In the matter of the Resource Management Act 1991

and in the matter An inquiry pursuant to Schedule 1 RMA into the provisions of the proposed One Plan notified by Horizons Regional Council.

GENERAL LEGAL COMMENTARY ON SCOPE

Dated 26 January 2010

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1. Issues of scope have arisen from time to time in the water related hearings. The purpose of this memorandum is to address the question of scope generally. Where specific questions on scope are raised and relate to material changes then separate advice will be provided to the Hearing Panel on scope. In addition, HRC officers will advise on changes where scope is an issue.

2. The Courts have always adopted a non legalistic approach to scope as it relates to the First Schedule process. That is, the Courts have never expected the proposed resolution of competing requests for changes to a plan to be justified by specific words in a submission.

3. Prior to the amendment to the Resource Management Act in 1996[1] the First Schedule authorised the local authority to do the following after hearing submissions:

> "...the local authority *concerned* shall give its decision regarding the submissions and state its reasons for accepting or rejecting them".[2]

4. In respect of clause 10 as drafted at that time the High Court said in *Countdown Properties (Northlands Ltd) v. Dunedin City Council*:

> "Like the Tribunal, we cannot accept this submission. We agree with the Tribunal that the word "regarding" conveys no restriction on the kind of decision that could be given. We accept the Tribunal's remark that "in our experience a great variety of possible submissions would make it impracticable to confine a Council to either accepting a submission in *its* entirety or rejecting it".
>
> "Councils customarily face multiple submissions, often conflicting, often prepared by persons without professional help. We agree with the Tribunal that Councils need scope to deal with the realities of the situation. To take a legalistic view that a Council can only accept or reject the relief sought in any *given* submission is unreal. As was *the case here, many* submissions traversed a wide variety of topics; many of these topics were addressed at the hearing and all fell for consideration by the Council in its decision."

5. The Courts took a pragmatic approach and asked whether or not the amendments were reasonably and fairly within submissions[3].

6. The 1996 amendment to the RMA amended clause 10 of the First Schedule. Of particular note, is a new sub-clause (2) that provides a different wording than that which previously existed. Clause 10 reads:

> "**10 Decision of local authority**
>
> (1) Subject to clause 9, whether or not a hearing is held on a

[1] See section 25 Resource Management Amendment Act 1996
[2] See *Countdown Properties Northlands Ltd v. Dunedin City Council* 1994 NZRMA 145
[3] See also *Royal Forest and Bird Protection Society v. Southland District Council* [1997] NZRMA 408

> proposed policy statement or plan, the local authority shall give its decisions, which shall include the reasons for accepting or rejecting any submissions (grouped by subject-matter or individually).
>
> [[(2) The decisions of the local authority may include any consequential alterations arising out of submissions and any other relevant matters it considered relating to matters raised in submissions.**]]**

7. It is not considered that clause 10(2) materially alters the approach adopted by the High Court in *Countdown properties (Northland) Limited v. Dunedin City Council.*[4] The words 'relating to' in clause 10(2) is considered to have a similar meaning to the word 'regarding' considered by the High Court in the *Countdown* decision.

8. Judge Jackson in *Christchurch International Airport Limited v. Christchurch City Council* [5] applying the *Countdown* approach in respect of clause 10(2) as amended in 1996 held: [6]

> "An amendment to a proposed plan may, as a result of other submissions in further deliberation, be in quite different words but to be 'fairly and reasonably' within a submission the amendment must at least be a family resemblance to:
>
> (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, policies and rules."

9. All cases confirm that the question of scope is a matter of fact and degree. As the Court of Appeal stated in *Estate Homes Limited v. Waitakere City Council:* [7]

> "[106] We have concluded that the question is in fact always one of natural justice, which responds to the themes both of the effects of the change and that of the opportunity for those affected to participate: *Mills v Queenstown Lakes District Council* [2005] NZRMA 227; compare *Shell New Zealand Ltd v Porirua City Council* HC WN CIV-2003-485-1476 21 December 2004 (Goddard J)."

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[4] [1994] NZRMA 145
[5] Decision number C77/99
[6] See paragraph 15
[7] [2006] NZRMA 308 para 1 06.