BUDDLE FINDLAY

18 November 2024

To
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Copy to
Matthew Bacon

From
Cedric Carranceja

By Email

Dear Andrew

Hearing Stream 12D - Minutes 29 and 46 - Advice on scope

1. The Independent Hearings Panel (**IHP**) appointed to consider Variation 1 (Housing Intensification) to the Proposed Waimakariri District Plan (**PDP**) has issued Minutes 29[1] and 46[2] requesting legal advice on matters of scope, and in response to a memorandum of counsel for Carter Group Holdings Limited and Rolleston Industrial Development Limited (together referred to as **RIDL**) dated 8 November 2024 (**RIDL Memorandum**).[3]

2. The IHP has sought advice on the following:

   (a) Whether there remains scope for RIDL's Variation 1 submission, in circumstances where:

      (i) RIDL no longer are seeking a general residential zone (**GRZ**) for part of the rezoning site (under the PDP submission) and are instead seeking to replace it with a settlement zone (**SETZ**). The other residential zone proposed is large lot residential zone (**LLRZ**);

      (ii) RIDL are no longer seeking a medium density residential zone (**MRZ**) under Variation 1 for that part of the site that was sought to be zoned GRZ under the PDP submission;

      (iii) Under s77G of the RMA, a specified territorial authority may create new residential zones through an Intensification Planning Instrument (this is Variation 1);

      (iv) A new residential zone is defined as a "an area proposed to become a relevant residential zone that is not shown in a district plan as a residential zone";

      (v) A relevant residential zone is defined as meaning all residential zones, but does not include a LLRZ or a SETZ, which are the zonings now proposed by RIDL.

   (b) Whether there remains scope for RIDL to introduce a GRZ at this stage of proceedings, particularly taking into account the IHP's previous direction in Minute 31[4] to provide an

[1] Minute 29 – Cross-Examination for Hearing Stream 12D – Variation 1 (here).
[2] Minute 46 – Wrap Up Matters for Hearing Stream 12D (here).
[3] RIDL Memorandum (here).
[4] Minute 31 – Expert Conferencing and Next Steps for Hearing Stream 12D (here).

updated set of provisions to be applied to the Ōhoka proposal by 26 July 2024, and the submitters not providing any further provisions or relevant evidence in Hearing Stream 12E(b) where Variation 1 was considered, and how introducing them now would be consistent with natural justice and fair process.

3. In summary it is our opinion that:

   (a) RIDL's Variation 1 submission, which seeks a new residential zone for several Ohoka properties, is not "on" (or within scope of) Variation 1.

   (b) In the event the Panel nonetheless adopts RIDL's wider argument for its Variation 1 submission to be "on" Variation 1, a risk of natural justice and fair process could arise to the extent there may be submitters who were led to believe from the Hearing Streams 12D and/or 12E proceedings that RIDL may no longer be seeking a rezoning that reasonably falls within the ambit of its Variation 1 submission.

4. We provide the reasons for our opinion below. We confirm that we considered the RIDL Memorandum in providing our opinion.

Whether there is scope for RIDL's Variation 1 submission?

5. We previously advised the Council regarding the scope of Variation 1 in our opinion dated 30 May 2023 (**Scope Opinion**), a copy of which was provided in Appendix D of the s42A officer's report dated 22 July 2024 on Variation 1 Rezonings.[5] Our consideration of the RIDL Memorandum does not cause us to change the views expressed in our Scope Opinion. We do not repeat the content of our Scope Opinion, but it should be read as informing the opinions we express here.

6. Although our Scope Opinion did not specifically comment on RIDL's Variation 1 submission, it did describe (at paragraph 22) 5 different categories of submissions, and commented on which of those categories of submissions are "on" (or within scope of) Variation 1. In our opinion:

   (a) RIDL's Variation 1 submission falls within the category of an Intensification Planning Instrument (**IPI**) submission seeking new residential zones, as described at paragraph 42(e) of the Scope Opinion. As acknowledged in RIDL's Memorandum, RIDL's Variation 1 submission seeks a new residential zone.[6]

   (b) For reasons given in our Scope Opinion, RIDL's submission does not fall within the scope of Variation 1 because the new residential rezoning sought by RIDL is separated from (rather than adjacent to) relevant residential zones and proposed new residential zones in Variation 1.[7] In particular RIDL's submission relates to land that is not adjacent (or near):

      (i) any relevant residential zones (which is defined to exclude large lot residential zones and settlement zones); or

[5] A pdf is downloadable here. See pages 130 to 139 of the pdf.
[6] RIDL Memorandum (here) at paragraphs 21 and 28.
[7] See in particular paragraph 44(b)(i) of our Scope Opinion, downloadable here at pages 130 to 139 of the pdf.

(ii) any new residential zonings (as Variation 1 did not propose new residential zones in or around Ohoka).

7. We understand from paragraph 13 of the RIDL Memorandum that counsel for RIDL generally agrees with our description of the findings of the Courts regarding the scope of submissions on a plan change. However, counsel for RIDL suggests that caution should be exercised so as not to place too much reliance on the scope cases when considering Variation 1. A consideration of the RIDL Memorandum reveals three arguments why counsel for RIDL suggests that the usual scope cases should not be relied on for Variation 1:

(a) There are no cases (that counsel for RIDL are aware of) that deal with scope of a full review of a district plan and then a variation to that proposed plan.[8] If there is a full review where the public is already on notice the entire plan may change, an IPI is just a further move in that direction, and it is not appropriate in such circumstances to adopt the narrow (usual) interpretation of whether a submission is "on" a variation.[9]

(b) Variation 1 is an IPI with unique legislation and a different policy and purpose from standard first schedule plan changes / variations.[10] Because of those differences, submissions need not be "on" a variation as per the usual scope cases, but instead it is sufficient for a submission to be on matters that Council was "*legally entitled*" to include in its IPI.[11]

(c) In the case of Variation 1, there is no real risk that persons directed affected by the additional change proposed in RIDL's submission have been denied an appropriate response.[12]

8. We respond to these three arguments in turn.

<u>Scope when there is a full review of a district plan and then a variation to that proposed plan</u>

9. The RIDL Memorandum essentially seeks to argue that the case law on scope should not apply to an IPI that is not a plan change but is instead a variation to a full district plan review, essentially because with the latter, the public is already on notice that the entire plan can change under a full district plan review. Counsel for RIDL advised that they are not aware of any case law dealing with scope of a full review of a district plan and then a variation to that proposed plan.

10. However, the *Clearwater*[13] decision dealt with scope of a variation to a proposed plan that was a full review of a district plan. The relevant proposed plan in that case was a full review of the Christchurch City Council's district plan. A variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan and in the *Clearwater case*, the Council sought to introduce a variation (Variation 52) to remove an incongruity between policies dealing with urban growth and protection of the Christchurch airport. Variation 52 contained no proposal to adjust the noise contours, but the submitter, Clearwater, wanted to challenge the accuracy of the contours on the planning maps.

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[8] RIDL Memorandum (here) at paragraph 14.
[9] Ibid at paragraphs 16 to 21.
[10] Ibid at paragraphs 15 and 22 to 30.
[11] Ibid at paragraphs 31 to 43, particularly at 43.
[12] Ibid at paragraphs 51 to 59.
[13] *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

11. While challenges to the contours on the planning maps was capable of being challenged as part of the proposed plan (being a full district plan review), the High Court was concerned with whether Clearwater's submission was "on" Variation 52 at all. The Court concluded that a challenge to the location of the 55 and 65 dBA Ldn airport noise contour lines was not "on" Variation 52 because those lines served the same function under Variation 52 as they did in the pre-Variation 52 version of the proposed plan.[14] In other words, Variation 52 proposed no change to the function or position of the 55 dBA Ldn and 65 dBA Ldn airport noise contour lines in the Proposed Plan.

12. In the present case, Variation 1 proposed no change to the zonings in and around Ohoka in the Proposed Plan.

13. The High Court in *Albany North Landowners* confirmed[15] the scope for a proposed plan that is a full district plan review is different from scope for a variation on a proposed plan. In particular:

    (a) Where a variation, as distinct from a full plan review, seeks to change an aspect only of a proposed plan, the usual scope cases which are concerned to maintain principles of fairness and natural justice inherent will apply, as articulated in *Clearwater*, *Motor Machinists* and other related resource management case law.[16]

    (b) However, full reviews of planning instruments are far removed from the relatively discrete variations and plan changes. In such situations, the notified proposed plan addresses every aspect of the status quo, and thus the scope for a submission being on a full review is "very wide".[17]

14. The RIDL Memorandum essentially argues for a very wide view on scope on Variation 1 as if it were not a variation, but a full district plan review instead. The RIDL Memorandum is effectively asserting that Variation 1 should be treated the same as a full district plan review. However, Variation 1 is not a full district plan review. It is a variation to a full district plan review, and should be treated as such pursuant to *Clearwater*, *Motor Machinists* and other related resource management case law. Notified Variation 1 sought to change only an *aspect* of the PDP, and was focused on relevant residential zones and intensification in the townships of Rangiora, Kaiapoi, Woodend, Ravenswood and Pegasus. Variation 1 and its accompanying section 32 reports do not propose changes to (for example) the Proposed Plan's rural zones, or the zones in and around Ohoka. Part A section 3 of the section 32 report for Variation 1 outlines the scope of Variation 1 and makes no mention of Ohoka being included within scope.[18] Instead, it specifically notes that all rural zones, and the Settlement and Large Lot Residential Zones including those which form parts of Ohoka, are not within scope.[19] Members of the public could have relied on these documents to conclude that the rural zones and Ohoka are not within scope of Variation 1.

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[14] Ibid at paragraph [79] to [82].
[15] *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [119] to [134].
[16] *Palmerston North Industrial and Residential Developments Limited v Palmerston North City Council* [2014] NZEnvC 17 at [34] to [36]; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [90]; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
[17] *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [129].
[18] Section 32 report (here).
[19] Ibid, particularly at 3.1 and table 1.

Whether for an IPI (as distinct from ordinary plan changes) submissions can be on matters that Council was "legally entitled" to include in IPI?

15. RIDL essentially argues that because Variation 1 is an IPI with unique legislation with a different policy and purpose from standard first schedule plan changes / variations, submissions need not be "on" a variation as per the usual scope cases.[20] While we agree that Variation 1 has some differences from standard first schedule plan changes and variations, we do not agree that this warrants a complete departure from applying the usual scope cases.

16. Our Speaking Notes for Hearing Stream 12E set out our views on the scope of Variation 1 while accounting for the various differences an IPI has from a standard first schedule plan change (**Speaking Notes**).[21] Our consideration of the RIDL Memorandum does not cause us to change the views expressed in our Speaking Notes. We do not repeat the content of our Speaking Notes, but it should be read as informing the opinions we express here.

17. The RIDL Memorandum has taken a very wide view on scope which we consider is incorrect at law and contrary to the principles of fairness and natural justice inherent articulated in *Clearwater*, *Motor Machinists* and other related resource management case law.[22] Central to the wider view on scope is the argument that if Council was "*legally entitled*" to include a matter in Variation 1 (such as a new residential rezoning) but expressly chose not to when it notified Variation 1, then a submitter can ask for that outcome.[23] However, this assertion overlooks the fact that *Clearwater* and *Motor Machinists* also dealt with situations where planning authorities were also legally entitled to include any matter in a notified plan change, but had not included other such matters beyond what was notified.

18. The problem with the wide view of scope pursued in the RIDL Memorandum is that it lays aside years of case law emphasising the importance of fairness and natural justice for ordinary plan changes or variations where Council is similarly "*legally entitled*" to include a matter in a plan change or variation. In the same way the RMA legally entitles the Council to define the scope of an ordinary plan change / variation by giving Council discretion to decide what changes are proposed to the *status quo* (e.g. what land, if any, to rezone, or what rules, if any, are to be changed), for an IPI the RMA also legally entitles the Council to decide what, if any, land is to be rezoned, or what rules are to be changed), with the sole exception and difference being that the RMA mandates some changes that Council must include in an IPI (as mentioned in our Speaking Notes).

19. For reasons given at paragraphs 2.4 to 2.13 of our Speaking Notes, the *Clearwater* and *Motor Machinists* principles give way only to the extent that submitters can assert that the Council has not properly complied with the mandatory requirements for an IPI. This is appropriate because no prejudice, fairness or natural justice concerns arise where:

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[20] RIDL Memorandum (here) at paragraphs 31 to 43.
[21] Speaking Notes For Particular Legal Issues Arising in Hearing Stream 12E dated 19 August 2024 (here).
[22] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [119] to [128]; *Palmerston North Industrial and Residential Developments Limited v Palmerston North City Council* [2014] NZEnvC 17 at [34] to [36]; *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290 at [90]; *Clearwater Resort Limited v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.
[23] RIDL Memorandum (here) at paragraphs 31 to 43, particularly at paragraph 43.

(a) any and all submitters are entitled to rely on the IPI-related provisions in the RMA, with the expectation that Council's IPI would comply with the mandatory matters that Variation 1 must include; and

(b) it is consistent with fairness and natural justice for submitters to lodge submissions requesting that Variation 1 includes what Council is compelled to include by statute.

20. However, in all instances where the RMA provides Council with a discretion (or legal entitlement) to include other matters in an IPI, *Clearwater* and *Motor Machinists* principles continue to apply.

21. Accordingly, we consider that the Ohoka rezonings sought by RIDL in reliance on the *"legally entitled"* argument for wider scope, are beyond the scope of Variation 1.

Whether there is no real risk that persons directed affected by the additional change proposed in RIDL's submission have been denied an appropriate response?

22. The RIDL Memorandum asserts that as Variation 1 is a variation to a full review of a district plan which "*places everything up for grabs*", there is less risk that a person could be deemed to have been denied an opportunity to participate.[24]

23. However, while a full review of a district plan can place "*everything up for grabs*", Variation 1 does not. As mentioned at paragraph 14 above, notified Variation 1 and its accompanying section 32 reports did not propose changes to the zones in and around Ohoka. This gives rise to a risk that persons can be denied an opportunity to participate. In particular:

(a) Persons considering notified Variation 1 could have decided that the intensification of land proposed in Variation 1 was irrelevant to them, especially when the accompanying section 32 expressly noted that rural zones and Ohoka are not within scope of Variation 1. It is reasonable to assume that members of the public would rely on these statements. They may not have cared whether intensification occurred in towns and areas that are not in or around Ohoka, and therefore elected not to participate in the Variation 1 process. Such persons would also have no reason to review a summary of submissions because the variation itself related to areas of the district that they considered to be irrelevant to them.

(b) As such persons would have no reason to review the summary of submissions, they could not reasonably become aware of a submission that seeks to rezone land in and around Ohoka that was not the subject of the notified variation. Such persons would be disenfranchised from having a real opportunity to have their say in respect of the Ohoka land that RIDL's Variation 1 submission now seeks to rezone.

24. While the RIDL Memorandum notes that 8 further submitters were lodged on RIDL's Variation 1 submission[25], that does not mean there is no longer a real risk of disenfranchisement. In our opinion, there remains a risk that there are other persons who read notified Variation 1 and not understood it as applying to land in and around Ohoka, and therefore be disenfranchised from

[24] RIDL Memorandum (here) at paragraphs 51 to 57.
[25] Ibid at paragraph 58. The Section 42A Report for Hearing Stream 12D (here) also mentions 8 further submissions lodged on RIDL's Variation 1 submission at paragraph 36, fourth bullet point.

participating as a submitter (or further submitter) on Variation 1. The section 42A report mentions that there were 30 further submissions lodged on RIDL's PDP submission, which is 22 more than the number of further submissions lodged on RIDL's Variation 1 submission.[26] This suggests there may have been persons who lodged further submissions on RIDL's PDP submission who did not think Variation 1 applied to Ohoka and therefore did not participate.

25. A further risk arising in this case that is particular to an IPI that is not present for an ordinary first schedule plan change, is the potential to also disenfranchise persons from rights of appeal. The RIDL Memorandum makes clear that its intent for seeking a wide view on scope for Variation 1 is to avoid any appeal should the Panel determine to it appropriate to rezone the land for residential use.[27] RIDL effectively seeks removal of appeal rights by seeking to convert the SETZ rezoning it seeks under its PDP submission into a GRZ zoning under Variation 1[28], notwithstanding that Variation 1 proposed no change to the PDP zones in and around Ohoka. Accordingly, RIDL's argument for a wider view on scope for Variation 1 is not only incorrect at law and contrary to the principles of fairness and natural justice, but it would also disenfranchise persons from exercising appeal rights.

Whether there remains scope for RIDL to introduce a GRZ at this stage of proceedings?

26. For reasons given above, we do not consider there is scope for RIDL to seek a GRZ (or any other zone) at Ohoka as part of Variation 1. As the law on scope is concerned about natural justice and fair process, we consider that allowing RIDL to seek a GRZ at Ohoka as part of Variation 1 would be inconsistent with natural justice and fair process.

27. However, in the event the Panel nonetheless adopts RIDL's wider argument for scope, we briefly comment on whether there *remains* scope for RIDL to introduce a GRZ at this stage of proceedings, particularly taking into account the IHP's previous direction in Minute 31 to provide an updated set of provisions to be applied to the Ōhoka proposal by 26 July 2024, and the submitters not providing any further provisions or relevant evidence in Hearing Stream 12E(b) where Variation 1 was considered, and how introducing them now would be consistent with natural justice and fair process.

28. The RIDL Memorandum argues that introducing a GRZ at this stage of proceedings will not prejudice any party and would be consistent with natural justice and fair process in the context outlined in paragraphs 3.1 to 3.6 of the memorandum, and for the reasons given at paragraphs 5.1 to 5.3.

29. As a starting point, we note that RIDL's Variation 1 submission seeks to rezone land from Rural Lifestyle Zone (**RLZ**) to a combination of Medium Density Residential Zone (**MRZ**), Large Lot Residential Zone (**LLRZ**), Local Centre Zone (**LCZ**), and Open Space Zone (**OSZ**). Seeking a General Residential Zone (**GRZ**), or a Settlement Zone (**SETZ**), could well fall within the scope of what RIDL's Variation 1 submission requested, provided the provisions sought under the GRZ (or

[26] Section 42A Report for Hearing Stream 12D (here) at paragraph 36, first bullet point.
[27] RIDL Memorandum (here) at paragraph 28.
[28] By seeking a Variation 1 GRZ that RIDL says has no substantive difference with the SETZ sought under RIDL's PDP submission. See paragraph 61 of RIDL Memorandum (here).

SETZ, or other zone) represent an outcome that reasonably falls between the RLZ, and MRZ/LLRZ/LCZ/OSZ zoning combination sought by the submission. However, while a GRZ might fall within the ambit of what RIDL's Variation 1 submission requested, that does not mean the submission itself falls within the scope of Variation 1. As noted above, our opinion is that RIDL's Variation 1 submission seeking a rezoning at Ohoka is not "on" Variation 1, whether a GRUZ, SETZ or other zone is ultimately being sought.

30. However, we understand the IHP's query is not necessarily confined to scope of Variation 1 or whether relief sought is within the ambit of a submission, but rather whether RIDL seeking a GRZ at Ohoka at this stage of proceedings raises potential natural justice and fair process issues more generally.

31. Suffice to say, we consider a risk of natural justice and fair process could arise to the extent there may be submitters who were led to believe from the Hearing Streams 12D and/or 12E proceedings that RIDL may no longer be seeking a rezoning (including any GRZ rezoning) that reasonably falls within the ambit of RIDL's Variation 1 submission. While we are unaware of RIDL withdrawing or narrowing what its Variation 1 submission requested, we do not know whether submitters participating in Hearing Streams 12D and/or 12E might have been led to believe (e.g. through RIDL legal submissions, evidence or oral representations made during the course of the hearings, or the absence of rezoning provisions provided by RIDL in response to Minute 31) that RIDL may no longer be seeking a rezoning that reasonable falls within the ambit of RIDL's Variation 1 submission, and thus elected not to (for example) call further evidence for resumed Hearing 12D or seek cross-examination in relation to a rezoning. Such a belief may have arisen from a consideration of the evidence of Mr Walsh dated 5 March 2024 stating that RIDL are no longer seeking a GRZ but are seeking a SETZ.[29] We suggest that this issue might be best raised with relevant submitters. However, this issue may be academic and unnecessary to traverse should the IHP accept that RIDL's Variation 1 submission is not "on" Variation 1 anyhow (which is also a natural justice and fairness issue).

Yours faithfully
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[29] Statement of evidence of Tim Walsh (Planning) on behalf of RIDL dated 5 March 2024 (here), at paragraphs 38 to 41.