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Bidwill Trust Hospital

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By email: Tina@bidwillhospital.co.nz

Dear Tina

**Advice on scope of submission**

1. We have been asked to comment on the indication made on behalf of Timaru District Council (**Council**) regarding possible scope issues for the Bidwill Trust Hospital's (**Trust**) submission on the Proposed Timaru District Plan (**Plan**).
2. The indication was given under the heading "*Other potential scope issues...*" and, in relation to the Trust submission, observes:

Bidwill Hospital Trust (submitter #225) – the submission sought relief relating to existing hospitals, but the permitted activity rule sought extends to any health facility or activity operated by the Bidwill Trust (whether existing or not). There would be no scope issue if the rule was to apply to existing facilities.

3. In our view, based on the discussion below, the Trust's submission does fairly and reasonably raise the issue of growth of the Hospital, both at its existing site and onto adjacent sites if the demand and opportunity for that is found to exist in the future. That view is based on:
  - 3.1. An assessment of the whole of the relief sought in the submission:
  - 3.2. The fact that the proposed new zone (now not pursued by the Trust) was to include policies to enable the "growth of the zone": and
  - 3.3. The proposed changes to the Medium Density Zone (**MRZ**) policies includes a policy entitle future growth, which does not limit such growth to the existing site.
4. The following advice sets out a summary of the law on scope before assessing the submission and asking whether any scope issue arises.

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## Law on scope

5. The issue is the scope a submission affords to the final decision maker to approve a particular outcome<sup>1</sup>. Scope issues arise under the First Schedule to the Resource Management Act (“the RMA” or “the Act”), often in the context of variations and plan change appeals, and in relation to the adequacy of the summary of submissions prepared by the local authority<sup>2</sup>. But how is scope assessed?
6. In *Albany North Landowners v Auckland Council*<sup>3</sup>, which considered the extent to which submissions on the Auckland Unitary Plan provided scope for subsequent decisions by the Independent Hearing Panel, Whata J noted the opportunity for public participation afforded by Schedule 1 of the RMA and the need to consider whether any amendments to a proposed plan:

*“...goes beyond what is reasonably and fairly raised in submissions on the proposed plan... To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public’s participation. 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. The workable approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in submissions.”*

[underlining added]

7. This represents a confirmation of the general approach that has long been applied.
8. Effectively any person<sup>4</sup> may make a submission on a proposed plan to the relevant local authority. As to what a submission may contain, there guidance in the First Schedule and the Act itself. As a starting point, submissions must be in the prescribed form.<sup>5</sup>
9. Form 5 requires the identification of: “[t]he specific provisions of the propos[ed plan] that [the] submission relates to”, “whether [the submitter] support[s] or oppose[s] the specific provisions or wish[es] to have them amended”, the “reasons for [those] views” and the “precise details” of the decision that is sought from the local authority.

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<sup>1</sup> That is, whether the decision is within the scope of the submission, not whether the submission is within the scope of a Proposed Plan.

<sup>2</sup> See: *Gertrude’s Saddlery v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZHC 147 (2021) 22 ELRNZ 433

<sup>3</sup> [2017] NZHC 138 at [115], citations omitted.

<sup>4</sup> Other than a trade competitor whose interest has no relation to an environmental effect.

<sup>5</sup> Form 5 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003.

10. In all cases, as noted above in *Albany North*, the interpretation of submissions is to be approached in a realistic and workable fashion, rather than from the perspective of a legal nicety<sup>6</sup>. This principle reinforces that the approach to interpretation under the RMA is focused on substance rather than form.
11. While the issue of whether a decision sought under a submission is within scope is approached in a realistic and workable fashion, the submission itself must 'relate to' the proposed plan. Since a submission can raise issues excluded by the local authority, 'relate to' in this context must mean the submission relates to an issue that is relevant to the local authorities' duties in preparing its plan and that the plan is required to regulate.
12. This approach is reflected in *Campbell v Christchurch City Council*<sup>7</sup> where the Court considered whether Campbell's submission and appeal gave the Court jurisdiction for the relief sought. In that context it held that the test is whether the submission, as a whole, fairly and reasonably raises the relief – expressly or by implication. In considering this the Court was guided by the following factors:
  - 12.1. The submission must identify what issue is involved and some change sought in the proposed plan;
  - 12.2. The local authority must be able to summarise it accurately and fairly; and
  - 12.3. The submission should inform others what it is seeking, but it will not be automatically invalid if unclear.
13. Where there is doubt that the submission provides sufficient scope, care is required because the Council cannot confer jurisdiction by agreement. It must be satisfied it has jurisdiction to consider the decision sought. If scope is found where the relief is unclear, this may prejudice the rights and ability of other interested persons to have lodged a further submission.
14. But equally, where a submission and in particular the relief it seeks is sufficiently clear, when approached in a realistic and workable fashion, the absence of further submissions should not be held against it. Ultimately, the District Plan process is a public one and all submissions are included in the Council's summary, and interested parties have the right to make further submissions. This underscores the importance of the summary of the submissions.
15. The process, while at times complex and time consuming, allows people to get involved but also requires people to be vigilant and to take the time to check whether

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<sup>6</sup> *NZ Forest and Bird Protection Society Inc. v Southland District Council* [1997] NZRMA 408 at 413.

<sup>7</sup> [2002] NZRMA 352.

submissions that are lodged affect them. If the submission is clear, on its face, the fact that there may be others in the community that could have submitted, if they'd been aware of the submission, does not limit the scope provided under the submission.

16. In other words, an intolerably unclear submission would be one that a prudent person, who has reviewed the summary of submissions, was unable to identify as affecting them, despite being affected based (for example) on the changes to the plan proposed in subsequent evidence lodged by the submitter.
17. In our view the Trust submission does not fall into that category.

### **Content of the submission**

18. It is inferred that the comment in the Council's advice regarding the potential issue relates to only part of the submission for the Trust. The Trust is seeking the *permitted activity rule* (mentioned in paragraph 2 above) in the alternative. The submission seeks, firstly:

A new special purpose Hospital Zone (HOSZ) be included in the PDP, encompassing the BTH lands and facilities.

While the second (alternative) relief sought is:

The inclusion of a new rule and policy in the Medium Density Residential Zone to include hospitals and their associated buildings, facilities and activities.

19. The third aspect of the relief sought is the inclusion of a definition for "*Hospital*".

### **Primary relief**

20. The submission indicates the Trust's preference for the first option on the basis that the second option "does not provide sufficient certainty for [the Trust] in its continued or future objectives."
21. The discussion of the possible HOSZ includes the following comments in respect of future growth (all appear on page 4):
  - 21.1. "... The special purpose zone would facilitate the further development of the hospital site and associated health care complex..."
  - 21.2. "... By rezoning the land, the continued development of the site would be secured while achieving the following:
    - a. Building setbacks and landscaping along street frontages, consistent with adjoining residential zone boundaries. The site has already been

*developed in a manner compatible with the character and amenities of the residential zone.*

- b. Maintenance of the standards of residential amenity...*
- c. Continued development of ancillary activities associated with hospital facilities...*
- d. Management of traffic impacts through onsite parking provision...*
- e. Providing scope for further growth, while protecting the integrity of the surrounding residential zone."*

[our underlining]

22. Importantly, under *Relief Sought* the submission the focus continues in relation to the *evolving demands* of the hospital and refers, specifically, under the suite of policies that would accompany the rezone:

- c. support the future growth of the zone, ...*

[our underlining]

23. The underlined words are particularly important as they make it abundantly clear that the creation of the zone is not to prescribe the final size of the hospital within it, but to ensure that any development or further growth, with within or *of* the zone, is managed in a way that will remain compatible with the surrounding residential zone. The rules framework that is alluded to is clearly the means to ensure that compatibility.

### Secondary relief

24. The secondary relief sought, which the Council legal advice may suggest is the focus of its thinking, does not provide such an explicit reference to growth *of* the zone, which in this case refers to the Medium Density Residential Zone (**MRZ**). However, that is because any growth would occur within the *same* zone. The same objectives, policies and rules will apply.
25. If the Trust were able to procure adjoining properties and seek to incorporate then into the Hospital site, the zoning sought would not preclude that occurrence, which is the apparent intention.
26. Because, at the same time, the prospect of, and provision for, growth is clearly signalled. Points 3.3 and 3.4 of the submission plainly allude to growth. The (alternative) submission seeks "a specific policy acknowledging the significance of the facilities and to provide for its ongoing operation, and its future development and redevelopment..."  
[our underlining].

27. The specific relief sought includes new policy MRZ-09 Future Growth, which is intended to:

*Support the future expansion of the hospital within this [MRZ] zone where it will enable the continue[d] use and development of the hospital while maintaining the character of the residential area.*

[our underlining and MRZ added]

28. This of course follows policy MRZ-08 which refers to any “existing hospitals” that maintain the character, qualities and amenity values of the surrounding residential area.
29. Importantly, the Council’s summary of submissions replicates the relief sought in the submission in its entirety. It does separate the relief into individual points but the points relating to “growth of the proposed zone” and the “future growth” policy are included.

#### **Is there a scope issue?**

30. Having considered the submission as a whole, as any decision maker is required to do, it is tolerably clear, in our view that, while the term *existing* is used in the submission, its purpose is to make clear that the Hospital is an existing activity. Therefore, it already has existing use rights. Presumably changes to that existing use, on the existing site, provided the character of the use remains the same and its intensity does not exceed what might be expected from the normal evolution of the activity, would not require recognition in the plan. But equally clearly (and understandably), the Trust seeks greater recognition and certainty.
31. But the *existing* activity is also clearly the starting point. The submission notes that the Hospital is already developed within a relatively modest site area and with small scale building. The submission clearly has a development focus, to enable growth of the facility. That such growth would also likely include the growth of the site itself can not only be inferred but is obvious from the relief sought.
32. As noted the proposed HOSZ includes a policy to *support future growth of the zone*. As the zone sought is effectively, and at this stage, limited to the site, such growth of the zone must involve some expansion onto surrounding properties. However, that growth must still ensure compatibility with the remaining adjacent residential zoned land.
33. The second prayer for relief, which is the focus of the Trust’s evidence, includes a new policy called *Future Growth* which will occur, *within this zone*, the MRZ. That description does not limit the ability to expand the site, and it is evident, given that the previous

relief included the growth of the HOSZ, that it was not intended to include any such limit.

## Conclusion

34. Having read the Trust submission as a whole, with the intention of gleaning what changes it intends for the plan, we conclude that the prospect of the development of the Hospital beyond its current site footprint is clearly signalled.
35. The relief sought, but now abandoned, to create a new HOSZ includes the drafting of a policy to support the future growth of the (new) zone, which must relate to the possible expansion of the site. Despite the Trust's evidence moving away from that option, from the perspective of scope, the submission (as summarised by the Council) placed future growth of the site in clear focus.
36. To that end, the relief seeking change to the MRZ specifically includes a policy supporting further growth. The suggestion that this would relate only to the existing site is unrealistic, especially as the policy will relate to the entire MRZ, as the Council's advice indicates.
37. In the round, it is unclear how any interested, but not necessarily expert person, reading the whole of the Trust submission, would not conclude that future growth of the site was one of the main drivers of the submission, in addition to acknowledging the Hospital's place and function.
38. The fact that there were no further submissions could easily have been that the promise that residential amenity will be preserved, and that the outlook of the Hospital and the effort to maintain residential coherence would continue, gave confidence to the neighbours who appear to focus of the Council's advice.
39. Of course, the ultimate decision of the Panel will still need to ensure that it does not exceed the scope of the submission, but in our view there is a clear intent to enable the growth of the existing hospital and site, which could include onto adjacent properties in time.

40. Please advise if you require further information.

Yours faithfully



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