

Before the Independent Hearing Panel
Appointed by the Invercargill City Council

Under The Resource Management Act 1991 (**RMA**)

In the matter of Plan Change 2 to the Invercargill City District Plan

Legal Submissions on behalf of Invercargill City Council

11 May 2026

Invercargill City Council's solicitors:

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**anderson
lloyd.**

Introduction

1. These legal submissions:
 - (a) provide an outline of the legal framework for plan changes;
 - (b) address and apply the law on whether submissions are within the scope of Plan Change 2 (**PC2**);
 - (c) address a consequential change to RES1Z-P20;
 - (d) outline the approach to the Code of Practice; and
 - (e) address the position of Environment Southland and the evidence of Mr Roy.

Legal Framework

2. The legal framework is covered and applied by Ms Spalding in her section 42A report: Housing and Code of Practice Plan Change (Plan Change 2) dated 20 April 2026.
3. The assessment under the RMA for this plan change includes whether:
 - (a) It is in accordance with the Council's functions (s74(1)(a));
 - (b) It is in accordance with Part 2 of the RMA (s74(1)(b));
 - (c) It will give effect to any national policy statement or operative regional policy statement (s75(3)(a) and (c));
 - (d) The objectives of the proposal are the most appropriate way to achieve the purpose of the RMA (s32(1)(a)); and
 - (e) The provisions within the plan change are the most appropriate way to achieve the objectives of the District Plan (s32(1)(b)).
4. In addition, your assessment of the plan change must also have regard to:
 - (a) any proposed regional policy statement, and management plans and strategies prepared under any other Acts (s74(2));
 - (b) the extent to which the Plan is consistent with the plans of adjacent territorial authorities (s74(2)(c)); and
 - (c) in terms of any proposed rules, the actual or potential effect on the environment of activities including, in particular, any adverse effect (s76(3)).

5. The assessment of the plan change must also take into account any relevant iwi management plan (s74(2A)).
6. Specific provisions within the RMA and in other planning documents that are relevant to PC2 are set out in the s32 Report. These documents are discussed in more detail within the s42A Report where relevant to the assessment of submission points.

Submissions – the law on scope

7. Clause 6 of Schedule 1 of the RMA provides that once a plan change is publicly notified, submissions may be made "on" the plan change¹:

6 Making of submissions under clause 5

(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.

...

8. The High Court established the test for determining whether a submission is "on" a plan change in *Clearwater Resort Limited v Christchurch City Council*,² which has been further developed in cases such as *Palmerston North City Council v Motor Machinists Limited*.³ The Environment Court decision *Calcutta Farms Limited v Matamata-Piako District Council*⁴ provides a helpful summary of the current legal principles as determined through these cases:
 - (a) *Clearwater Resort Limited* established a two-limb test for assessing scope as follows:
 - (i) A submission can only be regarded as being "on" a plan change (and in scope), if it addresses the extent to which the plan change changes the status quo⁵; and
 - (ii) If the outcome of accepting a submission as being "on" a plan change would be that a change is made without real opportunity

¹ Noting this is a plan change initiated by the Council to the District Plan. Definitions of Plan and Change are in section 43AA RMA.

² *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

³ *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, [2014] NZRMA 519.

⁴ *Calcutta Farms Limited v Matamata-Piako District Council* [2018] NZEnvC 187.

⁵ At [57], referring to *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

for those potentially affected by that change to participate, then that is powerful reason against finding the submission is "on" the plan change;⁶

- (b) The first limb of the *Clearwater* test is considered a "*filter*" or the "*dominant consideration*", "*based on a direct connection between the submission and the degree of notified change proposed to the extant plan*".⁷
- (c) If a submission can be regarded as coming out of "left field" it is likely out of scope⁸;
- (d) The purpose of the plan change is relevant; if the relief requested in a submission is outside the purpose of the change, and other potential submitters who could have benefited from seeking the same relief would not have anticipated such a different purpose, then it is likely the submission is out of scope;⁹
- (e) Whether the s32 report addresses, or ought to have addressed, the relief sought in a submission is indicative of whether it is in scope. The High Court in *Palmerston North City Council v Motor Machinists Limited* states that¹⁰:

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 the submission seeking a new management regime for that resource is unlikely to be "on" the plan change... Incidental or consequent extensions of zoning changes proposed in a plan change are permissible, provided that no substantial further s 32 analysis is required to inform

⁶ Ibid.

⁷ Above n2, at [80].

⁸ Above n3, at [58], referring to *Clearwater Resort Limited v Christchurch City Council* HC Christchurch, William Young J, 14/3/2003.

⁹ Above n3, at [62], referring to *Option 5 Incorporated v Marlborough District Council & Bezar* HC Blenheim, Ronald Young J, 28/9/2009.

¹⁰ Above n3, at [67], referring to *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290, [2014] NZRMA 519 at [81].

affected persons of the comparative merits of that change.

- (f) If a topic in a submission is not addressed in a s32 report, but it should have been and the omission was a potential error, the submission may be considered to be in scope.¹¹

9. Applying these principles, a submission on PC2 must:

- (a) Address the extent to which the plan change changes the plan;
- (b) Not be coming out of 'left field' or be unanticipated when considering the purpose of PC2;
- (c) Reasonably be said to fall within the ambit of the change, including any incidental or consequential changes requiring no additional section 32 analysis; and
- (d) Not carry a risk that people affected by PC2 (if modified in response to the submission) would be denied an effective opportunity to participate in the plan change process.

Applying the law on scope

- 10. If a submission or part of a submission is found to be out of scope, the Hearing Panel should reject that point, on the basis there is no jurisdiction to consider that.
- 11. Ms Spalding has identified in Paragraph 5 on Page 9 of the section 42A report those submissions considered out of scope. The section 32 report specifically and clearly identified those matters that were out of scope and not subject to any changes. Ms Spalding's analysis is supported for the reasons she gives and it is submitted the following four submissions should not be accepted, because they are out of scope:
 - (a) Adrian Sheat RML (10.01) – seeking changes to rule SUB-R6(7) in the Outer Control Boundary or the Single Event Sound Exposure Boundary.
 - (b) Ministry of Education (18.01) – relating to rule RES1Z-R2 to provide for educational activities.

¹¹ Above n3, at [68], referring to *Bluehaven Management Limited & Rotorua District Council v Western Bay of Plenty District Council* [2016] NZEnvC 191, Environment Court, 30/9/2016, Judge JA Smith and Judge DA Kirkpatrick.

(c) John Gerty (05.01) – seeking to expand the Residential zone.

(d) Colin Bishop (06.01) - also seeking to extend the Residential zone.

Consequential Change – RES1Z-P20

12. On Page 41-42 of the section 42A report Ms Spalding identifies a recommended consequential change to Policy RES1Z-P20.
13. This is raised with the Panel to consider because it relates to the description of the heights in this Policy for the Residential 1 and 1A zones. The description in this Policy does not accurately reflect the different height limits introduced by PC2 in these zones. PC2 introduced an 11m height limit in the Residential 1A zone, and Ms Spalding recommends this is retained.
14. This consequential change to the Policy is not sought by any submission. Ms Spalding recommends it so that the Policy description reflects the difference in the proposed height rules in these two zones.
15. The law to enable this is contained in Clause 10(2)(b) First Schedule. This enables the Panel to make decisions to change the Plan that are "consequential" or "any other matter" arising from the submissions. This Clause provides that a decision:

may include—

(i) matters relating to any consequential alterations necessary to the proposed statement or plan arising from the submissions; and

(ii) any other matter relevant to the proposed statement or plan arising from the submissions.
16. Applying this principle here, if the 11m height limit is retained as Ms Spalding recommends (on page 42 of the s42A report), it is submitted to be a reasonable and consequential change to amend Policy RES1Z-P20 to reflect that difference between the two zones.
17. It is also noted the risk of prejudice to any submitter is very unlikely. There are no submissions identified by Ms Spalding opposing the 11m height rule. Aligning the Policy description to the height rule proposed is therefore not going against the interests of any submitter.
18. The alternative of not amending the Policy will leave it out of alignment with the rules that implement it. This is not considered good practice and may cause confusion and misalignment when the Policy is assessed as part of future consents.

Code of Practice

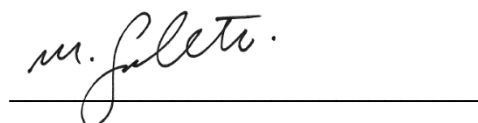
19. The intent of PC2 is to deliberately remove reference to the Bylaw that contains the Code of Practice for Land Development and Subdivision.
20. The reference to the Code of Practice in the Plan is intended to identify there is one, and it is referred to in advice notes only. The Code of Practice is not intended to be "incorporated by reference" and tied into Objectives, Policies or Rules as a District Plan compliance matter (under part 3, First Schedule, RMA).
21. This means the Council can keep the Code of Practice outside the Plan and can update it from time to time as guidance for infrastructure design.
22. It is noted Mr Gareth Clarke (19.02 and 19.03) supports removing reference to the previous Code of Practice, but prefers the Plan to define clearly the version referred to. This is addressed in paragraph 12 of the s42A report.
23. It is submitted that defining a version of the Code of Practice in the definitions has the potential consequence of locking in that version as the one that the Plan refers to. It is preferred not to do this so the Code of Practice sits outside the Plan as guidance and can be updated from time to time, without needing a Plan Change under Schedule 1. This better gives effect to the deliberate approach adopted by the Council.

Evidence of Mr Roy for Environment Southland

24. It is noted in his evidence dated 4 May 2026, Mr Roy recommends that the Hearing Panel needs to consider the requirements of the NPS-NH and give effect to this NPS.
25. This does raise a timing issue. PC2 was notified on 14 January 2026.
26. This was one day before the NPS-NH came into effect on 15 January 2026. Because of this timing, obviously PC2 was not prepared in full knowledge of the NPS-NH. Risk assessments under this new framework have also not been completed as the framework is new and post-dates notification of PC2.
27. It is submitted that in evaluating submissions, it is correct that PC2 has to give effect to the NPS-NH, but because of timing, the Hearing Panel can only make changes to give effect to the NPS-NH to the extent those changes are now within the scope of submissions.

28. It is noted that Environment Southland did directly request removal of the areas between Tee and Tweed Street from the Residential 1A zone in PC2 as this area is identified as potentially floodable.
29. This issue is addressed in Pages 45-49 of the section 42A report. It is noted that the risk assessment referred to by Mr Roy in paragraph 20 of his evidence that states the risk in this area is medium to high, under the NPS –NH risk matrix was not available to Council when the PC2 was prepared. Nor does this risk assessment feature in the natural hazard section of the Plan. It is noted the natural hazard section of the plan is out of scope of PC2.
30. Ms Spalding makes the point that the extent of the Residential 1A zone is unchanged by PC2 and the extent of the zone is not in scope. This zone already includes areas containing an identified level one hazard. Ms Spalding has responded by recommending that natural hazards is included as a matter of discretion in RES1AZ-R7 and R8 to make sure natural hazards risk is assessed.
31. Ms Spalding's s42A recommendation does not go as far as Environment Southland request in their submission. Following review of Mr Roy's evidence, Ms Spalding has advised Counsel she is to recommend further changes to the provisions to specify that the density rules of the Residential 1 Zone continue to apply to sites in the Residential 1A Zone where they are located within the Riverine Inundation Level 1 Overlay.
32. Ms Spalding has been asked to outline this to the Panel and submitters in writing before the Hearing. This is something for the Panel to evaluate. It is submitted that Ms Spalding's recommendation addresses the issue of natural hazard risk and is reasonable in these circumstances.
33. If new risk assessments under the new NPS-NH framework are produced in the future, they can be assessed further when the natural hazards provisions of the Plan are reviewed.

Dated this 11th day of May 2026

A handwritten signature in cursive script, appearing to read 'M. Garbett', is written above a horizontal line.

Michael Garbett
Counsel for Invercargill City Council