

**BEFORE THE HEARING COMMISSIONER
FOR SELWYN DISTRICT COUNCIL**

UNDER

the Resource Management Act 1991

IN THE MATTER

of Private Plan Change 68
(Prebbleton) by Urban Holdings
Limited, Suburban Estates Limited
and Cairnbrae Developments Limited

**SYNOPSIS OF LEGAL SUBMISSIONS FOR S J SHAMY (SUBMITTER PC68-
0017)**

Dated 22 March 2022

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MAY IT PLEASE THE COMMISSIONER

- 1 These legal submissions are filed on behalf of SJ Shamy. They focus on the principal legal issue arising out of Mr Shamy's submission – whether there is scope for his property to be rezoned (in the event Plan Change 68 (**PC68**) is granted). This relief is sought and discussed at paragraphs 4(b), 5(h) and 6(b) of Mr Shamy's original submission.
- 2 Mr Shamy's property is approximately 2.4 hectares in size. It shares its southern and eastern boundaries with the PC68 area. Figure 4 on page 11 of the s42A Report shows Mr Shamy's land in red.
- 3 Mr Shamy's request needs to satisfy you both in terms of merit and jurisdiction. Each is discussed below.

Merits

- 4 As to the merits of Mr Shamy's rezoning request, this is favourably addressed in the s42A Report and in the various expert briefs provided by the Applicant's witnesses.
- 5 Paragraphs 145 and 272 of the s42A report are most relevant to this aspect of your consideration. The Report does not identify any particular concerns, from a merits perspective. Conversely, it concludes inclusion of Mr Shamy's property will have positive outcomes for urban form. It notes¹ Mr Shamy's request is an *exception in terms of scope and merit* as compared with the three other blocks within the Shands/Trents Road corner.
- 6 In addition, each of the Applicant's relevant witnesses have included evidence to the effect their conclusions are unaltered if Mr Shamy's land were also rezoned. Largely, they have done this by reference to the approximately 12 hectares of land within the entire "block", rather than just Mr Shamy's land. At only 2.4 hectares, I submit the inclusion of Mr Shamy's land would:
 - 6.1 No create any discernible difference in potential adverse effects or costs; and
 - 6.2 Would create some benefit in terms of urban form and planning logic.

¹ At paragraph 145.

Jurisdiction

- 7 Mr Shamy seeks to add approximately 2.4ha of land to the 67.5 hectares proposed for rezoning in PC68. The land sought to be added by Mr Shamy is contiguous with the area already under consideration. It would effectively *'square-up' the stepped northern edge of the plan change site.*²
- 8 This item of relief requested has been (in the s42A Report and the proponents' legal submissions and evidence) characterised as a "me too" submission. Whilst this is probably a reasonable descriptor, not all "me too" submissions are created equal. Whether a submission is "on" a plan change can raise questions of *irreducible simplicity but which may not necessarily be easy to answer in a specific case*³. In the case of Mr Shamy's request, it is submitted the question is mercifully simple to answer, for the reasons discussed further below.

Legal principles

- 9 The s42A Report addresses the issue of scope at paragraphs 45 to 51. It is agreed, for Mr Shamy, the exercise of evaluating scope requires consideration of both fact and law. In this regard, the s42A Report leaves the legal analysis to Mr Shamy. That is the purpose of these legal submissions.
- 10 The Applicant's legal submissions also anticipate Mr Shamy addressing you more fully on the legality of the relief sought. As an interim measure, those submissions provided a helpful outline of the high-level principles applying. Respectfully, Mr Shamy agrees with the summary of legal principles recorded at paragraphs 11.4 to 11.8 of the Applicant's legal submissions.
- 11 The bipartite test for assessing whether a request is "on" a plan change is well settled⁴:
- 11.1 A submission can only fairly be regarded as being "on" a plan change or variation if it is addressed to the extent to which the plan change or variation changes the pre-existing status quo; and
- 11.2 If the effect of regarding a submission as being "on" a plan change or variation would be to permit a planning instrument to be appreciably

² S42A Report at [45].

³ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [56].

⁴ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [24] citing *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003 at [59].

amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be “on” the change.

12 This *first limb* was described in *Motor Machinists* as⁵:

12.1 ...a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan;

12.2the dominant consideration; and

12.3 Involving two aspects, the breath of alternation to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration.

13 The more recent High Court decision in *Motor Machinists*⁶ is often relied upon (mainly by local authorities) as a reason to reject all and any “me too” submissions. This observation is consistent with paragraph 50 of the s42A Report. However, it is submitted this is an erroneous and overly simplistic application of the *Motor Machinists* case, which indicated support for and implementation of the *Clearwater* tests. Further (relevant) principles in terms of the first limb in *Clearwater* that have emerged since *Motor Machinists*, include:

13.1 The questions posed in *Motor Machinists* need to be answered in a way that is not unduly narrow⁷;

13.2 In the end, the jurisdiction issue comes down to a question of degree and, perhaps, even of impression.⁸

13.3 Each case needs to be assessed within the context it arises. Relevant contextual considerations could include⁹:

Whether the submission seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant

⁵ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [80].

⁶ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

⁷ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [36].

⁸ *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [88]; citing with approval *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [32].

⁹ *Mackenzie v Tasman District Council* [2018] NZHC 2304 at [89] and [90]; citing with approval *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [37] and [38].

objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change:

... submissions seeking some major alteration to the objectives of a proposed plan change would likely not be “on” that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.¹⁰

- 14 The *Motor Machinist* finding about incidental or consequential changes was qualified to the following extent:

... provided that no substantial further s32 analysis is required to inform affected persons of the comparative merits of that change.¹¹

- 15 Consistent with this, the Environment Court has noted the fact a rezoning request does not fall within the area of a proposed plan change does not, in and of itself, make the submission out of scope¹². *Motor Machinists* held that *incidental or consequential changes* are permissible in any event. The Environment Court has observed that an example of a permissible, consequential change could be the rezoning of land adjacent to land proposed to be rezoned by a plan change¹³.

Fairness to other parties

- 16 Whether a submission falls within the ambit of a plan change does not, alone, answer the *Clearwater* tests. An assessment of whether a planning instrument might be *appreciably amended without real opportunity for participation by those potentially affected* is required. This does not mean any and every unnotified change will create fairness issues.

- 17 The High Court in *Motor Machinists* noted¹⁴:

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 s32 analysis.

¹⁰ *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [37].

¹¹ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [81].

¹² *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes District Council* [2015] NZEnvC 214 at [24].

¹³ *Tussock Rise Ltd v Queenstown Lakes District Council* [2019] NZEnvC 111 at [76].

¹⁴ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [83].

PC68 - Analysis

The breadth of alteration to the status quo

- 18 Paragraph 46 of the s42A Report concisely describes the breadth of PC68. It notes:

... A key element in the merit of the plan change advanced by the applicant concerns the logical extension of the township boundary and the establishment of a new southwestern boundary to Prebbleton. The inclusion of the submitters' properties ... could therefore be said to fall within the broad ambit of PC68 insofar as the plan change examines the appropriate formation of the southern edge of the township.

- 19 Usefully, a “me too” submission relating to detached land on the southern side of Hamptons Road may be considered illustrative of the difference between a submission within the ambit of PC68 and one which is not. Certainly, that is how the “blue” submission is discussed at paragraph 47 of the s42A Report.
- 20 It is submitted Mr Shamy’s submission responds to and directly addresses the change to status quo proposed by PC68. It relates to part of the area between the existing southern edge of Prebbleton and the proposed one. In this sense, it is proposing to infill part of the ‘gap’ in urban form resulting from PC68. It responds to the fact PC68 does not propose to directly alter the regime applying to Mr Shamy’s land but that it will undoubtedly affect it, by markedly changing the planning regime around it.
- 21 The s42A Report concludes Mr Shamy’s request is *therefore arguably consequential to the substantive outcomes sought in the plan change* and, further, the relief sought is *sufficiently modest in scale that their inclusion does not threaten or unduly expand the scope of the plan change*.¹⁵
- 22 Mr Shamy respectfully concurs with the s42A assessment in this regard, with one amendment – it is submitted the change sought is consequential, as opposed to just *arguably*. This is supported by paragraph 150 of the s42A Report, which considers rezoning of the ‘gap’ to, ultimately, be inevitable. In addition, it is noted Mr Shamy’s land would comprise a mere 3% (approximately) of the overall rezoned area, if added to the 67.5 hectares currently proposed for rezoning. In this sense it is genuinely incidental and remains so even if the entire 12 hectares of ‘gap’ is rezoned (comprising some 15% of the total area).

¹⁵ S42A Report at [46].

Procedural fairness

- 23 It is difficult to conceive of a situation where a person might be potentially affected by Mr Shamy's request, but not PC68. This is because Mr Shamy's request is both:

23.1 ... *incidental or consequential*, such that it represents a very small risk in terms of denying potentially affected persons *an effective response to ... additional changes in the plan change process*¹⁶; and

23.2 Because the relief sought is not *out of left field*. Rather, it is submitted to be entirely predictable and readily foreseeable.¹⁷

- 24 As noted in the s42A Report, all four property owners at the corner of Shands and Trents Road submitted on PC68. This included the landowner immediately adjoining Mr Shamy's northern boundary (being located at 687 Shands Road). The fact these landowners each made original submissions supports the submission there is no risk of disentitlement if you accept Mr Shamy's request.

- 25 Mr Shamy sought rezoning as an alternative relief. Upon investigating the Summary, this would have been very clear¹⁸:

Decline the Plan Change (preferred decision). If the plan change is approved then also include 701 Shands Road to be rezoned for residential development in same intensity as PC68.

- 26 The other three "corner" submitters sought rejection of PC68. The evidence of submitter 6 (Xiaojiang Chen) now discloses a desire to have the remaining three properties in the corner rezoned also, if PC68 is granted. This further corroborates the Officer's conclusion that rezoning of all 'gaps' is ultimately inevitable¹⁹.
- 27 In conclusion on this point, it is submitted as incomprehensible that a person would be concerned with the zoning of Mr Shamy's land, but not already involved in the PC68 process and therefore not interested enough to look at the Summary of Decisions Requested. In the event the notified PC68 land

¹⁶ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [83].

¹⁷ S42A Report at [150].

¹⁸ https://extranet.selwyn.govt.nz/sites/consultation/PC68/SitePages/report.aspx#InplviewHash2ed1d7eb-4d84-4bc5-98dd-bddddd31ca561=Paged%3DTRUE-PagedPrev%3DTRUE-p_SubmitterID%3DPC68%252d0028-p_Point_x0020_Number%3D006-p_ID%3D102-FolderCTID%3D0x012001-PageFirstRow%3D31

¹⁹ S42A Report at [150].

were rezoned, it is appropriate, lawful and fair that Mr Shamy's land receive equivalent treatment.

Dated this 22nd day of March 2022



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