JAMES WINCHESTER
BARRISTER

1 September 2023

Taupō District Council
Private Bag 2005
Taupō Mail Centre
Taupō 3352

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

Plan Change 42 to the Taupō District Plan – Submission 74 by Steve Hawkins – Response to Further Memorandum and Legal Advice on behalf of the Submitter

1. The purpose of this letter is to respond to the material volunteered on behalf of submitter 74 on 22 August 2023, relating to the relief sought in its submission proposed Plan Change 42 (**submission**) to the Taupō District Plan (**PC42**).

2. It is understood that the Hearing Panel for PC42 may be assisted in its decision-making by the inclusion of this letter with the Council's right of reply and it is therefore prepared for that purpose.

3. The two documents filed on 22 August 2023 that I address are the second memorandum (**memorandum**) prepared by the Project Manager for submitter 74, and a legal opinion prepared by Lara Burkhardt which has been characterised as a peer review (**opinion**).

4. Having considered both the representations in the memorandum and the advice in the opinion, I do not consider that the matters raised in either document warrant a change to the advice that I provided on 14 August 2023[1]. I maintain my earlier view that the relief now being advanced by the submitter is beyond the scope of the submission in that there is a jurisdictional barrier to that relief being granted (irrespective of the merits of such relief).

5. I make relevant comments and observations on each document below. I have not addressed every point made but the absence of a response in this letter should not be taken as acceptance of matters not specifically referred to.

The memorandum

6. The memorandum provides an explanation and analysis of the submitter's intention and the interpretation that should be adopted as to what relief the submission seeks and envisages[2].

7. Even if the position advanced on these matters is accepted and is the most favourable to the interests of the submitter (which is the basis upon which I have prepared this advice), the issue

[1] In response to a query from the Hearing Panel, I confirmed this position orally on 23 August 2023
[2] See paras 5 – 20 of the memorandum

remains that the relief now advanced is, in my view, beyond the scope of what a reasonable person could have envisaged from reading the submission. I hold this view notwithstanding the suggestion that the relief is more restrictive[3] than what was originally sought (an assertion or representation which I do not consider is reasonable, for the reasons identified in my previous advice).

8. It is a matter of fact that the planning approach, the planning mechanisms now relied on, the level of detail advanced, the density and number of house sites, and the type of outcome envisaged are all significantly different from the relief sought in the submission, and are not foreshadowed in any way in the submission.

9. The representations in the memorandum as to the correct legal position do not appear to directly consider or address the extent of difference between the relief sought in the original submission, and what is now sought, in terms of reasonable foreseeability. That is a fundamental element of the law relating to scope and is not answered by an assertion that revised relief is more restrictive.

Relevance of further submissions

10. Another issue in the memorandum that warrants comment is the suggestion that, if any person was concerned about smaller lot sizes being enabled, then they could have lodged a further submission[4]. Reliance is then placed on the submission by the Waikato Regional Council (**WRC**) as apparently being a conclusive example of that position.

11. Whether or not further submissions were made is not of itself the answer to reasonable foreseeability and fairness issues. With respect, it would be a questionable approach for decision-makers to rely on the presence or otherwise of a further submission made in response to the original submission, because the fact of a further submission cannot be representative of what the reasonable person would understand from the original submission or would foresee as being a consequence of the relief sought. All that can be taken from the WRC further submission is that it formed an understanding of what relief was sought and wished to oppose that relief. It is quite possible that other people simply did not understand what was being sought by the submitter.

12. Reliance on whether further submissions were or could have been made is not of itself the correct legal test relating to scope, for the reason that people will not make a further submission if they cannot understand or foresee what the relief in the original submission is or might change into. If the WRC's further submission is deserving of weight in resolving this issue, the reasons for opposing the submitter's relief do not provide any indication that it understood or could foresee the relief package now advanced for the hearing.

13. Further, the explanation and interpretational exercise of the relief sought in the submission (as outlined earlier in the memorandum) tends to suggest that it would have been relatively difficult for any person reading the submission on its face to understand what the submitter had in mind when he wrote the submission, let alone what he now proposes.

---

3 There continues to be no authority cited for this proposition or test

4 Para 24 of memorandum

Glen Massey example

14. In terms of the Glen Massey precinct plan example, I do not consider it to be an example of the Court endorsing jurisdiction and it is not reliable judicial authority for the position advanced on behalf of the submitter. I note that the memorandum recites passages of the Council Commissioners' decision where those decision-makers did not appear to even turn their mind to the question of scope, for the reason that they declined the relief on the merits. This is not a matter that this Hearing Panel should regard as being relevant to scope.

15. The fact that the Court then granted a consent order following an appeal is also not a basis upon which this Hearing Panel can be satisfied that scope was endorsed. Rather, on appeal the parties did not put scope in issue but, as is required by the Court's Practice Note, advised the Court that they considered that the relief was within scope. Given that all parties in that case wished to resolve the appeal, that is hardly surprising.

16. The Glen Massey consent order is at Appendix 5 of Mr Cumming's evidence. It is stated to be made under section 279(1)(b) of the RMA – in that respect, it is an order that is not opposed. The Court did not convene a hearing on any matters that it wanted to hear from the parties about, but rather issued the order on the papers.

17. It appears from the face of the order that the parties put information before the Court regarding section 32AA of the RMA, which is referred to at [11]-[15] of the consent order. The order identifies at [17] that it is not a decision or determination on the merits, and in [18] that the changes agreed are within scope.

18. It is apparent that scope was unlikely to have ever been a live issue on this matter. It was neither argued before nor determined by the Court. The Court's endorsement is simply that, an approval of the position advanced in a draft consent order when the parties chose not to make scope a live issue.

19. A consent order is not a decision of the Court. A decision is issued under section 295 of the RMA.

20. I would therefore suggest that the Hearing Panel should act with some caution, based on the information before it, to rely on the Glen Massey consent order as being judicial authority for there being scope in the present instance[5]. It does not overcome established case law (including that from the superior courts) which is binding on the Environment Court and, I would suggest, the Panel. Based on the factual position which has been outlined by the submitter about the Glen Massey matter, it appears highly likely that, based on a correct application of legal test, it would have been held to be beyond scope if the issue was argued before the Court.

21. Had the Court convened a hearing on the Glen Massey consent and had the question of scope argued before it or been the subject of express legal submissions, then the Panel would likely be in a position to place greater weight on the consent order (again however subject to binding authority from the superior courts which would prevail over anything inconsistent that might have been said by the Environment Court).

[5] No authority is cited in the memorandum for regarding a consent order as being a persuasive judicial determination

The opinion

22. The opinion prefers the analysis of the submitter's Project Manager on the basis that it is more detailed and comprehensive, and characterises my 14 August 2023 advice as an overview based on "gut" feel.

23. The former assessment is accurate in its description of the attention the Project Manager has devoted to seeking to advance his preferred interpretation, but it does not make the position correct as a matter of law. In other words, the volume of discussion and analysis does not make a tenuous proposition more or less correct.

24. The latter assessment that my advice was based on "gut" feel, aside from showing a measure of professional discourtesy, lacks any reasonable foundation. The point where I differed from the Project Manager on the correct legal test was discrete. I was well aware that I was providing advice that would be disclosed in a public setting and could be relied on by independent decision-makers. I recorded in that advice the full range of material that I had reviewed, and any inference that the relative brevity of my opinion meant I had not undertaken a "forensic analysis" or that it is less reliable is simply unsound. What is important is whether or not the legal analysis and the identified legal test were correct.

25. Based on my review, nothing in either the memorandum or the opinion has altered that position in terms of the correct legal tests to be applied.

26. Some points of the opinion require comment, as follows:

    a. I note that the opinion, at paragraph 2(e), uses the phrase "fair notice of the nature of the relief sought", which in my view is an accurate description of the law on scope. The Panel can reach its own conclusions when comparing the relief in the submission with what was advanced at the hearing, but the differences are, in my view, wide-ranging and material;
    b. The opinion, like the memorandum, does not consider those differences and their foreseeability, but the position recorded at paragraphs 2(f) and (g) is telling in identifying with clarity what the submission sought (ie. what the world had fair notice of);
    c. The issue in paragraph 2(h) appears to relate to whether the submission is "on" the plan change, which is a matter that is not in dispute and this paragraph therefore adds nothing material; and
    d. I have dealt with the Glen Massey material above and the opinion does not address any of the issues I have identified other than suggesting a level of comfort on scope which has no proper legal foundation.

27. The final matter that I would seek to point out to the Hearing Panel relates to the reliance placed on the *Gock* decision[6]. I have no issue with the way in which the relevant legal principles are recorded at paragraphs 3 and 4 of the opinion, and I accept them as an accurate statement of the law.

---

6 Which is actually a judgement of Justice Muir, rather than Justice Whata. I have included a full copy of the *Gock* decision for the Panel's assistance

28. What would have been helpful for the Hearing Panel in this instance was if the opinion had identified the factual position being considered in that case, which was very different from the present circumstances. The issue there was whether the outcome being challenged was within the scope available from *all relevant submissions* (ie. the relief in question that was challenged as being beyond scope was effectively sought by a number of other submitters). This is apparent from reading paragraphs [44] to [62] of Justice Muir's decision.

29. In this instance, the factual position is that a single submitter has sought specific relief about an identified site. The submitter has subsequently advanced very different modified relief for that site through its evidence. The issue is not about the scope of "global relief" as was considered in *Gock*, but rather a direct comparison between an individual submission and the relief now sought by that submitter.

30. To the extent that the inference in the opinion is that there is greater flexibility available to the Hearing Panel to consider the submitter's revised relief, and/or that a finding that the submitter's revised relief is more restrictive will suffice to provide scope, reading the *Gock* decision in its entirety would not provide authority for either proposition.

Conclusion

31. For those reasons, and for the reasons expressed in my earlier advice, I continue to hold the opinion that the position sought to be advanced by the submitter would be beyond the scope of the original relief and is, as a consequence, unfair.

32. I trust that this advice is of assistance. If you have any questions or require any clarification, please contact me.

Yours sincerely

James Winchester