

**BEFORE THE ENVIRONMENT COURT
AT CHRISTCHURCH**

ENV 2018 CHC 285

**I MUA I TE KOOTI TAIAO O AOTEAROA
ŌTAUTAHU ROHE**

IN THE MATTER of the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of an appeal under section 120 of the Act

BETWEEN THE PRESERVATION COALITION TRUST

Appellant

AND DUNEDIN CITY COUNCIL

Respondent

**REPLY MEMORANDUM FOR THE PRESERVATION COALITION TRUST (PCT) ON
SCOPE**

6 July 2020

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MAY IT PLEASE THE COURT

Introduction

- 1 This memorandum responds to relevant grounds raised in the following Notices of Opposition or memorandum:
 - (a) Notice of Opposition by Respondent (**DCC**) dated 25 May 2020;
 - (b) Notice of Opposition for Wyber & Duffy dated 25 May 2020;
 - (c) Notice of Opposition by Federated Farmers dated 25 May 2020;
 - (d) Memorandum for Otago Regional Council dated 22 May 2020.
- 2 There are 3 key issues:
 - (a) Whether to grant leave to file the second amended appeal; and
 - (b) Whether relief sought is within scope of the original submissions filed by PCT,¹ and therefore within jurisdiction of the Court; and
 - (c) If within scope, what procedural directions are appropriate for case management.
- 3 A further issue may arise if the Court determines absence of scope for some or all of the relief sought by PCT. This is whether the Court should exercise powers under s293 RMA, or otherwise, to ensure that the 2GP gives effect to its statutory and planning imperatives under Part 2 RMA, Council's statutory functions, NZCPS and RPS provisions, particularly in relation to matters identified by the JWS Landscape. The issue is moot, pending resolution of scope.

Amended appeal

- 4 No party opposes leave being granted to file the second Amended Notice of Appeal, partly for reasons of pragmatism, but it remains subject to the Court's approval. The second amended appeal is likely to better assist the Court and parties in future case management, because it is "much clearer"² than the original appeal.
- 5 Relevant reasons for lateness, grounds for waiver, and absence of undue prejudice are identified by the application and supporting affidavit of Craig

¹ As previously acknowledged, PCT adopted the submission as successor to the Harboursides and Peninsula Preservation Coalition.

² DCC Notice of Opposition at [2]; DCC notes this is subject to resolution of scope issues.

Werner.³ Accordingly, directions are sought for waiver for late filing and amendment of the appeal, under ss269 & 278 RMA, and the relevant District Court rules.

Scope

- 6 General grounds are identified by DCC's Notice of Opposition. Both Federated Farmers and the Wyber parties adopt DCC's grounds.⁴ A summary of relevant issues, and reply, is as follows:

A. DCC opposes specific parts of the amended appeal as follows:

- Paragraph 8.2(a) and 8.4(a) factors and criteria of ONLs
- Paragraphs 8.2(c) and 8.4(c) Harbour Islands and Portobello Peninsula ONF
- Paragraph 8.4(d) Consequential relief to amend RR1 and RR2 provisions
- Paragraph 11.1.4 – reasonably difficult to see
- Paragraph 11.2.4.1 buildings and structures 550m2
- Paragraph 12.1 and 12.4 consequential amendments to rural residential and RD activity status within RR zones, outside landscape overlays

PCT reply:

- 7 In response:

Factors and criteria of ONLs

- 7.1 Relevant factors and criteria for ONLs are recommended by the JWS Landscape, with expanded factors to recognise a bi-cultural lens and to align with the proposed RPS.⁵ It is accepted that PCT does not have direct scope to amend 2GP policy 2.4.4.1; but the 2GP must give effect to the RPS. Because it depends on a merits assessment (i.e. the Court's view of the recommendations set out in the JWS Landscape), this may be able to be parked as a jurisdictional or out of scope (s293 RMA) issue, pending resolution of the wider landscape issues.

³ Application dated 19 May 2020 and supporting affidavit of Craig Werner dated 11 May 2020

⁴ Federated Farmers Notice of Opposition at [4]; Wyber Notice of Opposition.

⁵ Amended JWS Landscape dated 25 May 2020 at [1.1]; Counsel understands that the status of the RPS has recently been updated by consent order.

Harbour Islands and Portobello Peninsula ONF

7.2 On reflection, PCT accepts that seeking an ONF at Portobello Peninsula is outside scope. The position is less clear for Harbour Islands, already identified as ONF in the 2GP. By contrast, PCT submits that it is within scope to seek ONL status for Portobello Peninsula areas identified by the JWS landscape.⁶ This may require amendments to relief in [8.2c] and [8.4c] of the second amended appeal. PCT can address this at the proposed pre-hearing conference.⁷

Consequential relief – general comment

7.3 Consequential relief has not been identified by PCT at this stage. PCT can address this at the pre-hearing conference.

Reasonably difficult to see

7.4 The 2nd amended appeal is clear as to relief sought: a new policy and rule that apply to landscape overlays and Hill Slopes Rural zone for location, design and management of buildings and structures in those zones. PCT can address this at the pre-hearing conference.

Buildings & structures to 550sqm

7.5 PCT accepts DCC's criticism that an agreed position was reached on jurisdiction and relief (i.e. 700sqm, not 550sqm, as a limit on total area of buildings and structures). Counsel is instructed that PCT concedes that relief in the amended appeal at [11.2.4.1] should be limited to 700sqm.

B. Further issues raised by Wyber & Federated Farmers: Rural residential strategic

- While rural residential zonings are challenged by the original submission, the grounds raised in support of the relief are confined to residential capacity studies and not landscape.⁸
- The first time that landscape evidence was contemplated for strategic provisions was by Mr Werner's affidavit dated 24 April 2020.⁹

⁶ As previously advised, no relief is sought for the Portobello Marine Science Mapped Area.

⁷ Discussed below.

⁸ Wyber Notice of Opposition at [4]

⁹ Wyber Notice of Opposition at [5]

- Farming and rural parties represented by Federated Farmers
“..would be completely unaware that they would be affected by the appellant’s amended notice of appeal, insofar as landscape matters are now being sought onto zoning considerations.”¹⁰
- Relief sought for policies 2.6.1.3 and 2.6.1.4 is beyond scope of PCT’s submission.¹¹

PCT reply:

8 This is contested:

- 8.1 Landscape issues are referred to in the PCT submission as generally relevant to its relief (including rural-residential zoning) for reasons identified in Counsel’s earlier submissions; for example, Addendum 1¹² and the “integrated relief” identified in PCT’s original submission.¹³ It is often the case that landscape values will constrain capacity and growth management. PCT’s submission at D17 (Rural Residential zone) states that additional RR zoning “is contrary to 2GP Strategic Directions and DCC-sponsored land use assessment reports”.¹⁴ “Strategic directions” is wide, rather than narrow in scope, and not, for example, limited to capacity studies.
- 8.2 It is overstatement to say that farming interests may be “completely unaware” of relief sought by PCT for rural residential zoning. PCT’s relief on rural residential zoning was clear from its submission, independent of the landscape dimension.
- 8.3 PCT adopts without repeating PCT’s earlier submissions.

C. Unfairness concerns raised by Wyber parties & Federated Farmers including that a number of landowners are materially affected but not aware of relief sought, or not aware of the landscape dimension

PCT reply:

¹⁰ Federated Farmers Notice of Opposition at [6]

¹¹ Wyber Notice of Opposition at [6]

¹² Agreed bundle, PCT submission, Addendum 1, expand protection of Dunedin landscapes

¹³ Agreed bundle, PCT submission at p2-3; Addendum 1 at p50 (c.f. “..As Dunedin grows, landscape protection will become more necessary..”)

¹⁴ Agreed bundle, PCT submission at p37 at [17.1.1]

- 9 Unfairness is relevant to scope;¹⁵ but the fact that PCT’s submission was wide-ranging and affects a large number of properties in Dunedin is not of itself a reason to decline scope. PCT’s submission identified that a large number of properties were affected by the relief sought by PCT. For example, Addendum 4 identified that “300 more allotments” were affected by relief sought by PCT on the Peninsula alone.¹⁶
- 10 A wide-ranging submission that seeks broad relief on relevant resource management grounds, or seeks wide-ranging relief in opposition to decisions version of the 2GP, may impact a number of properties. This is inherent to the plan review process. PCT otherwise adopts without repeating its’ earlier submissions on scope.¹⁷
- 11 To the extent required, case management directions can answer many of the fairness and process concerns identified:
- 11.1 PCT consents to full public disclosure of the JWS landscape 2020 and related PCT maps dated 26 August 2019;
- 11.2 PCT has previously confirmed that it will not oppose late applications to join the PCT appeal. Without prejudice to its position on scope, or necessity, PCT does not oppose the general tenor of proposed directions identified by the Wyber parties,¹⁸ and supported (as alternative relief) by Federated Farmers,¹⁹ except that:
- (a) If the Court considers that a direction is appropriate, and involves a large number of properties, then PCT submits that DCC is the better party to manage this process;
 - (b) For practical and transparency reasons, DCC is better placed to comply with the identified directions (or similar directions). PCT would find it difficult to undertake the exercise, without Council oversight and assistance;

¹⁵ Relevant case law is discussed in PCT’s memorandum dated 19 May 2020

¹⁶ Agreed bundle, PCT submission, Addendum 4, p56

¹⁷ Set out in PCT’s Notice of Motion dated 19 May 2020 and Memorandum as to scope dated 19 May 2020.

¹⁸ Wyber Notice of Opposition at [11]

¹⁹ Federated Farmers Notice of Opposition at [9]; Federated Farmers complaints about myriad changes in position and paperwork by PCT are, it is submitted, overstated, given that much of the time spent to date on the PCT appeal has been in mediation processes and identification of landscape issues through the JWS process.

- (c) Copies of the JWS landscape and PCT maps (dated 2019) could preferably be made available electronically for interested parties, for example on the Council's website;
- (d) PCT's original relief was wide-ranging, and submitters have already had opportunity to join the appeal.

Procedure

- 12 The Court has already indicated that it will set the PCT appeal (and related appeals) down for a pre-hearing conference; and that any direction for hearing argument on scope will be deferred until after the pre-hearing conference.²⁰

Dated this 6th day of July 2020



Rob Enright
Counsel for Appellant

²⁰ Minute dated 29 May 2020