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Clare Piper
Manager Planning and Development
Nelson City Council
NELSON

By email

Your reference
Plan Change 29

Our reference
1038017

13 May 2024

Dear Clare,

Plan Change 29 - the law relating to the scope in a plan change context

Introduction

1 You have asked for a summary of the law relating to 'scope' in a plan change context, to enable the section 42A reporting officers for Plan Change 29 (**PC29**) to the Nelson Resource Management Plan to assess scope issues relating to that plan change.

2 There are two scope issues in the plan change context:

2.1 Whether a submission is within scope of PC29 (i.e. whether a submission is 'on' the plan change), and

2.2 Whether the relief is within scope of a submission.

3 This summary addresses both issues and provides case examples to illustrate the principles in action.

Summary

4 For a submission to be within scope of PC29, it must be 'on' PC29. Case law has established that for a submission to be 'on' a plan change two tests need to be satisfied:

4.1 It must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which PC29 entails. This can be analysed by asking whether the submission raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular resource is altered by the plan change; and

4.2 The Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks. The key risk to guard against is whether the reasonable interests of others might be overridden by a 'submissional side-wind'. That is, a plan change is so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission, which had not been directly notified to them.

5 For there to be scope to make an amendment to a plan change, any amendment made to a plan change following notification must be fairly and reasonably within a range of options between what was originally notified, and the relief requested in submissions. That assessment should be approached in a realistic workable fashion.

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6 Consequential changes which logically arise from the grant of relief requested and submissions lodged are permissible, provided they are reasonably foreseeable.

Scope of a plan change

The law

7 Following notification of a plan change, Schedule 1, clause 6 of the Resource Management Act 1991 (**RMA**) sets out that any person may make a submission 'on' a plan change. The legal framework in respect of scope of relief that can be sought through a submission (and therefore granted through the decision) is well settled, although it will require careful case by case application.

8 The High Court confirmed in *Palmerston North City Council v Motor Machinists Limited* that for a submission to be 'on' a plan change, a two-limbed test must be satisfied:[1]

8.1 the submission must address the proposed plan change itself. That is, it must address the extent of the alteration to the status quo which the change entails; and

8.2 the Council must consider whether there is a real risk that any person who may be directly affected by the decision sought in the submission has been denied an effective opportunity to respond to what the submission seeks.

9 In considering the first limb, the High Court held in *Motor Machinists* that whether the submission falls within the ambit of the plan change may be analysed by asking whether it raises matters that should be addressed in the section 32 report, or whether the management regime in the plan for a particular resource is altered by the plan change. Submissions seeking relief beyond that ambit are unlikely to be 'on' the plan change. However, some extensions to a plan change are not excluded: incidental or consequential extensions are permissible if they require no substantial section 32 analysis.

10 What is to be considered in respect of the first limb, was discussed in paragraphs [36]-[40] of the Environment Court decision in *Bluehaven Management Limited v Western Bay of Plenty District Council*,[2] including at [39], where it states:

> Our understanding of the assessment to be made under the first limb of the test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 evaluation report did or did not address the issue raised in the submission. Such an approach would enable a planning authority to ignore a relevant matter and thus avoid the fundamentals of an appropriately thorough analysis of the effects of a proposal with robust, notified and informed public participation.

11 In considering the second limb, the High Court in *Motor Machinists* identified the risk that the Council must guard against is that the reasonable interests of others might be overridden by a 'submissional side-wind'. The concern identified was that a plan change could be so morphed by additional requests in submissions that people who were not affected by the plan change as notified became affected through a submission, which had not been directly notified to them.

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1 *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [80]-[82].
2 [2016] NZEnvC 191.

12 The leading authorities on scope were considered in *Paterson Pitts Limited Partnership v Dunedin City Council*[3] and it was concluded that[4]:

> Put simply, these cases establish the proposition that if a submission is not "on" a plan change or variation, the Council has no jurisdiction to consider it.

Case example – *Paterson Pitts Limited Partnership v Dunedin City Council* [2022] NZEnvC 234

13 This case concerned a variation of Dunedin's proposed 'Second Generation Plan' (**2GP**) to respond to specific housing issues, namely a projected shortfall in housing supply. The variation amended the density performance standards to increase density.

14 Mr Murray made a submission which expressed support for increased residential density where it was 'integrated with complimentary amendments to heritage provisions'. The submission went on to identify inadequacies in the 2GP protection of heritage buildings, including that too few buildings had been scheduled throughout Dunedin. Although Mr Murray did not specify particular relief, he suggested that the Council needed to:

> …look better at the flow-on effects of its plan change. Reviewing suburban heritage provisions should be part of this, allowing for densification in a way that better targets it to minimise the loss of the best built heritage.

15 In response to his submission, new heritage provisions were included in the 2GP requiring a resource consent for the demolition of pre-1940s buildings. The Council also decided to incorporate amendments to objectives and policies in the 'Heritage' and 'Strategic Directions' chapters of 2GP, to apply to buildings not in the Heritage Schedule. These chapters had otherwise been unaffected by the variation.

16 The Court held that:

16.1 While there was a connection between the subject matter of the variation and the relief being sought, the relief sought 'was focussed on the adequacy of the management regime for a heritage resource within the 2GP that was *not* being altered by the variation'.[5]

16.2 There was a potential for persons to be unaware of the changes made.[6] It was not reasonably foreseeable that additional heritage protection measures could be included as Council had deliberately limited the scope of the variation, giving notice of that when the variation was notified to the public.[7] Potentially affected persons reading the variation and accompanying information when it was notified may have elected not to participate knowing the deliberately focussed scope of the proposed changes.[8]

17 The changes made by Council to the heritage provisions were therefore not 'on' the variation.[9]

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3 [2022] NZEnvC 234.
4 At [68].
5 At [96].
6 At [97].
7 At [99].
8 At [102].
9 At [100].

Scope of relief sought in submissions

The law

18 Schedule 1, clause 10 of the RMA sets out that the Council's decisions on PC29 are made on the matters raised in submissions. Often as the plan change process progresses, submitters may seek to refine the relief they have sought. Caselaw has established that any amendment made to a plan change following notification must be fairly and reasonably within a range of options between what was originally notified, and the relief requested in submissions.

19 The paramount test is whether any amendment made to a plan change as notified goes beyond what is 'reasonably and fairly raised' in submissions on that plan change and that assessment should be approached in a realistic workable fashion.[10] The High Court in *Albany North Landowners v Auckland Council* stated:[11]

> …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.

20 Where a matter has not been fairly and reasonably raised in a submission there is no scope for that amendment to be made through a decision on PC29 (even if the amendment would be within scope of PC29).

21 The Courts have also accepted that a submission must first raise a relevant resource management issue, and then any decision requested must fairly and reasonably fall within the general scope of the original submission, or plan change as notified, or somewhere in between.[12]

22 Consequential changes which logically arise from the grant of relief requested and submissions lodged are permissible, provided they are reasonably foreseeable.[13]

Case example – *Trustees of Spruce Grove Trust v Queenstown Lakes DC* [2023] NZEnvC 279

23 This case concerned the scope of relief on appeal, however the principles remain the same. In summary, the appellant had sought in their original submission (and appeal) to rezone an area of land. What was agreed between the parties was an amended version of the notified zoning. The Court was asked to determine whether agreed relief was within scope of appellant's submission and appeal.

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10 *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171.
11 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].
12 *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC), at [19].
13 *Westfield (New Zealand) Ltd v Hamilton City Council* (2004) 10 ELRNZ 254 (HC), at [73] - [77].

24 The Court held that:

> [18] As notified, the Wakatipu Basin proposed WBRAZ zoning for the Sites. At the time of notification, that was by reference to the 80ha minimum lot size regime. The appellants' submissions sought that be changed to MRZ. MRZ is a resort zone designed to provide for a visitor resort allowing for recreational activities (including golf), commercial, residential and visitor accommodation, together with support facilities and services. In that sense, the MRZ stands apart from the PDP's general rural and urban zone classes. However, its development controls, according to a structure plan approach, can be broadly characterised as enabling of planned development that includes residential enclaves to an urban density. It is that aspect of the MRZ that the original relief primarily pursued for the Sites. Considered in those terms, the Agreed Modified Relief proposes to allow a density of residential development within the spectrum between WBRAZ as notified and the structure planned residential enclaves enabled as part of the MRZ.
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> [19] Therefore, we find the Agreed Modified Relief is within the jurisdictional scope of cl 10, Sch 1 RMA.

25 We are happy to answer any specific questions you may have or that arise during the hearing.

Yours sincerely



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