

BEFORE THE HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991

AND

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

LEGAL SUBMISSIONS ON BEHALF OF KAMA TRUST ON SCOPE

Dated 22 February 2023

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MAY IT PLEASE THE HEARING PANEL**INTRODUCTION**

1. These submissions are made on behalf of Kama Trust which made a submission (08) and a further submission (FS02) on Proposed Plan Change 17: Hautapu Industrial Zones to the Waipā District Plan (**PC17** or the **Plan Change**).
2. By way of Minute dated 8 February 2023, the Panel issued directions, including that:
 - a) It will determine the issue of scope it raised in relation to part of the submission lodged by the Hautapu Landowners Group (**HLG**) on PC17 “on the papers”; and
 - b) Any legal submissions on behalf of Waipā District Council and Kama Trust are to be filed by 22 February 2023.
3. Part of HLG’s submission seeks that additional land outside the PC17 area be rezoned from Rural Zone to Deferred Industrial Zone. These submissions address whether the HLG land is within the scope of PC17 and is within the jurisdiction of the Hearing Panel to consider.
4. Kama Trust does not fundamentally oppose there being further industrial land in this area, but it does seek to ensure that all procedural and legal requirements for PC17 are met. Kama Trust has been provided with a copy of HLG’s legal submissions dated 15 February 2023 which address the issue of scope. Kama Trust generally agrees with HLG’s summary of the caselaw principles. However, it differs as to the application of some of those principles and the conclusions reached, as addressed in these submissions.

LEGAL PRINCIPLES ON SCOPE

5. Submissions on plan changes are made under clause 6(1) of Schedule 1 to the RMA which provides:

Once a proposed policy statement or 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.

[Emphasis added].

6. A person may, in the prescribed form, make a submission seeking decisions “on” a proposed plan. If the relief sought in the submission is not “on” the plan change, there is no jurisdiction for relief to be granted by the Panel (or, on appeal, the Court).¹
7. The leading authorities on the jurisdictional question of whether a submission falls within clause 6(1) of Schedule 1 are *Clearwater Resort Ltd v Christchurch City Council (Clearwater)*² and *Palmerston North City Council v Motor Machinists Limited (Motor Machinists)*³.
8. *Clearwater* establishes a bipartite test:
- a) First limb: A submission can only fairly be regarded as being “on” a plan change “if it is addressed to the extent to which the plan change alters the pre-existing status quo”; and
 - b) Second limb: If the effect of regarding a submission as “on” a plan change would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, this is a powerful consideration against finding that the submission was “on” the plan change.
9. In relation to the first and dominant limb, the High Court in *Motor*

¹ *Federated Farmers & Ors v Otorohanga District Council* [2014] NZEnvC 070 at [11].

² AP 34/02, 14 March 2013, Young J.

³ [2013] NZHC 1290.

Machinists observed that *one* way of analysing whether a submission falls within the ambit of a plan change is to ask whether it raises matters that should have been addressed in the Section 32 Evaluation Report. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If the answer to these questions is no, then the submission is unlikely to be “on” the plan change, unless the change sought is incidental or consequential.⁴

10. Whether there is jurisdiction is a matter of fact and degree. Each case must be determined on its own facts, and there is no clear line.⁵

KAMA TRUST POSITION

11. Kama Trust contends that the rezoning relief sought by HLG is beyond the scope of PC17 for the reasons set out below. The burden rests with the party seeking such relief to establish that the relief sought is within the Hearing Panel’s jurisdiction to grant.

First limb

12. For the HLG relief to be “on” PC17, it must address the “alteration to the status quo” brought about by PC17. That is, it must be directly connected to the “degree of notified change proposed to the extant plan”. Kama Trust disagrees that the HLG rezoning relief is “on” PC17, and that the rezoning of the HLG land constitutes an incidental or consequential rezoning change.
13. Notwithstanding incidental or consequential zoning extensions by submission is permissible,⁶ the Environment Court has held that “there are considerable obstacles in the paths of persons who wish to challenge the zoning of properties which are outside the boundaries of the land subject

⁴ At [91](d).

⁵ *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [16].

⁶ *Motor Machinists* at [81].

to a plan review”⁷. Much depends on the nature of the plan change.

14. The purpose of PC17 is described in the Plan Change Request as follows:

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.

[Emphasis added].

15. As recorded in the Plan Change public notice, PC17 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 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 Industrial which will incorporate a new stormwater pond.

16. HLG’s characterisation of PC17 as a “re-zoning plan change” is misplaced. The rezoning of Area 6, a defined Rural Zoned parcel of land owned by Kama Trust, to a ‘live’ Industrial Zone is just one aspect of the plan change which seeks to “*rationalise and activate industrial activities in Hautapu*”. The rezoning of Area 6, which is identified in the Future Proof Growth

⁷ *Halswater Holdings v Selwyn District Council* (1999) 5 ELRNZ 192 at [51].

Strategy for future industrial development in the short-term, is a direct response to that objective.

17. In direct contrast, the HLG submission seeks to change the zoning of its land to the north of Area 6, which is not identified in the Future Proof Strategy for future industrial activity, from Rural Zone to Deferred Industrial Zone. The relief sought by HLG is therefore out-of-step with PC17 which has the purpose of immediately activating land for industrial activity to address the current shortfall within the Waipā District.
18. The HLG rezoning takes Rural Zoned land to the status of Deferred Industrial Zone. A 'deferred' status is clearly out- of-step with a plan change purpose to activate industrial land. In addition, activating this deferred land requires another plan change. This inherently suggests that the submission, which will require a further plan change before it can achieve 'live' industrial zoning, is clearly beyond the ambit of PC17.
19. Moreover, Area 6 has been the subject of detailed technical analysis and the design, and the actual and potential effects of the rezoning of Area 6 have been comprehensively assessed and managed. The same cannot be said of the land subject to the HLG land. The status quo of that land is a Rural Zoning. Due to the absence of technical analysis of the infrastructure and servicing requirements for HLG's proposal, it is unclear to Kama Trust whether the potential effects are appropriately managed and whether consequential changes to the PC17 provisions would be needed if the land was to be rezoned as sought. It is not for Kama Trust to fill these evidential gaps or to address actual or potential cumulative effects of including the HLG land within PC17, and as recorded in the Section 32 Report, there is insufficient time in this plan change process to consider all of the relevant infrastructural matters. Particularly as the site borders a river and there are known stormwater and water constraints in the general vicinity.⁸

⁸ Section 32 Report, p 56-57.

20. HLG place significant emphasis on the Section 32 Report coverage of the HLG land as being an indication that its relief is “on” PC17. What is required however, is that the changes proposed are “adequately assessed” in the evaluation. If it is not, then the relief is unlikely to meet the first limb of *Clearwater*.⁹ The Section 32 Report expressly records that the HLG proposal is unsupported by technical reports for transportation and three waters. In the absence of that critical technical information, a substantive assessment of the effects and merits of the proposal could not be undertaken. Kama Trust considers that this further demonstrates that the HLG rezoning relief is not “on” PC17.
21. For the foregoing reasons, the HLG relief does not meet the first limb of the *Clearwater* test. Accordingly, the relief is beyond the scope of PC17. Even if the Panel disagreed, the HLG relief also fails the second limb of the test for the reasons that follow.

Second limb

22. The PC17 and the Section 32 Evaluation Report planning maps clearly show Area 6 as the area proposed to be rezoned industrial, not the HLG land. Neighbours of the HLG land and key parties including the Department of Conservation, Fish and Game, iwi, and others may have reviewed PC17 as notified and elected not to make a submission on the understanding that the northern boundary of the proposed rezoning to live Industrial Zoning was the northern boundary of Area 6, not the Mangaone Stream adjacent to the HLG land. That understanding being consistent with Future Proof’s decision on the Future Proof Strategy 2022 that Area 6 would be a “hard boundary” for the Hautapu Industrial Area.¹⁰
23. In Kama Trust’s view, there is a real and appreciable prospect that, if the relief is determined to be in scope, that persons directly or potentially

⁹ *Motor Machinists* at [76].

¹⁰ Section 32 Report, p 56.


affected by rezoning additional land to Deferred Industrial Zone would be denied an effective opportunity to respond through the plan change process. Persons reviewing PC17 would have had no appreciation of the possibility that the HLG land could form part of PC17. The changes facilitated by the rezoning sought by the submissions may have important impacts on those persons. Seeking other land to be rezoned Deferred Industrial Zone is novel and “out of left-field” in the context of PC17.

24. In light of the above, the HLG submission seeking the rezoning of its land from Rural to deferred Industrial Zone does not satisfy either limb of the *Clearwater* test.

CONCLUSION

25. The land subject to PC17 is limited, defined and clearly depicted in the Plan Change Request and Section 32 Report. HLG’s submission to rezone additional land is not on the plan change and goes beyond the scope of PC17. Seeking land outside of the PC17 area to be rezoned Deferred Industrial Zone is novel and “out of left-field” in the context of PC17. The HLG land does not meet either limb of the *Clearwater* test. Accordingly, the Hearing Panel has no jurisdiction to consider that part of the submission on its merits.

Dated 22 February 2023



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