[2018] NZEnvC 187
Environment Court, Auckland

Calcutta Farms Ltd v Matamata-Piako District Council

ENV-2017-AKL-161
Hearing: 14 May 2018
Decision: 28 September 2018
Judge Harland

Classifications (2)

[1] **Civil procedure** ⬑ Jurisdiction

[2] **Resource management** ⬑ Change or variation

Legislation Considered
Resource Management Act 1991 (NZ) s 32, s 32(1), s 79, s 79(1), s 79(2), s 79(3), Sch 1

Party Names
Calcutta Farms Ltd *(Appellant)*, Matamata-Piako District Council *(Respondent)*, Inghams Enterprises (NZ) Pty Ltd *(s 274 parties)*, New Zealand Transport Agency *(s 274 parties)*, J & S Johnson *(s 274 parties)*, D & L Weatherley *(s 274 parties)*

Legal Representatives
PF Lang for Calcutta Farms; *A Green & C Adam* for Matamata-Piako District Council; *J Forret* for Inghams Enterprises (NZ) Pty Limited

Orders

Decision of the Environment Court as to Scope of Appeal
A: The appeal by Calcutta Farms Limited is within the scope of Plan Change 47 to the Matamata-Piako District Plan and may proceed to be heard on the merits.

Judgment

REASONS

Judge M Harland

Introduction
[1] Calcutta Farms Limited (**Calcutta Farms**) has appealed part of the decisions of the Matamata-Piako District Council (**Council**) in relation to proposed Plan Change 47 to the Matamata-Piako District Plan (**PC47**). The appeal seeks the re-zoning of parts of the Calcutta Farms property near Banks Road, Matamata to Residential Zone (in part) and Future Residential Policy Area (in part).

[2] The Council and Inghams Enterprises (NZ) Pty Limited (**Inghams**) contend that the submission is not "on" PC47, and therefore there is no jurisdiction for the appeal because it is out of scope.

[3] I have decided that the appeal is "on" PC47, and therefore is within the scope of PC47. This decision sets out my reasons for reaching that conclusion.

Background

[4] PC47 is part of a rolling District Plan Review process that is being undertaken by the Council as an alternative to the single stage full District Plan Review. It is specifically designed to address the planning controls and the extent of zoning for Matamata, Morrinsville and Te Aroha in relation to the provision of housing, new business and industrial activities.

[5] Section 79 of the Resource Management Act 1991 (**RMA**) requires a territorial authority to conduct 10 yearly reviews of its District Plan provisions. Sections 79(1) and (2) enable the review of part of a plan. For such a partial review s 79(3) provides:

> "(3) If, after reviewing the provision, the local authority considers that it does not require alteration, the local authority must still publicly notify the provision-
>
> (a) As if it were a change; and
>
> (b) In the manner set out in Parts 1, 4, or 5 of Schedule 1 and this Part."

[6] As can be seen, s 79(3) ensures that a partial review process still enables interested parties to make submissions on the proposed retention of the status quo, if the Council decides not to change a provision, however in this case PC47 proposed alterations to the planning regime for residential development in Matamata by identifying in advance areas where future residential zoning would be appropriate and through the Future Residential Policy Area approach. This was, therefore, a change to the status quo.

[7] Mr Lang's point was that if s 79(3) enables a person to submit on a plan change which is a partial review that continues the status quo, it cannot be the intent of s 79(3) to preclude submissions about the extent and location of such changes when the purpose of the change is to review and resettle those very matters. He submitted that this was the effect of the Council's and Ingham's submissions here. There is some force to this argument.

Consultation before PC47 was notified

[8] Prior to PC47 being notified, the Council consulted with various stakeholders, including Calcutta Farms, about the need and location for additional residential zones and areas for future residential growth and development at Matamata. The two locations considered were an area north of Tower Road and another near to Banks Road. Calcutta Farms owns a large amount of land in the vicinity of Banks Road. It was, therefore, interested in looking at options for future residential growth in the Banks Road location.

[9] Calcutta Farms' advisors liaised with the Council on a number of occasions to advance the reasons why it contended that the Banks Road locality, rather than the Tower Road locality, was to be preferred for residential growth in both the shorter and longer term.

[10] A letter dated 24 July 2015 with an attached map was sent by the Council to Calcutta Farms' advisors updating the options it was considering in relation to PC47 after having received feedback during the consultation phase of the plan change process. It is not clear whether this was a standard letter sent to others as well, although given that the contents included matters which were not relevant to Calcutta Farms, this is likely.

[11] In relation to the issues I am concerned with, the letter set out what the Council proposed in terms of the options for a Future Residential Policy overlay and an Equine Area for Matamata. One of the options for the overlay was the Banks Road area near to (and including) Calcutta Farms' land, but as much as can be gleaned from the attached map, the

proposed overlay at Banks Road was smaller than the option proposed at Tower Road. The map included an Equine Zone in two areas to the south of Banks Road, one to the north and the other to the south of the racecourse.

[12] The letter included a table summarizing the preferred options. In relation to the new Future Residential Policy Area proposed for Matamata it noted the following:

Provision	Location	Proposed Changes
Matamata	Banks Road, Matamata	• New "Future Residential Policy" overlay with existing Rural Zone provisions to apply • Only one area to be confirmed, with **preferred option at this stage being Banks Road**
	Tower Road, Matamata	

(emphasis added)

[13] Accordingly, at this stage (the end of July 2015) the Council's preferred area for longer term residential growth in Matamata was at Banks Road.

[14] By a letter dated 16 June 2016, the Council invited Calcutta Farms' advisors to attend an informal meeting to discuss "rezoning for Tower Road." It is likely that this was a standard letter sent to a number of people interested in this topic. An information sheet was attached to the letter. The information sheet outlined the Council's proposal that approximately 24ha of rurally zoned land at Tower Road would be replaced with a residential zoning, and a further 48ha, also at Tower Road, would be identified as a Future Residential Policy Area. A map showing this was attached. The information sheet identified that a traffic report had been commissioned, which signaled that upgrades to the network would be required, and that there would be an increase in traffic around certain local roads nearby. There was a section provided about development contributions and costs, and information about how to comment and learn more about the proposal, including the advice that a submission could be made later in the year when PC47 was notified.

[15] Calcutta Farms did not agree with this proposal.

PC47

[16] PC47 was notified on 28 September 2016. It included the proposal outlined in the 16 June 2016 letter for re-zoning rural land to residential, and providing a Future Residential Policy Area at Tower Road. The notified version of PC47 included the Council's s 32 report. It also included maps: [1]

(a) Map MM1 showed the proposed Equine Area for Matamata applying to land to the north and south of Banks Road. The land included in the Equine Area to the north of Banks Road included land Calcutta Farms contended should be included in the Future Residential Policy Area it had proposed at Banks Road.

(b) Map MM2 showed the proposed Residential Zone and Residential Future Policy Area at Tower Road.

(c) Another map showed the proposed Structure Plan Areas for Matamata. Relevant to this decision are the Structure Plan Area shown at Tower Road over the proposed Residential Zone and the Structure Plan Area to the north Banks Road but to the west of the proposed Equine Area.

[17] The PC47 document is headed "District Plan Review: Plan Change 47 - Plan Your Town, [2] and it is divided into eight parts (Parts A-H). It included three appendices.

Parts A-F

[18] **Part A** is an Executive Summary. It describes PC47- Plan Your Town as "part of the review cycle for the District Plan, which the Council is required to do every ten years". The process leading up to PC47 is described as a "major review process that has been happening for the last two years". It further outlines: "Plan your Town is looking at planning standards for the three main towns in the district, including Matamata … ". It states: [3]

> "We need to ensure that we have the right amount of land zoned for people to build houses and also to accommodate new business and industrial activity. It is also important that we protect the amenity and values of the community so that we can all enjoy the opportunity to work, live and play in the Matamata-Piako District."

[19] After outlining that the review first started in 2013 with the development of the Town Strategies 2013-2033, for each town it is noted that the "Town Strategies established a framework for the plan change process, and allowed early engagement with the community and to scope out those issues which were important to the community." [4]

[20] The Executive Summary then notes (relevant to this case): [5]

> "The changes being considered are wide-ranging and affect the zoning and planning rules for Matamata … The changes include:
>
> - A review of the Residential Zones, including some new areas …
> - The introduction of Residential Policy Areas to indicate likely future urban growth areas … "

[21] The Executive Summary then identifies four important principles underpinning the development of the plan change and the outcomes that the Council hoped to achieve through the provisions. The principles relevant to this case are: [6]

> "• Ensuring that the land supply is aligned to our population projections and that an over supply is maintained; and
> • Ensuring that zoned land is in the right place, and that it can be efficiently connected to Council services."

[22] **Part B** of the PC47 document is entitled "Introduction". The scope of PC47 is outlined in section 3 of Part B. It states that PC47 " … further develops and provides a planning response to the issues that were identified in the Town Strategies document, including the integration of land use and infrastructure within the district". It also states that PC47 aims to "provide well-connected and planned towns through a review of zoning and plan provisions for Residential, Rural Residential, Industrial and Business zones". [7]

[23] Section 3.1 of Part B states that PC47 "covers a town-by-town review of the zonings (Residential, Rural-Residential, Industrial and Business)" and "also responds to the new population projections which have been released since the adoption of the Town Strategies document", which it then says, "reviews and refines the areas allocated for residential, rural-residential, business and industrial activities." As well, it states that PC47 "also assesses the need for additional land use zoning and plan mechanisms which the District Plan doesn't currently provide for, including new equine lots and policy areas for possible long-term urban growth." [8]

[24] **Part C** signals the changes PC47 will make to the District Plan and **Part D** outlines the legislative requirements.

[25] **Part E**, entitled "Review and Research Process" elaborates on the Town Strategies and the issues addressed in the Town Strategies. There is a section outlining the review and research process undertaken in relation to population projections. Part E provides a summary of the technical reports, infrastructure planning and funding, and consultation processes undertaken. As one might expect, given that this is a publicly notified document, these matters were only briefly summarised.

[26] **Part F** contains the Council's assessment of the relevant planning instruments and statutory provisions, but it is more a statement of the planning instruments and statutory provisions that the Council considers apply to PC47, rather than an assessment. There is nothing of real relevance in this part of PC47 to the scope argument.

Part G - cost/benefit analysis

[27] Part G of PC47 is the section 32 cost/benefit analysis, which includes an overview section, sections about the population projections and land supply "budgets" (i.e estimates considered necessary to meet the population projections) and a cost benefit analysis. If the appeal is found to be within scope, the population projections for Matamata will be in issue, as will the predictions about the amount of land needed for residential land use purposes for the planned period. Table 8, under section 3.1.1,[9] (dealing with Residential and Rural-Residential zones in Matamata) outlines that the proposed land budget for residential use in Matamata is to include new zoning at Tower Road (24.6ha, assuming a density of 8 dwellings per hectare) and in relation to the "Policy Area" (I infer this refers to the Future Residential Policy Area) 50ha at Tower Road is identified (again, assuming a density of 8 dwellings per hectare).

[28] Section 4 of Part G sets out the cost/benefit analysis, which relevant to this case is said to take into account the Town Strategies Reports and Recommendations, a review of existing District Plan provisions, consultation and feedback from the community and direct engagement with stakeholders.

[29] The cost/benefit analysis is presented in a series of tables. Section 4.1 is entitled "Broad Plan Change Issues and Topic Areas" and the first part of this table relates to Residential Zones and Future Residential Policy Areas, where three options are identified. The relevant part of the table, dealing with the description of the location and supply of Residential Zones and Future Residential Policy Areas is now reproduced:[10]

LOCATION AND SUPPLY OF RESIDENTIAL ZONES AND RESIDENTIAL NOTIFIED POLICY AREAS			
	Option 1 - Status Quo	Option 2 - Amendments to new Residential zoning and New Future Residential Policy Areas	Option 3 - Alternatives considered
Description	• To retain existing areas as currently zoned • No Future Residential	• New Policy for Future Residential Policy Area • New Residential	• Additional residential areas in Te Aroha and Matamata • Provision for full Residential

LOCATION AND SUPPLY OF RESIDENTIAL ZONES AND RESIDENTIAL NOTIFIED POLICY AREAS			
	Policy Areas	Zone and Structure Plan for Tower Road, Matamata … • New Future Residential Policy Area Areas in each town	zoning over proposed Future Residential Policy Areas • Alternative location and extent of Policy Areas and Residential zones

[30] After assessing the benefits, costs, effectiveness/efficiency and the risks of acting/not acting, Option 2 was identified as the preferred option. It was said to be "the most appropriate way to achieve the overall objectives of the District Plan" because "the existing residential areas are largely retained, which provides certainty to the community and assurance in terms of existing and future land use", and "the new Residential Zones and Structure Plans, as well as the new Future Residential Policy Areas, provide appropriate planning mechanisms for future residential planning and infrastructure investment." [11]

[31] The difficulty with the s 32 analysis (bearing in mind that it is not the Court's role at this point to analyse it in depth) is that the alternative options that were considered for residential areas in Matamata are not specified, neither are the additional locations said to have been considered. What this means is that, whilst the Tower Road option for Matamata was identified, there is nothing in PC47 or the s 32 analysis to identify that the Banks Road location was considered as an alternative option, even though earlier consultation documents had considered it to be the preferred location for the extension of the Residential Zone, and a Future Residential Policy Area. Furthermore, the reasons why the Tower Road option was preferred over the Banks Road option were not specifically addressed.

[32] Despite this, Mr Lang submitted that the s 32 analysis includes specific reference to the Council's consideration of the options of additional or different locations and scales of the Residential Zones and Future Residential Policy Areas for Matamata, which he said confirms that the intent of PC47 was not only to consider the locations proposed in PC47, but also potential alternative locations and the extents of the Residential Zones and Future Residential Policy Areas.

[33] Mr Lang submitted that any person reading PC47 and the s 32 analysis would have, or at least should have, appreciated that the resettlement of Residential Zones and the addition of Future Residential Policy Areas may be more extensive and/or in different locations to the new zones and policy areas included in the notified version of PC47. He submitted that the status of PC47 as a part of the District Plan review made the potential for that type of outcome even more obvious. There is force to this argument.

Submissions on PC47

Calcutta Farms' submission

[34] Calcutta Farms lodged a submission by the end of the period for lodging submissions required under Schedule 1 of the RMA. [12] Its submission was a very detailed one. It opposed the extent of the proposed additional Residential Zone land supply and Future Residential Policy Area shown on PC47's proposed planning maps MM1 - MM6. The reasons for Calcutta Farms' opposition can generally be expressed as follows:

(a) The s 32 analysis was based on population projections prepared in December 2014, which did not reflect 2016 data projections;
(b) Because the s 32 analysis was based on incorrect population projections, the assessed land budgets were incorrect;
(c) The s 32 analysis did not include sufficient detail to understand the alternative sites considered for residential-zoned land in particular;
(d) The s 32 analysis did not demonstrate that sufficient consideration had been given to the submitters' land;
(e) The s 32 analysis did not include sufficient detail to demonstrate why Option 2 prevailed over the alternatives considered (which were not detailed in any event);
(f) The s 32 analysis did not include sufficient detail to understand infrastructure costs (although it was noted that a later Infrastructure Funding paper dated 25 November 2016 had been released);
(g) Calcutta Farms owns land connected to existing residential-zoned and developed properties that is readily available for development with little cost to the Council. It contended that this land should be re-zoned Residential;
(h) Calcutta Farms contended that the addition of its land to the residential land supply would not result in an unnatural and unwarranted extension to the existing urban land use in Matamata.

[35] Calcutta Farms' submission included a Development Concept Plan proposing a 27ha Residential Zone comprising some of its land and a 126ha Future Residential Policy Area comprising its land, but also land owned by others.

Other submissions

[36] Other submitters also lodged submissions requesting site-specific residential zoning for their individual properties.

[37] Of the 60 submissions received, seven (one of which was Calcutta Farms) lodged submissions requesting that land they owned in the Banks Road area be either re-zoned Residential or included in the Future Residential Policy Area. Mr Lang submitted this was relevant, because if these submitters could recognize that they could challenge PC47, others who chose not to make a submission could also have recognized this.

[38] Dr Forret submitted however, that had the Inghams site not been within the proposed Equine Area, Inghams would not have been alerted to any potential for residential intensification in the area, as the Banks Road location was not included in PC47. I note that if this submission is correct, it must equally apply to the properties to the immediate north of Banks Road identified in Map MM1 (also depicted in Map 1 attached to this decision as Area E) also included in the then proposed Equine Area. Two of these property owners within the area now proposed by Calcutta Farms as part of the Future Residential Policy Area lodged submissions in addition to Calcutta Farms, but six did not. Calcutta Farms has since purchased one of these six properties. I acknowledge however, that there are two other property owners outside the then proposed Equine Area who are now included in the Calcutta Farms proposal and could therefore be covered by the point Dr Forret was making.

Summary of submissions

[39] As required, the Council published a summary of the submissions that had been lodged and sought further submissions. [13]

[40] The summary of submissions identified Calcutta Farms as number 48. The summary noted that Calcutta Farms sought further residential and future residential zoning on the "land between Banks Road and SH 24" in addition to the Tower Road provisions in PC47. [14]

Further submissions

[41] In accordance with the statutory process, further submissions were sought in relation to the submissions that had been lodged. [15]

[42] Calcutta Farms lodged a further submission in relation to seven submissions, including supporting parts or all of some of the submissions seeking residential zoning in the Banks Road area. Inghams, the Waikato Regional Council and NZTA also responded to the Calcutta Farms submission. There were further submissions in response to other submissions that sought similar outcomes to Calcutta Farms' submission.

[43] Mr Lang submitted that these further submissions confirm that there was not only the opportunity to anticipate and respond to submissions for residential development in the Banks Road locality, but that this opportunity was taken up.

The PC47 hearing and decision

[44] The Council considered the submissions and the further submissions, and commissioned a planner's report (referred to as "the Hearing Report") for the hearing on PC47. This was publicly released shortly before the hearing and was dated June 2017.

[45] The Council conducted a hearing in which Calcutta Farms and others participated. It issued its Hearing Decisions on 13 September 2017. [16] The Hearing Decisions dealt with the issues concerning Matamata in Section 3. [17]

[46] The Hearings Decision specifically addressed the submissions that had sought the zoning of land around Banks Road, including the area identified within the Banks Road Structure Plan. It was noted that:

(a) while the Town Strategies considered options for zoning land around the existing Banks Road Structure Plan, the Council had opted to notify the plan change with new residential areas at Tower Road, rather than at Banks Road. [18]
(b) most of the submissions proposed that the area north of Banks Road should be urbanised, however it was also acknowledged that some submissions suggested including properties to the south of Banks Road; [19]
(c) some of the submissions questioned the merit of promoting urbanizing the Tower Road area over the Banks Road area; [20]

[47] In relation to where the new residential-zoned land and Future Residential Policy Area should be in Matamata, it was decided that:

(a) a new Residential Zone would be established in the Tower Road location;
(b) a new Residential Zone of 8.24ha, covered by the Banks Road Structure Plan, would be applied to land adjoining the Calcutta Farms land at the Banks Road location in response to submissions;
(c) a Future Residential Policy Area would be applied to approximately 18ha of land in the Banks Road location, covering some of the Calcutta Farms land and partly to other land;
(d) the Future Residential Policy Area as proposed in PC47 was removed from the Tower Road location;
(e) the Equine Overlay (proposed in relation to the Banks Road location) was no longer pursued.

[48] The reasons given for introducing an additional Residential Zone to the areas covered by the Banks Road Structure Plan were:

(a) the Structure Plan anticipated this could occur through the plan change process; and
(b) the servicing of the new area could be accommodated by the existing infrastructure network; and
(c) any environmental effects would be less than minor.

[49] The reasons given for introducing a Future Residential Policy Area to the north side of Banks Road rather than Tower Road was that:

(a) it would signal that this land could be considered for future urbanisation; and
(b) a subsequent plan change process would provide a full opportunity to assess all the relevant environmental and infrastructural requirements and effects.

[50] Accordingly, the Calcutta Farms submission was accepted in part. The zoning changes were shown in Appendix 3 to the Hearing Decisions.

[51] The net result of the Council's decision was that some of Calcutta Farms land was included in the new Residential Zone and the new Future Residential Policy Area at the Banks Road location, but only a small portion of it.

Appeal to the Environment Court

[52] Calcutta Farms has appealed the Council's decision to the Environment Court. It asks the Court to include the land it sought to be covered by the Residential Zone and the Future Residential Policy Area at Banks Road in its submission as outlined in the Concept Development Plan.

[53] I attach two maps showing the extent of the land sought to be covered by the appeal (**Map 1**), and the landowners within and adjacent to the appeal area (**Map 2**). The maps also show the extent of the Residential Zone Policy Area proposed by Calcutta Farms in relation to that which was approved by the Council.

[54] In relation to Map 1, numbers 1-8 indicate landowners who did not make a submission on PC47 who would be affected by the rezoning sought by Calcutta Farms. Map 1 also includes areas identified as A-G. Mr Green helpfully prepared a table explaining these areas with reference to the zoning sought under the notified version of PC14, the zoning provided in the Decisions Version of PC14, the relief sought by Calcutta Farms in its appeal, and the Council's position on scope. This table is now reproduced:

Area	Zoning in Notified Version	Zoning in Decisions Version	Relief sought by Calcutta Farms	Council's position on scope
Area A Shaded green	Proposed Equine Overlay	Rural - except for Area E identified as Future Residential Policy Area	Future Residential Policy Area	No - with the exception of Area E
Area B Shaded Orange	Land not identified as subject to change under PC47. Remains zoned as rural	Area outside of purple outline remains zoned as Rural. Areas D rezoned as Residential	Residential Zone	No - with the exception of Areas D and F
Area C Shaded Yellow	Land not identified as subject to change under PC47. Remains zoned as Rural	Remains zoned as Rural - except Area G identified as Future Residential Policy Area	Future Residential Policy Area	No - with the exception of Area G
Area D Outlined in purple	Rural Zone	Residential Zone	Residential Zone	Yes

Area	Zoning in Notified Version	Zoning in Decisions Version	Relief sought by Calcutta Farms	Council's position on scope
Area E Outlined in blue	Proposed Equine Area Overlay	Future Residential Policy Area	Future Residential Policy Area	Yes
Area F Shaded Orange	Area not within notified area of PC47	Future Residential Policy Area	Future Residential Policy Area	Yes
Area G Outlined in blue	Area not within notified area of PC47	Future Residential Policy Area	Future Residential Policy Area	Yes

[55] Mr Green's submissions also explained,[21] in relation to the Areas A-G in Map 1, the following:

> **"Area A**
>
> Area is within the boundary of land subject to PC47 as notified to which the proposed equine overlay applied. Council agrees that the western portion of Area A, outlined in blue, should be identified as Future Residential Policy Area. This has been incorporated into the Decisions Version accordingly.
>
> **Area B**
>
> In response to submissions the Council has agreed to rezone the area outlined in purpose as residential and the area outlined in blue as Future Residential Policy Area.
>
> **Area C**
>
> This land is outside of the area subject to PC47 as notified and it has remained zoned as Rural through the PC47 process.
>
> **Area D**
>
> Area D falls within the Banks Road Structure Plan (**BRSP**) area. The BRSP was made operative in April 2009 and anticipated that Area D would be rezoned as Residential in a future plan change.[22] The Council has agreed to rezone this area as Residential in response to a submission,[23] as foreshadowed by the BRSP.
>
> **Area E**
>
> Area E is land that was identified for change in the Notified Version of PC47. To partially address relief sought in submissions by the owners of Area A, the Johnsons and Weatherleys[24] (s 274 parties to this appeal), the Council has agreed to identify this area as Future Residential Policy Area.
>
> **Area F**
>
> Area F falls outside of the notified area of PC47. To partially address the relief sought by Calcutta Farms in its submission, the Council has agreed to identify this area as Future Residential Policy Area as a consequential extension.
>
> **Area G**
>
> 3.10 In its Decisions Version, the Council has extended the Future Residential Policy Area over Area F as an incidental amendment."

The legal principles

[56] An appeal against a plan change can only occur if the person's original submission is "on" the plan change. What comprises "on" a plan change has been discussed in several High Court and Environment Court decisions.

[57] In Clearwater Resort Limited v Christchurch City Council [25] William Young J held that:

(a) a submission can only be regarded as being "on" a plan change or variation of it, if it addresses the extent to which the plan change or variation changes the pre-existing status quo; and

(b) if the effect of regarding a submission as being "on" a plan change or variation would be to permit a planning instrument to be amended without real opportunity for participation by those potentially affected, that is a powerful consideration against finding the submission to be "on" the change. [26]

[58] The following observations were also made by the Court: [27]

> " … it is common for a submission on a variation or proposed plan to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the Local Authority. It may be that the process of submissions and cross-submissions will 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. In a situation, however, where the proposition advanced by the submitter can be regarded as coming out of 'left field', there may be little or no real scope for public participation. Where this is the situation, it is appropriate to be cautious before concluding that the submission (to the extent to which it proposes something completely novel) is 'on' the variation."

[59] In Option 5 Incorporated v Marlborough District Council & Bezar [28] the High Court was again faced with determining whether a submission was "on" the plan change. In that case, the Marlborough District Council had promulgated a variation to the proposed plan (**Variation**) to re-zone parts of the Central Business District (**CBD**) as Central Business Zone.

[60] The Variation proposed better defining the use of existing land within the Central Business Zone, rather than expanding the CBD area generally, and only proposed to re-zone some vacant land owned by the Council already in the CBD.

[61] A submission was made seeking that other land be included in the Central Business Zone. The Court identified that approximately 50 private residential owners would have had the zoning of their properties changed to Central Business Zone if the submission was considered and if it succeeded.

[62] In reaching its decision that the submission was not "on" the plan change, the Court accepted that the policy behind the Variation was not to provide for the long-term expansion of the Central Business Zone as had been proposed by the submitter. Furthermore, the Court held that the requested relief was outside the purpose of the Variation, and would also have deprived approximately 50 residential property owners of the opportunity to submit on the zoning of their land holdings. The Court held that these property owners could not have anticipated that the plan change would be used for such a different form of re-zoning. Emphasis was placed on the need to take an approach based on "scale and degree". [29]

[63] The High Court next considered the issue of whether a submission was "on" a plan change in Palmerston North City Council v Motor Machinists Limited. [30] This case concerned a plan change proposed by the Palmerston North District Council which extensively reviewed the Inner Business Zone and Outer Business Zone provisions of the District Plan. The plan change proposed substantial changes to the way in which the two business zones managed

the distribution, scale and form of activity, and provided for a less concentrated form of development in the Outer Business Zone. It also proposed to re-zone 7.63ha of residentially-zoned land to Outer Business Zone. Most of that land was along a ring road. [31]

[64] Motor Machinists filed a submission contending that two lots it owned in the Residential Zone should be included in the Outer Business Zone. The Council agreed to re-zone the back half of these properties as Outer Business Zone because a factory building was situated on them, but its primary position was that there was no jurisdiction to re-zone the remainder of the two properties to Out of Business Zone under the proposed plan change. [32]

[65] The commissioners appointed by the Council to decide the plan change rejected Motor Machinists' submission. Motor Machinists then appealed to the Environment Court. The Environment Court determined that Motor Machinists had filed a submission that was "on" the proposed plan change, thereby finding that there was a valid appeal before the Court. The Council appealed that decision to the High Court.

[66] After noting that, where a landowner is dissatisfied with a regime covering their land, they have three principal choices, to seek a resource consent, to seek to persuade the Council to promulgate a plan change or to seek a private plan change themselves, the High Court noted that all three options provide procedural safeguards for directly affected people in the form of notification and a substantive assessment of the effects or merits of the proposal. [33] By way of contrast, the Court noted that the Schedule 1 submission process (applicable to plan changes) lacks those procedural and substantive safeguards, and therefore the Court considered that a very careful approach needs to be taken to the extent to which a submission may be said to satisfy both limbs of the Clearwater test. Kós J observed that: [34]

> "Permitting the public to enlarge significantly the subject matter and resources to be addressed through the Schedule 1 plan change process beyond the original ambit of the notified proposal is not an efficient way of delivering plan changes."

[67] In relation to whether a submission addresses the proposed plan change itself, Kós J noted that "the first limb in Clearwater serves as a filter, based on a direct connection between the submission and the degree of notified change proposed to the extant plan". He described this as the "dominant consideration … " involving "the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration". [35] He went on to say: [36]

> "In other words, the submission must reasonably be said to fall within the ambit of the plan change. One way of analyzing 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 (such as a particular lot) is altered by the plan change. If it is not, then the submission seeking a new management regime for that resource is unlikely to be 'on' the plan change … Incidental or consequent extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further section 32 analysis is required to inform affected person of the comparative merits of that change."

[68] The Court held, on the facts of that case, that Motor Machinists' proposed spot zoning was not within the ambit of the existing plan change as it involved more than an incidental or consequential extension of the re-zoning proposed by the plan change. [37] Kós J further held that the inclusion of a re-zoning of two isolated lots in a side street could be said

to "come from left field". [38] The appeal was therefore allowed, with the result that the Court found the Council lacked jurisdiction to consider the submission lodged by Motor Machinists, which was not "on" the proposed plan change.

[69] In Bluehaven Management Limited & Rotorua District Council v Western Bay of Plenty District Council, [39] the Environment Court expressly dealt with Kós J's observations in *Motor Machinists* about the role of the s 32 evaluation and report in determining whether a submission falls within the ambit of a plan change. The Environment Court concluded that a submission point or approach that is not expressly addressed in the Council's s 32 analysis ought not to be considered out of scope of the plan change, if it was an option that *should* have been considered in the s 32 analysis. Otherwise, the Court reasoned, a Council would be able to ignore potential options for addressing the matter that is the subject of the plan change, and prevent submitters from validly raising those options in their submissions.

[70] In Bluehaven, the Court held that the submission addressed the change to the planning regime that was promoted by the plan change, and after reviewing the s 32 evaluation report, it drew a tentative conclusion that there had been a potential failure to address some of the alternatives that should have been addressed in it. The Court held that the failure of the s 32 report to address the options raised by the submitters did not prevent their submissions from being "on" the plan change.

[71] A similar approach was taken by the Environment Court in another recent decision, that of McKenzie v Tasman District Council. [40] In this case, the appellant wanted the plan change after the prohibition on subdivisions that existed in the Rural Residential Closed Zone that applied to her land.

[72] The Court referred to the Clearwater test as it had been elaborated upon by Kós J in *Motor Machinists*. It held:

> "The first of the Clearwater tests decides that for a submission to be on a plan change, that submission must address the extent to which the plan change changes the pre-existing status quo. In considering the extent to which PC60 changes the status quo, I have had regard to the provisions of the s 32 Evaluation forming part of the plan change documents.
>
> In *Motor Machinists*, Kós J identified analysis of the s 32 Evaluation as the means of determining whether or not a submission fell within the ambit of a plan change. I recognise that it is not a test in its own right, but rather a means of analyzing the status quo issue, and that there may be other means in any given instance. In this instance, consideration of the s 32 Evaluation is of particular relevance in addressing the first test. [41] "

[73] After considering the objectives of the proposal being evaluated (a requirement of s 32(1) of the RMA), the Court specifically referred to the fact that the scope of the proposed plan change did not include the re-zoning of rural land, but that a zoning location review was expected to follow the plan change as the next phase of work. [42] The Court held therefore, after analysing various provisions of the plan change, that the appellant's submission was not "on" PC60, and for that reason she had no right of appeal.

Analysis

[74] I now address the facts of this case in accordance with the Clearwater test, as further elaborated upon in *Motor Machinists* and subsequent cases.

Does Calcutta Farms' submission address the extent to which PC47 changes the pre-existing status quo?

[75] PC47 clearly changes the pre-existing status quo to the extent that it proposes new residential zoning and a Future Residential Policy Area to ensure that sufficient zoned land is available for residential purposes in Matamata for

the next 10 years. This much is stated in the Executive Summary to PC47. Unfortunately, PC47 itself is short on discussion about the specific areas that were considered for the new Residential Zone, and the new Future Residential Policy Area in Matamata.

[76] Helpfully, the s 32 report was part of the notification of PC47. It does identify that alternative areas were considered, but the assessment of those alternatives is also short on detail.

[77] In Bluehaven, the Court provided a very thorough critique of the observations by Kós J in *Motor Machinists*[43] about the role of a s 32 analysis in assessing whether a submission is "on" a plan change. Bluehaven was a decision of the Environment Court, but it was presided over by two Environment Judges. I can do no better, and respectfully adopt, the reasoning outlined in paragraphs [34]-[38] of that decision and the conclusion at paragraph [39] which I now outline:

> "Our understanding of the assessment to be made under the first limb of the test is that it is an enquiry 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 enquiry 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."

[78] In Bluehaven, the Court held that, in the context of the facts of that case, the submission had raised matters that should have been (and, at least to some extent, were) addressed in the s 32 report. The problem in this case is that the s 32 report, whilst referring to alternatives, did not outline what those alternatives were to any great degree. It certainly did not refer to Banks Road as an area for future residential development, even though this had actively been considered and favoured as an option previously.

[79] Given the breadth of PC47 and its stated purpose to consider changes, including a review of Residential Zones (including some new areas) and introducing a new Future Residential Policy Area to indicate likely future urban growth areas, and that two of the four stated principles underpinning PC47 were to, first, ensure land supply is aligned to population projections and over-supply is maintained, and second, to ensure zoned land is in the right place and that it can be efficiently connected to Council's services, it is hard to see why the s 32 report did not provide a detailed comparison of the Banks Road and Tower Road options. This is a situation where the absence of the Banks Road options in the analysis could well be said to exclude the thorough analysis of a relevant option properly able to be considered as part of the stated purposes and principles underpinning the plan change, however without full argument on the point, this is only an observation not a finding.

[80] The Council submitted that the alternatives raised in the submissions concerning the Banks Road area were, in fact, analysed in the Hearings Report. This, however, does not assist the Council's argument because, by then, the submission period had closed.

[81] In my view, PC47 did involve changes to the management regime for residential activity and areas to be designated as future residential activity areas, so that it was open to Calcutta Farms to lodge a submission seeking an alternative position on the areas proposed in PC47 to either be Residential Zones or Future Residential Policy Areas, which is what it did. It did therefore address in its submission the extent to which PC47 changes the existing status quo.

[82] There is, however, another matter that troubles me about the Council's argument in this case. Despite maintaining that Calcutta Farms' submission was not "on" the plan change because the Banks Road option was not included in it, the Hearings Report and subsequently the Hearing Decisions adopted by the Council proceeded to provide for a new

Residential Zone in the Banks Road area, and adopted a Future Residential Policy Area in the Banks Road location rather than in the Tower Road location, as PC47 had proposed. One must ask how this new Residential Zone and new Future Residential Policy Area are within scope, but the remainder of what was sought by Calcutta Farms is not.

[83] Mr Green addressed this in his submission by referring to the size and scale of that which Calcutta Farms proposes, and that which the Council approved for the Banks Road area. Furthermore, he submitted that two out of the three land owners in this area submitted on PC47, but in the area that was not submitted on, he contended that this was an incidental change to avoid spot zoning, and therefore was permissible.

[84] Dr Forret for Inghams was also troubled by the decision of the Council hearings panel to extend the Residential Zone at Banks Road and introduce a new Future Residential Policy Area there. With reference to the s 32 Report, Dr Forret submitted that PC47 did not propose changes to the pre-existing status quo for the Banks Road area, as none of the infrastructure and/or geotechnical assessments had been prepared. Dr Forret submitted that Inghams considers that neither the decision to extend the residential zone, nor to introduce a new Future Residential Policy Area at Banks Road, was a decision on "the plan change" but she explained that Inghams had insufficient time to consider and then lodge an appeal against the decision given that it had only received notice of the Residential Zone expansion at Banks Road by way of the Calcutta Farms appeal proceedings. Dr Forret further explained that, as the Equine Area was rejected by the hearings panel in its decisions, that effectively resolved Ingham's original interest in PC47.

[85] As well as raising an issue about the scope of the hearings panel's decisions relating to Banks Road, Dr Forret compared the scale of the residential entitlement provided under PC47 as notified (24.6ha of residential zoning and 50ha of Future Residential Policy Area at Tower Road) with that proposed by Calcutta Farms (a further residential zone of 26ha and the creation of a new Future Residential Policy Area of up to 126ha at Banks Road). Her concern was that Calcutta Farms' proposal is considerably larger in size, and in a completely different area, to that which was originally proposed.

[86] In response, Mr Lang submitted that, while these areas are larger than those proposed, they are not such that they could be considered inconsistent with the intent and purpose of PC47. He submitted that PC47 is intended to review and recast the provision for immediate residential development, and to introduce a new method for identifying intended future residential zones by adopting the Future Residential Policy Area approach.

[87] Whilst the scale and degree of a proposal can assist in determining whether a submission is "on a plan change", I do not read the *Option 5* decision as indicating that it is determinative. Much will depend on the nature of the plan change which can assist to determine its scope, (whether it is a review or a variation for example) and what the purpose of it is. In this case, the purpose of the plan change is to review the future need for residential areas in Matamata, and to identify areas next to urban areas where future residential activity is proposed to occur. The method by which the latter is proposed to occur in PC47 is by the application of the Future Residential Policy Area notation. Underpinning the need for the size and scale of both new Residential Zones and the Future Residential Policy Area are the population predictions, which Calcutta Farms' submission directly sought to challenge. I agree with Mr Lang that the District Plan review process should be such that differing views on the appropriate scale of such policy areas can be considered, rather than assuming that the Council's nominated scale of policy areas represents the uppermost limit for future planning. I therefore agree with Mr Lang that the difference and scale and degree of what is proposed by Calcutta Farms is a matter going to the merits of the submission rather than to its validity.

[88] For the above reasons, I consider that Calcutta Farms' submission does address the extent to which PC47 changes the existing status quo.

Does the submission permit the planning instrument to be appreciably amended without real opportunity for participation by those potentially affected?

[89] I have carefully considered this limb of the Clearwater test, because the submissions from the Council and Inghams were that the extent of the relief sought by Calcutta Farms would mean that other, potentially interested, people (including landowners directly affected by the re-zoning or the Future Residential Policy Area) would not have been alerted to this possibility, and therefore did not have the opportunity to oppose Calcutta Farms' proposal. Mr Lang's submission was that this, in fact, had occurred, and other submitters had made submissions about these matters in relation to Banks Road, and further submissions had also addressed the issue. He referred to Inghams who, while not making a submission, had managed to identify and made a further submission about Calcutta Farm's proposal.

[90] The maps (particularly Map 2). assist here. Map 2 shows that none of these people are affected by Calcutta Farms' proposed changes to the Residential Zone, but all own land within Calcutta Farms' proposed extension to the Future Residential Policy Area. Map 2 depicts a land owner (Number 20) who did not make a submission, but I was advised that this land has now been purchased by Calcutta Farms.

[91] The proposal for future residential development at Matamata was raised as an issue for the community to be consulted upon well prior to PC47 being notified. As the letter of 24 July 2015 referred to above reveals, the Council received considerable feedback from the community on, among other things, the zoning options that were under consideration. The Banks Road option for future residential development was clearly in the public arena, and was the preferred option up till mid-June 2016. Even though PC47 as notified preferred the Tower Road option and applied an Equine Area over part of the land which then became the subject of Calcutta Farms' submission, I do not agree that the eight landowners directly affected who chose not to make a submission would necessarily have assumed that PC47, as notified, was the last word on the topic.

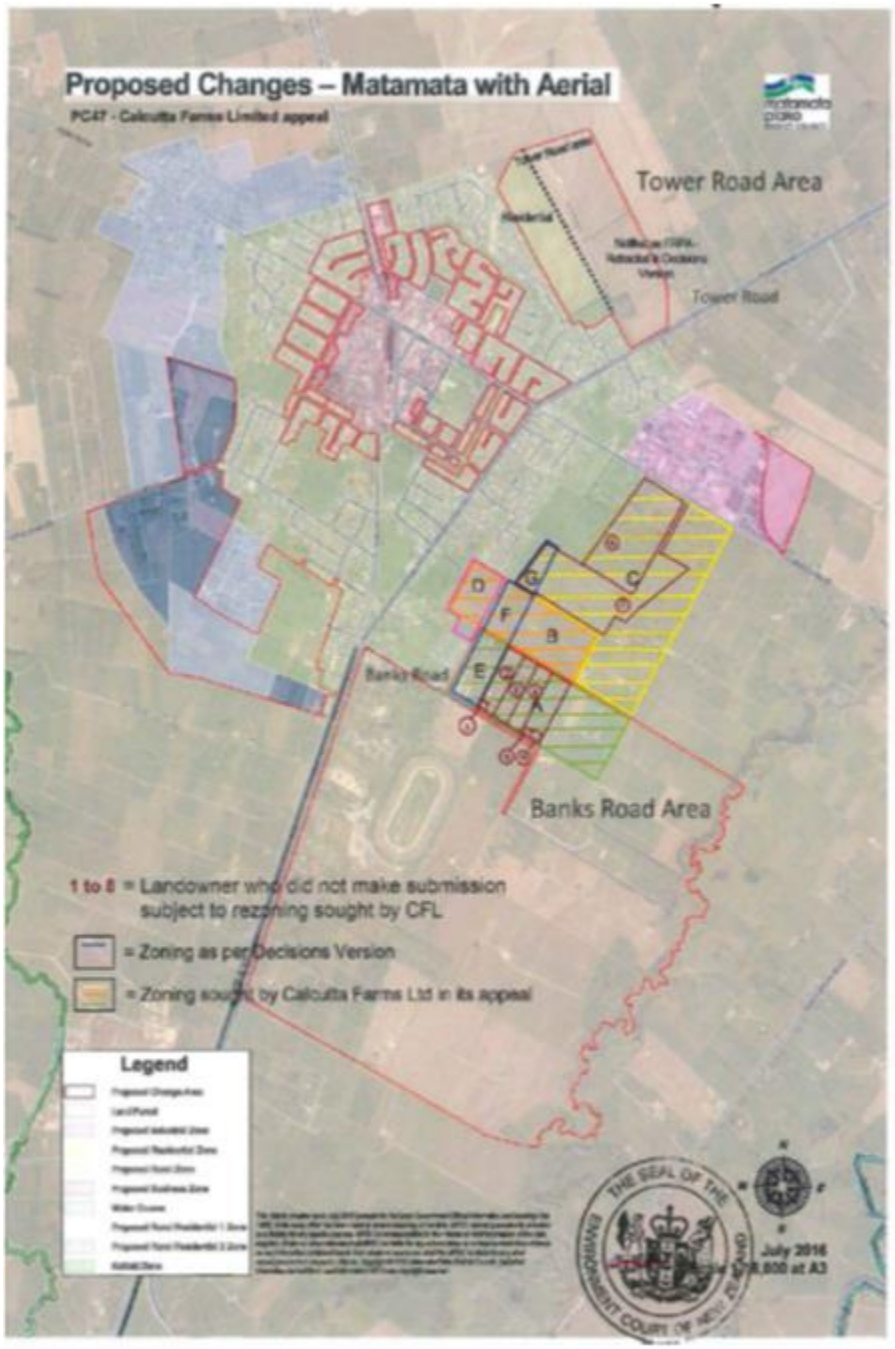
[92] When considering these matters in the round, I am of the view that any prejudice is only likely to occur if those who may have submitted wish to oppose Calcutta Farms' position. Given that there are only a few parties directly affected, their position is likely to be met by the Council and Ingham's case opposing the appeal, and if they are willing to do so, they may be called as witness to support either the Council or Ingham's cases.

[93] I am satisfied that there is no risk that a potentially affected party would not have the opportunity to participate if I found the submission to be “on” the plan change. This is not a situation akin to the *Option 5* position, where there were a large number of people potentially affected, who would not have had an opportunity to be heard. Nor is it akin to the *Motor Machinists* case where what was proposed was considered by the Court to “come from left field”. [44]

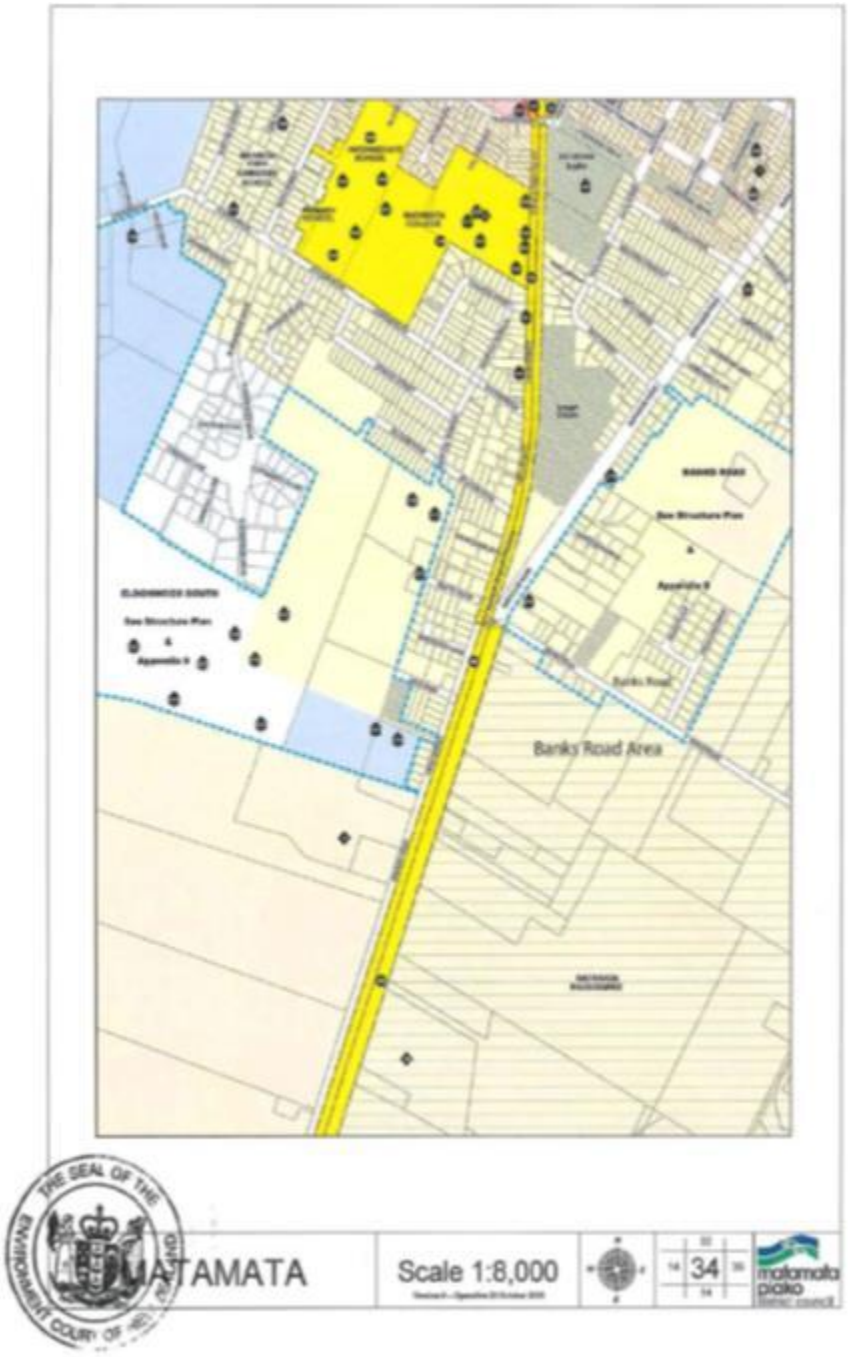
Conclusion

[94] I note that there is a real issue to be determined in this case, particularly in relation to the population predictions that underpin the land budget allocations for the Residential zoned areas and Future Residential Policy Areas in Matamata. I find that the submission by Calcutta Farms is “on” the plan change. The issues about whether its proposal ought to be allowed and if so, to what degree are matters for the substantive hearing.

Map 1


Proposed Changes – Matamata with Aerial
PC47 - Calcutta Farms Limited appeal
Tower Road Area
Tower Road
Banks Road
Banks Road Area
1 to 8 = Landowner who did not make submission subject to rezoning sought by CFL
= Zoning as per Decisions Version
= Zoning sought by Calcutta Farms Ltd in its appeal
Legend
July 2016

Map 2


Banks Road Area
MATAMATA
Scale 1:8,000
34
matamata piako



All Citations

[2018] NZEnvC 187, [2018] ELHNZ 275, 2018 WL 4794125

Footnotes

1 Counsel for the Council's submissions Tab F

2 Counsel for the appellant's submissions Tab C

3 At page 5.
4 At page 5
5 At page 5.
6 Counsel for the appellant's submissions Tab C pages 5-6
7 At page10
8 At page 10
9 At page 53.
10 At page 61
11 At page 63
12 Counsel for the appellant's submissions, Tab D.
13 Counsel for the appellant's submissions, Tab E.
14 Tab E, page 15
15 Counsel for the appellant's submissions, Tab G
16 Counsel for the appellant's submissions, Tab HI10.
17 Page 26.
18 Counsel for the appellant's submissions, Tab I page 26
19 Page 28
20 Page 28.
21 At paragraphs [3.4]-[3.10].
22 See area shaded pink identified as possible future residential (subject to separate plan change) on the Banks Road Structure Plan Map
23 KR Simpson & KR Simpson Family Trust - Submitter number 41
24 Submitter number 16
25 HC Christchurch, William Young J, 14/3/2003.
26 At [66].
27 At [69].
28 HC Blenheim, Ronald Young J, 28/9/2009.
29 See paragraphs [42] and [43].
30 HC, Palmerston North, Kos J, 31 May 2013.
31 At paragraph [10].
32 At paragraph [16].
33 At paragraph [78].
34 At paragraph [79].
35 At paragraph [80].
36 At paragraph [81].
37 At paragraph [86].
38 At paragraph [89].
39 [2016] NZEnvC 191, Environment Court, 30/9/2016, Judge JA Smith and Judge DA Kirkpatrick.
40 [2017] NZEnvC 136, Judge B Dwyer.
41 *Motor Machinists*, paragraph [13]
42 At paragraph [16]
43 HC, Palmerston North, Kos J, 31 May 2013.
44 At paragraph [89].

[2018] ELHNZ 275, 2018 WL 4794125

End of Document

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