

BEFORE HEARINGS COMMISSIONERS
FOR KAIPARA DISTRICT COUNCIL

IN THE MATTER OF

The Resource Management Act 1991 ("the Act")

AND

IN THE MATTER OF

Private Plan Change 85 ("PPC85")
Mangawhai East Development Area

Opening Legal Submissions of Counsel for Black Swamp Limited

(Submitter #48)

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May it Please the Commissioners:

1. These submissions are given on behalf of Black Swamp Limited (“**BSL**”) regarding the property at 25 Black Swamp Road (Windsor Way). The property was included as part of PC85. My client is seeking a refinement of the zoning pattern as was notified to be Low Density Residential over the developable and hazard free part of the property, Business Mixed Use recognising the existing brewery with the balance being Rural Lifestyle as originally proposed in PC85.
2. The zoning pattern sought is attached to Mr Hood’s evidence.
3. I would like to comment on the following issues:
 - (i) Scope for the relief sought by BSL;
 - (ii) The relevance of the evidence before you; and
 - (iii) Application of s32 of the Act.
4. Turning to each issue.

Scope of Relief Sought

5. The BSL land is included in PC85 as notified¹, and it was proposed to be zoned Rural Lifestyle Zone. The only reason for proposing that zone, and not something else, was presence of coastal inundation and flood hazard constraints over the property. These issues have been successfully addressed in my client’s evidence.
6. PC85 proposes the rezoning of approximately 94 hectares to a mix of residential and commercial zonings², containing a suite of planning provisions to control and manage subdivision, use and development within the Plan Change area³. The purpose of PC85 is given as to provide additional urban zoned land as a natural extension of Mangawhai Village⁴.....for residential and supporting business⁵. One of the Plan Change’s objectives is to provide a coordinated and efficient use of the land resource for the Mangawhai East area where there are urban activities and extensive rural residential living activities establishing in an ad hoc manner. The proposed

¹ Application at 2.2, page 5

² Application Details at 1(a)

³ Application Details at 1(b)

⁴ Application at 2.1

⁵ Supra note 3

new zoning will provide additional residential dwellings to meet the demand of the increasing population and contribute to maintaining affordable housing in the Mangawhai area⁶.

7. My client seeks the Low Density Residential zoning over the part of his property that is developable not subject to an open space covenant, with a Mixed Use Zoning recognising the existing Black Stump Brewery. The Brewery operates under a resource consent and a permitted activity status under the Operative District Plan.
8. Mr Cleese is supportive of the zoning request, subject to there being scope for my client's submission. Ms O'Connor is supportive of the Low Density Residential zoning sought, but not the Mixed Use component. She too flags the question of scope.
9. The issue of scope turns primarily on whether or not my client was able to make a submission requesting a rezoning. In other words, whether their submission was "on" or "about" the Plan Change.
10. *Clearwater Resort Ltd v Christchurch City Council*⁷ is the leading authority. There, the High Court determined that a submission is 'on' a plan change if:
 - (a) the submission addresses the extent to which the plan change would alter the status quo; and
 - (b) the submission does not cause the plan changed to be appreciably amended without real opportunity for participation by those potentially affected.
11. The Clearwater tests were cited with approval by the High Court in *Palmerston North City Council v Motor Machinists Limited*⁸, where the Court said:

[80] *For a submission to be on a plan change, therefore, it must address the proposed plan change itself. That is, to the alteration of the status quo brought about by that change. 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.*

⁶ Application at 2.1, page 3

⁷ *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP34/02, 14 March 2003.

⁸ [2013] NZHC 1290

[81] *In other words, the submission must reasonably be said to fall within the ambit of the plan change.* One way of analysing that is to ask whether the submission raises matters that should have been addressed in the s 32 evaluation and report. If so, the submission is unlikely to fall within the ambit of the plan change. Another is to ask whether the management regime in a district plan for a particular resource (such as a particular lot) is altered by the plan change. If it is not then a submission seeking a new management regime for that resource is unlikely to be "on" the plan change. That is one of the lessons from the Halswater decision. Yet the Clearwater approach does not exclude altogether zoning extension by submission. Incidental or consequential extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform affected persons of the comparative merits of that change. Such consequential modifications are permitted to be made by decision makers under schedule 1, clause 10(2). Logically they may also be the subject of submission.

[82] *But that is subject then to the second limb of the Clearwater test: whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.* As I have said already, the 2009 changes to Schedule 1, clause 8, do not avert that risk. While further submissions by such persons are permitted, no equivalent of clause 5(1A) requires their notification. To override the reasonable interests of people and communities by a submissional side-wind would not be robust, sustainable management of natural resources. Given the other options available, outlined in [78], a precautionary approach to jurisdiction imposes no unreasonable hardship.

12. If the submission is "on" the plan change, the question then arises as to whether the relief sought is within the scope of the private plan change. The key test is whether the relief can be said to fall "fairly and reasonably" or by "reasonable implication", within the general scope of the original plan change as notified and the submissions made on it.
13. In *Bilimag Holdings Ltd v Waipa District Council*⁹ the Environment Court explained that the starting point for jurisdiction is whether the change sought is "fairly and reasonably" or by "reasonable implications" within the scope of the submission and the notified plan change. The Environment Court said:

⁹ [2008] ELHNZ 228

The issue therefore is whether the changes where jurisdiction is challenged seek to materially depart from the basic premise of the notified version of the Plan Change and its supporting documentation. Or to put it another way, whether the change sought falls "fairly and reasonably" or by "reasonable implication" within the general scope of a submission and/or the proposed plan as notified¹⁰.

14. In summary, the scope of relief is determined by whether the submission can be said to be "on" the plan change and then whether the proposed amendments are fairly and reasonably within the scope of the notified plan change. This is a question of degree based on the terms of the plan change and submissions.
15. PC85 proposes a change to the zoning of the BSL property from rural as it now is under the Operative District Plan to Large Lot Residential. The plan change itself contemplates several different residential zonings and it proposes a mix of residential and commercial zonings, supporting both residential and business activities. As notified, the Development Area provides opportunities for high quality residential and commercial development¹¹ and it recognises that the brewery is an established activity.
16. Clearly then, PC85 proposes a change to the "status quo" of the BSL land. Consistent with that, and as notified, PC85 specifically seeks to provide both a range of residential and commercial development, recognising too the existing brewery. BSL's submission responds to the change in zoning proposed in PC85, its objectives and the issues it highlights. There cannot be any doubt, applying the correct legal principles, that BSL's submission is "on" PC85.
17. Similarly, the relief sought by BSL responds to PC85, and really seeks a refinement of what was notified. On that basis, it falls fairly and reasonably in what was notified. For reasons developed in Mr Hood's evidence and outlined below, the refinement in zoning sought by BSL actually more appropriately achieves the purpose of the Act and the objectives of the plan change.
18. My client's submission was correctly included in the summary of submissions, and has actually attracted a further submission, so the second of the Clearwater Tests, is evidentially satisfied.
19. In conclusion then, BSL's submission, and the relief it seeks are within scope.

¹⁰ Supra note 9 at paragraph 33

¹¹ Mangawhai East Development Area description, July 2025, paragraph 1

Evaluation of the Evidence

20. There is a substantial measure of agreement between the expert planning witnesses.
21. Mr Clease¹², Ms O'Connor and Mr Hood all agree that the developable, hazard free portion of the BSL land, will be appropriately zoned Low Density Residential if the plan change is approved. That level of consensus materially narrows the issues requiring your determination.
22. The only point of difference between the experts concerns the existing brewery and the appropriateness of Mixed Use Zoning sought by BSL. Mr Clease, having thoroughly considered the matter, supports the Mixed Use Zoning as *“better reflects both the nature of the existing operation and would provide a more enabling framework to facilitate a modest amount of expansion or commercial adaptation of the brewery area over time”*¹³.
23. Ms O'Connor expresses concern that application of MUZ in this location could amount to “spot zoning”, preferring instead that the brewery area be incorporated within the surrounding Low Density Residential environment so that any future change is assessed through resource consent processes.
24. She concludes that:

“.....the best overall environmental outcomes (and most appropriate in a s32 sense) will be achieved through applying the Residential Low Density zone and thus enabling assessment of future proposals associated with the brewery to be undertaken in the context of the future planned residential environment.”
25. That, with respect, does not properly recognise the nature of the existing and lawfully operating brewery, the purpose of the Mixed Use Zone within PC85, which is expressly to provide flexibility for compatible commercial and service activities in proximity to residential areas, and the reverse sensitivity and consenting risks faced by the brewery, if it is to be consumed by a residential zoning.
26. There is an emphasis in PC85 of enabling both residential and commercial activity. The proposed Neighbourhood Centre and mixed use business land are to *“enable a range of commercial and*

¹² s42A Report at 337; rebuttal evidence at 3.23

¹³ Rebuttal Evidence at 3.24

service activities to support the new residential community, and recreational land uses in the wider area.¹⁴ The purpose of the Business – Mixed Use Zone is to provide flexibility for a range of appropriate land use outcomes in proximity to the Business – Neighbourhood Centre and transitioning between the residential and business zones. In this context, the brewery cannot be considered as a “spot zoning”, but rather an appropriate recognition of the activity, whilst at the same time maintaining an appropriate consenting pathway for any future expansion.

27. Your decision must be made on the evidence now before you. The probative value of that evidence is for you to weigh, but the credibility and expertise of witnesses is routinely at issue, as is the robustness and thoroughness of their evidence to you. In matters such as this, evidence (and assessments) from experts operating within their chosen field of expertise is fundamental to, and must inform, your consideration.
28. Here, the expert evidence before you, given on behalf of my client, the Council, and the Applicant; all of whom are seasoned and very experienced experts, all concur that the Low Density Residential Zone is the appropriate zone over the developable area of the BSL land, if PC85 is approved. So, having regard to the evidence, there really cannot be any further debate on that.

Mixed Use Zoning - Application of s32 of the Act

29. Section 32 requires you to be satisfied that the provisions ultimately adopted are the most appropriate way to achieve the objectives of the plan change, having regard to efficiency, effectiveness, and the costs and benefits of the available options.
30. In respect of the brewery land, the principal options are:
 - (i) Low Density Residential zoning, relying on future resource consents to manage any continuation or evolution of commercial activity; or
 - (ii) Mixed Use zoning, expressly recognising the existing activity while retaining discretionary or restricted discretionary control over future change.

31. The evidence before you establishes that:

¹⁴ Development Area, p2

- (i) The brewery is a lawfully established activity forming part of the existing environment;
- (ii) PPC85 anticipates and provides for supporting commercial activities within the wider development area;
- (iii) That the, Mixed Use Zone provides a clearer, more certain planning framework for managing both operational continuity and any future change, while still enabling appropriate assessment of effects.

32. In contrast, a residential zone over the brewery would introduce a greater sensitivity to reverse sensitivity issues, enhanced consenting risk, and fundamentally fail to recognise the existing, and lawful activity that is occurring.

33. Consequently, as is set out in the evidence of Messrs Hood and Clease, the Mixed Use Zone, is the most appropriate zoning choice.

Conclusion

34. In conclusion, there is a consensus amongst the experts as to the residential zonings over my client's property. Regarding the Mixed Use Zoning; the evidence of Messrs Hood and Clease is thorough and consistent with PC85, so that it concludes that the Mixed Use Zoning is the most appropriate zone to recognise the brewery.

A handwritten signature in blue ink, appearing to read "J C Dawson".

J C Dawson – Counsel for Black Swamp Limited