

4 December 2023

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Dear Mr Winchester

TE PŪTAHI LADIES MILE PLAN VARIATION AND THE SUBMISSION BY ANNA HUTCHINSON FAMILY TRUST

Introduction

- 1 You have asked us to advise as to whether the submission¹ (*Submission*) made by the Anna Hutchinson Family Trust (*Trust*) has legal scope in that it is 'on' the variation to the Queenstown Lakes Proposed District Plan: Te Pūtahi Ladies Mile (*Variation*).
- 2 The Submission seeks in the main that the notified Te Pūtahi Ladies Mile Zone (*TPLM*) in the Variation is extended to include approximately 20ha at the north-western end of the TPLM (*Extension Area*). The Extension Area would include four lots that the Trust owns, as well as other land.² Our advice focusses on the request in the Submission for urban rezoning rather than the more specific relief.
- 3 The Council Officer's section 42A report on the Variation recommends rejecting the Submission on the grounds that it is out of scope³. The reasons noted are:
 - 3.1 The Extension Area was not notified as being rezoned or included in the Variation, and therefore there was no analysis within the section 32 report of any change to this land; and
 - 3.2 This is a significant change to the TPLM such that substantial analysis in the section 32 report would have been required for this change.
- 4 The section 42A report also relies on a memorandum from Wynn Williams⁴, which sets out general legal principles relevant to scope.
- 5 The Council's legal submissions address the Submission and matter of scope.⁵ They submit that the Submission is not "on" the plan change for the following reasons:

¹ Submission #107.

² Ibid, Page 3, figure 3.

³ Section 42A report, pages 59, 175-179.

⁴ Section 42A report, Appendix C.

⁵ Opening legal submissions on behalf of Queenstown Lakes District Council dated 24 November 2023, at [40]-[51].



- 5.1 The addition of the Extension Area would be a significant change, increasing the total Variation land area by approximately 1/6th;⁶
- 5.2 The change would require substantial s 32 analysis, including analysis of the effects on the Shotover River and the Shotover River Outstanding Natural Feature;⁷
- 5.3 It would require shifting of the urban growth boundary;⁸
- 5.4 The Trust's expert evidence was filed after the period for submissions closed;⁹ and
- 5.5 There would be substantial potential prejudice to persons directly or potentially affected by the additional changes proposed in the Submission.¹⁰

Summary

- 6 We consider the Submission's legal scope is not beyond doubt. We acknowledge the section 42A report, Wynn Williams' reasoning and the Council's legal submissions as material and important considerations on scope. However, the points raised are not determinative of scope. And the need for substantial section 32 analysis in particular is not supported by the Council Officer's section 42A report. The procedural fairness submissions are also substantially overstated in our view given the facts. With respect, scope assessments should not be undertaken in way that is unduly narrow. We consider that there are other relevant factors that have not apparently been taken into account which reasonably support an alternative view.
- 7 Based on our analysis, we prefer the view that the Submission is "on" the Variation. We note at the outset that there is no general legal rule that land outside a variation's geographical area cannot be included through public submissions. In our experience, it is common for submissions to suggest alternative solutions to achieve a variation's purpose to those proposed by the local authority. Such solutions can include extending a variation's geographical area to land within the context of the relevant variation.
- 8 In terms of relevant considerations from the case law, when looked at in the full context of the Variation, the Extension Area can in our view be reasonably viewed as an incidental or consequential extension or directly connected to the Variation:

⁶ Ibid, at [42].

⁷ Ibid, at [43].

⁸ Ibid.

⁹ Ibid, at [44].

¹⁰ Ibid, at [47].



- 8.1 The Submission sets out that the rezoning will support the Variation's overall policy and purpose.¹¹
- 8.2 Apart from its geographical extent, the Variation is not a narrow change in our view. We consider it is a major departure from the status quo rural lifestyle and rural and large lot zonings. It is also a strategic response to Queenstown's future growth needs and to national direction, namely the National Policy Statement on Urban Development (*NPSUD*).
- 8.3 Large parts of the Extension Area have been highlighted for potential urban development in the Council's prior spatial planning work and the Extension Area is, as a matter of fact, part of the Ladies Mile corridor.
- 8.4 This wider review has had both broad objectives and geographical focus and has involved several rounds of public consultation.
- 8.5 Some of the supporting appendices in the Variation's section 32 assessment include maps that show some of the land as potential future urban zoning.
- 8.6 The Trust has provided substantial evidence to support urban rezoning in past processes.
- 8.7 The wider context is of an increasing transition from rural to urban character. The Variation, if approved, will substantially change the currently undeveloped environment to a highly urbanised one over time.
- 8.8 The Extension Area is directly adjacent to the Variation and, as previously noted, part of the Ladies Mile.
- 8.9 The requested zoning changes (medium density residential transitioning to low density residential) are consistent with the zoning patterns promoted on the neighbouring land in the Variation area.
- 9 The Submission could not be said to be coming from 'left-field' given these factors.
- 10 The Council Officer's section 32 analysis does not directly address the Extension Area. However, this omission is not determinative that the Submission is not 'on' the Variation. We observe that the section 32 analysis provides no reasonably practicable option of including additional land, and may be seen as inadequate from that point of view. In our view, the factors at paragraph 8, above, mean that the section 32 assessment "should have" assessed the Extension Area. This makes the suggestion that there is no scope due to the absence of a section 32 analysis to support the rezoning of the Extension Area both self-fulfilling and unsafe.
- 11 The need for substantial further section 32 assessment work to support a submission is an important consideration in determining scope, but is also not

¹¹ Note: we acknowledge that these matters will need to be further tested on the merits and are disputed by Council officers. This advice does not consider the merits of the submission.



determinative. In our view, the further work needed in this case is not substantial when compared to the extensive assessment work undertaken already. The section 42A assessment undertaken by the Council Officer on the merits of the Submission contains a relatively brief assessment and appears to rely on work already undertaken by the officers to supplement the conclusions. None of those experts suggest that they have been unable to fully assess the merits of the Submission. The Trust's Submission also contains sufficient reasoning and information to assist in informing neighbours of the justification for rezoning.

- 12 In our view, there is no material risk of procedural fairness in determining that the Submission is in scope. The Trust served its Submission on potentially affected persons. Several neighbouring landowners have engaged counsel and have lodged further submissions on the Submission. Those directly affected neighbours are in any case likely to be affected by the Variation regardless of the Submission.
- 13 Further, the wider context noted in paragraph 8, including the extensive past consultation processes undertaken by the Council means that anyone with an interest in the urbanisation of the area should have become involved in the Variation process. The prospect of parties (particularly the Trust given its prior submission on the draft Spatial Plan) seeking additional land to be included in the Variation through submissions was a likely scenario.
- 14 Finally, we note as relevant the significant consequences of determining that the Submission is out of scope. Such a determination would deprive the Trust of the usual rights of participation and a decision on the merits of their Submission. To us, there also seems little downside to undertaking that merits evaluation. The Council's assessment work on the Submission has now been largely completed. There are no material procedural fairness issues at play. If the Trust's Submission is upheld, then the benefits of the Variation could be substantially increased. We are also mindful that the Variation is being processed via the streamlined planning process, where there are no appeal rights. In our mind, this makes it even more important that any scope decisions are comprehensively considered.
- 15 We set out our reasons for the above conclusions in greater detail below.

Whether a submission is "on" a plan change

- 16 We generally agree with the summary of legal principles in the Wynn Williams' memorandum and supplemented by the Council's legal submissions as to whether submissions are "on" a plan change. However, it is important to record that the answer to scope questions such as here is to be evaluated in the particular circumstances of the relevant variation and submissions.¹² As noted in *Clearwater Resort Ltd v Christchurch City Council*, whether a submission is "on" a variation, "poses a question of apparently irreducible simplicity but which may not necessarily be easy to answer in a specific case."¹³ Questions of scope should not be looked at narrowly.

¹² *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at [29] and [42]-[43].

¹³ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56]:



- 17 We note that the High Court in *Palmerston North City Council v Motor Machinists Ltd*¹⁴ affirmed and expanded on the Clearwater “bipartite” test for scope. Cases since then have further refined the approach to be taken. Importantly, the factual context of the relevant variation is important. A number of the cases have viewed *Motor Machinists* as a relatively discreet plan change scenario which limited the opportunity to expand the notified approach. Other plan changes and variations may have a wider remit. We outline further relevant case law in the **Appendix** to assist in assessing the particular facts and circumstances of the Submission. Key considerations informing whether the Submission is on the Variation in this case are:
- 17.1 The extent to which the Variation changes the pre-existing status quo. This assessment involves assessing the full context of the Variation - its policy and purpose, the background and the scale and degree of change that the Variation brings about;
 - 17.2 What the Variation’s section 32 report assessed and/or should have assessed and the nature and degree of any further assessment required to support the Submission;
 - 17.3 The nature of submissions and further submissions received on the Variation, including the Submission;
 - 17.4 In that context, is the Submission incidental, consequential or directly connected to the Variation? Is it “out of left field”?;
 - 17.5 The potential for procedural fairness issues from the Submission in terms of directly affected parties and the likelihood that they would (or would not) have been sufficiently aware of the changes sought in the submission;
 - 17.6 The participatory scheme of the Resource Management Act 1991 (*RMA*) and the opportunity for robust participation in plan-making process.

The context of the Variation – the degree of change to the status quo

- 18 The section 42A report and section 32 assessment address the purpose, policy and background to the Variation and the Submission also comments on these matters. We draw attention to some key aspects in support of our view that the Submission is within the context of the Variation and accordingly “on” it. The Variation is not a narrow change in our view of the discreet nature of the proposed plan changes in *Clearwater* and *Motor Machinists*. It represents a substantial departure from the status quo and the Extension Area is in that context.

¹⁴ [2013] NZHC 1290 at [54]-[56].



- 19 The purpose of the Variation is reasonably broadly framed:¹⁵
- The purpose of the Zone is to ensure efficient use of land for the provision of housing within an integrated, well-functioning, and self-sustaining urban community, that is inclusive of communities in nearby zones.
- 20 The Submission sets out how it aligns with the purpose and objectives of the Variation and the wider policy context, including the provision of housing located adjacent to and integrating with the Variation area.
- 21 The wider context is also important. The section 32 report discusses some background to the Variation and includes:
- 21.1 The Variation has resulted from an ongoing process of identifying land suitable for residential development in the Queenstown-Lakes District since 1998, including development of the Spatial Plan and the Masterplan.
- 21.2 Referring to the Ladies Mile Te Pūtahi Masterplan Establishment Report¹⁶, the section 32 report records four resource management issues that the Variation is responding to:¹⁷
- (a) Population growth and housing affordability – Queenstown has significant predicted population growth and limited areas of land to provide housing;
 - (b) Safe and efficient functioning of the transportation network. Coordinated planning of the area is considered to be the optimum method for ensuring that supporting transportation infrastructure best meets the requirements of the area;
 - (c) Efficient land use; and
 - (d) Supporting existing satellite residential suburbs.
- 22 The stated outcomes of the Variation¹⁸ are said to help achieve the section 5 purpose of the RMA, and "*...inform the planning options for the Te Pūtahi Ladies Mile land*".
- 23 Rezoning the Extension Area could (subject to assessment of the merits) align with outcomes (a)–(d) in that it:

¹⁵ Section 42A report, at 6.

¹⁶ Ladies Mile Te Putahi Masterplan Establishment Report (February 2020): <https://www.qldc.govt.nz/media/21ikpsil/3a-ladies-mile-establishment-rationale-report-c.pdf>

¹⁷ Section 32 report, page 14.

¹⁸ Section 32 report, 4.3.



- 23.1 provides additional land for residential development, to support a growing population, where land for development is scarce;
 - 23.2 allows for the provision of housing choice, diversity and affordability;
 - 23.3 due to the location of the Extension Area, promotes public transport options; and
 - 23.4 provides integration with existing adjacent urban areas (Shotover Country and Lake Hayes Estate) and complements these by providing new social infrastructure and amenities for the existing and future communities.
- 24 These themes are further particularised in the various objectives and policies of the TPLM, including:
- 24.1 49.2.1 Objective: Development complements and integrates with adjoining urban development at Te Pūtahi Ladies Mile and development south of State Highway 6.
 - 24.2 49.2.2. Objective: Development achieves a range of residential intensity and diversity of housing choice to promote affordable homes, a self-sustaining community, and efficient use of urban land.
 - 24.3 49.2.2.1: Within the medium density...[precinct]: Promote affordability and diversity of housing by maximising choice for residents through encouraging a range of residential typologies, unit sizes and bedroom numbers and avoiding development that does not achieve the residential densities required in each Precinct, and avoiding low density housing typologies including single detached residential units.
 - 24.4 49.2.2.4: Within the Low Density Residential Precinct, manage the total number of residential units provided for within the TPLM to avoid significantly increasing vehicle trips and adverse effects on the safe and efficient operation of State Highway 6.
 - 24.5 49.2.6 Objective: Development in the TPLM minimises the generation of additional vehicle trips along State Highway 6, and reduces, as far as practicable, vehicle trips along State Highway 6 generated by the adjoining residential areas at Ladies Mile.
 - 24.6 49.2.6.3 Provide for efficient and effective public transport through:
 - (a) Requiring higher residential densities within the Zone north of State Highway 6;
 - (b) Ensuring road widths and configurations are consistent with their efficient utilisation as bus routes;



- (c) Discouraging private vehicle ownership and use by limiting onsite carparking via maximum rates for residential, office, retail and education activities;
 - (d) Limiting on-street parking;
 - (e) Requiring transport infrastructural works related to public transportation to be in place prior to development.
- 25 On the face of it, there is nothing in the Submission that obviously offends these objectives (again, the merits will need to be tested). Given the zoning sought in the Submission is the same as that in the Variation, the Submission relief could add further support to these objectives.
- 26 The Submission is also, on its face, potentially consistent with higher order objectives and policies in the NPSUD, which the Variation is in part designed to give effect to.¹⁹ These objectives and policies emphasise the need for local authorities to provide for appropriate development capacity. Residential rezoning of land outside of the Variation boundary could add to achieving these higher order provisions. We think caution should be exercised in regarding a submission as out of scope where it could lead to outcomes that better give effect to national direction.
- 27 The wider process to confirm the Variation has involved a wide area of consideration (rather than being closely focussed on the current Variation boundaries). The area of interest is variously described as:
- 27.1 The TPLM corridor between Shotover River (Kimi-ākau) and Lake Hayes (Te Whaka-ata a Haki-te-kura);
 - 27.2 Ladies Mile;
 - 27.3 The Ladies Mile (Te Putahi) Corridor between Shotover River (Kimi-ākau) and Lake Hayes (Te Whaka-ata a Haki-te-kura).
- 28 In light of its factual and geographical context in being part of the Ladies Mile corridor, the Extension Area can reasonably be considered to be within each of these descriptors.
- 29 At least some of the Land has been included in the proposed urban zoning boundaries at earlier stages. In March 2021, during the development of the Queenstown-Lakes Spatial Plan, some of the Extension Area was included in an area earmarked for future urban and priority development as part of the Te Putahi / Eastern Corridor.²⁰ In April 2021, the Trust submitted on the draft Spatial Plan in

¹⁹ NPSUD, Objective 3, Policy 5.

²⁰ Draft Queenstown Lakes Spatial Plan, March 2021, see Map 7 on page 52 and Map 9 on page 60: <https://letstalk.gldc.govt.nz/49239/widgets/266124/documents/199216>.



support of the inclusion of its land for future urban development.²¹ The Trust appeared at the Committee hearings on 3 and 4 May 2021 with its independent technical experts. Other land, such as parts of Shotover Country and land owned by Queenstown-Lakes District Council, has been excluded and are now included in the Variation. Further, the north-eastern boundary of the Variation Area included a considerable amount of land now excluded from the Variation.²² This indicates that the Variation Area has been subject to change over time but not apparently on a particularly principled basis. This background supports not taking an overly rigid view on submissions seeking to further extend the current boundaries.

- 30 Some of the supporting appendices in the Variation's section 32 assessment include maps that include the Extension Area. For example, Appendix 3A(i) - LMC Te Pūtahi Ladies Mile Masterplan Transport Strategy,²³ includes a map showing the AHFT land as being zoned future urban, as was proposed in the draft Spatial Plan.
- 31 The Variation area involves mostly the area to the north of State Highway 6, which is presently in rural lifestyle zoning, with no special features or overlays such as Outstanding Natural Landscapes.
- 32 The Extension Area is also in that context. It is immediately adjacent to the Variation area on the north side. The area adjoins SH6 and has rural residential properties to the north and the Shotover River to the west. It also accesses the Variation area via Lower Shotover Road. It is similarly unaffected by special features or overlays. It is factually and geographically part of the Ladies Mile corridor.
- 33 The wider purpose of the Variation is to enable more housing in a consolidated area of Queenstown, which is already in a state of transition from a rural to an urban context, given the established neighbouring subdivisions of Lake Hayes Estate and Shotover Country, as well as the more recent Queenstown Country Club development. The Variation will lead to a major change to the status quo environment of the area from a rural to one that is highly urbanised.
- 34 In terms of scale, the Variation is 120ha in size. The Extension Area is around 20ha of which approximately 10ha is land owned by the Trust. We consider that to be a material addition to the Variation area, but consider it can still be viewed as consequential or directly connected to the Variation given the wider context described above.

²¹ Submissions to the draft Queenstown Lakes Spatial Plan (Part 3), pages 642–662: <https://letstalk.qldc.govt.nz/49239/widgets/266124/documents/202986>.

²² <https://www.qldc.govt.nz/media/15bnkx1o/1-appendix-a-te-putahi-final-draft-masterplan-report-pages-i-to-22.pdf>, page 12 which shows land to the south of the State Highway excluded from and land to the north-east included in the Area of Focus. This notes that "... the Area of Focus fluctuated over the project timeline as various factors came into play, however the wider areas of Influence and Interest continued to inform decisions within the Area of Focus"; https://www.qldc.govt.nz/media/xdjhxtoi/qldc_ladies-mile-notification_a4-factsheet_apr23-web.pdf, which shows land to the south of the State Highway included in the Area of Focus while the land to the north-east has been excluded.

²³ Page 26.



- 35 The requested zoning changes (medium density residential transitioning to low density residential) are consistent with the zoning patterns promoted on the neighbouring land in the Variation area.
- 36 The Submission could not be said to be coming from 'left-field' given these factors.

Whether the section 32 assessment did, or should have, assessed the land in question and the extent of further work needed

- 37 The section 32 assessment does not address the Extension Area in particular. This fact is an important consideration and could weigh against the submission having legal scope. However, as noted the section 32 assessment is not determinative. We consider there is a reasonable argument that the section 32 assessment "should have" assessed the Extension Area and included it in the Variation, given the above mentioned contextual factors. In the absence of a comprehensive s 32 analysis, there is a risk that the scope set by the Council is self-fulfilling and precludes reasonably practicable options that could assist in achieving the purpose of the Variation. Extensions to the Variation boundaries are an obvious and logical option to achieve that purpose.
- 38 The need for substantial further section 32 assessment work to support a submission is another important factor in determining scope, but is also not determinative. In this case, as noted the existing section 32 analysis is potentially flawed in not addressing all reasonably practicable options. That said, in our view, the further work needed is not substantial when compared to the wider work undertaken. We note:
- 38.1 The Trust includes reasoning for its proposed changes and the alignment with the existing section 32 assessment work and the Variation, supported by independent technical experts. We understand the Submission was served on affected parties to ensure they were properly informed of that reasoning.
- 38.2 The Council Officers have also undertaken additional assessment work in their section 42A report by evaluating the merits of the Submission. In the context of the section 32 assessment and broader background work leading up the Variation (several years and multiple assessments), the additional work is relatively "insubstantial" in our view. The Council experts appear to have been able to readily supplement the broader work they have already undertaken to assess the Submission.²⁴ None of those experts suggest that they have been unable to fully assess the merits of the Submission.
- 38.3 The further submissions process has revealed additional potentially relevant information. And, as is usual, the hearing process and the requirements of section 32AA of the Act will also add to the section 32 assessment.

²⁴ SOE of Stephen Skelton dated 29 September 2023, pgs 21-17; SOE of Stuart Dun dated 29 September 2023, pg 27; SOE of Susan Fairgray dated 29 September 2023, pgs 33-34; and SOE of Colin Shields dated 29 September 2023, pg 24.



Potential prejudice to other parties

- 39 We consider that there is no material risk of prejudice arising if the Submission is considered 'on' the plan change. The affected landowners were notified of the Extension Area. Most chose to make a submission. The wider review and background to the Variation would have alerted potentially affected people to the possibility of zone boundaries being extended, including on the Extension Area.
- 40 You have advised us that the Trust hand-delivered copies of its Submission to all of the properties within the Extension Area and to adjoining property owners. The Council's summary of submissions²⁵ also refers to the Submission in some detail.
- 41 Further, the interest in the Variation is extensive, as indicated by the number of submissions and further submissions the Council has received (a total of 125 submissions and 25 further submissions). We consider that the proposal to urbanise the Ladies Mile area was well-known to local landowners and certainly known to those affected by the Submission.
- 42 As noted, the Spatial Plan and Masterplan processes involved a wide area of interest, including at times parts of the Extension Area being within the proposed rezoning boundary.
- 43 The Gazette notice directing the Council to use a Streamlined Planning Process for the Variation records that:²⁶
- Extensive engagement and consultation on the Masterplan and Proposed Plan Variation has been undertaken over the last two years, including consultation in accordance with clause 1A–3A of the Schedule 1 of the RMA and public feedback on drafts.
- 44 In this context, the potential for the TPLM boundaries to be extended through the Variation can be viewed as reasonably anticipated. Accordingly, a submission seeking to rezone directly adjoining land should not be viewed as coming out of "left field". Such requests are relatively commonplace in variation processes such as this. As set out above, caselaw also confirms the relevance of prior processes, such as spatial planning, when determining the nature and scope of changes that can be reasonably anticipated through a subsequent plan change or variation process.
- 45 Of the 24 other further submissions received, 10 mention the Submission. Two further submissions do not oppose the Extension Area in its entirety, one being limited to the location of the road connection²⁷, the other to the absence of a

²⁵ <https://www.qldc.govt.nz/media/nqfid1v0/te-putahi-ladies-mile-summary-spreadsheet-20july23.xlsx>.

²⁶ The Resource Management (Direction to Queenstown Lakes District Council to Enter the Streamlined Planning Process for a Proposed Variation to the Queenstown Lakes District Plan – Proposed Te Pūtahi Ladies Mile Plan Variation) Notice 2023.

²⁷ Further submission #140.



landscape buffer²⁸. The remaining nine further submissions oppose the Submission, on the basis that:

- 45.1 the Submission lacks jurisdiction;
- 45.2 the Extension Area has not been subject to public consultation and was not included in the 'Area of focus' as set out in the Council's Streamline Planning Process application to the Minister;²⁹ and
- 45.3 the Extension Area results in unacceptable adverse effects on the rural amenity enjoyed by the further submitter on their property.³⁰

46 Seven of the 10 further submitters own property adjacent to the Extension Area, labelled A-G on Diagram 1 below.

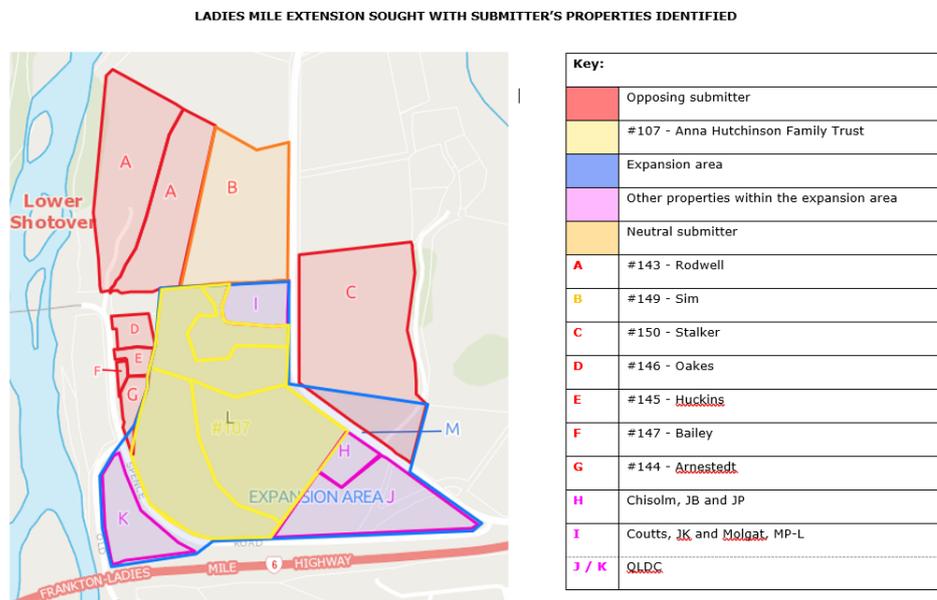


Diagram 1

47 There are two property owners (labelled H and I) who live within the Extension Area that were notified of the Submission but did not make a submission or further submission.

²⁸ Further submission #149.

²⁹ Further submissions #142-148.

³⁰ Further submission #150.



Conclusion

48 In our view, for the reasons set out above the Submission is 'on' the plan change and the merits of it are able to be considered by the Council.

Yours sincerely

Luke Hinchey / Tamsin Gorman

Partner / Senior Solicitor



Appendix - Case Law synopsis

- 1 *Clearwater Resort Ltd v Christchurch City Council*³¹ sets out the two key scope tests, namely that:
 - 1.1 First, a submission can only fairly be regarded as “on” a variation if it is addressed to the extent to which the variation changes the pre-existing status quo; and
 - 1.2 Secondly, if the effect of regarding a submission as “on” a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a powerful consideration against finding that the submission was “on” the variation in question.
- 2 The High Court also noted that submissions may suggest different methods to achieve the purpose of the plan change than those set out by the local authority:³²
 - 2.1 it is common for a submission on a plan change to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority; and
 - 2.2 the process of submissions and further submissions may be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate.
- 3 The High Court in *Palmerston North City Council v Motor Machinists Ltd*³³ affirmed and expanded on the *Clearwater* “bipartite” test for scope. It stated that “*the first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. 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*”.³⁴
- 4 It also noted in relation to the second test that³⁵ a submission should not come out of “left field”, (i.e. proposing something “completely novel”).³⁶

³¹ HC Christchurch AP34/02 14 March 2003.

³² *Clearwater* at [69].

³³ [2013] NZHC 1290 at [54]-[56].

³⁴ At [80].

³⁵ At [54].

³⁶ The Court noted that if the effect of regarding a submission as “on” the variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a “powerful consideration” against finding that the submission was truly “on” the variation (at [55], quoting William J Young in *Clearwater*).



5 Relevantly here, the Court held that a submission may lawfully seek for land outside a plan change area to be included, provided:

5.1 it represents an “incidental or consequential” extension; and

5.2 “no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change”.³⁷

6 The factual context of the Court’s comments is important in our view. The case related to a request for rezoning of land geographically disconnected from the plan change area. The Court held that scenario to be, “more than an incidental or consequential extension of the rezoning proposed”.³⁸ In terms of the potential for procedural fairness issues the Court also observed that there was a “lack of formal notification of adjacent landowners” and “the inclusion of a rezoning of two isolated lots in a side street can indeed be said to “come from left field”.³⁹

7 In terms of the second limb of the Clearwater test, the Court went on to acknowledge that a remedy for potential procedural unfairness is for the submitter to directly notify parties affected by further changes:⁴⁰

[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted.

8 These two High Court authorities have also been applied in a number of subsequent cases, providing further clarity to the tests.

9 In *Option 5 Inc v Marlborough District Council*,⁴¹ the High Court stated that it is correct to assess scope matters in terms of the purpose and policy behind the plan change at issue. The case also emphasised the importance of scale and degree in terms of assessing scope matters.⁴²

10 The principal Environment Court Judge’s decision in *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 confirms that the content of a section 32 Report is not determinative that a submission is not ‘on’ a plan change. It is a means of analysing the status quo at issue:

[36] In that sense, we respectfully understand the questions posed in *Motor Machinists*³⁹ as needing to be answered in a way that is not unduly narrow, as

³⁷ *Motor Machinists*, at [81].

³⁸ *Motor Machinists*, at [88] and [89].

³⁹ *Motor Machinists*, at [86].

⁴⁰ *Motor Machinists*, at [83].

⁴¹ (2009) 16 ELRNZ 1 (HC).

⁴² At [43].



cautioned in *Power*.⁴⁰ In other words, while a consideration of whether the issues have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the Clearwater test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.

11 The Court went on to note:⁴³

Our understanding of the assessment to be made under the first limb of the [Clearwater] test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

12 Other cases have confirmed this approach. The High Court in *Albany North Landowners v Auckland Council*⁴⁴ found that a submitter would not always be precluded from seeking relief that was not specifically considered by the section 32 assessment and report:⁴⁵

[132] Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification. On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require “out of scope” processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.

13 The Court also noted that the importance of protecting affected persons from “submissional side-winds” (as raised in *Motor Machinists*) must also be considered “alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 30 year region-wide plan, via the submission process.”⁴⁶

⁴³ *Bluehaven* at [39].

⁴⁴ [2017] NZHC 138

⁴⁵ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [132].

⁴⁶ *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [133].



- 14 That Court also emphasised the importance of the context of the plan change at issue in determining how wide the scope of submissions could be. In that case, the Auckland Unitary Plan planning process was viewed by the Court as, “*far removed from the relatively discrete variations or plan changes under examination in Clearwater, Option 5 and Motor Machinists*”.⁴⁷
- 15 Further, the Environment Court in *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes DC*⁴⁸, noted that if a section 32 assessments fails to consider the implications of adopting flexibility to the proposal (because that flexibility might more appropriately achieve the relevant objectives) then that may be a failure in the section 32 assessment.⁴⁹
- 16 The Court also addressed the question of whether extensions to a plan change area could still be on a plan change even if not geographically connected to the plan change area. The Court found that the appellants’ submissions were ‘on’ the plan change as their land had been identified for potential rezoning in the appendices to the section 32 assessment. However, despite that, the Court considered the notice to alert potential parties to the further extension appeals was inadequate as it was unfair to expect potential submitters to “*pore over the Appendices*”.⁵⁰ Due to the resulting procedural unfairness, the Court found “if barely” the appellants had not been given sufficient notice of the submissions by the combination of the section 32 Evaluation, and the Council's summary of submissions.⁵¹
- 17 In *Calcutta Farms Limited v Matamata Piako District Council* [2018] NZEnvC 187⁵², the District Council proposed to rezone areas of rural land to residential through a plan change. This plan change followed an extensive spatial planning process. The plan change itself did not propose to rezone Calcutta Farms’ land, despite the fact that that area had been considered for residential expansion through the spatial planning process.
- 18 The Court found that Calcutta Farms’ submission seeking that its land be included in the plan change was in scope. Regarding the purpose of the plan change, the Environment Court noted that:⁵³

In my view, PC47 did involve changes to the management regime for residential activity and areas to be designated as future residential activity areas, so that it was open to Calcutta Farms to lodge a submission seeking an alternative position on the areas proposed in PC47 to either be Residential Zones or Future Residential

⁴⁷ At [129]. We acknowledge that the Variation is much narrower than the Auckland Unitary Plan but also view it as much wider than the more limited variations in *Motor Machinists* and *Clearwater* given it comprehensively changes the current zoning to enable relatively intense urban activities and responds to Queenstown’s strategic growth needs and the NPSUD.

⁴⁸ [2015] NZEnvC 214.

⁴⁹ *Ibid*, at [23].

⁵⁰ *Well Smart*, at [33] and [37].

⁵¹ *Well Smart*, at [40].

⁵² *Calcutta Farms Limited v Matamata Piako District Council* [2018] NZEnvC 187.

⁵³ *Calcutta Farms* at [81].



Policy Areas, which is what it did. It did therefore address in its submission the extent to which PC47 changes the existing status quo.

19 The Environment Court went on to find that:⁵⁴

Whilst the scale and degree of a proposal can assist in determining whether a submission is “on a plan change”, I do not read the *Option 5* decision as indicating that it is determinative. Much will depend on the nature of the plan change which can assist to determine its scope, (whether it is a review or a variation for example) and what the purpose of it is. In this case, the purpose of the plan change is to review the future need for residential areas in Matamata, and to identify areas next to urban areas where future residential activity is proposed to occur. The method by which the latter is proposed to occur in PC47 is by the application of the Future Residential Policy Area notation. Underpinning the need for the size and scale of both new Residential Zones and the Future Residential Policy Area are the population predictions, which Calcutta Farms' submission directly sought to challenge. I agree with Mr Lang that the District Plan review process should be such that differing views on the appropriate scale of such policy areas can be considered, rather than assuming that the Council's nominated scale of policy areas represents the uppermost limit for future planning. I therefore agree with Mr Lang that the difference and scale and degree of what is proposed by Calcutta Farms is a matter going to the merits of the submission rather than to its validity.

(Emphasis added)

20 Importantly, the Environment Court took into account the extensive spatial planning process that had occurred when determining whether affected parties would have been aware of the potential for the Calcutta Farms land and surrounds to be rezoned for residential purposes. The Court noted that:⁵⁵

The proposal for future residential development at Matamata was raised as an issue for the community to be consulted upon well prior to PC47 being notified. As the letter of 24 July 2015 referred to above reveals, the Council received considerable feedback from the community on, among other things, the zoning options that were under consideration. The Banks Road option for future residential development was clearly in the public arena, and was the preferred option up till mid-June 2016. Even though PC47 as notified preferred the Tower Road option and applied an Equine Area over part of the land which then became the subject of Calcutta Farms' submission, I do not agree that the eight landowners directly affected who chose not to make a submission would necessarily have assumed that PC47, as notified, was the last word on the topic.

⁵⁴ *Calcutta Farms* at [87].

⁵⁵ *Calcutta Farms* at [91].