

OBJECTOR:	Dean Hawthorne and the Hautapu Landowners’ Group (HLG)
PLAN CHANGE:	Proposed Plan Change 17 – Hautapu Industrial Zones
HEARING DATE:	3 rd April 2023
INDEPENDENT HEARING COMMISSIONER:	Alan Withy
ATTENDEES:	<p><u>For the Applicant:</u></p> <p>Marianne Mackintosh - Counsel</p> <p>Mark Chrisp – Expert Planning Advisor</p> <p><u>For Council:</u></p> <p>Wayne Allan – Group Manager – District Growth & Regulatory Services</p> <p>Nicola Holmes – Team Leader District Plan</p> <p>Megan Crocket – Council Legal Advisor</p>

1 INTRODUCTION

- 1.1 This decision is made on behalf of the Waipā District Council (“**the Council**”) by Independent Hearing Commissioner Alan Withy, appointed and acting under delegated authority under sections 34 and 34A of the Resource Management Act 1991 (“**the RMA**”).
- 1.2 The subject matter for this decision relates to an objection by Dean Hawthorne and the Hautapu Landowners’ Group (“**the Objector**”), pursuant to section 357 of the RMA. The issue refers to part of the submission to Proposed Plan Change 17 lodged by the Objector, deemed to be out of scope of the Plan Change.
- 1.3 A determination on the issue of scope was made by the Hearings Panel on 6th March 2023 as set out in Minute #8 (refer to Appendix 1). The Hearings Panel deemed that the rezoning of land owned by the Objector from rural to deferred industrial is not within the scope of Proposed Plan Change 17 (“**the Plan Change**”). The Hearings Panel found

that the purpose of the Plan Change is to deliver 'live' industrial zoned land in the short term in order to meet current demand.

2 BACKGROUND

- 2.1 The Plan Change introduces various changes to the Hautapu Industrial Zones and includes amending the Structure Plan so that it aligns with the infrastructure master plan for the area, enabling development of growth cell C9 pre-2035 rather than post 2035 to align with changes on the ground, and to rezone an area of approximately 20ha north of Hautapu Road from Rural to Industrial (referred to as Area 6). Refer to Figure 1 below.
- 2.2 The Plan Change was notified on 30th September 2022 and a further submission period was notified on 5th December 2022. A hearing date was scheduled to commence on 29th March 2023 however was since postponed pending an outcome of a decision on this section 357 objection.

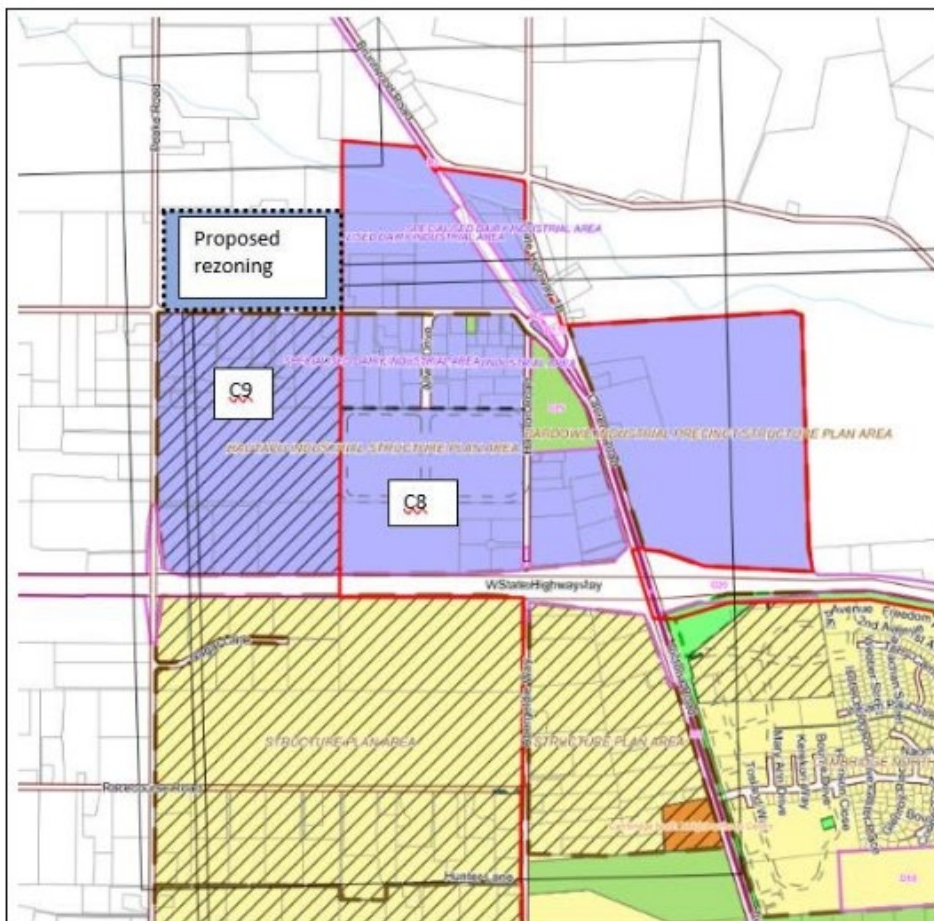


Figure 1 – Plan Change 17 Proposed Rezoning (hatched purple area represents rezoning from deferred industrial to industrial)

- 2.3 In response to the notification of the Plan Change a total of 28 submissions were received, including a submission from the Objector that sought the following:

Confirm the proposed rezoning of the land owned by Kama Trust from Rural Zone to Industrial Zone only on the basis that the land holdings owned by the Hautapu Landowners Group are rezoned to Deferred Industrial Zone as part of PC17 (refer to below Figure 2). This can include a proviso that the land holdings owned by the Hautapu Landowners Group would not be 'live zoned' to Industrial Zone until the Kama Trust land has reached 80% development (meaning that 80% of the developable land area is the subject of s224 certificates) or by 31 March 2030, whichever occurs sooner. Any live zoning would be subject to the preparation of a Structure Plan (including all necessary technical investigations being completed) and a Proposed Change to the Waipa District Plan being approved.



Figure 2 – Plan showing properties within the Hautapu Landowners’ Group

3 STATUTORY CONSIDERATIONS

- 3.1 Section 357(2) of the RMA provides the right of objection to a person whose submission to an authority is struck out under section 41D.
- 3.2 The legal opinions from Counsel for the current Objector (as well as for Kama Trust and Council to the previous Hearings Panel) were consistent in identifying the criteria applying to consideration of the scope of the Objector’s submission on the Plan Change. The Commissioner is required to determine whether the submissions by the Objector are “on PC17” or “out of scope”. He was referred to relevant case law, especially including the “Clearwater case” and subsequent cases that dealt with application of the “Clearwater tests”.

3.3 The 2 limbs of the “Clearwater test” were summarised by Ms Le Bas (Counsel for Council in submissions to the Hearings Panel dated 21 February 2023 in Para 4) as:

(a) Does the HLG Submission address the changes to the pre-existing status quo advanced by PC17?

And

(b) Is there a real risk that people affected ... would be denied an effective opportunity to participate in the PC17 process?

3.4 No legal opinion challenged that statement, and neither does the Commissioner. However the application of those tests to the “facts” and “degree” (terms used in the caselaw) of the present proposal is contentious and that is the task involved in consideration of this Objection. The legal opinions came to different conclusions on application of the “facts” and “degree” within the above legal framework.

4 SECTION 357 OBJECTION

4.1 On 9th March 2023, an objection was lodged pursuant to section 357 of the RMA by Dean Hawthorne and the Hautapu Landowners’ Group (refer to Appendix 2). The Objection relates to the determination of the Hearings Panel on the scope of that part of their submission to the Plan Change requesting the inclusion of land within the ownership of the Objector into the plan change process to be rezoned to ‘Deferred Industrial’.

4.2 The reasons for the Objection outlined by the Objector are as follows (with the Commissioner’s emphasis):

*“The Decision **does not correctly apply the relevant legal principles** to the question of whether the part of the HLG submission which seeks rezoning to Deferred Industrial Zone is “on” PC17;*

The Decision does not adequately or fairly consider the legal submissions made on behalf of the HLG;

The reference in the Decision to the Hearing Panel’s inability to “predetermine” a future planning process is misdirected. The question regarding scope of part of the HLG submission does not import any requirement of the Hearing Panel to determine a future outcome; and

The determination in the Decision that the purpose of PC17 is effectively centred on “live” industrial zoning is, with respect, incorrect.”

4.3 The Commissioner was referred to the Council Website which contains various submissions and evidence relevant to the Plan Change.

4.4 Also considered were legal opinions from Mr Muldowney for Kama Trust, Ms Le Bas for Council and various memoranda from Ms Mackintosh for the Objector.

- 4.5 At the Hearing Ms Mackintosh made submissions regarding the Objection and was supported by Mr Chrisp with planning evidence.
- 4.6 Subsequently the Commissioner has read the evidence proposed to be called by the Objector at the hearing of the Plan Change in due course, including particularly that of experts in: industrial land demand, supply and suitability; three waters, transport and planning.

5 FINDINGS

- 5.1 It is the application of the legal principles in the *Clearwater* test and not the principles themselves that lead the Commissioner to granting the Objection. The application of the principles is a matter of “good planning” and “best process”, and should not be constrained unnecessarily by a narrow interpretation of the legal principles.
- 5.2 The Commissioner accepts that the determination should be made within the criteria established in the “*Clearwater*” case. That requires consideration of the 2 limbs enunciated in that case.
- 5.3 Application of the “Clearwater test” should be pursued with “fact” and “degree” sensitivities as noted in relevant case law. Two approaches are possible, a narrow approach and a broad approach. The Commissioner prefers, for the reasons which follow, to take a “broad approach” for reasons given below, and to keep a goal of “best planning practice” in mind.
- 5.4 A narrow approach, adopted by Counsel for both Kama Trust and the Council in the first instance, is considered less preferable in terms of best planning practice and leads to a conclusion that the relevant Objector’s submissions are “out of scope”.
- 5.5 A broad approach would allow the Hearings Panel to hear the Objector’s submissions and evidence regarding its land and make an informed decision on the Plan Change; this is, in the Commissioner’s view, consistent with best planning practice.
- 5.6 The Hearings Panel will have jurisdiction to either grant or discard the Objector’s submission to rezone its land on its merits. The Commissioner’s decision on the Objection simply allows the Hearings Panel to fully evaluate the Objector’s submission and to consider possibilities that would be excluded by a narrow approach.
- 5.7 It is noted there have been discussions and consultations between the parties over several months leading up to the Objection Hearing, and the s32 Report included analysis of the suitability of the Objector’s land for industrial zoning and development.
- 5.8 The Commissioner had the benefit of receiving evidence that Counsel for the Objector hopes to produce at the Plan Change hearing itself. That counters in many ways and answers various problems and reasons advanced in the s32 Report for excluding the Objector’s land from inclusion in the Plan Change as notified.

- 5.9 It is of relevance that the Plan Change proposes to rezone the land in the C9 Growth Cell from “deferred industrial” to “industrial” without any replacement of deferred industrial land. Also, the requested amendment by the Landowner Group to “deferred industrial” zoning would not itself authorise any industrial activity or development, which would require a further Plan Change or Resource Consent(s).
- 5.10 The Hearing Panel’s Minute #8 (Para 6 under its reasons for the decision) asserted that the Plan Change is about “live zoning”. However the Commissioner prefers to adopt a broader approach to the purpose of the Plan Change: that the purpose of the Plan Change targets a shortage of industrial land with a range of suitable planning and resource management responses.
- 5.11 There is a strong argument (as advanced by Mr Chrisp) that the Mangaone Stream can be a better long-term boundary than the cadastral boundary between the Kama Trust and Objector’s land. Better roading and stormwater provisions could flow from an acknowledgement that the future industrial boundary will be the Mangaone Stream.
- 5.12 For all these reasons the Commissioner considers, on balance, that a broad approach, accepting that the Plan Change targets a shortage of industrial land with suitable planning and resource management responses, allows the Hearings Panel to hear the Objector’s submissions and evidence regarding its land. This is consistent with best planning practice.
- 5.13 Accordingly the Commissioner concludes that the **“first limb” of the “Clearwater test” is satisfied.**
- 5.14 Regarding the “second limb” of the “Clearwater test”, the submissions of Counsel for the Objector to the Hearings Panel (24 February 2023 - Paras 24-33) are accepted in preference to those of Counsel for Kama Trust and Council.
- 5.15 In essence the Commissioner is persuaded that landowners and others with interests in the outcomes of the Plan Change in the vicinity of the Kama Trust and Objector’s land have been aware for some time of the proposals in the Plan Change which, as explained above, the Commissioner considers targets a shortage of industrial land with suitable planning and resource management responses. Some landowners indeed have changed their stance since hearing from Mr Chrisp regarding the planning and resource management implications.
- 5.16 Several landowners are submitters to the process as well as the Objector and proposals such as the Plan Change attract considerable interest amongst landowners and residents.
- 5.17 The Commissioner concludes for all the above reasons that the **“second limb” of the “Clearwater test” is satisfied.**

6 DECISION

- 6.1 The Commissioner finds (acting under delegated authority in terms of RMA s34 and 34A on behalf of Council) the **Objector's Submissions are "within scope" and "on" the Plan Change.**
- 6.2 Accordingly the Hearings Panel's Decision contained in the Panel Minute #8 is overturned, and the Hearings Panel (as a committee of Council) is directed to hear and consider the Objector's submissions regarding future deferred industrial zoning and development, and consider evidence in support of them in the hearing on the Plan Change.



Alan Withy

INDEPENDENT COMMISSIONER

Appendix 1

Proposed Plan Change 17 – Hautapu Industrial Zones

Minute of the Hearings Panel (Minute #8)

Dated 06/03/2023

WAIPĀ DISTRICT COUNCIL

Proposed Plan Change 17, Hautapu Industrial Zones

MINUTE OF THE HEARINGS PANEL

Dated 6/03/2023: Minute #8

Distribution: All submitters on Proposed Plan Change 17; all further submitters who did not make an original submission on Proposed Plan Change 17; Council.

1. The purpose of this Minute is to record our decision on the scope of part of a submission lodged by the Hautapu Landowners' Group requesting the rezoning of land owned by Group members from Rural to Deferred Industrial Zone.
2. In accordance with Minute #7 of 8 February 2023, the Hearings Panel received legal submissions on this scope issue filed on behalf of the Hautapu Landowners' Group, Waipā District Council and Kama Trust, as well as legal submissions in reply on behalf of the Hautapu Landowners Group.
3. The Hearings Panel was also advised by Council Officers of a request communicated to Council by representatives of the Hautapu Landowners' Group on 1 March 2023 for the Panel to delay the issue of its decision on the scope issue in order to allow Kama Trust to consider the Group's infrastructure proposal. Council Officers provided an overview of the Hautapu Landowners' Group infrastructure proposal. For the reasons recorded below, the Hearings Panel was not persuaded to delay its decision on the scope issue.

Resolution:

4. The Hearings Panel has considered 'on the papers' all legal submissions filed on the scope of that part of the Hautapu Landowners' Group submission requesting the rezoning of land owned by Group members from Rural to Deferred Industrial Zone.
5. The Hearings Panel, from resolution passed by Councillor Brown and Councillor Gordon, has determined that that part of the Hautapu Landowners' Group submission requesting the rezoning of land owned by Group members from Rural to Deferred Industrial Zone does not satisfy both limbs of the *Clearwater* test and is not, therefore, within the scope of Proposed Plan Change 17.

Reasons for the Decision:

6. The Hearings Panel finds that the purpose of Proposed Plan Change 17 is to deliver 'live' industrial zoned land in the short term in order to meet current demand to locate new and relocate existing industrial activities in Hautapu.
7. The Hearings Panel does not accept the Hautapu Landowners' Group proposition that the purpose of Proposed Plan Change 17 is to generally rationalise and activate industrial activities over time in Hautapu.
8. That part of the Hautapu Landowners' Group submission seeking to rezone land owned by Group members to a 'deferred' Industrial Zone will require a second, future statutory process to rezone the land to a 'live' Industrial Zone; and the Hearings Panel cannot predetermine the outcome of that future process. The deferred rezoning relief sought in the Hautapu Landowners' Group submission would not, therefore, deliver 'live' Industrial zoned land in the short term to meet current demand.
9. The Hearings Panel is not persuaded by the Hautapu Landowners' Group argument that references in the section 32 Report to the pre-notification discussions between Council and the Hautapu Landowners' Group would have placed directly or potentially directly affected persons on notice of the Group's deferred rezoning proposal.
10. The Hearings Panel concludes, for these reasons, that that part of the Hautapu Landowners' Group submission seeking to rezone land owned by Group members from a Rural to a 'deferred' Industrial Zone does not satisfy both limbs of the *Clearwater* test which, all legal submissions agreed, is the correct legal test for the Hearings Panel to apply to this scope issue.
11. The consequence of the Hearings Panel's decision is that that part of the Hautapu Landowners' Group submission requesting the rezoning of land owned by Group members from Rural to Deferred Industrial Zone, together with all further submissions which supported or opposed that part of the Hautapu Landowners' Group's submission, are struck out pursuant to s41D(1)(c) of the Resource Management Act 1991 and will not be considered by the Hearings Panel in the hearing of Proposed Plan Change 17.
12. All correspondence with the Hearings Panel shall be made through the following contact details:

districtplan@waipadc.govt.nz

Appendix 2

Section 357 Objection

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

Notice of objection pursuant to section 357 of the Act regarding the Hearing Panel decision in Minute #8 (decision on scope of part of the submission by Hautapu Landowners Group)

Dated: 9th March 2023

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NOTICE TO THE WAIPA DISTRICT COUNCIL:

1. Pursuant to section 357 of the Act, Dean Hawthorne, and the Hautapu Landowners' Group ("HLG") **objects** to the decision of the Hearing Panel on proposed Plan Change 17 to the Waipa District Plan ("PC17"), to strike out part of the submission lodged by the HLG under section 41D(1)(c) of the Act ("Decision").
2. The Decision, recorded in the Hearing Panel Minute #8, was received by Mr Hawthorne and the HLG on 6 March 2023.

REASONS FOR OBJECTION

3. The Decision does not correctly apply the relevant legal principles to the question of whether the part of the HLG submission which seeks rezoning to Deferred Industrial Zone is "on" PC17;
4. The Decision does not adequately or fairly consider the legal submissions made on behalf of the HLG;
5. The reference in the Decision to the Hearing Panel's inability to "predetermine" a future planning process is misdirected. The question regarding scope of part of the HLG submission does not import any requirement for the Hearing Panel to determine a future outcome; and
6. The determination in the Decision that the purpose of PC17 is effectively centered on "live" industrial zoning is, with respect, incorrect.

CONSIDERATION OF OBJECTION

7. Section 357 of the Act does not provide that an objector may request an independent commissioner to determine the objection. However, given the circumstances, Mr Hawthorne and the HLG consider it appropriate that an independent and suitably qualified resource management professional

(such as a senior Resource Management legal practitioner and qualified hearing commissioner), is engaged by the Waipa District Council to determine the objection.

8. Pursuant to section 357C(3)(b), Mr Hawthorne and the HLG wish to be heard at any hearing of this objection.



M Mackintosh

Counsel for Dean Hawthorne, on behalf of the HLG.