IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF Waikato IPIs – Hamilton CC PC12.

RESOURCE MANAGEMENT ACT 1991

DIRECTION #11

INDEPENDENT HEARING PANEL

Purpose: The purpose of Direction #11 is to provide direction on scope and submission requests for rezoning.

Introduction

1. A number of submitters had sought rezoning in their submissions. Hamilton City Council (Council) had identified them as being potentially out of scope. Those submissions were:

    - Waikato Racing Club Incorporated (WRCI);
    - Station Corner Limited (Station Corner);
    - Pragma Property Group Limited (Pragma);
    - Te Awa Lakes JV/Perry Group/Horotiu Farms Limited (TAL/HF);
    - Metlifecare Limited;
    - D & B Yzendoorn; and
    - SJ & ZG Yzendoorn.

2. The Panel's direction #9 provided a timetable for the filing of legal submissions by which time the following had responded:

    - WRCI dated 6 April 2023;
    - Pragma dated 6 April 2023;
    - TAL/HF dated 6 April 2023; and
    - D & B Yzendoorn dated 17 March 2023.

3. In its 4 May 2023 legal submissions for Council, the Panel was advised that a scope determination was no longer sought on SJ & ZG Yzendoorn's submission as that and other similar heritage submissions would be addressed at hearing.

4. On 10 May 2023, reply submissions were filed by Pragma, TAL/HF and D & B Yzendoorn.

First Principles

5. For the record we note that there was general agreement that the relevant and leading case authorities on scope are those short-handed as *Clearwater* and *Motor Machinists Ltd*.[1]

6. TAL/HF also submitted that the Environment Court decisions of *Sloan*[2] and

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1 *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003; and *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

2 *Sloan v Christchurch City Council* [2008] NZRMA 556 (EC).

Bluehaven,[3] and the High Court decisions of *Power* and *General Distributors*, were relevant authorities which, while applying *Clearwater*:

(a) cautioned against taking an unduly narrow approach to scope;

(b) indicated that scope was a question of fact and degree to be decided in each case in a realistic, robust and pragmatic way.[4]

7. We accept that questions of scope must be determined by applying these principles to the particular circumstances before us.

Council

8. In summary, counsel for Council submitted that:

(a) PC12 is narrowly focussed on changes to the existing residential zones and activity provisions with limited consequential changes to other parts of the ODP.

(b) PC12 included no material rezonings from non-residential to residential (or vice versa) or rezonings within urban non-residential zones.[5]

(c) Section 77G(4) provides a discretion to Council, not submitters, with respect to creating new residential zones – and it elected not to do so and that therefore closes the door both to submitters and, by extension, the Panel.

(d) The merits of the rezoning requests are irrelevant to the determination of scope.

(e) The Panel was not able to defer its decision on scope to the substantive hearing, as there was no scope to consider the merits of the requests, and to do so would lead it into an error of law.

The Parties

9. Counsel for WRCI, Pragma, TAL/HF and Yzendoorn (the Parties) disagreed.

10. In summary, counsel for the Parties submitted that s.77G is not a bar to submissions seeking a rezoning to residential (or from another existing zone to a non-residential zone)[6] in the interest of making better provision for MDRS. We note that none of the submissions relate directly to NPSUD policy 3 inasmuch as that relates to height and density rather than activity.

Changes sought

11. The following zone changes are sought:

(a) Metlifecare – Major Facility Zone (MFZ) to MDRZ;

(b) Pragma – Open Space Zone (OSZ) to General Residential Zone (GRZ);

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3 *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191,

4 *Sloan v Christchurch City Council* [2008] NZRMA 556 (EC), at [30]; *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191, at [36]-[39] and [55]; and *General Distributors Limited v Waipā District Council* (2008) 15 ELRNZ 59 (HC), at [56].

5 There were two very narrow exceptions noted at para 16 of the Council submissions, being (1) A small strip of industrial zoned land at Quentin Drive which is subject to a 'Special Housing Area' notation and consented for residential use; and (2) Renaming the Special Character Zones, which are already residential in nature, to Residential Zones.

6 Refer next section for a summary of the changes sought.

Residential Intensification Zone to Business 5 Zone (Suburban Centre);

(c) Station Corner: Base - Business 3 Zone (sub-regional centre) to Metropolitan Centre Zone (MCZ); GRZ within 800m walkable to MDRZ;

(d) TAL/HF – HEN: MFZ to MDRS; HES: Deferred Industrial Zone to MFZ;

(e) WRCI - MFZ to MDRZ;

(f) Yzendoorn – Natural Open Space Zone to GRZ.

12. The only submission accepted by Council as being "on" PC12 is the second part of Station Corner's submission seeking MDRS from GRZ within an 800m walkable catchment.

Discussion

13. We start our discussion by reminding ourselves that:

(a) s.80G(1)(b) prohibits a specified territorial authority from using the IPI for any purpose other than the uses specified in s.80E – being the implementation of the MDRS and any supportive or consequential related provision.

(b) MDRS Schedule 3A clause 6 requires and confirms that Objective 2 (variety of housing types and sizes) applies to a *relevant residential zone*; and Policy 2 requires the MDRS' application across all *relevant residential zones* (except if a qualifying matter applies).

(c) A *relevant residential zone* means all residential zones with the exception of those identified in s.2 RMA (large lot residential zone being one such exclusion).

(d) Section 2 RMA defines *residential zone* as those listed / described in National Planning Standard 8. That Standard identifies four residential zones:

(i) Low density residential zone
(ii) General residential zone
(iii) Medium density residential zone
(iv) High density residential zone

(e) S.77G requires a specified territorial authority to give effect to policy 3 or policy 5 of the NPSUD in every residential zone in an urban environment and enables a specified territorial authority to create new residential zones or amend existing residential zones.

(f) S.77N requires that each urban non-residential zone within the authority's urban environment gives effect to the changes required by policy 3 or policy 5 and enables a specified territorial authority to create new urban non-residential zones or amend existing urban non-residential zones.

(g) Clause 99 of Part 6 Schedule 1 provides that IHP recommendations must relate to a matter identified during the hearing but are not limited to being within the scope of submissions made.

14. We find little in the above to suggest that rezoning from non-residential to residential is contemplated (or *vice versa*). We do however accept that, for example, upzoning from a general residential zone to a medium density residential zone (to apply the NPSUD

policy 3 height and density provisions) or downzoning from a general residential zone to a large lot residential zone could be contemplated. These being changes *between* residential zones – and that a similar up or down zoning could be requested within urban non-residential zones. We also accept that these types of changes could be sought regardless of whether Council's notified plan change and associated s.32 evaluation dealt with that prospect.

15. With respect to the IHP's cl.99 recommendation power, we have received contrary legal submissions both at the initial strategic hearing and in the particular submissions noted above. Those submissions are to the effect that either cl.99 remains subject to *Clearwater's* first limb and the matter must be "on" PC12, or, in the alternate, that cl.99 enables a more relaxed application of *Clearwater's* first limb and accords with the intention of the "enabling housing supply" policy.

16. Having considered the options the panel prefers the first interpretation – that is, that a matter arising must still conform to *Clearwater's* first limb test and be "on" PC12. Had the legislation intended to enable a wider *carte blanche* approach then it could have stated that more plainly. We interpret cl.99 as providing a pragmatic power such that relatively programmatic consequential changes to PC12 can be recommended by the Panel without the need for a submission to support the change.

17. We find that this narrower interpretation also accords with the direction implicit in the *Waikanae* decision. As the Environment Court in that case noted:[7]

> *[23] As wide as territorial authorities' powers may seem to be in undertaking the IPI process it is apparent that they are not open ended. They are confined to the matters identified in a number of relevant provisions….*
>
> *[31] … the purpose of the IPI process inserted into RMA by the EHAA was to impose on Residential zoned land more permissive standards for permitted activities addressing the nine matters identified in the definition section and Schedule 3A.*

Determination

18. As noted, PC12 made no material rezonings from non-residential to residential (or vice versa) or rezonings within urban non-residential zones. We understand that this is because the housing supply enabled by the incorporation of the MDRS into existing residential zones are, in Council's view, more than sufficient for the realistic long-term (30+ year) capacity projections.

19. Having carefully considered the submissions made, the cases on scope and the relevant RMA provisions noted above, we prefer Council's reading on scope. We therefore find that the submissions listed in paragraph 11 (with the exception noted in paragraph 12) fails the first limb of *Clearwater* and fall outside the ambit of the plan change.

20. We also consider that submissions seeking rezoning of non-residential zones to MDRS, non-residential zones to major facilities zones, and residential to business zones fails the second limb of *Clearwater*. It was not reasonably foreseeable that such submissions would be made on the IPI, given its focus is on the incorporation of MDRS in relevant residential zones, and therefore prospective submitters have not

[7] *Waikanae Land Company v Heritage New Zealand* [2023] NZEnvC 056.

had a reasonable opportunity to have their say.

Directions:

21. The Panel makes the following directions:

    [1] The submissions made and relief sought by:

    - Metlifecare;
    - Pragma;
    - TAL/HF;
    - WRCI; and
    - Yzendoorn

    as noted in paragraph 11 above are not in scope of PC12 and are struck out under s.41D(1)(b) RMA.

    [2] The submission made and relief sought by Station Corner relating to rezoning the Base from Business 3 Zone (sub-regional centre) to Metropolitan Centre Zone (MCZ) is not in scope of PC12 and is struck out under s.41D(1)(b) RMA.

    [3] The submission made and relief sought by Station Corner relating to rezoning the General Residential Zone land around the Base within an 800m walkable catchment to MDRZ is in scope.

22. We note that cl.98(2) Part 6, Schedule 1 RMA provides a right of objection to the IHP.

23. Any queries or correspondence related to this Direction should be sent through to the Hearing Coordinator, Steve Rice at steve@riceres.co.nz .

David Hill (Chairperson)
Independent Hearing Panel

23 May 2023