BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of Proposed Plan Change 12 to the Operative Hamilton District Plan

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REPLY SUBMISSIONS ON SCOPE FOR TE AWA LAKES UNINCORPORATED JOINT VENTURE, PERRY GROUP, AND HOROTIU FARMS LIMITED

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MAY IT PLEASE THE PANEL

Introduction

1. These reply submissions respond to the legal submissions of Hamilton City Council dated 4 May 2023 in respect of rezoning within PC12, and are to be read in conjunction with TAL's opening legal submissions.

2. It is a matter of consensus that for a submission to be within scope, it must be "on" the plan change, in this case PC12. However, there is a difference of views around the approach to be taken in terms of case law. HCC's argues for a narrow approach, with its summary stating that for a submission to be within scope, it must be "in accordance with" the test in *Clearwater*,[1] and "must" meet the *Clearwater* tests.[2] HCC comments that the Panel stated at direction #10 that the Panel intends to apply the two-limb *Clearwater* test to questions of scope,[3] though other submitters have also pointed to the manner in which the IPI process can be distinguished from a "standard" plan change process,[4] and the Panel has emphasised the need for a "realistic workable approach".[5]

3. As will be made clear in these submissions, *Clearwater* is authority for this two-step test, but a number of later cases have explored the test in further detail. These submissions respond to HCC's narrow reading of *Clearwater* by drawing on the case law that has commented on *Clearwater* and has further considered the correct approach to scope, including that questions of scope must be answered in a robust, pragmatic, and realistic manner, with regard to context.

HCC's Approach to *Clearwater*

4. HCC proposes a strict approach to *Clearwater*, involving a two-step test. The first part of the test can be described as whether the submission addresses the extent to which the plan change or variation alters the pre-existing status quo.[6] HCC's approach is that PC12 is narrow in purpose, and that the management regime for non-residential land is unaltered,[7] particularly because (with limited exceptions), HCC has not exercised its discretion to rezone land to residential under PC12.[8] In HCC's view, allowing rezoning other than as notified by HCC was not intended by Parliament, and would result in an "unmanageable lottery" of zone change applications, creating a "rezoning wilderness".[9]

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[1] *Clearwater Resort Ltd v Christchurch City Council*, HC Christchurch AP34/02, 14 March 2003.
[2] Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 7-9.
[3] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 10.
[4] Opening legal submissions for Pragma Property Group, dated 6 April 2023. paragraph 21.
[5] Direction #11 of Hearing Panel for Waikato District Council Variation 3, paragraph 9.
[6] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 9.
[7] Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 12-13.
[8] Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 13-16.
[9] Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 17-18.

5. Notwithstanding this colourful language, HCC submissions are clearly wrong in fact and law. It is apparent that there are a very limited (and so manageable) number of submissions seeking rezoning, and TAL's submission sits within a very specific context of being sites adjacent to a sizeable portion of other residential land (and so not in any sort of wilderness). Further, it is clear that Parliament intended to enable the rezoning of sites to residential, per section 77G(4), and that this power extends to the Panel. There is no error of law in acknowledging a submission seeking rezoning to be within scope.

Section 32 Report

6. In response to HCC, and to the extent that *Motor Machinists* directs attention to the section 32 report,[10] it is worth noting that the relevant section 32 report describes PC12 as resulting in "significant change" to HCC ODP provisions, and involving a "large shift" in residential zone provisions, with impacts that "extend over the whole city" with long term effects.[11]

7. In assessing the degree of shift from the status quo, the section 32 report notes that the "degree of shift from the status quo/current approach is significant" in terms of current residential zones, with changes in respect of the general residential, and medium density residential zones, and a new high density residential zone, and that the changes "[do] not seek to protect the existing character of neighbourhoods".[12] A "large number of landowners" throughout the city are affected by the changes.[13]

8. As the section 32 report acknowledges, a significant rather than minor degree of change is introduced by PC12.

9. Given the extent of these changes, it is hardly surprising that certain specific submitters have sought a rezoning of certain specific sites to residential use, particularly where these are adjacent to other residential sites – especially given that, as HCC acknowledges, it has under PC12 altered existing residential zones, introduced new residential zones, and rezoned industrial land for residential purposes.[14] It has also taken steps to encourage use of business land for residential purposes.[15]

10. It is also worth noting that the appropriateness of various qualifying matters proposed by HCC has not yet been properly considered in this process. These qualifying matters restrict development for a range of reasons, and the legitimacy and scope of these in terms of the Amendment Act and

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[10] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, at [81], though see *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at 38-39.
[11] Section 32 report, Appendix 2.1, at 2.
[12] Section 32 report, Appendix 2.1, at 5.
[13] Section 32 report, Appendix 2.1, at 10.
[14] Section 32 report. Appendix 2.1, at 4-5; legal submissions of Hamilton City Council dated 4 May 2023, paragraph 16.
[15] As noted in legal submissions of Hamilton City Council dated 4 May 2023, paragraph 53.

Parliament's intentions, and the extent to which they will impact on "enabling housing" in Hamilton, have not yet been examined by the Panel. This is particularly important in the context of a brownfields site where the landowner will be providing much of its own infrastructure, and against the context of HCC's infrastructure capacity difficulties.[16]

Examining the *Clearwater* Test – First Limb

11. It was noted above that the first limb of *Clearwater* concerns whether the submission addresses the extent to which the plan change or variation alters the pre-existing status quo. It must be remembered that the Panel can make orders beyond the scope of submissions, per clause 99(2) of Schedule 1 of the RMA, as amended. Changes can be made without interested parties having an opportunity to submit. HCC takes the view that the *Clearwater* tests must still be met.[17] Regardless of views on this in light of clause 99(2), further consideration of *Clearwater* is essential, as it is clear that case law following *Clearwater* is broadly textured.

12. First, there is clear authority that the *Clearwater* test does not preclude zoning changes. *Motor Machinists* has acknowledged that the test still allows "incidental or consequential" extensions of zoning changes.[18] It is clear that the rezoning of part of HEN to residential is incidental to other zoning implications within HEN arising from PC12, and that the rezoning of HES is a consequential change.

13. It is also clear that any question of scope is a matter of fact and degree. As *Sloan v Christchurch City Council* noted, the tests in *Clearwater* are not the only relevant factors, and must be applied within their statutory context.[19] The Court in *Sloan* observed:[20]

> The purpose of clause 6 is to give anybody a right to make a submission on a variation (or plan change). **The idea behind making a submission is to change what the Council is promoting in its plan change or variation**. While a Council chooses the subject of a variation there may come a point where it is procedurally unfair and substantially inappropriate — because the Council's proposal may not accomplish the purpose of the Act — for a Council to try to limit the ambit of submissions. **Those are questions of fact and degree to be decided in each case in a robust and pragmatic way**.

14. Determining scope in a "robust and pragmatic way" requires an interrogation of the inconsistency in approach between Council's section 32 report – which rightly notes the significant scope and impacts of PC12 across the city – versus Council's legal submissions, which pitch PC12 as reflecting narrow changes to the status quo.[21] The former is clearly a more accurate description. Further,

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[16] As outlined in paragraph 10 of opening legal submissions.
[17] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 8.
[18] *Motor Machinists*, at [81].
[19] *Sloan v Christchurch City Council* [2008] NZRMA 556 at 30.
[20] *Sloan*, at [30], emphasis added.
[21] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 13.

the innate purpose of the Amendment Act in "enabling housing" is useful to applying a robust and pragmatic approach to what TAL is seeking.

15. Taking a similar approach to that in *Sloan*, the Court in *Power v Whakatane District Council* noted the importance of avoiding "an unduly narrow approach" to scope,[22] and in *General Distributors*, the Court noted that scope needs to deal with "the realities of the situation".[23] Comments such as these clarify that *Clearwater* is not to be read as restricting scope in a narrow or technical manner, but rather in a robust, pragmatic, and realistic way.

16. *Bluehaven Management* has expanded on this, reiterating that scope should not be considered in an unduly narrow way,[24] and noting that:[25]

> [We] might also ask, in the context of the first limb of the Clearwater test, whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change.

17. The relief sought by the submitter does not seek to alter the objects or intent of PC12. Following *Bluehaven*, the submission could be seen as providing an alternative method of achieving the objects of the Amendment Act, particularly given the context of the site and its proximity to other residential land, as outlined in earlier submissions. The vast majority of the Te Awa Lakes site within Hamilton City is now zoned for residential use, and zoning a further part for residential use is clearly incidental. The rezoning of HES is a consequential change to align with, rather than depart from, relevant objectives and policies applicable to Te Awa Lakes.

18. As *Sloan* noted, the idea of any submission is to seek something different from what the proposed plan change sets out. Case law commenting on *Clearwater* is plainly sets out that whether a submission is "on" a plan change is a question of fact and degree to be decided in each case in a robust and pragmatic way.

19. To draw a comparison to the present situation, while the Council in *Sloan* argued that the variation was simply "tweaking", the Court noted the wider changes to the status quo, including new objectives and changed zone functions. These points clearly resonate within the context of PC12, where HCC has acknowledged other changes in zoning, as well as changes to the status quo across the city landscape. Further, it can be noted that *Bluehaven Management* treated submissions as within scope where they challenged the proposed change "substantively" but not "radically".[26]

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[22] *Power v Whakatane District Council*, HC Tauranga, CIV-2008-470-456, 30 October 2009, Allan J, at [30].
[23] *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56].
[24] *Bluehaven Management*, at [36].
[25] *Bluehaven Management*, at [37].
[26] *Bluehaven Management*, at [55].

20. The approach taken to *Clearwater* in case law allows for breadth in considering questions of scope, and highlights the importance of avoiding being unduly narrow, with a realistic, robust, and pragmatic approach to be preferred. In this instance, it is clear that the zoning changes sought by TAL fall squarely within the intent, significance, and scope of PC12.

Examining the *Clearwater* Test – Second Limb

21. The second limb of *Clearwater* concerns the effect of regarding a submission as being "on" the plan change, if the planning instrument would be appreciably amended without real opportunity for participation.

22. To HCC, the rezoning of the site was not a foreseeable consequence of PC12.[27] The submitter disagrees. The section 32 report emphasises the significant changes that would occur across the city as a result of PC12. The scale and significance of PC12 as recorded in the section 32 report, and the broad media attention given to it, highlight that changes in the nature and intensity of various land uses are taking place across the city under PC12.

23. Further, HCC places considerable weight on the rezoning of Te Awa Lakes under PC2, with submissions from various parties including Affco and Fonterra.[28]

24. In reply, it is reiterated that following Plan Change 2, the vast majority of the Te Awa Lakes site within Hamilton City is now zoned for residential use. Across the road, a large part of phase 2 of Te Awa Lakes known as Horotiu West or "HW" is also zoned for residential use. As outlined in earlier submissions, these different phases (HEN, HES, and HW) form part of a single urban environment – the master-planned community called "Te Awa Lakes". As such, this is not a submission "out of left field".[29] It is entirely foreseeable that PC12, which concerns upzoning across significant parts of Hamilton, would be seen as an opportunity to rezone parts of the Te Awa Lakes site: the changes sought are at their essence incidental and consequential changes, and it is apparent that various other parties have sought site rezonings as well.[30]

25. It is also entirely foreseeable that parties who opposed rezoning of Te Awa Lakes to residential would now, in the wake of Plan Change 2, have come to accept that residential use will occur on the site and see no reason to submit further. Of course, Fonterra has chosen to submit on PC12, as it has on other IPIs. While HCC raises potential concerns about reverse sensitivity, these were extensively considered as part of Plan Change 2, and a minor extension

[27] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 56.
[28] Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 56.
[29] To borrow the wording of *Clearwater*, at [58].
[30] It can also be noted that it has been confirmed that a submission to have the medium density residential standards apply to Horotiu West is within scope: see direction #12 of the Hearing Panel for Waikato District Council Variation 3.

of residential use within HEN cannot be seen to raise new issues of the kind that HCC seems concerned about.

26. In light of the existing nature and permitted use of the site, no party has lost a substantive opportunity to be heard, and the second limb of the test in *Clearwater* has not been met.

Conclusion

27. While the two-limb test in *Clearwater* must be considered, it is apparent from further case law that the test is not to be approached in a strict or narrow manner as HCC seeks to do.

28. Rather, scope must be considered in a manner that is robust, pragmatic, not unduly narrow, and realistic. The submission of TAL can be seen as being addressed to incidental or consequential changes to PC12, and while HCC seeks to describe PC12 as narrow in approach, this is not reflected in the significance assessment in the section 32 report, nor in the way HCC has allowed for other zone changes in PC12.

29. The limited number of submissions seeking zone changes highlights that this is not a situation where "everything is up for grabs",[31] but rather, a circumstance where some parties, including specifically TAL, have sought logical and foreseeable changes to zoning in order to meet the intent of the Amendment Act and PC12.

30. TAL reiterates that it seeks confirmation of scope so that the issues of rezoning can be considered further in substantive hearings with further evidence.

Dated 10 May 2023

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[31] As suggested in the legal submissions of Hamilton City Council dated 4 May 2023, paragraph 11.