

Appendix 3: Legal Advice



Memo

DATE: 14 September 2022

TO: Justine Ashley

FROM: Paul Rogers/Kate Rogers

CLIENT: Selwyn District Council

OUR MATTER: 038777

SUBJECT: SCOPE

Introduction

- 1 You have asked us to consider whether there is scope to amend the Proposed Selwyn District Plan (**Proposed Plan**) to give effect to the amended relief sought by Gulf Central Properties Ltd and Apton Developments Limited (**submitters**), in relation to the site referred to in their submission (**site**). The amended relief sought differs from the submission filed by the submitters.
- 2 As you are aware, the scope for amendments generally lies between the provisions of the notified version of the proposed Plan, and the relief sought in submissions on the proposed Plan, although the scope of a submission extends beyond the express words of the submission.¹ Ultimately it is a question of procedural fairness. Adequate notice and opportunity must be given to those who might seek to take an active part in the hearing if the proposed changes would not have been within the reasonable contemplation of the original reference.²

Conclusion

- 3 In this case, our conclusion is that there is scope for the amended relief sought by the submitters. The outcome sought as part of the amended relief is essentially the same outcome as that provided in the submission – provision for a rural/industrial activity which directly supports rural land use. Any person reading the original submission could have contemplated that outcome, even though the specific mechanism has changed.
- 4 Our reasons for this view are set out in more detail below.

¹ General Distributors Ltd v Waipa District Council HC Auckland, CIV 2008-404-4857, 19 December 2008 at [56].

² Westfield (New Zealand) Ltd v Hamilton City Council [2004] NZRMA 556 at [74].

5 Whilst we understand that the Council and Commissioners are aware of the
legal tests for scope, it is helpful to briefly set them out.

6 The limitation for decision makers is that planning instruments cannot be
appreciably amended without real opportunity for participation by those
potentially affected by the amendment.³ Accordingly, for an amendment to be
within scope, typically there would be a relationship between a submission and
an amendment, such that the amendment 'can fairly be said to be a
foreseeable consequence of any change directly proposed in the reference.'⁴
However, the Court has held that to take a legalistic view and hold that a
council, or the Environment Court on appeal, can only accept or reject the relief
sought in any given submission would be unreal.⁵

7 On a relatively recent appeal, the High Court held that:⁶

8 The High Court went on to state that:⁷

Background

10 On 11 December 2022, Gulf Central Properties Ltd and Apton Developments
Limited filed a submission⁸ on the Proposed Plan. The submission states that:

⁸ PDF markup for Gulf Central Properties Limited & Apton Developments Limited.pdf (selwyn.govt.nz)

Specific Proposals to Which this Submission Relates:

1. *The District Plan in its entirety, including but not limited to: The zoning of land shown on Figure 1 below.*
2. *The Urban Growth objectives and policies.*

Our Position on these provisions are:

We oppose these provisions and seek the changes outlined below.

Relief Sought / Decision we want Council to Make

Rezone the Site as identified in Figure 1 of this submission as 'the Site' General Industrial but with additional standards/requirements consistent with the development concept for a Rural Business Zone with the following features:

- *Type of activity limited to activities associated with business which supports rural land use activities (eg farm machinery sales, or farm product sales etc)*
- *Design and appearance of a site from a landscape perspective to reflect rural character, including fencing and plant species controls*
- *Buffer or setbacks of activities from strategic infrastructure with areas to be landscaped*
- *Buildings to have appropriate noise insulation to meet standards*
- *Controls on the location, size, amount, orientation and design of signs, particularly if they face SH1*

- 11 The submission provided specific proposed amendments to the Proposed Plan, and then went on to request:

Any consequential, further or alternative amendments to the Proposed District Plan to be consistent with and give effect to the intent of this submission and the interests of the Submitter.

- 12 On 11 February 2022, the Section 42A Report on the General Rural Zone was released. It stated that:⁹

I agreed with submitters that having both 'rural service activity' and 'primary industry' definitions could create unnecessary confusion and I recommend deleting both terms and relying only on the NPS definition of a 'rural industry'. As a consequential change, I recommend combining GRUZ-R8 and GRUZ-R11 into one rule for rural industry.

- 13 A 'rural industry' is defined in the notified version of the Proposed Plan as 'an industry or business undertaken in a rural environment that directly supports, services, or is dependent on primary production.'

⁹ https://www.selwyn.govt.nz/_data/assets/pdf_file/0006/704886/S42-Report-General-Rural-Zone.pdf at [10.61]

14 The recommended rule is:

| GRUZ-R8 Rural Service Activity-Rural Industry ⁵⁹³ | | |
|--|--|--|
| SCA-RD1 SCA-RD4 SCA-RD5 SCA-RD6 SCA-RD7 | Activity status: PER | Activity status when compliance not achieved: 2. When compliance with any of GRUZ-R8.1 is not achieved: DIS 3. When compliance with any rule requirement is not achieved: Refer to relevant Rule Requirement |
| | 1. The establishment of a new, or expansion of an existing <u>rural industry rural service activity</u> . | |
| | Where: | |
| | a. The area of land associated with the <u>rural industry rural service activity</u> is less than 200m ² . | |
| | And this activity complies with the following rule requirements: GRUZ-REQ6 Hours of Operation GRUZ-REQ7 Full Time Equivalent Staff | |

...

| | | |
|---------------------------|--|---|
| GRUZ PREC1 ⁵⁹⁴ | Activity status: PER 7. The establishment of a new, or expansion of an existing <u>rural industry</u> And this activity complies with the following rule requirements: GRUZ-REQ6 Hours of Operation | 8 When compliance with any rule requirement is not achieved: Refer to relevant Rule Requirement |
|---------------------------|--|---|

15 On 5 August 2022, evidence in support of the submission was filed by Ivan Thomson.¹⁰ The evidence described the submission as:¹¹

Submission 399 to the notified Proposed Selwyn District Plan (SPDP) seeks to rezone approximately 86 ha of rural zoned land (GRUZ) to General Industrial (GIZ) but with additional standards/requirements consistent with the development concept for a Rural Business Zone.

16 The evidence states that the relief sought by the submitters was being amended (**amended relief**):¹²

An alternative zoning, and my preference, is to retain the GRUZ but apply a Rural Business Precinct overlay. This is more consistent with the planning framework in both the Regional Policy Statement and PSDP.

...

The refined proposal is now to place a Rural Business Precinct Overlay over the part of the site but retain the GRU zoning

17 The outcome the amended relief is to identify the relevant land to 'as 'Rural Services Precinct' (specifically GRUZ PREC 2) and amend Rule GRUZ-R8 (set out above) to include GRUZ PREC 2 with GRUZ PREC 1. This would enable a rural industrial activity on the site as a permitted activity, subject to the relevant limitations. The outcome sought also provided for additional limitation on structure setbacks, and impermeable surfaces, and some specific provisions in relation to traffic.

18 The key issue is whether the relief now sought is within scope of the submission.

¹⁰ [DPR-0399 Gulf Properties & Apton - Statement of Ivan Thomson \(Planning\).pdf \(selwyn.govt.nz\)](#)

¹¹ At [7]

¹² At [9] and [13]

Assessment

- 19 The factors which support the relief sought not being within scope of the submission are:
- 19.1 The specific amendments to the Proposed Plan sought in the submission are not reflected in the specific amendments sought in the amended relief – there is no cross over as the provisions proposed to be amended are completely different.
- 19.2 The underlying zoning is different to that sought in the submission – the submission sought an underlying zoning of Industrial, whereas the amended relief seeks the zoning remain Rural.
- 20 The factors that support the relief sought being within scope of the submission are:
- 20.1 The outcome sought in the amended relief is broadly the same as the original submission, as per the assessment below. Where differences arise, it is due to an outcome sought in the submission not being pursued in the amended relief.

| Outcome sought in submission | Outcome sought in amended relief |
|---|--|
| Rezone the Site as identified in Figure 1 of this submission as 'the Site' General Industrial but with additional standards/requirements consistent with the development concept for a Rural Business Zone with the following features: | Zoning is not the same. Rural Business Zone similar to the outcome sought in the submission – see further discussion below. |
| Type of activity limited to activities associated with business which supports rural land use activities (eg farm machinery sales, or farm product sales etc) | The activity is limited to 'Rural Industry', which is 'an industry or business undertaken in a rural environment that directly supports, services, or is dependent on primary production.' This is essentially the same activity as the submission sought to enable |
| Design and appearance of a site from a landscape perspective to reflect rural character, including fencing and plant species controls | The amended relief provides for a landscape strip on road frontages, and setbacks for buildings. |

| Outcome sought in submission | Outcome sought in amended relief |
|--|--|
| Buffer or setbacks of activities from strategic infrastructure with areas to be landscaped | Does not appear to be sought in the amended relief |
| Buildings to have appropriate noise insulation to meet standards | Does not appear to be sought in the amended relief |
| Controls on the location, size, amount, orientation and design of signs, particularly if they face SH1 | Does not appear to be sought in the amended relief |

- 20.2 The reason for the submission was given as: 'The rezoning reflects the reality of existing land uses at the Site and provides greater certainty and reduced consenting costs for their continued operation and potential future changes/additions'. The amended relief appears to support that reason.
- 20.3 There is no change to the underlying zoning – it remains Rural. Accordingly, the only change which requires scope is the imposing of the overlay.
- 20.4 The submission and the amended relief sought deal with the same pieces of land. The submission covers more land, and the amended relief sought is narrower. There is no expansion of the area to be covered.
- 20.5 This is a full plan review. Accordingly, change is generally anticipated.
- 20.6 The submission allowed for consequential, further or alternative amendments to the Proposed District Plan to be consistent with and give effect to the intent of this submission and the interests of the Submitter. Given this, a person reading the submission could have anticipated a different amendment than that specifically sought in the submission may arise.
- 20.7 The amendment arose as a consequence of the proposal put forward by Council in the section 42A Report, which was released after the original submission was filed.

Conclusion

- 21 In considering the two possible outcomes above, we consider that the more persuasive outcome is that amended relief sought by the submitters is within scope of the original submission, because:

- 21.1 The outcome sought as part of the amended relief is essentially the same outcome as that provided in the submission – provision for an industrial activity which directly supports rural land use. Any person reading the original submission could have contemplated that outcome, even though the specific mechanism has changed.
- 21.2 The zoning now sought in the amended relief is to retain the Rural zoning. As set out above, scope lies between the notified version of the Plan, provided for the site to be zoned GRUZ. Given this, it is open to the decision maker to leave the Rural zoning in place, based on the notified version of the Proposed Plan
- 21.3 It is acknowledged that a different zoning was sought in the submission (Industrial), to that sought in the amended relief. However, the zoning sought in the amended relief was an attempt to reach the same outcome (allowing for a rural industrial activity), and reflected amendments made in the section 42 Report. Given this, it is considered that this is not a critical issue.
- 21.4 There are other differences between the original submission and the amended relief (area of land proposed, restrictions on noise insulation and signs). However, those additional restrictions arose in the submission, rather than in the amended relief, and appear to no longer be pursued. Accordingly, scope does not need to be identified for them. In addition, they do not form a critical part of the original submission, so their absence does not undermine the argument that the amended relief seeks the same outcome as the submission.



Paul Rogers/Kate Rogers

Adderley Head