

Before the District Plan Hearings Panel appointed by Central Hawke's Bay District Council

In the matter of the Resource Management Act 1991 (**RMA**)

And

In the matter of the hearing of submissions on the Proposed Central Hawke's Bay District Plan

Legal Submissions for Central Hawke's Bay District Council in response to Minute 9 and matters raised in Hearing Stream 3

Dated 5 August 2022

May it please the Panel

Introduction

1. Minute 9 issued by the Hearings Panel following Hearing Stream 3 requested comment, by way of right of reply, as to:

Whether there is scope to change the wording of the additional Rural Land Resource policy sought by the Heretaunga Tamatea Settlement Trust (**HTST**) in regard to access to stored water resources to ensure the productive capacity of the land (evidence of Stephen Daysh).

2. The following legal submissions on behalf of the Council provide the legal context for the Panel's decision as to whether there is scope to consider the change now sought. In doing so, Council takes a neutral position, and I am neither advocating for nor opposing a finding that there is scope, but rather expressing my view as to how I consider the caselaw applies to the facts.
3. If the Panel finds there is scope, then it will need to go on to consider the merits of the change sought. The merits are addressed in the right of reply by the s 42A authors.

Principles of Scope

4. Issues related to whether the Panel has scope to make changes to the plan were addressed in my opening legal submissions dated 9 March 2022, and relevantly referred to the High Court decision in *Countdown Properties (Northlands) Limited v Dunedin City Council*. In that case, the Court held that an amendment made to a proposed plan as notified must be “reasonably and fairly raised in submissions” on the proposed plan.¹ This is to be approached “in a realistic and workable fashion, rather than from the perspective of legal nicety”.²
5. In *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115] the High Court referred to the “orthodox” test in *Countdown* and said (internal citations omitted):

The “workable” approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.

As Wylie J noted in *General Distributors Limited v Waipa District Council* the underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise “the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness”.
6. While there is a significant body of caselaw on scope, I consider the above to be a concise summary of the law as it applies to determining whether the relief now sought is able to be granted.

Application of law to facts

7. The relevant part of the HTST submission is set out below:

1 [1994] NZRMA 145 at 166.

2 *Royal Forest and Bird Protection Soc NZ v Southland District Council* HC Christchurch AP198/96

Section / Provision	Support / Support in Part/Oppose	Submissions	Relief sought
Rural Land Resource	Support in Part	HTST supports the objectives and policies relating to Rural land resource. The opportunities provided by the Settlement provides the ability for people who have been dispossessed of their land to return to it. As such HTST understands the importance of ensuring the sustainable management and economic value of the highly productive rural areas of the district. Ensuring a reliable source of stored water is essential to ensuing the productive capacity of the land.	Amend the Rural Land Resource Policies to include a new policy as follows: <u>Tangata whenua recognise the need for an economically sustainable rural environment which has access to reliable stored water resources to ensure the productive capacity of the land is maintained.:</u>

8. The wording now sought is:

RLR-PX - To provide for an economically sustainable rural environment which has access to reliable stored water resources to ensure the productive capacity of the land is maintained.

9. The differences between the wording as sought by the submission, and what is now sought is as follows:

~~Tangata whenua recognise the need~~ To provide for an economically sustainable rural environment which has access to reliable stored water resources to ensure the productive capacity of the land is maintained.:

10. In considering whether the relief now sought by HTST is within the scope of its submission, it is important to consider not only the 'Relief sought' column but also the reasons given for that relief. The submission asserts that "*Ensuring a reliable source of stored water is essential to ensuing the productive capacity of the land*".

11. Applying the caselaw tests as set out above, I consider that:

- (a) The amendment now sought is fairly and reasonably raised by the HTST submission, when the specific relief and the reasons are read together;
- (b) Drawing differences between wording of “recognising” and “providing for” would be taking a “legal nicety” approach, rather than a realistic and workable one;
- (c) It is likely that the substance of the policy sought that would have been considered by potential further submitters, that is, reference to the link between water storage and an economically sustainable rural environment. I consider it unlikely that such a person would have decided it was unnecessary to make a further submission because of the terminology of “recognition” by tangata whenua rather than “providing for”;
- (d) A change in emphasis between tangata whenua recognising and the PDP generally ‘providing for’ the substance of the submission would not, in my view, result in a provision that is so different from what was originally sought as to raise issues of procedural unfairness.

12. In short, I consider there is a proper basis for the Panel to determine there is scope to consider the merits of the relief sought.



Asher Davidson

5 August 2022