

**BEFORE INDEPENDENT HEARING COMMISSIONERS APPOINTED BY THE
TIMARU DISTRICT COUNCIL**

IN THE MATTER OF

The Resource Management Act 1991 (**RMA** or
the Act)

AND

IN THE MATTER OF

Hearing of Submissions and Further
Submissions on the Proposed Timaru District
Plan (**PTDP** or **the Proposed Plan**)

AND

IN THE MATTER OF

Submissions and Further Submissions on the
Proposed Timaru District Plan by **Waipopo
Huts Trust and Te Kotare Trust**

**LEGAL SUBMISSIONS FOR WAIPOPO HUTS TRUST AND TE KOTARE TRUST
REGARDING HEARING E**

Dated: 30 January 2025

Presented for filing by:
Chris Fowler / Shona Walter
Saunders & Co
PO Box 18, Christchurch
Telephone: 021 311 784 / 022 400 6676
Email: chris.fowler@saunders.co.nz / shona.walter@saunders.co.nz

INTRODUCTION

- 1 These legal submissions are filed on behalf of Waipopo Huts Trust (**Waipopo Trust**) and Te Kotare Trust (**Te Kotare Trust**) regarding their submission (the **Submission**) on the Proposed Timaru District Plan (**Proposed Plan**).
- 2 The settlements at Waipopo (**Waipopo** or **Waipopo Land**) and Te Kotare (**Te Kotare** or **Te Kotare Land**) are located close to the Opihi River. Te Kotare Trust and Waipopo Trust own approximately 2.5 ha off Waipopo Rd on the southern side of the lower Opihi River. The land is separated into two blocks, with approximately 0.6 ha owned by Te Kotare Trust to the west and approximately 1.9 ha owned by Waipopo Trust to the east.
- 3 There are 26 existing dwellings on Waipopo in various states of repair and disrepair, the state of each dwelling has been described in Ms Stevenson's evidence at paragraphs 63 to 73. Te Kotare contains 15 dwellings and two empty sites, one of the dwellings has a certificate of existing rights issued by the Council to rebuild a house on that site.
- 4 Neither the area owned by the Trusts nor the wider Waipopo area has a reticulated water, wastewater or stormwater system with individual properties having their own private water supply and onsite wastewater and stormwater systems.
- 5 The zoning of Te Kotare and Waipopo under the Operative District Plan (**ODP**) is zoned Open Space Zone Recreation 1. Under the Proposed Plan, Waipopo is zoned Open Space Zone (**OSZ**). Te Kotare is rezoned Māori Purpose Zone (**MPZ**).
- 6 The Submission seeks that the Waipopo Land be rezoned from OSZ to MPZ. The Submission also opposes 3-Waters servicing provisions in the MPZ Chapter, which limit the reconstruction of homes and the future use and development of the Waipopo Land and Te Kotare Land.
- 7 The Trusts' case is that MPZ zoning is appropriate and better achieves the objectives of the Proposed Plan than the OSZ for Waipopo. Of particular relevance to the issue of zoning and future development of the Waipopo Land and Te Kotare Land is the history of both sites with respect to Kemp's Deed including promises made, but not kept, by various Crown representatives to

Kāti Huirapa since the Treaty was signed, to the present day. Kāti Huirapa are the hapu that hold mana whenua in the Timaru District.

- 8 A key feature of this case are provisions of the RMA that place obligations on local authorities in relation to Māori. Section 8 specifically requires decision-makers, in achieving the purposes of the Act, to take into account the principles of the Treaty of Waitangi (the **Treaty**). Section 6(e) requires decision-makers under the RMA to recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands as a matter of national importance. Section 7(a) requires decision-makers to have particular regard to kaitiakitanga when exercising functions and powers that management the use, development and protection of resources.
- 9 Another key feature of this case is that the Waipopo Land is at risk of flooding from the Opihi River. The case for the Waipopo Trust in the context of this hearing is that flood hazard should not prevent or preclude MPZ for the Waipopo Land.
- 10 Evidence in support of MPZ sought by the Waipopo Trust and Te Kotare Trust has been filed by Elizabeth Stevenson, Trustee of the Waipopo Trust and Trustee of the Te Kotare Trust. Evidence is also filed by Robert Kerr, flood hazard expert. Further, MPZ for both sites is supported by the s42A Officer Report (**Officer Report**).
- 11 The Waipopo Trust intends to present further evidence and legal submissions at Hearing F regarding application of existing use rights to the Waipopo Land in support of an exemption to the flood hazard policy and rule framework to recognise that residential use of the Waipopo Land predates the establishment of the regional council stopbanks and flood hazard rules in planning instruments.

KEY ISSUES

- 12 The key issues arising are as follows:
 - (a) Whether MPZ is the most appropriate zoning for the Waipopo Land?
 - (b) Whether MPZ better meets the obligations on local authorities that arise from the RMA and the Treaty in relation to Waipopo and Te Kotare?

- (c) Whether flood hazard should prevent MPZ of the Waipopo Land?
- (d) What is the most appropriate volume for water storage for new homes on Waipopo Land and Te Kotare Land?

THE SUBMISSIONS AND RELIEF SOUGHT BY WAIPOPO HUTS TRUST AND TE KOTARE

- 13 The changes sought by Waipopo Trust and Te Kotare Trust in their submission on the Proposed Plan are addressed by the Reporting Officer in the Officer Report. For ease of reference the response of Waipopo Trust & Te Kotare Trust to the Officer Report are summarised below.

Proposed Plan Provision/matter	Waipopo & Te Kotare submission	s42A Officer Report position	Waipopo and Te Kotare response at Hearing E
Mapping			
Waipopo Land is zoned Open Space Zone	Oppose	Amend – rezone to MPZ	Support
Te Kotare is zoned Māori Purpose Zone	Support	Retain	Support
Waipopo has a High Hazard Overlay	Oppose	To be determined at Hearing F	Support - defer issue to Hearing F
Māori Purpose Zone			
MPZ-O1 Enabling use and development of Māori land - support	Support	Retain	Support
MPZ-O2 Purpose of the zone	Support	Retain	Support
MPZ-P1 Whānaukataka, Mātauraka and Tikaka	Support	Accept	Support
MPZ-P2 Papakāika	Support	Accept	Support
MPZ-R1 Papakāika not otherwise listed in this chapter	Support & oppose	Retain	Support
MPZ-S4(1) Servicing – requirement to store 45,000L	Oppose	Retain	Oppose
MPZ-S4(2) Servicing – requirement to connect to reticulated sewerage system	Oppose	Amend	Support

SASM-R1 Earthworks not including quarrying and mining	Oppose	Amend	Support
Natural Hazards			
NH-R7 Natural Hazard Sensitive Activities and additions, new buildings, and structures with a ground floor area of less than 30m ²	Oppose	To be determined at Hearing F	Support - defer issue to Hearing F

- 14 These submissions focus on MPZ zoning for Waipopo Land and the MPZ-S4(1) Servicing – requirement to store 45,000L for new houses built in the MPZ.

STATUTORY FRAMEWORK FOR PROPOSED PLAN CHANGE DECISIONS

- 15 The approach to be taken in making decisions on proposed plan changes was summarised in the recent Environment Court decision of *Middle Hill Ltd v Auckland Council*,¹ (following the decision of *Colonial Vineyard Ltd v Marlborough District Council*), as follows:

[29] *In summary, therefore, the relevant statutory requirements for the plan change provisions include:*

- (e) *whether they are designed to accord with and assist the Council to carry out its functions for the purpose of giving effect to the RMA;*³
- (f) *whether they accord with Part 2 of the RMA;*⁴
- (g) *whether they give effect to the regional policy statement;*⁵
- (h) *whether they give effect to a national policy statement;*⁶
- (i) *whether they have regard to [relevant strategies prepared under another Act];*⁷ and
- (j) *whether the rules have regard to the actual or potential effects on the environment including, in particular, any adverse effects.*⁸

[30] *Under s 32 of the Act we must also consider whether the provisions are the most appropriate way to achieve the purpose of the plan change and the objectives of the Auckland Unitary Plan by:*

¹ [2022] NZEnvC 162 at [29].

² [2014] NZEnvC 55 at [17].

³ RMA, ss 31 and 74(1)(a).

⁴ RMA, s 74(1)(b).

⁵ RMA, s 75(3)(c).

⁶ RMA, s 75(3).

⁷ RMA, s 74(2)(b).

⁸ RMA, s 76(3).

- (a) *identifying other reasonably practicable options for achieving the objectives;⁹ and*
- (b) *assessing the efficiency and effectiveness of the provisions in achieving the objectives, including by:¹⁰*
 - i. *identifying and assessing the benefits and costs of the environmental, economic, social, and cultural effects that are anticipated from the implementation of the provisions, including the opportunities for:*
 - *economic growth that are anticipated to be provided or reduced;¹¹ and*
 - *employment that are anticipated to be provided or reduced;¹² and*
 - ii. *if practicable, quantifying the benefits and costs;¹³ and*
 - iii. *assessing the risk of acting or not acting if there is uncertain or insufficient information about the subject matter of the provisions.¹⁴*

16 In *Colonial Vineyard Ltd* the Court adopted an approach of identifying and evaluating the potential positive consequences and potential negative consequences of the two different options that were being assessed by the Court as a means to evaluate the risks of acting or not acting in respect of each option.¹⁵

17 I have generally adopted that approach in these submissions. The circumstances in this case are unusual. Typically, residential rezoning proposals related to greenfield developments concern land that is undeveloped farmland. Here, the Waipopo Land already contains a residential settlement and the environmental effects are existing and known.

18 Consequentially, these submissions focus on the key features of the proposed rezoning. I note this approach has also been adopted by the Officer Report.¹⁶

⁹ RMA, s 32(1)(b)(i).

¹⁰ RMA, s 32(1)(b)(ii).

¹¹ RMA, s 32(2)(a)(i).

¹² RMA, s 32(2)(a)(ii).

¹³ RMA, s 32(2)(b).

¹⁴ RMA, s 32(2)(c).

¹⁵ *Colonial Vineyard Ltd v Marlborough District Council* [2014] NZEnvC 55 at [68] – [71].

¹⁶ Section 42A Report: Sites and Areas of Significance to Māori and Māori Purpose Zone, at [9.1.6].

WHAT ARE THE POTENTIAL POSITIVE CONSEQUENCES OF THE PROPOSED REZONING COMPARED TO THE PROPOSED PLAN

Environmental

- 19 The zoning will enable Kāti Huirapa to exercise kaitiakitanga and manage the Waipopo Land according to tikanga, which may provide benefits to the conservation of indigenous biodiversity and māhika kai development.
- 20 The zoning facilitates housing and papakāinga, and ancillary activities, which allows Kāti Huirapa to maintain a connection to their land and provide suitable housing for members of the hapu.

Economic

- 21 The zoning will be a significant step in simplifying the approval of the rebuilding of homes on Waipopo Land and result in fewer resource consent applications or a less arduous consenting procedures.
- 22 The ability to rebuild derelict homes or rebuild on empty sites will contribute to revitalising the village that once occupied the Waipopo Land. It will also help to make Waipopo Trust more financially viable and to provide for the economic wellbeing of Kāti Huirapa.

Cultural

- 23 The rezoning will provide for the needs and wellbeing of Kāti Huirapa and allow them to maintain a connection with their ancestral land, to exercise their turangawaewae and to gather māhika kai for cultural purposes. This will have flow on benefits to the wider community, by reinforcing multiculturalism in the Timaru District.

WHAT ARE THE POTENTIAL NEGATIVE CONSEQUENCES OF THE PROPOSED REZONING COMPARED TO THE PROPOSED PLAN

Environment

- 24 There are unlikely to be adverse environmental effects because the zoning is largely retrospective in that it recognises the existing settlement on the Waipopo Land.

Economic

- 25 There will be some economic cost in introducing new rules which require monitoring and implementation by Council and working with iwi to achieve the required outcome.

Flood hazard

- 26 The Waipopo Land is currently located within a High hazard area, as defined in the CRPS. However, this does not preclude approval for rezoning the land to MPZ, as set out in the evidence in chief of Mr Kerr and the s42A Report. The s42A Report Officer at section 9.1.6 considers "it is appropriate to zone the 36 properties at Waipopo Huts MPZ". Mr Kerr, at paragraph 34 of his evidence, agrees with this conclusion from a flood hazard perspective.
- 27 Mr Kerr's evidence at paragraphs 10 to 18 sets out the main findings of two ECan assessments concerning the risk of flooding on the Waipopo Huts. These assessments are appended to Mr Kerr's evidence as Appendix A and Appendix B.
- 28 Mr Kerr at paragraphs 21 to 24 sets out the assumptions made by ECan while carrying out their assessment. Mr Kerr's reservations about how ECan carried out these assessments are summarised as follows at paragraph 7 of his evidence:

*I am concerned that the assessments undertaken by Environment Canterbury (**ECan**) are overly conservative leading to the actual flood hazard being overstated, and the actual hazard is not likely to meet the threshold of high hazard under the Canterbury Regional Policy Statement (**CRPS**).*

- 29 Mr Kerr's reasons to support his contention that the flooding risk to Waipopo does not meet the high hazard threshold under the CRPS are set out in paragraph 27 of his evidence.
- 30 Ms Stevenson, at paragraph 18 of her evidence, explains from the perspective of the Trust:

While we are aware of the floods of the past, as far as the Trust is concerned, none of these events have impacted on the Waipopo Land. Apart from surface flooding there has never been any threat to the dwellings or the people at Waipopo.

- 31 While acknowledging the uncertainty with ECan's assessments, Mr Kerr suggest a prudent approach to flood hazard, as set out in paragraph 29 of his evidence, as one where "*this uncertainty needs to be considered in light of the competing matters ... and duties of local authorities in relation to Te Tiriti.*"
- 32 At paragraphs 30 to 32 Mr Kerr assesses a proposal provided by Waipopo Trust to manage the flood hazard risk to Waipopo as two separate areas, and that he supports this approach.
- 33 At paragraph 35, Mr Kerr agrees with the s42A Officer's Report at section 9.2.17 to consider the natural hazard rules in relation to the Waipopo Land as part of the Natural Hazards topic in Hearing F.

Summary of positive and negative consequences

- 34 In summary to this point, the rezoning of Waipopo Land to MPZ will generate significant positive consequences that cannot be realised under the Proposed Plan and the negative consequences can be mitigated.

APPLICATION OF THE TREATY OF WAITANGI PRINCIPLES

Legal Framework

- 35 Section 8 of the RMA require local authorities to take into account the principles of the Treaty.¹⁷ The Courts have adopted a case by case approach to determining what those principles are in respect of an individual case.¹⁸ However, courts of general and specialist jurisdictions have developed a body of jurisprudence about the Treaty principles, which has tended to emphasis three interrelated and overlapping Treaty principles: partnership, active protection and redress¹⁹
- 36 The decision whether to rezone the Waipopo Land to MPZ is a role delegated to local authorities by virtue of the RMA. It involves consideration of environmental factors, alongside the principles of the Treaty. The High Court has found that the application of Treaty principles is undertaken appropriately within the scope of the statutory scheme.²⁰

¹⁷ *Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau* [2003] 2 NZLR 349.

¹⁸ *Mason-Riseborough v Matamata-Piako DC* (1997) 4 ELRNZ 31 (EnvC)

¹⁹ *Wairarapa Moana Ki Poākani Incorporation v Mercury NZ Ltd* [2022] NZSC 142 at [104].

²⁰ *Faulkner v Bay of Plenty Regional Council* [2023] NZHC 145.

- 37 A further principle relevant to these circumstances, is that where iwi were found to have a considered, consistent and genuine view that a proposal would have a significant and adverse impact on an area of cultural significance to them, the iwi's views were determinative of those findings. It was not later open to the Courts to exercise their discretion and decide otherwise. Deciding otherwise was inconsistent with that iwi's rangatiratanga, guaranteed to them by Art. 2 of the Treaty and which the Court and other decision-makers under the RMA must "recognise and provide for".²¹
- 38 Part 2 of the RMA contains provisions directly relevant to the interests of Māori. Sections 6(e) and 7(a) make it clear that the relationship of Māori with their ancestral lands, water, wahi tapu, taonga and kaitiakitanga in respect of their lands, are matters that must be taken into account by persons exercising functions and powers under the RMA.²²

Application to the Waipopo Land

Rangatiratanga

- 39 Ms Stevenson in her evidence states at paragraph 135:

The imposition of zoning and the effects of local government decisions have prevented Waipopo and Te Kotare from maintaining a connection to their whenua and carrying out their cultural practices in these areas, which is contrary to the intent of sections 8 and 6(e) of the RMA and the purpose of the RMA.

- 40 The Waipopo Trust's vision for their land is set out at paragraphs 61 to 62 in Ms Stevenson's evidence. Ms Stevenson, at paragraph 13, comments that *"The Proposed Plan frustrates the Waipopo Trust's ability to carry out our vision for the land."*

- 41 At paragraph 30, Ms Stevenson states that:

Without any change to the zoning of the Waipopo Land to MPZ and Natural Hazard provisions and the servicing provisions in the MPZ Chapter to recognise the special situation at Waipopo and Te Kotare, this will result in the various Crown apologies and well-meant statements from local authorities falling short of the much needed regulatory change to enable Waipopo Trust and Te Kotare Trust to realise the vision for their land.

²¹ *Tauranga Environmental Protection Soc Inc v Tauranga City Council* [2021] NZHC 1201.

²² *Faulkner v Bay of Plenty Regional Council*.

- 42 Ms Stevenson statement above is an expression of her rangatiratanga as a Trustee of Waipopo Huts Trust and member of Kāti Huirapa.

Kaitiakitanga

- 43 At paragraph 41 of Ms Stevenson's evidence, she explains how Kāti Huirapa have maintained kaitiakitanga over the Waipopo Land. Paragraphs 63 to 69 of her evidence describes the recent activities the Trust has done to maintain and improve housing, to remove rubbish and replant areas with native vegetation. Ms Stevenson at paragraphs 70 to 76 explains the activities they would like to carry out in the future to improve the living conditions for those living on the Waipopo Land. The evidence of Ms Stevenson illustrates how the Trusts acts as kaitiaki for the Waipopo Land and how they would like to carry out that role into the future.

Redress

- 44 Ms Stevenson at paragraph 133 of her evidence states:

Since establishment, the Arowhenua Reserve and later Waipopo Huts Trust, has been subject to various laws and regulations. These regulations have largely restricted the ability of descendants of the original grantees to build dwellings on land originally set aside for them under Kemp's Deed. Further, the current planning provisions in the ODP do not provide for the descendants of the original grantees to use the land for the purpose it was intended.

- 45 The rezoning of the Waipopo Land represents an opportunity to act on the Treaty principle of redress to remove the OSZ from the Waipopo Land, which restricts their ability to build new homes and rezone the Waipopo Land to MPZ, which will enable the Trust to carry out their vision for their land.

Conclusion

- 46 Applying the MPZ to Waipopo Land will better achieve the objectives and policies for the MPZ, rather than the application of OSZ to this Land. The s42A Report supports this finding at paragraph 9.1.9:

Under s32AA, I consider that applying MPZ will better achieve MPZ-O1, by recognising and providing for the occupation of ancestral land by mana whenua. Similarly, it assists in achieving SD-O5.v as it better facilitates the use of Māori reserve lands by Kāti Huirapa for their intended purpose. Conversely, I consider that application of

OSZ and PREC4 would not assist in achieving these outcomes and is therefore less appropriate.

- 47 The rezoning will give effect to Objective 5.2.1 and related Policy 5.3.4 of the CRPS. These provisions seek that development is located and designed so that it functions in a way that facilitates the establishment of papakāinga and marae. Policy 5.3.4 states that papakāinga housing is appropriate where it is undertaken by tangata whenua with mana whenua and when it occurs on their ancestral land.
- 48 Finally, applying the MPZ to Waipopo Land will accord better with Part 2 of the RMA than the OSZ. In particular, the application of the MPZ accords better with s6(e), 7(a) and s8 RMA, by actively protecting and providing for the relationship of Kāti Huirapa with their ancestral lands, waters and taonga.

INFRASTRUCTURE SERVICING

- 49 The dwellings on the Waipopo Land and Te Kotare Land have their own private water supply system. The majority of the properties have an individual shallow bore, with a few properties also having a rainwater tank. Most of the properties have wastewater holding tanks which are regularly emptied at the Trust's expense. Many of the wastewater holding tanks have been in place since the 1980's.

Water supply

- 50 Under the Proposed Plan, MPZ-S4(1) requires storage of 45,000L for new houses built in the MPZ. The Waipopo Trust opposed this requirement in their submission. The s42A Report, at paragraph 9.2.24, recommends that MPZ-S1 is retained as notified. That approach is opposed by the Trust for the reasons set out below:

- (a) 30,000L is considered adequate
- (b) Not in accordance with Part 2 of the RMA and the Treaty.

30,000L is considered adequate

- 51 Davis Ogilvie prepared a 3-waters servicing report for the Waipopo Trust and Te Kotare Trust (**Davis Ogilvie Report**). The Davis Ogilvie Report is discussed at paragraphs 105-106 and 110 in Ms Stevenson's evidence and attached to her evidence at **Appendix M**.

- 52 The Davis Ogilvie Report assessed different water supply options for existing and new dwellings, ranging from a community reticulated system to an enhanced individual supply.²³ For the individual supply for new dwellings, the Davis Ogilvie Report recommends the installation of a rainwater tank with a capacity of $\geq 10,000$ L. To ensure a sufficient and reliable supply of water, storage of at least 30,000L is required.²⁴

Part 2 of the RMA and the Treaty

- 53 Ms Stevenson's evidence, at paragraph 122, details her opposition to the retention of the 45,000L storage requirement in MPZ-S4(1):

The Waipopo Trust operates on a very limited budget, as it does not charge a market rent and does not have the resources to install a 45,000 litre tank. I also do not consider it necessary to install a 45,000 litre tank for new builds.

- 54 In terms of the Trusts' role as kaitiaki of the Waipopo Land and Te Kotare Land and their engagement with the Proposed Plan process in order to help the Trusts' realise their vision for their land, Ms Stevenson states at paragraph 123 of her evidence:

I do not agree that it is sufficient for the plan to allow for a smaller supply through a restricted discretionary pathway. Forcing the Trust to go down a consenting pathway will result in further costs and delays for the Trust.... An important part of the Trust engaging in the Plan Review process is to ensure the Proposed Plan removes unnecessary planning rules that frustrate the Trust's objectives.

Conclusion

- 55 A more suitable water storage requirement in MPZ S4(1) is 30,000L. This is based on the expert evidence in the Davis Ogilvie Report that 30,000L of storage is enough to ensure a sufficient and reliable source of water for new dwellings on the Waipopo Land and Te Kotare Land, and the views of Ms Stevenson that the 45,000L storage requirement would frustrate the Waipopo Trust and Te Kotare Trust's ability to exercise their role as kaitiaki.

²³ Davis Ogilvie Report, pp-13-21.

²⁴ *Ibid*, p.15.

CONCLUSION

- 56 The rezoning of the Waipopo Land to MPZ is considered overall the most appropriate, as it gives the appropriate planning status to an existing settlement where the environmental effects are existing and known. The MPZ for the Waipopo Land also better fulfils the obligations on local authorities that arise from the RMA and the Treaty in relation to Waipopo.
- 57 The rezoning of Waipopo Land to MPZ will generate significant positive consequences that cannot be realised under the Proposed Plan and the negative consequences can be mitigated. Applying the MPZ to Waipopo Land will better achieve the objectives MPZ-O1 and SD-O5v rather than the application of OSZ to the Waipopo Land. The rezoning to MPZ will give effect to Objective 5.2.1 and related Policy 5.3.4 of the CRPS.
- 58 Finally, applying the MPZ to Waipopo Land will accord better with Part 2 of the RMA than the OSZ. In particular, the application of the MPZ accords better with s6(e), 7(a) and s8 RMA, by actively protecting and providing for the relationship of Kāti Huirapa with their ancestral lands, waters and taonga.
- 59 It is considered that a more suitable water storage requirement in MPZ S4(1) is 30,000L. This requirement is supported the Davis Ogilvie Report and it better allows the Waipopo Trust and Te Kotare Trust to exercise their role as kaitiaki and accords better with Part 2 of the RMA.

DATED this 30th day of January 2025



Shona Walter
Counsel for Waipopo Huts Trust and Te Kotare Trust