IN THE MATTER	of the Whangarei District Plan and the Resource Management Act 1991 (RMA)
A N D	
IN THE MATTER	of Plan Changes 85, 85A, 85B, 85C, 85D, 86A, 86B, 87, 102 and 114 to the Whangarei District Plan
BEFORE	**THE HEARING PANEL** **WHANGAREI DISTRICT COUNCIL**

SUBMISSIONS OF COUNSEL
FOR WHANGAREI DISTRICT COUNCIL
AS TO SCOPE

DATED: 30th June 2017

EVIDENCE 01
TOPIC 85A-D 86A and B 114 102
SUB# Rural Plan Changes
DATE 3/07/2017

THOMSON WILSON LAW
Solicitors
125 Bank Street
Whangarei 0110
Phone: (09) 430-4380
Fax: (09) 438-9473

P O Box 1042
Whangarei 0140

Partner Responsible / Solicitor Acting: GJ Mathias / ST Shaw
Email: sts@thomsonwilson.co.nz

MAY IT PLEASE THE PANEL:

1. I have been asked by Whangarei District Council to present legal submissions to the Panel with respect to scope of submissions.

2. The Council has provided me with a list of matters from the s42A reports where scope issues were considered by the reporting officers, and I have reviewed those.

3. In these submissions I first discuss the recent developments in the case law dealing with scope, and then provide analysis of scope issues in the context of submissions on these plan changes by grouping scope matters into like categories.

Case law on Scope

4. It is settled law that in order for a submission (and the relief it seeks) to be 'in scope' for a plan change the submission must be "on" the plan change (RMA schedule 1 clause 6). The "Clearwater" test[1] is a two part test as to whether a submission is "on" a plan change, summarised[2] as:

> *"[54] First, the submission could 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". ...*
>
> *[55] 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 truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate". If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel". Such a consequence was a strong factor against finding the submission to be on the variation."*

5. In the subsequent High Court decision *Motor Machinists*, Kos J went on to helpfully describe the application of the Clearwater test:

> *"[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo*

[1] *Clearwater Resort Ltd v Christchurch CC* HC Christchurch AP34/02, 14 March 2003.
[2] *Palmerston North CC v Motor Machinists Ltd* [2013] NZHC 1290 at [54]-[55]

brought about by that change. 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.

[81] In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the Halswater decision. Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change...

[82] But that is subject then to the second limb of the Clearwater test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.... To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources....

[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."

6. A recent decision of the High Court with respect to the Auckland Unitary Plan[3] has clarified the application of the Clearwater test. The context of the decision is that under the Auckland legislation the hearings panel could recommend outcomes that were not in scope from submissions. Any decision that was in scope had only a right of appeal to the High Court on a point of law, but a decision that was out of scope

[3] *Albany North Landowners v Auckland Council* [2017] NZHC 138

gave right to an appeal de novo to the Environment Court. In this context the High Court received a number of appeals and applications for judicial review with respect to scope. Whata J convened a hearing on scope to determine how those would be progressed.

7. Whata J drew a distinction between the Clearwater test as it applies to a discrete **plan change,** and the assessment of scope on a broader **plan review**. He concluded that the appropriate test for the scope of a submission (and relief) on a plan review is whether the outcome was "fairly and reasonably raised" in a submission (per the established Countdown test[4]) or, in the language of the Auckland IHP, was a "reasonably foreseen logical consequence" of a submission:

> *'[121] A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan...*
>
> *[129] ...the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in Clearwater, Option 5 and Motor Machinists. The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP. Unlike the cases just mentioned, there was no express limit to the areal extent of the PAUP (in terms of the Auckland urban conurbation). The issues as framed by the s 32 report, particularly relating to urban growth, also signal the potential for great change to the urban landscape. The scope for a coherent submission being "on" the PAUP in the sense used by William Young J was therefore very wide.*
>
> *[130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s 32 report. I respectfully doubt that Kós J contemplated that his comments about s 32 applied to preclude departure from the outcomes favoured by the s 32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.*

[4] *Countdown Properties (Northlands) Ltd v Dunedin CC* (1994) 1B ELRNZ 150 (HC).

> *[131] By contrast a s 32 report is, in the context of a full district plan review, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.*
>
> *[133] The important matter of protecting affected persons from submissional side-winds raised by Kós J must 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. Take for example a landowner affected by a rule in a proposed plan that will remove a pre existing right to develop his or her property in a particular way. The RMA does not envisage, via s 32, that he or she would be precluded from seeking by way of submission a form of relief from the proposed restriction that was not specifically considered by the s 32 assessment and report....*
>
> *[135] In accordance with relevant statutory obligations, the IHP correctly adopted a multilayered approach to assessing scope, having regard to numerous considerations, including context and scale (a 30 year plan review for the entire Auckland region), preceding statutory instruments (including the Auckland Plan), the s 32 reportage, the PAUP, the full gamut of submissions, the participatory scheme of the RMA and Part 4, the statutory requirement to achieve integrated management and case law as it relates to scope. This culminated in an approach to consequential changes premised on a reasonably foreseen logical consequence test which accords with the longstanding Countdown "reasonably and fairly raised" orthodoxy and adequately responds to the natural justice concerns raised by William Young J in Clearwater and Kós J in Motor Machinists."*

8. In light of the *Albany* decision, an important factor in determining scope of submissions is whether the submissions are made on a plan change of limited 'areal extent' or a wider plan review.

9. A recent local example of a plan change of limited areal extent was the Kamo Walkability plan change (PC120). I refer to this simply as a useful example of the process of applying the Clearwater test to a standalone plan change of limited areal extent. PC120 involved replacing the Living 1 and Business zoning within a mapped extent of Kamo. A submission was received from the owner of a large holding of Countryside land outside the mapped extent of the plan change, seeking the new

KWE zoning. At issue was whether the submission was "on" the plan change, as the land fell outside the mapped boundary and was Countryside rather than Living zoned, and whether potential submitters were likely to have foreseen that a submission would seek that relief. The Panel determined, after hearing legal submissions for the Council and the submitter, that the submission was not "on" the plan change (and noted that the Rural plan changes would address the zoning).

10. I submit that the package of Rural plan changes being heard by this Panel is generally more akin to a **plan review** than a plan change, and that the Albany "reasonably and fairly raised" test is therefore appropriate when assessing most scope issues.

11. While WDC has adopted a "rolling review" approach to the district plan rather than a full plan review, the Rural plan changes:

(a) Review the planning regime for a significant geographic portion of the District;

(b) Provide the only opportunity for the next ten year period for the community to engage with these issues, as the Council does not propose to revisit rural issues again in this rolling review;

(c) Were comprehensively addressed in the s32 reports including assessment of alternatives; and

(d) Were likely to generate a range of submissions questioning the appropriateness of proposed provisions and zoning and seeking amendments to the notified plan changes.

12. In summary I submit that the Rural plan changes can be seen as providing the platform for an open consideration of the appropriate planning treatment of Rural land, and that in short any submission seeking a zoning outcome of "something starting with R" from the 'menu' of proposed Rural zones (and the Minerals, Landscape and Coastal Areas) should be seen as "reasonably and fairly raised" and therefore "on" the package of Rural plan changes.

13. I submit that this follows not just from the Albany test, but also from Kos J's question in Motor Machinists *"whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change."*

14. I submit that the Rural plan changes have sought to alter the 'management regime' for all Rural land in the District (to one or other of the proposed Rural zones, "something beginning with R") – and if landowners cannot request consideration of alternative Rs now, then when?

15. This is the basis on which I now approach the specific scope issues the Council have asked me to consider. I have done so by grouping the issues into like areas, some of which I submit do not raise 'scope' matters in the Clearwater or Albany sense, and others which do.

Group One: "Not the District Plan"

16. The first grouping I have considered is what I term "not the District Plan". These are submissions seeking relief, such as physical engineering works or amendments to external source documents, which are simply not matters in the Plan. I submit that these submissions are out of scope, but do not raise Clearwater or Albany issues.

Submission	***s42A Report***	***Page***	***Para***
25/1, 90/2, 101/2, 413/2, 447/3	Part 1	35-37	169, 171
425/23	Part 2	95	614-619
488/2	Part 3	70-71	220-221
70/1-4	Part 4	9-10	35, 43
90/2 & 3 and 101/1	Part 12	9	29-30

Group Two: Another Plan Change

17. The second grouping is matters that are not solely related to the Rural plan changes, and are to be addressed in future plan changes, such as the forthcoming review of the Environmental Engineering Standards and Transport plan change. I submit that these submissions are out of scope, but do not raise Clearwater or Albany issues.

Submission	*s42A Report*	*Page*	*Para*
479/14	Part 1	43-44	205-207
99/1	Part 11	12, 14-18	55-63, 74-88
90/2 & 3 and 101/1	Part 12	9-10	29 & 31
453/18 and 479/10 & 11	Part 12	10-11	33-40
410/48	Part 8	17	107-108
405/1	Part 10	21-22	110, 114

Group Three: Plan review

18. The third grouping consists of submissions seeking alternative zoning in Kokopu, Onerahi, Ruakaka, Springfield and Parua Bay.

19. If these were taken on an individual plan change basis and the Clearwater test applied, I submit that these submissions would all be considered out of scope as not "on" the particular plan change for which zoning is sought (Rural Village zoning sought in areas not identified in the RVE s32 report as existing rural villages). The Parua Bay submission (Kiteone Road) would be more finely balanced than the others, with the land in question being near (but not adjacent) to the village edge.

20. I submit however that it is more appropriate to assess these submissions using the Albany test for plan review. All of the submissions relate to land sought to be rezoned by the Rural plan changes, and all seek an alternative Rural zoning from the 'menu' of proposed Rural zones. I submit that this grouping falls within the 'if not now, when?' category, as the Council does not propose to revisit Rural zoning again in further plan changes. If the submitter seeks RVE zoning, this is the time to do so. This is the opportunity to assess which of the proposed Rural zones is the most appropriate – which of the Rs?

21. I note that for the Onerahi and Ruakaka submissions this matter is more complicated, as the Urban plan change will consider the need for further residential zoned land in those locations. As the land is however currently zoned Countryside and therefore (in the interim, at least) proposed to be rezoned RPE, I submit that the appropriateness of an alternative *Rural* zoning (but not an alternative *Urban* zoning) is in scope for the Rural plan changes.

22. As such I submit that these submissions are all in scope based on the Albany test.

Submission	*s42A Report*	*Page*	*Para*
93/1	Part 6	14	54-55
245/2	Part 6	25	99-100
393/1, 397/1, 398/1, 438/1, 458/1 – 461/1, 470/1	Part 6	34	142-143
303/1	Part 6	35	145-146
376/1	Part 6	27, 30	107-108, 119

Group Four: Not "on" (but another plan change)

23. This final grouping relates to submissions which I submit are not "on" these plan changes, but will be or have been addressed in other plan changes. These include diverse matters such as GMOs, UTE zoning, Open Space zoning, Business zoning, Plan definitions, and a 500m MEA setback.

24. The GMO matter has already been addressed in the GMO plan change, currently subject to appeal. Open Space and Business zoning and Plan definitions will be picked up in future plan changes in the rolling review.

25. I submit that requests for land currently zoned UTE to be rezoned to one of the Rs, and requests for additional land to be rezoned to UTE, are not within the 'areal extent' of the Rural plan changes. Nor were such options included in the s32 reports which identified that it was land with a Countryside or Coastal Countryside zoning, existing rural villages and the RUEE /RUEE Living structure plan areas that were to be rezoned by the Rural plan changes. Land already zoned UTE has recently been addressed by the UTE plan change, and any consideration of amendments to the UTE (considered to be an Urban zone) will be addressed in the Urban plan change.

26. Submissions seek amendments to the Living Environment rules with respect to setbacks from MEAs. For the reasons outlined in Part 12 of the s42A report, I submit that amendments to the Minerals chapter or any of the Rural chapters are in scope, but that amendments to the Living Environment rules are not "on" the Rural plan

changes. The Minerals s32 evaluated potential amendments to the Living Environments but no amendments were proposed or notified, and as such I submit that the 'management regime' for Living Environments has not been amended by the plan changes. Further I submit that the submissions did not specify with sufficient clarity that amendments were sought to the rules governing the Living Environments, and that there is therefore a real risk that potential further submitters have been denied an opportunity to respond. In terms of "if not now, when?", I submit that the appropriate time to address changes to rules governing the Living Environments is the Urban plan change.

27. I submit that all of these matters are not "on" the Rural plan changes in the Clearwater sense, as potential submitters would not have been alert to these matters being raised out of "left field" / "submissional side-wind" and are therefore out of scope.

Submission	***s42A Report***	***Page***	***Para***
70/5	Part 1	44	211-212
453/21 & 462/4	Part 1	55-56	273-275
523/1	Part 6	27, 31	109, 123
193/1	Part 6	101, 105	496, 515
408/2	Part 6	109-110	527-530
509/1	Part 6	110-111	532-535
320/1, 319/1, 328/1, 331/2	Part 6	121-122	576-581
178/3 and 4	Part 3 Part 12	60-63 6-8	184-194 22-27

.....

ST Shaw
Counsel for Whangarei District Council
Date: 30 June 2017