**BEFORE THE WAIPA DISTRICT COUNCIL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of Proposed Plan Change 13 to the Waipa District Plan

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**SUBMISSIONS BY COUNSEL FOR WAIPA DISTRICT COUNCIL**
**16 June 2021**

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## Introduction

1. On 24 May 2021 I provided a legal opinion to Waipa District Council (Council) regarding the scope of submissions on Proposed Plan Change 13 (PC 13). A copy of that legal opinion has been provided to you by Hayley Thomas (Council legal opinion).

2. I have been provided with a copy of the legal opinion prepared by Joan Forret on behalf of Coombes Farms Limited dated 10 June 2021 (Coombes legal opinion).

3. The purpose of these submissions is to provide a brief response to the Coombes legal opinion.

## Legal principles

4. Both legal opinions agree that the appropriate legal test for scope is the two-limb test set out in *Clearwater Resort Ltd v Christchurch City Council*[1] and endorsed in *Palmerston North City Council v Motor Machinists Limited*[2]:

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[1] AP 34/02, 14 March 2013, Young J.
[2] [2013] NZHC 1290.

(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.

First limb

5. In my legal opinion I concluded that, as the rezoning of part of the post-2035 N3 Growth Cell from deferred Large Lot Residential to Large Lot Residential was not publicly notified as part of PC 13, and was not considered in the section 32 report for PC 13, that it falls outside the extent of the changes that are proposed by PC 13.[3]

6. The Coombes legal opinion asserts that the "land swap" between growth cell N2 and N3 is merely a consequential or incidental change to PC 13 and as a result can be considered to fall within the ambit of PC 13.[4]

7. I agree that changes that can be considered to be incidental or consequential may be permissible. In the *Motor Machinists* case, the High Court stated that:[5]

> 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 amendments are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submissions.

8. However, I submit that the rezoning of part of the N3 Growth Cell from Deferred Large Lot Residential to a live Residential Zone is not an "incidental or consequential" change, but requires a section 32

[3] Paragraphs 21 to 25 of the Council legal opinion.
[4] Paragraph 16 of the Coombes legal opinion.
[5] Ibid at 2, at para [81] and also in Environmental Defence Society v Otorohanga District Council [2014] NZEnvC 70 at para [43].

assessment which has not taken place as part of PC 13.[6] Such an assessment would consider the appropriateness of the rezoning of part of the N3 Growth Cell proceeding in advance of 2035, and in particular whether this would achieve integrated management of natural and physical resources, and provide for the efficient extension of infrastructure including roads.

9. In addition, incidental and consequential amendments are still subject to the second limb in *Clearwater*.[7]

Second limb

10. The test is not whether the submission is out of left-field or completely novel,[8] but 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.

11. In *Motor Machinists* the Court recognised that:[9]

> It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage (so as not to have received notification initially under clause 5(1A)) might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly notified as it would have been had it been included in the original instrument. It is this unfairness which militates the second limb of the *Clearwater* test.

12. The Judge also recognised the limits of the further submission process:[10]

> Unlike the process that applies in the case of the original proposed plan change, persons directly affected by additional changes proposed in submissions do not receive direct notification. There is no equivalent of clause 5(1A). Rather, they are dependent on seeing public notification that a summary of submissions is

[6] The Coombes legal opinion acknowledges that the uplifting of the deferred zoning status of a post-2035 growth cell (N3) is an option which is not explicitly considered in PC 13 (paragraph 21).
[7] Ibid at 2, at para [82].
[8] Paragraph 31 of the Coombes legal opinion.
[9] Ibid at 2, at para [77].
[10] Ibid at 2, at [43].

available, translating that awareness into reading the summary, apprehending from that summary that it actually affects them, and then lodging a further submission. And all within the 10 day timeframe provided for in clause 7(1)(c).

13. In my submission as the public notice of PC 13, and the section 32 report, do not refer to the possibility of rezoning post-2035 Growth Cells, and the N3 Growth Cell in particular, from a Deferred Residential Zone to a "live" Residential Zone, there is a real risk that many landowners both within and surrounding the N3 Growth Cell would be denied an effective opportunity to participate in respect of the proposed rezoning.

**Conclusion**

14. In conclusion, I consider that the Coombes submission which seeks to rezone part of the N3 Growth Cell is outside of the scope of PC 13.

15. The Coombes legal opinion acknowledges that a private plan change will be required to release land for development of the community hub and for the development of the remaining N3 land.[11] It would be appropriate for this private plan change to consider the rezoning of the whole of the N3 Growth Cell, as anticipated by PC 13.

**Dated** this 16th day of June 2021

**W J Embling**
Counsel for Waipa District Council

[11] Paragraph 38 of the Coombes legal opinion.