Before the Independent Hearing Panel
Appointed by the Mackenzie District Council

Under	The Resource Management Act 1991 (**RMA**)
In the matter of	proposed Plan Change 21 to the Mackenzie District Plan

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Legal submissions on behalf of Mackenzie District Council

15 February 2023

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May it please the Hearing Panel:

1 These legal submissions provide an outline of the law on whether a submission and further submission is within the scope of a plan change. These submissions do not comment on specific submissions or further submissions made in relation to proposed Plan Change 21 to the Mackenzie District Plan (**PC21**). The s42A report applies this law to submissions and recommends which are out of scope.

Submissions – the law on scope

2 Clause 6 of Schedule 1 of the RMA provides that once a proposed plan is publicly notified, submissions may be made "on" the plan the change:

> **6 Making of submissions under clause 5**
>
> (1) 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.
>
> …

3 The High Court established the test for determining whether a submission is "on" a plan change in *Clearwater Resort Limited v Christchurch City Council*,[1] which has been further developed in cases such as *Palmerston North City Council v Motor Machinists Limited*.[2] The recent Environment Court decision *Calcutta Farms Limited v Matamata-Piako District Council*[3] provides a helpful summary of the current legal principles as determined through these cases:

(a) *Clearwater Resort Limited* established a two-limb test for assessing scope as follows:

(i) A submission can only be regarded as being "on" a plan change (and in scope), if it addresses the extent to which the plan change changes the status quo[4]; and

(ii) If the outcome of accepting a submission as being "on" a plan change would be that a change is made without real opportunity

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[1] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

[2] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, [2014] NZRMA 519.

[3] *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187.

[4] At [57], referring to *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

> for those potentially affected by that change to participate, then that is powerful reason against finding the submission is "on" the plan change;[5]

(b) The first limb of the *Clearwater* test is considered a "*filter*" or the "*dominant consideration*", "*based on a direct connection between the submission and the degree of notified change proposed to the extant plan*".[6]

(c) If a submission can be regarded as coming out of "left field" it is likely out of scope[7];

(d) The purpose of the plan change is relevant; if the relief requested in a submission is outside the purpose of the variation, and other potential submitters who could have benefited from seeking the same relief would not have anticipated such a different purpose, then it is likely the submission is out of scope;[8]

(e) Whether the s32 report addresses, or ought to have addressed, the relief sought in a submission is indicative of whether it is in scope. The High Court in *Palmerston North City Council v Motor Machinists Limited* states that[9]:

> In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not, then the submission seeking a new management regime for that resource is unlikely to be "on" the plan change... Incidental or consequent extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform

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[5] Ibid.

[6] Above n2, at [80].

[7] Above n3, at [58], referring to *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

[8] Above n3, at [62], referring to *Option 5 Incorporated v Marlborough District Council & Bezar* HC Blenheim, Ronald Young J, 28/9/2009.

[9] Above n3, at [67], referring to *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, [2014] NZRMA 519 at [81].

affected persons of the comparative merits of that change.

(f) If a topic in a submission is not addressed in a s32 report, but it should have been and the omission was a potential error, the submission may be considered to be in scope.[10]

4 Taking into consideration the various approaches to assessing whether a submission is in scope, a submission on PC21 must:

(a) Address the extent to which the plan change changes the plan;

(b) Not be coming out of 'left field' or be unanticipated when considering the purpose of PC21;

(c) Reasonably be said to fall within the ambit of the change, with any incidental or consequent changes sought requiring no additional section 32 analysis; and

(d) Not carry a risk that people affected by PC21 (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

Further submissions

5 Clause 8 of Schedule 1 of the RMA identifies the parties that may make a further submission on a plan change:

> **8 Certain persons may make further submissions**
>
> (1) The following persons may make a further submission, in the prescribed form, on a proposed policy statement or plan to the relevant local authority:
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> > (a) any person representing a relevant aspect of the public interest; and
> >
> > (b) any person that has an interest in the proposed policy statement or plan greater than the interest that the general public has; and
> >
> > (c) the local authority itself.
>
> …

[10] Above n3, at [68], referring to *Bluehaven Management Limited & Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191, Environment Court, 30/9/2016, Judge JA Smith and Judge DA Kirkpatrick.

> A further submission given under subclause (1) or (1A) must be limited to a matter in support of or in opposition to the relevant submission made under clause 6 or 6A.

6 The High Court in *Palmerston North City Council v Motor Machinists Ltd*[11] considered clause 8(2) to capture people directly affected by submissions. In relation to applications under s274 RMA, the same phrase has been held to identify people who have some advantage or disadvantage in relation to the submission, such as a right in property directly affected, that is not remote from the relief sought.[12]

Outcome if submission is out of scope

7 If a submission or part of submission is found to be out of scope, the Hearing Panel may either:

(a) Strike out the submission or part of it (because a submission that is not "on" a plan change is an abuse of process); or

(b) Decline to consider the submission or part of it.

8 It is submitted that in this circumstance where there are submission points, and not always whole submissions considered out of scope, the best approach is for the Panel to decline to consider a submission or part of it that is out of scope and beyond the Panel's jurisdiction to allow (as opposed to striking it out).

9 This approach avoids the procedural burden of a strike out process (and rights of objection under section 357), and retains the ability for a submitter to appeal the decision, including arguing there is scope by way of an appeal on the decision on the plan change.

10 In the event the Hearing Panel elects to instead strike out submissions, the procedure is as follows:

(a) Section 41D of the RMA provides for the striking out of a submission or part of a submission by an authority (including a Hearings Panel appointed by a local authority pursuant to section 34A of the RMA), conducting a hearing on a plan change. All or part of a submission may be struck out if:

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[11] [2013] NZHC 1290

[12] *Genera Ltd v Bay of Plenty Regional Council*, [2018] NZEnvC 171

(i) it is frivolous or vexatious;

(ii) it discloses no reasonable or relevant case;

(iii) it would be an abuse of the hearing process to allow the submission or the part to be taken further;

(iv) it is supported only by evidence that, though purporting to be independent expert evidence, has been prepared by a person who is not independent or who does not have sufficient specialised knowledge or skill to give expert evidence on the matter; or

(v) it contains offensive language.

(b) A decision to strike out a submission may be made before, at, or after the hearing, and the reasons for the direction must be given; and

(c) The submitter has a right of objection under s 357 RMA.

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