

**BEFORE A PANEL OF INDEPENDENT HEARING COMMISSIONERS IN THE
WAIKATO REGION**

I MUA NGĀ KAIKŌMIHANA WHAKAWĀ MOTUHEKE WAIKATO

UNDER the Resource Management Act 1991 (RMA)

AND

IN THE MATTER of Proposed Variation 3 to the Waikato Proposed
District Plan (PDP)

**LEGAL SUBMISSIONS OF COUNSEL FOR WAIKATO DISTRICT COUNCIL
ON SCOPE (EXCLUDING INCLUSIONARY ZONING/ AFFORDABLE HOUSING)**

Dated 24 March 2023

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INTRODUCTION

1. On 22 December 2022, Waipā District Council, Waikato District Council (**Council**) and Hamilton City Council jointly lodged a memorandum regarding late, potentially invalid and out of scope submissions on the Waikato Intensification Planning Instruments (**Joint Memorandum**). Appendix 2 of the Joint Memorandum specified the submissions or parts of submissions considered to be out of scope, and the reasons for the submission being out of scope. Five submissions to Council were identified in Appendix 2. The Joint Memorandum requested that the Independent Hearings Panel (**Hearing Panel**) determine whether the appeals are out of scope and should be struck out under section 41D of the Resource Management Act 1991 (the **RMA**) in advance of the hearings.

2. With regard to Variation 3, the following submissions were considered to be out of scope:
 - (a) Greig Developments Limited's submission to amend maps to include properties on Johnson/Oak Street, Tuakau as MRZ2;
 - (b) Howard Lovell's submission to identify areas of land between Great South Road and Gordonton Road in Taupiri as MRZ1;
 - (c) Horotiu Farms Limited's (**HFL**) submission to amend maps to include areas in Horotiu West between Great South Road and State Highway 1 as MRZ2;
 - (d) Halm Fan Kong's submission seeking to rezone 145 Park Road Horotiu from GRUZ to MRZ;
 - (e) Kainga Ora's submission to amend the zoning of 32 Main Road and at 1-7 Baird Ave, Te Kauwhata from Commercial zone to Town centre zone.

3. Kainga Ora withdrew submission point 106.15 on 7 March 2023. A copy of that correspondence is attached at **Annexure A**.
4. At this time, Council no longer seeks a direction from the Hearings Panel to strike out part of the Grieg Development Limited submission. I have become aware, during the preparation of these submissions, that the same relief for the same property is sought by Kāinga Ora in its submission.¹ The relief sought by Kāinga Ora was not identified in our earlier memorandum on scope and it has not had the opportunity to participate in this process. The Council will address the scope of these submissions (seeking rezoning of large lot residential zoned land in Tuakau) in its section 42A report for the substantive hearing.
5. In accordance with Direction #10 of the Hearing Panel, HFL filed legal submissions in support of their relief being within scope on 15 March 2023. No other submitter listed in paragraph 2 above has filed legal submissions.
6. These legal submissions are lodged on behalf of the Council in respect of whether the relief sought by the remaining three submitters is within the scope of Variation 3, and in response to the submissions from HFL.

APPROACH TO SCOPE

7. Variation 3 is the Council's Intensification Planning Instrument (**IPI**) under section 80E of the RMA.
8. I have had the benefit of seeing the scope submissions lodged by counsel for Waipā District Council on 24 February 2023 (Waipā DC's scope submissions) in respect of its IPI (the same firm is acting for both councils on their respective IPI's). I agree with and therefore adopt the approach

¹ Submission point 106.11.

to scope for an IPI as set out in paragraphs [7] to [23] of Waipā DC's scope submissions.

9. In summary, the three questions for the Hearing Panel to determine when considering whether there is scope for a submission lodged in response to the notification of an IPI are:
 - (a) Whether the submission is within the scope of an IPI defined in section 80E of the Act (the **first question**);
 - (b) Whether the submission is "on" the plan change (in accordance with the usual *Clearwater*² tests) (the **second question**); and
 - (c) Whether the proposed relief falls within the submission on the plan change (the **third question**).
10. The Hearing Panel issued its decisions on Waipā District Council's potentially out of scope submissions (excluding inclusionary zoning and affordable housing) in Direction #12 dated 10 March 2023. Its decision endorses the approach to scope set out in Waipā DC's scope submissions.
11. There is however one aspect of Direction #12 that I wish to respond to as it is relevant to every determination to be made on an IPI (whether before or at the substantive hearing). Direction #12 addresses a submission point raised by counsel for Triple 3 Farm Limited (the same counsel for HFL on Variation 3):

[6] ... Mr Gibbons submitted that the High Court in *Albany North Landowners* decision was authority for departing from a strict reading of clearwater where bespoke planning processes are in play.

12. The Hearing Panel appears to accept that submission point at [8]:

² *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

Having considered the submissions made, and **whilst agreeing with the broad principles submitted by Mr Gibbons**, the Panel is not persuaded that they assist Triple 3 Farm Limited's case.

[emphasis added]

13. The submission point is repeated by counsel for HFL in its submission on Variation 3:

[12] Further, within the context of a bespoke planning process such as an IPI, *Albany North Landowners* expands on the nature of the test. *Albany North* supports the panel departing from a strict reading of *Clearwater*, as it highlights that non-standard planning processes (in Albany North, the PAUP; here Variation 26 and its IPI context) are distinct from discrete variations or plan changes of the kind considered in cases such as *Clearwater*.

14. I disagree with the proposition put forward by counsel for Triple 3 Farm Limited and HFL. With respect, counsel has misinterpreted Justice Whata's comments at [129] of the decision.

15. *Albany North Landowners v Auckland Council*³ did not suggest that a less strict reading of the *Clearwater* was appropriate or required because of the bespoke planning process adopted for the Auckland Unitary Plan (AUP).

16. Rather, in relation to the first limb of the *Clearwater* test⁴ the Court distinguished between a full plan review and a plan change with limited areal reach and found that the breadth of the AUP's purview meant that every aspect of the status quo in planning terms was considered. The High Court went on to state that in the context of a full plan review, it does not follow that the failure to raise a matter in the section 32 report means the first limb of the *Clearwater* test is not met. It simply highlights that a section 32 evaluation in the context of a discrete plan change with limited

³ [2017] NZHC 138.

⁴ *Clearwater*, above n 1, at [66]: Whether '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.'

areal reach assumes greater significance than a full plan review, because it helps define the intended extent of the change from the status quo.

17. The scope of Variation 3 cannot be compared to either a full district plan review or the AUP which comprised a full review of a regional policy statement, regional plan and district plan into one plan. Furthermore, the scope of Variation 3 is limited by the requirements of section 80E of the RMA. It is further limited in terms of its areal reach in the Waikato district to areas that meet the definition of a “relevant residential zone” under the RMA.
18. I submit that the *Clearwater* and *Motor Machinists*⁵ tests remain the leading decisions when answering the second question of whether the submission is “on” the notified variation.

SCOPE OF VARIATION 3

19. The public notice for Variation 3 advised that it amends the Waikato PDP decisions version (**PDP-DV**) as follows:
 - (a) Renames the Medium Density Residential Zone in Huntly, Ngaaruawaahia, Pookeno and Tuakau to Medium Density Residential Zone 2 (MRZ2);
 - (b) Amends the objectives, policies and rules of MRZ2 to provide for three, three storey residential units as a permitted activity if all the standards are met;
 - (c) Modifies the standards where qualifying matters apply, such as cultural and heritage sites, natural hazards and Te Ture Whaimana o Te Awa o Waikato;
 - (d) Amends the subdivision rules for MRZ2 to provide for residential subdivision as a controlled activity;

⁵ *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

- (e) Retains the current provisions for the General Residential Zone in Huntly, Ngaaruawaahia, Pookeno and Tuakau to address qualifying matters; and
 - (f) Rezones specified areas of land from the General Residential Zone to the MRZ2, and from the Rural Zone to the General Residential Zone.⁶
20. No land outside of the four towns listed in paragraph 18(a) is proposed to become MRZ2, and land that is already MRZ under the PDP-DV in Raglan and Te Kauwhata is renamed MRZ1 to distinguish it from MRZ2. No changes are made to the provisions in MRZ1 or the spatial extent of the MRZ1 in Raglan or Te Kauwhata.
21. In terms of the rezoning identified in paragraph 18(f) above, Volume 1 of the section 32 report at section 7.6 provides further detail of the extent of the rezoning of land in the four towns, over and above land already zoned MRZ in the PDP-DV, as follows:

Town	Proposed change in zone	Number of properties
Pookeno	General residential zone to Medium residential zone 2	1 ⁷
	General rural zone to General residential zone	2
Tuakau	General residential zone to Medium residential zone 2	307
Huntly	General residential zone to Medium residential zone 2	68
Ngaaruawaahia	General residential zone to Medium residential zone 2	66

22. Significantly, only two rural zoned properties are proposed to be rezoned to General residential zone and both properties are located in Pookeno.

⁶ Variation 3 also makes consequential amendments to the PDP to refer to the MRZ1 and MRZ2 zones.

⁷ The section 32 report notes three properties in Pookeno were rezoned from GRZ to MRZ2 via Variation 3, however a review of the planning maps indicates that only one property was rezoned in the notified version.

These properties will now become MRZ2 as a result of Council no longer applying the Urban Fringe qualifying matter.

SUBMISSIONS OUT OF SCOPE

23. I now address the four remaining submissions identified in paragraph 2. The submissions by Halm Fan Kong and HFL will be dealt with last as they both relate to Horotiu.

Submission by Greig Developments Limited

24. As set out above, while no legal submissions on scope have been received on behalf of Greig Developments Limited, the Council no longer seeks that this submission point be struck out by the Hearings Panel at this time.

Submission by Howard Lovell

25. The submission by Mr Lovell (submission number 27.1) seeks to rezone land in Taupiri from GRZ (following the PDP-DV) to MRZ1. It is clear from the submission when read as a whole that the reference to MRZ1 (rather than MRZ2) is intentional and not an error. As mentioned, MRZ1 now only applies to MRZ land in Raglan and Te Kauwhata.⁸
26. With regard to question 1, the scope of an IPI, Variation 3 as notified did not identify any relevant residential zones in Taupiri. Changing the zoning from GRZ to MRZ1 as requested by the submitter would not have the effect of incorporating the MDRS or giving effect to policies 3 and 4 of the NPS-UD, being the mandatory elements of an IPI. The PDP-DV MRZ zone is not the same as MRZ2 under Variation 3. Further, changing the zoning to MRZ1 would not have the effect of incorporating any of the discretionary elements provided for in the Act.⁹ Given the MRZ1 does not meet either the mandatory or discretionary elements of an IPI, it is

⁸ All MRZ land in the 4 towns subject to Variation 3 has become MRZ2.

⁹ Sections 80E(1)(b), section 77G(4), section 77H and section 77I of the Act.

submitted that section 80G prevents Variation 3 from making the change sought by the submitter.

27. If the Hearing Panel determines the submission is within the scope of an IPI, Council submits that the submission nevertheless fails the *Clearwater* tests for the following reasons:
- (a) Variation 3 does not include any rezoning of land from GRZ to MRZ1. Variation 3 does not make any changes to either the spatial extent of MRZ1 or to the provisions within that zone. Taupiri does not contain any MRZ land.
 - (b) The section 32 report does not consider the consequences of expanding the MRZ1 anywhere in the district.
 - (c) Variation 3 as notified does not include any change to any zoning in Taupiri and the change sought by the submitter would create a real risk that persons living in the vicinity of the site would be denied an effective opportunity to participate in the variation process.
28. If the submitter is in fact seeking that the relevant land in Taupiri be zoned MRZ2, I submit that such a submission still fails the first question relating to the scope of an IPI. Incorporation of the MDRS is within the scope of an IPI only if the residential land in Taupiri is a relevant residential land. Variation 3 does not identify any relevant residential zones in Taupiri.¹⁰
29. If the Hearing Panel considers the submission should be read as seeking rezoning to MRZ2, rather than MRZ1, and passes the first question, it is submitted that it fails to meet the *Clearwater* tests and is therefore not 'on' Variation 3:

¹⁰ RMA, s 77G(1).

- (a) Variation 3 rezones 444 properties from GRZ to MRZ2 but only within the four towns of Huntly, Ngaaruawahia, Pookeno and Tuakau. It does not include any rezoning of land from GRZ to MRZ2 in Taupiri.
- (b) The section 32 report does not consider the consequences of applying the MDRS in the residential zones in Taupiri.
- (c) As Variation 3 as notified does not include any land in Taupiri, including the submitter's land, there is a real risk that persons living in the vicinity of the site would be denied an effective opportunity to participate in the variation process.

Submission by HFL

- 30. The submission by HFL (submission 49.1) seeks to rezone land between Great South Road and State Highway 1C in Horotiu from General Residential (GRZ) to MRZ2. HFL have also filed legal submissions setting out why they consider that submission to be within the scope of Variation 3.¹¹ My responses to those legal submissions are included in the application of the three questions below.
- 31. With regard to question 1, when notified Variation 3 did not include the GRZ in Horotiu as a relevant residential zone. The relevant residential zones were limited to the towns of Taukau, Pookeno, Huntly and Ngaaruawaahia.
- 32. Question 2 requires that the submission also satisfy the two-part *Clearwater* test in order to be 'on' the variation. I submit that the HFL's submission does not satisfy the first *Clearwater* test for the following reasons:

¹¹ Opening Submission on Scope for Horotiu Farms Limited, 15 March 2023.

- (a) Variation 3 does not rezone any land within Horotiu. Further, it does not include any land in Horotiu.
- (b) The section 32 report for Variation 3 did not address the actual or potential effects, or the servicing requirements, of including Horotiu as a relevant residential zone and incorporating the MDRS. These matters were not required to be addressed in the section 32 report as they are not a mandatory element of an IPI under section 80E.
- (c) While initial economic modelling was undertaken to assess the impact of MDRS being incorporated into a range of 'urban areas' within the district,¹² that theoretical modelling was undertaken before determining which urban areas would constitute a relevant residential zone as defined in the RMA. A number of those towns were not included as relevant residential zones in Variation 3 including Te Kauwhata, Raglan, Hopuhopu, Taupiri, and Ohinewai. The reference to "urban areas" in the section 32 report did not equate to either a relevant residential zone or an urban environment as defined in the RMA.
- (d) The submissions of HFL refer to Table 10 of the section 32 report where a number of "broad options" were considered, including Option 2 – replace all residential zones with an amended medium density residential zone. While this option was theoretically considered, it could not have been lawfully achieved, as many of the residential zones in the district are not located within relevant residential zones, and the Council would have been unable to include those areas in the IPI under section 88G(1)(b). That subsection prevents the Council from using the IPI for a purpose beyond incorporating the MDRS into the relevant residential zones and giving effect to policies 3 and 4 of the NPS-UD.

¹² As referred to in submissions on behalf of HFL.

- (e) The zoning and related management regime for Horotiu are not varied by Variation 3.
33. More importantly, the second test from *Clearwater* is also not met. As Variation 3 does not include any land in Horotiu, including the submitter's land, there is a real risk that persons with an interest in land at Horotiu would be denied an effective opportunity to participate in the variation process.
34. This risk is evidenced by the very limited number of further submissions to the HFL submission. Only four further submissions were received, three submissions in support¹³ and one from Ports of Auckland Limited in opposition. By comparison, Private Plan Change 2 to the Operative Hamilton District Plan to rezone nearby land in the Te Awa Lakes area was hotly contested, with Environment Court appeals lodged by several significant industrial operators (including Fonterra and AFFCO) concerned about reserve sensitivity effects in the area. It is noteworthy that AFFCO, who have to date always been involved in planning processes concerning Horotiu, are not a further submitter to HFL. This absence indicates that more intensive residential development in Horotiu would not have been contemplated by interested parties in the community. All Council communications concerning Variation 3 in the lead up to, notification and post notification focused on its application to the four towns.
35. Therefore, I submit that even if the Hearings Panel consider that the HFL's submission meets the first *Clearwater* test, it must be struck out for failing to meet the second test. In adopting the *Clearwater* tests in the High Court decision *Option 5 Inc v Marlborough District Council*, Ronald Young J held:¹⁴

¹³ Submissions in support from Korris Limited, W & H Parker, and C Merritt.

¹⁴ *Option 5 Inc v Marlborough District Council* CIV 2009-406-144 28 September 2009, HC Blenheim, at [29].

I agree with the approach of William Young J in *Clearwater*. I accept that his first point may not be of particular assistance in many cases. His **second point will be of vital importance in many cases and may be the determining factor** in some cases. As the Environment Court said in this case so much will depend upon scale and degree.

[emphasis added]

Submission by Halm Fan Kong

36. The submission by Halm Fan Kong seeks to rezone 145 Park Road, Horotiu from General Rural Zone (GRUZ) to a medium density residential zone to allow for more housing in Horotiu.¹⁵ The site adjoins the existing residential zoned land in Horotiu but is surrounded by other GRUZ land to the north and west. To the east of the site, across the railway is heavy industrial zoned land including the AFFCO and Open Country sites. The submission is only one line and provides limited detail about whether the MRZ1 or MRZ2 zone is sought to be applied to the site.
37. With regard to question 1, it is accepted that, as an IPI, Variation 3 can introduce new residential zones, but it is not mandatory that it does so. The introduction of new residential zones is a discretionary element under section 80E RMA. Council chose not to rezone any land in Horotiu in Variation 3. The GRUZ is not a “relevant residential zone” under section 2 of the RMA and is therefore not required to incorporate the MDRS. Accordingly, I submit changes the GRUZ in Horotiu is outside the scope of an IPI.
38. In respect of the second question, the Council Submits that the submission fails the *Clearwater* tests for the following reasons:
- (a) With the exception of only two rural properties in Pookeno that were completed surrounded by existing relevant residential

¹⁵ Submission points 13.1

zones, Variation 3 does not rezone rural land to either GRZ or MRZ2. It does not rezone any rural land outside of the four relevant residential zone towns to MRZ1.

- (b) The section 32 report has not considered the potential effects of rezoning this land (or other land in Horotiu) to a medium density zone.
- (c) As no zoning changes in Horotiu were notified in Variation 3, there is a real risk that persons potentially affected by the rezoning, including surrounding landowners, have been denied an effective opportunity to participate in the variation process. Only two further submissions were made to the submission, from Ports of Auckland and Waikato Regional Council. As above, the absence of AFFCO and other industrial users, is evidence that more intensive residential development in Horotiu would not have been contemplated by interested parties in the community

39. For the reasons set out above, I submit that the submission by Halm Fan Kong is not on Variation 3. It is therefore out of scope and should be struck out under section 41D(1)(b) of the RMA.

CONCLUSIONS AND DIRECTIONS SOUGHT

40. I respectfully request that the following submissions be struck out under section 41D(1)(c):

- (a) Howard Lovell (submitter 27);
- (b) Horotiu Farms Limited (submitter 49); and
- (c) Halm Fun Kong (submitter 13).¹⁶

¹⁶ Each of these submissions only raise one submission point, therefore the submissions should be struck out in their entirety.

41. In addition to the submission points identified above for early determination, there are other submissions to Variation 3 that raise issues of scope that will be addressed at the substantive hearing. I therefore request that the Hearing Panel clarify the application of the bipartite *Clearwater* tests to Variation 3 and an IPI. I do not accept the submission from HFL that *Albany North Landowners* allows a departure from the *Clearwater* tests. The bespoke planning process referred to in the *Albany North Landowners* case for the Auckland Unitary Plan was broader than even a full district plan review. An IPI is not a full district plan review, or a unitary plan planning process.
42. It is important that submitters to Variation 3 understand that the recommendations the Hearing Panel can make must be 'on' the Variation in accordance with *Clearwater*. Clause 99(2)(b) allows the Hearings Panel to make recommendations beyond the scope of submissions, but in my submission that power does not permit the Hearing Panel to make recommendations that are not 'on' the Variation. The High Court has emphasised the vital importance of the second *Clearwater* test and acknowledges that it will often be determinative to the question of scope. *Albany North Landowners* does not depart from that legal principle.

Signed this 24th day of March 2023



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Counsel for Waikato District Council

Annexure "A"

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7 March 2023
Sent by Email

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Variation 3 to the Proposed Waikato District Plan - Withdrawal of Submission Point 106.15 by Kāinga Ora-Homes and Communities

We act for Kāinga Ora-Homes and Communities.

Kāinga Ora lodged a submission on Variation 3 (Enabling Housing Supply) to the Proposed Waikato District Plan which has been allocated submission number #106.

Kāinga Ora wishes to formally withdraw one of its submission points, being the submission point located at Row 9 of Appendix 1 to its primary submission. This submission has been allocated submission point 106.15 in the summary of decisions requested.

Kāinga Ora acknowledge that the Council consider such a zoning request to be outside of scope of this IPI process. Irrespective of any position regarding scope and Kāinga Ora withdrawing its submission point, Kāinga Ora wishes to highlight that the requested regularisation of the zoning pattern should be considered within a future plan change process by the Council.

Yours faithfully
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