

**BEFORE THE HEARING PANEL ON PROPOSED PLAN CHANGE 17 TO THE WAIPA
DISTRICT PLAN**

IN THE MATTER of the Resource management Act 1991 (the Act)

AND

IN THE MATTER of proposed Plan Change 17 to the Waipa District Plan

**Submissions on behalf of the Hautapu Landowners' Group
Dated 15 February 2023**

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MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These submissions are made on behalf of the Hautapu Landowners' Group ("HLG") in response to the Hearing Panel's Minute #7 dated 8 February 2023. Minute #7 directed that any legal submissions on behalf of the HLG are to be filed by 4pm on Wednesday, 15 February 2023.
2. These submissions address whether the part of the HLG's submission which seeks re-zoning of the land to the north of the Kama Trust land to "Deferred Industrial" is within the scope of proposed Plan Change 17 to the Waipa District Plan – Hautapu Industrial Zones ("PC17"). That is, whether that part of the submission is "on" PC17.
3. As the Hearing Panel will be aware, by law a submission made under clause 6(1) of Schedule 1 to the Resource Management Act 1991 ("RMA") must be "on" the proposed plan, in this case a proposed plan change to the operative Waipa District Plan ("WDP").¹ The Hearing Panel does not have jurisdiction to consider relief sought in a submission which is not "on" the plan change.
4. The HLG lodged a submission on PC17 ("Submission") and sought relief in the following terms:

5.1. Confirm the proposed rezoning of the land owned by Kama Trust from Rural Zone to Industrial Zone **only on the basis that the land holdings owned by the Hautapu Landowners' Group are rezoned to Deferred Industrial Zone as part of PC17 (as shown on the attached plan presented as Attachment 1)**. This can include a proviso that the land holdings owned by the Hautapu Landowners Group would not be 'live zoned' to Industrial Zone until the Kama Trust land has reached 80% development (meaning that 80% of the developable land area is the subject of s.224 certificates) or by 31 March 2030, whichever occurs sooner. Any live zoning would be subject to the preparation of a Structure Plan (including all necessary technical investigations being completed) and a Proposed Change to the Waipa District Plan being approved.

[Emphasis added]

¹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, Kós J, at [1].

5.2. If the relief sought above is not accepted, **reject the proposed rezoning of the land owned by Kama Trust from Rural Zone to Industrial Zone.**

[Emphasis added]

5. As the Hearing Panel will be aware, the land owned by the Kama Trust is described in PC17 as “Area 6”. Attachment 1 to the Submission illustrates that Area 6 is contiguous to the HLG land area. The Submission seeks relief which would expand the geographical extent of PC17 to include an additional 16ha (approximately) immediately to the north of “Area 6” such that the boundary of C9 would align with the topographical boundary delineated by the Mangaone Stream.

Purpose and ambit of PC17

6. The published documentation in support of PC17 is titled “Proposed Plan Change 17 – Hautapu Industrial Zones, incorporating section 32 report” (“PC17 Report”).² The purpose of PC17 is described in the Part A – Proposed Plan Change 17 as follows:

The purpose of Proposed Plan Change 17 is to rationalise and activate industrial activities in Hautapu. This is achieved through amending the provisions relating to the Hautapu Structure Plan, Growth Cell C9 and including additional industrial land.³

7. The “Background” to the section 32 evaluation includes the following commentary:

[...] These changes are proposed to **address increasing demands for industrial land in the region**, to ensure consistency and accuracy of the District Plan’s structure plans, and to implement the Future Proof Strategy 2022. Due to circumstances outside of Council’s control, some land identified for industrial and future industrial use in the C8 growth cell has **not been made available for development**. This has created **heightened demand for additional industrial land within the region and in particular in Hautapu.**

[Emphasis added]

²<https://www.waipadc.govt.nz/repository/libraries/id:26zgz4o7s1cxbyk7hfo7/hierarchy/our-council/waipadistrictplan/documents/Plan%20Change%2017/PC17%20Documents/Proposed%20Plan%20Change%2017%20and%20s32%20Report> “PC17 Report”.

³ PC17 Report, at page 8.

8. The HLG submission expressly responds to the purpose of PC17 and the change to the management regime proposed by PC17. It seeks the same management regime as proposed by PC17 to apply to the HLG land, albeit as a “deferred” industrial zone. The relief sought by the HLG is unequivocally within the ambit of PC17 given the purpose of PC17, the context and factual background to the HLG submission⁴, and because the area in question is contiguous to “Area 6”. Moreover, the purpose of PC17 and the PC17 Report’s consideration of the HLG land, including in its section 32 evaluation demonstrates that a person potentially affected by the change would be on notice that a submission may be made seeking to re-zone the HLG land. This is reiterated by the Public Agenda of 6 September 2022 in which the concerns of the HLG were discussed at length.⁵ It follows that such persons would not be denied a real opportunity for participation in the PC17 process.⁶

CASE LAW PRINCIPLES ON SCOPE

9. The question of whether a submission is “on” a plan change has been the subject of several Court decisions.⁷ The leading High Court authority is *Palmerston North City Council v Motor Machinists Limited*⁸ which endorsed the two staged approach in *Clearwater v Christchurch City Council*.⁹ In short, the two staged test requires an assessment of:

⁴ The HLG’s position has been the subject of communications with Council prior to notification of PC17 which are recorded in publicly available documents. For example, the “Strategic Planning & Policy Committee Public Agenda, 6 September 2022.

⁵ *Ibid.* See Agenda page [22] where communications from HLG and its representatives are discussed (Report to Strategic Planning and Policy Committee – 6 September 2022 Decision to notify: Proposed Plan Change 17 (Hautapu Industrial Zone), page 4 of 15 of Report: Doc ref:10876374.

⁶ Indeed, a number of further submissions respond to the HLG submission.

⁷ For example: *Clearwater Resort Ltd and Canterbury International Golf Ltd v ChCh City Council* [HC CHCH AP32/04 [14 March 2003]; *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 [31 May 2013]; *Well Smart Investment Holding (NZQN) Limited (formerly Reid Investment Trust) & Ors v Queenstown Lakes District Council* [2015] NZEnvC 214; *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191; *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187; *Meridian Energy Limited & Ors v Mackenzie District Council* [2022] NZEnvC 105.

⁸ [2013] NZHC 1290.

⁹ [HC CHCH AP32/04 [14 March 2003].

- (a) whether the submission addresses the change to the status quo advanced by the plan change and, second,
- (b) whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.¹⁰

10. The first and substantive limb of the test is the “dominant” consideration¹¹ and acts as a “filter based on direct connection between the submission and the degree of notified change proposed to the extant plan.”¹² Kós, J described this in the following terms:

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.¹³

11. This was further expanded by Kós, J as follows:

[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.

[Emphasis added.]

12. However, the High Court went on the state that, if the answer to the above questions was no, this 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.¹⁴

¹⁰ *Motor Machinists*, at [91].

¹¹ *Motor Machinists*, at [80].

¹² *Motor Machinists*, at [80].

¹³ *Motor Machinists*, at [80].

¹⁴ *Motor Machinists*, at [81].

13. Much will depend on the nature of the plan change which can assist to determine its scope and what the purpose of it is.¹⁵ Each case must be determined on its own facts, and there is no clear line: whether there is jurisdiction is a matter of fact and degree.¹⁶

FIRST LIMB

Does the HLG submission address the extent to which PC17 changes the pre-existing status quo?

14. As set out in the introduction above, the purpose of PC17 is to rationalise and activate industrial activities in Hautapu. This is proposed to be achieved through amending the provisions relating to the Hautapu Structure Plan, Growth Cell C9 and including additional industrial land. The basis for the proposed change is to “address increasing demands for industrial land in the region”. This is in part because “industrial and future industrial use in the C8 growth cell has not been made available for development”, and that “this has created heightened demand for additional industrial land within the region and in particular in Hautapu”.¹⁷
15. It follows that the ambit of PC17 is to amend the operative Waipa District Plan to rationalise and activate industrial activities in Hautapu. Given the purpose of PC17, the part of the HLG submission at issue clearly addresses the breadth of the change to the status quo and addresses that alteration. It directly addresses the question of re-zoning of land from rural to industrial/deferred industrial. The submission sets out the planning merits and rationale for the extension of the land in “Area 6” to include

¹⁵ *Calcutta Farms Limited v Matamata-Piako District Council*, at [87].

¹⁶ *Well Smart Investment Holding (NZQN) Limited (formerly Reid Investment Trust) & Ors v Queenstown Lakes District Council* [2015] NZEnvC 214.

¹⁷ Proposed Plan Change 17: Hautapu Industrial Zone/Structure Plan and Section 32 Evaluation Report, Page 32 of 85, Doc re: PC/0006/20 ECM#10881239.

additional deferred industrial zoning, which is necessary because of a lack of available capacity for such land.

16. Relevantly, the section 32 evaluation expressly addresses the HLG land area as follows:

The land to the north of the Kama Trust land is zoned Rural Zone. It includes a number of dwellings (including one close to the boundary of the Kama Trust land) and the land is primarily used for equestrian purposes. This includes an agistment business which accommodates high-value thoroughbred horses. In order to, amongst other things, facilitate the boundaries of a future industrial area following logical topographical boundaries rather than a cadastral boundary, the future extension of the proposed Industrial Zone to the north (to the top of the escarpment on the southern side of the Mangaone Stream), bounded by Peake Road to the west and the existing Industrial Zone to the east (whereby that land could be rezoned as a Deferred Industrial Zone), is a possible proposal that Council could consider if technical work being completed (at the cost of the relevant land owners) is able to demonstrate that the land can be adequately serviced in terms of roading and three waters.¹⁸

17. This is further expanded upon as follows:

5.3.4 Option 4 – Extending the rezoning of Area 6 to the north as additional Deferred Industrial Zone. This option would respond to a formal request during the plan change preparation from landowners north of Area 6, to extend the zoning to include their land. The merits of this proposal include: Additional industrial land availability. Sentiments across the region support the need for additional industrial zoned land in Waipa. While on paper it appears there is sufficient capacity, landowners in identified growth cells are currently not in a position to sell/develop this land. This is leaving a need that is not being met currently in the district.

Location. The proposed additional parcels of land are in a prime location to provide a seamless addition to already industrially zoned land in Hautapu. It is recognised that to not accept this proposal does leave a pocket of rural land that is bordered on two sides by industrial land. Locationally, and more specifically spatially, the proposal has a logical planning basis.

Mitigation of effects on rural neighbours. It is recognised that the neighbouring properties were not aware of the proposal to rezone Kama Trust land as industrial, that they did not have a chance to appeal the Future Proof decision to accept the rezoning, and that the rezoning is not in an identified growth cell in the Waipa District Plan. Mitigation measures such as buffer zones, landscaping/screening, limits on types of industrial activity will be considered as part of this plan change and will mitigate, to a certain extent, the effects of Industrial land uses.

¹⁸ PC17 Section 32 evaluation, at page 36.

18. Option 4 expressly addresses the HLG land and recognises the planning merits of its rezoning. Any person reading PC17, and the section 32 evaluation would have, or at least should have, appreciated the potential for a submission to seek the inclusion of this land and that it may indeed be re-zoned to deferred industrial. The purpose of PC17, together with the publicly available Council records relating to PC17 in the lead up to notification, including the Strategic Planning & Policy Committee Public Agenda, 6 September 2022, makes the potential for this even more obvious.
19. This express reference to, and consideration of, the HLG land in the section 32 evaluation, clearly demonstrates that the HLG submission addresses the extent to which PC17 changes the status quo. The reference to a lack of technical information in support of including the HLG land (referred to in the section 32 evaluation) and whether Future Proof has considered the HLG land does not, and cannot, be determinative of the issue of scope. Indeed, this could be cured through the evidence exchange process prior to the hearing.
20. PC17 is a “re-zoning” plan change. It includes a proposed re-zoning of Area 6 from Rural to Industrial. HLG seeks an extension to that zone and does not seek a new “spot zone”¹⁹ which is disconnected from the land proposed to be re-zoned in PC17.
21. Moreover, despite the section 32 evaluation expressly referring to the HLG land and the analysis set out above, the proposed rezoning is, nevertheless, an “incidental” or “consequential” change. In that regard, minimal changes to the section 32 evaluation would be necessary should the submission be considered “on” PC17. Such changes would primarily relate to infrastructure matters: traffic/transport and 3-waters

¹⁹ *Motor Machinists.*

integration, all of which can be addressed through evidence and the section 32AA evaluation.

SECOND LIMB

Does the submission permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected?

22. In short, no. Anyone who read the publicly available information on PC17 would be clearly “on notice” of the prospect that a submitter (i.e., the HLG), would lodge a submission seeking the re-zoning of the HLG land to deferred industrial. The PC17 report, the section 32 evaluation, and numerous publicly available Council documents prior to notification of PC17 signalled that the land to the north of the Kama Trust land was at issue. The responses in further submissions also demonstrate that parties were alert to the prospect.²⁰
23. Moreover, the topography of the area depicted on the proposed structure plan maps would alert a potentially affected person to the possibility that a submitter would seek to extent Area 6 to align with the Mangaone Stream – which would also be effectively in alignment with the existing industrial zone boundary to the north on the eastern side of Area 6.²¹ In addition, as stated in the HLG submission, the nearest land owner to the north of the HLG land is some 300m away from the proposed boundary of the extension to Area 6.
24. The proposed rezoning of the HLG land cannot be said to “come from left field” as described in *Clearwater*.²²

[...] In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field, there may be little or no real scope of public participation.

²⁰ FS01; FS02; FS03; FS04; FS05: FS06.

²¹ See *Figure 1: Reference map to show Area 6 as Proposed rezoning*, Proposed Plan Change 17: Hautapu Industrial Zone/Structure Plan and Section 32 Evaluation Report, Page 9 of 85, PC/0006/20 ECM#10881239.

²² *Clearwater*, at [69].

25. It follows that there is negligible risk that a potentially affected person would not be denied reasonable opportunity for participation in the PC17 process. The reasonable interests of potentially affected persons would not be overridden by a “submissional side-wind”²³.

CONCLUSION

1. The HLG submission is on PC17, and the Hearing Panel has jurisdiction to consider the relief sought in the part of the submission which seeks the re-zoning of rural land to deferred industrial.



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²³ *Motor Machinists* at [82].

