

SUMMARY OF LEGAL SUBMISSIONS REGARDING HEARING E

INTRODUCTION

- 1 This summary of submissions is presented on behalf of Waipopo Huts Trust (**Waipopo Trust**) and Te Kotare Trust (**Te Kotare Trust**).
- 2 My submissions are confined to the key issue raised by the Waipopo Trust submission, regarding the rezoning of the Waipopo Land to Maori Purpose Zone (**MPZ**).
- 3 The case for Waipopo is that MPZ zoning is appropriate and better achieves the objectives of the Proposed Plan than the Open Space Zoning (**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 hāpu that hold mana whenua in the Timaru District.
- 4 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.
- 5 I also briefly touch upon the servicing requirements in Rule MPZ S4(1) for potable water storage.

SUMMARY OF LEGAL SUBMISSIONS FOR WAIPOPO

Statutory Framework for Proposed Plan Change decisions

- 6 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:*

- (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

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).

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).

- 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

7 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

8 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.

9 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

The Potential positive consequences of the Proposed rezoning compared to the Proposed Plan

Environmental

10 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.

11 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 their hāpu.

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].

Economic

- 12 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.
- 13 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

- 14 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.

The Potential negative consequences of the proposed rezoning compared to the proposed plan

Environment

- 15 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

- 16 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

- 17 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.

- 18 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).

- 19 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.

- 20 While acknowledging the uncertainty with ECan's assessments, Mr Kerr suggests 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."

- 21 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.

Summary of positive and negative consequences

- 22 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

- 23 Section 8 of the RMA requires 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
- 24 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
- 25 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.²¹
- 26 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

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.

²¹ *Tauranga Environmental Protection Soc Inc v Tauranga City Council* [2021] NZHC 1201 at [2].

²² *Faulkner v Bay of Plenty Regional Council*.

Application to the Waipopo Land

Rangatiratanga

27 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."*

28 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.

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

Kaitiakitanga

30 The evidence of Ms Stevenson at paragraphs 41, 63 to 69 and 70 to 76 illustrate how the Trusts acts as kaitiaki for the Waipopo Land and how they would like to carry out that role into the future.

Redress

31 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.

32 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

- 33 Applying the MPZ to Waipopo Land will better achieve the objectives and policies for the MPZ and SD-O5v, rather than the application of OSZ to this Land.
- 34 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.
- 35 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

- 36 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.

- 37 In addition, 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.²³
- 38 I note that the author of the s42A Report in her s42A Summary Statement considers it is appropriate for a reduction in size for the potable water storage in MPZ-S4 and supports that in the present circumstances 30,000 litres is sufficient.²⁴

²³ *Ibid.*, p.15.

²⁴ Liz White – Hearing E – s42A summary statement, 4 February 2025, at [9(i)].

CONCLUSION

- 39 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.
- 40 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.
- 41 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.
- 42 It is considered that a more suitable water storage requirement in MPZ S4(1) is 30,000L. This requirement is supported by the Davis Ogilvie Report, by the Trust and by the s42A Report Officer.

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