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Waipa District Council
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Dear Tony

Plan Change 13 - scope of submissions

1. We refer to your email of 29 April 2021. You have asked us to provide advice regarding the extent of Council's jurisdiction in respect of submissions on Proposed Plan Change 13 to the Waipa District Plan (PC 13). In particular, you have asked us to consider whether PC 13 provides the scope to make the changes sought in the following submissions:
 - (a) A submission by Coombes Farms Ltd, Cameron Coombes and Sheree Coombes (the "Coombes submission") seeking to rezone the post-2035 N3 Growth Cell at Ngahinapouri from Deferred Large Lot Residential to Large Lot Residential; and
 - (b) Various submissions seeking to change some of the structure plans to be inserted into the District Plan (for example: change road width, align structure plan with master plan and include new components on the structure plan) (the "Structure Plan submissions").

Summary of advice

2. In summary, we consider that:
 - (a) The part of the Coombes submission seeking to rezone part of the post-2035 N3 Growth Cell from Deferred Large Lot Residential to Large Lot Residential falls outside of the scope of PC 13.
 - (b) The Structure Plan submissions which seek specific changes to the three Structure Plans proposed to be inserted into the District Plan by PC 13 fall within the scope of PC 13 (provided they do not alter the location or the extent of the land affected by the Structure Plan).
3. Our detailed advice is set out below.

Jurisdiction to amend PC 13

4. Submissions on PC 13 are made under clause 6 of Schedule 1 of the Resource Management Act 1991 (“RMA”):

Once a proposed ... plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.
5. The role of the Council (or Commissioners) is to hear submissions on PC 13 and give a decision on the provisions and matters raised in submissions.¹
6. In terms of the Council’s jurisdiction to make changes to PC 13 in response to a submission:
 - (a) A submission must first be “on” PC 13; and
 - (b) The changes made to PC 13 must be within the scope of the submission.
7. For the purpose of this advice, the key question for consideration is whether the Coombes submission and the Structure Plan submissions can be considered to be “on” PC 13.
8. The leading authority² on whether a submission is “on” a variation or plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*.³ It set out a two-limb test:⁴
 - (a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and
 - (b) Whether there is a real risk that people affected by the plan change (if modified in response to the submission), would be denied an effective opportunity to participate in the plan change process.
9. A submission can only fairly be “on” a proposed plan if it meets both these limbs. The *Clearwater* test has been adopted in a number of High Court decisions.
10. The first limb requires consideration of whether the submission falls within the ambit of the plan change. This involves consideration of the breadth of alteration to the status quo entailed in the proposed plan change and whether the submission then addresses that alteration. The *Palmerston North City Council v Motor Machinists Limited*⁵ case suggested that one way of assessing this limb is to ask whether the submission raises matters that should have been addressed in the section 32 evaluation. Subsequent cases have clarified that the assessment is as to what matters should have been included in the section 32 evaluation report and whether the submission addresses one of those matters, rather than being limited to what the s32 report actually contained.⁶
11. The purpose of the second limb is to ensure that persons who are directly affected by the additional changes proposed in the submission are not denied an effective response to those

¹ Sch 1, cl 8(B) and 10(1) of the RMA.

² As confirmed by the High Court in *Turners & Growers Ltd v Far North District Council* [2017] NZHC 764.

³ AP 34/02, 14 March 2013, Young J.

⁴ At [66].

⁵ [2013] NZHC 1290 at [80].

⁶ *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191 at para [39].

additional changes in the plan change process. This is particularly important given the limitations on lodging further submissions.⁷

12. In order to assess whether the Coombes submission, and the Structure Plan submissions, meet the two-limb test in *Clearwater*, we have considered:
 - (a) The purpose of PC 13, and the changes it proposes to the status quo;
 - (b) Whether the Coombes submission and the Structure Plan submissions fall within the ambit of PC 13; and
 - (c) Whether a finding that the submissions are “on” PC 13 would deprive interested parties of the opportunity for participation.

The purpose of PC 13

13. The “Executive Summary – Uplifting Deferred Zones” of the section 32 report describes the purpose of PC 13 as follows:

The purpose of Proposed Plan Change 13 is to update the District Plan to reflect best practice with regards to the process of uplifting the Deferred Zone.

14. The three “objectives” of PC 13 that are assessed in the section 32 report are:⁸
 - (a) To amend the District Plan to correct and update the process currently provided for in Section 14 for the uplifting of deferred zones; and
 - (b) To update the planning maps to reflect the uplift of the deferred zone in areas with approved structure plans; and
 - (c) To update and amend Growth Management Structure Plans and Concept Plans Appendices to reflect current Structure Plans.
15. The preferred option as a result of Council’s section 32 analysis involves:⁹
 - (a) Removing the ability to uplift any Deferred Zone via a Council resolution;
 - (b) Rezoning the pre-2035 Growth Cells to their live zoning;
 - (c) Requiring all post-2035 Growth Cells to undergo a Plan Change process to uplift the Deferred Zoning;
 - (d) Updating the planning maps for two Growth Cells with approved Structure Plans;
 - (e) Removing the structure plans for three Growth Cells which are fully developed; and
 - (f) Incorporating three recently endorsed Structure Plans.

⁷ Sch 1, cl 8 of the RMA.

⁸ Section 5.1 of the Section 32 report.

⁹ Executive Summary – Uplifted Deferred Zones.

16. The key changes are to Sections 14: Deferred Zone and 15: Infrastructure, Hazards, Development and Subdivision, and to Appendix S: Growth Management Structure Plans and Concept Plans, and the Planning Maps; with minor changes also required to Sections 2: Residential, 3: Large Lot Residential and 21 Assessment Criteria and Information Requirements.¹⁰
17. The next step is to consider whether the changes sought by the Coombes submission, and the Structure Plan submissions, fall within the ambit of PC 13.

Coombes submission

18. The Coombes submission relates to the N2 and N3 Growth Cells in Ngahinapouri. The submission seeks that:
 - (a) Growth Cell N2, which is proposed to be rezoned from Deferred Large Lot Residential to Large Lot Residential, be retained as a Deferred Large Lot Residential zone; and
 - (b) Growth Cell N3, which is a post-2035 Growth Cell, be partially rezoned from Deferred Large Lot Residential to Large Lot Residential instead.
19. As PC 13 seeks to rezone Growth Cell N2 from Deferred Large Lot Residential to Large Lot Residential, there is no doubt that the part of the submission in (a) above falls within the scope of the plan change.
20. However, the part of the submission relating to Growth Cell N3 in (b) above, seeks to rezone a post-2035 Growth Cell from Deferred Large Lot Residential to Large Lot Residential. The submission addresses the issue of scope as follows:
 1. The change affects two land parcels that are within the scope of PC13. We note that in relation to Objective 1 (section 5.3.1 of PC13) Options 1, 3 and 4 are relevant. Option 1 is to retain the Status Quo, Option 3 is to remove Deferred Zones entirely and Option 4 is to Uplift pre-2035 Deferred Zones. Coombes seek to retain the Deferred Zone over N2 and to instead uplift the Deferred Zone over an equivalent portion of N3 while retaining the Deferred Zone over the balance.
 2. 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 change give rise to any trade competition issues.
21. PC 13 does not seek to alter the location or sequencing of the Growth Cells that were identified in the Waipa 2050 District Growth Strategy, and inserted into the District Plan by Plan Change 5 which became operative on 14 March 2019. Only the pre-2035 Growth Cells are proposed to be rezoned by PC 13 from a deferred to a live zone, as these have been identified as appropriate for development in the short and medium term.
22. While the submission refers to Options 1, 3 and 4 of the section 32 report, none of these options considered giving a live zoning to the post-2035 Growth Cells. In particular:
 - (a) Option 1 is to retain the status quo which would leave a post-2035 Deferred Large Lot Residential zone on Growth Cell N3;

¹⁰ Executive Summary – Uplifted Deferred Zones.

- (b) Option 3 is to remove the Deferred Zones entirely, which would return Growth Cell N3 to a rural zone; and
 - (c) Option 4 is to uplift the pre-2035 Deferred Zones, which does not affect Growth Cell N3 as it is a post-2035 Growth Cell.
23. Accordingly, the possibility of rezoning the post-2035 Growth Cells, and the N3 Growth Cell in particular, from a deferred zone to a live zone was not considered in the section 32 report, and falls outside the extent of the changes that are proposed by PC 13.
24. In respect of the second limb of the *Clearwater* test, while the submission has been lodged by the owner of the whole of the N2 Growth Cell and the majority of the N3 Growth Cell, there are many landowners in the vicinity of these properties who would be deprived of the opportunity to be heard in respect of the proposed rezoning. As the Council's public notice and section 32 report does not refer to the possibility of rezoning post-2035 Growth Cells to their "live" zoning, the neighbours of these properties would not have been alerted to the need to make a submission on the plan change.
25. In conclusion, we consider that the request in the Coombes submission for rezoning of part of the N3 Growth Cell from Deferred Large Lot Residential to Large Lot Residential falls outside the scope of PC 13.

Structure plan submissions

26. PC 13 seeks to incorporate three Structure Plans for pre-2035 Growth Cells. The Structure Plan submissions seek specific changes to the Structure Plans in respect of matters such as road width, aligning the Structure Plan with a master plan, and including new components on the Structure Plan. In assessing whether these submissions are "on" the plan change, we have reviewed the "Summary of Decisions requested to Proposed Plan Change 13: Uplifting Deferred Zones by Topic". We propose to make our assessment collectively, rather than in respect of specific submissions. However, please let us know if you have any further queries relating to specific submissions.
27. You have advised that the Structure Plans were developed through a separate consultative process outside the district plan, and have been endorsed by Council in the form in which they are now included in PC 13. We understand that the "endorsement" by Council is a non-statutory process.
28. In respect of Structure Plans, PC 13:
- (a) Inserts in Appendix S: Growth Management Structure Plans three Structure Plans that have been endorsed by Council;
 - (b) Proposes changes to Section 2: Residential and Section 3: Large Lot Residential to provide rules which link to the Structure Plans; and
 - (c) Proposes changes to Section 21: Assessment Criteria and Information Requirements to provide assessment criteria which link to the Structure Plans.

29. The Section 32 report (at section 5.3.3) considers whether the Structure Plans should be included in Appendix S, and concludes that they should be included to enable subdivision and development within these areas to be assessed against the endorsed Structure Plans.
30. As PC 13 seeks to include three new Structure Plans within the District Plan, any submissions seeking specific changes to those Structure Plans (without altering the location or extent of the land affected) will be within the ambit of PC 13.
31. In terms of the second limb of the *Clearwater* test, the public notice for PC 13 specifically referred to the inserting of Structure Plans for Te Awamutu T6 and T11 and Cambridge C4 Growth Cells, and the section 32 report contained a copy of each Structure Plan as well as the supporting technical reports. Accordingly, we do not consider that any persons have been deprived of the opportunity to be heard in respect of these Structure Plans.
32. In conclusion, we consider that the Structure Plan submissions which seek specific changes to the new Structure Plans inserted by PC 13 are within the scope of PC 13.

Conclusion

33. In conclusion, we consider that the part of the Coombes submission which seeks to rezone part of Growth Cell N3 from Deferred Large Lot Residential to Large Lot Residential falls outside the scope of PC 13. A more appropriate process would be a plan change following the completion of the Ngahinapouri Village Concept Plan process.
34. However, we consider that the various submissions seeking specific changes to the three Structure Plans which have been inserted in Appendix S by PC 13 are within the scope of PC 13 (provided they do not alter the location or extent of the land affected), and should be considered by Council at the hearing of the submissions.
35. Please contact us if you have any further queries, or require clarification of any aspect of our advice.

Yours faithfully
TOMPKINS WAKE



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