

**BEFORE THE COMMISSIONER PANEL**

**IN THE MATTER** of the Resource Management Act 1991

**AND**

**IN THE MATTER** of Private Plan Change 20: Titanium Park Limited and Rukuhia Properties Limited - Airport Northern Precinct Extension

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**LEGAL SUBMISSIONS ON BEHALF OF HAMILTON CITY COUNCIL (SCOPE ISSUE)**

**Dated 16 January 2023**

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**MAY IT PLEASE THE COMMISSIONER PANEL****INTRODUCTION**

1. Hamilton City Council (**HCC**) made a submission and a further submission on Private Plan Change 20: Titanium Park Limited and Rukuhia Properties Limited – Airport Northern Precinct Extension (**PC20**).
2. These legal submissions respond to the Commissioner Panel’s (**Panel**) Minute #2 which directs HCC to file submissions addressing whether its submission point 23.7 is within the scope of PC20.<sup>1</sup>
3. The central purpose of PC20 is to extend the Airport Business Zone (**ABZ**) in the Northern Precinct of Titanium Park to respond to current and projected demand for industrial land within the Hamilton Airport Strategic Node which is significantly greater than anticipated.
4. HCC’s submission point 23.7 seeks that the extent of PC20 be amended to include the wedge of land bounded by the proposed north-western boundary of the Northern Precinct ABZ and the Southern Links designation identified in Appendix 4 of HCC’s submission as Future Growth Area – Northern Precinct B (**HCC Extension Area**), to avoid a Rural Zone ‘island’ being stranded between a large industrial park and the state highway network.
5. The central purpose of PC20 is to extend the ABZ. Submission point 23.7 addresses the *extent* of the *extension*. Given the nature of PC20, it is unequivocally “on” the plan change.

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<sup>1</sup> Minute #2 of the Commissioner Panel.

## LEGAL PRINCIPLES

6. Submissions on plan changes are made under clause 6(1) of Schedule 1 to the RMA which provides:

Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority.

[Emphasis added].

7. A person may, in the prescribed form, make a submission seeking decisions “on” a proposed plan. If the relief sought in the submission is not “on” the plan change, there is no jurisdiction for relief to be granted by the Panel (or, on appeal, the Court).<sup>2</sup>
8. The leading authorities on the jurisdictional question of whether a submission falls within clause 6(1) of Schedule 1 are *Clearwater Resort Ltd v Christchurch City Council (Clearwater)*<sup>3</sup> and *Palmerston North City Council v Motor Machinists Limited (Motor Machinists)*<sup>4</sup>.
9. *Clearwater* establishes a bipartite test:
- a) A submission can only fairly be regarded as being “on” a plan change “if it is addressed to the extent to which the plan change alters the pre-existing status quo”; and
  - b) 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 finding that the submission was “on” the plan change.

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<sup>2</sup> *Federated Farmers & Ors v Otorohanga District Council* [2014] NZEnvC 070 at [11].

<sup>3</sup> AP 34/02, 14 March 2013, Young J.

<sup>4</sup> [2013] NZHC 1290.

10. In relation to the first and dominant limb, the High Court in *Motor Machinists* observed that one way of analysing whether a submission falls within the ambit of a plan change is to ask whether it raises matters that should have been addressed in the Section 32 Evaluation Report. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If the answer to these questions is no, then the submission is unlikely to be “on” the plan change, unless the change sought is incidental or consequential.<sup>5</sup>
11. Whether there is jurisdiction is a matter of fact and degree. Each case must be determined on its own facts, and there is no clear line.<sup>6</sup>

#### **FIRST LIMB**

12. It is well-settled that there is no jurisdictional bar against zoning extension by submission. In *Motor Machinists* the High Court established that:<sup>7</sup>

Incidental or consequential extensions of zoning changes proposed in a plan change are permissible provided that no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

13. It is apparent from *Motor Machinists* that an “incidental or consequential” rezoning extension is likely to involve the rezoning of land that is contiguous to land being rezoned under a plan change. That can be contrasted with a plan change that is not changing any zonings at all or where a submission seeks to “spot zone” land that is remote to, and disconnected from, land being rezoned under a plan change. Such a scenario is unlikely to amount to an incidental or consequential rezoning extension that is “on” the plan change.

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<sup>5</sup> At [91](d).

<sup>6</sup> *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [16].

<sup>7</sup> At [81].

14. Another relevant consideration is the nature of the plan change, and the extent to which the rezoning extension addresses the changes advanced by the plan change.<sup>8</sup> The core purpose of PC20 is to extend the ABZ in the Northern Precinct of Titanium Park. Although not clearly articulated in the PC20 documents, it is trite that as a ‘zone extension plan change’, there has been active deliberation concerning the appropriate location for the proposed boundaries of PC20. Thus, the extent of the rezoning under PC20 is properly a matter “on” the plan change.
15. The zoning extension proposed under PC20 should be considered in light of the existing planning regime for the Hamilton Airport Strategic Node. The HCC Extension Area is located within the area identified on the Hamilton Airport Growth Map in Appendix S1 – Future Growth Cells of the Operative Waipa District Plan as “Future Extension Direction” (**FED**). The FED is an area identified for future expansion of the Northern Precinct ABZ additional to the adjacent area also identified for future expansion of the ABZ in the long-term (after 2035) which is demarcated on the map as the “Possible Future Growth Area” (**FGA**).
16. PC20 rezones approximately 89ha of Rural Zoned land to ABZ (comprised of 19 properties), so that the ABZ extends across all of the FGA and takes a large bite out of the FED, leaving only the north-west corner abutting the Southern Links designation as a Rural Zone enclave. Extending PC20 to include the HCC Extension Area is not simply an “opportunistic insertion by submission” that requires a comprehensive s 32 analysis<sup>9</sup>. Rather, it is a logical and natural extension of the ABZ, and like the FGA and the rest of the FED, the HCC Extension Area is the subject of a coherent long-term analysis for industrial growth in the Hamilton Airport Strategic Node embedded within the relevant planning documents.<sup>10</sup>

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<sup>8</sup> *Motor Machinists* at [48], [58]-[59].

<sup>9</sup> *Motor Machinists* at [86].

<sup>10</sup> Waipa District Plan, Future Proof Strategy.

17. Moreover, the Plan Change request expressly contemplates expansion into both the FGA and the FED. It records:<sup>11</sup>

Additional land to the north-west of the Northern Precinct is currently zoned Rural but has been identified as a ‘Possible Future Airport Growth Area’. The Hamilton Airport Growth Map, which is contained in Appendix S1 of the WDP (refer Figure 7 below). This area has also been identified in Appendix S1 of the WDP and is shown in relation to the alignment of Southern Links.

**The future extension direction has an undefined land area under the WDP and is shown to indicate where any further development would logically be located given the alignment of Southern Links.**

**The WDP considers that this future extension would provide for future industrial land beyond 2035, but we note that because available land within Titanium Park has nearly all been sold and/or developed, the development of the Northern Precinct will now be required much sooner than this to meet current and projected demand.**

[Emphasis added].

18. On the basis of the above, HCC submits that the additional rezoning sought in submission 23.7 constitutes an incidental or consequential extension of the rezoning proposed under PC20.
19. To illustrate why this outcome is correct, it is useful to note that submission point 23.7 squarely addresses the nature of the change to the status quo advanced by PC20 (being the extension of the ABZ by the rezoning of the contiguous Rural Zoned land in the FED). In contrast, (for example) if the plan change was merely amending objectives, policies, and rules within the ABZ, a submission then seeking a geographic extension to the ABZ would be unlikely to be “on” the plan change.
20. Further reinforcement is found in the Section 32 Evaluation Report prepared by the proponent which plainly addresses the very subject of submission point 23.7 (extension of the ABZ into the FED). The assessment of alternative options in Section 3.1 of the report includes an evaluation of the expansion of the Northern Precinct ABZ as part of options 2 and 3. However, the assessment does not refer to any particular area of land.

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<sup>11</sup> Page 10.

Presumably, this is because expansion of the Northern Precinct ABZ is anticipated to occur in the FGA and FED in accordance with the District Plan and expansion in any other direction is inhibited by the Southern Links designation and the Airport runway.

21. While the Section 32 Evaluation Report addresses the expansion towards the northwest, it is deficient in its articulation of the reasons supporting the notified delineation of the plan change area. This lack of analysis in the Section 32 Evaluation Report removes any force to a possible argument that, in the absence of a site-specific analysis of the HCC Extension Area, submission 23.7 is beyond the ambit of the plan change.
22. Even if that was not the case, the Environment Court has clarified that a submission is not simply beyond scope because the matter it addresses is not evaluated in the Section 32 Evaluation Report. The inquiry is whether it *should* have been. The Court observed that:<sup>12</sup>

...the inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

23. In HCC's submission, a thorough site-specific evaluation of the rezoning of the FGA and FED should have been included in the Section 32 Report. However, for the reasons set out in paragraphs 20 and 21 above, this deficiency is not determinative of the issue of scope in this case.
24. Further supporting the contention that submission 23.7 is "on" the plan change, PC20 fundamentally alters the management regime for the FED by rezoning part of it from Rural to ABZ. The submission challenges the extent of the change to the management regime of the FGA, in particular the size of the ABZ extension into the FED.

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<sup>12</sup> *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

25. In summary, submission point 23.7 meets the first limb of the *Clearwater* test as the rezoning of the HCC Extension Area is an incidental or consequential extension of the rezoning proposed by PC20. More specifically:
- a) The fundamental effect of PC20 is to extend the ABZ by altering the management regime for the FED by rezoning it from Rural to ABZ.
  - b) The submission point squarely addresses the alteration to the status quo advanced by PC20 (the nature of the expansion of the Northern Precinct ABZ into the FED); and
  - c) The Section 32 Report addresses (albeit poorly) the very subject of submission point 23.7 (expansion of the Northern Precinct ABZ into the FED – see options 2 and 3 of the assessment of alternative options).

## **SECOND LIMB**

26. The High Court in *Motor Machinists* observed that “there is less risk of offending the second limb of the *Clearwater* test in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the s 32 analysis”.<sup>13</sup> In light of the s 32 discussion under the first limb, particularly the extent to which expansion to the north and west into the FED would occur, the risk that affected persons would be denied an effective opportunity to participate in respect of the rezoning of the HCC Extension Area is negligible.
27. Moreover, the Plan Change Request records that extensive consultation with residents was undertaken. Invitations to a community open day was

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<sup>13</sup> At [83].

provided to over 400 properties in the areas surrounding the Airport (including those located on Raynes Road, Narrows Road, Middle Road, Lowe Road, Ingram Road, Steele Road, John Spencer Way, Ossie James Drive, Sharpe Road, Lochiel Road, Faiping Road and parts of State Highway 21 and State Highway 3) and directing them to a website with information about PC20. The Request further records that through that consultation, a group of landowners from the Middle Road/Narrows Road area north of the Rukuhia Properties Limited land expressed interest in whether their land could also be rezoned from Rural to ABZ.<sup>14</sup>

28. Based on the consultation undertaken with residents, combined with the earmarking of the HCC Expansion Area for possible future expansion of the ABZ in the District Plan, the clear purpose of PC20 to extend the ABZ, and the clear signal from the matters addressed in the Plan Change Request and the Section 32 Report (described in paragraphs 17 and 20 above), the residents were effectively on notice that the rezoning of the remaining FED might be the subject of submissions on PC20. They could then decide whether to participate in the process by lodging a submission or by lodging a further submission. Direct evidence of this is the lodgement of submissions by Salvador and Maryline Morales (Submitter No. 24), the landowners of 114 Narrows Road, located within the HCC Extension Area, seeking that it be included in the proposed extension of the ABZ.<sup>15</sup>
29. Accordingly, submission point 23.7 meets the second limb of the *Clearwater* test.

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<sup>14</sup> Page 29.

<sup>15</sup> Notably also the Middle/Narrows Focus Group (Submitter No.5) seeks to defer any decisions about areas outside of the Northern Precinct's northern boundaries.

**CONCLUSION**

30. For the foregoing reasons, HCC submits that submission point 23.7 is within the scope of PC20 and the Commissioner Panel has jurisdiction to consider the submission point on its merits.

Dated 16 January 2023

A handwritten signature in black ink, appearing to be 'L F Muldowney' or similar, written over a light blue horizontal line.

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L F Muldowney / S K Thomas  
Counsel for Hamilton City Council