

WAIMAKARIRI DISTRICT PLAN REVIEW
MEMO TO HEARING PANEL

FILE NO AND TRIM NO: DDS-14-05-01 / 230601080866

DATE: 1 June 2023

MEMO TO: Hearing Commissioners

FROM: Peter Wilson, s42A reporting officer on Variation 1

SUBJECT: Scope issue

Purpose and background

1. The purpose of this memo is to respond to the questions in paragraph 19 of Minute 2. The Commissioners asked the following questions:

19. Given the importance of this matter, we wish to deal with it proactively with the Council and those submitters who have submissions to the PDP on matters addressed in Variation 1 and submitters to Variation 1. As a first step, we hereby request that the Council prepare a memorandum for the IHP, preferably informed by legal advice, which:

- a. Identifies specific:
 - (a) PDP submissions on "relevant residential zones";
 - (b) PDP submissions on provisions of the PDP substituted by Variation 1;
 - (c) PDP submissions in relation to land that is now proposed new residential zones in Variation 1;
 - (d) PDP submissions seeking new residential zones;
 - (e) IPI submissions seeking new residential zones.
 - b. Sets out how the Council intends to address the interface between Variation 1 submissions and PDP submissions, including:
 - (a) The scope of Variation 1;
 - (b) The relevant tests for determining whether Variation 1 submissions are within or outside of the scope of an IPI, including advice on consequential or incidental amendments; and
 - (c) The IHP's powers to make recommendations on Variation 1.
 - c. In responding to a. and b., the Council is requested to set out its position of the applicability of Clause 16B of Part 1 of Schedule 1, and in particular, can submissions on the PDP be deemed to be on Variation 1, and if so, what are the relevant applicable tests.
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2. This memo:
 - a. Identifies specific PDP and IPI submissions in accordance with the Hearing Panel's request.
 - b. Outlines the scope of Variation 1;
 - c. Annexes a legal opinion from Buddle Findlay which addresses:

- (a) The relevant tests for determining whether Variation 1 submissions are within or outside of the scope of an IPI, including advice on consequential or incidental amendments; and
- (b) The IHP's powers to make recommendations on Variation 1.
- (c) The applicability of Clause 16B of Part 1 of Schedule 1, and in particular, can submissions on the PDP be deemed to be on Variation 1;
- d. Sets out Council's position on the Clause 16B, Part 1 of Schedule 1 of the RMA;
- e. Explains how Council will address the interface between Variation 1 submissions and PDP submissions.

Background to Variation 1

3. Following the notification of, and receipt of submissions on, the Waimakariri Proposed District Plan (**PDP**), the Council notified Variation 1 (its Intensification Planning Instrument (**IPI**)) pursuant to the Resource Management (Enabling Housing Supply and Other Matters) Amendment Act 2021 (**Amendment Act**). The PDP is progressing through the standard Schedule 1 process and Variation 1 is progressing through a bespoke process, called the Intensification Streamlined Planning Process (**ISPP**). These parallel processes have created a number of complexities as identified by the Panel.
4. Below I provide further context to Variation 1 which is relevant to the questions the Panel has asked in Minute 2.
5. Variation 1 incorporates the Medium Density Residential Standards (**MDRS**) into every "relevant residential zone" in the PDP as required by the Amendment Act. A "relevant residential zone" is defined in the Amendment Act to mean all residential zones, but excludes a large lot residential zone, an offshore island, a settlement zone, and areas predominantly urban in character with a population (at the 2018 census) of less than 5,000 (unless the local authority intends those areas to become part of an urban environment).
6. Variation 1 has applied the MDRS to residential zones in Rangiora and Kaiapoi because they have populations exceeding 5,000. Variation 1 also applies the MDRS to residential zones in Woodend, Pegasus, and North Woodend/Ravenswood because they are intended to become part of an urban environment and have had the MDRS applied to them. The areas with a population of less than 5,000 and which are not intended to become an urban environment are Oxford, Ashley, Sefton, Cust, Ohoka, Mandeville, Waikuku Beach and the rest of the rural and rural lifestyle zone. Variation 1 makes no alteration to these areas.
7. The notified PDP contained a medium density residential zone (pMRZ) in the centres of Rangiora and Kaiapoi, surrounded by a general residential zone (**GRZ**).
8. All of the pMRZ and almost all of the GRZ in Rangiora, Kaiapoi, Woodend, Pegasus, and North Woodend/Ravenswood has been rezoned as medium density residential zone (vMRZ) under Variation 1, leaving a small residual amount of GRZ unchanged by Variation 1 on the outskirts of Woodend/Pegasus/Ravenswood towns and in the

smaller towns with a population of less than 5,000 which do not meet the 'relevant residential zone' test in Oxford, Ashley, Sefton, Cust, Ohoka, Mandeville, Waikuku Beach

9. Variation 1 also rezoned the Bellgrove Stage 1 development land in the North East Rangiora Development Area and the Townsend Fields development land in the South West Rangiora Development Area from rural to residential. These are "new residential zones" proposed by Variation 1 (being relevant to the Panel's question at paragraph 19(a) (iii) in Minute 2).
10. It is also important to note that Variation 1 made a number of changes to the PDP across a number of chapters (including those listed in paragraph 14 below) and provisions. These changes are discussed further later in this memorandum under the heading "Scope of Variation 1".
11. For completeness, I note the PDP proposes further land for residential zoning in the PDP future urban development areas (FUDA). The FUDA are not included as "new residential zones" in Variation 1.

Analysis of submissions

12. As a starting point, I note that:
 - a. There are 415 submissions on the PDP and 6,765 individual submission points;
 - b. There are 81 submissions on Variation 1 and 449 individual submission points;
 - c. There are 78 submissions on Variation 2 and 137 individual submission points;
 - d. There are 7351 individual submission points on the Proposed Plan and the two variations (Variation 1 and Variation 2), and 2589 further submission points in total.
13. There are submissions for and against rezoning land, or similar provisions, such as outline development plans (ODPs) — under both the PDP and Variation 1.
14. I have undertaken an analysis of the PDP and IPI submissions to answer the Panel's questions in paragraph 19(a) of Minute 2. As submissions often contain multiple submission points, I have analysed the submissions by *submission point*, rather than by submission in the first instance. I have also grouped the analysis by submissions so that submitters can easily identify whether their submission contains submission points that fit within the categories the Panel identified.
15. A submission or submission point on the PDP can be on a matter as general as a chapter or as specific wording amendments to a rule. Variation 1 has proposed changes to objectives, policies, and rules, and the Panel may find that consequential amendments within other district plan chapters are required as section 77N requires a decision-maker to consider how policies 3 and 5 of the National Policy Statement on Urban Development 2020 (**NPS-UD**) are given effect to in a non-residential zone within an urban

environment. For this reason, there are some chapters listed in the table below that are not 'relevant residential zones' but contain changes that give effect to policy 3 or 5 of the NPS-UD in non-residential zones¹.

16. I consider that there are two categories of PDP submissions that may be in scope of Variation 1 if deemed or carried over into Variation 1:
 - a. The first category are PDP submissions that fall within general scope of Variation 1, which is captured by the questions that the Panel has asked and which the legal opinion provides a clear test on. For instance submissions in category (a), (b) and (c) would fall within scope of Variation 1.
 - b. The second category are PDP submissions that would involve an incidental or consequential extension to a Variation 1 medium density residential zone boundary. The relevant test is a fact specific analysis of the submission itself as outlined in the legal opinion from Buddle Findlay.
17. As a practical example; in the commercial and mixed use zones, where a PDP submission seeks changes to housing density, that submission may result in changes to give effect to Policy 3 or 5 of the NPSUD 2020.
18. Undertaking an evaluative exercise of the degree to which submissions will achieve Policies 3-5 of the NPSUD, or consequential or incidental extensions to zones will require a detailed analysis of the context of each submission point and the matters sought by the submission alongside consideration of any points raised in evidence presented to the Panel. It is suggested that the s42A officers' reports consider the applicability of these tests in making recommendations.
19. As the analysis involves a large amount of data, I have presented a summary of the analysis below, and attached the specific submissions by category as annexures (Appendices 1 to 5). These will be available on the Council website as excel spreadsheets so that submitters can review the information and easily search the documents to see if their submission falls within the categories I have identified.

Identification of specific PDP and IPI submissions in accordance with the Hearing Panel's request

20. Below is a table summarising the number of submissions and submission points I have identified as fitting within the 5 categories of submissions identified by the Panel in paragraph 19(a) of Minute 2. The table below has been prepared using a 'broad brush' approach to avoid limiting the scope of submission identification prior to a detailed analysis of submission points as discussed in paragraphs 16 and 17.

¹ Generally these are the chapters that relate to city centre zones, that could include walkable catchments, that are within or adjacent to local/neighbourhood/town centre zones or their equivalents, relate to accessible public transport or relative demand for housing and business use in that location.

21. A list of the submission points per category is set out in the appendices to this memorandum as set out in the "Appendix" column in the table below.

Category	Context	Codes	Appendix	Number of submissions	Number of submission points
a. PDP submissions on "relevant residential zones"	This relates to PDP submissions on every "relevant residential zone" in the PDP, as described in paragraph 5 above. Variation 1 applies to all "relevant residential zones".	DEV-NWR, EKP, EWD, FUDA, FUDS, GRZ, K, MRZ, NER, New Dev, NRG, NWR, PEG, RESZ, SER, SUB, WKP, WR	Appendix 1	123	1307
b. PDP submissions on provisions of the PDP substituted by Variation 1;	<p>.This relates to PDP submissions on any objective, policy, rule or other provision that Variation 1 substitutes, regardless of whether it is a provision applying to a "relevant residential zone", or some other zone (non-residential zone).</p> <p>This category will include PDP submissions that also fall within categories (a) and (c), as those categories capture submissions on provisions (zones) that are being substituted by Variation 1.</p> <p>This category will include PDP submissions on non-residential zone provisions that Variation 1 has substituted.</p>	CMUZ, KLFR, LCZ, LFRZ, LLRZ, MUZ, OSZ, SARZ, TCZ	Appendix 2	65	911
c. PDP submissions in relation to land that is now proposed new residential zones in Variation 1	This relates to PDP submissions on land within North West Rangiora (Bellgrove Stage 1) and South/West Rangiora	NER, NRG, WR	Appendix 3	27	75

	(Townsend Fields) which have been upzoned from rural and rural lifestyle to medium density residential by Variation 1 and which the PDP proposes for further urban development (FUDA)				
d. PDP submissions seeking new residential zones	These are PDP submissions seeking residential rezonings outside of the zones described in (a) and (c) above.	RZONE (subset)	Appendix 4	104	119
e. IPI submissions seeking new residential zones.	These are IPI submissions seeking residential rezonings outside of the zones described in (a) and (c) above.	V1-RZONE	Appendix 5	11	29

22. I have not included totals in the above table because some submissions and submission points will appear in multiple categories.
23. The submissions categorised above in response to the Commissioners' questions constitute around 33% of the total submission points on the PDP and the two Variations.

Nature of general and specific submissions

24. Most of the submissions and submission points that have been identified are general in terms of relief sought and whilst they fall into the categories (a)-(e) above, I consider that it will be straightforward for Council officers to make recommendations on in the relevant s42A report having regard to the Variation 1 scope issue.
25. Where specific and/or technical relief is sought in a PDP submission on a PDP provision or chapter that has been amended or replaced by Variation 1, these submission points will require careful integration between the s42A reports for the residential zone (PDP, Schedule 1 process) and the s42A report for Variation 1 (ISSP process). 'General' submissions may relate to the whole chapter, such as where Variation 1 amended, or could amend in response to recommendations, an objective or a policy. 'Specific' submissions are on identifiable or discrete provisions, such as seeking changes to a rule.
26. I consider that whilst the analysis above has identified categories of submissions in respect of scope, the analysis, evaluation and recommendation on these submissions should occur through the s42A reports.

Scope of Variation 1

27. The Section 32 report for Variation 1 summarises the key changes proposed by Variation 1 as follows:

- a. Replace the General Residential Zone with the Medium Density Residential Zone in the Proposed District Plan in the relevant residential urban areas.²
- b. Insert the new Medium Density Residential Standards into the Medium Residential Zone chapter in the Proposed District Plan.
- c. Include the higher density standards within Town Centres and Local Centre Zone.
- d. Changes to the height limits of the Local Centre and Neighbourhood Centre Zone to match with changes to the adjacent residential zones where the MDRS apply.
- e. To rezone two areas of Rangiora from 'Future Development Areas' to 'Medium Density Residential Zone' and include the MDRS. These areas are zoned Rural in the Operative District Plan however are also identified as Greenfield areas within the Canterbury Regional Policy Statement and have been identified within the District Development Strategy.
- f. A New 'Qualifying Matter Natural Hazards' layer to reduce potential for MRDS development within this identified area based on an identified High modelled flood risk.
- g. 'Qualifying Matter Airport Noise' layer to manage the threshold of reverse sensitivity effects on airport operations from MDRS development within an identified area in Kaiapoi.
- h. A 39m Setback from National Grid Transmission Lines in North East Rangiora identified as 'Qualifying Matter – National Grid Subdivision Corridor' to reduce potential for MRDS development from within this setback, as per the Outline Development Plan for North East Development Area in Rangiora.
- i. A 5m setback from the rail corridor within Town Centre Zone of Rangiora and Kaiapoi identified as a qualifying matter to reduce potential for MDRS development from within this setback.

28. A discussion regarding the scope of Variation 1 is set out in section 3 of the Council's section 32 report on Variation 1. In broad terms, the scope of Variation 1 spatially applies to the following:

- a. The following zones in the townships of Rangiora, Kaiapoi, Woodend (including Ravenswood) and Pegasus:
 - i. General Residential Zone;
 - ii. Medium Density Residential Zone;
 - iii. Town Centre Zone;
 - iv. Local Centre Zone;
 - v. Neighbourhood Centre Zones;
- b. Urban environment areas adjacent to the following zones in the townships of Rangiora, Kaiapoi, Woodend (including Ravenswood) and Pegasus:

² i.e. in the townships of Rangiora, Kaiapoi, Woodend (including Ravenswood) and Pegasus.

- vi. Town Centre Zone
 - vii. Local Centre Zone
 - viii. Neighbourhood Centre Zones.
- c. Two areas of Rangiora rezoned from 'Future Development Areas' to 'Medium Density Residential Zone' with MDRS included being Bellgrove and Townsend Fields

Treatment of qualifying matters

29. Variation 1 introduces “qualifying matters” which restrict and limit the application of the MDRS. This is one area where the broad scope given to the IHP on an IPI is needed, as both the variation and submissions cover a broad range of different types of qualifying matters – as proposals and submission requests.
30. Qualifying matters must meet a series of tests, under s77I, s77K RMA, and the NPS-UD 2020.
31. The qualifying matter areas are in effect to delineate where they apply, however the additional density within the proposed qualifying matter area does not yet have effect.
32. For the most part, the qualifying matters utilise the technical content and provisions in some of the district-wide PDP chapters.
33. For the most part, the technical content of proposed qualifying matters are being heard before the Variation 1 hearing in November, however, there are exceptions. The exceptions are the airport noise matters, which I have recommended to be heard in February 2024.

Buddle Findlay Legal advice

34. The Council has obtained an opinion from Buddle Findlay which is attached as Appendix 6 to this memo. The advice addresses:
- a. the relevant tests for determining whether Variation 1 submissions are within or outside of the scope of an IPI, including advice on consequential or incidental amendments;
 - b. the IHP’s powers to make recommendations on Variation 1;
 - c. the applicability of Clause 16B of Part 1 of Schedule 1, and in particular, can submissions on the PDP be deemed to be on Variation 1.
35. I do not repeat the content of that advice. However, I set out below the Council's position in light of the advice regarding the applicability of clause 16B.

Clause 16B, Part 1 of Schedule 1 of the RMA

36. The legal opinion considered the issue of whether clause 16B, schedule 1, RMA applies to Variation 1 such that PDP submissions on provisions which are substituted by Variation 1 are automatically deemed to be submissions on Variation 1. The opinion acknowledges uncertainty in the legislation, and states that there are arguments for and against the application of clause 16B.

37. The opinion states that if PDP submissions are not automatically deemed submissions on Variation 1 pursuant to clause 16B, it is still possible to protect the position of a PDP submitter whose submission was lodged before Variation 1 substituted the PDP provision against which that submission had been lodged.
38. The Council supports the Panel utilising its powers and discretion to ensure submissions are heard in the relevant processes and adherence to natural justice principles.

Handling of submissions that are within scope of Variation 1 but which were made on the PDP

39. Whilst PDP submissions were not made on Variation 1 specifically, Variation 1 superseded a number of PDP provisions. If PDP submitters do not have an opportunity to be involved in the Variation 1 process (where Variation 1 amended the PDP provisions addressed in those submissions), submitters may be disenfranchised. However, even if clause 16B does not apply so that PDP submissions on provisions amended by Variation 1 are not automatically deemed to be submissions on Variation 1, there may be the ability for the Panel to consider the matters raised within some of the identified PDP submissions in the Variation 1 process.
40. Submission points in categories a to c of paragraph 19 of Minute 2 should fall within the scope of Variation 1. For example, PDP submissions on "relevant residential zones" (category (a)) should be within scope of Variation 1 because the RMA requires Variation 1 to change all "relevant residential zones" by applying MDRS or introducing a qualifying matter to make MDRS less enabling in those zones.³
41. Having regard to Buddle Findlay's advice, submission points in categories d and e:
 - a. Will not fall within the scope of Variation 1 if it is seeking a new residential zoning that is separated from (rather than adjacent to) relevant residential zones and proposed new residential zones in Variation 1.
 - b. May fall within the scope of Variation 1 if it is seeking a new residential zoning that is adjacent to relevant residential zones or proposed new residential zones in Variation 1. However, a determination will be required on a case-by-case basis as to whether particular rezoning requests are permissibly within scope as incidental or consequential extensions of zoning changes proposed in a plan change.

³ Paragraph 44, Appendix 6

Council approach to interface between Variation 1 submissions and PDP submissions

42. Council notes the challenging issues of scope and process with respect to the PDP and Variation 1 and the importance of the issues for submitters and the Panel. I can advise the Panel that the following measures are in place:
- a. Individual tracking of every submission (and further submission) point by way of a custom submissions database. This ensures that no submission points are missed, and that each submission point is handled in the appropriate process – either Schedule 1, RMA for the PDP and Variation 2, and the ISSP for Variation 1.
 - b. The s42A reports with the most overlap – namely residential, large lot residential, Variation 1, and Variation 2 (financial contributions) – whilst being in different planning processes, share the same hearing stream (hearing 7). Subdivision, which also has some overlap is in the next hearing (hearing 8). These s42A report authors are working off and will present a shared set of drafting amendments consistent with the Amendment Act requirements to minimise duplication and confusion.
 - c. Variation 1 qualifying matters utilise content from the district-wide provisions of the PDP, some of which have hearings prior to Variation 1, and some of which may have hearings after. Where the hearings are before Variation 1, the s42A reporting officer for Variation 1 will ensure that the recommendations in the Variation 1 s42A report reflect matters discussed at the hearings and the relevant right of reply report before finalising recommendations. Where the hearings on the technical content are after the Variation 1 report, such as suggested for airport noise, there may be a need for an additional IHP hearing session to occur after the final PDP hearing in order to finalise the qualifying matter content. This could occur as part of the wrap-up hearing.
43. I consider that where PDP submissions are within scope of Variation 1 and where that submitter has not made a similar IPI submission, that the discretion given to the IPI panel by the Amendment Act to make recommendations beyond just the IPI submission scope could be utilised depending on the merit of the particular PDP submission.
44. In light of the categories of scope identified in this memo, the s42A authors will be considering the identified PDP submissions in light of submission content on a relevant residential zone, the application of Policies 3-5 of the NPSUD on non-residential zones in the urban environment, or the possibility of consequential or incidental extensions to zones in the context of rezoning requests. This is also a requirement of rezoning requests, which may meet all or many of the categories (a)-(e)

Peter Wilson

Senior Policy Planner

Appendix 1 - PDP submissions on "relevant residential zones"

Appendix 2 - PDP submissions on provisions of the PDP substituted by Variation 1

Appendix 3 - PDP submissions in relation to land that is now proposed new residential zones in Variation 1

Appendix 4 - PDP submissions seeking new residential zones

Appendix 5 - IPI submissions seeking new residential zones.

Appendix 6 – Buddle Findlay Legal Opinion

BUDDLE FINDLAY

30 May 2023

TO

Peter Wilson
Waimakariri District Council
215 High Street
Rangiora 7400

Copy to
Matthew Bacon

FROM

Cedric Carranceja
Jenna Silcock

By Email

Dear Peter

PROPOSED WAIMAKARIRI DISTRICT PLAN AND VARIATION 1 – ADVICE ON SCOPE

1. Waimakariri District Council (**Council**) has appointed hearings panels to hear submissions and further submissions, and make recommendations to the Council on:
 - (a) The Proposed Waimakariri District Plan (**PDP**), to be heard by the PDP Hearings Panel;
 - (b) Variation 1 (Housing Intensification) to the PDP (**Variation 1**), to be heard by the Independent Hearings Panel (**IHP**); and
 - (c) Variation 2 (Financial Contributions) to the PDP (**Variation 2**), to be heard by the PDP Hearings Panel.
2. The PDP and Variation 2 are progressing through the standard plan review/variation process pursuant to Schedule 1 of the Resource Management Act 1991 (**RMA**).

3. Variation 1 is an Intensification Planning Instrument (**IPI**) that is progressing through a new process introduced by the Resource Management (Enabling Housing Supply and other matters) Amendment Act 2021 (**Amendment Act**), called the Intensification Streamlined Planning Process (**ISPP**). This process is primarily set out in clause 95(2) of Part 6 of Schedule 1 of the RMA.
4. On 13 April 2023, the PDP Hearings Panel and IHP jointly issued Minute 2 requesting the Council prepare a memorandum, preferably informed by legal advice, regarding the scope of Variation 1 and the applicability of clause 16B of Schedule 1 of the RMA to Variation 1. You have asked that we provide legal advice to accompany your memorandum.
5. We understand you will identify specific PDP and Variation 1 submissions that fit the categories set out at paragraph 19(a) of Minute 2 and outline the scope of Variation 1. Accordingly, our advice addresses the following matters identified in Minute 2:
 - (a) The relevant tests for determining whether Variation 1 submissions are within or outside the scope of Variation 1, including advice on consequential and/or incidental amendments;

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- (b) The IHP's powers to make recommendations on Variation 1; and
 - (c) The applicability of clause 16B of Part 1 of Schedule 1, and in particular, can submissions on the PDP be deemed to be on Variation 1, and if so, what are the relevant applicable tests.
6. In preparing this advice, we have had regard to Minute 1, the Memorandum of Counsel from Chapman Tripp dated 24 March 2023 (**Chapman Tripp Memo**), and Minute 2.

THE RELEVANT TESTS FOR DETERMINING WHETHER SUBMISSIONS ARE WITHIN SCOPE OF VARIATION 1

7. A variation (or plan change) is distinct from a full plan review, as the former only seeks to change an aspect of a proposed plan. In the case of a variation, case law has confirmed that Council has no jurisdiction to consider a submission point if it falls outside the scope of the variation due to it not being "on" a variation.⁴

⁴ *Paterson Pitts Limited Partnership v Dunedin City council* [2022] NZEnvC 234 at [66] to [68].

8. For a submission to be "on" a variation or plan change, the Courts have required that it satisfies the following two limbs of what has been referred to as the "Clearwater test":⁵
 - (a) First, the submission must reasonably fall within the ambit of the variation by addressing the extent to which the plan change or variation changes the pre-existing status quo.⁶
 - (b) Second, the decision-maker should consider whether there is a real risk that persons potentially affected by changes sought in a submission have been denied an effective opportunity to participate in the decision-making process.⁷ This second limb is directed to asking whether there is a real risk that persons directly affected by the additional change being proposed in a submission have been denied an appropriate response.⁸
9. Whether a submission is "on" a variation or plan change is a question of fact and degree to be decided in each case in a robust and pragmatic way.⁹
10. In *Motor Machinists Limited v Palmerston North City Council*, the High Court provided the following useful observations to assist in identifying whether a submission is "on" a plan change, including in relation to submissions seeking zoning extensions:

[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 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 2 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... Yet the Clearwater approach does not exclude altogether

⁵ The test was identified by the High Court in *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

⁶ *Ibid* at [69](a).

⁷ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [119] to [128]; *Palmerston North Industrial and Residential Developments Limited v Palmerston North City Council* [2014] NZEnvC 17 at [34] to [36]; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [90]; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

⁸ *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [127]; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [82]

⁹ *Sloan v Christchurch CC* [2008] NZRMA 556 (EnvC).

zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no 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. [our underlining for emphasis]

Consequential and incidental amendments

11. The Panel has requested advice on consequential and/or incidental amendments.
12. We have understood the Panel's query to be regarding whether submission requests for rezoning of land not specifically covered by Variation 1 could be considered permissibly within scope as "*incidental or consequential extensions of zoning changes proposed in a plan change*" as mentioned by the High Court in *Motor Machinists* (see quotation at paragraph 10 above).
13. The High Court in *Motor Machinists* confirmed that the Clearwater test for determining whether a submission is on a variation or plan change does not prevent submissions from seeking zoning extensions altogether. However, a "precautionary approach" is required when determining that a submission proposing rezoning of land beyond the areas being rezoned by a notified variation is within scope as an incidental or consequential further change.¹⁰ Robust sustainable management of natural and physical resources requires notification of a section 32 analysis of the comparative merits of a proposed variation to persons directly affected by the proposals.¹¹ Incidental or consequential extensions of zoning changes proposed in a variation are permissible given that no section 32 analysis is required to inform affected persons of the comparative merits of the change.¹²
14. The High Court's reference to an "extension" of a zoning change proposed in a variation implies that a proposed rezoning that is separated from, rather than adjacent to, land proposed to be rezoned in a variation, cannot be considered within scope as a consequential and incidental zoning extension. On the facts of *Motor Machinists*, the Court held that a submission seeking that the submitter's land be rezoned was outside the scope of a plan change that proposed to rezone a different area of land that was ten lots away from the submitter's land.

¹⁰ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [91](c).

¹¹ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [91](c).

¹² *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [81].

15. However, the fact that a submitter's proposed rezoning is adjacent to land proposed to be rezoned in a variation does not automatically mean that the submitter's request should be considered within the scope of the variation as an incidental or consequential rezoning extension.¹³ Any proposed zoning extension must still meet the second limb of the Clearwater test (see paragraph 8(b) above),

and that necessitates a judgement call. It is a question of fact, scale and degree to be decided in each case in a robust and pragmatic way.

16. As an illustration of making a judgement call, in *Option 5 Inc v Marlborough District Council*¹⁴ the appellant argued that once the Council notifies a variation to extend the area of a Central Business Zone (**CBZ**), any submission which seeks to add directly to that zone in immediately contiguous areas would also be "on" the variation. That argument was rejected by the High Court. Rather, the High Court considered that whether a rezoning submission is "on" a plan change or variation will involve a question of scale and degree, and when considering that question, it is relevant to take into account:
- (a) the policy behind the variation;
 - (b) the purpose of the variation; and
 - (c) whether a finding that the submissions were on the variation would deprive interested parties of the opportunity for participation.¹⁵
17. The Court concluded it was relevant to consider the scale and degree of the difference between a variation and the submission's rezoning request. Scale and degree was also important when considering the extent to which affected property owners are shut out of the consultation process for the purpose of determining whether the submission on a variation.¹⁶
18. In the circumstances before it, the Court considered that:
- (a) The policy and purpose of the variation was modest compared to the submission. The intention of the variation was simply to support the Blenheim central business district and to avoid commercial developments outside the CBZ. By contrast, the theme of the submission was to seek a long-term expansion of the CBZ, involving over 50 properties.
 - (b) The submission to extend the CBZ beyond the area covered by the notified variation would shut potentially affected property owners out of the consultation process. In particular, there was nothing to advise potentially affected property owners that the

¹³ *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at paragraph [41].

¹⁴ *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC).

¹⁵ *Ibid* at [41].

¹⁶ *Ibid* at [43].

submission could affect property interests in another zone adjoining the area which was the subject of the variation.

19. The Court was satisfied, as a matter of scale and degree, the submitter's proposed 50 property expansion of the CBZ was not within scope of the Council's more modest variation to extend the CBZ.
20. In summary, and for the reasons given above, we consider that if a rezoning request relates to land that has not had its management regime (e.g. zoning) altered by Variation 1, then:
 - (a) If that land is not adjacent to land that has had its management regime (e.g. zoning) altered by Variation 1, then it will fall outside the scope of Variation 1.

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- (b) If that land is adjacent to land that has had its management regime (e.g. zoning) altered by Variation 1, then it can be considered as falling within the scope of Variation 1 only if, on a precautionary assessment of fact, circumstances, scale and degree, it can be considered as an "*incidental or consequential extension of zoning changes*" proposed by Variation 1. Factors relevant to consider when making the precautionary assessment include:
 - (i) the policy behind a variation;
 - (ii) the purpose of the variation;
 - (iii) whether the request raises matters that should have been addressed in the s32 evaluation and report;
 - (iv) the scale and degree of difference between the submission request and the variation;
 - (v) whether the request gives rise to a real risk that persons potentially affected by changes sought have been denied an effective opportunity to participate in the decision-making process.

THE IHP'S POWERS TO MAKE RECOMMENDATIONS

21. The IHP's powers to make recommendations of Variation 1 are set out in clause 99, schedule 1 of the RMA which states:
 - (1) *An independent hearings panel must make recommendations to a specified territorial authority on the IPI.*
 - (2) *The recommendations made by the independent hearings panel—*

- (a) *must be related to a matter identified by the panel or any other person during the hearing; but*
- (b) *are not limited to being within the scope of submissions made on the IPI.*
- (3) *An independent hearings panel, in formulating its recommendations, must be satisfied that, if the specified territorial authority were to accept the panel's recommendations, sections 85A and 85B(2) (which relate to the protection of protected customary rights) would be complied with.*

[our underlining for emphasis]

22. Clause 99 does not provide the IHP with an unfettered discretion to make recommendations that fall outside the scope of Variation 1.¹⁷ Clause 99(1) makes it clear that the IHP's recommendations must still be "on" the IPI (Variation 1). We consider that the scope principles discussed at paragraphs 7 to 20 above regarding the need for a submission to be "on" a variation or plan change, equally apply to the scope of the IHP's recommendations being "on" the IPI.
23. Clause 99(2)(b) provides the IHP with an ability to make recommendations that have not been raised within the scope of submissions made on the IPI, but the recommendations must still be "on" the IPI pursuant to clause 99(1). Thus:
- (a) The IHP could make recommendations "on" (within scope of) Variation 1, even if no submitter specifically sought that recommendation in their submission, provided that it relates to a
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- matter identified by the IHP or any other person during the hearing (as required by clause 99(2)(a)).
- (b) Submitters are able to raise matters at a hearing that were not raised in their submission, but are "on" (within the scope of) Variation 1, for the IHP to consider.
24. Natural justice considerations will remain relevant. The IHP also needs to turn its mind to whether any recommendations it makes are within or outside the scope of submissions. In accordance with clauses 100(2)(b) and (c) of the First Schedule of the RMA, the Panel's recommendations report needs to remain cognisant of scope matters which are outside the scope of submissions as their recommendation report needs to identify any recommendations that are outside the scope of the submissions made on Variation 1 and set out their recommendations on the matters raised in submissions.

¹⁷ As addressed in Minute 2 at paragraph 13 and the Chapman Tripp memo.

THE APPLICABILITY OF CLAUSE 16B

25. The IHP has requested advice regarding the applicability of clause 16B of Schedule 1 of the RMA to the PDP and Variation 1. In particular, the Panel queries whether submissions on the PDP can be deemed to be on Variation 1, and if so, what are the relevant applicable tests.
26. Clause 16B of Schedule 1 states:
- (1) *Every variation initiated under clause 16A shall be merged in and become part of the proposed policy statement or plan as soon as the variation and the proposed policy statement or plan are both at the same procedural stage; but where the variation includes a provision to be substituted for a provision in the proposed policy statement or plan against which a submission or an appeal has been lodged, that submission or appeal shall be deemed to be a submission or appeal against the variation.*
 - (2) *From the date of... notification of a variation, the proposed policy statement or proposed plan shall have effect as if it had been so varied.*
 - (3) *Subclause (2) does not apply to a proposed policy statement or plan approved under clause 17(1A).*
- [our underlining for emphasis]
27. Clause 16B(1) is in two parts, separated by a semi-colon:
- (a) The first part provides for the merger of a variation with the proposed plan when they both reach the same procedural stage.
 - (b) The second part is intended to protect the position of a proposed plan submitter whose submission was lodged before a variation substituted a provision against which that submission had been lodged.¹⁸ It does this by deeming the submission on the proposed plan provision to be a submission against the variation.
28. Clause 16B ordinarily applies to a variation being progressed through the standard procedures set out in Schedule 1 of the RMA. However, Variation 1 is an IPI that the RMA requires to be

progressed under a modified planning process (the ISPP), rather than the standard Schedule 1 procedure.¹⁹

29. As mentioned above, the ISPP is primarily set out in clause 95(2) of Part 6 of Schedule 1 of the RMA. Clause 95(1) provides that Council "must" prepare, notify, and progress an IPI by following the relevant processes described in subclause (2). Clause 95(2) then lists a number

¹⁸ *Shaw v Selwyn District Council* [2001] NZRMA 399

¹⁹ Section 80F(3)(a) of the RMA.

of clauses of Schedule 1 which apply to the ISPP, to the extent they are relevant. Notably, the list in clause 95(2) does not specifically refer to clause 16B.

30. The Chapman Tripp memo asserts that as clause 95(2) does not refer to clause 16B as applying to an IPI, clause 16B does not apply to Variation 1, and therefore it is not possible under the RMA to merge the PDP with Variation 1. Two reasons are provided as follows:
 - (a) Variation 1 is not a carte blanche rezoning exercise with a substitution of zoning across the board. The extent of rezoning through Variation 1 is confined to incorporating the Medium Density Residential Standards (**MDRS**) and National Policy Statement on Urban Development 2020 (**NPS-UD**) intensification policies.
 - (b) It would be inappropriate to merge the two processes given the inherent differences in procedure (e.g. cross examination), the different appeal rights, and the express exclusion of clause 16B from clause 95(2).
31. We consider the position taken by Chapman Tripp is reasonably arguable for the reasons given in the Chapman Tripp memo. The exclusion of a reference to clause 16B in clause 95(2) suggests a mandatory merger of a PDP Schedule 1 procedure with the Variation 1 ISPP procedure was not intended by the Amendment Act. In a standard process, a mandatory merger when a variation reaches the same procedural stage as a proposed plan is workable because the two procedures align – they are both progressed using the same Schedule 1 procedure.
32. By contrast, differences between the Schedule 1 procedure for the PDP and the ISPP procedure for Variation 1 make a mandatory merger between these two procedures confusing at best, and potentially conflicting at worst, with misalignment between the two procedures in terms of (for example) cross-examination, the constitution of hearings panel, differing appeal rights, and the potential for recommendations under the ISPP process needing to go to the Minister.
33. In our view these factors suggest that clause 16B was not intended to apply to Variation 1, and its absence from clause 95(2) was intentional.
34. While we consider the Chapman Tripp position is reasonably arguable, in our view there remains sufficient uncertainty introduced by the Amendment Act into the RMA to support counter arguments that clause 16B does apply to the PDP and Variation 1. For example, it could be argued that:
 - (a) Clause 95(2) makes express reference to clause 16A applying to an IPI (Variation 1).

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- (b) Clause 16A(2) states "*[t]he provisions of this schedule, with all necessary modifications, shall apply to every variation as if it were a change*". The phrase "provisions of this schedule" is a reference to the provisions of Schedule 1.
- (c) As clause 16B is a provision of Schedule 1, clause 16B would still apply to an IPI by virtue of being referred to in clause 16A, which is referred to in clause 95(2).
35. In our view, what the above illustrates is that there is uncertainty in the legislation regarding whether or not clause 16B applies to an IPI (Variation 1). We understand the IHP will be obtaining and considering the views of submitters regarding the applicability of clause 16B before deciding whether clause 16B should be applied.²⁰ Without the benefit of considering submitter views on the issue, it appears the argument against clause 16B applying to the PDP and Variation 1 is stronger than the argument in favour of clause 16B applying.
36. A consequence of clause 16B not applying to the PDP and Variation 1 is that there is no automatic (or mandated) protection of the position of a PDP submitter (or further submitter) whose submission was lodged before Variation 1 substituted the PDP provision that was submitted on (see paragraph 27(b) above). In effect, clause 16B is unavailable to deem the submission on the PDP provision to be a submission against Variation 1 that varies that PDP provision. This gives rise to the potential for PDP submitters being disenfranchised from pursuing their original relief on the PDP in the context of the provisions as varied by Variation 1.

Pragmatic considerations

37. If the IHP determines that clause 16B does not apply to the PDP and Variation 1, then that does not mean it is impossible to:
- (a) obtain benefits of managing the PDP procedure and the Variation 1 procedure so as to enable integrated decision-making and hearing efficiencies; and/or
 - (b) protect the position of a PDP submitter whose submission was lodged before Variation 1 substituted the PDP provision against which that submission had been lodged.
38. We understand the PDP Hearings Panel and IHP are regulating their procedures so that PDP and Variation 1 hearings can occur simultaneously, with the intended outcome being an integrated set of recommendations. We also understand that the Panels are taking care to ensure there is no full merger of the two procedures into a single procedure. Rather, as the

²⁰ Minute 2, paragraphs 21 to 22. ¹⁸ Minute 1, paragraph 18.

Panel has identified, there are different decision-making requirements and appeal rights for the PDP and Variation 1 that are to be maintained. By way of example:

- (a) Although there will be an integrated set of recommendations, the Panels will clearly differentiate which recommendations are made under the standard Schedule 1 procedure (and thus able to be appealed to the Environment Court), and those made under the ISPP (with no right of appeal).¹⁸

- (b) There will be no cross-examination of witnesses by other submitters, except as provided for on submissions on Variation 1.²¹

- (c) The hearing, deliberations and recommendation processes will be managed to ensure PDP Hearings Panel members Commissioners Mealings and Atkinson do not play a role in respect of Variation 1 (i.e. only the IHP will be involved on Variation 1).²⁰

39. However, there is potential for protecting the position of a PDP submitter through alternative means.

The IHP has the discretion to accept late submissions pursuant to clause 98(3) of the First Schedule of the RMA. Although the clause does not specify criteria to consider when exercising that discretion, guidance can be taken from sections 37 and 37A of the RMA which provides Council with a discretion to waive compliance with time limits for lodging submissions. There is potential for the discretion to be exercised in a way that enables PDP submissions that could have been deemed as a Variation 1 submission under clause 16B (had it applied) to instead be "carried over" as a late Variation 1 submission.

40. In determining whether to waive compliance with time limits, section 37A requires Council to take into account:

- (a) the interests of any person who, in its opinion, may be directly affected by the extension or waiver; and
- (b) the interests of the community in achieving adequate assessment of the effects of a proposal, policy statement, or plan; and
- (c) its duty under section 21 to avoid unreasonable delay.

41. Should PDP submitters claim prejudice or disenfranchisement from having assumed an ability to comment on the PDP provision originally submitted on that has since been substituted by Variation 1, then those submitters could request the IHP to exercise its discretion under clause 99(3) to carry over their PDP submission point as a late submission on Variation 1. If PDP

²¹ Minute 1, paragraphs 95, 111 to 117. ²⁰ Minute 2, paragraph 7.

submission points in respect of a PDP provision being substituted by Variation 1 can be carried over as late submissions, then that may cure any disenfranchisement that would otherwise occur if clause 16B does not apply. PDP submitters would be able to retain the ability to pursue their original relief on the PDP in the context of the provisions as varied by Variation 1.

CONCLUDING COMMENTS

42. The Panel has requested that Council identifies the following categories of submissions:
- (a) PDP submissions on "relevant residential zones";
 - (b) PDP submissions on provisions of the PDP substituted by Variation 1;
 - (c) PDP submissions in relation to land that is now proposed new residential zones in Variation 1;
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- (d) PDP submissions seeking new residential zoning outside of relevant residential zones and proposed new residential zones in Variation 1; and
 - (e) IPI submissions seeking new residential zones.
43. We understand you are preparing a memorandum identifying the submissions fitting the above categories. Assuming submissions are identified as falling within the above categories, and that the PDP submissions are capable of becoming submissions on Variation 1 (whether by deeming under clause 16B, or "carried over" as a late Variation 1 submission), then an issue arises as to whether submissions fitting the above categories would fall within the scope of Variation 1.
44. Without having reviewed submissions being allocated to the above categories, from a broad conceptual perspective, we anticipate that:
- (a) Submission points fitting categories (a) to (c) should fall within the scope of Variation 1 on the understanding that such points would clearly and directly be impacted by the alteration to the status quo brought about by Variation 1, and should not raise a "submissional side wind" that gives rise to a real risk of denying potentially affected person an effective opportunity to participate. For example, PDP submissions on "relevant residential zones" should be within scope of Variation 1 because the RMA requires Variation 1 to change all "relevant residential zones" by applying MDRS or introducing a qualifying matter to make MDRS less enabling in those zones.²²

²² See for example sections 77G, 77I.

- (b) Submission points fitting categories (d) and (e):
- (i) Will not fall within the scope of Variation 1 if seeking new residential zoning that is separated from (rather than adjacent to) relevant residential zones and proposed new residential zones in Variation 1.
 - (ii) May fall within the scope of Variation 1 if they are seeking new residential zoning that is adjacent to relevant residential zones or proposed new residential zones in Variation 1. However, a determination will be required on a case by case basis as to whether particular rezoning requests are permissibly within scope as "*incidental or consequential extensions of zoning changes proposed in a plan change*" (see paragraphs 11 to 20 above).

Yours faithfully

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