BUDDLEFINDLAY

To
Selwyn District Council
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For
David Smith
Cameron Wood

From
Rachel Dunningham
Cedric Carranceja

By
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Date
11 March 2011

Dear David/Cameron

Scope on Proposed Plan Change 7

1. The Council has received numerous submissions on Proposed Plan Change 7 to the Selwyn District Plan ("PC7") seeking to rezone land around Lincoln and Rolleston outside of those areas which are rezoned by PC7. In addition, the Council has received submissions seeking to amend the rules of the Business 1 zone by removing the ability to provide for residential living activities. You have asked for my opinion as to whether such submissions fall within the scope of PC7.

2. In summary, it is my opinion that based on the High Court's decision in *Clearwater Resort Limited and Canterbury Golf International Limited v Christchurch City Council* (AP34/02):

   (a) With the exception of submission #89, all of the submissions seeking to rezone land around Lincoln and Rolleston outside of those areas which are rezoned by PC7 (as listed in paragraph 4(g) below) fall outside the scope of PC7;

   (b) The submissions seeking to amend the rules of the Business 1 zone (as listed in paragraph 5(a) below) fall outside the scope of PC7 where the change would impact Business 1 zones throughout the District which are not the subject of PC7. Scope is limited to amending the Business 1 zone rules only to the extent that those provisions apply to any "local business areas" identified in new Living Z zones introduced by PC7.

3. My reasons are discussed below.

Background

4. I understand the background of this matter to be as follows:

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(a) According to Section 2, paragraph 2.1 of the section 32 report for PC7 ("Section 32 Report"), the plan change introduces substantial amendments to the Selwyn District Plan, particularly the township volume. Section 6, paragraph 6.2 of the Section 32 Report explains that PC7 seeks to change the existing reliance on a "private plan change" or "market-led" approach within the District Plan, which has in some cases resulted in poorly integrated developments and inefficient provision of servicing and transport infrastructure. The purpose of PC7, as stated in paragraph 6.2 of the Section 32 Report, is as follows:

> **"The purpose of PC7 is to introduce a framework for managing the growth of townships within the Greater Christchurch area, so as to achieve the integrated settlement pattern set out in the Urban Development Strategy (UDS) (and subsequent Proposed Plan Change 1 to the Regional Policy Statement (Change 1)). In doing so, changes to the Plan include the introduction of new objectives, policies and rules so as to enable and guide development of future township growth areas as identified within structure plans. In particular, Proposed PC7 incorporates a requirement for development of urban growth areas to be in accordance with an Outline Development Plan…"**

(b) Paragraph 6.1 of the Section 32 Report mentions that PC7 amends the District Plan in relation to three main topic areas:

(i) Implementing a strategic approach to managing urban development within the Greater Christchurch area, including the requirement to prepare Outline Development Plans ("ODP") for development "*within specified urban growth areas*"[1] ("Topic 1");

(ii) Making provision for medium density housing in specific locations[2] ("Topic 2"); and

(iii) Introducing subdivision design guidelines[3] ("Topic 3").

(c) The above 3 topic areas are discussed in the Section 32 Report in sections 6, 7 and 8 respectively. Of these topics, only Topic 1 seeks to provide for the rezoning of land[4].

(d) The scope of amendments introduced by Topic 1 is discussed under the heading "*Scope of Proposed Plan Change*" at paragraph 6.53 on page 38 of the Section 32 Report. Amongst other things, Topic 1 seeks to provide for the rezoning of land within ODP areas as identified on the planning maps accompanying PC7. Paragraph 6.53 confirms that changes to the District Plan include:

(i) Introducing a requirement to prepare an ODP for all new subdivision within those areas identified on the planning maps[5];

[1] Section 32 Report, at section 6.
[2] Ibid, at section 7.
[3] Ibid, at section 8.
[4] In essence, Topic 2 provides new objectives, policies, rules and assessment matters for medium density developments, but does not introduce rezoning. Topic 3 introduces objectives, policies and design criteria for improving the quality and design of subdivisions – rezoning is not proposed under this topic.

(ii) Splitting the Lincoln and Rolleston growth areas into separate ODP areas[6];

(iii) Amending planning maps to identify each ODP block within Lincoln and Rolleston[7];

(iv) Rezone all existing living and rural zoned land with residential ODP areas to a new zone (Living Z or Living Z deferred), including associated minimum average allotment sizes and site coverage requirements[8]; and

(v) Rezone land within ODP Area 5 at Lincoln to Business 2 deferred for future industrial purposes[9].

(e) The various ODP areas for Lincoln and Rolleston are shown on maps accompanying PC7, copies of which are **attached** for ease of reference. The proposed areas to be rezoned as Living Z, Living Z deferred and Business 2 within the ODP areas are identified on PC7 planning maps 13A and 14A, copies of which are **attached**.

(f) PC7 also introduces new rules that would apply to the proposed Living Z zones. The proposed allotment size standards for restricted discretionary activity subdivisions will be different for the Living Z zones in Lincoln and Rolleston. In summary, the applicable standards are as follows:

(i) For Living Z in Lincoln:

> **Average allotment size not less than 650m^2, with a minimum individual allotment size of 550m^2, except that allotments within a Medium Density area located within an operative Outline Development Plan shall have a maximum average allotment size of 450m^2 and a minimum individual allotment size of 350m^2.**

(ii) For Living Z in Rolleston:

> **Average allotment size not less than 750m^2, with a minimum individual allotment size of 550m^2, except that allotments within a Medium Density area located within an operative Outline Development Plan shall have a maximum average allotment size of 450m^2 and a minimum individual allotment size of 350m^2.**

(g) The Council has received numerous submissions that seek to rezone land that has not been rezoned by PC7 as notified. You have suggested that the submissions can be grouped as follows:

<u>Rolleston submissions</u>

(i) Submission 53 (Park Grove Estate Limited) seeks to rezone approximately 3.5ha of land from its existing Living 1 zone (average allotment size no less than 750m^2) to Living Z (deferred), and include the land as a new ODP Area 7 with criteria to enable high density

[5] Ibid, at paragraph 6.53, 2nd bulletpoint.
[6] Ibid, at paragraph 6.53, 3rd bulletpoint.
[7] Ibid, at paragraph 6.53, 4th bulletpoint.
[8] Ibid, at paragraph 6.53, 9th bulletpoint.
[9] Ibid, at paragraph 6.53, 10th bulletpoint.

residential development at approximately 20 households per hectare. PC7 does not seek to rezone this land, nor include it in an ODP area. You have advised that the relief could essentially double the residential density of the land.

(ii) Submission 40 (Craig Thompson) seeks to rezone approximately 33 hectares of land at Park Lane from its existing Living 1B zone (average allotment size to be no less than 1200m^2) to Living Z (average allotment size no less than 750m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

(iii) Submissions 33 (Klaus Prusas) and 64 (William McGill) seek to rezone approximately 24.5 hectares of land at Lowes Road from Living 2 and Living 2A (average allotment sizes to be no less than 5000m^2 and 1ha respectively) to provide for smaller average allotment sizes. Submission 64 seeks the smallest average allotment size with a proposed Living 1 rezoning (average allotment size no less than 750m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

(iv) Submissions 42, 56, 57, 58, 59, 60, 61, 62, 63, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76 and 81 seek to rezone approximately 145 hectares of land between Springston Rolleston Road and Lincoln Rolleston Road from Rural Inner Plains (4ha minimum allotment size) to provide for smaller allotment sizes. While it is not clear from the submissions what the smallest allotment size is being sought, there is reference to a rezoning "*in the like of 1 – 2 hectrare lots*". PC7 does not seek to rezone this land, nor include it in an ODP area.

(v) Submission 92 (Rodney Jarvis) seeks to rezone approximately 0.75 hectares of land at Goulds Road from its existing Living 1B zone (average allotment size to be no less than 1200m^2) to Living Z (average allotment size no less than 750m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

(vi) Submissions 17 (Marilyn McClure & Graeme Hubbard), 18 (Phillip Russell), 19 (Annmaree & Hendrickus Hofmeester) and 77 (Margit Muller & David Watson) seek to rezone approximately 2.89 hectares of land at Goulds Road from Living 2A (average allotment size to be no less than 1ha) to Living Z (average allotment size no less than 750m^2). The land was previously covered in part by the Christchurch airport noise contour. PC7 does not seek to rezone this land, nor include it in an ODP area.

(vii) Submission 25 (Angelene Holton) seeks to rezone enough land around East Maddisons Road to support 200 – 300 households pursuant to a Living Z zone (average allotment size no less than 750m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

(viii) Submission 21 (Clive Horn) seeks to rezone approximately 30 hectares of land between East Maddisons Road and Goulds Road to Living Z (average allotment size no less than 750m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

Lincoln submissions

(ix) Submission 13 (Edna Earnshaw) seeks to rezone approximately 4 hectares of land at Ellesmere Road from Rural Inner Plains (4ha minimum allotment size) to an unspecified residential zone. PC7 does not seek to rezone this land, nor include it in an ODP area.

(x) Submission 89 (McIntosh, Jung and Lee) seeks to rezone approximately 18 hectares of land at in the south of Lincoln from Rural Inner Plains (4ha minimum allotment size) to Living Z (average allotment size no less than 650m^2). PC7 identifies this land as falling within ODP1, but it has not been rezoned.

(xi) Submission 90 (Denwood Trustees Limited) seeks to rezone approximately 70 hectares land on the west side of Springs Road from Rural Outer Plains (20ha minimum allotment size) to Living Z (average allotment size no less than 650m^2). PC7 does not seek to rezone this land, nor include it in an ODP area.

(h) You have asked me to advise whether the Council has jurisdiction to consider any of the rezonings requested in the above submissions.

5. With regards to the submissions seeking to amend the Business 1 rules, you have advised me of the following:

(a) The Council has received two submissions that seek to remove the ability to provide residential living activities in a Business 1 zone. These submissions are:

(i) Submission 39 (Carrick No.1 Ltd); and

(ii) Submission 93 (Jens Christensen).

(b) PC7 does not seek to amend any of the existing Business 1 zone provisions in the District Plan, nor does it rezone any new land as Business 1.

(c) However, PC7 does provide for new Living Z zones, within which it is anticipated that the Business 1 zone provisions would apply, provided that an Outline Development Plan identifies a "local business centre" within that Living Z zone. For example, under the heading "deferred zones", PC7 states (at page 58):

> **In the Living Z zones shown on the Planning Maps, any area shown within an Outline Development Plan as a local business centre is subject to the provisions of the Business 1 zone.**

Page 107 of PC7 adds the following to Rule 1.1 (Status of Activities) in Section 13 (Business zone rules – status of activities):

> **In the Living Z zones, any area shown within an Outline Development Plan as a local business centre is subject to the provisions of the Business 1 zone, with a consent notice or similar mechanism to be registered on the Certificate of Title for these lots advising owners that the lot is subject to the Business 1 rule package.**

(d) You have asked me to advise whether the Council has jurisdiction to consider the amendments to the Business 1 zone rules as requested in submissions 39 and 93.

Opinion

6. There appears to be 3 lines of case law on the issue of whether a submission falls within the scope of a variation or plan change, with each suggesting a different legal test. In summary, the different tests are:

   (a) The *Clearwater* two part test;

   (b) The *Naturally Best* "relationship" test;

   (c) The *Option 5* "scale and degree" test.

7. I will discuss each of the above tests, then consider whether the submissions fall within the scope of Plan Change 7 under each test, then provide an overall conclusion in light of my analysis.

The *Clearwater* two part test

8. The leading case on the issue of whether a submission falls within the scope of a variation or plan change is the High Court's decision in *Clearwater Resort Limited and Canterbury Golf International Limited v Christchurch City Council* (AP34/02). The test is stated in two parts as follows:[10]

   > **1 A submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo.**
   >
   > **2 But 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, this is a powerful consideration against any argument that the submission is truly "on" the variation.**

9. The High Court's test requires a two step analysis:

   (a) The first part of the test is stated as a prerequisite. A submission can only be regarded as "on" a variation if it supports all the changes introduced by the variation, or opposes all those changes (i.e. seeks a reversion to the status quo), or seeks relief that represents something in between those 2 extremes (i.e. it addresses the extent to which the status quo is changed by the

[10] *Clearwater Resort Limited and Canterbury Golf International Limited v Christchurch City Council* (AP34/02) at paragraph 66.

variation). The first part of the test essentially involves an analytical comparison of the relief sought in a submission, with the spectrum of relief available between the status quo and the amendments introduced by the variation.

(b) The second part of the test is relevant only if a submission passes the first part of the test. The word "but" at the start of the second part of the test confirms that if a submission passes the first part of the test (i.e. would be regarded as "on" a variation under the first part), then it would not truly be "on" the variation unless it also passes the second part of the test.

10. Thus, under the two part test, a submission would not be "on" a variation if it either:

(a) Fails the first part of the test; or

(b) Passes the first part of the test, but fails the second part.

11. The second part of the test acts as a safeguard against submissions which pass the first part of the test, from being considered to be "on" a variation. It essentially involves a discretionary judgement as to whether a submission passing the first part of the test may nonetheless have the effect of disenfranchising affected persons from participating in the variation or plan change process. The High Court described the second part of the test in this way:

> **The second of the considerations** [i.e. the second part of the test] **is consistent with the judgment of the Environment Court in *Halswater Holdings Ltd v Selwyn District Council* (1999) 5 ELRNZ 192. It is common for a submission on a variation or a proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. It may be that the process of submissions and cross-submissions will be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of "left field", there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is "on" the variation.**

12. Applying the first part of the test to PC7, it is my opinion that there is scope to lodge submissions that:

(a) Support PC7, and therefore the rezoned areas and the identification of ODP areas as annotated in the planning maps, and the new rules applicable to such areas; or

(b) Oppose PC7 by seeking a reversion to the status quo, being a retention of the current zonings and the existing rules; or

(c) Seek alternative relief that represents something between the above extremes. In other words, a submission can seek relief that represents an outcome between the rezoning and rules provided for under PC7, or the status quo.

13. Thus, under the first part of the *Clearwater* test, a submission can be considered as "on" PC7 if it seeks relief that supports or opposes the specific land areas that are proposed to be rezoned or included within an ODP area by PC7, or seeks alternative relief which represents something in between those extremes (e.g. an alternative zoning of those same land areas, but which would provide for alternative development opportunities that lie in between that enabled by the current zoning, and that which would be allowed under the proposed zoning).

The rezoning submissions

14. In my opinion, submissions seeking to rezone land areas that lie outside of those areas rezoned by PC7 or outside any new ODP area identified by PC7, would not pass the first part of the *Clearwater* test because those land areas are unaffected by PC7. With the exception of submission 89, I consider that all of the submissions listed in paragraph 4(g) fail the first part of the High Court's test, and are not "on" PC7. The rezoning request in submission 89 does fall within the scope of PC7 for the following reasons:

    (a) PC7 anticipates that existing living and rural zoned land within residential ODP areas would be rezoned to a new Living Z or Living Z deferred zone (see paragraph 4(d)(iv) above);

    (b) As the land area sought to be rezoned by submission 89 lies within an ODP area identified by PC7 (ODP1), it is within scope to seek the rezoning of that land to Living Z.

15. I also consider that the rezoning submissions (other than submission 89) would fail the second part of the *Clearwater* test because it would shut potentially affected persons out of the consultation process. In particular:

    (a) Some people reviewing PC7 as notified may have determined that they are not concerned with the specific areas of land being rezoned under PC7 as identified on the planning maps, and thus elected not to participate in the plan change process.

    (b) Those people may have also elected not to review the summary of submissions, given that submissions would have been in respect of a plan change proposal that was not of any concern to them.

    (c) However, such people might be concerned about a proposal to rezone additional land, because the rezoning of that land was not proposed by PC7 as notified.

16. By contrast, I do not consider that potentially affected persons would have been shut out of the consultation process in respect of the rezoning request in submission 89 because it seeks to rezone land that PC7 identifies as falling within an ODP area, being an area that PC7 anticipates for rezoning.

17. In summary, with the exception of submission 89, it is my opinion that none of the submissions listed in paragraph 4(g) are “on” PC7 pursuant to the High Court’s two step test in *Clearwater*.

The business zone submissions

18. In my opinion, the submissions seeking to amend the rules of the Business 1 zone (as listed in paragraph 5(a)) would fail both parts of the *Clearwater* test insofar as the submissions seek to amend the rules in a manner that would affect all Business 1 zones throughout the District which are not the subject of PC7. The first part of the *Clearwater* test is not met because PC7 does not seek to change the Business 1 zone rules as they apply to the existing Business 1 zones. The second part of the test is not met because the submissions would shut potentially affected persons out of the consultation process as follows:

    (a) Some people reviewing PC7 as notified may have determined that they are not concerned with PC7 because it does not seek to change any of the existing Business 1 zones in the District, nor the rules applicable to those zones;

    (b) Those people may have also elected not to review the summary of submissions, given that submissions would have been in respect of a plan change proposal that was not of any concern to them;

    (c) However, such people might be concerned about a proposal to amend the Business 1 zones or the applicable rules, because a change to those provisions was not proposed by PC7 as notified.

19. However, there is some scope to amend the Business 1 zone rules, but only to the extent that such changes would apply to "local business areas" identified in new Living Z zones introduced by PC7. Applying the first part of the *Clearwater* test to PC7, it is my opinion that scope is limited to:

    (a) Supporting the application of the Business 1 zone rules in any "local business areas" identified in the new Living Z zones;

    (b) Retaining the status quo, being the existing zoning and rules. Thus, there would be no Living Z zones, and no application of the Business 1 zone rules in any "local business areas" identified for those Living Z zones; or

    (c) Seeking alternative relief that represents something between the above extremes. For example, the application of the Business 1 zone rules in any "local business area" could be amended in a manner that incorporates some of the rules and restrictions that apply to the existing zoning.

20. As any relief must fall between supporting PC7 or retaining the status quo, it is possible that there is insufficient scope to completely remove the ability to provide residential living activities from an identified "local business area", depending on the size (area) of the "local business area" concerned. For example, if a newly identified "local business area" in a new Living Z zone is, under the status quo, zoned as Rural

(Inner Plains) with a permitted residential density ratio of no more than 1 dwelling per 4 hectares, then:

(a) There would be scope to remove the ability to erect dwellings on a sub-4ha site because a dwelling would not have been permitted on that site under the status quo;

(b) However, there is no scope to completely prevent dwellings on a site of 4ha or more as that would be more restrictive than the status quo.

The *Naturally Best* "relationship" test

21. The case of *Naturally Best NZ Ltd and Shotover Park Ltd v Queenstown Lakes DC* (C49/2004) is a decision of Environment Court presided by Judge Jackson which does not, in my opinion, follow the High Court's view in *Clearwater Resort Limited*. Rather, the *Naturally Best* decision creates an alternative "relationship" test for assessing whether a submission is "on" a variation or plan change.

22. The *Naturally Best* case involved a variation to rezone 420 hectares of rural land to a special resort zone. A neighbour lodged a submission seeking to rezone an additional 127 hectares to the special resort zone. The Court considered that the submission was "on" the variation. The Court declined to follow the High Court's first test which was considered to be "rather passive and limited"[11], and instead created and applied what was called a "relationship" test.

23. In essence, the relationship test requires an inquiry as to whether a submission reasonably relates to the whole variation or plan change in the context of the remainder of the district plan. The relationship test will involve a discretionary judgement in every case. The decision states[12]:

> **There must be a kinship between the submission and the reference and it must be a reasonably close relationship. How close depends on the circumstances of each case.**

24. However, the relationship test presents numerous difficulties, not the least of which is the inability for councils to conclusively determine whether a submission that would fail the *Clearwater* two part test, might still be regarded as "on" a variation or plan change under the relationship test.

<u>The rezoning submissions</u>

25. In this case, the relationship test could open the door to an argument that some or all of the rezoning submissions listed in paragraph 4(g) are "on" PC7 on the basis that the plan change seeks to provide for new residential zonings in and around Lincoln and Rolleston. If, in the *Naturally Best* case, the Court was prepared to extend the special resort zone to cover 127 hectares of neighbouring land that was not even the subject of the variation as notified, then the inclusion of additional land as new living zones alongside those rezoned by PC7 is entirely plausible under the reasoning used in the *Naturally Best* case.

[11] *Naturally Best NZ Ltd and Shotover Park Ltd v Queenstown Lakes DC* (C49/2004), at paragraph 15.
[12] Ibid, at paragraph 20(c).

26. However, it is my opinion that the relationship test cannot apply. Strictly speaking, as a matter of law, the Environment Court is bound to follow the High Court's ruling in *Clearwater Resort Limited*. I can only speculate as to why the Environment Court's *Naturally Best* decision was not appealed to the High Court.

27. In any event, I consider that the relationship test cannot be correct because it does not adequately address the risk of persons being disenfranchised from having a real opportunity to have their say on submissions that are held to be "on" a variation or plan change under that test. In applying the relationship test, the Environment Court determined that persons would not be prejudiced or disenfranchised by a submission seeking to extend the resort zone beyond the area which was the subject of a variation because those persons could review the summary of submissions, and they have an opportunity to lodge further submissions.[13] However, that determination does not adequately address the risk of disenfranchising potentially affected persons as follows:

    (a) Persons considering the notified variation could have decided that the creation of a resort zone over the area specified in the variation was irrelevant to them. They may not have cared whether the 420 hectares of land identified in the variation was rezoned or not, and therefore elected not to participate in the variation process. Such persons would also have no reason to review a summary of submissions because the variation itself related to an area of land that they previously considered to be irrelevant to them.

    (b) As such persons would have no reason to review the summary of submissions, they could not reasonably become aware of a submission that seeks to rezone a different area of land from that which was the subject of the notified variation. Potentially, that different area of land, covering an additional 127 hectares, could be relevant to such persons. For example, some persons may own land adjacent to the new area of land, but not adjacent to the land which was the subject of the variation as notified, and may be concerned about having resort developments next door. Such persons would be disenfranchised from having a real opportunity to have their say in respect of the new land area that the submission seeks to rezone.

28. Judge Jackson's division of the Environment Court continues to apply the relationship test in a number of cases,[14] although interestingly, in *Avon Hotel Limited v Christchurch City Council* (C42/2007), Judge Jackson appears to move somewhat away from the relationship test originally formulated in *Naturally Best* in two main respects:

    (a) First, although Judge Jackson does not say that the decision in *Naturally Best* was wrong (in fact states he was happy with the outcome in *Naturally Best*), he does mention that:[15]

[13] Ibid, at paragraph 29.
[14] See for example *Avon Hotel Limited v Christchurch City Council* (C42/2007) and *P D Sloan v Christchurch City Council* (C82/2007).
[15] *Naturally Best NZ Ltd and Shotover Park Ltd v Queenstown Lakes DC* (C49/2004), at paragraph 30.

(i) His decision in *Naturally Best* "*was obviously written in haste and is not a shining light of judicious or clear writing*";

(ii) He "*made mistakes"* about the High Court's *Clearwater* decision;

(iii) His discussion of the *Clearwater* decision was "*not of much help*"; and

(iv) That on reflection the *Clearwater* decision "*is much more useful than I was prepared to acknowledge then*".

(b) Second, although Judge Jackson was again, in *Avon Hotel*, attracted by the argument that the further submission process can address concerns about the potential for other persons to be disadvantaged by primary submissions extending the scope of a variation or plan change, he ultimately accepted that such a view is incorrect. Without expressly acknowledging the error in his earlier reasoning in *Naturally Best*, Judge Jackson states at paragraph 36 of the *Avon Hotel* decision:

> **Initially I was attracted to that argument. However, I consider Mr Hardie's counter-argument is correct. He submitted that because the original notification clearly stated that Variation 89 related to recession planes, persons interested in the subject of heights would have looked at the variation's provisions, seen that heights generally and chimneys in particular were not mentioned, and put Variation 89 out of mind. Thus when the availability of a summary of submissions was notified those persons would have seen it related to the irrelevant – to them – issue of recession planes and dismissed it. Those persons would have had no reason to go to the trouble of inspecting the summary of submissions itself, and then the Avon submission, at the Council offices where they are kept.**
>
> [My underlining]

Judge Jackson concluded that a submission seeking to change the definition of "height" did not fall within the scope of a variation that related to recession planes.

29. In summary, although all of the submissions listed in paragraph 4(g) could conceivably be seen as being "on" PC7 pursuant to the relationship test described in *Naturally Best*, it is my opinion that the test cannot be relied on because it is inconsistent with the High Court's two step test in *Clearwater*; and does not adequately recognise and address the risk of prejudice to potentially interested persons as a consequence of submissions being held to be "on" a variation under the relationship test.

The business zone submissions

30. If the relationship test is to be applied to the business zone submissions (as listed in paragraph 5(a)), then it is my opinion that:

(a) As PC7 does not seek to amend the Business 1 zones rules, nor the existing Business 1 zones throughout the district, I consider that there is no relationship of sufficient moment that would provide scope to amend the

Business 1 rules in a manner that would affect all Business 1 zones in the district.

(b) However, there is a sufficient relationship between the Business 1 zone rules and any "local business areas" identified in the new Living Z zones to provide limited scope to amend the Business 1 provisions to the extent described in paragraphs 19 and 20 above.

The *Option 5* "scale and degree" test

31. On 28 September 2009, the High Court released *Option 5 Incorporated v Marlborough District Council* (CIV 2009-406-144), being a more recent decision on the issue of whether a submission is "on" a variation or plan change.

32. What is particularly interesting about the *Option 5* decision is that it does not comment on the validity or otherwise of the *Naturally Best* relationship test. In fact, the *Naturally Best* case is not even mentioned. Instead, the High Court expressly refers to and endorses the *Clearwater* test.

33. Surprisingly however, the High Court in *Option 5* does not apply the *Clearwater* test in the two step manner described in paragraph 9 above. Instead, the High Court expressed the view that the first part of the two part test may not be particularly helpful and proceeds to merge the two tests. Referring to the two parts of the *Clearwater* test, the High Court states:[16]

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

34. In essence, the High Court in *Option 5* merges the two parts of the *Clearwater* test into a single "scale and degree" test. What needs to be assessed is the scale and degree of difference between the subject matter of a submission, and the policy and purpose of a variation or plan change. Matters that are relevant to assess include:

(a) The policy behind the variation or plan change;

(b) The purpose of the variation or plan change;

(c) Whether a finding that the submissions were on the variation/plan change would deprive interested parties of the opportunity for participation.

35. The High Court noted that on the "scale and degree" test, it is not only those submissions that are out of "left field" or "completely novel" that are likely to be considered not "on" a variation. A judgement call is required as to whether, as a matter of scale and degree:

(a) The difference between the submission, and the policy and purpose behind the variation/plan change; and

[16] *Option 5 Incorporated v Marlborough District Council* (CIV 2009-406-144), at paragraph 29.

(b) The extent to which affected property owners are shut out of the consultation process;

warrants a determination that a submission is not “on” a variation or plan change.

36. In *Option 5*, the appellant argued that where the Council notifies a variation to extend the area of a Central Business Zone (“CBZ”), then a submission which seeks to further extend that zone into immediately contiguous areas would be “on” the variation. That argument was rejected by the High Court. Applying the scale and degree test, the High Court noted 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 central 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.

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

<u>The rezoning submissions</u>

37. As the *Option 5* test involves an element of discretion in ascertaining matters of scale and degree, there may be some room for argument that some of the submissions listed in paragraph 4(g) may fall within scope. For example, there may be attempts to argue that some of the additional rezonings relate to a sufficiently small land area that the degree of difference is minor compared to the large area of land being rezoned by PC7. However, with the exception of submission 89, it is my opinion that none of the rezoning submissions are "on" PC7 pursuant to the *Option 5* "scale and degree" test for the following reasons:

(a) The intention of PC7 is to rezone only those particular land areas identified on the planning maps. In terms of policy and purpose, rezoning is proposed only in those areas contained within ODP areas which themselves are identified on the ODP maps accompanying PC7. By contrast, the submissions listed in paragraph 4(g) (other than submission 89) seek to zone additional land that is neither identified on the notified PC7 planning maps, nor in the identified ODP areas.

(b) For the reasons discussed at paragraph 15 above, I also consider that the rezoning submissions (other than submission 89) would shut potentially affected persons out of the consultation process. If such submitters want additional land rezoned, then they have the option of requesting a private plan change to provide for that rezoning, in which case potentially affected persons would be notified of the proposed rezoning and have an opportunity to participate in the process.

38. Overall, I consider that the *Clearwater* test should be the preferred test for scope. I am not convinced that the scale and degree test is the most robust, as it introduces a discretionary judgement that needs to be applies in every case (i.e. whether a submission would, as a matter of scale and degree, fall within the scope of a plan change). As with every discretionary judgement, there is room for debate. By contrast, a discretionary judgement would only arise under the second part of the *Clearwater* test, and would apply only to those limited submissions that are able to pass the first part of the test. As mentioned above, the first part of the *Clearwater* test is analytical rather than discretionary, and should in most cases enable scope issues to be ascertained as a matter of analysis, thereby bringing a high degree of certainty in determining whether a submission falls within the scope of a variation or plan change in any given case.

The business zone submissions

39. If the *Option 5* test is to be applied to the business zone submissions (as listed in paragraph 5(a)), then it is my opinion that:

    (a) As a matter of scale and degree, there is no scope to amend the Business 1 rules in a manner that would affect all Business 1 zones in the district because PC7 does not seek to amend the Business 1 zones rules, nor the existing Business 1 zones throughout the district;

    (b) However, there is limited scope to amend the Business 1 provisions to the extent described in paragraphs 19 and 20 above.

Conclusion

40. Having regard to all 3 lines of case law on the issue of scope, it is my opinion that:

    (a) With the exception of submission 89, all of the rezoning submissions listed in paragraph 4(g) fall outside the scope of PC7 on both of the tests formulated by the High Court, being the *Clearwater* two part test, and the *Option 5* scale and degree test. While all of the rezoning submissions could conceivably fall within the scope of PC7 pursuant to the relationship test described by Judge Jackson in *Naturally Best*, that test should not be followed because it is inconsistent with the High Court decisions. As a matter of law, High Court decisions are binding on the Environment Court, and would therefore also bind local authority decision making on scope issues.

    (b) The business zone submissions (as listed in paragraph 5(a)) provides limited scope to amend the Business 1 zone provisions, and only to the extent described in paragraphs 19 and 20 above.

41. Please call me if you have any further queries.

Yours faithfully
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