

14 August 2023

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For: Hilary Samuel, Senior Policy Advisor (e-mail: [hsamuel@taupo.govt.nz](mailto:hsamuel@taupo.govt.nz))

**Plan Change 42 to the Taupō District Plan – Advice on Scope – Submission by Steve Hawkins**

1. I refer to our discussions and e-mail correspondence, and your instructions for me to advise Taupō District Council (**Council**) on scope issues associated with a submission by Mr Steve Hawkins (**submitter**) on proposed Plan Change 42 to the Taupō District Plan – Rural General and Rural Lifestyle Environments (**PC42**).
2. The purpose of this advice is to assist the Council in preparing its report and recommendations on submissions relating to PC42, as part of the exercise of its functions under section 42A of the Resource Management Act 1991 (**RMA**).
3. In particular, the Council has sought advice on whether intended modifications to the submitter's relief, which have been advanced following the close of the submission and further submission period, are beyond scope.

**Background**

4. The submitter lodged a submission on PC42 seeking (*inter alia*) that the site at 387 Whakaroa Road (**site**) be rezoned as Rural Lifestyle and that subdivision resulting in lots less than 10ha in area be a discretionary activity. The site was identified as Rural General in PC42 as notified.
5. In the meantime, the submitter has been working in parallel on a consent application for the development of the site, and has indicated that this application is likely to be lodged prior to the PC42 hearing.
6. The representative for the submitter has filed a memorandum dated 25 July 2023 which seeks to update the Council and the Hearing Panel on amended relief that it intends to advance at the hearing of PC42. It seeks that the Council in its section 42A reporting role address that updated relief so as to assist the Hearing Panel, although it has not yet committed to that updated relief and seeks some flexibility to advance further refinements in evidence.
7. Nevertheless, the essence of the submitter's position is that refined relief, being discretionary activity status only for creation of allotments less than 10ha in size that are in general accordance with a detailed structure plan, is preferred and would be within scope as being more restrictive than the relief set out in its original submission.

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8. The submitter's representative has set out a legal rationale for why the preferred relief is within scope and able to be considered by the Hearing Panel on its merits.
9. I also understand that, following the filing of the memorandum, planning conferencing has taken place between the submitter, the Council, and Waikato Regional Council and resulted in a Joint Witness Statement (JWS)<sup>1</sup> with further refinements identified, noting that the question of scope has been set to one side.

### Analysis of the legal position

10. For the reasons that I set out below, I have reservations as to whether the position on scope advanced by the submitter's representative is correct. My view is that the preferred relief that the submitter now seeks to advance is beyond the scope of its submission.
11. I note that some attention has been devoted to the question of whether the submitter's preferred relief is beyond scope because it is not "on" PC42 (ie. whether it is entitled to seek that its site be rezoned Rural Lifestyle). I do not have any issues with the submitter's position on that matter and do not intend to address that question further.
12. The memorandum for the submitter outlines relevant case law on the question of scope, which I do not propose to repeat in this advice. Where I have doubts about the position advanced for the submitter is the suggestion that all that is required is for the relief now sought to be more restrictive for it to be within the scope of the relief sought in the original submission. Indeed, I also doubt whether the relief is in fact less restrictive in any event.
13. In my view, the submitter's position is possibly a simplification of the issue which then leads to an incorrect application of the legal tests. It is correct that there are two inter-related limbs to the legal tests that would apply in this instance - scope and fairness.
14. The starting point is the relief sought in the original submission. In this instance, the relief sought is relatively simple and straightforward, being Rural Lifestyle re-zoning of the site, and a submission on General Rural subdivision rule 4b.5.1 seeking a discretionary activity status for subdivision below a 10ha lot size. There was no submission made on the Rural Lifestyle subdivision provisions.
15. The modified relief, while it is characterised as more restrictive, is significantly different<sup>2</sup>. It involves:
  - a new site-specific sentence in the Introduction to the Rural Chapter;
  - what might be regarded as a new "precinct" or sub-zone description for the site in the Introduction, on page 2;
  - a new Objective 3b.3.9 foreshadowing a bespoke development of the site;
  - a new bespoke Policy 3b.3.9A relating to subdivision, use and development of the site;
  - an addition to rule 4b.3.2 for minor residential units;
  - an addition to rule 4b.3.4 for intensive indoor primary production;
  - a new rule 4b.3.9 relating to new buildings and structures on the site;
  - a new rule 4b.3.10 clarifying the application of earthworks standards to the site;

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<sup>1</sup> Which I understand was finalised on 9 August 2023

<sup>2</sup> See Attachment 1 to the submitter's memorandum and the planning JWS

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- a new exception to rule 4b.5.7 making an exception of the site from subdivision in an Outstanding Landscape Area (**OLA**) having a non-complying activity status;
  - a new rule 4b.5.10 relating to subdivision of the site; and
  - a new Appendix 1 which will outline the key components, activities and features of the proposed precinct plan for the site.
16. In my view, it is possible that many people would regard the package now proposed as more enabling rather than more restrictive when considering it against the original relief. In that respect, no submission was made on rule 4b.5.7 which made subdivision in an OLA non-complying in both the General Rural Environment and Rural Lifestyle Environment (and indeed there was no submission made on Rural Lifestyle subdivision provisions at all).
  17. What is now proposed is an exception to rule 4b.5.7 by deferring to new rule 4b.5.10 which would make subdivision of the site (which is in an OLA) discretionary if it is in accordance with the precinct plan. That outcome is, in my view, clearly more enabling and less restrictive than the relief sought in the original submission.
  18. In addition, it raises a question as to whether what is being sought by the submitter is still Rural Lifestyle zoning or, in reality, a detailed and bespoke spot zone which envisages and supports a specific intended development which bears little resemblance to Rural Lifestyle zoning.
  19. Putting those matters to one side, I do not consider that the scope issue can of itself be resolved by a debate about whether the relief now sought is more restrictive than the original relief. Rather, the question should be whether the submitter is seeking a change which is beyond the scope of its submission and/or the range of relief to be determined by the submissions as a whole.
  20. One of the key underlying concerns which is addressed by case law on scope is about fairness, involving questions about whether a party may modify their relief in a way that introduces new or unforeseen outcomes that potentially interested persons might not have been able to identify or effectively have a say on. Whether the outcome might be appropriate or better is not the test, as the fairness consideration is based on the risk that persons directly or potentially directly affected by the additional changes proposed by a submitter have been denied an effective opportunity to respond to those additional changes in the plan change process.
  21. Another way of approaching the issue is to ask whether the outcome that the submitter now seeks would be reasonably foreseeable based on its submissions and/or the scope of all submissions on the issue.
  22. In terms of fairness and potential prejudice, even if it was accepted that what is now advanced by the submitter would result in an appropriate or superior planning or environmental outcome, it is my understanding of case law that the test of fairness relates to foreseeability of outcomes, not necessarily the merits of a potential outcome.
  23. On the discrete question of scope and the reasonable foreseeability of the package of provisions now proposed by the submitter, it is likely that the outcome could not have been reasonably appreciated or foreseen as a possible consequence by other submitters or members of the public. The full range of relief sought is very different from what was advanced in the original submission, and would result in changes to the PC42 provisions that would not have been appreciated as a likely or consequential extension of the original relief sought.

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24. There are several examples of this, but the proposed result of a management through a detailed precinct plan, the very different outcome compared to Rural Lifestyle zoning, and the discretionary activity subdivision status in an OLA, are all well beyond the relief sought in the submission. I consider that it is unlikely that a potentially interested person would have reasonably anticipated the overall package of refined relief as an outcome of the original relief sought.

### Conclusion

25. For those reasons, I consider that the position sought to be advanced by the submitter would be beyond the scope of the original relief and, as a consequence, unfair.
26. I trust that this advice is of assistance. If you have any questions or require any clarification, please contact me.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J. Winchester', with a small dot above the 'i'.

James Winchester