APPENDIX B: CASE LAW SYNOPSIS

1 This Appendix summarises the relevant case law as it relates to scope.

2 *Clearwater Resort Ltd v Christchurch City Council*[1] sets out the two key scope tests, namely that:

2.1 First, a submission can only fairly be regarded as "on" a variation if it is addressed to the extent to which the variation changes the pre-existing status quo; and

2.2 Secondly, if the effect of regarding a submission as "on" a variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a powerful consideration against finding that the submission was "on" the variation in question.

3 The High Court also noted that submissions may suggest different methods to achieve the purpose of the plan change than those set out by the local authority:[2]

3.1 it is common for a submission on a plan change to suggest that the particular issue in question be addressed in a way entirely different from that envisaged by the local authority; and

3.2 the process of submissions and further submissions may be sufficient to ensure that all those likely to be affected by or interested in the alternative method suggested in the submission have an opportunity to participate.

4 The High Court in *Palmerston North City Council v Motor Machinists Ltd*[3] affirmed and expanded on the *Clearwater* "bipartite" test for scope. It stated that "*the first limb in Clearwater serves as a filter, based on direct connection between the submission and the degree of notified change proposed to the extant plan. It is the dominant consideration. It involves itself two aspects: the breadth of alteration to the status quo entailed in the proposed plan change, and whether the submission then addresses that alteration*".[4]

5 It also noted in relation to the second test that[5] a submission should not come out of "left field", (i.e. proposing something "completely novel").[6]

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1 HC Christchurch AP34/02 14 March 2003.

2 *Clearwater* at [69].

3 [2013] NZHC 1290 at [54]-[56].

4 At [80].

5 At [54].

6 The Court noted that if the effect of regarding a submission as "on" the variation would be to permit a planning instrument to be appreciably amended without real opportunity for participation by those potentially affected, that will be a "powerful consideration" against finding that the submission was truly "on" the variation (at [55], quoting William J Young in *Clearwater*).

6 Relevantly here, the Court held that a submission may lawfully seek for land outside a plan change area to be included, provided:

6.1 it represents an "incidental or consequential" extension; and

6.2 "*no substantial further section 32 analysis is required to inform affected persons of the comparative merits of that change*".[7]

7 The factual context of the Court's comments is important in our view. The case related to a request for rezoning of land geographically disconnected from the plan change area. The Court held that scenario to be, "*more than an incidental or consequential extension of the rezoning proposed"*. [8] In terms of the potential for procedural fairness issues the Court also observed that there was a *"lack of formal notification of adjacent landowners"* and *"the inclusion of a rezoning of two isolated lots in a side street can indeed be said to "come from left field"*.[9]

8 In terms of the second limb of the Clearwater test, the Court went on to acknowledge that a remedy for potential procedural unfairness is for the submitter to directly notify parties affected by further changes:[10]

> *[83] Plainly, there is less risk of offending the second limb in the event that the further zoning change is merely consequential or incidental, and adequately assessed in the existing s 32 analysis. Nor if the submitter takes the initiative and ensures the direct notification of those directly affected by further changes submitted*.

9 These two High Court authorities have also been applied in a number of subsequent cases, providing further clarity to the tests.

10 In *Option 5 Inc v Marlborough District Council*,[11] the High Court stated that it is correct to assess scope matters in terms of the purpose and policy behind the plan change at issue. The case also emphasised the importance of scale and degree in terms of assessing scope matters.[12]

11 The principal Environment Court Judge's decision in *Bluehaven Management Ltd v Western Bay of Plenty District Council* [2016] NZEnvC 191 confirms that the content of a section 32 Report is not determinative that a submission is not 'on' a plan change. It is a means of analysing the status quo at issue:

> [*36] In that sense, we respectfully understand the questions posed in Motor Machinists[39] as needing to be answered in a way that is not unduly narrow, as cautioned in Power.[40] In other words, while a consideration of whether the issues*

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7 *Motor Machinists*, at [81].

8 *Motor Machinists*, at [88] and [89].

9 *Motor Machinists*, at [86].

10 *Motor Machinists*, at [83].

11 (2009) 16 ELRNZ 1 (HC).

12 At [43].

> *have been analysed in a manner that might satisfy the requirements of s 32 of the Act will undoubtedly assist in evaluating the validity of a submission in terms of the Clearwater test, it may not always be appropriate to be elevated to a jurisdictional threshold without regard to whether that would subvert the limitations on the scope of appeal rights and reduce the opportunity for robust participation in the plan process.*

12 The Court went on to note:[13]

> *Our understanding of the assessment to be made under the first limb of the [Clearwater] test is that it is an inquiry as to what matters should have been included in the s 32 evaluation report and whether the issue raised in the submission addresses one of those matters. The inquiry cannot simply be whether the s 32 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 with robust, notified and informed public participation.*

13 Other cases have confirmed this approach. The High Court in *Albany North Landowners v Auckland Council*[14] found that a submitter would not always be precluded from seeking relief that was not specifically considered by the section 32 assessment and report:[15]

> *[132] Section 32 does not purport to fix the final frame of the instrument as a whole or an individual provision. The section 32 report is amenable to submissional challenge and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification. On the contrary, the schemes of the RMA and Part 4 clearly envisage that the proposed plan will be subject to change over the full course of the hearings process, including in the case of the PAUP, a further s 32 evaluation for any proposed changes which is to be published with (or within) the recommendations on the PAUP. While it may be that some proposed changes are so far removed from the notified plan that they are out of scope (and so require "out of scope" processes), it cannot be that every change to the PAUP is out of scope because it is not specifically subject to the original s 32 evaluation.*

14 The Court also noted that the importance of protecting affected persons from "submissional side-winds" (as raised in *Motor Machinists*) must also be considered "*alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a 30 year region-wide plan, via the submission process*."[16]

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13 *Bluehaven* at [39].

14 [2017] NZHC 138.

15 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [132].

16 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [133].

15 That Court also emphasised the importance of the context of the plan change at issue in determining how wide the scope of submissions could be. In that case, the Auckland Unitary Plan planning process was viewed by the Court as, "*far removed from the relatively discrete variations or plan changes under examination in Clearwater, Option 5 and Motor Machinists*".[17]

16 Further, the Environment Court in *Well Smart Investment Holding (NZQN) Ltd v Queenstown Lakes DC*[18], noted that if a section 32 assessments fails to consider the implications of adopting flexibility to the proposal (because that flexibility might more appropriately achieve the relevant objectives) then that may be a failure in the section 32 assessment.[19]

17 The Court also addressed the question of whether extensions to a plan change area could still be on a plan change even if not geographically connected to the plan change area. The Court found that the appellants' submissions were 'on' the plan change as their land had been identified for potential rezoning in the appendices to the section 32 assessment. However, despite that, the Court considered the notice to alert potential parties to the further extension appeals was inadequate as it was unfair to expect potential submitters to *"pore over the Appendices".*[20] Due to the resulting procedural unfairness, the Court found "if barely" the appellants had not been given sufficient notice of the submissions by the combination of the section 32 Evaluation, and the Council's summary of submissions.[21]

18 In *Calcutta Farms Limited v Matamata Piako District Council* [2018] NZEnvC 187[22], the District Council proposed to rezone areas of rural land to residential through a plan change. This plan change followed an extensive spatial planning process. The plan change itself did not propose to rezone Calcutta Farms' land, despite the fact that that area had been considered for residential expansion through the spatial planning process.

19 The Court found that Calcutta Farms' submission seeking that its land be included in the plan change was in scope. Regarding the purpose of the plan change, the Environment Court noted that:[23]

> *In my view, PC47 did involve changes to the management regime for residential activity and areas to be designated as future residential activity areas, so that it was open to Calcutta Farms to lodge a submission seeking an alternative position on the areas proposed in PC47 to either be Residential Zones or Future Residential*

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17 At [129]. We acknowledge that the Variation is much narrower than the Auckland Unitary Plan but also view it as much wider than the more limited variations in *Motor Machinists* and *Clearwater* given it comprehensively changes the current zoning to enable relatively intense urban activities and responds to Queenstown's strategic growth needs and the NPSUD.

18 [2015] NZEnvC 214.

19 at [23].

20 *Well Smart*, at [33] and [37].

21 *Well Smart*, at [40].

22 *Calcutta Farms Limited v Matamata Piako District Council* [2018] NZEnvC 187.

23 *Calcutta Farms* at [81].

Policy Areas, which is what it did. It did therefore address in its submission the extent to which PC47 changes the existing status quo.

20 The Environment Court went on to find that:[24]

> *Whilst the scale and degree of a proposal can assist in determining whether a submission is "on a plan change", I do not read the Option 5 decision as indicating that it is determinative. Much will depend on the nature of the plan change which can assist to determine its scope, (whether it is a review or a variation for example) and what the purpose of it is. In this case, the purpose of the plan change is to review the future need for residential areas in Matamata, and to identify areas next to urban areas where future residential activity is proposed to occur. The method by which the latter is proposed to occur in PC47 is by the application of the Future Residential Policy Area notation. Underpinning the need for the size and scale of both new Residential Zones and the Future Residential Policy Area are the population predictions, which Calcutta Farms' submission directly sought to challenge. I agree with Mr Lang that the District Plan review process should be such that differing views on the appropriate scale of such policy areas can be considered, rather than assuming that the Council's nominated scale of policy areas represents the uppermost limit for future planning. I therefore agree with Mr Lang that the difference and scale and degree of what is proposed by Calcutta Farms is a matter going to the merits of the submission rather than to its validity.*
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> (Emphasis added)

21 Importantly, the Environment Court took into account the extensive spatial planning process that had occurred when determining whether affected parties would have been aware of the potential for the Calcutta Farms land and surrounds to be rezoned for residential purposes. The Court noted that:[25]

> *The proposal for future residential development at Matamata was raised as an issue for the community to be consulted upon well prior to PC47 being notified. As the letter of 24 July 2015 referred to above reveals, the Council received considerable feedback from the community on, among other things, the zoning options that were under consideration. The Banks Road option for future residential development was clearly in the public arena, and was the preferred option up till mid-June 2016. Even though PC47 as notified preferred the Tower Road option and applied an Equine Area over part of the land which then became the subject of Calcutta Farms' submission, I do not agree that the eight landowners directly affected who chose not to make a submission would necessarily have assumed that PC47, as notified, was the last word on the topic.*

[24] *Calcutta Farms* at [87].

[25] *Calcutta Farms* at [91].