

BEFORE THE HEARING PANEL

EVIDENCE 02
TOPIC Papakāinga
SUB# PC94B-Papakāinga
DATE 21-11-2016

IN THE MATTER

of the Resource Management Act 1991

AND

IN THE MATTER

Plan Change 94B to the Operative Whangarei
District Plan

SUBMISSIONS OF COUNSEL
FOR THE WHANGAREI DISTRICT COUNCIL

17th November 2016

THOMSON WILSON LAW

Solicitors

125 Bank Street

Whangarei 0110

Phone: (09) 430-4380

Fax: (09) 438-9473

Partner Responsible / Solicitor Acting:

Email:

P O Box 1042

Whangarei 0140

GJ Mathias / ST Shaw
sts@thomsonwilson.co.nz

1. Introduction

1.1 I have been asked by Council staff to provide legal submissions to the Hearing Panel with respect to two aspects of Plan Change 94B (“PC94B”) to the Operative Whangarei District Plan (“WDP”):

- a) A legal response to submissions stating that the PC94B provisions are ‘race based’ and therefore unfair and invalid.
- b) Whether submissions on the objectives and policies of the Papakainga chapter are within scope.

2. Provisions for Maori land

2.1 PC94B proposes rules which provide different activity status to Maori land. Submissions have questioned the fairness of this and whether the WDP can or should differentiate on the basis of race.

2.2 The existing PKA Papakainga Housing chapter in the WDP states that the chapter provides for the development of ancestral Maori land. The purpose of PC94B, as stated in the public notice for PC94B (“the public notice”), is to provide opportunities for Maori land owners to develop and live on their ancestral land.

2.3 Section 76 of the RMA provides that:

76 District rules

- (1) *A territorial authority may, for the purpose of—*
 - (a) *carrying out its functions under this Act; and*
 - (b) *achieving the objectives and policies of the plan,—**include rules in a district plan.*
- (4) *A rule may—*
 - (a) *apply throughout a district or a part of a district:*
 - (b) *make different provision for—*
 - (i) *different parts of the district; or*
 - (ii) *different classes of effects arising from an activity:*
 - (c) *apply all the time or for stated periods or seasons:*
 - (d) *be specific or general in its application:*
 - (e) *require a resource consent to be obtained for an activity causing, or likely to cause, adverse effects not covered by the plan.*

2.4 The RMA explicitly provides for Maori values and issues to be taken into account in relation to resource management. This was highlighted by the Privy Council in *McGuire v Hastings DC*:

“The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Maori issues. By section 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including “(e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]”. By section 7 particular regard is to be had to a list of environmental factors, beginning with “(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Maori people of the area]”. By section 8 the principles of the Treaty of Waitangi are to be taken into account. These are strong directions, to be borne in mind at every stage of the planning process...”¹

2.5 I submit that PC94B proposes rules which seek to:

- achieve the objectives and policies of the PKA chapter of the WDP, would apply throughout the district, and would make different provision for different parts of the district (those parts that are ancestral Maori land) (s76);
- recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands (s6(e));
- have particular regard to kaitiakitanga (s7(a)); and
- take into account the principles of the Treaty of Waitangi (s8).

2.6 I therefore submit that PC94B is not unfair or invalid in terms of the RMA for proposing particular rules for ancestral Maori land.

3. Validity of submissions on objectives and policies

3.1 To be valid, a submission must be made “on” a plan change.² The High Court has summarised the legal position as:

*“A precautionary approach is required to receipt of submissions proposing more than incidental or consequential further changes to a notified proposed plan change”.*³

3.2 There is a two part test (known as the *Clearwater* test) as to whether a submission can fairly be regarded as “on” a plan change:

1. Whether the submission is addressed to the extent to which the plan change changes the pre-existing status quo.

¹ McGuire v Hastings DC [2001] UKPC 43 at para 21.

² RMA schedule 1 clause 6.

³ Palmerston North CC v Motor Machinists Ltd [2013] NZHC 1290 at para 91(c).

2. Whether accepting the submission could result in the Plan being appreciably amended without real opportunity for participation by those potentially affected.⁴

3.3 For the first limb of the test, the following questions need to be considered:

- What is the breadth of the alteration to the status quo in the plan change?
- Does the submission address that alteration?
- Does the submission raise matters that should have been addressed in the s32 evaluation?⁵

3.4 For the second limb, the question is whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process.⁶

3.5 The submissions at issue in PC94B seek amendment to the objectives and policies of the Papakainga chapter.

3.6 Applying the first limb of the test:

- *What is the breadth of the alteration to the status quo in the plan change?*
Chapter PKH Papakainga Housing exists in the WDP, having become operative on 28 April 2011. The chapter currently contains a description and expectations, an eligibility rule, objectives and policies.
The public notice states that the plan change proposes to change the chapter title, and proposes permitted, discretionary and non-complying activity status rules and provisions for transfer of powers and hearings. The notice states that the existing PKH objectives and policies are not proposed to be altered. The PC94B section 32 report reiterates (at section 4.2.4 paragraph 61) that the objectives and policies are not subject to any proposed alterations.
- *Does the submission address that alteration?*
As PC94B did not seek to alter the status quo of the PKH objectives and policies, I submit that any submissions seeking amendments to the objectives and policies do not address an alteration to the status quo.

⁴ *Clearwater Resort Ltd v Christchurch CC* HC Christchurch AP34/02, 14 March 2003.

⁵ *Re Palmerston North Industrial and Residential Developments Ltd* (2014) 17 ELRNZ 501.

⁶ *Motor Machinists* at para 82.

- *Does the submission raise matters that should have been addressed in the s32 evaluation?*

As no changes were proposed to the objectives and policies, no s32 assessment has been undertaken. If PC94B had sought to alter the PKH objectives and policies, that alteration would have required an assessment of alternatives, costs and benefits, efficiency and effectiveness in the s32 report.

3.7 Applying the second limb of the test:

- *Is there a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been denied an effective response to those additional changes in the plan change process?*

If PC94B had proposed changes to the PKH objectives and policies, those changes would have been summarised in the public notice and evaluated in the s32 report. Potential submitters would have been aware that changes were proposed and would have had the opportunity to submit in support of or opposition to the proposed changes. I submit that where changes were not sought in the plan change and were not notified, there is a real risk that the public has been denied an opportunity to respond.

3.8 I therefore submit that submissions seeking amendments to the PKH objectives and policies do not satisfy either limb of the *Clearwater* test and as such are not “on” the plan change.



S.T. Shaw

Counsel for the Whangarei District Council
17th November 2016