BEFORE THE WAIPĀ DISTRICT COUNCIL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Proposed Plan Change 20 – Airport Northern Precinct Extension to the Operative Waipā District Plan

LEGAL SUBMISSIONS ON BEHALF OF TITANIUM PARK LIMITED AND RUKUHIA PROPERTIES LIMITED ON PRELIMINARY ISSUE: SCOPE

20 January 2023

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MAY IT PLEASE THE PANEL:

INTRODUCTION

1. These submissions are made on behalf of Titanium Park Limited ("TPL") and Rukuhia Properties Limited ("RPL"), joint applicants for the Private Plan Change 20 ("PC20") request to extend the Northern Precinct Airport Business Zone.

2. By way of Minute 1 dated 12 December 2022, the Panel has issued directions to submitters Tabby Tiger Limited[1] and Salvador and Maryline Morales[2] to "*provide the Panel with written submissions regarding whether their submission is within the scope of Private Plan Change 20*".[3] In Minute 2 dated 16 December 2022, the Panel also directed Hamilton City Council[4] to provide submissions on "*whether Submission point 23.7 (in the Council's Summary of Submissions) is within the scope of Private Plan Change 20*".[5] All three submitters seek additional land outside of the PC20 area be rezoned from the existing Rural Zone to Airport Business Zone.

3. Although not specifically addressed in either Minute, we note that further submissions have been filed which relate to the primary submissions of Tabby Tiger Limited and Salvador and Maryline Morales. A decision that the primary submissions of Tabby Tiger Limited and Morales are out of scope will have a consequential effect on the following further submissions:

    (a) Mervyn Clark (Costenuff Trust) supporting the relief of Tabby Tiger Limited;

    (b) Grass Ventures Limited supporting the relief of Tabby Tiger Limited;

    (c) Tabby Tiger Limited supporting the relief of Salvador and Maryline Morales; and

    (d) Hamilton City Council opposing the relief of Tabby Tiger Limited.

4. The purpose of these submissions is to assist the Panel in its deliberations and to provide the Panel with the position of TPL/RPL as the applicants for PC20.

5. In these submissions we:

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1 Submitter 15.
2 Submitter 24.
3 Minute 1 paragraph 10.
4 Submitter 23.
5 Minute 2, paragraph 3.

(a) Address the applicable law as to the scope of a submission;

(b) Comment on PC20 as it relates to the issue of the scope of the three submissions identified by the Panel in its Minutes; and

(c) Set out TPL and RPL's position on the three submissions (and the consequential effect on the four further submissions set out above).

6. We have also been provided a copy of the legal submissions dated 16 January 2023 of Counsel for Hamilton City Council and we briefly comment on those submissions.

7. We note that there is additional relief sought by other submitters that may be out of scope. Given no directions have been issued on other submissions, TPL/RPL reserve the right to raise the issue of scope in its opening submissions and evidence.

APPLICABLE CASE LAW

8. Counsel generally agrees with the summary of relevant legal principles on scope as set out in the legal submissions on behalf of Hamilton City Council. However, we differ as to the application of some of those principles and the conclusions reached, as we address later in these submissions.

9. Clause 6(1) of the First Schedule to the Resource Management Act 1991 provides that once a proposed plan is notified the persons described in clause 6(2)-(4) may make a submission "*on it*" to the relevant local authority. Whether there is scope/jurisdiction for a modification to a plan change depends on whether the amendment sought was raised in a submission "on" the plan change. The law relating to whether a submission is "on" a plan change has been addressed in numerous cases. The test, discussed below, differs from that to be applied in the context of a full proposed district plan review process. The fact that this is a private plan change request should not be overlooked.

Whether a submission is "on" a proposed change

10. In *Clearwater Resort Ltd v Christchurch City Council*[6] *("Clearwater")* the High Court set out the bipartite approach regarding whether a submission is "on" a plan change as:[7]

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6 High Court AP34/02.

7 *Clearwater* has been endorsed in numerous later decisions, including: *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 (paragraph 91) (see below); and *Turners & Growers Horticulture Ltd v Far North District Council* [2017] NZHC 764 (paragraphs 22-23).

1. A submission can only fairly be regarded as "on" a plan change if it is addressed to the extent to which the plan change changes the pre-existing status quo.

2. But 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 any argument that the submission is truly "on" the plan change.

11. *Clearwater* was endorsed by the High Court in *Palmerston North City Council v Motor Machinists Limited*[8] *("Motor Machinists")* which helpfully described the application of the *Clearwater* test as follows at [54] and [55]:

> *First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".*
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> *Secondly, "if the effect of regarding a submission as 'on' a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate". If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation.*

12. The decision in *Motor Machinists* at [80] - [82] also further clarified the application of 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.*
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> *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*

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8 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [90], endorsing the approach of William Young J in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. See also *Mackenzie v Tasman District Council* [2018] NZHC 2304 for a more recent application of the test.

> *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. …*
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> *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…*

13. In *Palmerston North Industrial and Residential Developments Limited*[9] the Environment Court found that the applicant's submission on Proposed Plan Change 6 to the Palmerston North District Plan was not on the Plan Change within the meaning of clause 6 of the First Schedule. Plan Change 6 concerned the rezoning of land and the applicant's submission sought the rezoning of its land in the same manner as that land subject to Plan Change 6. The Court found that Plan Change 6 was limited in its scope and was not intended to be a wider review of all of the provisions of the district plan relating to Rural or Residential Zones contained in the plan. The applicant's land formed part of the Urban Growth Area and the applicant argued that the outcome it sought was the same as that of Plan Change 6, albeit in a different area. The Court disagreed that those facts provided scope to the submission and at [47] noted that "*by identifying a different area, [the applicant] ispo facto seeks a different outcome*".

14. The Court found that while the Urban Growth Area notation was to be uplifted, including on the applicant's land, Plan Change 6 did not rezone the Urban Growth Area land or bring down new rules on it. By seeking a new zone, the submission went beyond the changes to the status quo proposed by Plan Change 6.

15. The Court was referred to an earlier decision of *Halswater Holdings v Selwyn District Council*[10] where in that case the Court held that "a *submission on a plan change cannot seek a rezoning (allowing different activities and/or effects) if the rezoning was not contemplated by the plan change".*[11] The Court continued:

> *either way, and having regard to the provision of Motor Machinists…, it is apparent that there are considerable obstacles in the paths of persons who*

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9 [2014] NZEnvC 17.
10 (1999) 5 ELRNZ 192.
11 Paragraph 51 of the decision.

wish to challenge the zoning of properties which are outside the boundaries of the land subject to a plan review.

16. Finally, the Court noted that including the applicant's land was not addressed in the s32 report. While the Court found that consideration of a s32 analysis is only one way of considering whether or not a submission is on a plan change, its absence highlighted the restricted and specific nature of Plan Change 6 such that inclusion of the applicant's land would be an outcome "*seen as out of left field*".

Summary

17. It is necessary therefore that first, the submission must reasonably fall within the ambit of the proposed plan change by addressing a change to the 'status quo' advanced by the proposed plan change. Secondly, the decision-maker should consider whether there is a real risk that persons potentially affected by the changes sought in a submission have been denied an effective opportunity to participate in the decision-making process.

18. If a management regime in a planning document for a particular resource or lot is unaltered by the proposed plan change, a submission seeking a new or different management regime for that resource is unlikely to be "on" the proposed plan change (unless the change is incidental or consequential). Additionally, if the effect of regarding a submission as being "on" a proposed change would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a "powerful consideration" against finding that the submission was truly "on" the proposed change.[12]

19. For the reasons outlined below, the three submissions seeking to change the Rural zoning of the property to which each submission relates to Airport Business Zone fail to meet either limb of the *Clearwater* test.

PC20

20. PC20 seeks the co-ordinated extension of the Northern Precinct of the Airport Business Zone in the Operative District Plan. PC20 is a private plan change request made by TPL and RPL - it is not a review of the Waipā District Plan or the Rural or Business zones.

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12 *Clearwater Resort Ltd v Christchurch City Council* at (66).

21. The PC20 request seeks the amendment of the Structure Plan for the Airport Business Zone, and amendments to several provisions including objectives, policies and supporting provisions. The scope of PC20 is limited insofar as wholesale amendment to the Airport Business Zone and other related parts of the district plan is not sought.

22. While the area to which the PC20 request applies is approximately 130ha, 41ha of that is already within the Northern Precinct and zoned Airport Business Zone. The 89ha that is currently zoned Rural is contiguous to the existing Titanium Park/Hamilton Airport and has been identified in the Waipa District Plan as Possible Future Growth Area/Extension Direction.[13] Simply put, the land subject to PC20 is defined, limited and set out in section 3.2 of the request – it does not include the land subject to the three submissions.

23. The PC20 site has been subject to a masterplanning process meaning the Northern Precinct has been designed comprehensively. This extends to the assessment of effects and the management of the actual and potential effects and policy analysis. For example, management of transport effects includes defined 'triggers' for transport network upgrades and constraints on development until such upgrades have been undertaken.

24. While the submissions seek to rezone additional land to the Airport Business Zone, PC20 does not in any way apply to those properties. That is, there is no direct connection between PC20 and the submissions. Simply seeking the application of an Airport Business Zoning does not, in our submission, address the plan change itself in the *Clearwater* sense.

25. No assessment of effects has been undertaken by any of the three submitters nor has there been any assessment against any of the relevant policy documents. Because of that, it is unknown what additional or cumulative effects would be generated by the inclusion of those properties. Hamilton City Council has opposed the submission of Tabby Tiger Limited, *inter alia*, on the basis that a robust industrial land supply and demand analysis would be needed from the application to support their submission. No such analysis has been provided by the three submitters, including Hamilton City Council. It is not for TPL/RPL to fill these evidential gaps or to address actual or potential cumulative effects of including additional land within PC20.

[13] See S01, Waipa District Plan.

26. Nor is it evident what consequential changes to the PC20 provisions would be required, particularly as no s32 evaluation assessment has been completed in respect of the land.

27. In addition, there is a realistic possibility that there are persons directly affected by the additional properties being rezoned who did not file a submission on PC20 and now have no standing to participate in the plan change process. For those persons there will be an appreciable change from the status quo position. It is submitted that this is fatal to the submissions.

TPL/RPL Position on the submissions

28. TPL and RPL contend that the relief sought by the submitters as they relate to including additional properties within PC20 is not on the plan change and is out of scope for the reasons set out below. For completeness, counsel notes that the burden rests with the party seeking such relief to establish that the relief sought is within the Panel's jurisdiction to grant.

29. The submissions are out of scope because:

    (a) PC20 provisions do not apply in any way to any of the land subject to the three submissions. The District Plan's management regime for the three affected properties is not altered by the PC20 request.

    (b) The submissions do not fall within the ambit of PC20 by addressing a change to the 'status quo' advanced by PC20 – simply seeking to rezone land outside of the PC20 area is not of sufficient connection

    (c) The submissions raise matters that should have been addressed in the s32 evaluation report. The report did not do so and contrary to the submissions of Hamilton City Council this is not because the report was "deficient". That suggestion is misplaced.

    (d) Seeking other land to be rezoned Airport Business Zone is novel and "out of left-field" in the context of PC20.

    (e) There is a real and appreciable prospect that persons directly or potentially affected by rezoning additional land to Airport Business Zone have been denied an effective response through the submission/plan change process. Persons reviewing PC20 would have had no appreciation of the possibility

that the three properties could form part of PC20. The changes facilitated by the rezoning sought by the submissions may have important impacts on those persons. That this particularly the case for persons located near the Tabby Tiger Limited property which is not located in proximity to the PC20 site (being to the east beyond Hamilton Airport and the Central Precinct).

Response to Hamilton City Council

30. As noted earlier, counsel generally agrees with the legal submissions for Hamilton City Council on the identification of the relevant legal tests for determining scope. That said, we do not agree that the Hamilton City Council submission (or the other two submissions) are "unequivocally "on" the plan change. They are not.

31. Incidental or consequential changes are permissible provided that no substantive further s32 analysis is required to inform affected persons of the comparative merits of that change.[14] However we disagree that the relief sought by Hamilton City Council of rezoning land from Rural to Airport Business Zone is "*incidental or consequential*". As recorded in its submission, the rezoning request by Hamilton City Council would apply to 19[15] lifestyle block and cover an area of approximately 42.3ha. That represents an additional 47% increase in land zoned Rural to Airport Business when compared to the rezoning sought in PC20.

32. Appendix 4 (reproduced below) to the Hamilton City Council primary submission depicts the rezoning sought.

[14] See *Motor Machinists* at [81]

[15] Including a parcel owned by Waikato Regional Airport Limited

33. Finally, we disagree that based on the extensive consultation undertaken on PC20 residents were on notice that additional properties could be subject to rezoning via the submission process. The fact that a submission was filed by the Morales's is not evidence that additional rezoning beyond the PC20 area was a real and appreciable prospect.

Conclusion

34. The land subject to PC20 is limited, defined and clearly depicted in the PC20 request. PC20 has been subject to a master-planning process and the design, and the management of actual and potential effects have been comprehensively managed. The same cannot be said of the land subject to the three submissions. The status quo of that land is a Rural Zoning. No assessment of effects or s32 analysis has been undertaken and it is unclear to TPL/RPL what consequential changes to the PC20 provisions would be needed if the land was included within the PC20 ambit.

35. TPL/RPL therefore contend that submissions to rezone additional land are not on the plan change and go beyond the scope of PC20.

Dated 20 January 2023

JR Welsh

Counsel for Titanium Park Limited and Rukuhia Properties Limited