BEFORE THE 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 OF COUNSEL FOR WAIPĀ DISTRICT COUNCIL ON SCOPE
Dated 24 February 2023

TOMPKINS | WAKE

Wendy Embling (Wendy.Embling@tompkinswake.co.nz)

Westpac House
Level 8
430 Victoria Street
PO Box 258
DX GP 20031
Hamilton 3240
New Zealand
Ph: (07) 839 4771
tompkinswake.co.nz

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Introduction

1. On 22 December 2022, Waipā District Council, Waikato District Council and Hamilton City Council jointly lodged a memorandum regarding late, potentially invalid and out of scope submissions on the Waikato Intensification Planning Instruments (**Joint Memorandum**). Appendix 2 of the Joint Memorandum specified the submissions or parts of submissions considered to be out of scope, and the reasons for the submission being out of scope. The Joint Memorandum requested that the Independent Hearings Panel (**Hearing Panel**) determine whether the appeals are out of scope and should be struck out under section 41D of the Resource Management Act 1991 (the **Act**) in advance of the hearings.

2. On 23 December 2022 Direction #6 put in place a timetable for the exchange of legal submissions relating to whether the submissions identified in Appendix 2 of the Joint Memorandum were out of scope of the relevant IPI. On 3 February 2023 Direction #9 amended the timetable so that it only applies to Waipā District Council (**the Council**).

3. As confirmed by Direction #9, the following timetable now applies to the four rezoning submissions which the Council has identified as potentially out of scope of Plan Change 26 (Triple 3 Farm Limited 59.1, CKL NZ Limited 65.31, Retirement Village Association 73.125 and Ryman Healthcare Limited 70.125):
   (a) Submissions on behalf of the submitters in support of their relief being within scope to be lodged by 17 February 2023;
   (b) Submissions by the Council in response to be lodged by 24 February 2023;
   (c) Subject to the need for a scope hearing, the Panel will issue its determination by 3 March 2023.

4. In accordance with this timetable, legal submissions have been lodged on behalf of Triple 3 Farm Limited and joint legal submissions have been lodged on behalf of the Retirement Village Association and Ryman Healthcare Limited (**RVA/Ryman**).

5. These legal submissions are lodged on behalf of the Council in respect of whether the relief sought by the four submitters identified in paragraph 3 above is within the scope of Plan Change 26.

6. Counsel for Triple 3 Farm Limited and counsel for RVA/Ryman have requested an opportunity to reply to the Council's legal submissions, by 28 February 2023. As indicated in the Memorandum of counsel for Waipā District Council for the procedural matters conference dated 22 February 2023, the Council has no objection to a right of reply, provided that there is no consequential effect on the timeframe for the Hearing Panel's determination on scope. Alternatively, counsel would be available for a short hearing on the issue of scope, if that would be of assistance to the Hearing Panel.

Approach to scope

7. Plan Change 26 is the Council's Intensification Planning Instrument (IPI) under section 80E of the Resource Management Act 1991 (the Act).

8. I submit that there are three questions which must be considered by the Hearing Panel when determining the scope of a submission lodged in response to the notification of an IPI as defined in section 80E of the Act. These are:

   (a) Whether the submission is within the scope of an IPI as set out in section 80E of the Act (the **first question**);

(b) Whether the submission is "on" the notified plan change (in accordance with the usual *Clearwater* tests) (the **second question**); and

(c) Whether the proposed relief falls within the submission on the plan change (the **third question**).

9. At this stage of the process, a submission will be out of scope of Plan Change 26 if it fails to meet the requirements of the first and second questions above. The third question above will become relevant at the time the Hearing Panel considers recommendations on Plan Change 26.

10. If a submission falls outside the scope of Plan Change 26 as it fails to satisfy the requirements of the first and second questions above, the appropriate course of action is for the Hearing Panel to strike out the submission under s41D(1)(b) of the Act.[1]

11. Counsel for RVA/Ryman has queried the applicable subsection of section 41D and noted a lack of case law in respect of this section.[2] Section 41D contains the powers of a Council or Hearing Panel to strike out submissions. The equivalent power for the Environment Court is contained in section 279(4). Section 41D would only be considered by the Court in the event that the Hearing Panel's decision was the subject of an objection under section 357 and subsequently an appeal to the Environment Court. An example of such an appeal is the recent case of *Paterson Pitts Limited Partnership v Dunedin City Council* where the Court recorded that the submission that was found to be out of scope of Variation 2 was struck out pursuant to section 41D(1)(b) as disclosing no reasonable or relevant case. [3]

[1] Clause 98(1)(h) gives the independent hearings panel the powers under section 41D of the Act.
[2] Paragraphs 7 and 8 of the submissions on behalf of RVA/Ryman.
[3] *Paterson Pitts Limited Partnership v Dunedin City Council* [2022] NZEnvC 234 at [109]. A recent example of the Court striking out an out of scope submission under section 279(4) of the Act is *Re Otago Regional Council* [2022]NZEnvC 69.

12. Section 41D(2) of the Act specifically empowers the Hearing Panel to make a direction under this section before the hearing. I submit that it would be inconsistent with the purpose of the Intensification Streamlined Planning Process (**ISPP**)[4] for the Council and the submitter to prepare and present submissions and evidence in respect of a matter over which the Hearing Panel has no jurisdiction.

13. I discuss each of the three questions in more detail below.

First question: scope of an IPI

14. The Council is required to notify an IPI under s80F of the Act. The IPI must contain the following mandatory elements:[5]

    (a) Incorporate the medium density residential standards (**MDRS**) into all relevant residential zones; and

    (b) Give effect to Policies 3 and 4 of the National Policy Statement on Urban Development (**NPS-UD**) in respect of urban environments.

15. The Act also authorises Council to include any of the following discretionary elements into its IPI:[6]

    (a) Financial contributions;

    (b) Provisions to enable papakāinga housing in the district;

    (c) Creation of new residential zones;

    (d) Provisions that are more lenient than the MDRS;

    (e) Provisions that are less enabling than the MDRS where qualifying matters apply; and

    (f) Related provisions that support or are consequential on the MDRS or Policies 3 and 4 of the NPS-UD.

[4] Section 80B(1) of the Act.
[5] Section 80E(1)(a) of the Act.
[6] Sections 80E(1)(b), section 77G(4), section 77H and section 77I of the Act.

16. For matters which fall within the mandatory or discretionary elements of an IPI identified in paragraphs 14 and 15, the Act provides for an ISPP which enables a more expeditious planning process than the usual Schedule 1 process, including the absence of appeals to the Environment Court. However, section 80G makes it clear that only those matters listed in paragraphs 14 and 15 may be the subject of the ISPP process, and that only one IPI may be notified by the Council. Accordingly, the first question for the Hearing Panel is whether the submissions seek relief which falls within, or outside of, the mandatory or discretionary elements of an IPI.

Second question: *Clearwater* test

17. Submissions on an IPI are made under clause 6 of Schedule 1 of the Act which provides:[7]

> Once a proposed… plan is publicly notified under clause 5, the persons described in subclauses (2) and (4) may make a submission **on it** to the relevant local authority.
>
> [Our emphasis added.]

18. I submit that the second question for the Hearing Panel is the usual test of whether the submission is "on" the plan change as required by clause 6 of Schedule 1. The leading authority on whether a submission is "on" a plan change is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council.*[8] It sets out a two-limb test:[9]

    (a) Whether the submission addresses the changes to the pre-existing status quo advanced by the proposed plan change; and

    (b) Whether there is a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

[7] Clause 6 applies to an IPI under clause 95(2)(i) of Schedule 1 of the Act.
[8] *Clearwater Resort Ltd v Christchurch City Council* AP 34/02, 14 March 2003, Young J.
[9] Ibid at paragraph [66].

19. Subsequent decisions of the Court, in considering the first limb of the *Clearwater* test, have referred to matters which are assessed, or should have been assessed, in the section 32 report.[10] I submit that this aspect of the test is relevant to the mandatory aspects of IPIs. In particular, it would not be possible for a Council to omit part of the mandatory elements of an IPI, and then to claim that a submission seeking inclusion of these mandatory elements was out of scope as it had not been publicly notified as part of the IPI.[11] However, I submit that this approach does not apply to the discretionary elements of an IPI set out in paragraph 15 above.

Third question: Whether relief is within the submission

20. I submit that the third question is not relevant at this stage, as the Hearing Panel is not yet at the point of considering whether a proposed recommendation falls within a submission. However, as this enquiry is different for an IPI, and has been raised in legal submissions by the submitters, I will address it briefly.

21. Clause 99 of Schedule 1 of the Act provides that:

> (1) An independent hearings panel must make recommendations to a specified territorial authority on the IPI.
> (2) The recommendations made by the independent hearings panel-
> (a) Must be related to a matter identified by the panel or any other person during the hearing; but
> (b) Are not limited to being within the scope of submissions made on the IPI.

22. Clause 99 enables the Hearing Panel to make recommendations on Plan Change 26 which are related to a matter identified during the hearing, but are not limited to being within the scope of submissions made on the plan

[10] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [81] and *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].
[11] As raised by counsel for Kāinga Ora at the Joint Opening Hearing.

change. This provision is similar to section 144 of the Local Government (Auckland Transitional Provisions) Act 2010 (the **Auckland Act**). The Court has made it clear, in the course of decisions under the comparable Auckland Act, that the Hearing Panel's recommendation powers are not open-ended simply because of the removal of the traditional scope constraint; the power to make recommendations must still be reasonably foreseeable as a direct or logical consequence of a submission point.[12]

23. Counsel for Triple 3 Farm Limited and RVA/Ryman have claimed that clause 99 of Schedule 1 increases the scope of the Plan Change.[13] In my submission, this provision does not increase the scope of Plan Change 26, but it potentially increases the scope of the recommendations that the Hearing Panel can make on the Plan Change.[14]

The scope of Plan Change 26

24. Before addressing each submission in turn, I first set out the scope of the notified version of Plan Change 26. The public notice of the Plan Change advised:

> Proposed Plan Change 26 – Residential Zone Intensification is a mandatory Intensification Planning Instrument required to introduce new medium density residential standards ("standards") into the Operative Waipā District Plan.
> The Proposed Plan Change:
> (a) Will enable up to three, three storey residential units to be built in residential zones in Te Awamutu, Kihikihi and Cambridge without the need to obtain resource consent, if all of the standards are met.
> (b) Modifies the standards where qualifying matters apply, such as cultural and heritage sites, and Te Ture Whaimana o Te Awa o Waikato.
> (c) Updates the character cluster overlays to include new properties.
> (d) Updates the financial contribution provisions.
> (e) Includes consequential amendments.

[12] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [97].
[13] Paragraphs 6.5 and 25 of the submissions on behalf of RVA/Ryman and paragraphs 9 to 12 of the legal submissions on scope for Triple 3 Farm Limited.
[14] And is consistent with clause 100(3) of Schedule 1 which provides that the reports of the independent hearings panel may also include- (a) matters relating to any alterations necessary to the IPI as a consequence of matters raised in submissions; and (b) any other matter that the panel considers relevant to the IPI that arises from submissions or otherwise.

25. Part A of the Section 32 report provides a more detailed summary of the proposed changes to the Operative Waipā District Plan (**District Plan**). The changes that are relevant to the zoning of land within Waipā District include:

    (a) the creation of a new Medium Density Residential Zone which applies to land previously zoned Residential in Cambridge, Te Awamutu and Kihikihi;

    (b) The renaming of the Deferred Residential Zone to Deferred Medium Density Residential Zone where the growth cell adjoins land previously zoned Residential in Cambridge, Te Awamutu and Kihikihi; and

    (c) Changes to the planning maps to reflect the above changes to the zone names.

26. Significantly, Plan Change 26 does not propose any change to the extent of the current Residential Zone (now the Medium Density Residential Zone) in Cambridge, Te Awamutu and Kihikihi.

Submission by Triple 3 Farm Limited

27. The submission by Triple 3 Farm Limited (submission number 59.1) seeks to rezone a 3.5 hectare area of land located at 333 Tuhikaramea Road, Temple View, Hamilton from Rural to Medium Density Residential.

28. In respect of the first question: the scope of an IPI, the Council agrees that an IPI can include new residential zones.[15] This is a discretionary element of an IPI, as set out in paragraph 15 above.

[15] Paragraph 13 of the legal submissions on scope for Triple 3 Farm Limited.

29. In respect of the second question, the Council submits that the submission by Triple 3 Farms Limited fails the two-limb test in *Clearwater* for the following reasons:

    (a) Plan Change 26 did not include any rezoning of land from Rural (or other zones) to Medium Density Residential. In addition, the land owned by the submitter does not adjoin any land currently zoned Residential so its rezoning cannot be considered to be an incidental or consequential change.

    (b) The potential effects of rezoning the submitter's land, and the servicing requirements in terms of three waters and transportation, have not been considered in the Council's section 32 report for Plan Change 26. Nor were these matters required to be considered in the section 32 report as they are not a mandatory element of an IPI.

    (c) As no rezoning of rural land, or the submitter's land in particular, was notified in Plan Change 26, there is a real risk that persons who would be directly affected by the rezoning, including the owners of land surrounding the submitter's land, have been denied an effective opportunity to participate in the plan change process.

30. While I consider that the third question is not relevant at this stage, I submit that the rezoning of a 3.5 hectare area of land zoned Rural which does not adjoin the current Residential Zone would not fall within the type of consequential change that would be enabled by clause 99(2) of Schedule 1 of the Act.

31. Accordingly, I submit that the submission by Triple 3 Farm Limited is out of scope of Plan Change 26 and should be struck out pursuant to section 41D(1)(b) of the Act.

Submissions by RVA/Ryman

32. The submissions by RVA/Ryman (submission numbers 73.125 and 70.125) seek to rezone land that is currently zoned Deferred Residential to Medium Density Residential. The submission does not relate to a specific site but is understood to relate to all land zoned Deferred Residential in the District Plan.

33. The District Plan currently identifies a number of growth cells on the outskirts of Te Awamutu and Cambridge as "Deferred Residential". Appendix S01 of the District Plan provides that these growth cells have been identified for residential development post 2035. The District Plan requires a plan change to be notified to rezone these growth cells from Deferred Residential to a live Residential zone, and a structure plan to be developed, before residential development can proceed in these areas.

34. Plan Change 26 as notified did not propose to rezone any land currently zoned "Deferred Residential" to a live residential zone. The only relevant change made by Plan Change 26 was to rename the growth cells adjoining the new Medium Density Residential zone from "Deferred Residential" to "Deferred Medium Density Residential". This change of name recognises that, when a plan change is notified to rezone the land to a live residential zone, it will be necessary for the MDRS to be incorporated under s77G of the Act.

35. In respect of the first question: the scope of an IPI, the Council accepts that Plan Change 26 could have rezoned land from Deferred Residential to Medium Density Residential under section 77G(4) of the Act.[16] This is a discretionary element of an IPI as set out in paragraph 15 above. However, the Council did not choose to include any rezoning of Deferred Residential

[16] Paragraphs 20 and 23 of the submissions on behalf of RVA/Ryman.

zoned land in Plan Change 26. I submit that the submitters' opinion on the merits of this decision are not relevant to the issue of scope.[17]

36. In respect of the second question, I submit that the submission by RVA/Ryman does not satisfy the two-limb test in *Clearwater* for the following reasons:

    (a) Plan Change 26 did not rezone any land in deferred residential zones to a live residential zone.

    (b) The Section 32 report for Plan Change 26 did not address the potential effects, or the servicing requirements in terms of three waters or transportation, of a live residential zone in these locations. Nor did it insert a structure plan for development of these growth cells. Nor were these matters required to be considered in the section 32 report as they are not a mandatory element of an IPI.

    (c) As a result, there is a real risk that persons who would be directly affected by the rezoning, including the owners of land both within and surrounding these growth cells, have been denied an effective opportunity to participate in the plan change process.

37. While not directly relevant at this stage, I submit that the rezoning of growth cells from a deferred residential to a live residential zone is beyond the type of consequential change that would be enabled by section 99(2).

38. Accordingly, I submit that the submissions by RVA/Ryman are out of scope of Plan Change 26 and should be struck out pursuant to section 41D(1)(b) of the Act.

[17] Paragraphs 21 to 24 of the submissions on behalf of RVA/Ryman. The submitters may not be aware that Plan Change 13 to the District Plan, which became operative on 28 July 2022, rezoned all of the pre-2035 growth cells from a deferred residential zone to a live residential zone.

Submission by CKL NZ Limited

39. To date, no legal submissions on scope have been received on behalf of CKL NZ Limited. In addition to receiving the Hearing Panel's Directions from the Hearing Coordinator:

    (a) The Council advised the submitter (by email to its address for service) of the opportunity to make written submissions on scope on 8 February 2023; and

    (b) Counsel sent a further email to the submitter on 23 February 2023.

40. The submission by CKL NZ Limited (submission number 65.31) seeks to rezone two growth cells in Ohaupo from Deferred Large Lot Residential to a live Large Lot Residential Zone.

41. In terms of the first question: the scope of an IPI, the Council agrees that, in carrying out its functions under s77G, the Council could have created new residential zones under section 77G(4). However, the Large Lot Residential Zone is not a "relevant residential zone" under section 2 of the Act and is therefore not required to incorporate the MDRS. As a result, I submit that changes sought by CKL to the Large Lot Residential Zone are outside the scope of an IPI.

42. In terms of the second question, the Council submits that the submission fails the *Clearwater* tests for the following reasons:

    (a) Plan Change 26 did not make any change to the Deferred Large Lot Residential Zone, and did not make any changes to the zoning of land in Ohaupo.

    (b) The Section 32 report for Plan Change 26 did not consider the potential effects, or the servicing requirements in terms of three waters or infrastructure, of a live Large Lot Residential Zone in

Ohaupo. Nor were these matters required to be considered in the section 32 report as they are not a mandatory element of an IPI.

(c) As a result, there is a real risk that persons who would be directly affected by the rezoning, including the owners of land both within and surrounding Ohaupo, have been denied an effective opportunity to participate in the process.

43. For completeness, I submit that the rezoning of land in Ohaupo from Deferred Large Lot Residential to a live Large Lot Residential Zone is beyond the type of consequential change that would be enabled by section 99(2).

44. Accordingly, I submit that the submission by CKL NZ Limited is out of scope of Plan Change 26 and should be struck out pursuant to section 41D(1)(b) of the Act.

Directions

45. As noted above, Counsel for Triple 3 Farm Limited and counsel for RVA/Ryman have requested an opportunity to reply to the Council's legal submissions, by 28 February 2023. The Council has no objection to a right of reply, provided that there is no consequential effect on the timeframe for the Hearing Panel's determination on scope. Alternatively, counsel would be available for a short hearing on the issue of scope, if that would be of assistance to the Hearing Panel.

Signed this 24th day of February 2023

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W J Embling
Counsel for Waipā District Council