BEFORE THE RANGITIKEI DISTRICT COUNCIL

IN THE MATTER OF	the Resource Management Act 1991
AND	
IN THE MATTER	of a proposed plan change to the Rangitikei District Plan at 1091, 1151 and 1165 State Highway 1 Marton

LEGAL COMMENT

Dated: 17 June 2020

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INTRODUCTION

[1] The purpose of these legal submissions is to address the Independent Hearing Commissioner on relevant legal considerations for plan changes under the Resource Management Act 1991 (**RMA**) with a focus on addressing the legal framework in respect of matters raised submissions and Mr Carlyon's s 42A Report.

[2] As a guide for the Independent Hearing Commissioner, these submissions do not provide an evaluative assessment of the proposed plan change (**PPC**) in respect of the relevant tests.

[3] These submissions address the following issues:

(a) **The information issue**: broadly speaking, this issue relates to submissions that suggest a lack of evidence to substantiate demand for industrial land and query the adequacy of the assessment of effects.

(b) **The scope issue:** this issue addresses the jurisdiction of the Commissioner to reduce the scale of the PPC by directing that the rezoning apply over a reduced land area or to otherwise modify the proposal in response to submissions.

CONTEXT AND EVOLUTION OF PROPOSAL

[4] The objective of the PPC is to *"enable new investment in industrial activities in Marton by providing additional land within the industrial zone."*[1]

[5] The PPC proposes to rezone 216.6ha of land from Rural to Industrial. This requires amendment to zoning maps in the District Plan so that the operative

[1] Proposed District Plan Change Report for rezoning 1165, 1151, 1091 State Highway 1, Marton', August 2019, at page 4.

Industrial Zone provisions will apply to that land. The PPC does not propose changes to the operative objectives, policies, or rules of the District Plan.

[6] The s 32 evaluation report,[2] notified alongside the PPC, considered four reasonably practicable options (including the proposed option) for achieving the objectives of the proposal.[3] The options included: to rezone as proposed; to do nothing and keep the land zoned Rural; to reduce the area for rezoning to 100ha; or to add site specific bespoke provisions to the Industrial Chapter. The s 32 evaluation report preferred the option of rezoning with existing industrial provisions, for reasons given in the report.

[7] Eighteen submissions were received on the PPC. Some of the submissions opposed the PPC on the basis that the size of the area to be rezoned Industrial was inappropriate for Marton[4] and that site-specific rules should be added to the Industrial Chapter to protect against inappropriate development.

[8] Other submitters have expressed detailed criticism at the level of detail and technical analysis underpinning the PPC.[5] Submissions on the 'information issue' generally posit that there is a lack of evidence to substantiate demand for industrial land to justify rezoning 217 ha and that the assessment of effects with respect to traffic amenity, noise, dust, traffic safety odour and smoke is inadequate.

[9] Mr Carlyon is the Council's Reporting officer, adopting the role around the time of the PPC being notified. Mr Carlyon has prepared a s 42A report and a supplementary report, both before the Commissioner. Mr Carlyon has

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[2]Ms. S. Goble Proposed District Plan Change Report for rezoning 1165, 1151, 1091 State Highway 1, Marton', August 2019.

[3] As required by s 32(1)(b) of the Resource Management Act 1991.

[4] For example, Submitter 4 (David M. Dean, Joy Bowra-Dean) said that the "area for rezoning is inappropriate relative to the population of Marton." Submitter 12 (Ms. F. Wallace representing the Interested Residents of Marton and the Rangitikei) raised concerns that the "proposal to rezone approximately 217ha of land is significant and appears out of step with the previous planning direction of council."

[5] For example, the criticisms expressed in Mr Thomas' planning assessment.

responsibly acknowledged criticisms levied in various submissions, at one stage describing the PPC as "plagued with incomplete information".[6]

[10] In responding to what he acknowledged as incomplete information, Mr Carlyon himself addressed a different version of the options earlier identified in the s 32 report. Mr Carlyon presented five of his own recommended options (complete with accompanying is 32AA assessment) including:

(a) rezone;

(b) refuse because of insufficient information;

(c) approve with amendment to provide for industrial activity as noncomplying;

(d) approve rezoning with several changes including deferral overlay with severe restrictions on industrial development until such time as an deferral overlay is removed;

(e) rezone, but reduce the spatial scale to 40 ha.

[11] Mr Carlyon recommends option four ((d) above) as the most appropriate option to achieve the purpose of the RMA.

[12] Typical of a healthy participatory process under schedule one of the RMA, Mr Carlyon attended further meetings and discussions with submitters to gain a better understanding of their concerns and whether there might be opportunity to address concerns within the ambit of the PPC.

[13] In that context, Mr Carlyon's supplementary evidence provides a detailed list of issues heard from submitters, with yet further planning recommendations arising from those issues. It may be appropriate to describe the recommendation in the supplementary evidence as an evolution or hybrid version of Mr Carlyon's options four and five, which Mr Carlyon will explain.

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[6] Section 42A Report of Mr Greg Carlyon at [155].

[14] It is apparent from Mr Carlyon's s 42A report and supplementary report that the process of recommending planning provisions in conjunction with the rezoning proposal has been iterative, and responsive to the evaluative matters under s 32 RMA. The additional options in the s 42A report are provided as a direct response to his Mr Carlyon's acknowledgement of submitters concerns about information deficits that accompanied the original proposal.

[15] The Commissioner's consideration of these submissions must not therefore be limited to a comparison of available information in respect of the initial proposal in the s 32 report. It must also compare the available information with respect to the additional options (and the effects of those options) recommended over the course of this process.

[16] As stated prior, the additional options have been specifically proposed by Mr Carlyon for the purposes of assuaging concerns about the deficit of information by mitigating and insulating the effects of implementing the plan change (if one of the additional options are adopted) or delaying the resultant effects until such time that the desired information is available.

[17] While certainly the iterative response such as the recommendation before the commissioner not a model approach for a plan change or a reliable substitute for robust technical assessment, the Schedule 1 Plan Change Process, and ss 32 – 32AA recognise and allow for the evolution of the s 32 evaluation over the course of the hearing process.

Statutory Framework

[18] Sections 74 and 75 of the RMA set out the requirements for the Council in preparing the PPC. The PPC should be designed to accord with the Council's functions under section 31 and the provisions of Part 2.[7] When preparing the

[7] RMA, s 74(1).

PPC, Council must give effect to any national policy statement, New Zealand Coastal Policy Statement and the One Plan Regional Policy Statement.[8]

[19] Council must also have regard to any relevant management plans and strategies under other Acts, and to any relevant entry in the Historic Places Register and to various fisheries regulations, and to consistency with plans and proposed plans of adjacent territorial authorities.[9] Council must take into account any relevant planning document recognised by and every authority and must not have regard to trade competition.[10]

[20] The PPC must state its objectives, the policies to implement the objectives and rules (if any) to implement the policies.[11] In respect of the requirements for objectives, policies and rules in a plan change, the Courts have listed a 'relatively comprehensive summary of the mandatory requirements':[12]

(a) Each proposed objective in the PPC must be evaluated by the extent to which it is the most appropriate way to achieve the purpose of the Act.

(b) The policies are to implement the objectives, and the rules (if any) are to implement the policies.

(c) The provisions of the proposal are to be examined and quantified if practicable, assessing their efficiency and effectiveness against reasonably practicable options for achieving the objective, taking into account:

(i) The benefits and costs of the environmental, economic, social and cultural effects anticipated from the

[8] RMA, s 75(3).
[9] RMA, s 74(2).
[10] RMA s 74(2A) and (74(3).
[11] RMA, s 75(1).
[12] *Long Bay-Okura Great Park Inc v North Shore CC* EnvC A078/08 (updated by *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387) and amended by *Colonial Vineyards Ltd v Marlborough DC* [2014] NZEnvC 55.

provisions, including economic growth and employment; and

(ii) The risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the policies, rules, or methods.

(d) In the making a rule the territorial authority must have regard to the actual or potential effect of activities on the environment.

[21] In examining whether the provisions of the proposal are the most appropriate way to achieve the objectives, the assessment must identify and assess the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions.[13] This includes, if practicable, quantifying the benefits and costs and assessing the risk of acting or not acting if there is insufficient or uncertain information about the subject matter of the provisions.[14]

[22] The 'most appropriate' method does not need to be the superior method. The Court has held that 'appropriate' means suitable.[15] Although each objective must be examined during the evaluation, it is not necessary that each objective individually be the most appropriate way of achieving the purpose of the Act. Objectives may interrelate and have overlapping ways of achieving sustainable management of natural and physical resources.[16] A "holistic" approach should be taken rather than a more focused, vertical or "silo" approach to objectives, policies and methods.[17]

Comment

[23] The submissions raise concerns as to the industrial demand for the proposal and the effects of the proposal should it be implemented.

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[13] RMA, s 32(2).
[14] RMA, s 32(2).
[15] *Rational Transport Soc Inc v New Zealand Transport Agency* [2012] NZRMA 298 (HC) at [45].
[16] As above, at [46].
[17] *Art Deco Soc (Auckland) Inc v Auckland Council* [2012] NZRMA 451, at [108].

[24] The s 42A report and supplementary evidence of Mr Carlyon has added to the list of options reasonably available to the Commissioner. The additional options given consideration by Mr Carlyon propose to manage the acknowledged information deficits by mitigating the effects of the PPC. The option ultimately recommended by Mr Carlyon includes various policy and rule safeguards in order to control the effects of the plan change that go well beyond the option initially recommended, while retaining the industrial rezoning objective of the PPC.

[25] The resulting level of detail required under s 32(1)(c) must therefore be addressed by the reduction in effect that would be generated by the PPC as a consequence of the evolved recommendations and evaluation.

[26] In accordance with s 32AA and the requirement to undertake a further evaluation for changes to the proposal since the s 32 evaluation report, a s 32AA evaluation is provided alongside the s 42A report. Of relevance is that it considers the risk of not acting as per the s 32 report, of acting per the s 32 and the risks of acting under the three new alternative options. Despite the underlying absence of some technical information, the s 42A report recommends that the risks of adopting one of the additional options are preferred to the option of doing nothing, addressing the absence of information by responsibly reducing the risk of adverse effect associated with the plan change.

[27] If the Commissioner considered that further information is required in order to meet the requirements of s 32, there are powers available to the Commissioner under s 41C to require or compel further information to be provided. This could include information from submitters or engaging further technical assessment or evaluation in relation to any relevant matter.

The scope issue

[28] The submissions raise questions of scope.[18] In his s 42A report, Mr. Carlyon considers that the PPC as notified provides enough scope to make changes to the zoning maps in response to the abovementioned issues raised in submissions.[19]

[29] Mr. Carlyon has therefore recommended five options for the plan change that he considers are available to the Commissioner, with an evolved option in supplementary evidence that derives from those other options given. Option 5 proposes to rezone, but only 40ha rather than the initially proposed 216.6ha.[20] The rest of the site would remain Rural.

Legal framework

[30] A District Plan may only be changed "in the manner set out in Schedule 1" of the Act.[21] Schedule 1 is a code for this process,[22] although important glosses have been added by case law.[23]

[31] Schedule 1 requires that the submission and decision processes for plan change be confined in scope. See, for example, the discussion of scope in *Environmental Defence Society Inc v Otorohanga District Council*:[24]

> "... Submissions must be on the proposed plan and cannot raise matters unrelated to what is proposed. If a submitter seeks changes to the proposed plan, then the submission should set out the specific

[18] For example, Submitter 12 has questioned whether there is scope to make amendments to the proposed plan change following notification.
[19] Section 42A report of Mr. Greg Carlyon on behalf of the Rangitikei District Council (regulatory) in the matter of the Rangitikei District Plan Change, paragraphs 134 – 136.
[20] We note that Option 5 also adds new policies to the Industrial Chapter. This report is limited to the scope issue for the reduced zone as queried by the Commissioner. Therefore, it does not make any conclusions on the additional policies.
[21] Resource Management Act 1991, s 73(1A).
[22] *Re Vivid Holdings Ltd* [199] NZRMA 467 at para [16].
[23] *Environmental Defence Society Inc v Otorohanga District Council* [2014] NZEnvC 70.
[24] *Environmental Defence Soc Inc v Otorohanga DC*, as above, at [11].

> amendments sought. The publicly notified summary of submissions is an important document, as it enables others who may be affected by the amendments sought in submissions to participate either by opposing or supporting those amendments, but such further submissions cannot introduce additional matters. The Council's decisions must be in relation to the provisions and matters raised in submissions, and any appeal from a decision of a council must be in respect of identified provisions or matters."

[32] Clause 10 of Schedule 1 pertains to decisions of a local authority (or the Commissioner as in this case) on submissions. Subsection (1) says:

> "A local authority must give a decision *on* the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned."
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> [Emphasis added]

[33] Clause 10(1) requires that any decision on a submission be within the scope of that submission. Before a decision *on* a submission can be made, the submission must first be *on* the plan change.[25] The leading cases on whether a submission is *on* a plan change are *Clearwater Resort Ltd v Christchurch City Council*[26] and *Palmerston North City Council v Motor Machinists Ltd.*[27] We consider that the relevant submissions are *on* the PPC. The Commissioner must therefore decide whether the amendments in Option 5 are *on* the submissions.

[34] Whenever there is a question as to scope, procedural fairness is a relevant consideration and the Commissioner's decision must take this into account.

The paramount test

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[25] Resource Management Act 1991, Schedule 1 clause 6(1).
[26] *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02.
[27] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290.

[35] The leading case in the context of decisions *on* provisions and matters raised in submissions under clause 10(1) is *Countdown Properties (Northlands) Ltd v Dunedin City Council.*[28] In *Countdown Properties* the High Court confirmed that the paramount test is whether or not the amendments are ones which are reasonably and fairly raised by and within the ambit of the submissions.[29] This question is one of degree to be judged by the terms of the proposed change and the content of the submissions.[30]

[36] The High Court in *Countdown Properties* did not accept that the scope of decision-making under cl 10 was limited to no more than accepting or rejecting a submission, holding that the word "regarding" in cl 10 conveyed no restriction on the kind of decision that could be given.[31] This legalistic approach was not appropriate in a context where the decision-maker required scope to deal with multiple and often conflicting submissions. A practical approach is required. The Court in *Royal Forest & Bird Protection Society Inc v Southland District Council*[32] agreed with the practical approach to decision-making:

> "... it is important that the assessment of 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."

[37] The High Court in *Countdown Properties* approved the Planning Tribunal's categorisation of the types of amendments described in *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council,*[33]

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[28] *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145.
[29] *Countdown Properties,* at 166.
[30] *Countdown Properties,* at 166.
[31] While clause 10 has been amended since the *Countdown Properties* decision and no longer uses the word "regarding" in relation to decision on submissions, this does not alter the substance or approach of the *Countdown Properties* decision. See, for example, *Environmental Defence Society v Otorohanga District Council* [2014] NZEnvC 70 at [16].
[32] *Royal Forest & Bird Protection Society Inc v Southland District Council* [1997] NZRMA 145.
[33] *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497 at 524 – 529.

the first four types of amendment are permissible and the last of which is not:

(a) Those sought in written submissions;

(b) Those that corresponded to grounds stated in submissions;

(c) Those that addressed cases presented at the hearing of submissions;

(d) Amendments to wording not altering meaning of fact; and

(e) Other amendments not in groups (a) to (d).

[38] In *Christchurch International Airport Ltd v Christchurch City Council*[34] the Environment Court held that, as part of the paramount test in *Countdown Properties*, the local authority must consider whether persons would reasonably have appreciated that such an amendment could have resulted from the decision sought by the submitter as summarised by the local authority.[35]

[39] The Environment Court said that in order for an amendment to a proposed plan to be "fairly and reasonably" within a submission the amendment must at least bear a family resemblance to:[36]

(a) The original proposed plan; or

(b) A submission and the relief sought as summarised by the Council; or

(c) Something in between (a) and (b) – including possibly new objectives and rules.

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[34] *Christchurch International Airport Ltd v Christchurch City Council* C77/99.
[35] The Environment Court held that the 'reasonable appreciation' test was not removed by *Countdown*, it was just not the paramount consideration. See paras 14 and 15 of the decision.
[36] *Christchurch International Airport Ltd* at 15.

[40] An amendment to a proposed plan cannot be opposite or completely different from the relief in at least one of the local authority's clause 7 summaries.

Relief not specifically requested

[41] While amendments to a proposed plan may not be specifically requested in a submission, if the submission has in substance effectively raised the issue, there is scope to consider it.[37] For example in *GUS Properties Limited v Marlborough District Council*[38] the Planning Tribunal held that the Marlborough District Council had jurisdiction to make an amendment to change a permitted activity to a controlled activity in response to submissions, even if not specifically requested by any party. In that case, the degree of control provided by the permitted activity status was not adequate for the Council's purposes.[39]

[42] Whether a local authority can make amendments not specifically sought in objections is a question of fact and degree. The test is not whether relief has been expressly sought in the original submission, but whether the relief would go beyond what was reasonably and fairly raised in submissions.[40]

[43] We note that *Countdown Properties* was decided prior to the introduction of clause 10(2)(b), which says that a decision may include:

> (i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions"

[44] The test in *Countdown Properties* remains the primary consideration. Subsequent case law identifies that cl 10(2)(b)(i) provides some

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[37] *Johnston v Bay of Plenty Regional Council* EnvC A106/03.
[38] *GUS Properties Limited v Marlborough District Council* W075/94 (PT).
[39] Note that in that case it was also relevant that the original plan change requester was agreeable to the change.
[40] *Atikinson v Wellington Regional Council* EnvC W013/99.

flexibility, but the question remains whether the amendments are within scope of the submissions.[41] Clause 10(2)(b)(i) allows "consequential alterations", but those alterations must arise out of submissions or be raised in submissions.[42]

Analysis

What do the submissions say?

[45] Some of the submissions raised issues related to the scale of the area of land to be rezoned Industrial.

[46] For instance, Submitter 15 (Howard and Samantha Walsh) said that the "exact future land uses are unknown" and while there is potential economic benefits if industrial land uses were to be developed "they are speculative".[43] Submitter 15 said:[44]

> "There has been no demonstrative need for 217ha to be zoned as industrial, and 100ha is thought to be a reasonable alternative in the meantime, until it is established that there is demand for 217ha."

[47] Submitter 15 also said that "reliance on existing rules, policies and objectives does not protect the site for that purpose and allows small-scale piecemeal development that could undermine the ability of Council to avoid remedy or mitigate the cumulative adverse effects of the holistic development."[45]

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[41] *Johnston v Bay of Plenty Regional Council*, (26/6/2003) where the issue was framed as whether "the words in dispute [were] reasonably within the scope of submissions before the Council, importing such flexibility as clause 10(2) allows." See also *Christchurch International Airport Ltd v Christchurch City Council* C77/99 at 13.

[42] *Joy Dawson Limited v Thames-Coromandel District Council* (Decision A64/03), referring to clause 10(2) a previous version of clause 10(2)(b)(i).

[43] Howard and Samantha Walsh Submission at 5.3 and 5.5.

[44] Howard and Samantha Walsh Submission at 5.4.

[45] Howard and Samantha Walsh Submission at 1.4

[48] Submitter 4 (David M. Dean, Joy Bowra-Dean) say that the "area for rezoning is inappropriate relative to the population of Marton."[46]

[49] Submitter 12 (Ms. F. Wallace representing the Interested Residents of Marton and the Rangitikei) raised concerns that the "proposal to rezone approximately 217ha of land is significant and appears out of step with the previous planning direction of council."[47]

[50] These issues with the scale of the PPC raised in submissions are recorded in the Council's summary of submissions.

Option 5 – greater control

[51] Option 5 imposes greater restriction on industrial development than the proposal in the PPC. The PPC opens up a larger area of land for Industrial zoning and retains the same Industrial Chapter provisions. Option 5 is a smaller area and proposes site specific policies to prevent undesirable industrial development. Option 5 therefore minimises the effects of the plan change, being inappropriately large and poorly controlled industrial development, that were perceived to be undesirable by some submitters.

[52] In doing so, it specifically responds to problems with the PPC raised in submissions. The reduction in area can be categorised as type (a) or (b) amendment as described in *Foodstuffs (Otago Southland) Properties Ltd*, being an amendment that is sought in submissions (Submitter 15) and one that corresponds to grounds raised in submissions (Submitters 4 and 12).

[53] Submitter 15 specifically states that a smaller rezoning would be a "reasonable alternative" and Submitters 4 and 12 have general concerns about the scale of the rezoning in the PPC.

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[46] David Dean and Joy Bowra-Dean Submission at 1.
[47] Interested Residents Marton and Rangitikei Submission at page 5.

Section 32 evaluation report

[54] The s 32 evaluation report considered other proposals that the Council considered as reasonably practicable. These specifically include:

- **Reduce the area to be rezoned (approximately 100ha):** this option involves rezoning a smaller area than proposed to Industrial.

- **Site specific bespoke industrial provisions:** this option includes greater amenity controls and controls to address infrastructure constraints or natural hazard risks

[55] Amending the scale of the area to be rezoned was specifically identified in notified s 32 evaluation report, as well as by submitters in the submission phase.

[56] The submitters, having read the s 32 evaluation report and submissions, ought to have reasonably contemplated that the PPC could be amended by reducing the scale of the rezoning.[48]

[57] Submitters were therefore provided an opportunity to consider the comparative merits of the reduced zone at two stages of the plan change. Firstly, in the evaluation of alternative proposals as identified in the s 32 evaluation report, and secondly, as raised in the notified submissions and summary of submissions.[49] This mitigates the procedural unfairness of adopting a proposal that reduces the rezoned area.

Minimised effects and procedural fairness

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[48] *Noel Leeming Appliances Ltd v North Shore CC* (No 2) (1993) 2 NZRMA 243 (PT), at 249, where the Planning Tribunal said that the local authority was entitled to include amendments that an informed and reasonable member of the public, having studied all the submissions, should have appreciated that the local authority might make had those submissions been accepted.

[49] In *Motor Machinists* the High Court said that "incidental or consequential extensions of zoning changes proposed a plan are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change."

[58] Because Option 5 is more restrictive than the PPC, in terms of allowing industrial development, there are no persons who are affected by Option 5 that were not already affected by the PPC. For example, Option 5 will not rezone any land that would not have been rezoned by the PPC.

[59] This is relevant for two reasons. Firstly, all persons affected by Option 5 have already had an opportunity to provide feedback to Council on the PPC. Secondly, there is no risk that a person would be affected by Option 5 (that wasn't otherwise affected by the PPC) but does not have a right of appeal. Therefore, if the Commissioner adopted Option 5, it would create scenario where someone was affected by the PPC, who had not been notified, was then affected by subsequent amendments in Option 5 and left without recourse under the Act.

Conclusion

[60] We conclude that the reduced area for rezoning in Option 5 is "reasonably and fairly" within the scope of submissions and that there are little to no procedural fairness issues.

[61] It is therefore open to the Commissioner to decide to accept an amendment to the PCC that reduces the scale of the area to be rezoned Industrial.