MEMORANDUM

Date: 27 September 2023

To: Jeff Brown

From: Lucy de Latour | Kate Woods

JURISDICTIONAL MATTERS

Introduction

1. You have asked us to provide a summary of the jurisdictional matters that apply when the Hearing Panel is considering whether to recommend amendments to the Te Pūtahi Ladies Mile Variation (**TPLM Variation**).

2. In short, before recommending any amendments to the TPLM Variation, the Hearing Panel must consider whether there is scope to make amendments the TPLM Variation. In doing so, the Hearing Panel must consider whether:

   (a) First, submissions received are "on" the TPLM Variation; and

   (b) Secondly, whether the amendments are within the scope of the submissions.

3. The Hearing Panel also can recommend amendments to the TPLM Variation that are of minor effect, or to correct any minor errors in accordance with clause 16(2) of Schedule 1 of the Resource Management Act 1991 (**RMA**).

4. We address each of these jurisdictional matters further below.

Whether submissions received are 'on' the TPLM Variation

5. Submissions must be "on" the TPLM Variation, and if a submission is not "on" the TPLM Variation, then the Hearing Panel does not have jurisdiction to consider it. This is because clause 6(1) of Schedule 1 to the RMA provides that when a change is publicly notified, the Council and any person may make a submission "on" the plan change.[1]

6. The Courts have endorsed a two-stage approach when considering whether a submission is "on" a variation:

   (a) First, the submission must reasonably fall within the ambit of the variation by addressing a change to the status quo advanced by the proposed plan variation.

   (b) Secondly, the Hearing Panel should consider whether there is a real risk that persons potentially affected by the changes sought in a submission have been denied an effective opportunity to participate in the variation process.[2]

7. One way of analysing whether the first limb is met 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 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, unless the change is merely incidental or consequential.[3]

---

1 Clause 6, Schedule 1 to the RMA is required to be included in a streamlined planning process pursuant to section 80B(2)(a) of the RMA (and is provided for under step 4 of the Minister's direction dated 30 March 2023 to use the SPP for the TPLM Variation).

2 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [90], endorsing the approach of William Young J in *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003. See also *Mackenzie v Tasman District Council* [2018] NZHC 2304 for a more recent application of the test.

3 *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [91].

8. If the effect of regarding a submission as being "on" a plan change 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 plan change.[4]

Whether amendments requested are within scope

9. Pursuant to the Minister's direction, the Hearings Panel must prepare a report showing how submissions have been considered and any modifications made to the TPLM Variation "in light of submissions."[5] This appears to be consistent with the standard approach under Schedule 1 of the RMA requiring any amendments to a plan change or variation being within the scope of submissions.[6]

10. Case law has established that for an amendment to be considered within the scope of submissions, the amendment must be fairly and reasonably within the general scope of:[7]

    (a) An original submission; or

    (b) The plan change or variation as notified; or

    (c) Somewhere in between.

11. The question of whether an amendment goes beyond what is reasonably and fairly raised in submissions will usually be a question of degree, to be judged by the terms of the plan change (or in this case the TPLM Variation) and the content of submissions. This should be approached in a realistic workable fashion rather than from the perspective legal nicety, with consideration of the whole relief package detailed in submissions.

12. Further, the courts have recognised that councils need scope to deal with the realities of the situation and a legalistic interpretation that a council can only accept or reject relief sought in any given submission is unrealistic.[8] Approaching such amendments in a precautionary manner, to ensure that people are not denied an opportunity to effectively respond to additional changes in the plan change process, has also been endorsed by the courts.[9]

13. Changes that are considered to be incidental to, consequential upon, or directly connected to a plan change are also considered to be within scope.[10]

14. An amendment can be anywhere on the line between the plan change/variation and the submission. Consequential changes can flow downwards from whatever point on the first line is chosen, as a submission may only be on an objective or policy, but there may be methods or rules which are then incompatible with the new objective or policy in the proposed plan

---

4 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [66].

5 Pursuant to the Minister's direction dated 30 March 2023 to use the SPP for the TPLM Variation, the Hearings Panel must prepare a report and documents required by clause 83(1)(a) – (g) of Schedule 1 to the Resource Management Act 1991 (step 10). Clause 83(1)(c) requires a "report showing how submissions have been considered and any modifications made to the proposed planning instrument in light of submissions."

6 It is noted that in the other streamlined planning process under part 6 of Schedule 1 (the intensification streamlined planning process) recommendations made by the independent hearings panel are not limited to being within the scope of submissions (clause 99(2) of Schedule 1, RMA). On the basis that the streamlined planning process under part 5 of Schedule 1 does not similarly broaden the scope of amendments, it is considered that the standard approach of requiring amendments to be within the scope of submissions should be applied.

7 *Re Vivid Holdings Ltd* (1999) 5 ELRNZ 264 at [19].

8 *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [107], citing *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 170.

9 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 at [58]-[60]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [82].

10 *Well Smart Holding (NZQN) Limited v Queenstown Lakes District Council* [2015] NZEnvC 214 at [16]; *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290 at [91].

change as revised,[11] which would then also require an amendment, as a consequential change.

15. Further, amendments required for clarity and refinement of detail are allowed on the basis that such amendments are considered to be minor and un-prejudicial.[12]

Use of clause 16(2), Schedule 1 to the RMA

16. The Hearing Panel also has the ability to recommend amendments to the TPLM Variation in accordance with clause 16(2) of Schedule 1 of the RMA.[13] Clause 16(2) provides for alterations that are of minor effect, or to correct any minor errors.

17. The scope of any such amendments is limited to those which would be neutral, and therefore do not affect the rights of members of the public.[14]

18. Further, the power to correct minor errors is limited to changes that would not alter the meaning of the document (such as typographical or cross-referencing errors).[15]

11 *Campbell v Christchurch City Council* [2002] NZRMA 332 (EnvC) at [20].

12 *Oyster Bay Developments Limited v Marlborough District Council* EnvC C081/2009, 22 September 2009 at [42].

13 Pursuant to section 80B(2)(a) of the RMA, clause 16 of Schedule 1 applies to a streamlined planning process.

14 *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (EnvC) at 10.

15 *Re an Application by Christchurch City Council* (1996) 2 ELRNZ 431 (EnvC) at 11.