

**BEFORE THE INDEPENDENT HEARING PANEL ON WAIKATO INTENSIFICATION
PLANNING INSTRUMENTS**

IN THE MATTER of the Resource management Act 1991 (the Act)

AND

IN THE MATTER of proposed Plan Change 12 to the Hamilton City District
Plan

Legal submissions on behalf of Pragma Property Group Limited in response to
Direction #9 regarding issue of scope of submission seeking rezoning of site on
Rifle Range Road
(SUB #219.1)
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MAY IT PLEASE THE INDEPENDENT HEARING PANEL

INTRODUCTION

1. These submissions are made on behalf of Pragma Property Group Limited (“Pragma”) in response to the Independent Hearing Panel’s Minute #9 dated 3 March 2023.
2. Section 2, paragraph 7 of Minute #9 directs submissions on behalf of Pragma, in support of its relief being within scope, to be lodged with the hearing coordinator by 5pm on 6 April 2023. The following sets out the response on behalf of Pragma.
3. As the Hearing Panel will be aware, by law a submission made under clause 6(1) of Schedule 1 to the Resource Management Act 1991 (“RMA”) must be “on” the proposed plan¹, in this case proposed Plan Change 12 to the operative Hamilton City District Plan (“PC12”).

SUBMISSION BY PRAGMA

4. The submission by Pragma seeks the re-zoning of the land owned by Pragma at 51A Rifle Range Road, Hamilton (“Site”) to “General Residential Zone”. The Site is adjacent to an existing general residential zone. It is subject to a resource consent for development of residential housing which is under construction. The current zoning is “open space zone”. It is an anomalous zoning, given the consented development for the Site and its location in relation to the residential zones of Frankton.
5. Rezoning of the Site to residential will give effect to the NPS-UD by supporting the urbanisation and intensification of a site which has high accessibility to open space, schools, commercial centres and is well

¹ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, Kós J, at [1].

served by public transport. The Site is well suited to delivering the wider outcome of well-functioning urban environments and suitable for enabling intensification. It delivers the requirements for areas to be intensified under Objective 3 and Policy 3 of the National Policy Statement on Urban Development (2021). The proposed re-zoning of the Site will allow intensified residential use on a site which has high accessibility to public transport, the central business district, and other employment opportunities.

PURPOSE AND AMBIT OF PLAN CHANGE 12

6. The statutory directive for implementing MDRS and the NPS-UD (Policy 3); together with the related duties and functions of territorial authorities provide context in determining the issue of scope.² As the Hearing Panel knows, this is intended to urgently accelerate the supply of housing in urban areas where demand for housing is high. Addressing housing choice and affordability are key factors. Furthermore, the incorporation of the MDRS must be considered when giving effect to the higher order NPS-UD 2020 (May 2022). The objectives of the NPS-UD include:

Objective 2: 'improve housing affordability by supporting competitive land and development markets'.

Objective 6 (c): to be 'responsive, particularly in relation to proposals that would supply significant development capacity'.

7. The purpose of PC12 is described in the section 32 evaluation and is summarised as follows:

1.1 Purpose of PC12

The primary purpose of PC12 is to implement the changes required by the NPS-UD and HSAA. These changes are intended to rapidly accelerate the supply of housing by enabling greater housing intensification in the district plan.

1.2 Summary of Key Changes Proposed in PC12

The following is a high-level summary of the key changes proposed to the district plan under Plan Change 12 (PC12).

² The Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021.

Section 6 of this report includes a more specific outline, and the full provisions are in the E-Plan. The requirements of the HSAA and NPS-UD are met through proposed changes to the district plan, including:

Residential zones / density changes:

1. Unlimited residential heights in the Central City
2. New residential zone framework of high, medium and low-density zones
3. High Density (up to 6 stories) within walking distance of the Central City
4. Medium Density (up to 5 stories) within walking distance of the Sub-regional Centre Zones at Chartwell and the Suburban Centres Zones at Thomas Road, Lynden Court, Five Cross Roads, Clyde Street East, Hamilton East, Glenview, Frankton and Dinsdale.
5. MDRS applies to the General Residential Zone throughout those areas, not high or medium density zones.
6. Changes to subdivision provisions to align with new residential provisions and qualifying matters requirements

Qualifying matters

1. Retention of existing qualifying matters
2. Introduction of Infrastructure Capacity Overlay to give effect to Te Ture Whaimana as a qualifying matter
3. Introduction of Built Heritage and Historic Heritage Area provisions to give effect to historic heritage (Section 6(f) of the RMA) as a qualifying matter
4. Inclusion of Significant Natural Areas to give effect to significant natural areas (Section 6(c) of the RMA) as a qualifying matter
5. Inclusion of archaeological sites to give effect to the relationship of Maaori with archaeological sites (Section 6(e) of the RMA) as a qualifying matter

Eco-density

1. Permeable surfaces and landscaping requirements in all residential zones
2. Requirement for rainwater re-use tanks,
3. Additional stormwater management (such as soakage) and,
4. Higher water efficiency fixtures for most developments.

Transport Mode shift

1. Requirements for cycle and micro-mobility parking, end-of-journey facilities and making driveways safer for all.
2. Updated requirements for new roads to be wider to accommodate landscaping, stormwater devices, separated cycle facilities, public transport, or wider footpaths and parking spaces.
3. Requirements for recharging electric vehicles at every new parking space at home and for travel plans to be implemented for large developments to prioritise alternatives to the car.

Other related changes

1. Introducing financial contributions
2. Removing ultra vires concept development plan consents
3. Taller heights in some business zones to meet the MDRS or 6-storey requirements of NPS-UD policy 3

8. The proposed changes are wide ranging, comprehensive, and impact many of the chapters of the Hamilton City Operative District Plan

(“District Plan”). Indeed, the architecture of the District Plan will be fundamentally changed through PC12. In that regard, this is not a narrowly focused or confined plan change. It is more akin to a full plan review, particularly in the context of a Tier 1 urban authority with residential zoning its dominant zone.

CASE LAW PRINCIPLES ON SCOPE

9. The question of whether a submission is “on” a plan change has been the subject of several Court decisions.³ The leading High Court authority is *Palmerston North City Council v Motor Machinists Limited*⁴ which endorsed the two staged approach in *Clearwater v Christchurch City Council*.⁵ In short, the two staged test requires an assessment of:

- (a) whether the submission addresses the change to the status quo advanced by the plan change; and second,
- (b) whether there is a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process.⁶

10. The first and substantive limb of the test is the “dominant” consideration⁷ and acts as a “filter based on direct connection between the submission and the degree of notified change proposed to the extant plan.”⁸ Kós, J described this in the following terms:

³ For example: *Clearwater Resort Ltd and Canterbury International Golf Ltd v ChCh City Council* [HC CHCH AP32/04 [14 March 2003]; *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290 [31 May 2013]; *Well Smart Investment Holding (NZQN) Limited (formerly Reid Investment Trust) & Ors v Queenstown Lakes District Council* [2015] NZEnvC 214; *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191; *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187; *Meridian Energy Limited & Ors v Mackenzie District Council* [2022] NZEnvC 105.

⁴ [2013] NZHC 1290.

⁵ [HC CHCH AP32/04 [14 March 2003].

⁶ *Motor Machinists*, at [91].

⁷ *Motor Machinists*, at [80].

⁸ *Motor Machinists*, at [80].

It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.⁹

11. This was further expanded by Kós, J as follows:

[81] 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 a submission seeking a new management regime for that resource is unlikely to be “on” the plan change.

[Emphasis added.]

12. However, the High Court went on the state that, if the answer to the above questions was no, this does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change.¹⁰
13. Much will depend on the nature of the plan change which can assist to determine its scope and what the purpose of it is.¹¹ Each case must be determined on its own facts, and there is no clear line: whether there is jurisdiction is a matter of fact and degree.¹²
14. In that regard, the nature of PC12 sets it apart from other plan changes and the “standard” schedule 1 process. It is subject to its own specific hearing and decision-making process. In my submission, the nature scope of PC12 is broad and in the context of the MDRS directives of the RMA, does not preclude additional areas of residential zoning which may go beyond “incidental or consequential” (albeit that the rezoning of Site is

⁹ *Motor Machinists*, at [80].

¹⁰ *Motor Machinists*, at [81].

¹¹ *Calcutta Farms Limited v Matamata-Piako District Council*, at [87].

¹² *Well Smart Investment Holding (NZQN) Limited (formerly Reid Investment Trust) & Ors v Queenstown Lakes District Council* [2015] NZEnvC 214.

“incidental or consequential” given the size and scale of the land area in the context of PC12).

15. The potential for the creation of new residential zones or amendments to existing residential zones is evident in section 77G of the RMA. This sets out the duties of specified territorial authorities to incorporate MDRS and give effect to policy 3 or 5 of the NPS-UD (as amended in 2022) in residential (and non-urban) zones. Section 77G(4) provides that:

(4) In carrying out its functions under this section, a specified territorial authority **may create new residential zones** or amend existing residential zones.

[Emphasis added.]

16. A territorial authority must use the “Intensification Planning Process” to change its district plan to incorporate the MDRS and give effect to policy 3 or policy 5 of the NPS-UD. Policy 3 applies to Hamilton City. Relevantly, Policy 3 provides:

Policy 3: In relation to tier 1 urban environments, regional policy statements and district plans enable: in city centre zones, building heights and density of urban form to realise as much development capacity as possible, to maximise benefits of intensification; and in metropolitan centre zones, building heights and density of urban form to reflect demand for housing and business use in those locations, and in all cases building heights of at least 6 storeys; and building heights of at least 6 storeys within at least a walkable catchment of the following:

- (i) existing and planned rapid transit stops
- (ii) the edge of city centre zones
- (iii) the edge of metropolitan centre zones; and within and adjacent to neighbourhood centre zones, local centre zones, and town centre zones (or equivalent), building heights and densities of urban form commensurate with the level of commercial activity and community services.

17. While section 77G(4) provides that a specified territorial authority may create a new residential zone, this does not preclude a submission on an IPI plan change from seeking a new residential zone. Indeed, a submission which seeks a new residential zone which in turn assists a

territorial authority to carry out its functions under the RMA must fall within the scope of such a plan change.

18. Moreover, considering the purpose of the MDRS provisions and the comprehensive nature of PC12, it should be anticipated, if not expected, that submissions would be made to add new residentially zoned land. If it were intended that a submission could not seek additional residential zones, this would have been expressly stated in the amendments to the RMA. This is further supported by the specific section 32 requirements for the ISPP process.

FIRST LIMB

Does the Pragma submission address the extent to which PC12 changes the pre-existing status-quo?

19. Yes. Given the context of the MDRS and the purpose of PC12, the submission by Pragma falls within the ambit of the plan change. The Pragma submission seeks to re-zone a small area of land, which is subject to the implementation of an existing resource consent for residential development. The proposed re-zoning will regularise the underlying zoning and implement the MDRS and Policy 3 of the NPS-UD. The land in question is adjacent to an existing residential zone. It is a logical extension of that existing residential zone.
20. While the s32 evaluation for PC12 did not expressly refer to the Site as an option for inclusion in the IPI as a new residential zone, in my submission that should not be determinative of the question of whether the Pragma submission is “on” PC12 when considering the scope and purpose of PC12. Indeed, the section 32 evaluation should have considered the Site, given the existing resource consent for residential development, given

that it is subject to a resource consent for residential development which has been implemented.¹³

21. As explained above, the MDRS and IPI processes can be distinguished from the “standard” plan change process. That is, the “ambit” of an IPI or ISPP process is broader than that of any other plan change under the RMA. It follows that a submission seeking the re-zoning of land to a relevant residential zone should be considered in the context of the MDRS purpose and the duties and functions of territorial authorities in relation to the same.
22. The relief sought will assist HCC to fulfil its duties pursuant to section 77G of the RMA. Accordingly, the Pragma submission cannot be considered as coming from “out of left field” in respect of the PC12 process and is within the ambit of PC12. It would not require a significant re-write of the section 32 evaluation as the proposed “re-zoning” would be an extension of the mapped boundary for an existing residential zone and the site is already subject to a resource consent which is being implemented.

SECOND LIMB

Does the submission permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected?

23. No. Anyone who read the publicly available information on PC12 would be clearly “on notice” of the prospect that a submitter would lodge a submission seeking the re-zoning of land to a relevant residential zone. The proposed rezoning of the Site cannot be said to “come from left field” as described in *Clearwater*¹⁴, given the location of the Site (adjacent to

¹³ *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191.

¹⁴ *Clearwater*, at [69]: “[...] In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of “left field”, there may be little or no real scope of public participation”.

existing residential zones), alongside the fact that a resource consent for residential housing has been implemented (i.e., is under construction).

24. It follows that there is negligible risk that a potentially affected person would be denied reasonable opportunity for participation in the PC12 process. The reasonable interests of potentially affected persons would not be overridden by a “submissional side-wind”¹⁵.

CONCLUSION

25. The Pragma submission to re-zone 51A Rifle Range Road to general residential zone is “on” PC12 and therefore within the scope of P12. As explained above, the comprehensive and broad nature and purpose of PC12 supports the proposition that the MDRS and IPI process distinguishes this plan change from other changes to a district plan.
26. Considered in the context of the case law principles on scope, bearing in mind the consented development for the Site, the Pragma submission is within the scope of PC12. Accordingly, the IHP has jurisdiction to allow the relief sought by Pragma.



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¹⁵ *Motor Machinists* at [82].