

FORM 6

**NOTICE OF FURTHER SUBMISSION TO PORIRUA CITY COUNCIL
DISTRICT PLAN REVIEW
PURSUANT TO CLAUSE 8 OF THE FIRST SCHEDULE OF THE
RESOURCE MANAGEMENT ACT 1991**

To: Porirua City Council
P O Box 50-218
Porirua

Name: Robyn Smith

Address: 73 Tireti Road
Titahi Bay
Porirua 5022

This is a further submission in opposition to a submission on the proposed change to the district plan for Porirua: 'the district plan review'.

I am a person representing a relevant aspect of the public interest.

I am entitled to make this further submission because the subject of my further submission relates to a core principle of the RMA regarding the scope of matters capable of being introduced into a proposed district plan, or a proposed district plan review, by way of a submission. This is commonly referred to as: 'Scope'.

If there are scope issues associated with new matters introduced by way of submission this must be an aspect of public interest.

I do wish to be heard in support of my further submission.

If others make a similar further submission, I might consider presenting a joint case with them at a hearing.

The submission I oppose is that made by Kainga Ora (submitter no. 81).

In its submission Kainga Ora seeks:

- the introduction of a new 'High Density Residential Zone'; and,
- an enlargement of the part of the city to be subject to the 'Medium Density Residential Zone'.

Kainga Ora therefore seeks outcomes from the district plan review process that are not within the scope of the proposed district plan as it was notified.

Kainga Ora has previously sought similar outcomes via Plan Change 43 to the Hutt City District Plan. In that instance, Hutt City Council (HCC) sought a legal opinion. That opinion, along with the relevant

extract from the Council's decision, are attached. On the basis of this legal opinion, HCC rejected Kainga Ora's submission because the HCC rightly decided that the outcome sought by Kainga Ora was beyond of the scope of the plan change as it was notified.

I submit that the same tenet applies to Kainga Ora's submission on this review of the Porirua City District Plan.

Accordingly, I ask that Kainga Ora's submission with respect to:

- a new 'High Density Residential Zone'; and
- an enlargement of the 'Medium Density Residential Zone';

be rejected.



Signature

07/05/2021

Date

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**ATTACHMENT ONE: LEGAL OPINION AND EXTRACT FROM HUTT CITY COUNCIL'S DECISION
ON PC43**

response to questions Council officers stated that the provision was appropriate for the GRAA. If there are such areas, then future plan changes will need to address them. We note too, as above, that PC43 only applies to the GRAA, MDRAA and the SMUAA. There are many other activity areas in Hutt City that are not affected by PC43.

74. Irrespective of our position not accepting these late submissions, we consider that the further submission by the Council seeking the inclusion of the vegetation Rules were within scope. This is because it is within the extent of the alteration to the status quo which PC43 seeks to achieve and no party was prejudiced. Given the late nature of these submissions we had already, at the start of the hearing, accepted all late submissions (and further submissions) which were then before us.

Other jurisdictional matters

Scope

75. Issues of scope arose in three submissions being:
- (a) HNZ (in relation solely to rezoning of larger areas for MDRAA);
 - (b) KiwiRail; and
 - (c) Petone 2040.
76. The s42A Report attached³⁰ legal advice from counsel for the Council. While this advice related solely to HNZ's submission all counsel before us accepted the legal principles it set out, including using the test applied by the High Court in *Palmerston North City Council v Motor Machinists Limited*³¹ ("**Motor Machinists**") that:³²
- (a) the submission must address the proposed plan change itself, that is, it must address the extent of the alteration to the status quo which the change entails; and
 - (b) the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

³⁰ Appendix 8.

³¹ [2013] NZHC1290 at [80]-[82].

³² Legal advice of counsel for the Council dated 4 June 2019, paragraph 7.

77. When considering the first limb counsel went on to state that "*whether the submission falls within the ambit of the plan change may be analysed by asking whether it raises matters that should be addressed in the section 32 report ...*"³³ Counsel advised in relation to the second limb that "*the risk the Council must guard against is that the reasonable interest of others might be overridden by a submissional side-wind.*"³⁴

HNZ

78. Starting with HNZ, the Council's legal advice appended to the s42A Report concluded that the submission falls outside of the ambit of PC43³⁵ and there is a real risk that affected landowners would be denied the opportunity to respond to the additional changes.³⁶

79. Counsel for HNZ, in legal submissions, argued that PC43 redrafts the GRAA, and adds the new MDRAA, to provide for greater residential intensification. Therefore, the "*areal reach of PC43*"³⁷ is not extended such that a "*reasonably prudent landowner*"³⁸ would have reviewed the summary of submissions and been alerted to, and considered, the extensions to the MDRAA sought by HNZ (meeting the first limb of the *Motor Machinists* test). Therefore, and given the significant changes included within PC43, affected persons had a real opportunity to participate in the process such that procedural unfairness does not arise (meeting the second limb of the *Motor Machinists* test).

80. In response to HNZ's submission counsel for the Council remained of his initial opinion. In reply³⁹ the Council officers noted that analysis of the targeted areas requested by HNZ has not occurred in relation to matters such as transport, infrastructure, and hazards.

81. We agree with counsel for the Council that the zone extension submission by HNZ is not on PC43. We accept the intent of PC43 is to provide for increased housing supply and variety in Hutt City. We also accept that the further submission process provided an opportunity for interested persons to be involved but that the extent of the change was greater than anticipated and was unknown by all submitters who we asked during the hearing. Overall, we consider that the rezoning sought by HNZ is so extensive, and

³³ Legal advice of counsel for the Council dated 4 June 2019, paragraph 8.

³⁴ Ibid.

³⁵ Legal advice of counsel for the Council dated 4 June 2019, paragraph 18.

³⁶ Legal advice of counsel for the Council dated 4 June 2019, paragraph 20.

³⁷ Legal submissions on behalf of HNZ, 30 August 2019, paragraph 5.5(e).

³⁸ Legal submissions on behalf of HNZ, 30 August 2019, paragraph 5.5(c).

³⁹ Point 27.

the difference between GRAA and MDRAA too great,⁴⁰ as to not be within that contemplated by PC43, especially without a full s32AA evaluation.

82. Further, no evaluation, or evidence, was provided on the implications of such an extensive extension of medium density development on relevant issues such as hazards (including flooding), infrastructure (including wastewater and transport), and social effects of such extensive and intensive development. Council officers referred to the lack of such analysis in their reply.⁴¹
83. Even if we are wrong on scope, while we listened to and considered HNZ's submission carefully, without evidence from HNZ as to the effects of the significant increase in medium density development it seeks, we have no evidence before us and are unable to undertake a s32AA evaluation. We did hear evidence, and submissions, provided by the Council and submitters as to the need to strike the right balance when enabling intensification and the effects of intensification (see below). Therefore, on the evidence before us, irrespective of scope, we would not grant the MDRAA extensions sought by HNZ.

KiwiRail

84. The Council officers raised scope concerns in their rebuttal evidence in relation to KiwiRail's request for setback controls for built development alongside the rail corridor. The Council officers considered, supported by advice from counsel for the Council, that the proposal was outside the scope of PC43 as "*it did not include specific provisions to address or restrict built development in the proximity of the rail corridors.*"⁴²
85. Counsel for the Council, in advice of 22 August 2019, noted that no setbacks are proposed through PC43 to protect infrastructure and that the s32 Evaluation states that no areas of proposed intensification are located where they could affect, or be affected by, incompatible regionally significant infrastructure.⁴³ Counsel concluded that the setbacks sought are not addressed in the s32 Evaluation (although arguably it should have been) and overall the setback is not clearly linked to the purpose of PC43.⁴⁴
86. In relation to the second limb of the *Motor Machinists* test, counsel for the Council considered there was "*some risk*" that affected persons would not

⁴⁰ As noted in the Council's reply, point 27.

⁴¹ Officer's right of reply, 13 September, point 27.

⁴² Rebuttal evidence of the Council officers, paragraph 8.

⁴³ Attachment A to the Rebuttal Evidence of the Council officers, dated 23 August 2019, paragraph 17.

⁴⁴ Ibid, at paragraph 19.

Appendix 8 – Legal Advice on Scope of Submissions - DLA Piper



Our ref: 1026438

4 June 2019

Andrew Cumming
Divisional Manager District Plan
Hutt City Council
LOWER HUTT
By email

Dear Andrew

PROPOSED PLAN CHANGE 43: ADVICE ON SCOPE OF SUBMISSIONS

1 You have sought legal advice on the scope of relief sought by a submission made by Housing New Zealand Corporation (**Housing NZ**) to the Hutt City Council on Proposed District Plan Change 43 (**PC43**).

Overview

2 We consider the Housing NZ submission is not 'on' PC43.

3 We set out the reasons for this conclusion below.

Background

4 PC43 was notified on 7 November 2017. It reviews the General Residential Activity Area provisions of the Hutt City District Plan. It proposes the introduction of two new activity areas, providing for medium density residential development and suburban mixed use in targeted areas: a new 'Suburban Mixed Use Activity Area' and a new 'Medium Density Residential Activity Area'. The two new activity areas are proposed to be located in nine targeted areas. The purpose of the proposed plan change is to provide for greater housing capacity and a wider range of options for housing styles and sizes at medium densities within the existing urban area.

5 On 9 March 2018, Housing NZ filed a submission on PC43. Part of its submission is that further rezoning / wider application of the 'Medium Density Residential Activity Area' is required. The submission from Housing NZ outlines a proposal for the potential rezoning of the Hutt City urban area.

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- 6 The issue for consideration is whether this submission is 'on' PC43, when PC43 itself does not propose any change to the activity status or zoning of the land proposed by Housing NZ. The issue arises in this way because the right to make a submission on a plan change is conferred by Schedule 1 of the Resource Management Act 1991, clause 6(1): persons described in the clause 'may make a submission on it'. If the submission is not 'on' the plan change, the Council has no jurisdiction to consider it.

Legal principles relating to scope

- 7 The legal principles relevant to determining whether a submission is 'on' a plan change are well-settled. The High Court, adopting the approach taken in *Clearwater Resort Ltd v Christchurch City Council*,¹ set out a two-part test set in *Palmerston North City Council v Motor Machinists Limited*.²
- 7.1 The submission must address the proposed plan change itself, that is, it must address the extent of the alteration to the status quo which the change entails; and
- 7.2 The Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.
- 8 Whether the submission falls within the ambit of the plan change may be analysed by asking whether it raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular resource is altered by the plan change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the plan change. However, some extensions to a plan change are not excluded: incidental or consequential extensions are permissible if they require no substantial section 32 analysis.
- 9 In considering the second limb, the High Court identified the risk the Council must guard against is that the reasonable interests of others might be overridden by a submissional side-wind.³ The concern identified was that a plan change could be so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission which had not been directly notified to them.
- 10 The questions posed in *Motor Machinists* need to be answered in a way that is not unduly narrow.⁴

Scope to make changes to PC43

- 11 In terms of the first limb of the *Motor Machinists* test, our view is that the submission made by Housing NZ is not addressed to PC43.

¹ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

² *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC1290 at [80]-[82].

³ At [82].

⁴ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191, at [36].

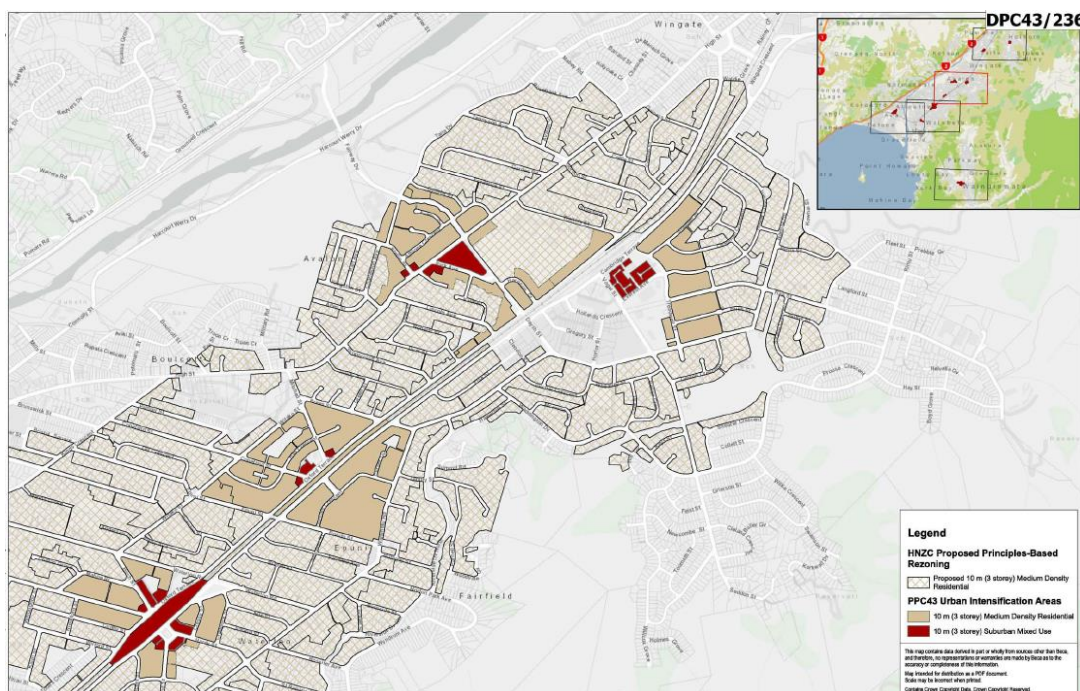


- 12 PC43 was the subject of a section 32 report. The proposed plan change proposes a comprehensive review and rewrite of the General Residential Chapter of the City of Lower Hutt District Plan. As set out in the section 32 report, in 2014 a process was undertaken to address growth in development in Hutt City, as summarised in the foregoing paragraphs.
- 13 The process was commenced with the release of a discussion document which addressed potential ways of providing for urban intensification in targeted areas. After considering public submissions on that document and intensification issues in workshops, councillors assessed options for residential growth in all parts of the City and instructed Council officials to identify targeted areas throughout the City. As a consequence, an Urban Development Plan was prepared, which assessed suburbs that could provide for residential intensification. A final Urban Development Plan set out recommendations on the spatial extent of different intensification types. This report contained a detailed discussion of the suitability assessment of Lower Hutt's suburbs that was undertaken.
- 14 A working group was established in 2016 to discuss and confirm public consultation on the draft plan change approach, which included establishing a new Medium Density Residential area in ten specific targeted areas. Following this, an online survey was then undertaken, which sought feedback on the key elements of the approach and the locations targeted in the approach, including maps of the possible target areas. The survey was also made available to the public on the Council's website, Facebook page and Neighbourly so that anyone with an interest could state their views. The survey was completed by 1540 people. Opinions varied on the proposed Medium Density Residential area.
- 15 The working group subsequently reconvened with a workshop, site visits, and a follow up workshop. It made a number of changes to the target areas as a result of feedback in the online survey, confirmed by the tour of the sites. The working group was unable to reach consensus on the extent of one of the targeted areas (the extent of the CBD Edge targeted area), and it was resolved that the best way forward was a formal plan change process with an extended submission period, to enable a specific formal proposal to be tested through the submission, hearing and appeal process. On 10 October 2017 Council resolved to promulgate Proposed Plan Change 43 for consultation, with the removal of the CBD edge target area from the proposed plan change.
- 16 The section 32 report sets out who and how many people would be affected, and the geographical scale of effects. It states that the whole of the general residential activity area and much of the Suburban Commercial areas are affected. The changes proposed in the submission do not substantially alter the broad objective of the proposed plan change, which is to enable greater housing capacity and a wider range of residential development within the existing Lower Hutt urban area. The proposed changes are broadly about the same subject matter as the PC43 proposal: intensification of the general residential area. In this sense, the submission is not 'out of left field'.⁵
- 17 However, Housing NZ is proposing a significant extension to the area proposed for the Medium Density Residential Activity Area. The map below shows the Medium Density

⁵ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003, at [69].



Residential Activity Area proposed in PC43 for one of the ten targeted areas in light brown shading, contrasted with the cross-hatched area proposed in the submission:



- 18 In our view, the submission goes further than the extent to which PC43 proposes to change the status quo. The extensions sought involve more than an incidental or consequential extension of the rezoning proposed in PC43. Any decision to rezone as proposed by the submission raises matters that would need to be addressed in the section 32 report, rather than by 'opportunistic insertion by submission'.⁶ In our view, the submission falls outside the ambit of the plan change. We do not consider the first limb of the *Motor Machinists* test is satisfied.
- 19 In terms of the second limb of the *Motor Machinists* test, we consider the reasonable interests of others could be overridden by the submission. The change sought in the submission would morph the plan change to an extent that people who were not affected by the plan change as notified could become affected through the submission. While PC43 involves rezoning, that does not mean a submission advocating an extension of the Hutt City urban area and rezoning would be 'on' that variation. As noted by the High Court in *Option 5 Inc v Marlborough District Council*:⁷

Simply because there may be an adjustment to a zone boundary in a proposed variation does not mean any submission that advocates expansion of a zone must be on the variation. So much will depend on the particular circumstances of the case. In considering the particular circumstances it will be highly relevant to consider whether, as William Young J identified in *Clearwater*, that if the result of accepting a submission as on (a variation) would be to significantly change a proposed plan without a real opportunity for participation by those affected then that would be a powerful argument against the submission as being “on”.

⁶ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC1290 at [86].

⁷ *Option 5 Inc v Marlborough District Council* HC Blenheim CIV 2009-406-144, 28 September 2009, at [34].



- 20 The Housing NZ proposal would change the zoning of a large number of other properties, which would occur without any direct notification to the property owners and so without any real opportunity for them to participate in the process by which their zoning would be changed. There is a real risk that those owners affected by the additional changes sought in the submission would be denied an effective opportunity to respond to those additional changes in the plan change process. In our view, any person considering the public notice and the proposed plan change documents would not have anticipated that additional areas could be added through the plan change process. Accordingly, we consider that the submission is not 'on' the plan change.
- 21 The submission process is not designed to make significant changes to the management regime for a particular resource, given the absence of procedural safeguards in Schedule 1 of the RMA. If Housing NZ wishes to expand the Medium Density Residential Activity Area, it has other options. As noted by Kós J in *Motor Machinists*,⁸ where a land owner (ie such as Housing NZ) is dissatisfied with a regime governing their land, it can seek resource consent regardless of existing zoning; seek to persuade the Council to promulgate a plan change or seek a private plan change.
- 22 Please let us know if you have any further questions.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'S. Quinn'.

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⁸ At [78].