

BEFORE THE WAIPĀ DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Proposed Plan Change 17 to the Waipā District Plan

LEGAL SUBMISSIONS ON BEHALF OF WAIPĀ DISTRICT COUNCIL ON SCOPE
Date 21 February 2023

MAY IT PLEASE THE HEARINGS PANEL

INTRODUCTION

1. These legal submissions are made on behalf of Waipā District Council (**Council**) in response to directions in the Hearings Panel's (**Panel**) Minute #7¹ to Hautapu Landowners' Group (**HLG**), Council and Kama Trust to file legal submissions in order to assist the Panel decide whether part of a submission lodged by the HLG is within the scope of Proposed Plan Change 17 (**PC17**) to the Operative Waipā District Plan (**District Plan**).
2. The relevant part of the HLG submission which is the focus of the Panel's consideration and decision on scope requests the rezoning of land owned by members of HLG from Rural to Deferred Industrial zone (the **HLG Submission**).²
3. We have reviewed the legal submissions filed on behalf of HLG on 15 February 2023. We generally agree with the identification of caselaw principles recorded in those legal submissions.³
4. We note at the outset that in order for the HLG Submission to be considered 'on' and, therefore, within the scope of PC17 for the purposes of clause 6(1) of the First Schedule of the Resource Management Act 1991 (**RMA**), it must satisfy both limbs of the *Clearwater*⁴ test which we have summarised on the following basis:
 - (a) The First Limb: Does the HLG Submission address the changes to the pre-existing status quo advanced by PC17?

¹ Minute of the Hearings Panel, Dated 8 February 2023: Minute #7, paragraph 2(b)(ii).

² Identified as Submission Point 21.1 in the Summary of Decisions Requested to Plan Change 17: Hautapu Industrial Zones by Submitter, page 21.

³ Submissions on behalf of the Hautapu Landowners' Group, Dated 15 February 2023, paragraphs 9 to 13.

⁴ *Clearwater Resort Ltd v Christchurch City Council*, High Court AP34/02.

Only if the answer to this question is 'yes' can the HLG Submission meet the first limb of the *Clearwater* test.

- (b) Second Limb: Is there a real risk that people affected by PC17 (if modified in response to the HLG Submission), would be denied an effective opportunity to participate in the PC17 process?

Only if the answer to this question is 'no' can the HLG Submission meet the second limb of the *Clearwater* test.

5. For the following reasons, we conclude that the HLG Submission does not satisfy both limbs of the *Clearwater* test; it is not, therefore, a submission that is 'on' PC17. The Panel accordingly has no jurisdiction to consider and grant the relief sought in the HLG Submission.

The First Limb of the *Clearwater* test

6. The First Limb of the *Clearwater* test involves consideration of the extent to which PC17 proposes to change the District Plan status quo and whether the HLG Submission addresses that change. Importantly, the High Court has described the First Limb as the dominant of the two limbs in the *Clearwater* test:

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.**

In other words, the submission must reasonably be said to fall within the ambit of the plan change...⁵

[Our emphasis added.]

7. The public notice notifying PC17 for submissions described the extent of change proposed to the District Plan on the following basis:

⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [80].

Proposed Plan Change 17 involves the Hautapu Industrial Area and seeks to reflect infrastructure changes that have happened since the Hautapu Structure Plan was last updated, to **bring forward industrial land availability, and to re-zone an area of rural land north of Hautapu Road.**

Plan Change 17 proposes three main changes:

1. Changes to the Hautapu Structure Plan – Council had developed a master plan for infrastructure upgrades in and around C8 growth cell in the Hautapu Structure Plan area, which supersedes the Structure Plan in the Waipā District Plan (*sic*) Proposed Plan Change 17 will amend the Structure Plan to align with the masterplan.

2. “Live zoning” the Industrial Zone in Growth Cell C9 – The second part of the plan change relates to the growth cell C9, shown as “deferred industrial” in the District Plan and planned for development to occur after 2035. **The deferred industrial zoning on C9 is no longer fit for purpose as it does not reflect the current land use or the demand for industrial land.** Proposed Plan Change 17 proposes to **lift the deferred industrial zoning on C9 which will make the industrial zoning “live”.**

3. Rezone an area from Rural to Industrial – An area to the north of Hautapu Road is currently zoned Rural. **Part of this zoning no longer reflects the land use and the Waikato Future Proof Growth Strategy 2022 has identified this area as suitable for “short term” development (industrial).** Draft Plan Change 17 proposes to **rezone an area of approximately 20ha north of Hautapu Rd from Rural to [‘live’] Industrial** which will incorporate a new stormwater pond.

[Our clarification and emphasis added.]

8. The clear purpose of PC17 is to both recognise existing and enable additional industrial land use through the ‘live’ industrial zoning of land in the short-term in order to respond to a current shortfall in available, appropriately zoned land for industrial use in the Waipā district. PC17’s proposal to rezone land to a ‘live’ industrial zoning responds directly to this purpose. In contrast, the HLG Submission to rezone HLG land to ‘deferred’ industrial, which would then require an additional, future plan change before it can achieve ‘live’ industrial zoning, is out-of-step with the clear purpose of PC17.
9. The reference in PC17’s public notice to an “area of rural land north of Hautapu Road” is subsequently confirmed in the PC17 documents to be a reference to 20 hectares of land described as “Area 6”. HLG land sits to the north of, and beyond, Area 6. The High Court has noted that a

submission requesting that a new district plan management regime apply to land not identified as being subject to that new regime in a plan change is unlikely to be within the scope of that plan change:

One way of analysing... [whether a submission is within the ambit of the plan change] is to ask whether the submission raises matters that should have been addressed in the s32 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...⁶

[Our clarification and emphasis added.]

10. The HLG land is not identified in the PC17 public notice, text or maps for rezoning. Pre-notification approaches from HLG representatives to Council seeking to include HLG land in the notified version of PC17, which are documented in the Section 32 Evaluation Report for PC17, cannot remedy this.⁷
11. In summary, the HLG Submission requests deferred industrial zoning that:
 - (a) Does not align with PC17’s live rezoning focus, which is essential to achieving PC17’s purpose; and
 - (b) Applies to land that is not identified for rezoning in the PC17 public notice, text or maps.

For these reasons the HLG Submission does not address those changes to the pre-existing District Plan status quo advanced by PC17. The HLG Submission cannot, accordingly, satisfy the First Limb of the *Clearwater* test.

⁶ *Motor Machinists* at [81].

⁷ See for instance Proposed Plan Change 17: Hautapu Industrial Zones incorporating Section 32 Evaluation Report, 30 September 2022, Section 5.3.4, pages 56 and 57.

The Second Limb of the *Clearwater* test

12. Acknowledging that incidental or consequential extensions of zone changes proposed in plan changes are permissible, even through a submission process,⁸ the focus of the Second Limb of the *Clearwater* test is to ensure that persons who are directly affected by such additional changes are not denied an effective response in the plan change process:

... Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s32 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 (*sic*) schedule 1, clause 10(2). Logically they may also be the subject of submission.

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...** 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.⁹

[Our emphasis added.]

13. As noted above in our discussion on the First Limb of the *Clearwater* test, both the PC17 text and planning maps identify Area 6, not the HLG land, as the 20ha area of land north of Hauptapu Road proposed to be rezoned by PC17 to a live industrial zoning. While it is acknowledged that some parties were aware of the HLG Submission's requested rezoning because they lodged further submissions on it,¹⁰ it is important to note that no third party lodged an original submission on this proposal. The only original submission on the rezoning of the HLG land was the HLG Submission itself.
14. There arguably remains, therefore, a 'real risk' that there may be one or more parties either directly or potentially directly affected by the

⁸ *Motor Machinists* at [81].

⁹ *Motor Machinists* at [81] and [82].

¹⁰ *Supra* at Footnote 2 at [22].

rezoning proposed in the HLG Submission who do not have legal standing to participate as a submitter, or even as a further submitter, in the PC17 process. If this proposition was accepted, the HLG Submission could not satisfy the Second Limb of the *Clearwater* test.

Conclusion

15. For the reasons we have outlined above, the HLG Submission does not satisfy both limbs of the *Clearwater* test; the HLG Submission fails to meet the dominant First Limb and arguably also fails the Second Limb of the test. The HLG Submission is not, therefore, a submission that is 'on' PC17. The Panel has no jurisdiction to consider and grant the relief sought in the HLG Submission. In the event that the Panel reaches the same conclusion, we recommend that the relevant part of the HLG Submission is formally struck out under s41D(1)(c) of the RMA in order to avoid any potential confusion in the hearing record.
16. However, we do note that notification of an appropriately worded variation to PC17 could provide sufficient scope for HLG to submit and for Council, in turn, to consider a request to rezone the HLG land from Rural to Deferred Industrial Zone.



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