

**BEFORE THE QUEENSTOWN LAKES DISTRICT COUNCIL  
AT WANAKA**

**IN THE MATTER** of the Resource Management Act  
1991

**AND**

**IN THE MATTER** of the Publicly Notified Plan Change  
46

**AND**

**IN THE MATTER** of Submissions and Further  
Submissions by PETER GORDON  
on behalf of the P D GORDON  
FAMILY TRUST, and Further  
Submissions by ORCHARD ROAD  
HOLDINGS LIMITED\_

**The Submitters**

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**LEGAL SUBMISSIONS REGARDING JURISDICTIONAL ISSUES BY  
COUNSEL FOR THE SUBMITTERS  
18 August 2015**

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## Introduction

1. Peter Gordon on behalf of the trustees of the P D Gordon Family Trust (Gordon") made a submission on the notified version of the Queenstown Lakes District Council District Plan, Plan Change 46 ("PC46") on the basis that land owned by Gordon should be included within the PC46 boundary.
2. Gordon and Orchard Road Holdings Limited ("ORHL") made further submissions on PC46.
3. The Gordon land is located immediately adjacent to the land proposed to be rezoned and if PC46 is confirmed will be totally surrounded by residential and industrial land.
4. The section 42a report produced in relation to PC46 has suggested that the above submissions are not 'on' PC46 in accordance with sch 1 cl 6 of the Resource Management Act 1991 (the "Act") and therefore should be rejected. <sup>1</sup> The purpose of these legal submissions is to demonstrate that the above submissions are in fact 'on' PC46 and therefore it is within the Commissioner's jurisdiction to consider them.

### Clause 6, Schedule 1 of the Resource Management Act 1991

5. Clause 6, Schedule 1 of the Resource Management Act 1991 (the "Act") states:

#### **"6 Making of submissions**

*(1) Once a proposed policy statement or plan is publicly notified under clause 5, the persons described in subclauses (2) to (4) may make a submission on it to the relevant local authority....[emphasis added]."*

6. The clause grants certain persons the right to make a submission to the relevant local authority in relation to a proposed plan change provided that such a submission is 'on' the plan change.

### **Determining whether a submission is 'on a plan change'**

7. The question of what it means for a submission to be 'on' a plan change has been the subject of a significant amount analysis by the New Zealand Courts. The leading authority on the matter is the High Court case of *Clearwater Resort Limited v Christchurch City Council*.<sup>2</sup> In that case the High Court established a two stage legal test through which a local authority can determine whether a submission is 'on' a plan change.

<sup>1</sup> Nigel Bryce *Planner's Section 42A report for Plan Change 46*:

<sup>2</sup> AP35/02

8. Whether a submission is 'on' a plan change can be determined by answering two questions:

- (a) Does the submission address the change to the status quo arising from the plan change; and
- (b) Is there a real risk that people affected by the plan change (if modified in response to the submission) will be denied an effective opportunity to participate in the plan change process.

9. The Clearwater test was endorsed by the High Court in the 2013 case of *Palmerston North City Council v Motor Machinists Limited*,<sup>3</sup> which was decided after the latest amendments to the Act made by way of the Resource Management (Simplifying and Streamlining) Amendment Act 2009. The Amendment Act made no amendment to the provisions of Clause 6 of Schedule 1.

*Do the submissions address the change to the status quo arising from the plan change?*

10. In *Palmerston North*, the High Court held that that the first limb of the Clearwater test requires a bipartite assessment. The consent authority should first assess the breadth of the alteration to the status quo arising from the proposed plan change. Second, the consent authority should assess whether the submission at issue addresses that alteration.<sup>4</sup>

11. The High Court found that the extent of the s 32 analysis made in respect of a plan change significantly determines the breadth of that plan change. The Court stated that an appropriately thorough analysis of the effects of a proposed plan or activity is fundamental to sustainable development as defined by the Act. In the context of a plan change such thorough analysis is achieved through the s 32 analysis whereby a comparative evaluation of efficiency, effectiveness and appropriateness of options is undertaken.<sup>5</sup> Accordingly, a submission seeking to extend the plan change boundary is more likely to fall within the breadth of a plan change if further s 32 analysis is not required to inform those affected of the merits of the change.<sup>6</sup>

12. The Court stated,<sup>7</sup>

*"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 [emphasis added]."*

<sup>3</sup> [2013] NZHC 1290.

<sup>4</sup> Ibid at [80].

<sup>5</sup> Ibid at [76].

<sup>6</sup> Ibid at [81].

<sup>7</sup> Ibid at [81].

13. The stated central purpose of PC46 is to increase the amount of Industrial B and Low Density Residential zoned land in the Wanaka area, in order to address the issues identified in the s32 report on the PC46.
14. The current circumstances are fundamentally different to those of the case of *Palmerston North*, in which the Court held that a submission was not 'on' the plan change to the Palmerston North City Council District Plan. The facts of that case were that a submitter submitted that its land, around ten blocks from the plan change boundary, should be rezoned as part of the plan change. The High Court determined that there was a disconnect between the primary focus of the plan change (which was a focus on main road rezoning and inclusion of two specific isolated lots) and the addition of the submitter's land some distance away.<sup>8</sup> The Court stated that in the circumstances the submission had 'come from left field.'<sup>9</sup>

*Is there a real risk that people affected by the plan change (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process?*

15. In *Palmerston North* the High Court stated that a second fundamental element of sustainable development is robust, notified and informed public participation in the evaluative and determinative process. A central purpose of the plan change process is to ensure that persons potentially affected are adequately informed of what is proposed and able to make submissions by way of clause 6 and 8 of schedule 1 of the Act.<sup>10</sup>

16. The High Court in *Palmerston North* pointed out that the purpose of s 8 is to,<sup>11</sup>

*"ensure that persons who are directly affected by submissions proposing further changes to the proposed plan change may lodge a further submission".*

17. The Court found that the difficulty to be remedied in respect of submissions not 'on' a plan change is not with a further submitters' right to lodge a further submission but with their being notified of the content of the original submission.<sup>12</sup> A central concern of the High Court in *Palmerston North* was that individuals who read a notified version of a plan change and concluded that there was nothing contained within it to affect them would be unlikely to read the submissions made under cl 6 and, therefore, would not have the opportunity to submit under cl 8. Such affected parties would be 'left out in the cold'.

18. It is submitted that the above situation would not occur in respect of the submissions of Gordon and ORHL. Those persons who read the notified version of PC46 would have

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<sup>8</sup> [2013] NZHC 1290, at [88].

<sup>9</sup> *Ibid*, at [89].

<sup>10</sup> *Ibid*, at [77].

<sup>11</sup> *Ibid*, at [43].

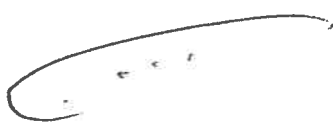
<sup>12</sup> *Ibid*, at [43].

been aware of the possibility that land within the immediate vicinity could be rezoned as a consequence of PC46. That possibility could hardly be said to be out of left field. The Gordon land is on the immediate boundary of the land proposed to be zoned and has been identified as suitable for urban land development. Accordingly, the rezoning of the land is directly within the ambit of this policy.

19. In *Palmerston North*, the Court held that the submitter's submission was disconnected from the purpose of the plan change and had come from 'left field'. In such circumstances persons affected by the submission would have been left out in the cold should it have been accepted.<sup>13</sup>

*Part 2 of the Act*

20. These submissions have demonstrated that the submissions of both Gordon and ORHL are 'on' PC46. They fall within the breadth of the plan change as they address the primary issue raised by the section 32 report which forms the foundation of PC46. The effects of the submissions are aligned with the policies proposed in PC46. Sufficient s 32 analysis has been undertaken in respect of the effects of the outcomes sought in the submissions. If you do not accept that to be the case, then further evaluation can still occur. Affected parties would have been aware of the potential for the land to be rezoned by way of PC46. This has always been contemplated in terms of the Wanaka Growth Boundary. Appropriate and thorough analysis of the effects of the submissions has been undertaken and robust notified and informed public participation in the evaluative and determinative process has been, or can still be, provided for. In such circumstances accepting the submissions as 'on' the plan change will give effect to sustainable development as defined by the Act.




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G M Todd  
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<sup>13</sup> Ibid, at [89].