

BEFORE an Independent Hearing Commissioner

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

AND

IN THE MATTER of hearing submissions and further submissions
in respect of Waipa District Council – Plan
Change 13 – Uplifting of Deferred Zones

STATEMENT OF EVIDENCE BY KATHRYN ANNE DREW
ON BEHALF OF COOMBES FARMS LTD & CAMERON & SHEREE COOMBES

INTRODUCTION

1. My full name is Kathryn Anne Drew.
2. I am a senior planner at Bloxam Burnett & Olliver Ltd (“BBO”), a firm of consulting engineers, planners and surveyors, based in Hamilton.
3. I have been employed in resource management and planning related position in local government and the private sector for 19 years, with the last 13 of those being at BBO.
4. My qualifications are a Bachelor of Resource and Environmental Planning (Hons) from Massey University. I am also a full member of the New Zealand Planning Institute.
5. My planning experience has included the preparation and processing various resource consent applications for both Council’s and private clients. I have also prepared and processed Plan Changes, made submissions on Plan Changes and on District Plan reviews.
6. In relation to this hearing I am authorised to give evidence on behalf of Coombes Farms Ltd and Cameron & Sheree Coombes (“Coombes”). I am the author of the submission prepared on behalf of Coombes in relation to Plan Change 13 (“PC13”) to the Waipa District Plan (“District Plan”).
7. I have read the Environment Court’s ‘Code of Conduct for Expert Witnesses’ as contained in the Environment Court’s Consolidated Practice Note 2014 and agree to comply with it. I have complied with it when preparing my written statement of evidence.

EVIDENCE STRUCTURE

8. This evidence provides a planning assessment of the relief sought in the Coombes submission on PC13. Topics covered in this evidence includes:
 - The background to the Coombes submission;
 - The relief sought;
 - The scope issue;
 - The reasons why the land swap is appropriate from an effects based perspective; and
 - Commentary on the further submission made by Mr Benjamin Frost¹.

BACKGROUND TO SUBMISSION

9. The Coombes’ are a major landowner in Ngahinapouri. More specifically they own the majority of the land within the N3 growth cell² and they also own all of the land within the N2 growth cell. Outside of those growth cells the Coombes entities also own 60ha of land south of Reid

¹ Submitter 8/2

² Apart from four lifestyle blocks at 29, 73, 89 and 101 Reid Road.

Road that connects with Cochrane Road, and a further 93ha of land north of Reid Road that connects with Old School Road. The extent of the Coombes landholding in Ngahinapouri is identified on the attached Property Ownership Plan (refer **Attachment A**), along with the N2 and N3 locations.

10. Being a majority landowner of two of the future growth cells in Ngahinapouri, the Coombes have a vested interest in the outcomes of PC13 and the resulting development potential that arises. The Coombes also have a long-established history with the Ngahinapouri district, so have been active participants in growth and development issues that affect Ngahinapouri. In that respect, it should be noted that the land swap opportunity sought has only arisen now because of the Coombes purchasing the majority of the N3 growth cell at the end of June 2019. Prior to this date, that opportunity was not available to the Coombes. Hence the question of timing between the N2 and N3 growth cells was never challenged by the Coombes through submissions on Waipa 2050 and/or Plan Change 5 that updated the Waipa 2050 growth sequencing into Appendix S1 of the District Plan³.

RELIEF SOUGHT

11. As currently provided for PC13 will rezone the N2 growth cell land from Deferred Large Lot Residential with the need for a Structure Plan to Large Lot Residential with no Structure Plan requirements. In relation to the N3 growth cell, there is no zoning change proposed (i.e. it stays zoned Deferred Large Lot Residential with a requirement for a Structure Plan) as it is identified as a post 2035 growth cell in Waipa 2050.
12. The Coombes submission seeks that the development potential of the N2 land (being 18ha) is swapped with an equivalent land area within the N3 growth cell (the land swap). The land signalled to be swapped is set out in the attached Land Swap Plan (refer **Attachment A**).
13. To give effect to this land swap, it is sought that instead of uplifting the deferred status on the N2 growth cell, that Council uplifts the deferred status across approximately 18ha of the N3 growth cell and subsequently retains the deferred status on the N2 growth cell. As a consequential amendment it is sought that the planning maps (map 34) is amended to demonstrate the above land swap.
14. As set out in the original submission, the reasons for the land swap is driven by the following points:
 - a) Both cells will eventually be developed as Large Lot Residential lots, so the only question to be considered is which piece of land should be developed first (i.e. its timing). It is the Coombes preference that it is a portion of the N3 cell.
 - b) The N2 growth cell is a more desirable piece of land for the Coombes dairy platform. The land within the N2 growth cell is part of a total dairy farm of approximately 250ha providing

³ PC5 became operative on the 14 March 2019.

grazing for 1150 milking cows. The N2 land consists of the closest paddocks to the dairy shed, is free draining sandy loam soil and in spring is used to calve cows.

- c) The N3 growth cell is less desirable from a dairy perspective. It requires cows to cross over Reid Road, is a much heavier silt loam soil, and grazing during winter and spring months is restricted/infrequent to avoid pugging. The distance from the dairy shed is also around 2km which I understand is at the recommended limit for a dairy cow to walk without having an adverse effect on production and animal health.
- d) The N2 growth cell is further separated from the Ngahinapouri centre and school than the N3 growth cell which is opposite. Development of the N3 cell closer to these facilities would foster the opportunity to give momentum to the development of the commercial heart proposed in the Ngahinapouri Village Concept Plan and would result in a more linear extension of the Ngahinapouri village. A linear progressive would have cost benefits, particularly relating to the upgrading of Reid Road from a rural road to a more urbanised environment with wider carriageways, footpaths and increased amenity through street planting.

SCOPE OF SUBMISSION

- 15. The s42A report for PC13 has rejected the relief sought by the Coombes on the basis of legal advice they have received that the relief sought is out of scope for PC13. In their opinion, this is because it has not been considered in the s32 report and therefore falls outside of the extent of changes that are proposed by PC13⁴.
- 16. The Coombes have sought their own independent legal advice on the scope issue. That advice is attached to my evidence (refer **Attachment B**).
- 17. Having due regard to that legal opinion and the tests set out in it, it is my opinion that the submission is within the PC13 scope for the following reasons:
 - a) The leading case on this issue of scope is *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290, which sets out two tests which must be satisfied for a submission to be “on” a proposed plan change. Those tests are:
 - i. The submission must reasonably be said to fall within the ambit of the plan change. If the submission raises matters addressed in the s32 Report that is a reasonable indication it is “on” the plan change.
 - ii. Whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in a submission will have been denied an effective opportunity to respond to those additional changes.

⁴ Paragraph 5.9.3 of the s42A report

- b) The Coombes submission satisfies the first test. Although a land swap between N2 and N3 was not considered in the s32, PC13 is clearly about timing of the development of growth cells i.e. in that it brings forward deferred zoning to live zones. The rezoning will enable immediate further development potential across the District to address the pressure for further development experienced in within the Waipa District. So, whilst not explicitly discussed/assessed in the s32 report the objectives of PC13 has determined the process that is required for the development potential of all identified growth cells to be realised. This creates a timing matter, as the different options put forward apply to all of the growth cells identified regardless of whether they were pre-2035 or post-2035 growth cells. For example three of the options considered relate to timing⁵ and the consequential impacts that timing will have on the development of Ngahinapouri. The Coombes submission also relates to a timing matter.
- c) As noted in the attached legal opinion, the Environment Court has recently expressed that the first test should not be interpreted in a way that is unduly narrow⁶ and that a submission does not necessarily need to be confined to what is addressed in a s32 report in order to be in scope of a plan change. Rather, the test should be whether the submissions under consideration *“seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change”*.⁷
- d) The Coombes submission will not radically alter the objectives of PC13, but rather is an alternative approach to releasing the same development potential enabled by PC13, albeit on a portion of their dairy platform that is less productive/desirable than the N2 growth cell. The assessment of this plan change should also be looking at how the options affect the timing for all growth cells and whether the sequence of development is still appropriate. As per this submission, it can be considered that the timing for the growth of Ngahinapouri, as set out in Waipa 2050⁸, is now out of date.
- e) The Coombes submission also satisfies the second test. Being an original submission on PC13, the submission has not prejudiced public participation as potentially affected parties have had an opportunity to lodge further submission on it (as has been done by Mr Benjamin Frost). Furthermore, the submission is not out of “left-field”. With the Coombes now owning the majority of both the N2 and N3 growth cells it could be reasonably expected that they may wish to change the timing of the development of those cells, based on what is operationally more appropriate.

⁵ This is expressed in paragraph 25 of the Harkness Henry legal opinion.

⁶ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191

⁷ At [37].

⁸ From November 2017

WHY THE CHANGE IS APPROPRIATE

18. Having demonstrated that the land swap can be considered by Council to be within scope of PC13, it is my opinion that the land swap is appropriate and will not give rise to additional environmental effects not already contemplated for the following reasons:
- a) The request is being made by the owner affected by the change and will not result in a net increase in developable land in Ngahinapouri, nor does the request give rise to trade competition issues.
 - b) The change is therefore a like for like approach that, as I have identified above, is considered to be within scope of PC13.
 - c) The change also enables Coombes to help with the growth and development of Ngahinapouri, as signalled by both the N2 and N3 land being earmarked for Large Lot Residential development, with minimal effect on their existing dairy farming operations.
 - d) The change enables growth to occur around what will become an enlarged 'heart' for Ngahinapouri by providing for development around the future commercial centre, the school and the golf club. The land sought to be swapped, excludes the pocket of commercial land, so that the size and scope of that land can further be refined through further consenting processes to ensure that there is scope for the school to grow.
 - e) The development of the N3 land would result in a linear progression of the Ngahinapouri, as opposed to developing at the edges and then coming back to the centre.
 - f) The Ngahinapouri Village Concept Plan has completed an engagement process and is to be presented to Council is 31 August 2021 to be endorsed. As an endorsed document the Concept Plan can form the basis of a Structure Plan for the N3 growth cell. The option that received widespread community support is one whereby a new intersection to SH39 is proposed that needs to go through the N3 growth cell. It consequently makes sense that growth of that cell is undertaken concurrently to the design and future construction of the key piece of infrastructure.
 - g) The land area allocated to be swapped enables growth to occur in a grid like pattern that is generally consistent with the Ngahinapouri Village Concept Plan and is outside of the airfield covenant area used by Ken Reid⁹.
 - h) The change also provides for growth with minimal transportation costs (i.e. upgrades to Reid Road) and enables the next stage of growth in Ngahinapouri to provide for and accommodate the future transportation link (i.e. roundabout) to SH39, based on demand/transportation effects.
 - i) The change will not give rise to additional traffic movements not already anticipated by the rezoning of 18ha of land. The transportation effects on Reid Road/SH39, subject to further detailed investigation are therefore expected.
 - j) The individual suitability of the land for the development outcome, for both the N2 and N3 growth cells, will be confirmed through technical reporting required to support future subdivision consent (and/or land use consent) applications. This will include geotechnical,

⁹ Ken Reid has a lease agreement with the Coombes to maintain use of the airfield until 30 May 2027.

stormwater design, archaeological, contamination, transportation/connection to Reid Road, ecological etc. These matters are all design considerations associated with the development and are unlikely to give rise to off-site effects.

MR FROST'S SUBMISSION

19. The submission from Mr Frost raises three issues being:
- a) Consultation on the Ngahinapouri Village Concept Plan has only recently closed and he is not aware that any decision has been made on which option will be adopted.
 - b) The reason N3 is to be developed last is due to complexity/issues with upgrading SH39/Reid Road intersection and potential expansion of the school, thereby enabling greater flexibility to develop a street network and village centre that is not constrained by previous development.
 - c) The Ngahinapouri Village Concept Plan only focuses on the future form of the settlement and not a change in the timing of the land release.
20. In relation to these statements, I note that:
- a) Council staff have confirmed that Option 6 (being a new three-leg roundabout intersection onto SH39) located approximately 200m south of the Reid Road/SH39 intersection was the most popular intersection and associated village layout option and will therefore be put forward as the preferred/recommended option for the Ngahinapouri Village Town Concept Plan¹⁰. This option will be presented to the Council for adoption/endorsement at their meeting on the 31 August 2021. It can therefore be reasonably assumed that the Council will adopt that option as it is based on feedback received from the community.
 - b) I personally am not aware that the timing for the N3 growth cell has been deferred to post 2035 because of complexity/issues with upgrading SH39/Reid Road intersection and potential expansion of the school. Whilst this may be technically correct from a transportation effects-based perspective if all of the N3 cell was to be released, what is actually sought in this submission is a like for like land swap. The transportation effects of the proposed land swap on the Reid Road/SH39 intersection would be the same regardless of the land being developed. Secondly, the issue of providing sufficient space for the school to expand has been addressed in the Option 6 layout for the Ngahinapouri Town Concept Plan (refer **Attachment C**).
 - c) Yes the Ngahinapouri Village Concept Plan has only focussed on future form and not timing, which also means that a change in timing is not specifically excluded from being considered in that process or this PC13 process.

¹⁰ Email from Justine Kennedy – Strategic Projects Driver of Waipa District Council dated 24/5/2021.

CONCLUSION

21. In conclusion, I confirm that it is my opinion that:
- a) The option adopted by Council in their s32 analysis for PC13 is, in my opinion, the most appropriate outcome for fixing a legal and technical issue whilst enabling Council to meet its obligations under the National Policy Statement for Urban Development (i.e. rezoning sufficient land to enable further development to occur).
 - b) The Coombes submission is within scope of PC13 as set out in this evidence and the supporting legal opinion.
 - c) The submission does not give rise to any additional or inappropriate effects that are not already contemplated by the uplifting of 18ha of land in Ngahinapouri for future development, or that would not be reasonably addressed through a future subdivision consent process.
 - d) The s42A report has not assessed the land swap as being inappropriate from an effects-based perspective, therefore, if the Commissioner is of the opinion that the submission is within scope, it can also be concluded that the outcome sought is appropriate. In other words there is no effects based reason not to approve the land swap.
 - e) The points raised by Mr Frost in his further submission have no material bearing on the appropriateness of the land swap sought by the Coombes.
22. For these reasons, I request that the Council's recommendation to reject submission points 29/1 and 29/2 is amended from 'reject' to 'accept' and that the consequential changes required to give effect to that change in stance are adopted by Council.

Dated: 11 June 2021



Kathryn Drew

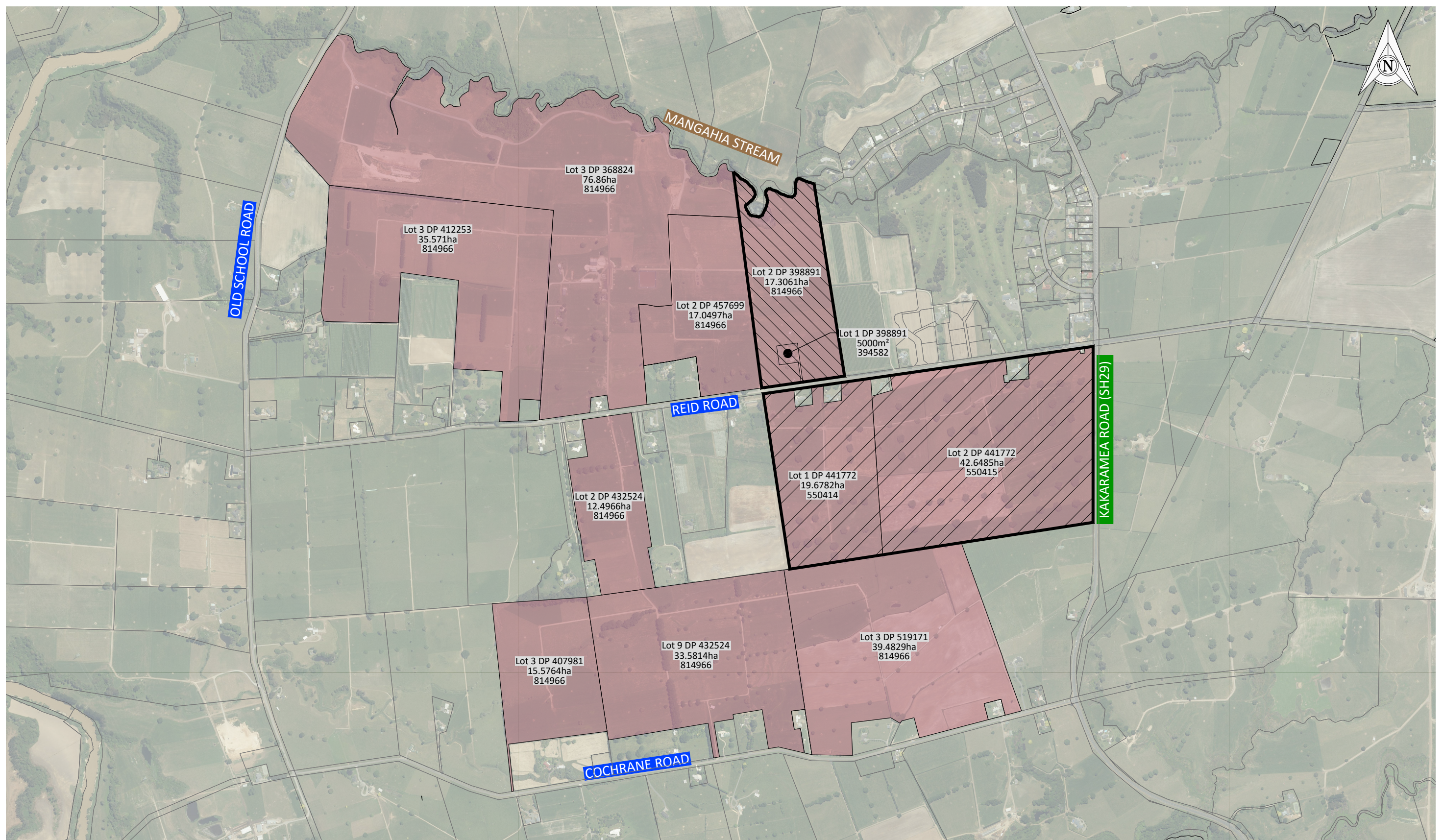
ATTACHMENT A:
Land Ownership and Land Swap Plans

100mm

SCALE FOR VALIDATING SIZE OF A3 PLOT ONLY

0

C:\Users\erichardson\AppData\Local\Temp\BrixCAD\BrixCAD\Temp\BrixCAD\BrixCAD.dwg, 20/04/2021 9:48 am erichardson Plotter.dwg, 20 Apr 2021 8:48 am



KEY:	
	EXISTING BOUNDARIES
	PROPERTY OWNED BY THE COOMBES
	N2 GROWTH CELL
	N3 GROWTH CELL

DATE	ISSUE/REVISION DETAIL	BY	CHK	APPR
20.04.2021	INITIAL ISSUE	ER	KD	KD

DESIGNED	CHECKED
KD	KD
DRAWN	APPROVED
ER	KD

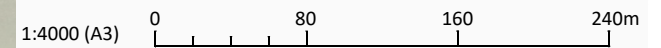
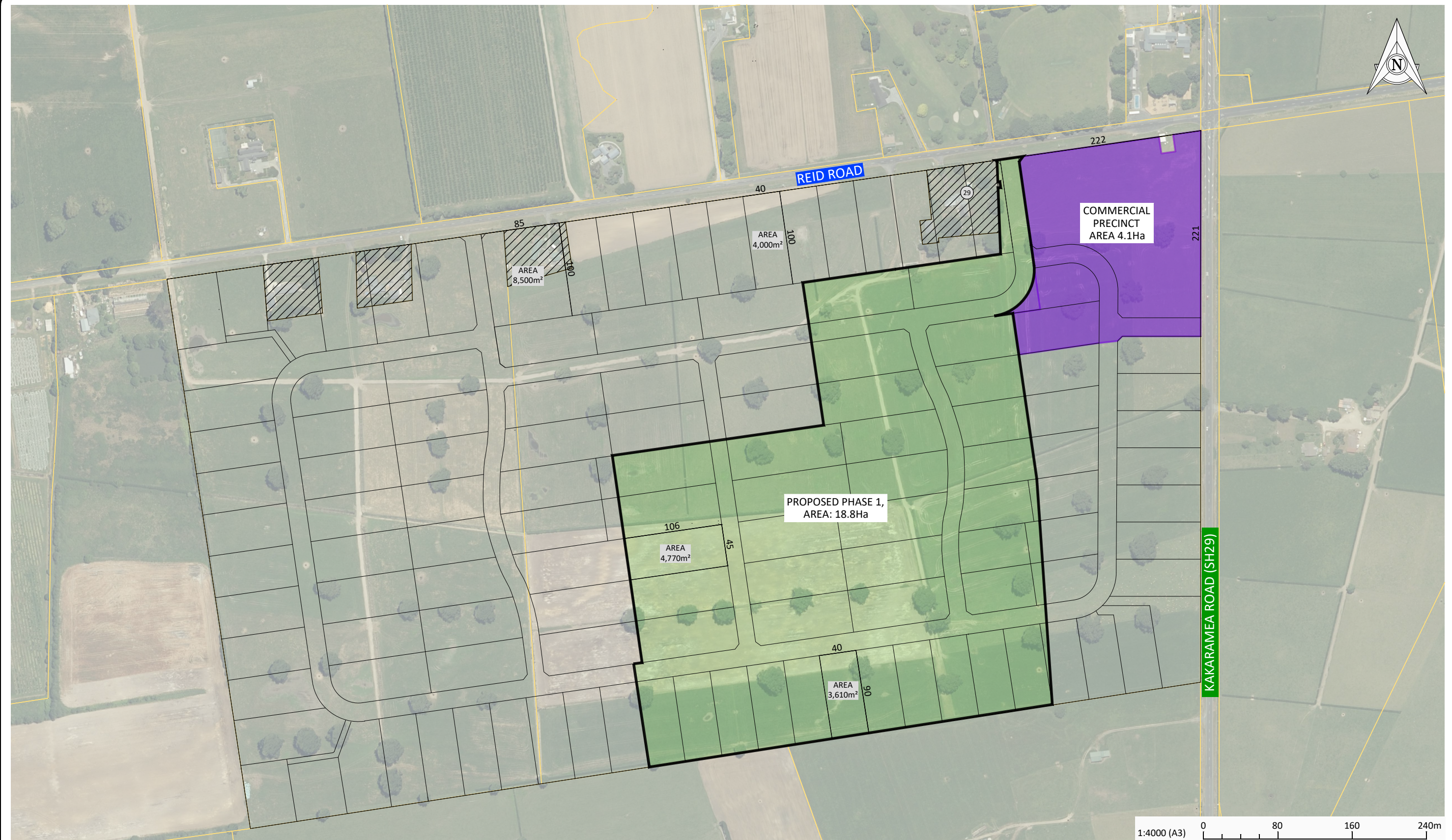


CLIENT
COOMBES FARMS

PROJECT
**N3 GROWTH CELL
NGAHINAPOURI**

DRAWING
PROPERTY OWNERSHIP PLAN

STATUS	
PRELIMINARY	
DATE	SCALE (ORIGINAL SIZE A3)
19.04.2021	1:12,500
DRAWING NUMBER	REVISION
147040-00-0003	A



NOTE:
 1. UNDERLYING LOT ARRANGEMENT CONCEPTUAL, BASED OF COUNCIL MASTER PLAN

KEY:	
	EXISTING BOUNDARIES
	COUNCIL'S SCHEME
	PROPOSED RESIDENTIAL STAGE 1
	COMMERCIAL PRECINCT
	LAND OUTSIDE OF COOMBES CONTROL

DATE	ISSUE/REVISION DETAIL	BY	CHK	APPR
D 02.02.2021	LOT LAYOUT REVISED	ER	KD	KD
C 02.02.2021	COMMERCIAL PRECINCT AREA UPDATED	ER	KD	KD
B 28.01.2021	PHASE 1 LAYOUT ALTERED	ER	KD	KD
A 22.01.2021	INITIAL ISSUE	ER	SB	SB

DESIGNED	CHECKED
KD	SB
DRAWN	APPROVED
ER	SB



CLIENT
COOMBES FARMS

PROJECT
**N3 GROWTH CELL
 NGAHINAPOURI**

DRAWING
LAND SWAP PLAN

STATUS	
PRELIMINARY	
DATE	SCALE (ORIGINAL SIZE A3)
22.01.2021	1:4000
DRAWING NUMBER	REVISION
147040-00-0002	D

ATTACHMENT B:
Harkness Henry Legal Advice

10 June 2021

Coombes Farms Limited
C/- C L Coombes
100 Reid Road
RD 2
Ohaupo 3882

Email joan.forret@harkness.co.nz

Direct Dial +64-7-834 4662

Partner Ref J B Forret

Please refer to J B Forret

Account No 315991-32

Attention: Cameron Coombes

Scope of Submission on Proposed Plan Change 13

Introduction

1. You have asked us to provide an opinion (**Opinion**) on whether a submission made by Coombes Farms Ltd (**Coombes**) is within scope of Proposed Plan Change 13 (**PPC13**), or in other words, is “on” PPC13. PPC13 was publicly notified by Waipa District Council (**Council**) on 22 March 2021.

Background

2. The stated purpose of PPC13 is to update the District Plan to, “*reflect best practice with regards to the process of uplifting the Deferred Zone*”. The Council’s Section 32 Evaluation report (**s 32 Report**) identifies that PPC13 is the result of Council having identified a technical and legal issue with the current process of uplifting the Deferred Zones in the District. The s 32 Report then identifies six options for remedying that technical and legal issue.
3. The Council’s preferred option is Option 4. Option 4 involves removing the Council’s ability to uplift any Deferred Zone via a Council resolution, rezoning all the pre-2035 Growth Cells to their live zoning and requiring all post-2035 Growth Cells to undergo a future Plan Change process to uplift the Deferred Zoning.
4. For Coombes, Option 4 means that all of its land at Ngahinapouri, in the N2 Growth Cell, will be rezoned to Large Lot Residential and that their N3 land will remain Deferred Large Lot Residential Zone. Coombes own all of the land in the N2 cell and the majority of the N3 land.
5. Coombes support PPC13 in part. However, their submission is that an equivalent portion of the N3 land should be re-zoned Large Lot Residential instead of the N2 land and that the N2 land should be swapped to the Deferred Zone (“**land-swap**” arrangement).
6. One submitter, Mr Frost, has lodged a further submission stating that the Coombes’ submission is out of scope because it seeks to uplift the deferred zone status of the N3 land which is not explicitly identified as an option in PPC13.

Executive Summary

7. In our opinion the Coombes' submission is within scope of PPC13. The leading case¹ on the issue of scope sets out a dual-test for evaluating whether a submission will be "on" a proposed plan change:
 - (a) The submission must address the alteration of the status quo brought about by the plan change and must reasonably be said to fall within the ambit of the plan change. If the submission raises matters that were or **should** have been addressed in the s 32 Report, then that is a reasonable indication that the submission is "on" the plan change;
 - (b) Whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in a submission will have been denied an effective opportunity to respond to those additional changes.

(emphasis added)
8. In our opinion, the Coombes' submission satisfies both tests. In relation to the first test, the "land swap" proposal addresses the alteration to the status quo proposed by PPC13, Option 4, and only proposes different methods for achieving the objectives of PPC13. The changes sought can also be characterised as merely incidental or consequential and therefore can be considered as falling within the ambit of PPC13.² While the objectives of PPC13 do not explicitly address the appropriateness of the Growth Cell development timing (post or pre 2035) they do determine the process that will have to be undertaken in order for Growth cells to have their development potential realised. As a result, the options that flow from those objectives give rise to different outcomes in terms of the development timeframes that will apply to the Growth Cells that have been identified.
9. In addition to this, there has been a clear direction in case law that incidental or consequential extensions of zoning changes proposed in a plan change are permissible.³ The Coombes' proposal seeks to swap the proposed zoning between two parcels of land which are both (primarily) owned by the Coombes. Further, N2 and N3 are in close proximity to each other and the Coombes will be the party which is most affected by the land-swap arrangement. As a result, it is difficult to characterise the Coombes' submission as anything but an incidental or consequential zoning request.
10. The Environment Court has also recently expressed that the first test should not be interpreted in a way that is unduly narrow⁴ and that a submission does not necessarily have to be confined to what is addressed in a s 32 Report in order to be within the scope of a plan change. Rather, the test should be whether the submission under consideration "seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative method

¹ *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290.

² *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290 at [81], [83].

³ At [81].

⁴ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191.



to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change”.⁵

11. If the submission can be characterised as an alternative method to achieve the objectives of the plan change, it is more likely to be within the scope of the plan change. In light of this wider test, it is reasonable to suggest that the Coombes’ submission does not seek to radically alter the objectives of PPC13, but rather is a discrete (alternative) method through which the objectives of PPC13 can be better achieved.
12. In respect of the second test, it is not considered that a consideration of the Coombes’ submission would prejudice public participation. The High Court has found that a submission will fail the second test if it is out of “left-field” or completely novel.⁶ It would be difficult to argue that the Coombes’ submission is out of “left-field”. The submission proposes an alternative method of uplift for the N2/N3 land and it is reasonable to suggest that such a submission should have been foreseeable by both Council and also other submitters. We note the Coombes’ submission was an original submission, which affected parties have had the opportunity to make further submissions on.

Legal Principles

13. The key provision in the context of the Coombes’ submission is Clause 6(1) of the Resource Management Act 1991 (**RMA**), which states that a person may make a submission “on” a proposed plan change. The Courts have had to determine when a submission will be deemed to be “on” a proposed plan change. The leading authority on this issue of scope is *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290, where the High Court explicitly endorsed the bipartite approach adopted in *Clearwater Resort Limited v Christchurch CC* HC Christchurch AP34/02, 14 March 2003 (**Clearwater test**).
14. In *Motor Machinists* the High Court set out the two limbs that must be satisfied for a submission to be “on” a proposed plan change. Kos J described the first limb as follows:

[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. **That is, to the alteration of the status quo brought about by that change.** The first limb in *Clearwater* serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. **It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.**

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be “on” the plan change. That is one of the lessons from the *Halswater* decision. **Yet the *Clearwater* approach does not exclude**

⁵*Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [37].

⁶ *Clearwater Resort Limited v Christchurch CC* HC Christchurch AP 34/02, 14 March 2003 at [69].

altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

(emphasis added)

15. Kos J then addressed the second limb as follows:

[82] But that is subject then to the second limb of the *Clearwater* test: whether there is a real risk that persons directly or potentially directly affected **by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.** As I have said already, the 2009 changes to Schedule 1, clause 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of clause 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

(emphasis added)

Motor Machinists first limb – Coombes Submission

16. In respect of the first limb in *Motor Machinists*, our opinion is that the Coombes' proposal for a "land swap" between growth cell N2 and N3 is merely a consequential or incidental change to PPC13 and as a result, it can reasonably be said to fall within the ambit of PPC13. The purpose of PPC13 is to streamline the approach to "opening up" Deferred Zones in the District and to ensure that the process of uplifting any Deferred Zone reflects best practice.
17. As earlier mentioned, Council's preferred option for PPC13, Option 4, is to rezone all the identified pre-2035 Growth Cells to their live zoning, and require all post-2035 Growth Cells to undergo a plan change process to uplift the Deferred Zoning. This would result in N2 being rezoned to Large Lot Residential and N3 retaining its Deferred Zone status.
18. In our opinion, the Coombes' submission satisfies the first test in *Motor Machinists* as it can be likened to an incidental or consequential zoning extension by submission.⁷ Further, the Coombes' position is that no substantial further s 32 analysis is needed in respect of the "land-swap" proposal. There are two reasons for this:
- (a) The request is being made by the owner of majority of the land that will be affected by the change; and

⁷ *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290 at [81].

- (b) The change can be considered as a “like for like approach” as it requests that Council effectively swaps the N2 development potential that will be enabled by PPC13 so that an equivalent area in the N3 growth cell can be developed.
19. While *Motor Machinists* is considered the leading case on the issue of scope, there are other Environment Court cases which have considered the issue of whether submissions must be confined to what is addressed in a s 32 report in order to be within the scope of a plan change. In *Bluehaven Management Ltd v Western Bay of Plenty District Council*⁸ the Environment Court outlined an alternative test for determining whether a submission could be considered within the scope of a plan change. In considering *Motor Machinists*, the Environment Court stated:
- [36] In that sense, we respectfully understand the questions posed in *Motor Machinists* as needing to be answered **in a way that is not unduly narrow**, as cautioned in *Power*. In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the *Clearwater* test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.
- [37] In that context, we respectfully suggest that one might also ask, in the context of the first limb of the *Clearwater* test, **whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change. The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be “on” that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.**
- (emphasis added)
20. The test in *Bluehaven* is that a submission will be within scope if it is putting forward a different or alternative method of achieving a relevant objective of a plan change, which is not radically different from what could be envisaged as resulting from that plan change.
21. The primary objective of PPC13 is to amend the District Plan to correct and update the process currently provided for in relation to the uplifting of deferred zones. The Coombes’ submission is a method of achieving this objective, but could be considered as an alternative to the discrete options proposed by Council in the s 32 Report, in that the submission seeks to uplift the deferred zoning status of a post-2035 growth cell (N3), an option which is not explicitly considered in PPC13.
22. Despite the Coombes’ submission not explicitly being considered in the s 32 Report, it can still certainly be argued that the submission is within scope of

⁸ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191

PPC13 in accordance with the *Bluehaven* analysis. In our opinion, to dismiss the Coombes' submission because it has not been considered as an option in PPC13 would be an "unduly narrow" interpretation of the judgement in *Motor Machinists*. The Coombes' proposal does not seek to add or alter an objective to PPC13, nor does it even seek to introduce any new policies. Rather it introduces a discrete proposal through which a growth cell (N3) can have its development potential better realised within a shorter timeframe than is currently envisaged by the planning framework in the District. The proposal will allow for the continued productive use of N2 as an area of dairy farm that is close to the Coombes' milking shed and will enable N3 (which is less desirable for rural use) to be residentially developed within a shorter timeframe than is currently possible. A 'blanket' dismissal of this proposal as being outside of scope of PPC13 would be a restrictive reading of the case law in this area and would overlook the advantages that the Coombes' proposal could have for the District.

23. The *Motor Machinists* judgement also states that another way to assess whether a submission is within the ambit of a plan change is to ask whether the management regime in a district plan for a particular resource is altered by the plan change.⁹ If the plan change is not proposing such an alteration, then a submission which seeks a new management regime for that resource is unlikely to be "on" the plan change.¹⁰
24. PPC13 does seek to alter the regime in the District Plan for a particular resource, with that resource being land which currently has a Deferred zoning. The "land-swap" arrangement is not looking to fundamentally change the recommendation of Council to uplift pre-2035 growth cells, but rather slightly alter the process in respect of the timing of the uplift of the Deferred Zone status for two discrete parcels of land. This change in timing is sought due to the particular circumstances surrounding each parcel of land. In the words of *Motor Machinist*, this can reasonably be characterised as an "incidental or consequential" change.¹¹
25. When considering the Options set out in the s 32 Report, Options 1, 3 and 4 deal with the timing for development within the Growth Cells. Option 1 would retain the status quo which would retain the deferred large lot zoning over both N2 and N3. That option affects the timing of development on N2. Option 3 would remove deferred zones altogether and that again would affect the timing of any large lot residential development in Ngahinapouri. Option 4 uplifts the pre-2035 deferred zones and retains the post 2035 deferred zones. Again that option affects the timing of development, bringing forward the development window on N2 and retaining the development window for N3. In a similar vein, the Coombes' proposal is relevant to the timing of development that can occur within previously identified growth cells.
26. The Coombes submission is that the PPC13 options have only partially considered the implications for timing of growth cells in the District. They have not addressed whether the sequence is still correct and whether the development triggers for the various Growth Cells identified as pre 2035 and post 2035 are appropriate. The Coombes' submission says they are not appropriate in Ngahinapouri because N2 is located so close to the working dairy farm.

⁹ *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290 at [81].

¹⁰ At [81].

¹¹ At [81], [83].

27. As PPC13 seeks to alter the management regime for deferred zones, a submission which proposes a (slight) alteration to this management regime should be viewed as being within scope. This should certainly be the case where the submission presents an alternative to the status quo which promotes the objectives of that plan change.
28. According to the s 32 Report, the rationale for recommending *Option 4 – Uplift pre-2035 Deferred Zones* is that pre-2035 growth cells, such as N2, are considered to be likely areas of growth within the lifetime of the District Plan. The Coombes’ position is that it would be more sensible for the land in N3 to be assigned its live zoning before the land in N2 as that would support development of Ngahinapouri Village. Coombes seeks an equivalent amount of land in N3 to have its Deferred Zoning uplifted as would be rezoned in N2 if Council implemented Option 4. There would be no difference in respect of the residential supply of land if the changes proposed in the Coombes’ submission are adopted by Council. The Coombes’ position is that the “land-swap” would better achieve the objectives of PPC13, as Coombes are more likely to be able to facilitate growth in N3 rather than N2 in the short-term.
29. We note that the Tompkins Wake legal opinion agrees that the part of the Coombes submission seeking to retain the deferred status over the northern N2 land would be within scope because PPC13 is seeking to change that zoning.¹² It is unduly narrow to limit the scope of PPC13 to the direct outcomes sought. To the same extent that the plan change considers the timing of pre-2035 development and proposes to uplift the deferred status from N2, it is also appropriate to consider the timing of development within the post-2035 Growth Cells and whether (and how) the deferred status should also be uplifted. We agree that proposing an entirely new area to be included as a Growth Cell is likely to be out of scope of PPC 13.

Second limb

30. The second test in *Motor Machinists* is whether there is a real risk that persons potentially affected by a proposed change in a submission have been denied an effective opportunity to participate in the plan change process. The second test is therefore concerned with procedural fairness.
31. In respect of the second limb, the Courts have stated that submissions which are novel or out of “left-field” will fail the second test of *Motor Machinists* and there will be little scope for public participation.¹³ The question is then whether the Coombes’ submission is out of “left-field” or completely novel. We consider that it would be very difficult to argue that the Coombes’ submission is out of “left-field”.
32. Again, the rationale for Council preferring Option 4 is that the partial uplift by way of the growth cell classifications has advantages because “...*these are the likely areas of growth within the lifetime of the District Plan*”. A submitter should be able to test that overall rationale and in our view this is what the Coombes are doing in that they are proposing a better method of uplift for the N2/N3 land. That

¹² Tompkins Wake opinion (24 May 2021) paragraphs 18 - 19.

¹³ See *Clearwater Resort Limited v Christchurch CC* HC Christchurch AP 34/02, 14 March 2003 at [69].

does not seem to be particularly out of “left field” or something which could not have been contemplated by other submitters.

33. In his judgement in *Motor Machinists* and in respect of the second limb, Kos J was concerned that adjacent landowners to the submitter’s site (who sought to have their land rezoned as part of a Council led plan change process) would not be formally notified as part of the submission process.
34. In respect of the Coombes’ submission, it is not considered that the adjacent landowners to N3 would be disadvantaged if N3 was to have to its Deferred Zoning status uplifted as part of PPC13. This is because the Coombes proposal was put to Council by way of an original submission. As a result, other potentially affected parties have had the opportunity to comment on this by lodging further submissions.

Submission in opposition

35. A submitter, Mr Benjamin Frost, has made a (further) submission in opposition to the Coombes’ submission. Mr Frost contends that the Coombes’ submission is out of scope as it seeks to uplift the deferred status of N3 which is not identified in PPC13. Issues of scope have already been addressed in this Opinion.
36. Mr Frost also states that he opposes the Coombes’ submission because as far as he is concerned, N3 should be developed last. This is because there are complexity issues with upgrading SH39/Reid Road intersection and the potential future expansion of Ngahinapouri School.
37. In response to that point, it is argued that the area to be developed in N3 will not place any additional pressure on the Reid Road Intersection than would be experienced if N2 was developed first. The same area of land and therefore the same land development capacity is proposed under the land swap. Cars would come in and out the same way (down Reid Road) off the State Highway.
38. It is appropriate to assess Mr Frost’s submission in light of the second limb in *Motor Machinists*, which is whether there is a real risk that Mr Frost has been denied the opportunity to give an effective response to the Coombes’ submission. As Mr Frost has been able to make a further submission on the Coombes’ submission, it is reasonable to suggest that the risk envisaged by the second limb of *Motor Machinists* is minimised. Coombes will still need to undertake a private plan change in order to release land for development of the community hub and for the development of the remaining N3 land that will be additional to the 18ha in the proposed land swap. Affected parties/landowners will be notified as part of any plan change application, ensuring neighbours and potential submitters will not be prejudiced.

Harkness Henry
SPECIALIST LAWYERS



JOAN FORRET
Partner



ATTACHMENT C:
Ngahinapouri Village Concept Plan – Option 6

OPTION SIX.

THREE LEG ROUNDABOUT.



OPTION SIX.

THREE LEG ROUNDABOUT FEATURES.

Roads & Transport.

1. Reduced Speed Zone: Offset roundabout 200m south of Reid Road and Ngahinapouri Road, with the intersection between the two to be closed. Including roundabout and road-side landscaping.

Community Facilities & Amenities.

2. Village Core / Commercial Centre: A mixed-use centre providing goods, services, hospitality, entertainment and office space offerings to the community and visitors, surrounding a central, linear open space.

3. Community Facilities Expansion: Community orientated facilities including healthcare, childcare and exercise facilities. Option to redevelop community hall.

Pedestrian & Cycle Connectivity.

4. Re-Aligned Reid Road Shared Streetscape: Allocation of space to promote and prioritise pedestrian and cycle use and connectivity between community, school, open space and commercial amenities and facilities.

5. Golf Course Access: Direct public pedestrian and golf cart access to Ngahinapouri Golf Course.

6. Shared Paths: Broad paths along connector roads within the village and through central open space, to provide quality and safe pedestrian and cycle connections to community, school, open space and commercial amenities and facilities.

Visibility & Sense of Place.

7. Visual Prominence of Village Core / Commercial Hub: A larger catchment of frequent and transient visitors and customers are captured by locating commerce at the visually prominent intersection with State Highway 39.

8. Building Typology, Form & Scale: Buildings that reflect the enduring rural character of Ngahinapouri and the surrounding landscape through appropriate colour and material use, building form, configuration and scale.

9. Landscape & Streetscape: Hard landscape materials that prioritise safety and wayfinding, while preserving and building upon a sense of rural character through considered allocation of space. Planting at a range of scales that compliment roading and built-form scales, with species that are cohesive with those existing within the surrounding landscape. Retention of existing vegetation where possible.

Open Space Network.

10. Diversity of Use: Provision of active and passive recreational areas that have strong pedestrian and cycle connection between them and existing open space areas. Opportunity for amenities including playgrounds, trails, sports areas and facilities.

11. Complimentary Facilities & Amenities: Supporting amenities including public bathrooms, rubbish bins, drinking fountains, shelters and signage located within the open space network.

12. Planting: Provides for increased amenity for users, expansion of habitat, nature play and opportunity for integrated stormwater treatment.

Three Waters.

13. Integrated Design: Stormwater treatment devices including planted swales, ponds, raingardens and engineered solutions where appropriate for a responsible and resilient development that respects the wider landscape catchment and contributes to increased water-quality.

OPTION 4: BIRD'S-EYE PERSPECTIVE.

