

J.

**BEFORE THE HEARINGS COMMISSIONER
AT WAIPA**

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of of the hearing for Plan Change 13 - Uplifting Deferred
Zones

SUBMITTER Coombes Farms Limited, Cameron Coombes and
Sheree Coombes

**SUBMISSIONS OF COUNSEL
16 June 2021**

Harkness Henry
SPECIALIST LAWYERS

www.harknesshenry.co.nz

Phone (07) 838 2399
Fax (07) 839 4043
Address Level 8, KPMG Centre,
85 Alexandra Street, Hamilton 3204
Mail Private Bag 3077, Hamilton 3240,
New Zealand, DX GP 20015

Counsel Acting:
Joan Forret
(Joan.Forret@harkness.co.nz)

MAY IT PLEASE THE COMMISSIONER:

Introduction

1. These submissions are in support of the submission lodged by Coombes Farms Limited (Coombes) on Proposed Plan Change 13 (PPC13) which was publicly notified by Waipa District Council (Council) on 22 March 2021.
2. Coombes is a major landowner in Ngahinapouri and own most of the land within the N3 growth cell and all of the land within N2 growth cell, both of which will be affected by PPC13.
3. Coombes support PPC13 in part. However, 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' submission is that an equivalent portion of the N3 land should be rezoned Large Lot Residential instead of the N2 land and that the N2 land should be swapped to the Deferred Zone (land-swap arrangement).
4. The position of Coombes is that their submission on PPC13 is within scope and is "on" the PPC13. As a result the Coombes' submission should be considered as part of the PPC13 process. This position is on the basis that the submission satisfies the legal tests for evaluating whether a submission will be "on" a proposed plan change¹.

Legal Principles

5. 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 earlier approach in *Clearwater Resort Limited v Christchurch CC* HC Christchurch AP34/02, 14 March 2003 (**Clearwater test**).
6. 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**

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

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 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)

7. 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**

8. 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.
9. 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.
10. The Coombes' submission satisfies the first test in *Motor Machinists* as it is an incidental or consequential zoning extension by submission.² 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:
 - (i) The request is being made by the owner of majority of the land that will be affected by the change; and
 - (ii) 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.
11. Other Environment Court cases have considered 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*³ 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**,

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

³ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191
JBF-315991-32-428-1:jbf

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)

12. 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.
13. 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.
14. The land swap proposal doesn't seek to add or alter any objective, policy or rule to PPC13, and 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 the *Motor Machinists* sense.

15. The proposal would allow growth cell N3 (on less productive land) to have its development potential better realised within a shorter timeframe while allowing for the continued productive use of N2 as an area of dairy farm that is close to the Coombes' milking shed.
16. 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.⁴ 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.⁵
17. 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 instead alters the timing of the Deferred Zone uplift 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.⁶
18. 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.
19. 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

⁴ *Palmerston North CC v Motor Machinists Limited* [2013] NZHC 1290 at [81].

⁵ At [81].

⁶ At [81], [83].

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.

20. 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.
21. 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.
22. Counsel notes 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.⁷ 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.

***Motor Machinists* second limb – Coombes Submission**

23. 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.

⁷ Tompkins Wake opinion (24 May 2021) paragraphs 18 - 19.
JBF-315991-32-428-1:jbf

24. 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.⁸ The question then is whether the Coombes' submission is out of "left-field" or completely novel. We submit that it would be very difficult to argue that the Coombes' submission is out of "left-field".
25. 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 does not seem to be particularly out of "left field" or something which could not have been contemplated by other submitters.
26. 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.
27. 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

28. Mr Benjamin Frost, has made a (further) submission in opposition to the Coombes' submission.
29. Mr Frost opposes the Coombes' submission on the basis that 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.
30. In our submission 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

⁸ See *Clearwater Resort Limited v Christchurch CC* HC Christchurch AP 34/02, 14 March 2003 at [69].

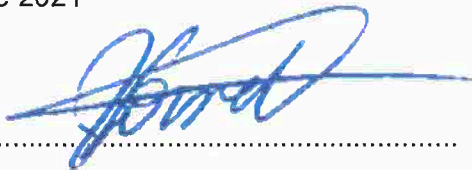
development capacity is proposed under the land swap. Cars would come in and out the same way (down Reid Road) off the State Highway.

31. Mr Frost has been able to make a further submission on the Coombes' submission and demonstrates that the risk envisaged by the second limb of *Motor Machinists* is minimised. Affected landowners are likely to be notified as part of any subdivision process.
32. In addition, 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.

Conclusion

33. Coombes seeks to have a portion of the N3 land rezoned Large Lot Residential instead of the N2 land and the N2 land being swapped to the Deferred Zone.
34. For completeness, if the land swap is not approved, Coombes oppose any changes to the N2 deferred zone uplift. That land would need to be developed in order to fund any changes to the intersection or to progress the commercial hub. It would just mean that development may not happen until 2030 or thereabouts.

16 June 2021



.....
Dr J B Forret

Counsel for the Submitter