

# Memorandum

Date: 8 July 2021

To: Lauren Baddock

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**Private and Confidential**

## Plan Change 4 Tara-Ika – Scope of submissions

### Instructions

- 1 An Independent Hearing Panel has been appointed by the Horowhenua District Council (*HDC*) to hear and determine Proposed Plan Change 4: Tara-Ika Growth Area (*PC4*) to the Horowhenua District Plan. The Commissioners consider that there may be potential scope issues with a number of submissions on *PC4* that have sought an uplift in zoning from Greenbelt Residential and Lower Density Residential to 'more intensive' residential zoning.
- 2 We have been asked to consider whether the identified submissions are *vires* submissions – i.e. whether they are fairly submissions "on" *PC4*. We have specifically not considered the merits of the submissions, as that is a matter solely for the Commissioners.

### Executive Summary

- 3 We have reviewed the submissions provided by *HDC* and consider that all of the submission points are fairly "on" *PC4*. Submissions of this type are entirely unsurprising given the subject matter of *PC4* and the scope of the Problem Definition set out in the Section 32 Report, which was to address rapid population growth in the Horowhenua region. Further, the changes sought were almost directly considered by *HDC* in its Option Analysis for *PC4*, specifically Option 2. Under that option *HDC* assessed the costs, benefits, efficiency and effectiveness of rezoning all of the land within *PC4* to residential only. Therefore, the Commissioners are free in our opinion to consider the merits of each submission point.
- 4 To ensure an absolutely fair process is maintained (in the sense of natural justice and for the benefit of lay submitters), there would be merit in *HDC* taking the following steps:
  - 4.1 It is unclear from a number of the identified submissions what specific parcels of land are affected by the requested zoning uplift. We recommend *HDC* seeks further information from some of the submitters (identified in the table in **Appendix A**) to clarify what specific areas of land they request be uplifted



to more intensive residential zoning, to ensure all submitters are across the details of the submission point.

- 4.2 The effects arising from the changes requested by the submitters may not have been *sufficiently* assessed by HDC in its Section 32 Report. Some thought should be given to whether or not this is the case – for example, we imagine that an increase in residential provision would have flow-on impacts around servicing, stormwater, traffic effects, amenity effects, etc. If there are potential issues there, we recommend HDC consider convening a pre-hearing meeting with the identified submitters to advise on the information requirements that may be necessary (i.e. potentially section 32AA assessments; planning and other technical evidence etc) to assist the Commissioners with their evaluation of the requested changes, should the submitters wish to speak in support of their submissions at the hearing.

### **Background**

- 5 The Commissioners released a Minute on 10 May 2021 highlighting relevant issues following their preliminary review of submissions and further submissions lodged with HDC. The Commissioners sought a further pre-hearing discussion between the parties on the following zoning issue:

*"Zoning/Density:*

- *Request from several submitters to change the proposed Greenbelt Residential and Low Density Residential Areas to standard density zoning in order to provide for growth/give effect to the NPS-UD and PNPS-HPL; and*
- *Alternate views from other submitters requesting that the proposed Greenbelt Residential and Low Density Residential Areas be retained in order to protect established character/amenity.*<sup>1</sup>

- 6 We understand there are ten submissions seeking to uplift Greenbelt Residential and Low Density Residential zonings to more intensive residential zones. The amendments sought vary between submitters as to the extent and the location of the zoning changes requested. Some submissions have also requested other amendments to PC4, unrelated to zoning requests.

- 7 For the purposes of this memorandum we have only considered submission points regarding uplifts in zoning. The relevant submission points are summarised in the table at **Appendix A**.

### **Scope of submissions on a plan change**

- 8 As a general concept, the approach to scope should be flexible, with the underlying purpose of the submission process being to ensure that submitters and potential submitters are sufficiently informed about what is proposed.<sup>2</sup>

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<sup>1</sup> Minute 1 of Independent Hearing Panel, 10 May 2021.

<sup>2</sup> *General Distributors v Waipa District Council* [2008] 15 ELRNZ 59 at 72.



9 The leading authorities on when a submission is “on” a plan change are *Clearwater Resort Ltd v Christchurch City Council*<sup>3</sup> and *Option 5 Inc v Marlborough District Council*<sup>4</sup> which both emphasised the need to consider the “scale and degree” of the alterations suggested by the submissions, and *Palmerston North City Council v Motor Machinists Limited (Motor Machinists)*.<sup>5</sup>

10 In *Motor Machinists* Kós J summarised the relevant principles as follows:<sup>6</sup>

*First, the submission could only fairly be regarded as "on" a variation "if it is addressed to the extent to which the variation changes the pre-existing status quo". That seemed to the Judge to be consistent with the scheme of the Act, "which obviously contemplates a progressive and orderly resolution of issues associated with the development of proposed plans".*

*Secondly, "if the effect of regarding a submission as "on" variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected", that will be a "powerful consideration" against finding that the submission was truly "on" the variation. It was important that "all those likely to be affected by or interested in the alternative methods suggested in the submission have an opportunity to participate". If the effect of the submission "came out of left field" there might be little or no real scope for public participation. In another part of paragraph [69] of his judgment William Young J described that as "a submission proposing something completely novel." Such a consequence was a strong factor against finding the submission to be on the variation.*

11 The test applied by the High Court can be broken down into two limbs:

***To what extent does the submission change the pre-existing status quo?***

11.1 The first part of this test has been described in *Motor Machinists* as the ‘dominant limb’, and requires consideration of the degree of alteration to the status quo (i.e. to the operative plan) proposed by the notified change, and whether the submission addresses that. In short, an assessment of the Section 32 Report and the submissions is required.<sup>7</sup>

***Is the submission "out of left field"?***

11.2 The second limb concerns procedural unfairness, and whether persons actually or potentially directly affected by the additional changes proposed in the submission have been effectively denied an opportunity to respond to the additional changes in the plan change process.<sup>8</sup> In short, “robust, notified and informed” public participation is required, as a theme of the RMA.<sup>9</sup> In

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<sup>3</sup> *Clearwater Resort Limited v Christchurch City Council* (HC) Christchurch AP34/02.

<sup>4</sup> *Option 5 Inc v Marlborough District Council* (HC) CIV 2009-406-144.

<sup>5</sup> *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290.

<sup>6</sup> *Motor Machinists* at [53], citing the decision of William Young J in the *Clearwater Resort Ltd* decision.

<sup>7</sup> See *Tussock Rise Ltd v Queenstown Lakes District Council* [2019] NZEnvC 111.

<sup>8</sup> *Motor Machinists* at [83].

<sup>9</sup> *Tussock Rise* at [55].



*Albany North Landowners*,<sup>10</sup> this test was summarised as whether the relief is a “reasonably foreseen logical consequence”, and that any resulting change is “appropriate in response to the public’s contribution”.

### **Further application by the Environment Court**

- 12 The High Court authorities have been applied by the Environment Court in a number of cases, which has provided further clarity:
- 12.1 A submission point or approach that is not expressly addressed in the Section 32 Report ought not to be considered out of scope of the plan change, if it was an option that should have been considered in the Section 32 Report. Otherwise, a council would be able to ignore potential options for addressing the matter that is the subject of the plan change. It would prevent submitters from validly raising those options in their submissions;<sup>11</sup> and
- 12.2 It is common for a submission on a plan change to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority. The process of submissions and cross-submissions may be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate;<sup>12</sup> and
- 12.3 If concerned about fairness to the wider public or neighbours, the council has a number of options to remedy unfairness (such as promoting a variation under clause 16A of Schedule 1 of the RMA or the Court could direct consultation and/or notification under section 293 of the RMA).<sup>13</sup>

### **Do the PC4 submissions address the extent to which PC4 changes the pre-existing status quo?**

- 13 The ten identified submissions have all sought the uplift of the zoning of land from Greenbelt Residential and Low Density Residential zoning to more intensive residential zoning.
- 14 In our view, these submissions address the extent to which PC4 changes the pre-existing status quo for the following reasons:
- 14.1 Six of the ten submissions are made by landowners whose land is directly affected by PC4. The remaining submissions also seek amendments to land within the PC4 area; and
- 14.2 The submissions raise matters that fall within the scope of the Problem Definition set out in the Section 32 Report, which is to address the rapid

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<sup>10</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

<sup>11</sup> *Bluehaven Management Limited and Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [39].

<sup>12</sup> *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187 at [58].

<sup>13</sup> *Tussock Rise Ltd* at [84]-[87].



population growth in the Horowhenua region.<sup>14</sup> The submissions seek to address this problem by seeking the uplift of lower density residential zones to more intensive residential zones; and

14.3 The submissions raise matters that have been directly considered by HDC in its Option Analysis for PC4, specifically Option 2.<sup>15</sup> Under Option 2 HDC assessed the costs, benefits, efficiency and effectiveness of rezoning all of the land within PC4 to residential only. While Option 2 was ultimately not the preferred option, it has been considered and evaluated by HDC.

15 In our view the identified submissions satisfy the first limb of the *Motor Machinists* test.

**Are the PC4 submissions “out of left field”?**

16 In our view, the submissions are not at all “out of left field”, in fact we would be surprised if there were *not* such submissions lodged on PC4, and certainly they are not so ‘left field’ as to create procedural unfairness in the PC4 process. Given the HDC Section 32 Report identifies growth in Horowhenua as leading to “significant and ongoing demand for housing”,<sup>16</sup> the changes sought by the submitters can be considered a reasonably foreseeable and logical consequence of the changes initially proposed by PC4.

17 Additionally, HDC provided affected landowners in the PC4 area with a letter on 26 February 2021 (attached as **Appendix B**), outlining that it was possible submissions may have been lodged which could impact the landowners’ properties. HDC also strongly encouraged those owners to read the submissions concerning the Tara-Ika area and determine if they wished to make a further submission in response.

18 In our view the letter sent by HDC on 26 February before the close of the further submission period ensured potentially affected landowners were informed of potential changes to their property, over and above the process requirements of the RMA and very good practice. The letter identified a real opportunity for the potentially affected landowners to respond to the proposed changes and to be involved in the PC4 process.

19 In our view the identified submissions also satisfy the second limb of the *Motor Machinists* test. As such, we consider the identified submission points are “on” PC4, and should be considered (as to their merits) by the Commissioners.

**Further recommendations**

20 We conclude that the submissions highlighted by HDC are “on” PC4. However, the effects of higher density changes to zoning requested by the submitters (set out in full in **Appendix A**) may have not been fully assessed as part of HDC’s Section 32 Report. If that is the case, we recommend that HDC consider convening a pre-hearing meeting with the relevant submitters to advise that applicable justification

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<sup>14</sup> Section 32 Report Proposed Plan Change 4 (Tara-Ika Growth Area) October 2020 at page 3.

<sup>15</sup> Section 32 Report at page 31.

<sup>16</sup> Section 32 Report at 3.



and evidence may be required by the Independent Hearing Panel to advance these requests further.

Catherine Somerville-Frost / Natalie Amos

Partner / Senior Associate



#### APPENDIX A: SELECTED SUBMISSIONS ON PLAN CHANGE 4

Submitter	Owner of PC4 land? <sup>17</sup>	Address for service	Zoning decision requested	General or specific zoning	Wishes to speak at PC4 hearing	Clarification required	"On" Plan Change 4?
Ann Thomas	[REDACTED]	156 Gladstone Road, RD 1 Levin	The Greenbelt Residential area to be amended by providing the full waste water services and allowing more density in that area of development.	General	Yes	Clarification required from submitter as to specific area of land over which uplift is sought.	Yes
Phillipa and Pasanka Wickremasinghe	[REDACTED]	3 Semaphore Lane, Whitby, Porirua	Change current Low Density Residential and Greenbelt Residential zoning to Residential.	General	Yes	No	Yes

<sup>17</sup> Some submitters have not explicitly stated whether they are an owner of land within the PC4 area. Where the submission does not state this, we have noted that further investigations were undertaken using contact details given in the submission.



Submitter	Owner of PC4 land? <sup>17</sup>	Address for service	Zoning decision requested	General or specific zoning	Wishes to speak at PC4 hearing	Clarification required	"On" Plan Change 4?
Helen Olive Brown and Kelvin Shane MacPherson	[REDACTED]	19 Featherston Street, Levin	Remove the Greenbelt Residential and Low Density Residential zoning from PC4 and replace both with Residential.	General	Yes	No	Yes
John William Brown & Jeny Doreen Brown	[REDACTED]	1134 Queen Street East, R.D.1, Levin	Change zoning for 1130 and 1134 Queen Street East (Lot 2 DP 412235) to Residential.  Change surrounding area to Residential.	Specific  General	Yes	Further clarification required from submitter as to the "surrounding area" they seek zoning changes to.	Yes
Gwyneth Schibli	[REDACTED]	19 Tainui Street, Levin	All Tara-Ika areas currently designated yellow/blue stripe (Low Density Residential), be changed to the current plain yellow residential areas (Residential).	General.	Yes	No	Yes



Submitter	Owner of PC4 land? <sup>17</sup>	Address for service	Zoning decision requested	General or specific zoning	Wishes to speak at PC4 hearing	Clarification required	"On" Plan Change 4?
			The blue zoning for Lot 2 DP412235 be changed to Residential.				
Julia Burgess	█	1116 Queen Street East, R.D.1, Levin	Request zoning alongside the proposed local and connector road through their Queen Street East property be changed to include Residential.	Specific	No	No	Yes
Kevin Daly	█	█ █ █ █ █	Requests removal of Low Density Residential overlay so that more of submitter's property is subject to Residential zoning (map with proposed changes provided).	Specific	Yes	No	Yes
Paul Turner on behalf of Haddon Preston	█ █ █ █	█ █ █	Remove the Low Density Residential overlay for the primary north-south road running from the Tara-Ika Commercial Centre	Specific	Yes	No	Yes



Submitter	Owner of PC4 land? <sup>17</sup>	Address for service	Zoning decision requested	General or specific zoning	Wishes to speak at PC4 hearing	Clarification required	"On" Plan Change 4?
	<p>██████████</p> <p>██████</p>		<p>to Tararua Road, and replace with Medium Density Zone on either side of the road.</p> <p>Replace Open Space Zone with Residential Zone on Planning Map 30 and 32.</p> <p>Extend Medium Density housing along both sides of north south arterial road to Tararua Road on Planning Maps 30 and 32.</p> <p>(Map with proposed changes provided with submission).</p>				
Officers of Horowhenua District Council	<p>██</p>		The area that is currently proposed to be zoned Low Density Residential in the south-western part of	Specific	Yes	No	Yes



Submitter	Owner of PC4 land? <sup>17</sup>	Address for service	Zoning decision requested	General or specific zoning	Wishes to speak at PC4 hearing	Clarification required	"On" Plan Change 4?
			<p>Tara-Ika be upzoned to standard Residential.</p> <p>The area currently zoned Residential in the north-western part of Tara-Ika be upzoned to Medium Density Residential.</p> <p>(maps with proposed changes provided).</p>				
Brendan Anthony McDonnell (James McDonnell Ltd)	██████████ ██████████ ██████████ ██████████ ██████████	156 McLintock Street North Johnsonville	Change from Low Density Residential sections to "standard" Residential in the area toward Tararua Rd.	General	Yes	Further clarification required from submitter as to the location of the "area toward Tararua Rd.	Yes.



## APPENDIX B: HDC LETTER TO LANDOWNERS



26<sup>th</sup> February 2021

████████████████████

██████

Levin 5571

Dear Sir or Madam,

### **Proposed Plan Change 4 – Tara-Ika Growth Area – Summary of Submissions and Further Submissions**

This letter is to provide you with an update about Proposed Plan Change 4 – Tara-Ika Growth Area. On the 1<sup>st</sup> February 2021, the period for public submissions closed. During this period we received 40 submissions on the Proposed Plan Change. As required by the Resource Management Act, Council have summarised these submissions and are now calling for further submissions (cross submissions) on the submissions originally received.

As a landowner in the Tara-Ika area, it is possible that others may have made a submission that could impact on your property. Therefore, we strongly encourage you to read the submissions to determine whether you wish to make a further submission on any of these submissions.

If you make a further submission, you must send a copy of your further submission to the person who made the original submission within five (5) working days of lodging your further submission with the Council. If you made a submission yourself, you may receive copies of other people's further submissions.

Full copies of the submissions, along with the summary of the submissions are available to view online at Council's website ([www.horowhenua.govt.nz/PPC4](http://www.horowhenua.govt.nz/PPC4)) or at the following locations:

- **Horowhenua District Council office:** 126 Oxford Street. Hours: 8.00am to 5.00pm on Monday to Friday.
- **Te Takeretanga o Kura-hau-pō:** 10 Bath Street, Levin. Hours: 9.00am to 6.00pm on Monday, Tuesday, Thursday and Friday, 10.00am to 9.00pm on Wednesday, 10.00am to 4.00pm on Saturday and 1.00pm to 4.00pm on Sunday.
- **Te Awahou Nieuwe Stroom:** 92 Main Street, Foxton. Hours: 10.00am to 5.30pm Monday to Friday, 10.00am to 4.00pm Saturday and Sunday.



- **Shannon Library:** Plimmer Terrace, Shannon. Hours: 10.00am to 12 noon, 1.00pm to 5.00pm Monday to Friday, 10.00am to 12 noon Saturday.

The period for making a further submission is from **26<sup>th</sup> February 2021** until **15<sup>th</sup> March 2021**.

Further submissions can be made via hard copy, email, or online as per the below:

**Delivered to:** Horowhenua District Council, 126 Oxford Street, Levin

**Posted to:** Strategic Planning, Horowhenua District Council,  
Private Bag 4002, Levin 5540

**Emailed to:** [districtplan@horowhenua.govt.nz](mailto:districtplan@horowhenua.govt.nz)

**Made online at:** [www.horowhenua.govt.nz/PPC4](http://www.horowhenua.govt.nz/PPC4)

Following the close of further submissions, the submissions will be analysed and public hearings will be held. The dates of the public hearings will be determined by the number and nature of submissions received but will be publically advertised. Only those who indicated in their submission that they wanted to speak to their submission will be able to speak at the hearing.

If you have any questions about this process then please do not hesitate to contact me (Lauren Baddock) via telephone on (06) 366 0999 or email at [districtplan@horowhenua.govt.nz](mailto:districtplan@horowhenua.govt.nz)

Yours Faithfully,

Lauren Baddock

**Strategic Planner**