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Hearing Topic 8B - Genetically Modified Organisms

INTRODUCTION

1. You seek legal advice as to whether the Hearing Commissioners appointed to determine submissions on the Waikato Proposed District Plan (Stage 1) ("PDP") have jurisdiction to consider the submission points relating to genetically modified organisms ("GMO"). Essentially, all of the submission points request that an objective, policy and rule framework be included in the PDP restricting the use and release of GMO's into the environment ("the GMO Submissions").

2. The notified PDP does not make any provision for GMO's in the Waikato district.

EXECUTIVE SUMMARY

3. In order for the Hearing Commissioners to amend the PDP to grant the relief sought in the GMO Submissions, those submissions must first be "on" the notified PDP.

4. Recent case law has highlighted the significant differences in scope considerations between a plan change/variation and a plan review/replacement plan. On a full plan review, almost anything is "on" the proposed plan.

5. In the context of the PDP, scope issues are not straight forward. While the PDP started life as a full district plan review under section 79(4) of the Resource Management Act 1999 ("RMA"), it changed to a partial review of the Operative Waikato District Plan ("ODP") under section 79(1) of the RMA prior to notification. To complicate matters, the public notification for the PDP referred to it being a full review of the ODP.

6. Therefore, the first issue that arises is whether for the purposes of determining scope questions, the partial review should be treated like a plan change (following a 2019 Court decision) or a full district plan review/replacement plan.

7. Our legal submissions dated 23 September 2019 presented at the opening hearing of the PDP on 30 September 2019 ("Opening Legal Submissions") submitted that it was more

appropriate in the circumstances of this case to treat the PDP akin to a full district plan review rather than a narrower plan change.

8. As we do not know what approach the Hearing Commissioners will adopt, it is necessary to consider the GMO scope considerations under both scenarios – on the one hand, if the PDP is treated as a plan change (stricter rules of scope apply) and, on the other hand, if the PDP is treated as a full district plan review (a broader approach can be taken).

9. If the Hearing Commissioners determine to treat the PDP as a plan change it is our view that the GMO Submissions are not "on" the PDP. In that circumstance, the Commissioners do not have jurisdiction to consider the GMO Submissions or further submissions.

10. If the Hearing Commissioners determine to treat the PDP as a full district plan review, it is our view that the GMO Submissions are "on" the PDP. As such, the Commissioners have jurisdiction to consider the submissions and further submissions. It does not however follow that the "in scope" GMO Submissions should be accepted (either in full or in part). They must be considered on their merits in the usual course and the relief sought in the submissions (new plan provisions) must be evaluated against the requirements of section 32AA.

11. As the Commissioners are very unlikely to make a determination on scope at the commencement of Hearing Topic 8B (i.e. before hearing the evidence), it will be necessary for the section 42A report writer for that topic to proceed on the basis that the GMO Submissions are within scope of the PDP and thus make a recommendation in respect of both the GMO Submissions and related further submissions.

THE LEGAL ISSUES

The scope issue

12. The right to make a submission on the PDP is conferred by clause 6 of Schedule 1 to the RMA which provides that once notified, any person may make a submission "on" the PDP.

13. If the GMO Submissions are not "on" the PDP, the Hearing Commissioners do not have jurisdiction to amend the PDP to grant the relief sought in the GMO Submissions.

14. The critical test is therefore whether the relief sought in the GMO Submissions is "on" the PDP as publicly notified.

The scope tests applicable to a plan change vs a full plan review

15. Our Opening Legal Submissions identified the difference in scope considerations between plan changes and variations on the one hand, and a full district plan review on the other:

> [120] …This difference was acknowledged by the High Court in the *Albany North Landowners* decision[1] when Whata J stated:
>
> > [129] Returning to the present case, the Auckland Unitary Plan planning process is far removed from the relatively discrete variations or plan changes under examination in *Clearwater*; *Option 5* and *Motor Machinists*. The notified PAUP encompassed the entire

[1] *Albany North Landowners v Auckland Council* [2017] NZHC 138, Whata J

> Auckland region…and purported and set the frame for resource management of the region for the next 30 years. **Presumptively, ever aspect of the status quo in planning terms was addressed by the PAUP…The scope for a coherent submission being "on" the PAUP in the sense used [in *Clearwater*] was therefore very wide.**
>
> (Our emphasis added)

[121] The difference in scope considerations between a plan change and a replacement plan was also identified by the Environment Court in *Tussock Rise Limited v Queenstown Lakes District Council*, where it stated:[2]

> "There appears to be a large difference between the strict rules of engagement prescribed by the High Court for submissions on plan changes and the much looser rules for submissions on new (replacement) plans. Much of that difference can be understood in the context of specific plan changes. For example, if a local authority wishes to change a rule in a plan, submissions on the operative objectives and policies would be beyond jurisdiction as not "on" the plan change. **In contrast, on new plans almost everything may be open to challenge as in *Albany North***, although the strategic issues I have identified do then often arise."
>
> (Our emphasis added)

16. As explained in our Opening Legal Submissions,[3] while Council had originally resolved to commence a full review of the ODP under section 79(4) of the RMA, that resolution was revoked in 2018 in favour of undertaking a rolling review (or partial review) of the ODP pursuant to section 79(1) to (3) of the RMA. At that point, the district plan review was divided into two stages – Stage 1 and Stage 2 (being the natural hazards and climate change topics).

17. Accordingly, in our Opening Legal Submissions we raised the issue of whether, for the purpose of determining questions of scope, a partial review should be treated like a plan change or a full district plan review/replacement plan (where almost anything is "on" the plan)[4]. That issue arose because in the 2019 *Tussock Rise* decision, the Environment Court said the Queenstown Lakes District Council's Stage 1 Proposed District Plan under section 79(1) was effectively a plan change to the Operative District Plan[5].

18. We submitted[6] that, for the purpose of determining scope issues on the PDP, it is appropriate to treat the PDP akin to a full district plan review, rather than a narrower plan change in the traditional sense[7]. The reasons for this approach were because the public notification for Stage 1 of the PDP expressly referred to a "full review" of the ODP, and Stage 1 of PDP contains the majority of the provisions (Stage 2 is limited to only two chapters).

19. We acknowledge however that the Hearing Commissioners may follow the *Tussock Rise* decision and treat Stage 1 of the PDP as a plan change for the purpose of determining scope

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[2] *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111 at [62]
[3] Opening Legal Submissions by Counsel for Waikato District Council dated 23 September 2019, paragraphs 11 and 13
[4] Opening Legal Submissions, paragraph 122
[5] Opening Legal Submissions, paragraph 123
[6] Paragraphs 124-128
[7] We identified that that the exception to this approach may relate to rezoning requests.

considerations. If that is the case, the legal tests for determining whether the GMO Submissions are "on" the PDP are significantly more strict.

20. In the circumstances, it is necessary to consider the GMO scope considerations under both scenarios:

    (a) In the event the Hearing Commissioners decide to treat Stage 1 of the PDP as a plan change; and

    (b) In the event the Hearing Commissioners decide to treat Stage 1 of the PDP as a full district plan review.

21. We address both scenarios below.

ANALYSIS OF SCOPE – IF PDP IS TREATED AS A PLAN CHANGE

22. This section considers whether the GMO Submissions are "on" the PDP in the event the PDP is treated as a plan change.

The legal principles

23. The applicable legal principles are comprehensively set out in our Opening Legal Submissions. In order to apply those legal principles to the GMO Submissions, it is convenient to set them out, in summary here.

24. The leading authority on whether a submission is "on" the relevant plan is the High Court decision in *Clearwater Resort Ltd v Christchurch City Council*[8]. It set out a two limb test[9]:

    (a) Whether the submission addresses the changes to the pre-existing status quo advanced by the plan change (PDP); and

    (b) Whether there is a real risk that people affected by the plan change (PDP) (if modified in response to a submission), would be denied an effective opportunity to participate in the plan change process.

25. A submission can only be said to be "on" the PDP if both the above limbs are met.

First limb of *Clearwater* test in context of PDP being a plan change

26. The *Clearwater* test was applied by Kos J in *Palmerston North City Council v Motor Machinists*[10]. He said the first limb, whether the submission addresses the proposed plan change itself, involves two aspects:

    (a) First, the degree of alteration to the status quo proposed by the notified plan change[11]; and

    (b) Secondly, whether the submission addressed that alteration.[12]

[8] AP34/02, 14 March 2003, Young J
[9] At paragraph [66]
[10] [2013] NZHC 1290
[11] Paragraph [80]
[12] Paragraph [81]

27. In terms of the first aspect, the PDP does not propose any changes to the status quo regarding GMO's. The ODP does not address GMO's and neither does the PDP. Both plans are silent on the management of GMO's. Accordingly, the GMO Submissions cannot address the degree or alteration to the status quo proposed by the PDP as the PDP does not seek any such alteration.

28. The High Court in *Motor Machinists* set out two further tests for determining whether a submission meets the first limb of *Clearwater*[13]*:*

    (a) If a submission does not raise matters that should have been addressed in the section 32 evaluation and report, then it is unlikely to be within the ambit of the plan change;

    (b) If the submission seeks a new management regime in a district plan for a particular resource, it must be in response to a plan change that alters the management regime.

29. Turning to the first test posed by *Motor Machinists*, the relevant section 32 report on the PDP does not address the issue of GMO's in any way whatsoever. The section 32 report is completely silent on the issue of GMO's.

30. On the face of it, the absence of GMO's in the section 32 report would tend to suggest that the first limb of *Clearwater* may not be met in relation to the GMO Submissions. However, the Environment Court in *Bluehaven Management Limited v Western Bay of Plenty District Council*[14] did not regard the inclusion or exclusion of matters in the section 32 report as determinative as to whether a submission is reasonably within the plan change. It stated:

    > [39] 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 s32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s32 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 within robust, notified and informed public participation.

31. In reliance on the Environment Court decision in *Motiti Rohe Moana Trust v Bay of Plenty Regional Council*[15] which is discussed further on, if it is a district council's function to address a certain matter (such as GMO's in its district plan) and doing so addresses matters in a higher order planning instrument, such as the RPS, and Council has not made provision for that matter in its district plan, then the submission seeking the inclusion of that matter (in this case GMO's) are likely to be "on" the plan. Based on the case law on GMO's discussed in the section 42A hearing report, it is arguable that district councils do have at least some power to regulate the use and control of GMO's in a district plan under section 31. However, both the Waikato Regional Policy Statement and the Waikato Regional Plan are silent on the issue of GMO's.

[13] Paragraph [81]
[14] [2016] NZEnvC 191, Smith J and Kirkpatrick J (sitting together)
[15] [2016] NZEnvC 120

32. Given the issue of whether the section 32 report "should" have addressed matters raised in the GMO Submissions is just one consideration among many in determining scope, we do not consider it is determinative of our final view on scope.

33. The second test raised in *Motor Machinists* relating to a new management regime for a particular resource, is directly relevant to the GMO Submissions.

34. The GMO Submissions clearly seek to introduce a new management regime to control GMO's in the Waikato district. However, Kos J said such a submission must be in response to a plan change that alters the management plan. As discussed above, the PDP does not seek to alter the management regime for GMO's between the ODP and the PDP. Rather, the PDP simply seeks to <u>retain</u> the existing status quo of not making any provision for GMO's in the district plan.

35. The GMO Submissions do not meet the second test indicated by Kos J in *Motor Machinists* because the PDP does not involve any changes to the management regime for GMO's. On that basis, it is not open for the submitters to lodge submissions seeking a new management regime.

36. The *Bluehaven* decision applied the second test in *Motor Machinists*. The decision concerned an appeal against plan change 72 ("PC72") to the operative Waikato Bay of Plenty District Plan. PC72 related to the Rangiruru Business Park which contained approximately 150 hectares of land.

37. In its notice of appeal, the Rotorua Lakes District Council ("RDC") sought to include a new rule imposing a maximum gross floor area for office and retail activities in the Community Service Area. The respondent argued RDC's submission and the relief sought in its notice of appeal was not on PC72.

38. The Environment Court held it was at least arguable that PC72 involved changes to the management regime for commercial activity in the Business Park and therefore it was open to RDC (and another appellant) to lodge submissions seeking a new management regime (being a limit on the GFA).[16]

39. Recently, the High Court has applied the second test in *Motor Machinists* in two decisions. The first decision, in 2017, was *Turners & Growers Ltd v Far North District Council*[17]. This concerned an appeal against Plan Change 15 ("PC15") which sought, amongst other matters, to change the *Keeping of Animals* rule to increase the boundary setback for factory farming and boarding kennels from 50 metres to 300 metres (except in sensitive zones where a larger setback was required).

40. The appellant lodged a submission seeking a radical extension to the reach of the *Keeping of Animals* rule by changing its name to *Potentially Incompatible Activities* and extending its scope from factory farming, boarding kennels and catteries to any non-rural industrial or commercial activity. The High Court stated:

> [247] Turners & Growers' submission to Council regarding setbacks appears to fail both limbs of the *Clearwater* test. The change to their relevant status quo concerning the "Keeping of Animals" rule proposed by Council in PC15…was to increase the normal setback for factory farming and boarding

[16] *Bluehaven Management Limited v Western Bay of Plenty District Council* [2016] NZEnvC 191, paragraph [60]
[17] [2017] NZHC 764

> kennels in the…Zone from 50 metres to 300 metres. The proposed change would affect only a limited class of persons, those having an interest in factory farming or boarding kennels…
>
> [25] If Council had adopted these changes, anyone wishing to engage in non-rural industrial or commercial activities would be directly affected…. These parties could well have chosen not to make a submission…having concluded that it would not affect them.

41. While the High Court accepted that the Turners & Growers' submission regarding setbacks was not "on" PC15, the Court was not required to make a definitive finding concerning it because the issue had not been raised in the Notice of Appeal by the second respondent.

42. The second recent High Court decision to apply the second test in *Motor Machinists* was the 2018 decision in *Mackenzie v Tasman District Council*[18]. This concerned an appeal against Plan Change 60 ("PC60") which made changes to the rural zones. Under the operative district plan, subdivision of the appellant's property was prohibited. PC16 did not seek any changes to the status quo of the appellant's land. The appellant lodged a submission which effectively sought to remove the prohibited status from her land.

43. The Environment Court concluded that the management of the appellant's land was not altered by PC60 and that her submission sought a new management regime for that resource[19]. The High Court held the Environment Court correctly applied the second method suggested by Kos J.

44. These cases demonstrate that if the Hearing Commissioners determine to treat the PDP akin to a plan change for scope considerations, the GMO Submissions fail the second test in *Motor Machinists*.

45. Returning to the first limb of the *Clearwater* test, the Environment Court in the *Bluehaven* decision suggested, in that context, that one might also ask whether the submission under consideration seeks to substantially alter or add to the relevant objective(s) of the plan change, or whether it only proposes an alternative policy or method to achieve any relevant objective in a way that is not radically different from what could be contemplated as resulting from the notified plan change[20]. The Court went on to state:

> [37] …The principles established by the decisions of the High Court discussed above would suggest that submissions seeking some major alteration to the objectives of a proposed plan change would likely not be "on" that proposal, while alterations to policies and methods within the framework of the objectives may be within the scope of the proposal.

46. In the case of the GMO Submissions on the PDP (which for the purposes of this section is treated as a plan change), the GMO Submissions do not simply seek to alter objectives, policies or methods of the notified PDP. Rather they seek to introduce a completely new objective, policy and rule framework into the PDP to address an issue that was not addressed in either the notified PDP or the relevant section 32 report. We conclude the GMO Submissions fail the first limb of the *Clearwater* test.

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[18] [2018] NZHC 2304
[19] Paragraph 103
[20] Paragraph [37]

Second limb of *Clearwater* test in context of a PDP being a plan change

47. The second limb in *Clearwater* concerns procedural fairness. It is whether there is a real risk that persons directly or potentially affected by the additional changes proposed in the submission have been declined an opportunity to respond to those proposed changes[21].

48. Given neither the section 32 report or notified PDP addressed the issue of GMO's whatsoever, affected person's participatory rights are dependant on seeing the submission or summary of submissions and appreciating the significance of the change from those documents.

49. There were 561 further submission points lodged on the GMO Submissions, 60 in support and 501 in opposition. The large number indicates that at least some interested parties have seen the GMO Submissions. However, we cannot guarantee that all affected persons have done so. The relief sought in the GMO Submissions are not merely incidental or consequential changes to the notified PDP. Rather, the relief sought may be regarded as coming out of left field for many persons. There is no guarantee that all persons directly or potentially affected by the relief sought will already be involved in the PDP process as submitters.

50. At the end of the day, no one reading the PDP (in the nature of a plan change) would have contemplated any change to the notified PDP to include an entirely new management regime for GMO's.

51. As a matter of caution, we conclude the GMO Submissions fail the second limb of the *Clearwater* test. However, the second test is of no consequence to the outcome because the GMO Submissions also fail the first limb of *Clearwater*, in the context of a plan change.

Conclusion on scope – plan change

52. If the Hearing Commissioners follow the Environment Court's approach in the recent *Tussock Rise* decision and treat the PDP as a plan change, not a full district plan review, then the GMO Submissions are not "on" the PDP. In that circumstance the Commissioners do not have jurisdiction to consider the submissions.

ANALYSIS OF SCOPE – IF PDP IS TREATED AS A FULL PLAN REVIEW

53. This section considers whether the GMO Submissions are "on" the PDP in the event the PDP is treated as a full district plan, not a plan change.

54. We have found only three decisions[22] concerning issues of scope on a full district plan review. This includes the 2017 High Court decision in *Albany North*. However, the central issue in that case was whether the recommendations made by the Independent Hearings Panel ("IHP") on the PAUP where within scope of the submissions (i.e. whether the recommended changes to the PAUP were fairly and reasonably raised in submissions as per the *Countdown* test).

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[21] Paragraph [83]

[22] *Albany North Landowners v Auckland Council* [2016] NZHC 138, *Tussock Rise Limited v Queenstown Lakes District Council* [2019] NZEnvC 111, and *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 190

55. *Albany North* did not concern whether certain submissions were "on" the PAUP[23]. This is because the hearings on the PAUP were governed by the Local Government (Auckland Transitional Provisions) Act 2010 which expressly provided that the IHP is not limited to making recommendations only within the scope of the submissions made on the proposed plan[24].

56. The out of scope parties to the appeal in *Albany North* argued that the two step *Clearwater* test as applied in *Motor Machinists* provided the better frame for scope, not the *Countdown* test. The High Court therefore analysed the *Clearwater* and *Motor Machinists* decisions and noted the difference between variation/plan changes and a full plan review. As mentioned in paragraph 7 above, it said presumptively, every aspect of the status quo in planning terms was addressed by the PAUP as it set the frame for resource management of the region for the next 30 years.

57. The Environment Court in *Tussock Rise* referred to *Albany North* and said "on new plans almost anything may be open to challenge".[25]

58. Furthermore, in our Opening Legal Submissions we submitted that the first limb of the *Clearwater* test is arguably of limited relevance to a plan review because the notified PDP will not always change the status quo. This is because under section 79, Council must, even after reviewing operative provisions and deciding they do not need altering, notify them as part of the PDP. Therefore, there may be no change to the status quo on a review. This was the case here when Council decided to make no changes to the status quo in relation to GMO's. It retained the status quo by not making any provision for GMO's in the PDP.

59. The view that a proposed plan will not always change the status quo is consistent with the Environment Court's observations in *Bluehaven*:

> [40] The context of a review of an entire planning instrument is likely to mean that not only the methods but even the objectives could be open to challenge by way of submissions, **because the review would not be considered within any existing framework of operative plan provisions**.
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> (Our emphasis added)

60. Significantly, the High Court in *Albany North* also departed from the *Motor Machinists* section 32 test in the context of a full district plan review, as the dicta was specifically directed to plan changes. Whata J stated:

> [130] Furthermore, I do not accept that a submission on the PAUP is likely to be out of scope if the relief raised in the submission was not specifically addressed in the original s32 report. I respectfully doubt that Kós J contemplated that his comments about s32 applied to preclude departure from the outcomes favoured by the s32 report in the context of a full district plan review. Indeed, Kós J's observations were clearly context specific, that is relating to a plan change and the extent to which a submission might extend the areal reach of a plan change in an unanticipated way. A s32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.

[23] Paragraph [121]
[24] Paragraph [93]
[25] See paragraph 7 of this letter above.

> [131] By contrast a s32 report is, **in the context of a full district plan review**, simply a relevant consideration among many in weighing whether a submission is first "on" the PAUP and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.
>
> (Our emphasis added)

61. Accordingly, it cannot be said, even on a full district plan, that the changes proposed in the GMO Submissions are out of scope simply because they were not specifically subject to the original section 32 evaluation.

62. The Environment Court in the *Motiti*[26] decision provides the most useful commentary in the context of a full district plan. This decision was issued by the same composition of the Court in *Bluehaven* and on the same day as that decision[27].

63. The *Motiti* decision concerned an application by the Bay of Plenty Regional Council to strike out the appeal by the appellant on the basis that, amongst other matters, the relief raised in the submissions and that now raised in the appeal was not "on" the Proposed Regional Coastal Environmental Plan ("Coastal Plan").

64. The Court noted that none of the case law presented to it on scope addressed the distinction between a plan change/variation and a full plan review:

> [28] There was a great deal of submission made to the Court about the case law applying to whether various submissions or appeal were "on" variations or plan changes. The distinction between a plan change/variation and a full plan review has not been addressed in any of the cases which were put to this Court. We think it is important to analyse the distinction between a full plan review and a plan change/variation to understand how the issues discussed in the cases concerning a provision being "on" plan change and variation come to the fore.

65. We did not find any case law addressing the issue of scope on a full district plan review which predated the *Motiti* decision.

66. Having reviewed the various statutory provisions relating to a full plan review and a plan change, the Court concluded:

> [34] The distinctions between the types of alteration to a plan represent significant differences in approach to the application of Schedule 1, particularly the submission process. For current purposes it is clear that the Regional Coastal Environmental Plan **is intended to replace the operative Coastal Environmental Plan in due course…it constitutes a review of the entire plan**, and is intended to **provide a comprehensive framework to meet the Council's obligations in respect of the coastal environment**.
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> (Our emphasis added)

67. By contrast, in respect of a plan change or variation, the Court stated:

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[26] *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 190

[27] J Smith and J Kirkpatrick. The decision was issued on 30 September 2016, some five months before the *Albany North* decision on 13 February 2017.

> [35] The issue in respect of a change or variation is that it may deal with a substantially narrower range of issues and not meet all of the obligations of the authority under the Resource Management Act.

68. The Court accepted that *Motor Machinists* represents a clear statement of an analysis which must occur where there is a plan change or variation dealing with a narrower range of issues in respect of Council's obligations. However, it took a broader approach to scope in the context of a full district plan review. It stated:

> [43] …Nevertheless, where the Council is fulfilling its statutory functions under s30 and ss66 and 67 of the Act, it must be open to a party to argue that the Council has failed to meet any of those obligations, or that these could be better met by altering the provisions of the plan.

69. The Court was satisfied that the Trust's submission seeking a marine spatial plan was within the framework of the Coastal Plan dealing with issues raised in both the regional policy statement and the New Zealand Coastal Policy Statement as well as addressing matters under Part 2 of the Act. It concluded that the submission was within the scope of the plan review[28].

70. As there was no case law authority at that time on the broad approach adopted by the Court in the context of a plan review (the decision pre-dated *Albany North*), and accepting that the *Motor Machinists* approach may also be appropriate for reviews, it went on to consider the *Motor Machinists* tests.

Application of Motiti principles to GMO Submissions

71. Applying *Motiti* to the p0resent case, if managing the effects of GMO's in its district falls within Waikato District Council's function under section 31, deals with any matters in any higher order planning instruments, such as the Waikato Regional Policy Statement, and addresses Part 2 matters, the GMO Submissions seeking to control or restrict GMO's are likely to be "on" the PDP.

72. The section 42A planning report for Topic 8B analyses the Court decisions which have considered whether provision should be made for GMO's in plans under the RMA.

73. We agree with the section 42A report author's view that it is arguable that district councils do have some power to regulate the use and control of GMO's in a district plan. However, neither the Waikato Regional Policy Statement or regional plan direct district councils to manage the effects of GMO's in their district plans. Despite that absence however, it is relatively easy to conclude GMO's do address matters under Part 2 – promote the sustainable management of natural resources (nearby land and crops) while protecting those resources from the adverse effects from GMO's.

74. Accordingly, in the context of a full district plan review which is intended to provide a comprehensive framework to meet the Council's obligations (with the exception of natural hazards and climate change) in respect of the appropriate management of the district's natural resources, it is open to the GMO's Submitters to argue that GMO's should be addressed in the district plan.

[28] Paragraph [45]

Conclusion on first limb of *Clearwater* test

75. Having regard to all of the case law principles, we consider that the GMO Submissions meet the first limb of the *Clearwater* test, in the context of a full plan review because:

    (a) In a district plan review, almost anything is "on" the plan review. Hence a broader approach is required compared to a narrower plan change.

    (b) On a full plan review, the notified PDP will not always change the status quo.

    (c) The issue of whether there should be controls on GMO's, in the context of a replacement plan, is arguably a matter within a district council's function under the RMA and raises Part 2 matters. Therefore the issue should have been addressed in the section 32 report(s).

    (d) On a full review, it is open to a party to submit a different approach is more appropriate in the plan.

Second Limb of *Clearwater* Test

76. As discussed above, there can be no guarantee that all persons directly or potentially affected by the GMO Submissions have had an opportunity to participate in the submission process. However the Courts in *Motiti* and *Albany North* tend to suggest that public participation in the context of a full plan review is of a lesser standard, or more limited, than a narrower plan change.

77. By way of example, the Court in *Motiti* accepted that on plan reviews there can be a wide range of potential submissions, and the notification only of a summary of those issues reflects a "limited intent for public participation".[29] The Court also noted that a number of parties made submissions seeking marine spatial plans and several further submissions were made on the Trust's submission.[30]

78. Similarly, the High Court in *Albany North,* in addressing the second limb of the *Clearwater* test, said in the context of a plan review as significant as the PAUP, a reasonable level of diligence is to be expected by landowners genuinely interested in preserving the status quo, whether at a site specific or more general neighbourhood or zone level.[31]

79. In that case, some submitters complained that interested landowners would not have been put on notice of changes affecting them because of search for submissions on a particular address, street or neighbourhood would not have triggered notification of certain submissions.

80. However, the High Court did not accept that was the standard of enquiry to be expected of a potentially affected landowner on matters as significant as 30 year provision for urban growth and residential amenity. The Court said it was not necessary to be precise about the standard required but said it must be reasonable in the context of the planning process and the issue under consideration.

[29] Paragraph [47]
[30] Paragraph [47]
[31] Paragraph [172]

81. The Court did however express a preference for employing a test based on what might be expected of a reasonable person in the community at large genuinely interested in the implications of the PAUP for him or her.[32]

82. In our view, the fact there were 561 further submission points (mostly in opposition) on the GMO Submissions indicates that persons have read the submissions and taken an interest. In this case, 501 further submission points seek to preserve the status quo in the notified PDP not to make any provision for GMO's.

83. We consider on balance, that the GMO Submissions meet the second limb of the *Clearwater* test, if the PDP is treated as a full plan review.

Conclusion on Scope – Full Plan Review

84. If the Hearing Commissioners depart from the Environment Court's approach in *Tussock Rise* and treat the PDP as a full plan review (which was indicated in the public notice), then we consider the GMO Submissions are "on" the PDP. As such, the Commissioners have jurisdiction to consider the submissions. Of course, it does not follow that the GMO Submissions should be accepted. They must be considered on their merits in the usual course.

CONCLUSION

85. Recent case law has highlighted the significant difference in scope between a plan change and a full plan review.

86. If the Hearing Commissioners determine to treat the partial review of the PDP as a plan change, we consider the GMO Submissions are <u>not</u> "on" the PDP.

87. However, if the Commissioners determine to deal with the PDP as a full plan review, we consider the GMO Submissions are "on" the PDP.

Yours faithfully
TOMPKINS WAKE

Bridget Parham
Partner

[32] Paragraph [176]