

Before the Independent Hearings Panel appointed by MacKenzie District Council

In the Matter

of the Resource Management Act
1991 (**Act**)

And

In the Matter

of Plan Change 21 to the MacKenzie
District Council (Stage 2 District Plan
Review)

**Opening Legal Submissions on behalf of
Tekapo Landco Limited and Godwit
Leisure Limited**

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INTRODUCTION

1. These legal submissions are provided on behalf of submitters, Tekapo Landco Limited and Godwit Leisure Limited (**TL and GL**) in response to Minute 3 of the Hearings Panel.
2. Minute 3 invites any submitter who disagrees with the scope assessment contained in Section 8 of the S42A Report for Plan Change 21 (**PC21**) to advise why they consider their submission (or part of it) is within scope of PC21 by 3 March.

POSITION ON THE COUNCIL'S LEGAL SUBMISSIONS ON SCOPE

3. I have read the Council's legal submissions on this matter dated 15 February and consider they accurately assess the tests established in *Motor Machinists* and the *Clearwater* decisions. However I consider they do not take the legal analysis far enough in the context of the MacKenzie District Plan Review process and in particular PC21 as well as bearing in mind later caselaw that has further refined the principles relied upon by the Council. I explain this in more detail below.
4. I agree with Mr Garbett that the best approach, should the Panel agree that a submission or part of it is out of scope, is for the Panel to decline to consider the submission further as opposed to striking it out. While a strike out comes also with a right of review and then appeal to the Environment Court, the different timing associated with those processes has the potential to create further difficulties in finalising plan provisions in an integrated, efficient and effective manner.

MACKENZIE DISTRICT PLAN REVIEW PROCESS AND PC21

5. The Council has chosen to review its District Plan in 3 stages (presumably under Section 79(1) – (3)).
6. Plan Change 21 is described on the Council's website as follows:

*Plan Change 21 proposes a number of changes to the operative District Plan that are **largely** aimed at the **urban areas** within our district, including the following:*

 - Residential Zones
 - Commercial and Mixed-Use Zones

- *General Industrial Zone*
- *Precincts*
- *Development Areas*

[Bold – my emphasis]

7. The formal public notice notes that PC 21 (and 22) forms Stage 2 of the District Plan Review and sets out Area Specific Matters (which accord with the matters set out above) and then consequential amendments from introducing new area specific matters including amendments to the planning maps identifying the new zones and overlays.

8. The Notice includes the following statement:

The above changes are within the scope of Plan Change 21 and 22, and changes to other provisions (including maps) of the Mackenzie District Plan are not within the scope of Plan Change 21 and 22.

9. This is a difficult sentence in a legal sense because in my submission it is not clear to the average reader what it means in the first instance. Secondly it implies that any submission suggesting different provisions in response to the new change provisions would not be within scope which cannot possibly be the case and that would render making a submission in opposition to the plan change nugatory. As such, in my submission you can put little weight on this statement to the extent that it may purport to limit the scope of the plan change beyond the actual legal requirements.

10. The final stage, Stage 3 of the District Plan review is described on the Council's website as covering the rural areas of the district as:

including the below topics:

- *Eastern Mackenzie*
- *Western Mackenzie*
- *Sites and Areas of Significance to Māori*
- *Subdivision, Earthworks and Transport*
- *Rural Lifestyle Zone*
- *Hazards and Risks*
- *Energy and Infrastructure*
- *Potential New Industrial Area in Twizel*

11. I note at this point that the land said to be out of scope covered by my clients' submission points is not situated within the rural area of the district but zoned Passive Recreation Zone and Special Travellers zone, neither of which are expressly identified in any of the Council's District Plan Review stages. However the zoning (and associated provisions) they seek are within the

zones the subject of PC 21 and adjacent to land expressly rezoned as part of PC21.

12. I also note at this point that the submitters position in terms of the requested zonings are included in the Council's summary of submissions including by express reference to the Council's adopted spatial plan for Tekapo Township.
13. Finally it is important to note that because a decision is being made on each Stage (i.e. each plan change) this makes the integration of the overall District Plan more difficult. It also highlights the issue of procedural fairness of the process including the right for persons to be able to properly participate in the District Plan process.

REFINEMENT OF LEGAL PRINCIPLES ASSOCIATED WITH SCOPE

14. The difficulties of totally relying on the *Motor Machinists* and *Clearwater* principles is that they both deal with what I would call more standalone or narrowly focussed plan changes and where the Court excluded the submission points due to scope.
15. In *Motor Machinists* the plan change in question concerned amendments to the Inner and Outer business zones in Palmerston North and was not part of a district plan review (either staged/ partial or a full review). The submission in question requested a business zone for 2 properties that were not connected to any newly zoned land that was the subject of the plan change.
16. *Clearwater* concerned a narrow variation to the proposed Christchurch district plan in relation to airport noise policy matters following decisions on wider airport matters but prior to the district plan becoming operative. Put simply, the submission sought to challenge two of the noise contours (i.e. methods not policy) for the airport which had already been the subject of hearing and decision.
17. In the particular circumstances of more narrowly focussed plan change or variation of those cases the principles make sense. So for a standalone plan change or variation which is narrowly focussed a submission can only fairly be regarded as being "on" the change or variation if:

- (a) it is addressed to the extent to which the change or variation changes the pre-existing status quo; and
 - (b) if the outcome of accepting it would be to deprive other affected parties then that is a powerful reason for finding it is not “on” the change. Thus if a submission comes “out of left field” or proposes something completely novel then that would mitigate against the submission being “on” the change.
18. In the context of *Motor Machinists* the Court found that “*given the manner in which PPC1 has been promulgated, and its focus on main road rezoning, the inclusion of a rezoning of two isolated lots in a side street can indeed be said to “come from left field”*”.
19. However, it is important to acknowledge that even *Motor Machinists* includes an exception stating that “*the Clearwater approach does not exclude altogether zoning extension by submission*” and that incidental or consequential extension of zoning changes may be permissible¹.
20. *Motor Machinists* and *Clearwater* also relied on the associated Section 32 analyses suggesting that if a submission raised issues that ought to have been addressed in the s32 assessment then the submission is unlikely to fall within the ambit of the plan change. This is discussed in more detail below.
21. In *Albany v Auckland Council*², the High Court was considering an appeal from the Proposed Auckland Unitary Plan review process (**PAUP**). This was undertaken under special legislation but with links back to the RMA 1st schedule process. Here the Court made the distinction between a variation (as it was referring to the *Clearwater* decision) and a full plan review.
22. The Court found that the PAUP planning process was far removed from the “*relatively discrete variations or plan changes under examination in Clearwater, Option 5 and Motor Machinists*” and that “*presumptively every aspect of the status quo in planning terms was address by the PAUP*” and further that the “*scope for a coherent submission to be “on” the PAUP in the sense used by William Young J was therefore very wide*”³.

¹ *Motor Machinists* para [81]

² [2016] NZHC 138

³ *Ibid* [129]

23. Importantly the High Court in *Albany* did not accept that a submission on the PAUP would be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report doubting that this could apply to a full district plan review⁴ noting “*that Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification*”⁵.
24. Then in *Bluehaven Management Ltd v Western Bay of Plenty District Council*⁶ the Court held that where a s32 evaluation should have considered the appellants land “*the fact that it didn’t was not a jurisdictional bar to finding that the appellant’s submission was beyond scope*”⁷.
25. Perhaps more directly relevant to the issue at hand is *Tussock Rise Ltd v Queenstown Lakes District Council*⁸, a somewhat complicated case where the Environment Court was considering a district plan review being undertaken in stages. The case concerned a strike out application on an appeal on the basis that the submission in question was not “on” the stage 1 plan change which included (inter alia) new strategic directions, urban development (including zones) and landscape chapters. The initial Legend to the planning maps expressly stated that areas identified as “Operative Zone” were not being reviewed in Stage 1 but was not repeated in later legends.
26. The decision points to the apparent difference in assessing scope as between “*the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans*” and in my view correctly notes that much of the difference can be understood in the context of specific plan changes⁹.
27. So scale and context are very important considerations when considering the issue of scope.

⁴ Ibid [130]

⁵ Ibid [132]

⁶ [2016] NZEnvC 191

⁷ Ibid para [59]

⁸ [2019] NZENC 111

⁹ Ibid para [62]

28. In reaching its conclusions the Court considered the issue of fairness. In relation to the submitter, the Court found that excluding the submission would not be fair to the submitter. Further it was no answer for the Council to say that the zone in question would be the subject of a later stage noting that the difficulty with this is that crucial arguments as to allocation of land may have been resolved at the first stage¹⁰.
29. In relation to persons not before the Court, the Court accepted that this is the dominant consideration acknowledging in particular Motor Machinists where the Court opined that *“to override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources”*.¹¹
30. However I note that in *Albany* the Court cautioned that the submissional side-wind issue *“must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing in the context of a 30 year region-wide plan, via the submission process”*.¹²
31. The Court in *Tussock Hills* found that because the submissions, summary of submissions (and appeal) were clear that the submitter sought a new zone for the property in question that there was fair notice to the public of the issues raised by the submitter and even if that were not the case there are options available to remedy that unfairness.
32. Overall the Court took a broader approach taking into account the scale and context of the Council’s staged review process and the particular plan change together with the fact that the land was next to one of the newly proposed residential zones. The Court held that the submission was within scope.
33. So putting these principles and refinements into the context of PC21. It is clear that PC21 is part of a district plan review process under Section 79 of the RMA (i.e. a review of all provisions of the plan but undertaken in stages). So PC21 must be considered in that light. PC21 itself is very broad in terms of scale essentially dealing with the entirety of the District’s urban zones.

¹⁰ Tussock para [78]

¹¹ Ibid para [79]

¹² Albany para [133]

34. In my submission PC21 is clearly more akin to the circumstances of *Albany/Tussock* than *Clearwater/ Motor Machinist* so in terms of what is “on” the plan change is broader and more flexible than the more strict *Clearwater/ Motor Machinist* principles.

TL AND GL SUBMISSIONS

35. Two of TL and GL submission points have been identified by the section s42A report as being purportedly out of scope. One seeks a small area of rezoning to the Medium Density Residential zone it adjoins (**proposed MRZ rezoning**) and currently zoned Passive Recreation and the other seeks rezoning to the Mixed Use zone together with two specific control area overlays (**proposed MUZ rezoning**) currently zoned Special Travellers Accommodation zone. The details of the requests are provided in Kim Bank’s brief of evidence.
36. Both pieces of land:
- (a) are within the urban area of Tekapo; and
 - (b) seek a new zone that is part of PC21;
 - (c) are identified in the Council’s spatial plan for Tekapo as being in the new zones requested.
37. The proposed MZR rezoning land is a very small extension to the proposed new MZR.
38. The proposed MUZ rezoning land is adjacent to land rezoned as part of PC21 and is importantly part of a much larger site operated by the submitters (and part of PC21) who wish to develop the land over time in an integrated and efficient manner.
39. The Council’s website does not identify either piece of land’s zoning to be part of the final Stage 3 plan change. And even if it did, it is possible that at Stage 3 seeking rezonings for zones that were part of Stage 2 could be out of scope (this in fact was an issue that arose in the recent Queenstown Lake staged review). More importantly there is also a real risk that my clients may miss the boat in terms of the allocation of additional residential and/ or mixed use zoned land because of earlier decisions made at Stage 2 (as identified in the *Tussock* decision).

40. In my submission it simply makes more sense in the context of a district plan review process that the most appropriate time to make a submission seeking a particular zoning is when the zone in question is being reviewed, not when the land itself is being reviewed (noting that this was the approach taken in Queenstown Lakes).
41. Given the above matters and given the broad scale and context of PC21, both submission points are clearly within the scope of PC21 and any lack of Section 32 assessment is not a jurisdictional bar to the requests in the particular circumstances of PC21.
42. Further in my submission it cannot be reasonably said that potentially affected persons may not have been live to the fact that the changes were sought and may have missed the opportunity to be heard on either or both of the submission points.
43. As discussed above and in the evidence of Ms Banks the Tekapo Spatial Plan was developed in consultation with the community and the two areas were included in the Council's Spatial Plan for Tekapo. In addition the submissions were correctly summarised by the Council with express reference to the Tekapo Spatial Plan.
44. Therefore in these circumstances it could not reasonably be said that that each submission point amounts to a *submissional side-wind* or "*out of left-field*" and therefore unfair to would-be submitters. There was in fact "*fair notice*" to the public of my clients' submissions.
45. So, as a matter of law, the submission points are within the scope of PC21 and can be considered by the Hearings Panel.
46. Finally, if despite these legal submissions you consider that the submission points are not within scope, then in my opinion the Panel should provide advice to the Council that it either needs to:
 - (a) ensure the Stage 3 Plan Change includes sufficient scope for all parties to request rezonings and to delay the decision on PC21 so that parties at Stage 3 are not disadvantaged by Stage 2 decisions (although noting this approach runs the risk having to relitigate zones and underlying provisions/ overlays which seems to me to be inefficient); or

- (b) undertake a variation to PC21 to deal with this issue.

Amanda Dewar

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6 March 2023