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Henley Downs Plan Change 44 - Scope Issues

1. You have asked for our advice in the context of Proposed Plan Change 44 to the Queenstown Lakes District Plan (**PC44**).

2. PC44 is a privately initiated plan change request which seeks to re-zone approximately 520 hectares of the northern-most (currently undeveloped) part of the 'Resort Zone' at Jacks Point as a new 'Henley Downs Zone'. In summary, the re-zoning will expand the urban area and enable a higher density of residential development; remove the requirement to create a commercial village within the Henley Downs area; and retain the surrounding land as predominantly rural (through an 'agricultural, conservation, and recreation' activity area).

3. The Council has engaged commissioners to hear and decide PC44. The hearing on PC44 commenced approximately 18 months ago, but was adjourned at the Requestor's request.

4. Henley Downs Farm Limited, Henley Downs Land Holdings Limited and Henley Downs Farm Holdings Limited (collectively referred to in this advice as **Henley Downs**) made submissions on PC44. The submissions made by Henley Downs were broad and did not include details as to the changes sought to the PC44 provisions.

5. We understand that Henley Downs owns most of the land which is proposed, under PC44, to be zoned Agricultural, Conservation and Recreation Area (**ACRAA**) and small amounts of proposed urban land.

6. Henley Downs in conjunction with the Requestor have now proposed an amended set of rules which would satisfy their submission / the request and have provided these to the Council with the intention that they be circulated to the parties and the commissioners to be used as the basis for discussion and evidence at the hearing into PC44.

7. The Council has advised us that the changes sought to PC44 are very broad, and amongst other things include changes which relate to:

   (a) New areas of development (which were zoned ACRAA in the notified version of PC44);

   (b) Increases to some height rules, including a restricted discretionary activity regime which may increase residential density in the ACRAA;

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(c) Enabling farm buildings as a controlled activity, and other buildings as a restricted discretionary activity in the ACRAA (all buildings are non-complying in the operative District Plan, and discretionary in the notified version of PC44);

(d) That residential and visitor accommodation in the ACRAA be non-notified; and

(e) The changes to the Structure Plan appear to extend beyond the geographic extent of the PC44 area.

8. In providing this advice, we have not undertaken an analysis of the provisions of PC44 as compared with those now being proposed by the Requestor and Henley Downs. Rather we have made general comments about the amendments now proposed to PC44 with reference to the summary of changes you have provided us. We are happy to undertake a detailed review of the provisions if you consider that that would be helpful.

9. In the context of the changes proposed by the Requestor and Henley Downs, you have asked us to consider:

(a) Whether the submissions by Henley Downs are within the scope of the Council's ability to consider PC44. In particular this is because the submissions seek development rights beyond those that exist in the operative District Plan and those proposed by PC44;

(b) Do the recently proposed provisions (outlined above) contain rules that go beyond the scope of the submissions (to the extent that they are not 'on' the plan change);

(c) Are the proposed expansions to Henley Downs' part of the Jacks Point Zone within the scope of PC44.

Summary of advice

10. In making a decision on PC44, the Council may approve or decline the plan change, or approve PC44 with modifications that fall within the scope of submissions received on the request.

11. In considering the submissions, we consider that the Council must only consider any submission that is 'on' PC44. In determining whether a submission is 'on' PC44 the submission must meet the following tests:

(a) Does the submission address the change to the status quo (i.e. in the operative Queenstown-Lakes District Plan) advanced by PC44; and

(b) Is there a real risk that persons potentially affected by such a change have been denied an effective opportunity to participate in the plan change process?

12. In this case, it appears that the changes that are now being proposed by Henley Downs and the Requestor extend beyond the changes that were sought to the operative Queenstown Lakes District Plan through PC44. Furthermore, we consider that there is a real risk of natural justice issues arising given the lack of detail provided in the submissions that were made by Henley Downs and the scope of the changes now being proposed.

Consideration of PC44

13. It is relevant, in our view, to set out the limits on the Council's ability to amend or modify a plan change request before considering whether the Commissioners would be able to make the amendments to PC44 proposed by Henley Downs and the Requestor. In the first instance this requires clarification of the distinction between the Council's powers under clause 29(4) and clause 10 of Schedule 1 of the RMA.

14. Clause 29(4) provides:

> "*After considering a plan or change, the local authority may decline, approve, or* ***approve with modifications,*** *the plan or change, and shall give reasons for its decision.*" [our emphasis]

15. In our view, the words "*approve with modifications*" do not provide the Council with discretion to make such amendments as it sees fit. It is our opinion that to "*approve with modifications*" only authorises substantive amendments that are within the scope of submissions received on the request. This position has also been confirmed in case law relating to private plan change requests. There are, however, limited exceptions to this position which are discussed later in this advice.

16. Of particular note we consider that modifications made in response to submissions cannot extend to submissions made that are not "on" the plan change. This matter is also discussed later in our advice.

17. Our preferred interpretation requires that clause 29(4) be read in conjunction with clause 10(2) of Schedule 1. Clause 10(2) sets out the requirements for decisions on provisions and matters raised in submissions. In our view clause 29(4) does not override or modify clause 10's clear wording, or exclude the need for modifications to a plan change request to be based on submissions. Although analysis under each clause does not necessarily involve the same jurisdictional considerations on the merits, the two cannot be seen as mutually exclusive. This interpretation is also supported by clause 29(9), which provides that a local authority may initiate a variation to a request for a private plan change under clause 16A of Schedule 1 of the RMA (as it provides a mechanism for the Council to vary a private plan change).

Case law on scope and jurisdiction – Council consideration of private plan changes

18. The Environment Court's decision in *GUS Properties Limited v Marlborough District Council*[1] provides authority for our interpretation of clause 29 of the Schedule 1. In that case, a private plan change request was approved by the Council with modifications. Among other things, the appellant (who opposed the plan change) argued that the modifications were not within the scope of the relief sought in submissions on the request.

19. The Court in *GUS Properties* held that, with one exception, the modifications were within the scope of submissions. In respect of the modification that was not, the Court ordered that the relevant part of the original request be reinstated.

20. *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council*[2] also addressed this issue and supports our interpretation. In *Foodstuffs*, the appellant challenged

1 W075/94.
2 W053/93 (partially reported at (1993) 2 NZRMA 497).

amendments the Council had made to a privately-promoted plan change. The Tribunal classified the various challenged amendments into the following five groups:

(a) amendments sought in written submissions;

(b) amendments that respond to groups of written submissions;

(c) amendments that address cases presented at the hearing of submissions;

(d) amendments to wording not altering meaning or effect; and

(e) other amendments not in groups (a) – (d).

21. Item (e) was held to be beyond the Council's jurisdiction. This limits the scope of what Council can amend in a private plan change to those listed in (a) – (d). The Courts have therefore confirmed the importance of limiting Council modifications to what is within the scope of submissions.

22. In our view, item (d) in *Foodstuffs* recognises what is effectively an exception from the requirement for changes to have a foundation in a submission. The Council may make changes to the formatting, style or terminology of a plan change request to enhance its clarity, provided any changes are not substantive and do not alter its meaning or effect. We understand that the changes sought to PC44 by Henley Downs and the Requestor would not fall within the item (d) category.

23. However, even for these changes, we record that the High Court in *General Distributors v Waipa District Council*[3], has urged caution about making such changes. *General Distributors* also involved a private plan change request and suggests the adoption of a conservative approach to the question of jurisdiction to make amendments to a plan change. At paragraph 63 of the decision, Wylie J observed:

> "*In my view councils, and the Environment Court on appeal,* ***should be cautious in making amendments to plan changes which have not been sought by any submitter****, simply because it seems that there is a broad consistency between the proposed amendment and other provisions in the plan change documentation. In such situations it is being assumed that the proposed amendment is insignificant, and that it does not affect the overall tenor of the plan change.* ***I doubt that that conclusion should be too readily reached***". [our emphasis]

24. The High Court's primary findings are set out at paragraphs 61, 62 and 63 of the decision, where the Court rejects the proposition that "connection with", being "signalled", or being "consistent" with the tenor of the plan change can provide jurisdiction for substantive changes. The *General Distributors* decision is clear authority for the provision that submissions need to provide the basis for specific changes which are being sought to a plan change request. As will be discussed later in this advice, the submissions made by Henley Downs are broad and it is debatable whether the amendments that are now being proposed to PC44 would be considered to fall within the amendments requested by the submissions.

25. In our view, the question of whether changes have a "connection" with the plan change request is a subsidiary issue to the question of jurisdiction, and is essentially the same as the fairness/natural justice consideration in *Oyster Bay Developments Limited v Marlborough District Council*[4] (discussed below).

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3 (2008) 15 ELRNZ 59.

4 C081/09.

26. Following *General Distributors*, the Environment Court in *Oyster Bay* further considered and clarified the question of 'what is within the scope of submissions', and the Court's scope to alter a plan change. In *Oyster Bay*, the council had accepted a private plan change request, notified the change, and then notified the submissions to allow further submissions. Following a hearing, the council declined the applicant's request for a plan change under clause 29(4).

27. At the Court hearing, the applicant volunteered several alterations to the plan change to address the deficiencies identified by the council. Most of the changes proposed were intended to reduce the scale and effects of the plan change request.

28. The Court sought to identify the appropriate elements for consideration when deciding whether an amendment to a change in a planning instrument is within or beyond jurisdiction. In doing so, the Court referred to and applied the reasoning in *General Distributors*.

29. The Court's test essentially incorporates two elements; jurisdiction and fairness. The relevant elements were summarised at paragraph 22 of the *Oyster Bay* decision:

> *"[a] The **terms of the proposed change** and the **content of submissions** filed **delimit the Environment Court's jurisdiction** [64];*
>
> *[b] Whether an amendment goes beyond what **is reasonably and fairly raised in submissions on the plan change** will usually be **a question of degree to be judged by the terms of the plan change and of the content of the submissions** [58];*
>
> *[c] That should be approached in a **realistic workable fashion** rather than from the perspective of legal nicety, and requires that **the whole relief package detailed in submissions be considered** [59] [60].*" [our emphasis]

30. Six alterations to the plan change originally requested by the applicant were questioned by the council in *Oyster Bay*. The council contended that:

> *"[a] none of those alterations to the plan change had been raised in any submission or further submission;*
>
> *[b] nor had any of them been notified to the public, nor even to submitters;*
>
> *[c] nor had any of them been considered by the Council;*
>
> *[d] nor had any of them been made the subject of the appeal to the Court;*
>
> *and submitted that the Court is limited to considering the plan change as originally requested, not as it would be altered in the ways described.*" [paragraph 25]

31. The Court held that the amendments proposed by the applicant qualified in terms of the Court's jurisdiction to entertain amendments to a plan change declared by the High Court in *General Distributors*; or as minor corrections that would prejudice no one. For example:

> *"We judge that this alteration would not broaden the plan change beyond the limits of what was originally requested and what is reasonably and fairly to be understood from the content of submissions; nor would it prejudice anyone who failed to lodge a submission on the original request.*" [paragraph 29]

32. It appears from our analysis of the case that the Court in *Oyster Bay* was careful to identify the issues/concerns that were identified in submissions in order to provide a basis for considering the changes which were proposed (see paragraphs 28, 32, 35 and 39). The only exception to this is the category of changes which relates to "*minor corrections which would prejudice no one*" (see paragraph 46). This latter category closely reflects the Council's own power in clause 16(2) of the First Schedule to rectify minor errors without further formality, and in our view could include changes to the formatting, terminology and style of the request that are not substantive and do not alter its meaning or effect.

33. In a further limited exception from the requirement for changes to a request to have a foundation in a submission, the Court in *Oyster Bay* also appeared to recognise that if an applicant volunteers or proposes changes to its plan change request that are within the scope of the request, are intended to mitigate effects, and would not cause prejudice to other parties or the public interest, then those changes can be considered by the Council or the Environment Court on appeal. In our view the changes now proposed to PC44 are probably not the same as the class of changes allowed through clause 16(2), as they could potentially be substantive and could cause issues with prejudice to other parties.

34. Having concluded that it had jurisdiction to consider all of the changes proposed by the applicant, the Court in *Oyster Bay* nevertheless determined that the modified request should be declined on its merits. In that respect, *Oyster Bay* demonstrates that if the Council intends to decline the plan change in whole, it has an inherent jurisdiction to do so irrespective of the content or scope of submissions, by considering and applying the relevant statutory tests and considerations as set out in *Long Bay*[5].

When is a submission "on" a plan change?

35. The High Court in *Palmerston North CC v Motor Machinists Ltd*[6] approved and provided clarification of the test set out by *Clearwater Resort Ltd v Christchurch City Council*[7] which set out the requirements for a submission to be considered to be 'on' a plan change. In *Palmerston North* the Court approved the following two requirements that must be met for a submission to be 'on' a plan change:

(a) The first limb requires that submissions must reasonably be said to fall within the ambit of the plan change. One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource is altered by the plan change. If it is not, then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change, unless the change is merely incidental or consequential.

(b) The second limb asks whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective opportunity to respond to those additional changes in the plan change process.

5. *Long Bay-Okura Great Park Society Incorporated & Others v North Shore City Council* (EnvC A078/08)
6. [2014] NZRMA 519.
7. HC Christchurch, AP34/02, 14 March 2003.

36. The Court further said that the approach taken by the Environment Court in *Naturally Best NZ Ltd v Queenstown Lakes DC*[8] of endorsing "fair and reasonable extensions" is not correct. Where a submission does not meet each limb of the *Clearwater* test, the submitter has other options: to submit an application for a resource consent, to seek a further public plan change, or to seek a private plan change.[9]

37. In *Palmerston North,* in the context of considering a plan change, the High Court stated that inherent in the sustainable management of natural and physical resources are two fundamentals:

> *[76]* ***The first is an appropriately thorough analysis of the effects of a proposed plan*** *(whichever element within it is involved) or activity. In the context of a plan change, that is the s 32 evaluation and report: a comparative evaluation of efficiency, effectiveness and appropriateness of options. Persons affected, especially those "directly affected", by the proposed change are entitled to have resort to that report to see the justification offered for the change having regard to all feasible alternatives. Further variations advanced by way of submission, to be "on" the proposed change, should be adequately assessed already in that evaluation. If not, then they are unlikely to meet the first limb in Clearwater.*
>
> *[77]* ***The second is robust, notified and informed public participation in the evaluative and determinative process.*** *As this Court said in General Distributors Ltd v Waipa District Council:*
>
> > *The promulgation of district plans and any changes to them is a participatory process. Ultimately plans express community consensus about land use planning and development in any given area.*
>
> ***A core purpose of the statutory plan change process is to ensure that persons potentially affected, and in particular those "directly affected", by the proposed plan change are adequately informed of what is proposed.*** *And that they may then elect to make a submission, under clauses 6 and 8, thereby entitling them to participate in the hearing process.* ***It would be a remarkable proposition that a plan change might so morph that a person not directly affected at one stage*** *(so as not to have received notification initially under clause 5(1A))* ***might then find themselves directly affected but speechless at a later stage by dint of a third party submission not directly*** *notified as it would have been had it been included in the original instrument. It is that unfairness that militates the second limb of the Clearwater test.*
>
> [Emphasis added]

38. In *Palmerston North,* Motor Machinists Ltd (**MML**) owned a block of land comprising five lots within one certificate of title; two lots were zoned Residential, fronting onto Lombard St, and the remainder were zoned Outer Business, fronting Taonui St. MML operated the five lots as a single site, and made a submission to PC1 asking that its residential lots on Lombard St be rezoned to Outer Business (the plan change did not otherwise affect MML's land). The High Court found that neither limb of the *Clearwater* test had been met by MML, and therefore its submission was not 'on' the plan change.

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8 EnvC C049/04

9 Refer to paragraph [78].

Scope of the Henley Downs submissions

39. In this case, the submissions made by Henley Downs are very broad and non-specific. In particular:

(a) Henley Downs Farm Holdings Limited sought that the objective, policies, and rules relevant to the ACRAA be amended to enable education, rural-based tourism, community, visitor accommodation and service activities (including buildings) in areas where such activities and buildings can reasonably be located without significantly adversely affecting the landscape and environmental values of the ACRAA, while ensuring that the majority of the ACRAA retains its current open space values. It also sought that the provisions of the ACRAA be amended to clarify that buildings supportive of agricultural include a residential dwelling to provide accommodation for the farm owner.

(b) Henley Downs Farm Limited and Henley Downs Land Holdings Limited sought that PC 44 be confirmed subject to refinement of the proposed Structure Plan to better achieve efficient use of the land resource and to ensure consistency with the Coneburn Resource Area Study 2002[10] and any refinement studies undertaken. They seek that PC44 be confirmed, subject to refinement of the proposed structure plan to better achieve efficient use and development of the land resource for the range of activities anticipated by PC44.

40. We note that in terms of highlighting to other parties who may have been interested in participating in the PC44 process, the Henley Downs submissions do not provide a good indication of the amendments those parties were seeking to PC44. In particular, the submissions do not indicate the scope of the changes Henley Downs is now seeking in the amended version of PC44.

41. We note that the submission right, under clause 6(5) of Schedule 1 of the RMA, requires that a submission be made *"in the prescribed form"* which is Form 5 set out in the Resource Management (Forms, Fees, and Procedure) Regulations 2003. As noted in *Palmerston North* the focus on the submission is to be on "specific provisions of the proposal", Form 5 says that twice.[11] Furthermore, the Environment Court has stated that *"if a submitter seeks changes to the proposed plan, then the submission should set out the specific amendments sought"*[12] In particular, this is because the summary of submissions provides potentially affected parties the ability to consider whether they are interested in the proposed plan change in light of submissions that may directly affect them. The Environment Court has stated that:

> *The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments…*[13]

42. Through the amended version of PC44 proposed by Henley Downs and the Requestor, essentially we understand Henley Downs is seeking to provide detail that was not set out in the original submissions. We record that any additional detail provided subsequent to the submissions being made is required to fit within the scope of the

10 We understand that a copy of the study was not provided with the relevant submissions.
11 Paragraph [38].
12 *Environmental Defence Society Incorporated v Otorohanga District Council* [2014] NZEnvC 070, paragraph [11].
13 *Environmental Defence Society Incorporated*, paragraph [11].

submission which must be "on" PC44. In other words, we consider that any further information / amended proposal would need to meet the *Clearwater* test set out above.

43. Although technically the proposed amendments to PC44 may fit within the broadly worded submissions made by Henley Downs, it appears that as a package the amendments would not meet the *Clearwater* test. In particular this is because:

(a) We understand from the Council that the proposed amendments include changes that were not contemplated as part of the notified version of PC44 (which sets the baseline for whether the changes sought are 'on' the plan change), and presumably were not addressed in the section 32 analysis. This includes the inclusion of new areas of development within the ACRAA, and amendments to the structure plan to include areas outside of the structure plan notified as part of PC44; and

(b) There may be members of the public who would have made submissions / further submissions on PC44 had they been aware of the extent of the changes now proposed. As there is no requirement for the new provisions to be publically notified for submissions at this point, those potentially affected parties have no legal ability to participate in the PC44 hearing at this point.

Replacement Structure Plan

44. We understand that one of the proposed amendments to PC44 is the inclusion of an additional structure plan diagram (drawing number HD_14_1_MLP-00L). This structure plan appears to identify a number of new activity areas, in particular the new structure plan shows activity areas within the Henley Downs area which was not previously identified in structure plans either in the operative Queenstown Lakes District Plan or as part of PC44.

45. It appears that the inclusion of additional activity areas in the structure plan, and the changes to the PC44 text in relation to these areas, falls outside of the scope of PC44 and what could be considered to be a submission 'on' that plan change. Similar to the *Palmerston North* case, it appears that Henley Downs and the Requestor are seeking to introduce new activity areas and classifications to areas as part of PC44.

Yours faithfully
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