BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Proposed Plan Change 26 to the Operative Waipā District Plan

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LEGAL SUBMISSIONS ON SCOPE FOR TRIPLE 3 FARM LIMITED

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MAY IT PLEASE THE PANEL

Procedural Comments

1. These legal submissions are directed in response to Direction #9 of the Panel. The effect of Direction #9 is that procedural issues concerning scope, including inclusionary zoning, will be addressed at the conclusion of the strategic hearing – pursuant to the revised timetable, on 24 February 2023.

2. Under paragraph 10(b) of Direction #9, paragraphs 3(b)-(d) of direction #8 remain in effect as regards Waipā's Plan Change 26. Parties who wish to argue they are within scope for Waipā must do so by 17 February 2023, with parties who disagree filing submissions by 21 February 2023, and Council providing response submissions by 24 February.

3. Based on paragraph 10 of direction #9, this timetable does not apply in respect of Hamilton City's Plan Change 12 and Waikato District's Variation 3, which are to be addressed at the procedural hearing on 24 February.

4. As a further procedural matter, Triple 3 Farm Limited seeks a right of reply to party and Council responses, due 21 and 24 February. Triple 3 Farm remains of the view that as at 17 February 2023, when Triple 3's submissions are due, Council will not have provided formal submissions on scope (only the summary information in the Joint Memorandum of 22 December).

5. Triple 3 believes this right of reply is in the interests of natural justice, and (acknowledging the desirability of expedition) **seeks directions** to the effect that Triple 3 may file submissions in reply no later than 28 February 2023.

Scope, and the Amendment Act

6. Scope has been raised as an issue in the Themes and Issues Report, and in the Joint Memorandum for the Councils dated 22 December 2022. Broadly, Triple 3 seeks rezoning of land in the Waipā District, but close to Hamilton City, as residential land.

7. It is submitted for Triple 3 that there are important differences in the approach to be taken to scope under an IPI and ISPP, versus the approach under a 'usual' plan change.[1] These differences must be worked through.

8. As the Councils have identified, clause 6 of Schedule 1 of the Resource Management Act 1991, which requires a submission to be "on" a plan change, applies to an IPI under clause 95 of Schedule 1. However, in considering scope, special provisions introduced by the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act (the "Amendment Act") need to be taken into account.

[1] Various differences between this process and the 'usual' processes have been discussed at times during the opening hearing.

9. Clause 99(2) of Schedule 1 of the RMA (as amended by the Amendment Act) says that the Panel's recommendations to the Councils must be related to a matter identified by the panel or another person during the submission, but "*are not limited to being within the scope of submissions made on the IPI*" (emphasis added).

10. That is, the Panel can make recommendations that go beyond submissions. This supports the view that it would be untimely to disregard submissions at an early stage. The Panel can go beyond the scope of submissions, and therefore scope should not be treated narrowly.

11. From submissions on the opening morning of the strategic hearing, counsel for Triple 3 understands that the Councils have put forward the view that clause 99(2) of Schedule 1 allows the Panel to make recommendations on matters arising during the hearing. This undermines the Councils' argument in the Joint Memorandum that various submissions are out of scope based on a "real risk that directly affected parties would be denied an effective opportunity to participate in the process": wording presumably borrowed from the case law discussed below.

12. In the current process, this risk arises anyway, by virtue of clause 99(2) of Schedule 1. This amplifies that it would be untimely to regard a submission such as Triple 3's as being out of scope based on a strict reading of these cases, without attention to the specific legislative provisions of the Amendment Act.

13. Further, it can be noted that section 77G(4) of the RMA (as amended by the Amendment Act) says that: "*In carrying out its functions under this section, a specified territorial authority may create new residential zones or amend existing residential zones.*" This allows that residential zones may be created or amended under this process. The ISPP process includes submissions to, and recommendations of, the Panel. It is entirely plausible that the Panel could consider the submissions of those such as Triple 3 and recommend that such rezoning proceed, even though the Councils assert these are outside scope. Such a recommendation of the Panel would be within section 77G(4) and clause 99(2). It can be further noted that section 77N allows for non-residential zones to be amended.

14. By way of example, it is noted that Waikato District Council has included a rezoning in its Variation 3.[2] It is submitted that a rezoning of land is authorised by statute, is a reasonable and legitimate outcome of this process, and is within scope.

15. Both section 77G and clause 99(2) of Schedule 1 apply specifically to this IPI process, not other plan change processes. They provide grounds for departure from earlier case law.

[2] See paragraph 4.2(c) of the opening legal submissions for Waikato District Council, dated 10 February 2022.

16. Should the Panel wish to consider earlier case law, there are a number of relevant cases. Key cases include:

    a. *Clearwater*,[3] which concerned a variation to a plan change (and in particular the accuracy of contour lines), which advanced an analysis of whether the submission addressed the change to the status quo advanced by the proposed plan change, and whether there was a risk that affected persons would not have an opportunity to participants.

    b. *PNCC v Motor Machinists*,[4] which focused on the ambit of the plan change, including particularly the content of the section 32 report, and (as with *Clearwater*) on the risks around participation.

    c. *Bluehaven Management,*[5] where the Court canvassed a range of earlier decisions,[6] noting that the test in *Motor Machinists* deserved clarification, taking into account that a section 32 report can have limitations in terms of the overall objectives and policies of the plan, and the importance of avoiding undue narrowness.[7]

17. The Councils' summary in the Joint Memorandum focused on this risk of affected persons not having the opportunity to participate, but this argument is misguided. As noted above, section 77G means the latter risk is an inherent feature of this process, as the Panel is authorised to make recommendations beyond even what submissions say.

18. *Clearwater* made statements of principle in the context of a variation on a plan change. It is submitted that some of the analysis in *Motor Machinists*, which emphasises the content of the section 32 report, can be departed from on the basis of the constraints of the current process. As *Bluehaven Management* noted, a strict focus on the section 32 report can give rise to difficulties; in addition, the section 32 report process is, in the context of an IPI, necessarily limited. As the Waipā District section 32 report notes, no evaluation of the MDRS has been made: rather, the section 32 report has a more limited focus on qualifying matters.[8]

19. This highlights the legislative specificity of the current process, and the importance of considering the specific statutory provisions, which have been examined above. The Court in *Bluehaven Management* emphasised that a contextual analysis of a scope question in relation to a plan change should consider statutory obligations.[9] The specific provisions of the Amendment Act support Triple 3's submission being within scope and being able to proceed further.

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[3] *Clearwater Resort Ltd v Christchurch City Council,* HC Christchurch, AP34/02, 14 March 2003.
[4] *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519.
[5] *Bluehaven Management Ltd v Western Bay of Plenty District Council* [1016) NZEnvC 191.
[6] *Bluehaven* Management, at [23] – [39].
[7] *Bluehaven* Management, at [36].
[8] Section 32 Report, paragraphs 3.1.7 – 3.1.8.

20. That is, the focus must be on the breadth of the specific legislative provisions outlined above: clause 99(2) of Schedule 1, and section 77G.

21. In due course, further attention will be needed to Policy 3 of the National Policy Statement on Urban Development 2020, their future-focus, the nature of the word "commensurate" in policy 3(d), and other matters. This land parcel is close to Hamilton City: location-wise, it is in between the suburbs of Templeview and Dinsdale, and therefore has links to transport and shopping facilities. Both of these suburbs have extensive medium-density development already, and residential development in the future will be in keeping with the character of these areas. Evidence as to the availability of Council three waters services, and connectivity to these, will be provided at a later stage. Rezoning this land to residential could make an important contribution to a well-functioning urban environment, especially in light of Policy 3 of the NPS-UD.

22. However, the intention at this point is not to examine the substantive elements of the proposal, only to seek confirmation that the submission is within scope – based on the wording of the Amendment Act - so that substantive matters can be considered further.

Dated 17 February 2023

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Thomas Gibbons

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[9] *Bluehaven* Management, at [38].