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 in response to legal submissions on behalf of Waipa District Council and Kama Trust on the issue of scope
Dated 24th February 2023

Marianne Mackintosh
BARRISTER

021 332 572
marianne@mmackintosh.co.nz
www.mmackintosh.co.nz

PO Box 6
Raglan 3265
New Zealand

MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These submissions are made on behalf of the Hautapu Landowners' Group ("HLG") in response to legal submission filed on behalf of the Waipa District Council ("Waipa DC") and Kama Trust dated 21st and 22nd February 2023 respectively. These submissions expand on and refer to the legal submissions on behalf of the HLG dated 15 February 2023 and should therefore be read in conjunction with those submissions.

2. In summary, with respect, the submissions on behalf of both parties rely on a flawed interpretation and application of the legal principles on whether a submission is "on" a plan change and, therefore, whether a submission is within the scope of the same plan change. This to both the first and second limb of the test originally set out in *Clearwater* and endorsed by the High Court in *Motor Machinists*.

3. The statement in the final paragraph of the Waipa DC submissions which refers to a future variation to PC17 is irrelevant to the question of scope. This submission point is not a matter to be considered in determining the issue of scope of part of the HLG submission.

4. These submissions address each of the limbs in turn and respond to the submissions on behalf of the Waipa DC and Kama Trust relating to each of those limbs. Counsel refers the Hearing Panel to paragraphs [9] to [13] of the legal submissions on behalf of the HLG dated 15 February 2023 ("15 February submissions") which sets out the legal principles established by *Clearwater* and *Motor Machinists*. Counsel understands that neither the Waipa DC nor Kama Trust disagree with these statements of principle by the High Court. The issue is the way in which those principles have been interpreted and applied.

5.

APPLICATION OF CASE LAW PRINCIPLES – TWO STAGE CONSIDERATION

First limb – whether the submission addresses the change to the status quo advanced by the plan change

6. As set out in paragraphs [10] and [11] of the 15 February submissions, the test is described by Kós, J 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.[1]

7. The 15 February submissions address this test, and those submissions are not repeated here.

Relevance of "deferred industrial" zone

8. Counsel for Waipa DC and counsel for Kama Trust emphasises the "live" zoning proposed in PC17 as a key factor in considering whether the HLG submission addresses the alteration proposed by PC17.[2] With respect, that is an artificially narrow construction of the purpose of PC17. As counsel for the Waipa DC pointed out in submissions, PC17 responds to a current shortfall in available, appropriately zoned land for industrial use in the Waipa district. It is intended to "rationalise and activate industrial activities in Hautapu".

9. The HLG submission engages directly with the purpose of rationalising and activating industrial activities, within the context of the acknowledged shortfall in available industrial land. The content of the HLG submission clearly demonstrates this. It addresses, *inter alia*, the proposed zoning of the Kama Trust land, the infrastructure needed for industrial zoning, and appropriate approach to integrated planning and staged development of industrial activities within the area.

---

[1] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, Kós J at [80].

[2] Legal submissions on behalf of Waipa DC on scope, 21 February 2023, para [8]; Legal submissions on behalf of Kama Trust on scope, 22 February 2023, para [18].

10. The proposed deferred industrial zone is consistent with this rationalisation and activation of industrial activities. It provides for the progressive occupation and uptake of Area 6 prior to release of the HLG land – hence the deferred zoning proposal. This reflects an integrated and rational approach to planning.

11. It is clear on its face that the submission addresses the alteration of the status quo that is the subject of PC17, and this supported by the preceding analysis above. In that regard, whether the HLG submission sought a "live" industrial zoning is not determinative of whether the submission satisfies the first limb in the context of the purpose of PC17. As submitted on 15 February, the ambit of PC17 is the zoning of land for industrial development in Hautapu. Deferred industrial zoning of land as part of the solution to the shortfall in available industrial land is within that ambit. Accordingly, it simply cannot be said that the HLG submission does not address the change to the status quo proposed through PC17. Live zoning is only one part of the purpose of PC17.

Section 32 evaluation

12. Both counsel for Waipa DC and Kama Trust make submissions on the relevance of the section 32 evaluation in considering the first limb of the *Clearwater* test.[3] As set out in submissions on 15 February, the case law principles regarding the relevance of a section 32 evaluation to the question of whether a submission is "on" a plan change was addressed in paragraphs [10] to [13]. The section 32 evaluation for PC17 expressly considered the HLG land and included the proposition as an option. Indeed, it supported the merits of including the HLG land.

13. Counsel for Waipa DC submitted the following on this issue:

> [The] HLG land is not identified in the PC17 public notice, text or maps for rezoning. Pre-notification approaches from HLG representatives to

[3] *Clearwater Resort Ltd and Canterbury International Golf Ltd v ChCh City Council* [HC CHCH AP32/04 [14 March 2003].

> 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.[4]

14. With respect, this ignores part of the approach reflected in the legal principles articulated by Kós, J in *Motor Machinists*. Relevantly, the High Court identified two ways in which the first limb can be considered. Regarding the highlighted text in the submissions for Waipa DC, the management regime for the HLG land is not being altered in the sense that new rules etc., have been notified in PC17 which will apply to that land. However, that is only one approach.

15. The second approach is to query whether the submission raises matters that should have been addressed in the s 32 evaluation and report.[5] In this case the HLG did raise matters that should have been addressed in the section 32 evaluation and the section 32 evaluation does just that. It makes relatively extensive reference to the HLG land. In that context, whether the public notice referred to the HLG land or whether the maps accompanying the notified PC17 showed the HLG land is irrelevant.

16. At paragraph [20] of legal submissions for the Kama Trust, its counsel questions the "adequacy" of the section 32 consideration of the HLG land. Relevantly, the alternative queries posed by High Court do not articulate in detail what is considered "adequate".

17. Nevertheless, the absence of technical reports and therefore detailed analysis in relation to the HLG within the section 32 evaluation is not material to the question of whether the HLG submission is within the scope of PC17. As stated in submissions on 15 February expert evidence would address those technical matters.

18. Indeed, there are examples of submissions being found to be within scope of a plan change where the matters raised in submission were not

[4] Legal submissions on behalf of Waipa DC on scope, 21 February 2023, para [10].
[5] *Motor Machinists*, para [81].

addressed in the section 32 evaluation on the basis that the section 32 evaluation "should" have considered those matters.[6] For example, in *Calcutta v Matamata-Piako District Council*[7] the Court stated the following:

> [76] Helpfully, the s 32 report was part of the notification of PC47. It does identify that alternative areas were considered, but the assessment of those alternatives is also short on detail.
>
> [77] In *Bluehaven,* the Court provided a very thorough critique of the observations by Kós, J in *Motor Machinists*[43] about the role of a s 32 analysis in assessing whether a submission is "on" a plan change. *Bluehaven* was a decision of the Environment Court, but it was presided over by two Environment Judges. I can do no better, and respectfully adopt, the reasoning outlined in paragraphs [34]-[38] of that decision and the conclusion at paragraph [39] which I now outline:
>
> Our understanding of the assessment to be made under the first limb of the test is that it is an enquiry as to **what matters should have been included in the s 32 evaluation report** and whether the issue raised in the submission addresses one of those matters. The enquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter, and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.
> [Emphasis added.]

19. The Court went on to state that:

> [78] In *Bluehaven*, the Court held that, in the context of the facts of that case, the submission had raised matters that should have been (and, at least to some extent, were) addressed in the s32 report. The problem in this case is that s32 report, whilst referring to alternatives, did not outline what those alternatives were to any great degree…

20. The Court went on to determine that the submission in question did satisfy the first limb of the test based on the basis that the section 32 evaluation was inadequate and should have considered the land in question as an option:

> […] it is hard to see why the s 32 report did not provide a detailed comparison of the Banks Road and Tower Road options…[8]

21. Its conclusion was set out in the following terms:

---

[6] *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191; *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187**.**

[7] [2018] NZEnvC 187.

[8] *Ibid,* paragraph [79].

> [81] In my view, PC47 did involve changes to the management regime for residential activity and areas to be designated as future residential activity areas, so that it was open to Calcutta Farms to lodge a submission seeking an alternative position on the areas proposed in PC47 to either be Residential Zones or Future Residential Policy Areas, which is what it did. It did therefore address in its submission the extent to which PC47 changes the existing status quo.[9]

22. In the current context, the section 32 evaluation did address the HLG land and, should the Hearing Panel question its "adequacy", given the extent of the engagement between HLG and Waipa DC following HLG's receipt of notice of the forthcoming PC17 on 26 May 2022, the section 32 should have investigated and analysed the option further.

23. Like the *Calcutta* scenario, albeit that plan change dealt with residential zoning, both *Calcutta* and PC17 address zoning of land to provide sufficient and appropriate capacity for a particular activity. In PC17 it is the management regime for industrial activity in Hautapu area. Like the *Calcutta* scenario, the HLG addresses in its submission the extent to which PC17 changes the existing status quo.

Second limb – 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

24. The 15 February submissions also address this test, and those submissions are not repeated here.

25. The submissions on behalf of Waipa DC and the Kama Trust say that the HLG submission does not satisfy the second limb. With respect, the submissions ignore the obvious and do not appropriately consider the case law when applying the legal principles to the facts.

[9] *Ibid,* paragraph [81].

26. Counsel for the Waipa DC contends at paragraph [13] that "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". With respect, this fact has no bearing on the question of persons being denied an opportunity to participate. Whether another party lodged a primary submission seeking the same relief as the submission in question is not relevant to the legal test.

27. In any event, the landowners within the area sought to be zoned deferred industrial are all part of the HLG. Furthermore, the extensive reference to the HLG land in the section 32 evaluation clearly puts parties on notice of the relief being sought – the further submissions demonstrate this.

28. Counsel for the Kama Trust submitted that neighbours of the HLG land and 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]

29. That is obviously not the case, given the further submissions. Furthermore, and as stated above and in submissions on 15 February, the references to the HLG land in the section 32 evaluation, coupled with the engagement between HLG, Waipa DC, and Kama Trust leading up to and including the strategic policy and planning meeting on 6 September (all publicly available on Waipa DC's website), clearly put parties on notice of the likelihood that a submission would be lodged seeking the re-zoning of the HLG land.

[10] Legal submissions on behalf of Kama Trust on scope, 22 February 2023, para [22].

30. In addition, the Future Proof strategy is not relevant to the Hearing Panel's determination. A limited number of parties would be aware of this strategy. Reference to the strategy in the section 32 does not support a proposition that persons would look at the strategy and decide not to submit, particularly when the same section 32 evaluation makes extensive reference to the HLG land. Moreover, the Future Proof Strategy 2022 which is available on the Future Proof.org website does not make any reference to the land that is the subject of PC17 nor the Hautapu area in question.[11]

31. The concern appears to be that there may be parties who would have taken an opposing position to the deferred zoning of the HLG land. There is a very small number of those who would likely be directly affected by the HLG proposal. There is at least 300m between the proposed northern boundary and the next landowner – who is also a member of the HLG. Furthermore, opposition to the HLG position is being pursued by some further submitters. A further plan change will be required in any event to "live" zone the HLG land if it were zoned deferred industrial. That process will provide ample opportunity for parties to participate in the Schedule 1 process.

32. Again, the Court in *Calcutta* provides helpful guidance on this point as it addressed somewhat similar circumstances to that in the PC17 context. In that decision, the Court made the following statements in determining whether the relief sought (to include additional land to be re-zoned) satisfied the second limb of the *Clearwater* test:

> [92] When considering these matters in the round, I am of the view that **any prejudice is only likely to occur if those who may have submitted wish to oppose** Calcutta Farms' position. Given that there are **only a few parties directly affected**, **their position is likely to be met** by the Council and Ingham's case **opposing the appeal**,…
> [93] I am satisfied that there is **no risk that a potentially affected party would not have the opportunity to participate** if I found the submission to be "on" the plan change. This is **not a situation akin to**

[11] https://waikatorc.sharepoint.com/sites/externalsharing/Shared%20Documents/Forms/AllItems.aspx?id=%2Fsites%2Fexternalsharing%2FShared%20Documents%2FDigital%20%2D%20general%2FFuture%2DProof%2Dstrategy%2FFPS%2Dfull%2Ddocument%2Epdf&parent=%2Fsites%2Fexternalsharing%2FShared%20Documents%2FDigital%20%2D%20general%2FFuture%2DProof%2Dstrategy&p=true&ga=1

> **the *Option* 5 position, where there were a large number of people potentially affected**, who would not have had an opportunity to be heard. **Nor is it akin to the *Motor Machinists* case where what was proposed was considered by the Court to "come from left field"**. [44]

33. As stated above and in submissions on 15 February:

    (a) Any prejudice is only likely to occur if those who may have submitted wish to oppose the HLG submission.

    (b) Only a few parties are directly affected.

    (c) Some of those parties have further submitted on the HLG submission.

    (d) A position in opposition is being pursued by those further submitters.

    (e) In any event, the section 32 evaluation clearly put parties on notice of the likelihood of HLG seeking re-zoning of the land to the north of Area 6.

    (f) It would be contrived to suggest that the submission by the HLG has "come from left field".

Other matters

34. Counsel for the Kama Trust refers to the "detailed technical analysis and the design" of Area 6.[12] Counsel goes on to state that it is not for Kama Trust to "fill these evidential gaps" of including the HLG land. Those submissions relate to the substantive relief and the merits of the outcome sought by the HLG, not the procedural issue of scope. Such matters are not relevant to the question of the validity of the HLG submission.[13] Appropriately detailed technical analysis and design details relating to infrastructure servicing etc., for the HLG land would be the subject of expert evidence through the P17 hearing.

CONCLUSION

35. For the reasons explained in submissions on 15 February and in these submissions in reply, the HLG submission satisfies both limbs of the *Clearwater* test. The HLG submission:

---

[12] Legal submissions on behalf of Kama Trust on scope, 22 February 2023, para [19].

[13] *Calcutta*, paragraph [87].

(a) Addresses the extent to which PC17 alters the status quo; and

(b) No person potentially affected by the change sought by the HLG have been denied an effective opportunity to participate in the plan change process.

36. It follows that the HLG submission is "on" PC17 and the Hearing Panel has jurisdiction to consider the part of the relief sought in that submission which seeks a deferred industrial zoning for the HLG land.

M Mackintosh
Counsel for Dean Hawthorne, on behalf of the Hautapu Landowners' Group