

**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 the Waikato Racing Club Incorporated in
response to Direction #9 regarding issue of scope of submission seeking
rezoning (proposed Plan Change 12)
Dated: 6th of April 2023

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MAY IT PLEASE THE INDEPENDENT HEARING PANEL

INTRODUCTION

1. These submissions are made on behalf of the Waikato Racing Club Incorporated (“WRCI”) 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 the WRCI, 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 the WRCI.
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 THE WRCI

4. The submission by the WRCI seeks amendments to the following provisions of PC12:
 - (a) Objectives, policies, rules, and methods relating to Chapter 4 residential zone;
 - (b) Objectives, policies, rules, and methods relating to Chapter 23 subdivision;
 - (c) Planning Maps;
 - (d) Financial contribution chapter 24 and Appendix 18;
 - (e) Assessment criteria;
 - (f) City wide provisions (chapter 25), including 3-waters and transportation; and

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

(g) Consequential amendments to others.

5. The relief sought in relation to the relevant Maps and amendments seeking reference to the Te Rapa Racecourse Precinct in chapters 4 and 23, are specifically relevant to the issue of scope.
6. As explained in the submission lodged on behalf of the WRCI, the WRCI has recently lodged a request for a private plan change to re-zone part of the Te Rapa Racecourse site from Major Facilities Zone to Medium Density Residential Zone (“PPC13”). This incorporates the MDRS standards as part of the proposed Te Rapa Racecourse Medium Density Precinct.
7. Against that background, the purpose of the submission lodged on behalf of the WRCI was not directed at achieving a site-specific zone change from Major Facilities Zone to Medium Density Residential Zone through PC12 as that purpose is achieved through PPC13.
8. At this stage, it is anticipated that the decisions on PPC13 will be made prior to the commencement of the substantive hearing for PC12. The PPC13 hearing is expected to be in early July 2023. Nevertheless, if PPC13 is confirmed, the “Te Rapa Racecourse Medium Density Precinct” including the MDRS, and the zone change of the site to Medium Density Residential zone may not be operative at the time of the PC12 hearing. It follows that the IHP may need to consider PPC13 when making their decisions on PC12 given that the two processes overlap.

Integration of PPC13 and PC12

9. PPC13 seeks a change to the operative Hamilton District Plan. Similarly, PC12 changes the operative Hamilton District Plan. The changes proposed under PC12 are wide ranging such that the architecture of the

district plan will be significantly amended, including Chapter 4 Residential Zones which is also proposed to be amended by PPC13.

10. As such, there is some degree of uncertainty regarding the integration of the changes proposed by PPC13 with the changes proposed under PC12, and the decisions to be made on PC12. Whether this will be a straightforward editorial or administrative process to achieve this integration when decisions are made on PC12 is not obvious at this point in the process. That is because there are examples where this may not be the case. For example:
 - (a) PPC13 inserts the MDRS Objectives and Policies into Chapter 4.2 Objectives and Policies: Residential Zones of the District Plan. However, PC12 proposes to delete Chapter 4.2 and include the MDRS Objectives and Policies in a new Chapter 4.1 Residential Zones. The MDRS Objectives and Policies in PC12 are also slightly reworded.
 - (b) PC12 introduces a new Chapter 4.3 Medium Density Residential Zone. In the District Plan Chapter 4 Residential Zones included objectives and policies for the site-specific Medium Density Residential zones such as Te Awa Lakes and Ruakura, therefore PPC13 objectives and policies were inserted there. Under PC12 the logical place for them is in Chapter 4.3.
 - (c) In PC12 Chapter 4.3 includes provisions relating to Te Awa Lakes, Riuakura and Peacocke precincts; Te Rapa Racecourse precinct will need to be inserted in this section.
 - (d) Site specific development rules for the Te Rapa Racecourse precinct will need to be added after 4.3.4.19 Development Rules in Te Awa Lakes Residential Precinct.

11. Against that background, the key purpose of the WRCl submission on PC12 was to address this uncertainty by providing a mechanism through which the IHP could make amendments to PC12 in its decisions to align the final text of PC12 with the decisions on PPC13.
12. If those amendments are not made through PC12 or an administrative amendment within the statutory framework of Schedule 1 to the RMA, a separate variation may be required to implement them. That is an unnecessary duplication of time and cost when the same outcomes can be achieved through amendments to PC12.

PURPOSE AND AMBIT OF PLAN CHANGE 12

13. 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'.

14. 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.

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

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).

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

15. 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

16. 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
17. The first and substantive limb of the test is the “dominant” consideration⁷ and acts as a “filter based on direct connection between the submission

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].

and the degree of notified change proposed to the extant plan.”⁸ Kós, J described this in the following terms:

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

18. 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.]

19. However, the High Court went on the state that, if the answer to the above questions was no, this does not exclude altogether extended zoning of land 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

20. 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

21. 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 and scope of PC12 is broad and in the context of the MDRS directives of the

⁸ *Motor Machinists*, at [80].

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.

RMA, does not preclude additional areas of residential zoning which may go beyond “incidental or consequential”.

22. The merits of the rezoning of the PPC13 site will not need to be revisited through the hearing of PC12. However, PPC13 will consequentially require a series of amendments to the text of PC12, which may not simply be an administrative exercise.
23. 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.]

24. 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.

25. 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.
26. 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 WRCI submission address the extent to which PC12 changes the pre-Existing status-quo?

27. Yes. Given the context of the MDRS and the purpose of PC12, and the subsequent decision which is to be made on PPC13, the submission by the WRCI falls within the ambit of the plan change. The WRCI submission effectively seeks to reflect the rezoning decision which is expected to have been made on PPC13 by the time of the PC12 hearing to enable that land to be developed in a manner which implements the MDRS and Policy 3 of the NPS-UD. Furthermore, when considering the case law principles on scope, the land in question is adjacent to an existing residential zone in Forest Lake and is adjacent to the boundary of the "City Centre North" Area Plan. It is a logical extension of that existing residential zone.
28. While the s32 evaluation for PC12 did not expressly refer to the TRRP or PPC13, in my submission that should not be determinative of the

question of whether the WRCl submission is “on” PC12 when considering the scope and purpose of PC12.¹³

29. 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.
30. The relief sought will assist HCC to fulfil its duties pursuant to section 77G of the RMA. Accordingly, the WRCl 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 amendments to the provisions sought in the submission are not fundamentally different to the MDRS provisions being implemented through PC12. Furthermore, the WRCl submission is aimed at integrating PC12 with the outcomes of PPC13, which is a narrow purpose without wide implications.

SECOND LIMB

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

31. 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. Indeed, the proposed changes to PC12 to reflect the rezoning of the TRRP land through PPC13 cannot be said to “come from left field” as described

¹³Indeed, the section 32 evaluation should have considered the TRRP site, given that HCC were aware of the timing of lodgement of PPC13 and the merits of the site, see: *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191.

in *Clearwater*¹⁴, given consultation occurred with neighbours of the TRRP prior to notification of PC12 regarding the proposed rezoning through PPC13; the location of the TRRP (adjacent to an existing residential zone); and the nature of PC12 *per se*. Any amendments made by the IHP will be consequential on the decision made on PPC13 so will not introduce any new or unforeseen issues.

32. 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

33. The purpose of the WRCl submission was to ensure that the IHP had scope to make consequential changes through its decision making on PC12 which are necessary to integrate the outcome of PPC13, lodged by the WRCl. By doing so, the submission has raised an issue as to whether the zone change sought through the submission is within the scope of PC12.
34. 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. Considered in the context of the case law principles on scope, the WRCl submission is within the scope of PC12. Accordingly, the IHP has jurisdiction to allow the relief sought by the WRCl should it be necessary to make amendments to PC12 for the purposes of integrating PPC13 with PC12.

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”.

¹⁵ *Motor Machinists* at [82].

35. HCC staff and advisors may consider this unnecessary and that any such changes may be made as administrative edits and/or promulgating a narrowly focussed Variation to PC12. However, a Variation would be unnecessary and inefficient. If integrating the plan changes by way of administrative edits is not appropriate or feasible, the submission will provide the ability for the IHP (or HCC) to make any necessary amendments to ensure integration of the two processes.

36. Given the unique nature of the situation with respect to the timing and content of PC12 and PPC13, the IHP may consider it appropriate to defer a decision on scope regarding the WRCI submission until such time as there is certainty as to the outcomes of the PPC13 hearing process.



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