BEFORE THE HEARING PANEL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER Plan Change 94B to the Operative Whangarei District Plan

RIGHT OF REPLY
SUBMISSIONS OF COUNSEL
FOR THE WHANGAREI DISTRICT COUNCIL

8th December 2016

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1. Introduction

1.1 I have been asked by Council staff to provide legal submissions to the Hearing Panel with respect to three matters arising from the hearing of submissions on Plan Change 94B ("PC94B") to the Operative Whangarei District Plan ("WDP"):

a) Maori reserves

b) Treaty settlement land

c) General land owned by Maori ("GLOBM")

2. Scope

2.1 A preliminary question is what scope is there for the s42A officer to recommend, or the Hearing Panel to determine, that provisions of PC94B be amended.

2.2 For a decision on a plan change, scope for amendment arises from clause 10 of the First schedule:

> *"10 **Decisions on provisions and matters raised in submissions***
> *(1) A local authority must give a decision on the provisions and matters raised in submissions, whether or not a hearing is held on the proposed policy statement or plan concerned."*

2.3 The range of allowable amendments is between:

- the status quo of the operative plan;
- the provisions of the plan change as notified; and
- any changes raised in submissions (whether to make the provisions more generous or more restrictive).

2.4 The WDP *operative* PKH chapter provides for papakāinga housing as a discretionary activity on ancestral Māori land that is administered under the Te Ture Whenua Māori Act 1993 ("TTWMA"). 'Ancestral Maori land' is defined in the chapter to include land administered under a Trust, GLOBM if there is an ancestral link identified, and Māori land. On all other land papakāinga housing is currently a non-complying activity.

2.5 PC94B as notified seeks:

- permitted activity status for papakainga developments on Maori land where certain controls are met;
- discretionary activity status for GLOBM where application has been made to convert the land to Maori land or an ancestral link is identified; and
- a non-complying activity on all other land.

2.6 It is my understanding that the range of relevant submissions received includes:

- support for the status quo;
- support for the notified provisions;
- any papakainga development that does not meet all underlying Environment rules should be a discretionary activity;
- the proposed permitted activities should be restricted discretionary;
- papakainga development on GLOBM that was converted from Maori land by statute should be a permitted activity;
- papakainga development on GLOBM where an ancestral link is established should be a permitted activity.

3. Maori reserves

3.1 Evidence presented at the PC94B hearing has questioned how Maori reserves would be dealt with under the PC94B rules.

3.2 "Maori reserve" is defined in s4 of TTWMA as:

> ***"Maori reserve*** means any lands that are for the time being vested in the Māori Trustee as or for the purposes of a Maori reserve; and, in particular, includes all lands that are for the time being subject to the provisions of the Maori Reserved Land Act 1955."

3.3 Maori reserves are described in s338 of TTWMA (emphasis added):

> ***"338 Maori reservations for communal purposes***
>
> *(1) The chief executive may, by notice in the Gazette issued on the recommendation of the court, set apart as Maori reservation any Maori freehold land or any General land—*
>
> *(a) for the purposes of a village site, marae, meeting place, recreation ground, sports ground, bathing place, church site, building site, burial ground, landing place, fishing ground, spring, well, timber reserve, catchment area or other source of water supply, or place of cultural, historical, or scenic interest, or for any other specified purpose; or*
>
> *(b) that is a wahi tapu, being a place of special significance according to tikanga Maori.*

3.4 When Maori reserves are created the land retains its underlying status as either Maori land or General land.

3.5 The *operative* PKH provisions would classify papakainga housing on a Maori reserve as a discretionary activity, whether the underlying status was Maori freehold land or GLOBM with an ancestral link.

3.6 The PC94B provisions as notified would treat Maori reserves differently depending on whether the underlying status was Maori land (permitted activity) or GLOBM with an ancestral link (discretionary).

3.7 I understand that there were no submissions referring to Maori reserves.

4. Treaty settlement land

4.1 Evidence presented at the PC94B hearing has questioned how future Treaty settlement land would be dealt with under the PC94B rules.

4.2 Settlement of historical Treaty of Waitangi claims involves three areas of redress:

a) An historical account of the Treaty breaches, and Crown acknowledgement and apology;

b) Cultural redress, which can include transfer of Crown land;

c) Commercial and financial redress, which can include cash, property or both.[1]

4.3 Treaty settlement land may therefore be Crown land or General land. Once returned it may become GLOBM. There may or may not be an identifiable ancestral link between the land and the settlement group.

4.4 The *operative* PKH provisions would classify papakainga housing on Treaty settlement land as a discretionary activity if GLOBM with an ancestral link, and non-complying if not.

4.5 The PC94B provisions as notified would result in the same activity status.

4.6 I understand that the only submissions on PC94B referring to Treaty settlement land are those from Patuharakeke Te Iwi Trust Board ("PTB") and Te Huinga, which request that discretionary activity status be retained for land such as that returned through Treaty settlement into tribal ownership.

4.7 As such I submit that there is scope for Treaty land to be dealt with in PC94B as either an identified specific discretionary activity, or falling generally within the discretionary / non-complying as in the operative and notified provisions.

[1] https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims/

5. General land owned by Maori

5.1 Policy PKH.1.4.1 provides:

"To limit papakāinga development to ancestral Māori land that is administered under the Te Ture Whenua Māori Act 1993."

5.2 There is no definition in TTWMA of land "administered" under the Act. Section 129 of the Act however provides that all land in New Zealand has a status:

- Maori customary land, or Maori freehold land (collectively Maori land);
- GLOBM;
- General land;
- Crown land;
- Crown land reserved for Maori.

5.3 Section 4 defines "GLOBM":

*"**General land owned by Maori** means General land that is owned for a beneficial estate in fee simple by a Maori or by a group of persons of whom a majority are Maori"*

5.4 Interpretation of TTWMA is guided by the Preamble to the Act, which describes its purpose, and by s2 of the Act:

"Preamble
... And whereas it is desirable to recognise that land is a taonga tuku iho of special significance to Maori people and, for that reason, to promote the retention of that land in the hands of its owners, their whanau, and their hapu, and to protect wahi tapu: and to facilitate the occupation, development, and utilisation of that land for the benefit of its owners, their whanau, and their hapu:.. "

"2 Interpretation of Act generally
(2) ...it is the intention of Parliament that powers, duties, and discretions conferred by this Act shall be exercised, as far as possible, in a manner that facilitates and promotes the retention, use, development, and control of Maori land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants, and that protects wahi tapu."

5.5 The general objectives of the Maori Land Court are contained in s17 and provide (emphasis added):

"17 General objectives
(1) In exercising its jurisdiction and powers under this Act, the primary objective of the court shall be to promote and assist in—

(a) the retention of Maori land and General land owned by Maori in the hands of the owners; and

(b) the effective use, management, and development, by or on behalf of the owners, of Maori land and General land owned by Maori."

5.6 The jurisdiction of the Maori Land Court includes, at s18:

"(h) to determine for the purposes of any proceedings in the court or for any other purpose whether any specified land is or is not Maori customary land or Maori freehold land or General land owned by Maori or General land or Crown land."

5.7 For the purposes of Policy PKH.1.4.1, I submit that GLOBM is land that is "administered" under TTWMA in the sense that:

- TTWMA does not identify or define land that is "administered" under the Act;
- all land has a status under the Act;
- the Maori Land Court has jurisdiction to determine the status of any land;
- the purpose of the Act is to promote the retention, use, development, and control of land as taonga tuku iho by Maori owners, their whanau, their hapu, and their descendants; and
- the primary objective of the Maori Land Court under the Act is to promote and assist in the retention and effective use, management and development of Maori land and GLOBM.

5.8 Rule PKH.1.2 of the *operative* PKH chapter includes the following explanatory definition:

"For the purposes of this rule 'ancestral Maori land' includes land that is administered under a Trust, general land owned by Maori (if there is an ancestral link identified) and Maori land."

5.9 PC94B proposes to split and relocate this explanatory definition to PKA.1.1 Description and Expectations:

"In the context of the District Plan, ancestral Māori land is land subject to the Te Ture Whenua Māori Act 1993, including; Māori customary land and Māori freehold land."

"Papakāinga developments can be considered on land that is not classified as ancestral Māori land. A discretionary activity status is provided for "General land owned by Māori" that is either the subject of proceedings before the Māori Land Court to convert it to Maori freehold land, or where an ancestral link has been identified."

5.10 In the first sentence of the PC94B text, ancestral Maori land is noted as "including" (rather than "meaning") Maori land. In statutory interpretation a definition that uses the word "includes" is wider than one that uses "means". "Includes" is taken as providing examples of matters within the definition, rather than "means" which restricts the definition to only those terms. As such I submit the first statement above does not preclude GLOBM from being ancestral Maori land in the PKA chapter.

5.11 I submit that the second statement above introduces ambiguity however, as it refers to papakainga on land that is *not* ancestral Maori land, but then describes the discretionary activity which requires an ancestral link. I submit that papakainga on land that is *not* ancestral Maori land is the non-complying activity, and that the discretionary activity (where an ancestral link is required) is ancestral Maori land. The Hearing Panel may wish to amend the proposed PC94B Description and Expectations text to remove this ambiguity, or to revert to the operative text.

5.12 Submissions sought:

- that land which had been converted from Maori land to GLOBM by statute be included in the permitted activity (PTB and Te Huinga); and
- that GLOBM be a permitted activity where an ancestral link is established (Ngati Hau Trust Board).

5.13 I submit that there is a technical difficulty with permitted activity status for GLOBM where an ancestral link must be established, as sought by Ngati Hau. A permitted activity must be capable of identification and compliance without the reservation of any discretion to Council. The PKH operative objectives and policies require that papakainga development is limited to ancestral land. Where that ancestral link must be established and evaluated on a case by case basis, I submit that permitted activity status is not appropriate.

5.14 I have considered whether the same concern arises for land that has been converted from Maori land to GLOBM by statute, as requested by PTB and Te Huinga. A historical title search would demonstrate that the land had been converted from Maori title to General title by Status Declaration. A copy of that Status Declaration would establish that the conversion was by operation of statute. Once the land was converted to General title however, ownership may have passed either by succession to a surviving spouse or under a Will (particularly if conversion occurred in the 1960s), or possibly by sale to someone outside the whanau with no ancestral link to the land. I submit therefore that a degree of evaluation of evidence is likely to arise when considering whether GLOBM converted by statute is still within whanau ownership. As such I submit that, as above, permitted activity status is unlikely to be appropriate as such evaluation introduces an element of discretion that is inconsistent with a permitted activity.

5.15 A further complication with GLOBM is that *subsequent* subdivision and sale of papakainga houses out of ancestral ownership is possible. The operative objectives and

policies are premised on papakainga development taking place on ancestral land, and the notified and recommended provisions offer relaxation of the density requirements of the underlying Environment. If papakainga development on GLOBM were a permitted activity there is nothing to prevent an application being made to subdivide the completed houses which, as General title, could be transferred out of whanau ownership. (Transfer of Maori land requires the approval of the Maori Land Court). If development on GLOBM required resource consent, a condition of consent could require some mechanism to ensure ongoing whanau ownership of the development.

5.16 I submit that the scope for amendments to the activity status for GLOBM is:

- it can be considered ancestral Maori land, where an ancestral link is identified (as in the operative provisions);
- it could remain as a discretionary activity (as in the operative and the notified PC94B provisions);
- whether the title was converted by statute, or an ancestral link must be established, a permitted or controlled activity is unlikely to be appropriate due to the requirement for evidence and evaluation of an ongoing (current) ancestral link to the land;
- as submissions sought a permitted activity, restricted discretionary (falling between permitted and discretionary) is available to the Hearing Panel.

6. Te Ture Whenua Maori Bill

6.1 Finally I have been asked by the Council to advise the Hearing Panel as to progress with the Te Ture Whenua Maori Bill ("the Bill") before Parliament.

6.2 A Te Ture Whenua Maori Amendment Act 2016 has passed. This contains a small number of minor technical amendments to the Act. The Bill, with the purpose "to restate and reform the law relating to Maori land", is still before the House. The Select Committee report has issued but the Bill still has 2nd and 3rd readings to complete before passing into law.

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8th December 2016