

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of hearing submissions and
further submissions on the
Proposed Waikato District Plan

AND

IN THE MATTER of Proposed Rezoning Requests
Hearings

MINUTE AND DIRECTIONS FROM HEARING COMMISSIONERS

5 March 2021

Introduction

1. On 4 March 2021, we received a Memorandum from Mr Peter Fuller, legal counsel for Pokeno West Limited, CSL Trust and Top End Properties, all of whom are submitters on the proposed Waikato District Plan ("**proposed plan**"). More specifically, Mr Fuller's clients are parties that will be appearing at Hearing 25, at which various requests for rezonings will be heard.
2. In short, Mr Fuller's memorandum raises concerns about the Waikato District Council's ("**WDC**" or "**council**") section 42A Framework Report, dated 19 January 2021, which is posted on the council's website under the "Hearing 25 - Rezoning" tab. Mr Fuller's memorandum is also posted under that same tab.
3. If any party has difficulty accessing either the Framework Report or Mr Fuller's memorandum, they should contact the Hearings Administrator, Mr Fletcher Bell – see paragraph 12 below for his contact details.
4. We briefly canvas below the matters raised by Mr Fuller and conclude by issuing some specific Directions in that regard.

Mr Fuller's Memorandum

5. It is not necessary for us to canvas Mr Fuller's memorandum in great detail, because, as noted above, it is available for reading on the council's website. For context though, the following

excerpts are intended to identify the issues he has raised and the process he has proposed moving forward:

Introduction

1. This Memorandum is to bring to the Panel's attention legal and planning procedural issues with the Council's s 42A Framework Report (**Report**). As the Panel will be aware, this Report was intended to standardize subsequent area specific s 42A reports, the assessment of zoning relief, and the structuring and content of evidence. In summary, the main concern is that the focus in the Report on Lens 1 is inappropriate and is not the correct statutory test for the Panel's assessment.
2. Lens 1 could be better described as an "integration test" for horizontal and vertical consistency in the Plan. While such a check is appropriate, it should be a final internal check and is subservient to the relevant statutory assessments. The lens that best aligns with the statutory tests is Lens 2.
3. The reason that this matter is being brought to the attention of the Panel is to avoid zoning applications, that would otherwise meet the Purpose of the Act, from being rejected for a failure to meet the Lens 1 "tests". This outcome is a risk in the area specific s 42 report recommendations.
4. A further concern is to avoid the repetition and duplication of material that the 3 Lens approach requires.
5. For the avoidance of doubt, this Memorandum does not comment on any of the recommendations in the Report on factual or merit issues, such as projected housing demand and growth capacities. The concerns raised are procedural and legal and it is submitted that early resolution of these issues will clarify the proper basis for the assessment of zoning relief and will assist to focus the evidence for the Hearings.
6. Resolution before the Hearing will also free the Panel to concentrate on the merits of zoning relief sought, rather than on procedural/structural/legal and planning issues, regarding the Report itself.

Background

7. The suggestion of a Framework s 42A Report was made by the Council and endorsed by the Panel in its' 12 May 2020 Direction (par 9 & 10). There is no issue with the preparation of a Framework Report, however it is important to note that the Panel had not endorsed the 3 Lens methodology. The intention of the Panel was to ensure a consistent approach addressing the relevant statutory matters (planning and legal) and avoid unnecessary repetition.
8. Regrettably, it is submitted that the intention of the Panel has not been achieved in the Report. The Executive Summary of the Report stated that:

The framework includes a three-lens method for s42A authors to employ when assessing and making recommendations on zoning submissions. The first lens is an analysis of the proposal against the intent of the PWDP (the intent being indicated through relevant objectives and policies). The second lens is an analysis for consistency against higher order policy documents. The third lens is an assessment of the extent to which the submission meets good planning practice approaches to zoning. Based on the assessment of the submission against the three-lens process, the individual s42A author can then make a recommendation to the panel. (par 6)

9. The application of the Lenses is to be applied as a "hierarchy" as indicated on the flow chart on page 15, with Lens 1: Assessment of Relevant Objectives and Policies in the PWDP as the first test to be satisfied before proceeding to Lens 2 and then Lens 3.

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Way Forward – Further Directions

34. It is respectfully requested that the Panel addresses concerns with the 3 Lens approach in the Report as soon as convenient. Mainly this is to ensure that the

Council's own area specific s 42 A reports refer to the correct legal tests and minimize the repetition of similar assessment material. Submitters would also benefit from Panel guidance for their future rounds of evidence.

35. I have broadly discussed the content of this Memorandum with some other counsel and no doubt they will express their views if provided with an opportunity by the Panel.
36. Regarding a possible process moving forward, it is suggested that:
 - (a) The Panel invite the Council and other submitters to comment on this Memorandum and provide feedback regarding whether they consider there is an issue with the 3 Lens approach that would benefit from Panel direction.
 - (b) If so, comments/legal submissions could be sought from the Council and submitters regarding the issue and suggesting directions that would address the issue.
 - (c) The Panel convenes a short Zoom Pre-hearing Conference to hear from submitters and for the Panel to ask any questions it may have of the Council and submitter representatives.
 - (d) The Panel issues Directions clarifying the role, if any, that the Lens 1 test/assessment is to play in the s 42A area specific reports and evidence moving forward.
 - (e) The Panel affirms what is the appropriate legal/planning approach to the assessment of zone change submissions in the s 42A area report recommendations.
37. It is respectfully submitted that the legal tests for district plan making are now well established and will ultimately prevail, subject to reform of the Act and further case law. It is also appropriate to recognize that submitters are largely free to present their legal submissions and evidence as they see fit (assuming it meets the tests of relevance etc.). Therefore, it could be argued that there is no need to address the 3 Lens approach mandated by the Report.
38. However, the purpose of the Report is to provide an internal framework for consistency in the s 42A area specific reports. If for example, as is recommended in the Report, a zone change should be declined because it is allegedly "inconsistent" with the proposed plan, that would be applying the wrong legal test. Therefore, if not addressed now, there is a risk that the area specific s 42A report recommendations will be of limited assistance to the Panel and submitters.
39. Counsel is happy to assist the Panel further, and participate in a Pre-Hearing Conference, regarding the issues raised in this Memorandum.

6. The Hearings Panel agrees with Mr Fuller that a pre-hearing conference to canvas issues regarding the Framework Report should be convened as quickly as possible. Doing so now will enable the area specific Hearings to focus on the substance of the various zoning / rezoning proposals, rather than on the approach taken in the Framework Report and the various section 42A reports.
7. We therefore issue the following Directions.

Directions

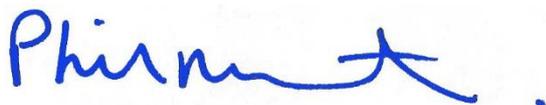
8. The Hearings Administrator is to:
 - a. Provide these Directions to all parties who have lodged submissions and / or further submissions that will be addressed in Hearing 25;
 - b. Post these Directions and Mr Fuller's memorandum on the council website; and
 - c. Provide all parties who have lodged submissions and / or further submissions that will be addressed in Hearing 25 with a link that will access these Directions and Mr Fuller's memorandum.
9. By no later than 5pm on Tuesday 9 March 2021, any party who has lodged a submission and / or further submissions that will be addressed in Hearing 25 may, if they wish, file a short memorandum with the Hearings Administrator (no more than 4 pages long) that succinctly addresses whether the procedure set out in the Framework Report and, in particular compliance with Lens1, should be generally adhered to, and, if not, the reasons why. To the extent possible, parties who are expressing similar views are encouraged to file joint memoranda.
10. A pre-hearing conference will be held, via Zoom, at **9:30 am on Friday 12 March 2021**, to discuss the memoranda filed in accordance with paragraph 9 above with their authors. Participation in the pre-hearing conference will be confined to those parties who have filed memoranda by the due date.
11. The Hearings Panel will then proceed to issue any Directions considered necessary.

Questions from Parties

12. Any questions regarding these Directions are to be addressed to the Hearings Administrator, Mr Fletcher Bell. His contact details are as follows:

Email Districtplan@waidc.govt.nz

Telephone 027 214 8052



P H Mitchell (Chair)

For the Hearings Panel

5 March 2021