MITCHELL DAYSH

Memorandum

To: CHBDC District Plan Review Panel

From: Stephen Daysh and Nicki Williams

Date: 11 July 2022

Re: Extent of Scope to amend the wording of the proposed new Rural Land Resource Policy

BACKGROUND

Following Hearing 3 of the Central Hawke's Bay District Plan hearings (15 & 16 June 2022), the Hearings Panel issued a minute[1] setting out directions to assist the reporting officer with the response requested by the Hearing Panel in a right-of-reply to several matters raised during the hearing.

In particular, the Hearings Panel sought a response by the reporting planner to the following matter – *whether there is scope to change the wording of the additional Rural Land Resource policy sought by the Heretaunga Tamatea Settlement Trust in regard to access to stored water resources to ensure the productive capacity of land (evidence of Stephen Daysh).*

The issue of scope to change the wording of the submission point is raised by the Panel as the original submission point by Heretaunga Tamatea Settlement Trust requested a new policy which related to "tangata whenua" however in the evidence presented at the hearing suggested that in light of the recommendation of the S42a reporting planner's and the further submissions received in support of the submission point that it may be more appropriate for the proposed new policy to be reworded to more broadly relate to all rural land productive capacity without the reference to "tangata whenua".[2]

EXTENT OF SCOPE

It is necessary to consider whether what is now being proposed is a change that is beyond the scope of the original submission and/or is within the range of the relief to be determined by the submission as a whole.

While it is anticipated legal advice will be sought from the Council's legal counsel to assist the reporting officer in responding on this matter requested by the Hearing Panels, set out below for

[1] Ninth Memorandum and Direction of the Hearings Panel – Directions Following Hearing 3.

[2] Evidence of Stephen Daysh on behalf of Heretaunga Tamatea Settlement Trust dated 31.5.22 (page 10)

your consideration is an overview of some relevant case law on the extent of scope in relation to a submission on a proposed district plan and relevance to the question of the Hearings Panel.

It appears that most of the case law on scope relates to the scope of review of appeals to the Environment Court. The advice sought by the Hearings Panel relates to a submission on a proposed district plan and therefore is potentially not as constrained as scope in relation to an appeal. In relation to the Proposed Plan there have been many submissions covering a wide range of issues on the Proposed Plan as notified, in particular in relation to the submissions on the Strategic Direction of the Rural Land Resource chapter there were a total of 54 submissions and 22 further submissions therefore it could be argued as set out below that the Panels scope is reasonably broad.

Case law has established that for an amendment to be considered within the scope of a submission, the amendment must be fairly and reasonably with the general scope of[3]:

(a) An original submission;
(b) The proposed change as notified; or
(c) Somewhere in between.

The High Court decision *Albany North Landowners v Auckland Council*[4] further states:

> *"… A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. 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.*
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> *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".*

One of the key concerns addressed by the case law on scope is fairness i.e. whether the party may modify their relief in a way that introduces new or unforeseen outcomes that potentially interested person might not of have been able to identify or effectively have a say on. This issue of fairness is

[3] Re Vivid Holding Ltd (1999) 5 ELRNZ 264 at [19].

[4] Albany North Landowners v Auckland Council [2017]NZHC 138 at [96], [113]-[118] and [135].

further set out in *Countdown Properties (Northlands) Limited v Dunedin City Council*[5] and in *Awarua Farms (Marlborough) Limited v Marlborough District Council*[6] *where the Environment Court said:*

> *When examining whether the Court has jurisdiction to hear the merits of a reference it must enquire:*
> *whether the general and/or specific relief sought in the reference comes fairly and reasonably within the ambit of the original submission; and*
> *whether the relief is sufficiently particular to comply with the provisions of the Act, and that those who are affected by the suggested amendments in the reference compared to the original submission, would have contemplated such amendment when reading the originally notified submission.*

In this instance the submission point while including reference to "tangata whenua' was seeking a new policy to be inserted into the Strategic Direction Strategic Rural Land Resource which includes the broad objectives and policies relating to the whole district in terms of the rural areas and rural land uses. In addition, three further submissions were lodged in support of the submission point from groups that are involved in the whole of the rural sector of the district. These parties saw benefit in promoting the new policy. Ultimately, from reviewing the relevant case law it is up to the Hearings Panel to consider whether the proposed amendment now proposed goes beyond what was reasonably and fairly raised in the submissions by Heretaunga Tamatea Settlement Trust.

Further case law also addresses the issue of scope and in *Clearwater v Christchurch City Council*[7] the High Court adopted a two-part approach to determine whether a submission was "on" a variation:

> *A submission is "on" a variation if it addresses the extent to which the variation changes the status quo. But, if the effect of determining that the submission is "on" a variation would remove the opportunity for participation by those potentially affected, then this is a powerful consideration against an argument that the submission is truly on the variation.*

The approach in *Clearwater* was adopted in *Palmerston North City Council v Motor Machinists Limited*[8], where the High Court said that regarding the first part of the approach, there were two aspects. First, the breadth of alteration to the status quo entailed in the proposed plan change (important in this Plan review) and second, whether the submission addresses that alteration (clearly Heretaunga Tamatea Settlement Trust has done so in its submissions which requested a new policy that would apply in relation to the whole of the rural area which has been supported by several further submitters).

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[5] [1994] NZRMA 145 at 166

[6] Awarua Farm (Marlborough) Limited v Marlborough District Council, EnvC, W70/2004, at [58].

[7] 2 (unreported: High Court, Christchurch, AP34/02, 14 March 2003, William Young J)
9Ibid at 66
[8] 10[2013] NZHC 1290

As set out in the evidence of Stephen Daysh[9] - Objective 1 seeks to maintain the productive capacity of the District's rural land resource however there is no consideration in the objectives or policies for how this is to be maintained other than through limiting fragmentation.

The introduction to the Strategic Direction[10] states:

> *"Providing for a range and flexibility of land use activities is important for the future in adding diversity and resilience to the rural economy, thereby providing additional employment and economic opportunities to the community. However, this needs to be consciously balanced against the need to protect and retain the rural land resource, in particular the concentration of highly productive land in the District, alongside the health and availability of water".*

The specific provision of the Proposed Plan which Tamatea Heretaunga Settlement Trust seeks to introduce in its submission does not relate to any specific landholdings but more generally to all rural land and its ongoing productive capacity.

In summary applying the principles of the Environment Court, particularly *"whether the general and/or specific relief sought comes fairly and reasonably within the ambit of the original submission"*[11] It is considered that as Heretaunga Tamatea Settlement Trust requested a new policy seeking provision to *recognise the need for an economically sustainable rural environment which has access to reliable stored water,* it could be reasonably argued that the scope of the submission is quite broad and we consider that the requested wording amendment is within scope.

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[9] Statement of Evidence of Stephen Daysh dated 31 May 2022

[10] Part 2 – District Wide Matters Pg RLR 1 & 2.

[11] Awarua Farm (Marlborough) Limited v Marlborough District Council, EnvC, W70/2004, at [58].