

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

REPLY SUBMISSIONS ON SCOPE FOR DAVID AND BARBARA YZENDOORN

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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.
2. As the Panel has noted in Direction #12, referring to direction #11:

The Panel confirms that it intends to apply the 2-limb Clearwater test ... to questions of scope, adopting what Justice Whata characterised in *Albany North Landowners* as taking a realistic workable approach to what was reasonably and fairly raised in submissions.
3. For a submission on PC12 to be within scope, it must be “on” the plan change. The *Clearwater* decision sets out a two step test,¹ starting with whether the submission on the plan change or variation alters the status quo (step one), and then considering the question of whether regarding the submission would permit a planning instrument to be appreciably amended without a real opportunity for participation from those affected.²
4. HCC seems to take a strict approach to *Clearwater*, though as the Panel has identified, a “realistic workable approach” should be taken, rather than a strict or technical reading.

Extent of PC12

5. HCC’s approach seems to be that PC12 has a narrow purpose, that the alterations to the status quo are “narrow and focussed”, and that the management regime for non-residential land is unaltered.³ The legal submissions suggest that with limited exceptions HCC has not exercised its discretion to create new residential zones PC12.⁴ In HCC’s view, new residential areas may only be created if notified by HCC.⁵ In response, it can be noted that under section 77G(4) of the RMA, as amended, 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.
6. With regard to the extent of PC12, it can be noted that *Motor Machinists* directs attention to the section 32 report,⁶ though *Bluehaven Management* focuses on what the section 32 report *should* have covered.⁷ In any event, the relevant section 32 report describes PC12 as resulting in “significant

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, paragraph 9.

³ Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 12-13.

⁴ Legal submissions of Hamilton City Council dated 4 May 2023, paragraphs 13-16.

⁵ Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 17.

⁶ *Palmerston North City Council v Motor Machinists Ltd* [2014] NZRMA 519, at [81].

⁷ *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191.

change” to HCC ODP provisions,⁸ and involving a “large shift” in residential zone provisions, with impacts that “extend over the whole city” with long term effects.⁹

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,¹⁰ 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”.¹¹ A “large number of landowners” throughout the city are affected by the changes,¹² As the section 32 report acknowledges, a significant rather than minor degree of change is introduced by PC12.
8. Given the extent of these changes, it is easily foreseeable that some submitters would seek 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 altered existing residential zones, introduced new residential zones, and rezoned industrial land for residential purposes,¹³ and especially since the section 32 report acknowledges the impact of PC12 across the city.

A Realistic Workable Approach

9. HCC puts significant emphasis on a narrow reading of the *Clearwater* tests, though in reply it is clear that a large amount of case law supports the Panel’s desired “realistic workable approach”.
10. *Motor Machinists* has acknowledged that the test still allows “incidental or consequential” extensions of zoning changes.¹⁴ It is difficult to perceive an example that could be more incidental than this site.
11. *Sloan v Christchurch City Council* has noted that the tests in *Clearwater* must be applied within their statutory context, and that the purpose of clause 6 is to give anybody a right to make a submission, with the point of a submission being to change what a Council is putting forward. *Sloan* has also emphasised that scope issues are “questions of fact and degree to be decided in each case in a robust and pragmatic way”.¹⁵ The emphasis here is on a pragmatic approach to the particular case, not technicalities.

⁸ Section 32 report, at 2.

⁹ Section 32 report, at 2.

¹⁰ Section 32 report, at 5.

¹¹ Section 32 report, at 5.

¹² Section 32 report, at 10.

¹³ Section 32 report at 4-5; submissions of Hamilton City Council dated 4 May 2023, paragraph 16.

¹⁴ *Motor Machinists*, at [81].

¹⁵ *Sloan v Christchurch City Council* [2008] NZRMA 556 at 30.

12. Similarly, in *Power v Whakatane District Council*, the Court noted the importance of avoiding “an unduly narrow approach” to scope,¹⁶ and in *General Distributors*, the Court noted that scope needs to deal with “the realities of the situation”.¹⁷ 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. *Bluehaven Management* has echoed the *Power* decision, reiterating that scope should not be considered in an unduly narrow manner.¹⁸
13. While HCC puts significant weight on the section 32 report not considering rezoning of the site, *Bluehaven Management* has noted that a critical question is whether the section 32 report “should” have covered the issue in the submission.¹⁹ In light of the comments from *Sloan* on the role of submitters in the process, it is clear this question can be answered in the affirmative. Put another way, HCC should have considered rezoning to a greater extent than HCC did, particularly within the context of infrastructure constraints in many areas (as well as heritage and other overlays in others), which operate to severely restrict HCC from giving fuller effect to the intent of the Amendment Act.
14. Returning to *Sloan*, 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, and highlight the importance of avoiding an unduly narrow approach to scope. As *Sloan* noted, 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.

Management Regime for the Resource

15. In terms of the management regime for the resource, HCC suggests that PC12 “gave no consideration to altering the status quo” of the site.²⁰
16. But this conclusion can be queried: as HCC admits, under PC12, the site is included within the Infrastructure Overlay, which has application to the residential zone.²¹ The only practical reason for the Infrastructure Overlay to be placed over the site would be to restrict infrastructure use if the site was put to residential use. Clearly HCC has foreseen this residential use.
17. The submitter’s response to HCC is of course that the existing open space zoning is erroneous, and that the proximity of the site to other residential uses makes it appropriate for housing.

¹⁶ *Power v Whakatane District Council*, HC Tauranga, CIV-2008-470-456, 30 October 2009, Allan J, at [30].

¹⁷ *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 (HC), at [56].

¹⁸ *Bluehaven Management*, at [36].

¹⁹ *Bluehaven Management*, at [38].

²⁰ Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 60.

Submitters

18. HCC's legal submissions then state that there is wider interest in the property, "evidenced by the submissions lodged" in relation to a resource consent application. To HCC, the rezoning of the site was not a foreseeable consequence of PC12.²² As a first point, it must be remembered that the Panel can make orders beyond the scope of submissions, per clause 99(2) of the RMA, as amended. Changes can be made without interested parties having an opportunity to submit.
19. In any event, the submitter disagrees with HCC as to foreseeability. The section 32 report emphasises the significant changes that would occur across the city as a result of PC12. Further, HCC has imposed an infrastructure overlay that is only relevant to the site being used for residential purposes. Those who submitted on the resource consent would be aware of the landowner's intention to develop the site for housing, and given the broad media attention given to PC12, could reasonably be expected to have some knowledge of the process, or the ability to obtain this.
20. The site is within a residential suburb, is privately owned, is the subject of a resource consent application for housing, and HCC has placed the site within its infrastructure overlay in order to constrain development of the site, within the context of a plan change which has commanded extensive public attention. Any interested persons have had many opportunities to consider making a submission, and there is no real risk that those who consider themselves affected by the rezoning have been denied the ability to become involved.

Conclusion

21. A realistic workable approach to scope accords with case law, and the circumstances of the individual case warrant the submission of the Yzendoorn being confirmed as being within scope, so the merits can be considered further.

Dated 10 May 2023



Thomas Gibbons
For David and Barbara Yzendoorn

²¹ Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 60, fn 16.

²² Legal submissions of Hamilton City Council dated 4 May 2023, paragraph 61.