

**BEFORE THE HEARING PANEL ON PROPOSED PLAN CHANGE 20 TO THE WAIPA
DISTRICT PLAN**

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

AND

IN THE MATTER of proposed Plan Change 20 to the Waipa District Plan

**Submissions on behalf of Tabby Tiger Limited in response to Direction #3
Dated 7 February 2023**

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MAY IT PLEASE THE HEARING PANEL

INTRODUCTION

1. These submissions are made on behalf of Tabby Tiger Limited (“TTL”) in response to the Hearing Panel’s Minute #3 dated 24 January 2023. Minute #3 directed TTL to file legal submissions as to whether the part of TTL’s submission which seeks re-zoning of land is within the scope of proposed Private Plan Change 20 to the Waipa District Plan: Titanium Park Limited and Rukuhia Properties Limited – Airport Northern Precinct Extension (PPC20).
2. 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 private 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.
3. TTL made a submission and further submission on PPC20. Its primary submission (“SUB #15”) supports PPC20. However, as explained in the submission:

[...] TTL considers that further refinement is required to expand the area of industrial zoned land provided in this area. The area of industrial zoned land proposed under Plan Change 20 is a logical addition to the existing pattern of zoning surrounding the airport but falls short of what should be provided in terms of land use zoning²
4. The TTL submission proposes two options for areas of land to be re-zoned from Rural to Industrial (depicted in Figure 3 shown in the TTL submission); and from Rural/Mystery Creek Events to Industrial (depicted in Figure 2 shown in the TTL submission). Both options are located to the east of Airport Road, which is adjacent to the existing Airport Business Zone (“ABZ”). In that regard, the submission seeks relief which would

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

² Submission #15: Tabby Tiger Limited, paragraph 3.2.

expand the extent of PPC20 to include land which is adjacent to the existing ABZ, separated only by Airport Road/SH21.

5. TTL acknowledges that the option depicted in Figure 2 is of a nature and scale which is not supported by the legal principles regarding scope. TTL submits that this option was included in its submission to highlight the need for a more integrated approach to future development in and around the ABZ. It also sought a zoning of that land to reflect the nature of most existing activities which are “non-rural”. However, TTL understands that this is a matter for future engagement with Waipa District Council and relevant stakeholders.
6. TTL does not wish to pursue the option to rezone the larger area of land east of Airport Road, as discussed in Submission #15. Accordingly, these submissions relate only to the re-zoning option depicted in Figure 3, which is a discrete area of approximately 32ha rural zoned land adjacent to Airport Road and the ABZ.
7. The purpose/overall intent of PPC20 is described in the section 32 evaluation as to achieve the co-ordinated expansion of the Northern Precinct within the (“ABZ”) and to enable it to be developed in line with what has been envisaged by the Northern Precinct Masterplan.³ Ostensibly, PPC20 has been prepared in response to current and projected demand for business and industrial land around Hamilton Airport. Such demand is higher than anticipated and additional capacity is required to be enabled through the Waipa District Plan. As such, the ambit of PPC20 is the proposed expansion of the (“ABZ”) and provision of additional business/industrial land capacity surrounding the Airport.
8. The TTL submission expressly responds to this proposed expansion of the Airport Business Zone and provision of additional business/industrial land

³ Section 32 evaluation, section 2.1.

capacity surrounding the Airport. The relief sought by TTL is therefore within the ambit of PPC20 and given the proximity of the land in Figure 3 (“Option 2”) to the Airport, a person potentially affected by the change would be aware of the possibility for such a change. It follows that Sub #15 is “on” the plan change.

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.⁴ The leading High Court authority is *Palmerston North City Council v Motor Machinists Limited*⁵ which endorsed the two staged approach in *Clearwater v Christchurch City Council*.⁶ In short, the two staged test requires an assessment of:
 - (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.⁷

10. The first and substantive limb of the test is the “dominant” consideration⁸ and acts as a “filter based on direct connection between the submission and the degree of notified change proposed to the extant plan.”⁹ Kós, J described this in the following terms:

⁴ 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.

⁵ [2013] NZHC 1290.

⁶ [HC CHCH AP32/04 [14 March 2003].

⁷ *Motor Machinists*, at [91].

⁸ *Motor Machinists*, at [80].

⁹ *Motor Machinists*, at [80].

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.¹⁰

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.¹¹
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.¹² 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.¹³

FIRST LIMB

Does the TTL submission address the extent to which PPC20 changes the pre-existing status quo?

14. As set out in the introduction above, the purpose of PPC20 is to expand the (“ABZ”) and the provision of industrial land around the Airport by re-

¹⁰ *Motor Machinists*, at [80].

¹¹ *Motor Machinists*, at [81].

¹² *Calcutta Farms Limited v Matamata-Piako District Council*, at [87].

¹³ *Well Smart Investment Holding (NZQN) Limited (formerly Reid Investment Trust) & Ors v Queenstown Lakes District Council* [2015] NZEnvC 214.

zoning Rural land to (“ABZ”), albeit that the notified geographic extent of the proposed re-zoning is in the “Northern Precinct” of the Airport. The basis for the proposed change is the need for additional business and industrial land capacity surrounding the Airport. Furthermore, the Objectives in relation to the ABZ refer, *inter alia*, to providing for “the integrated future development of the Airport and its surrounding land as a transport hub and business location, taking advantage of its strategic location and infrastructure.”¹⁴

15. The TTL submission supports PPC20 but raises a deficiency as to the extent to which it changes the pre-existing status quo. In that respect, the TTL submission engages with the purpose of PPC20 and the issue of provision of adequate supply of industrial and business land. The management regime of the WDP in that respect is altered by PPC20. The following reasons for submission illustrate this point:

3.2. However, TTL considers that further refinement is required to expand the area of industrial zoned land provided in this area. The area of industrial zoned land proposed under Plan Change 20 is a logical addition to the existing pattern of zoning surrounding the airport but falls short of what should be provided in terms of land use zoning.

3.3. The quantum of industrial zoned land proposed under Plan Change 20 is not considered sufficient to meet current and future demands for industrial land in the short to medium term. Additional land surrounding the airport is therefore required to be rezoned for this purpose.

3.4. The land to the east of the airport is appropriately located within close proximity of the existing airport, associated business park and roading network. The existing land use activities and character is also suitable for future industrial zoning.¹⁵

16. Further, the proposed additional re-zoning is entirely consistent with the strategic location and infrastructure objective of the ABZ. It seeks an incidental rezoning of approximately 32ha of land which is adjacent to Airport Road, directly opposite the existing ABZ boundary to the east.

¹⁴ WDP, Objective 10.3.1 (PPC20 retains this objective).

¹⁵ Submission #15: Tabby Tiger Limited, paragraphs 3.2 to 3.4.

17. The proposed additional re-zoning is not a “spot zone” which is disconnected from the land proposed to be re-zoned in PPC20. Moreover, the proposed rezoning of the additional approximately 32ha cannot be said to “come from left field”. Indeed, as described in paragraph 3.8 of the TTL submission, insofar as the 32ha of land is concerned, most of the land in question is used for non-rural purposes, including:
 - (a) Industrial and Business Land Use Activities.
 - (b) Recreational Land Use Activities.
 - (c) Rural Lifestyle Properties.

18. Regarding the section 32 evaluation lodged in support of PPC20, while this did not expressly address the land in question in the TTL submission, the identification of Option 4 “Establish on an alternative site”, inadequately considers an alternative to Option 1-3 by addressing the Northern Precinct only. In that regard, it fails to consider the option of including land which is a logical extension of the existing ABZ – in combination with the land in the Northern Airport Precinct. TTL submits that the section 32 evaluation should have considered this option.

19. In summary, TTL’s submission and the relief sought to re-zone the area depicted in “Figure 3” of the same is “on” PPC20 because:
 - (a) PPC20 has been prepared in response to current and projected demand for business and industrial land surrounding the Airport. Its purpose is to expand the geographical extent of ABZ to meet this additional demand and alters the management regime to rezone land from rural to ABZ, which includes industrial use.
 - (b) Submission #15 directly addresses the issue of lack of capacity of industrial and business land, and the insufficient land area notified in PPC20 to provide this capacity. TTL’s submission identifies additional land to address this lack of capacity.

- (c) In that regard, the section 32 evaluation should have considered the option of land to the east of Airport Road.
- (d) The proposed relief to re-zone land, which is ostensibly adjacent to the ABZ (but for Airport Road), is an incremental or incidental extension of the proposed re-zoning.

SECOND LIMB

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

- 20. Given the ambit of PPC20, the proximity of the land depicted in Figure 3 of submission #15 to the ABZ, and the nature of the existing land uses on that land, the reasonable interests of potentially affected persons would not be overridden by a “submissional side-wind”¹⁶. TTL has communicated with neighbours within the approximately 32ha area sought to be re-zoned (Figure 3) and TTL understands that most of the relevant landowners are supportive of the proposal, at least in principle. One of the landowners has lodged a further submission in support of Submission #15 (Grass Ventures Limited).
- 21. As stated in *Motor Machinists*, there is less risk of offending the second limb of the *Clearwater* text if the further zoning change is merely consequential or incidental, and adequately addressed in the section 32 evaluation. As addressed above the section 32 should have considered this land in the option analysis.
- 22. Relevantly, 17.7ha of the land that is the subject of TTL’s submission is entirely owned by TTL. As noted above, an adjacent landowner has lodged a further submission in support of its proposal. It follows that any person potentially prejudiced would be a submitter in opposition. As explained above, those persons were effectively “on notice” of the

¹⁶ *Motor Machinists* at [82].

potential for a submission to seek additional land be re-zoned by way of submission on PPC20.¹⁷

23. It follows that the second limb of the legal test is satisfied.

CONCLUSION

24. TTL's submission is "on" PPC20 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 industrial as shown on Figure 3 of TTL's submission.



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¹⁷ This term was also referred to in *Albany North Landowners v Auckland Council* [2017] NZHC 138 when considering the potential prejudice to affected persons. The decision concerned an appeal in relation to the AUP process.