LARA BURKHARDT
Barrister & Solicitor

22 August 2023

Taupō District Council
Private Bag 2005
Taupō Mail Centre
TAUPŌ 3352

BY EMAIL
C/-: steve.hawkins@acuity2020.com

For: Hilary Samuel, Senior Policy Advisor (as co-ordinator for the Panel)

PLAN CHANGE 42 TO THE TAUPŌ DISTRICT PLAN – PEER REVIEW OPINION ON SCOPE – SUBMISSION BY STEVE HAWKINS

1. I have been asked to review the following materials:

   (a) Original submission, submitter #74;

   (b) Memorandum by submitter #74's representative, dated 25 July 2023;

   (c) the JWS following the conferencing of 8 August 2023;

   (d) Mr Winchester's letter of 14 August 2023; and

   (e) the further Memorandum by submitter #74, dated 21 August 2023;

   in order to provide a peer review opinion of views of Mr Winchester and those of the submitter's representative as to scope/ jurisdiction for the Panel to consider the refined preferred relief now being sought by the submitter on its merits.

2. In short, it is my opinion that the views of the submitter's representative are to be preferred. This is on the basis that:

   (a) both the original analysis by the submitter's representative, in the first memorandum of 25 July 2023 and the further memorandum of 21 August 2023, are more detailed and comprehensive;

   (b) whereas, in comparison, Mr Winchester's 14 August 2023 letter is more overview in nature and reliant on what could be described as more of a "gut feel" rather than an opinion formed following a forensic analysis;

(c) while I understand Mr Winchester's "gut" concerns, I am comforted by the careful assessment of the submitter's 21 August 2023 memorandum.

(d) this resolves the "within" (or "more restrictive than") the original relief sought issue, leaving only the matter of "fairness" or "notice";

(e) I agree, if it is accepted that the refined relief is within the scope of or more restrictive than the original relief sought, then it almost inevitably follows that the world had fair notice of the nature of the relief sought (or what it might become), or at the very least, the issues raised;

(f) I did wonder if the summary of submissions might have obscured matters, but it appears not, the summary stating:

Relief sought	**Summary of submission**
Amend Rule 4b.5.1 to make subdivision that results in lots smaller than 10ha a discretionary activity. Make any other consequential amendments to give effect to the relief above.	The proposed changes to the rural chapter should be amended to reflect the obligations and requirements of the National Policy Statement for Highly Productive Land whereby only Class 1-3 land should be protected with a non-complying activity subdivision rule.
Amend the rural environment chapters to reflect the objectives and policies of the NPS-HPL.	Oppose the proposed amendments to the rural environment chapters on the basis that the provisions do not reflect Council's obligations under the National Policy Statement for Highly Protective Land. In this regard, the proposed non-complying subdivision rules should only relate to land comprising class 1 - 3 soils. For all other rural land a Discretionary Activity status should apply.
Amend the zone of the site located at 387 Whakaroa Road to Rural Lifestyle Zone. Site investigations have confirmed that the site is suitable for rural-lifestyle development.	Oppose the General Rural Environment Zone on the site located at 387 Whakaroa Road to Rural Lifestyle Zone.

(g) while the notified summary does not have the additional (but relatively limited) "exposition" provided in the submitters' 21 August 2023 memorandum, in my opinion, the thrust of the submission is very much for discretionary subdivision status to apply across the revised rural zones (ie GRE and RLE), and for the site to be rezoned to RLE (which I understand is the more "permissive" of the two rural zones proposed);

(h) I also note that PC42 was also billed as a "full review" of the district's rural chapters. While not a full plan review, that does provide additional latitude in respect of what might be properly sought in a submission (or in refined relief) – as compared to, say, the introduction of a new zone to a specified location only; and

(i) I also observe that the Glen Massey example found by the submitter's representative also provides some comfort as to jurisdiction.

3. I also note, in terms of the principles to be applied, that these have also been helpfully recorded by Whata J in *Gock v Auckland Council* [2019] NZHC 276 at [43], as follows (as relevant, cross referencing from the original decision):

(a) The paramount test is whether any amendment made to the plan as notified goes beyond what is reasonably and fairly raised in submissions on the plan.[1]

(b) That assessment should be approached in a realistic workable fashion.[2]

(c) The submission must first raise a relevant resource management issue, and then any decision requested must fairly and reasonably fall within the general scope of the original submission, or the proposed plan as notified, or somewhere in between.[3]

(d) The approach requires that the whole relief package detailed in submissions be considered.[4]

(e) Consequential changes that logically arise from the grant of relief requested and submissions lodged are permissible, provided they are reasonably foreseeable.[5]

(f) Such changes can extend to consequential rule changes following agreed relief regarding policy changes, provided the changes are reasonably foreseeable.[6]

(g) There is an implied jurisdiction to make consequential amendments to rules following changes to objectives and policies on the principle that regional and district plans have an internal hierarchical structure.[7]

4. Justice Whata specifically accepted at [44] that:

> … one of the key principles emerging from the various decisions footnoted above that any amendment must be fairly and reasonably within a range of options between what was originally notified and the relief requested in individual submissions.

---

1 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171.

2 *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413.

3 *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC) at [19]. See also *Church of Jesus Christ Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [19].

4 *Shaw v Selwyn District Council* [2001] 2 NZLR 277 (HC) at [31].

5 *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [73]–[77].

6 *The Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [47].

7 *Clark Fortune McDonald & Associates v Queenstown Lakes District Council (No 2)* C89/02, 24 July 2003 at [17].

5. It may be that Whata J's summary of the principles as recorded above will assist the Panel in its decision.

6. Finally, it is also relevant to consider that the original relief (ie rezone to RLE with a DA subdivision consent status, including in an OLA) could still be pursued by the submitter, and could be granted by the Panel if it were to be satisfied on the merits. While I make no comment on the merits, if the Panel was tending to that outcome, then it would seem appropriate to provide some greater certainty and control on the outcome, such as through the preferred relief now sought.

7. Even if the Panel did find that the preferred relief was outside jurisdiction, I anticipate it would assist all parties for the Panel to nevertheless express some opinions as to the merits of the preferred relief. That would, I expect, assist the parties considerably should there be any appeals.

Your sincerely,

Lara Burkhardt
Barrister & Solicitor