Before Greater Wellington Regional Council

Under	the Resource Management Act 1991
In the matter of	the Proposed Natural Resources Plan for the Wellington Region
And	
In the matter of	Submissions (S135) and Further Submissions (FS25) by **Wellington Water Limited**

LEGAL SUBMISSIONS FOR WELLINGTON WATER LIMITED

IN RESPONSE TO MINUTE 45

14 June 2018

M J Slyfield
Barrister
Stout Street Chambers
Wellington

Telephone: (04) 915 9277
Facsimile: (04) 472 9029
PO Box: 117, Wellington 6140
Email: morgan.slyfield@stoutstreet.co.nz

iNTRODUCTION

1. The Hearings Panel, by Minute 45, has requested legal submissions whether there is an issue as to scope arising from one of Wellington Water Limited's submissions.

2. The relevant submission formed part of Wellington Water's written submission S135, dated 25 September 2015. The submission in its entirety is as follows:

> **[Relevant Provision]**
>
> Map 27b: Groundwater community drinking watter supply protection areas – Hutt Valley (incorporates Schedule M2)
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> **My submission on this provision is:**
>
> Amend
>
> **Reasons for my submission:**
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> Since most of the water supplied to the Lower Hutt Valley Aquifer comes from the Hutt River, contamination anywhere in the Hutt River Catchment could conceivably contaminate the Waterloo wellfield. The Hutt Park wells (R27/1144-1149) are shown on this map. They are no longer used for community drinking water. The Gear island wells are not shown on this map. They are used from community drinking water. To protect the Wawhetu aquifer resource, the groundwater supply protection area in the Hutt Valley, shown on May 27b should be extended to include all the valley floor to the foreshore of Wellington Harbour.
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> **I seek the following from WRC (give precise details):**
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> Extend the Lower Hutt Groundwater Protection zone to cover the Hutt Catchment upstream of the infiltration zone. Delete Hutt Park Wells and insert Gear Island Wells. Extend the groundwater supply protection area to include all the valley floor to the foreshore of Wellington Harbour.

3. As Minute 45 records, Mr Williams produced a map at Hearing 6 depicting the extensions sought to the groundwater protection zone. The Panel was left unclear whether the extensions depicted on the map were "an obvious outcome of the narrative description of the relief sought in the submission", and accordingly have requested that this submission address, "whether there is a legal issue as to scope".

4. Further, the Panel has requested that this submission, "identify whether there are any other submissions or further submissions that would give rise to other parties being involved in this exercise".

THE TESTS IN RELATION TO SCOPE

5. The tests in relation to scope are not the same for a full review of a plan as they are for a plan change or variation.

6. Leading cases on scope in plan changes and variations examine: [1]

   (a) the extent to which the plan change or variation proposes to alter the status quo, and the degree to which the submission addresses that alteration;

   (b) whether potentially affected parties might be denied a real opportunity to participate.

   In respect of the latter, the focus is often on the analysis that was, or should,[2] have been contained within the s 32 evaluation. If the matters raised by submission were not addressed (or should not have been addressed) in the s 32 evaluation they may be unlikely to fall within the ambit of the change.

7. By comparison, in the context of a full review of a plan, the relevant test remains that laid down by a full bench of the High Court in *Countdown Properties (Northland) Ltd v Dunedin City Council*:[3] the local authority must consider whether any amendment goes beyond what is reasonably and fairly raised in submissions.

8. In *Royal Forest & Bird Protection Society Inc v Southland District Council,* the High Court held that the assessment whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[4]

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[1] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003; *Palmerston North City Council v Motor Machinists* [2013] NZHC 1290, [2014] NZRMA 519.
[2] While Kos J in *Motor Machinists,* above n 1, focused on the actual contents of the s 32 evaluation, the Environment Court has expressed reservations on elevating this to a jurisdictional threshold, preferring to cast the question in terms of what 'should' have been in the s 32 analysis, so as to avoid a deficient s 32 analysis from undermining a properly participatory and robust process thereafter. See *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 at [34]-[40].
[3] *Countdown Properties (Northland) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).
[4] *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 408 (HC) at 413.

9. That these principles are to apply when assessing scope on a full plan review was recently confirmed by the High Court in appeals concerning the Proposed Auckland Unitary Plan, *Albany North Landowners v Auckland Council.*[5] The Court summarised the approach taken in key plan change/variation cases — *Clearwater*,[6] *Motor Machinists*[7] and *Option 5 Inc v Marlborough District Council*[8] — but observed that the PAUP process was far removed from the relatively discrete processes under examination in those cases, saying:[9]

> The notified PAUP encompassed the entire Auckland region (except the Hauraki Gulf) and purported to set the frame for resource management of the region for the next 30 years. Presumptively, every aspect of the status quo in planning terms was addressed by the PAUP.

10. The Court went on to downplay the significance of s 32 reporting for the assessment of scope on a full plan review:

> Kos J's observations [in *Motor Machinists*[10]] 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 s 32 evaluation in that context assumes greater significance, because it helps define the intended extent of the change from the status quo.
>
> By contrast a s 32 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.

11. It is submitted that the approach taken in *Albany North Landowners* is the correct approach to be taken here. The paramount question is whether the amendment is reasonably and fairly raised in the submission, which is to be assessed in a realistic workable fashion, not from the perspective of legal nicety. While it remains an important matter to protect affected persons from "submissional side winds", that must be considered alongside the equally important consideration of enabling people and communities to

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[5] *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115]-[134]. Notably, although the PAUP was subject to its own legislative process (in addition to RMA provisions) the Court concluded from its examination of the relevant provisions that the differences neither enhanced nor diminished the policy of public participation, and the orthodox common law principles enunciated in *Countdown Properties* and subsequent cases, applied.

[6] Above n 1.

[7] Above n 1.

[8] *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1.

[9] At [129].

[10] Above n 1.

use the submisison process to provide for their wellbing, in the context of a full scale plan review.[11]

12. Further it is submitted that what is reasonably and fairly raised by a submission should not be confused with the notion of hypothesising what a 'reasonable' person, potentially affected, would have taken from the submission. The Court in *Countdown* emphasised that adopting the standpoint of the "informed and reasonable owner" should not be elevated to a test in its own right, preferring to express as the paramount test, whether the amendment is reasonably and fairly raised in submissions on the plan change. This, it said:[12]

> will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions. The danger of substituting a test which relies solely upon the Court endeavouring to ascertain the mind or appreciation of a hypothetical person is illustrated by the argument recorded in a decision of the Tribunal in *Meadow Mushrooms Ltd v Selwyn District Council & Canterbury Regional Council* (C.A.71/93, 1 October 1993). The Tribunal was asked to decide whether it was either "plausible" or "certain" that a person would have appreciated the ambit of submissions and consequently the need to lodge a submission in support or opposition. We believe such articulations are unhelpful and that the local authority or Tribunal must make a decision based upon its own view of the extent of the submissions and whether the amendments come fairly and reasonably within them.

13. It may also assist the Panel to draw comparisons between the present situation and the situation considered by the Environment Court in *Motiti Rohe Moana Trust v Bay of Plenty Regional Council.*[13] That case involved a full review of a regional coastal plan, and called for an assessment whether matters raised on appeal by the Trust were within scope. The Trust had filed a notice of appeal substantially identical to its original submission, but the Council argued that the original submission had itself been beyond scope (despite the Council having heard and determined matters on the basis that the submission was within scope). The Court evaluated the content of the submission and concluded:[14]

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[11] *Albany North Landowners* above n 5 at [133].
[12] Above n 3, at 172.
[13] *Motiti Rohe Moana Trust v Bay of Plenty Regional Council* [2016] NZEnvC 190.
[14] At [27]. NB. It is submitted that the Court's reference to a "reasonable person" ought to be read against the guidance provided in *Clearwater*, which does not seem to have been brought to the Court's attention.

> any reasonable person reading these provisions would immediately ascertain that the Trust had an interest in the waters, reefs, toka, and islands and other features around and including Motiti, and that it sought to maintain various forms of control — particularly to protect the fisheries, flora and fauna of that area and cultural matters including Taonga, Exact places where varioius controls were sought is not set out, but it is intended to reflect a spatial planning regime.

14. The Court went on to assess whether the lack of precision defeated the submisison in terms of scope. It was ultimately able to differentiate between subject matter within scope and without:[15]

> [the submission] was sufficiently specific to identify that there could potentially be…
>
> > areas of restriction for cultural and natural environment reasons;
> >
> > areas of control including over spatial areas and fishery areas; and
> >
> > issues of co-management and cultural constraints, including upon land-based coastal areas.
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> However, there is nothing in the submission as filed that would suggest that the area of effect of the plan was to be wider than that notified. In other words, any landward areas not included within the regional plan were not raised as specific issues in the Trust's submission.
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> Overall, we have concluded that not only was the submission dealing with issues required to be dealt with under the Act in the review of the Regional Coastal Plan, but was sufficiently specific to alert members of the public to the potential outcomes sought — including potentially controlling parts of Motiti Island and the area around it for protection, management and aquaculture activities. However there was nothing in the submission which sought to affect the area inland of the coastline of Motiti Island itself.

APPLICATION OF THE LEGAL TESTS TO WELLINGTON WATER'S SUBMISSION

15. The notifed Plan proposed a protection zone, depicted on Map 27b. Wellington Water's submission applied to Map 27b.

16. Wellington Water's submission specified that the relevant concern was that "contamination anywhere in the Hutt River Catchment could conceivably contaminate the Waterloo wellfield".

17. The reason for this concern was also described by reference to the relationship between water in the river and water in the aquifer: "most of the water supplied to the Lower Hutt Valley Aquifer comes from the Hutt River".

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[15] At [50]-[52].

18. The submission explicitly sought to extend the Protection Zone "to cover the Hutt Catchment upstream of the infiltration zone".

19. No doubt a plan or diagram could have depicted the area over which the extension was sought, but that does not signify that the words themselves were somehow an inadequate basis for the relief that Wellington Water seeks. Any person reading the submission, or even GWRC's summary of the subission — which repeated the entirety of the relief sought — must have been aware that Wellington Water was seeking that the protection zone be extended. Indisputably, extension of the protection zone is a matter that the submission fairly and reasonably raised.

20. Had the submisison remained silent about the area of the proposed extension, there might be greater doubt about the scope of the submission. But the submisison did not remain silent. It incorporated words to directly describe the area of the proposed extension: *the Hutt Catchment upstream of the infiltration zone*. It did so in the context of having identified that the issue of concern was contamination of the aquifer from ***anywhere*** *in the Hutt River Catchment*. (Emphasis added.)

21. It is submitted that these words fairly and reasonably describe the area of the extension as has been further described in Mr Williams' evidence; and that Mr Williams has done no more than identify in additional words and images the extent of the area described in the written submission. Significantly, a river catchment is a common and well-understood concept in water management, and refers to an objectively ascertainable area. By referring to the catchment itself (and the concern for contamination anywhere in that catchment) Wellington Water was employing a common and well-understood concept to succinctly identify the outer limits of the extension. It matters not whether this was understood by Council officers (or any other person): it is simply the product of examining what the language itself reasonably and fairly raised.

22. Likewise, the submission's use of the term "upstream" cannot reasonably be said to lack clarity or specificity, as the term is likely to be well understood even from a lay perspective.

23. The third element of the description is the reference to "the infiltration zone". It is accepted that this may not be as susceptible to common understanding as the references to "upstream" and "catchment", yet the meaning of infiltration zone in this specific context — ie where the relationship beween water in the aquifer and water in the river has been explicitly raised — can be readily inferred.

24. Read as a whole, Wellington Water's submission on Map 27b is neither imprecise nor unclear. The language used may not be equally clear to all people, but the intent to extend the protection zone and Wellington Water's expression of concern for contaminants *anywhere* within the catchment of the Hutt River are plain on the ordinary meaning of the words used. Even if the reference to "infiltration zone" may have left some readers in doubt, such doubt is not due to imprecision in the language, but due to the language — in common with much of the vocabulary in common use in Resource Management — being of a relatively specialised nature. "Infiltration zone" may be a specialist term, yet it does not seem to be a term that in this context would support more than one meaning, as a common understanding of the recharge relationship between the river and the aquifer is evident in the evidence of Mr Williams, the assessments prepared by GWRC, and the assessments prepared by GNS. For example:

    (a) GWRC's July 2015 report *Conjunctive water management recommendations for the Hutt Valley* describes in section 5.4 the recharge of the aquifer by the Hutt River, identifying that the river generally loses water to aquifers between Taita Gorge and Boulcott/Kennedy Good Bridge;

    (b) Mr Williams' evidence at [22] described the primary 'recharge zone' for the aquifer as being the Hutt River approximately between Taita Gorge and Kennedy Good Bridge;

    (c) The GNS April 2015 report *Capture zone delineation of community supply wells and State of the Environment monitoring wells in the Greater Wellington Region* explicitly

acknowledges at 5.1 that much of the flow entering the model for Hutt Valley enters along the upper reaches of the Hutt River;

(d) The GNS December 2017 report *Groundwater protection zones for community drinking water supply wells in the Wellington Region* states at 4.2 that the main recharge source area for the Waiwhetu Aquifer is from the Hutt River.

25. In comparison with the *Motiti* decision, the element of Wellington Water's present relief that gives rise to the Panel's query about scope was plainly raised in Wellington Water's original submission.

26. Further, in the context of a full plan review, where the notified version of the plan proposed a specific protection zone, it was open to submissions to seek an enlargement of that area within the geographical confines of the Region.

27. It follows from this analysis that the relief sought by Wellington Water is within the Panel's jurisdiction to grant; subject of course to the Panel's assessment of the merits of that matter, as may be influenced by the additional expert conferences that the Panel has directed to occur.

OTHER PARTIES

28. The Panel has requested that this submission, "identify whether there are any other submissions or further submissions that would give rise to other parties being involved in this exercise".

29. If the Panel were to accept that the extension described in Mr Williams' evidence was fairly and reasonably raised in Wellington Water's submission, then the corollary is that the only parties who might somehow be involved in the present processes would be those who have expressed an interest in this subject matter either through a further submisison on Wellington Water's submission, a submission of their own, or a further submission on another party's submisison.

30. Attached to this submission is a table derived from the online submissions database. It identifies every party who made a submission in relation to Map 27b, and every party who made a further submisison on one of those submissions.[16]

31. A number of observations can be made.

32. First, no party filed a further submission in response to Wellington Water's submission to extend the groundwater protection zone.

33. Second, there are 65 identical submissions that relate to the application of Rule R83 to certain animal effluent discharges within the groundwater protection zone. To the extent that these 65 submitters have an interest in the application of the groundwater protection zone, that interest is already expressed through their submissions. Whether the zone is extended, as sought by Wellington Water, would not have any impact on the subject matter in which they are interested, and there is accordingly no reason for them to be involved in the present exercise.

34. Third, the other 7 submitters or further submitters not described above all express an interest, one way or another, in the extent of the groundwater protection zone as depicted on Map 27b. In this group are:

    (a) Horticulture NZ

    (b) Regional Public Health

    (c) Federated Farmers of New Zealand

    (d) Carterton District Council

    (e) Fish and Game

    (f) South Wairarapa District Council, and

    (g) Masterton District Council.

[16] Note: further submissions are shown in the table directly beneath the original submission to which they relate.

35. It is submitted that these 7 submitters have a direct interest in the outcome of Wellington Water's submission. While none of them filed further submissions in response to Wellington Water's submission, it may be that this is because their interest in the subject matter was already raised through their other submission documents.

36. It would be appropriate for the invitation to participate in technical and planning conferencing (as described in Minute 45) to be extended to these parties.

37. If the Panel were to adopt that submission, then consideration may need to be given to whether the timeframes set in Minute 45 remain appropriate, to enable meaningful participation between a significantly enlarged number of parties.

M J Slyfield
14 June 2018