

Before the Auckland Unitary Plan Independent Hearings Panel

Under the Resource Management Act 1991 and the
Local Government Auckland (Auckland
Transition Provisions) Amendment Act 2013
(**"the Act"**)

In the matter of submissions by Waytemore Forests Limited,
Waytemore Farms Limited, Adfordston Farms
Limited and Kauri Hiwi Limited (879-52) on the
Proposed Auckland Unitary Plan

And in the matter of Hearing on Topic 80 – Rezoning and Precincts.

**MEMORANDUM ON BEHALF OF WAYTEMORE FORESTS LIMITED
SEEKING DIRECTIONS INCLUDING THAT EVIDENCE BE STRUCK OUT**

Dated 11 December 2015

MAY IT PLEASE THE PANEL

1. Waytemore Forests Limited is a submitter to Topic 080 (Rezoning and Precincts).¹
2. It is also a submitter to Topic 058.²
3. In essence these submission points seek:
 - (a) rezoning of Hunua Forest from Public Open Space (Conservation) to Rural Production; or
 - (b) provision for production forestry as a permitted activity within the Public Open Space zone, with amendments to objectives and policies expressly enabling existing forestry activities to continue.
4. At the Topic 013 hearing (B2.6 Public Open Space) Waytemore produced evidence through Mr Tollemache addressing the Public Open Space provisions at RPS level, and expressly seeking confirmation as to whether the zoning of Hunua Forest as Public Open Space was an error or intentional.³
5. Mr Tollemache suggested that it was likely not to have been intentional given the Council's submission seeking to rezone the (former) Franklin District portion of the Forest to Rural Production.⁴
6. Mr Reidy, giving evidence for the Council, then produced rebuttal evidence stating as follows:⁵

The zoning of the Hunua Forest as Public Open Space – Conservation *is an error*. This has been recognised in the Council's submission 5716-2983, which seeks that the land be rezoned Rural Production. Unfortunately that submission does not refer to all of the affected lots. There are four further submissions supporting the rezoning request, one supporting in part and two opposing in part. (emphasis added)

The topic of Rezoning - South is set down for late 2015/ early 2016. I can confirm that it is the Council's intention, as sought in its submission, that the Hunua Forest be rezoned to Rural Production. This should also include the lots that comprise the Hunua Forest but omitted from the Council's submission.

¹ Submission points 879-1, 879-2, 879-129, 879-209 and 879-210.

² Submission points 879-130 and 879-79.

³ Refer paragraph 3.4 of Mr Tollemache's evidence, copy attached as **Appendix A** to this memorandum.

⁴ Refer copy of the Council's submission attached as **Appendix B** to this memorandum.

⁵ Paragraphs 14.2 and 14.3 of Mr Reidy's rebuttal statement of 9 December 2014.

7. A copy of Mr Reidy's rebuttal statement (relevant extracts) is attached as **Appendix C** to this memorandum.
8. Mr Tollemache attended the Topic 013 hearing and reported back to Waytemore to the effect that the Panel indicated to the Council it should be identifying sites where the zones are incorrect, so that submitters did not have to participate unnecessarily in a range of topics to "cover their bases" as would put the parties to unnecessary expense.⁶
9. On the basis of the definitive statement in Mr Reidy's evidence⁷ Waytemore did not participate in the Topic 058 hearings.
10. At those hearings, Waytemore's submission points seeking objectives and policies along with rules specifically providing for production forestry in the Public Open Space zone would have been addressed. As matters stand, forestry would now be a discretionary activity in the zone.
11. The Council has now produced evidence in the context of the Topic 080 hearing (rezoning issues) stating that it considers that Public Open Space zoning is more appropriate for reasons principally relating to the water supply function of the regional park.⁸ It is recorded that the vegetation and earthworks rules are more protective in this zone than those of the Rural Production zone.
12. The Panel may recall that issues surrounding the effects of forestry activities on Watercare's water supply reservoir in Hunua Forest were addressed in the context of the Topic 041 hearings.
13. It would now appear that this issue is being "re-litigated" in the context of the rezoning request. Waytemore participated in Topics 041 and 023 on the basis Hunua Forest would be rezoned Rural Production. Ancillary Forestry earthworks would be permitted on that basis under Part H4.2 (Table 1.1.2) but not if zoned Public Open Space (where it is a discretionary activity).
14. At the Topic 041 mediation and hearings, Waytemore focused on ensuring permitted activity provision for earthworks in the Rural Production zone. Waytemore achieved this in mediation, and participated in the subsequent hearings accordingly. This position would be undermined through the Council's revised approach, if

⁶ Mr Tollemache's reporting email to the client is attached as **Appendix D**.

⁷ As also referred to counsel for the Council's legal submissions to the Topic 013 hearing at paragraph 11.3.

⁸ Refer paragraph 14.17 of the joint planning evidence of Ms Stewart, Mr Reidy, Ms Deverall and Ms Cox, copy of relevant extract attached as **Appendix E** to this memorandum (for convenience).

adopted. It is likely the prejudice raised by adopting that position would be irreversible.

15. In the circumstances, Waytemore strongly submits that the Council's position is untenable and that the Hearing Panel should not receive (and/or strike out) Auckland Council's evidence seeking to retain the Public Open Space zoning on the following basis:
 - (a) It is directly contrary to the Council's own submission request as to the zoning for the relevant land;
 - (b) It is directly contrary to Mr Reidy's definitive statement in evidence to this Panel that the zoning (as Public Open Space) "is an error";
 - (c) Waytemore is prejudiced through having made the reasonable decision not to participate in the Topic 058 hearing on the basis of that definitive position, whereby it could have pressed its case for better provision for continued production forestry activities within the Public Open Space Zone (assuming it was to be retained).
 - (d) Similarly, as to Topics 041 and 023, where reliance was placed on the Council's firm statement that the Public Open Space zoning was an error, and that it was pursuing its submission to correct the zoning for the entire forest.
16. The Hearing Panel has power to make directions that the whole or any part of a submission be struck out and/or may direct the submitter not to present the whole or any part of a submission.⁹
17. It may do so on the basis that it considers the submission to be frivolous or vexatious, or an abuse of process.
18. While the Act refers to "submission", it is respectfully submitted that the power must equally extend to evidence presented by any party including in the context of a submission.
19. It cannot be right that Auckland Council can now produce evidence directly at odds with its own submission regarding the rezoning of Hunua Forest, and whereby the Council has given previous evidence that the point raised in this submission should extend to the entire forest (not just the parts of the forest expressly referred to in it).¹⁰

⁹ Section 140(2) and (3) of the Act.

¹⁰ Paragraphs 14.2 and 14.3 of Mr Reidy's rebuttal evidence of 9 December as set out above.

20. In *Banks v Waikato Regional Council*¹¹ the Environment Court referred to a “change of mind”, and whereby an appeal was brought by a party having previously agreed to a proposal as being vexatious.¹²

21. The Environment Court referred to the decision of the Planning Tribunal in *Ngati Kahu Trust Board v Northland Regional Council*¹³ in which the Tribunal stated:

The term “vexatious” is sometimes used of proceedings which require the opposing party to defend itself again against claims that have already been disposed of; and it is sometimes used of proceedings that cannot lead to any practical result. The same approach applies whether claims were previously disposed of by a decision of a court or tribunal, or by agreement between the parties.

22. The Tribunal in *Banks* went on to state as follows:

In our opinion, the appellants bringing of this appeal after having told the respondent’s hearings committee of their consent to the agreed conditions falls within the category of vexatious proceedings. They were free to change their minds about the conditions, but bringing this appeal raises again issues that they had already settled, even though they later regretted having done so.

23. By analogy here, Auckland Council has not only submitted requesting a change to the zoning, but formally stated to this Panel that the zoning is an error.

24. The bringing of evidence to this hearing topic which is directly contrary to that submission, and the previous definitive statement made in evidence to this Panel, is both vexatious and submitted to be an abuse of process.

25. It raises significant likely irreversible prejudice for Waytemore, as explained above, especially in the context of Topic 041.

26. The evidence should not be received accordingly.

Alternative Directions

27. In the event that the Panel disagrees with this submission, the following directions are sought:

(a) That Waytemore may produce evidence in the context of the Topic 058 hearing and in support of its submission points to that

¹¹ A31/95.

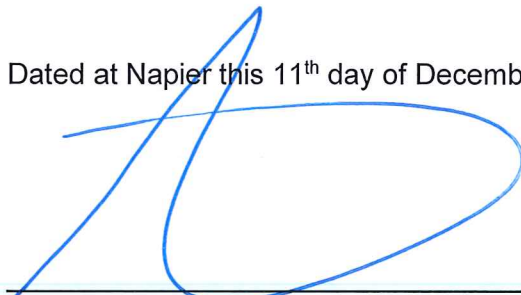
¹² Refer page 12 of the Decision, copy appended as **Appendix F**.

¹³ A48/94.

topic (if necessary reopening the hearing on that topic for the purpose); and

- (b) Extension to the deadline for Waytemore to produce evidence in the context of the current topic (rezoning).
28. Mr Tollemache did not anticipate needing to produce evidence in the context of Topic 080 and is not able to do so by the deadline of 18 December nor before Christmas.
29. Waytemore seeks that any evidence it wishes to produce on Topics 058 and 080 be filed by Monday 18 January 2016 (bearing in mind the Council's current rebuttal evidence deadline of Tuesday 26 January 2016).
30. The position regarding earthworks is more difficult. If the Hearings Panel is minded to accept this evidence, an additional memorandum would be filed identifying what further evidence or submissions Waytemore would wish to produce regarding Topic 41, and as it would have done if faced with the continued prospect of Public Open Space zoning in May 2015.

Dated at Napier this 11th day of December 2015



Martin Williams
Counsel for Waytemore Forests Limited

APPENDIX A

Before an Independent Hearings Panel

The Proposed Auckland Unitary Plan

Under	the Resource Management Act 1991 and the Local Government Auckland (Auckland Transition Provisions) Amendment Act 2013
In the matter of	submission by Waytemore Forests Limited, Waytemore Farms Limited, Adfordston Farms Limited and Kauri Hiwi Limited (879-52) on the Proposed Auckland Unitary Plan
And in the matter of	Hearing on Topic 013: Growth - B2.6 Public open space and recreation facilities

STATEMENT OF EVIDENCE OF MARK SEYMOUR MANNERS TOLLEMACHE

**ON BEHALF OF WAYTEMORE FORESTS LIMITED, WAYTEMORE FARMS
LIMITED, ADFORDSTON FARMS LIMITED AND KAURI HIWI LIMITED**

1 DECEMBER 2014

1. INTRODUCTION

- 1.1** My name is Mark Seymour Manners Tollemache. I am a planning and resource management consultant. I have a Masters of Planning (Merit). I have been practicing planning since 1997, and have been an independent planning consultant since 2004. Details of my experience and qualifications have been circulated with my previous evidence and are not repeated here for brevity.
- 1.2** I have read the Environment Court's Code of Conduct for Expert Witnesses, including amendments. I agree to comply with this Code. I confirm that the issues addressed in this statement of evidence are within my area of expertise and I have not omitted to consider any material facts known to me that might alter or detract from my opinions expressed in this statement.

2. HISTORY OF HUNUA FOREST

- 2.1** Waytemore is the owner of a Forestry Right registered under the Forestry Rights Registration Act (1993) applying to Hunua Forest, which straddles the boundary of the former Manukau City and Franklin Districts. The Forestry Right has a 95 year term, with 84 years left to run.
- 2.2** Whether by intention or error (and I suspect the latter), the PAUP has zoned the Hunua Forest as Public Open Space (Conservation) Zone. This results in the Hunua Forest being subject to the framework of RPS B2.6, along with zone and precinct rules that establish that forestry activities (including planting, harvesting, earthworks) are non-complying.
- 2.3** The Hunua Forest is long established. The land involved was progressively purchased by Auckland City Council (commencing in the 1940s), and later the Auckland Regional Authority, for water supply purposes. Auckland City Council first proposed commercial wood production in conjunction with water catchment protection of the land involved, and commenced planting the forest before transfer to the Auckland Regional Authority in 1967. By 1985 a total of 2,070 hectares was established.
- 2.4** The Forestry Right was initially granted by Auckland Regional Council (ARC) to the Auckland Regional Services Trust (following local government reorganisation) and Waytemore acquired the Forestry Right in 1998. In granting the Forestry Right, the

ARC gave the holder the right to manage, replant, tender and harvest the forest, as well as rights of access over the local road network.

- 2.5 It is notable in my opinion that Waytemore purchased the right from a predecessor (entity) to this Council on a commercial basis.
- 2.6 Hunua Forest was previously split between the Franklin and Manukau jurisdictions. It has a Rural 1 Zone in the Operative Manukau District Plan and Forest Conservation Zone in the Operative Franklin District Plan.
- 2.7 The summary of forest history I set out above is based on evidence Waytemore gave in support of a plan change promoted by Manukau City Council in 2003, to address what it accepted was a clear “anomaly” at that time, and where the Manukau portion of the forest was had been zoned public open space for a period.
- 2.8 I **attach** aspects of that evidence as produced to me by Waytemore’s legal advisor.¹ The irony is that Waytemore is now faced with a repeat of that scenario under the PAUP.
- 2.9 Waytemore submitted on the PAUP opposing the Public Open Space (Conservation) Zone over its long established production forestry operation. It sought the rezoning of the land to Rural Production Zone, or if the Council maintains that the zone is correct, the amendment of the PAUP policy and methods framework to provide for the existing forestry activities.

3. PUBLIC OPEN SPACE AND RECREATION FACILITIES ZONING

- 3.1 As noted, the PAUP’s policy framework and methods for this Public Open Space (Conservation) Zone do not provide for production forestry, making it a non-complying activity for earthworks, harvesting and replanting
- 3.2 Mr Reidy has indicated that the Waytemore’s submission is ultimately better addressed in the zoning topic.² I agree with this approach; however the matter has been allocated to 013 Growth in the meantime.
- 3.3 The sequence of hearing topics indicates that matters of zoning will be considered last. The submitter, by necessity, must prepare evidence to address the

¹ Attachments 1 and 2.

² Mr Reidy’s primary statement, at 18.128.

inconsistency in the PAUP's framework and approach to the land and the poor fit between the framework of objectives and policies and the use of the land. It would be more efficient for the Council to provide the submitter with more certainty about its position on the zoning of the land, given the scale of the production forest and the need for the submitter to otherwise participate in all the provisions relating to the Public Open Space Zones or the Rural Zones.

3.4 In particular, it would be preferable for the Council to clearly indicate whether the zoning of Hunua Forest is an error or intentional. If it is intentional, then the RPS 2.6 provisions, along with the methods and precincts would need to be amended to provide for forestry activities. I very much doubt that it is intentional, as Auckland Council has lodged a submission (copy **attached**)³ seeking to re zone the Franklin portion to rural production (unfortunately that submission being confined to just the parcels of land in former Franklin District).

3.5 As matters sit, Waytemore requested the new objective to provide for forestry in the Public Open Space zone as set out in Mr Reidy's evidence.⁴ I would agree that this objective (and the necessary policy/methods statement that would follow from it) would not fit comfortably with the focus of the zone, which is (as the name of the zone implies) very much on public open spaces and recreational needs, along with access to Auckland's coastline, foreshore and beaches. While located in a Regional Park, Hunua Forest very much has an emphasis on production forestry and any recreational use must be consistent with that priority, including for health and safety reasons.

3.6 Significant amendments would be needed throughout the PAUP to address the matters raised in the Waytemore submission, in the absence of rezoning. Rather than trying to fit a production forest into a zone with a different basic priority (which would inevitably be a poor fit) I recommend that it would be simpler to rezone the production forest to a more appropriate framework that accommodates it without these changes, including those to RPS 2.6, being needed.

3.7 The evidence for Council by Mr Tony Reidy outlines the Council's position on commercial forestry in Public Open Spaces. It states:

³ Attachment 3, Submission # 5716, Point 709.

⁴ Paragraph 18.125.

18.127 Under the PAUP's Public Open Space zones, forestry is a non-complying activity, unless identified in an adopted Reserve Management Plan, in which case it is a permitted activity. Conservation planting, which is separately defined, is a permitted activity in 3 of the 5 Public Open Space zones.

18.128 In my opinion therefore, no amendments to B2.6 are necessary in response to this submissions at the RPS level, but the status of forestry as an activity should be considered at the Public Open Space zone level and/or the zoning of the submitters land (which is the subject of a long-term lease for forestry purposes). I note that there are submission points on both matters.

18.129 Moreover, the submitter did not attend mediation to discuss the relief sought and I understand that the primary relief sought by the submitter is rezoning its land from Public Open Space to Rural Production.

- 3.8 As I say, if the Council seeks to maintain a Public Open Space (Conservation) Zone over one of the largest production forests in Auckland, then the RPS objectives and policies must enable the existing activities. As noted, the forest was specifically established (and purchased from the Council) as a commercial venture and to also provide for the management of land in the water supply catchments. It is of a significant scale, and contains activities that are important to the economic use of this land.
- 3.9 RPS B2.6 identifies a range of appropriate uses for public open spaces. With such a large area of land in production forestry, and should the zoning be maintained, I consider it is appropriate to identify existing forestry as an activity to be enabled within its provisions.
- 3.10 Notwithstanding this, the application of Public Open Space (Conservation) Zone is a complete anomaly and in my opinion must be corrected.

Mark Tollemache
1 December 2014

APPENDIX B

700	Attachment 700				7 Piki Thompson Way, Otahuhu. Lot 10 DP 17654, Lot 11 DP 17654 and Lot 12 DP 17654	Rezoning the site for a residential use will allow for the S&F resolution to be considered and is consistent with the adjacent residential zone.	Rezone 7 Piki Thompson Way from Public Open Space - Conservation to Terrace Housing and Apartment Building Zone as shown in Attachment 700.	2973
701	Attachment 701				15 Coronation Rd, Mangere Section 1 SO 555Z	Zoned THAB, however surrounding area has been changed to Mixed Housing Urban.	Re Zone as Mixed Housing Urban as shown in Attachment 701.	2974
702	Attachment 702				Matuhi Grove and Sean Fitzpatrick Place, Papakōwhiri	Incorrect zoning	Zoning for the two areas marked in red should be 'Residential'. They are currently zoned as 'Light Industry' which is incorrect as shown in Attachment 702.	2975
703	Attachment 703				Site adjoining street to north of 16-18 Miro Street, 18 Miro Street,	Site to north of 16 and 18 Miro Street zoned "road" meant to be esplanade reserve.	Site adjoining street to north of 16-18 Miro Street, Drury to be rezoned as Public Open Space - Conservation as shown in Attachment 703.	2976
704	Attachment 704				Lot 16 DP58135 4 Aylton Drive Totara Vale 0629	Mistaken spot zoning	Rezone the site to 'Mixed Housing Urban' as shown in Attachment 704.	2977
705	Attachment 705				Lot 13 DP 60095 300 PAKURANGA RD, PAKURANGA.	Mistaken spot zoning	Rezone the parcel to 'Mixed Housing' as shown in Attachment 705.	2978
706	Attachment 706				Lot 2 DP 409807 49A Ngapuhi Road, Remuera	Consequential mapping amendment as a result of SEA refinement.	Rezone from Mixed Housing Suburban to Single House as shown in Attachment 706.	2980
707	Attachment 707				Lot 1 DP 460500 51 SILVANA DRV, FLAT BUSH	Consequential mapping amendment as a result of SEA refinement.	Rezone from Mixed Housing Suburban to Single House as shown in Attachment 707.	2981
708	Attachment 708				1 Albert Street, Papakura Lot 2 DP 108882	Down zoning of parcels based on Flood data from the Storm water team	Rezone to Single House zone as shown in Attachment 708.	2982
709	Attachment 709				Hunua Forest, 201 Mounoukai Hill Rd, Clevedon - Allotment 168 PSH of Olau, Lot 1 DP 61276, Lot 1 DP 162670, Pt Kiriipaka, Section 3 Bk XIII Waitoa SD, Allotment 89 PSH of Olau, Allotment 145 PSH of Olau, Allotment 145 PSH of Olau, Lot 2 ALLT 90 PSH of Olau, Allotment 91 PSH of Olau	This Forest is subject to a 95 year forest right in favour of the operator (Waytemore Forests) and the primary use of the land is for production forestry, not recreation. The more appropriate zone is Rural Production.	Rezone the following parcels of land from Public Open Space - Conservation to Rural Production: Hunua Forest, 201 Mounoukai Hill Rd, Clevedon - Allotment 168 PSH of Olau, Lot 1 DP 61276, Lot 1 DP 162670, Pt Kiriipaka, Section 3 Bk XIII Waitoa SD, Allotment 89 PSH of Olau, Allotment 145 PSH of Olau, Allotment 145 PSH of Olau, Lot 2 ALLT 90 PSH of Olau, Allotment 91 PSH of Olau, shown in Attachment 709.	2983
710	Attachment 710				15a and 13a Butterworth Avenue, Papakura Lot 4 DP 48827 (15a) Lot 2 DP 48827 (13a)	Down zoning of parcels based on Flood data	Rezone to Mixed Housing Suburban zone as shown in Attachment 710.	2984
711	Attachment 711				14 Settlement Road, Papakura Pt Allotment 136 SECT 11 VILL OF Papakura	Down zoning of parcels based on Flood data	Rezone to Mixed Housing Urban zone as shown in Attachment 711.	2985
712	Attachment 712				22 Pantiera Way, Manurewa Lot 2 DP 206110	Down zoning of parcels based on Flood data	Rezone to Mixed Housing Suburban zone as shown in Attachment 712.	2986
713	Attachment 713				25 & 31 Halver Road, Manurewa Lot 5 DP 45123 (25) Lot 8 DP 45123 (31)	Down zoning of parcels based on Flood data	Rezone to Mixed Housing Urban zone as shown in Attachment 713.	2987
714	Attachment 714				7 Alma Crescent, Papakura Lot 1 DP 322842	Down zoning of parcels based on Flood data	Rezone to Single House zone as shown in Attachment 714.	2988

Attachment No.: 709**Hunua Forest Property Data for Proposed Unitary Plan Zone Changes.**

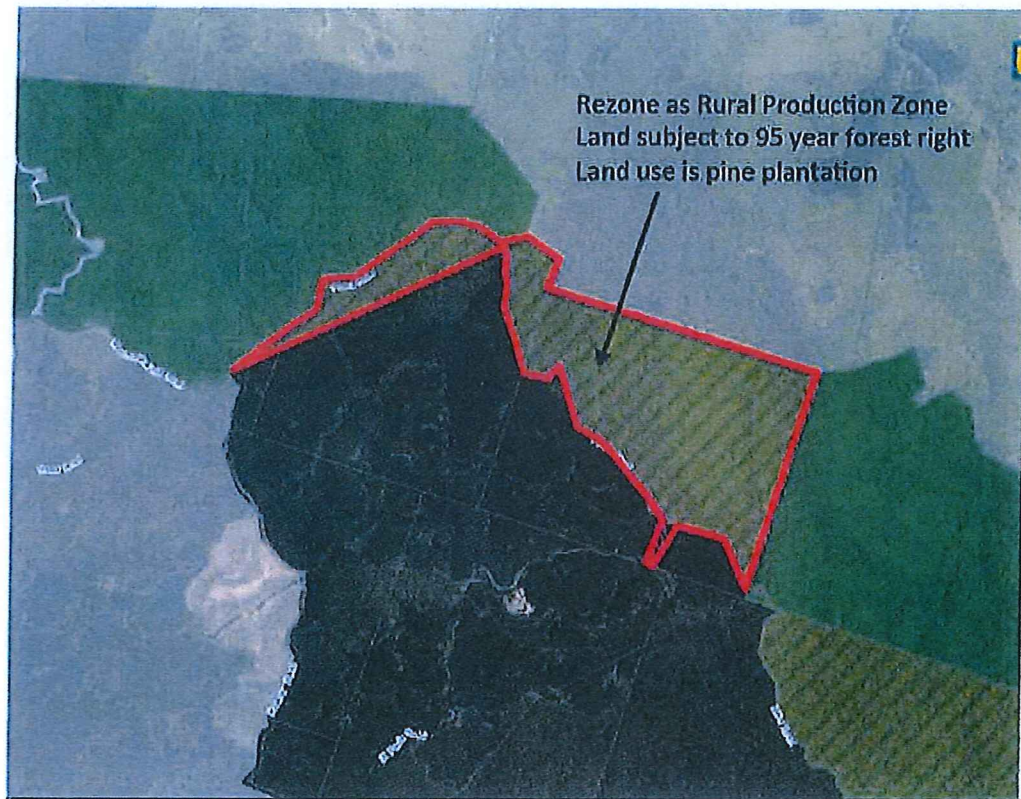
The attached data has been collated from the Auckland Councils GIS website

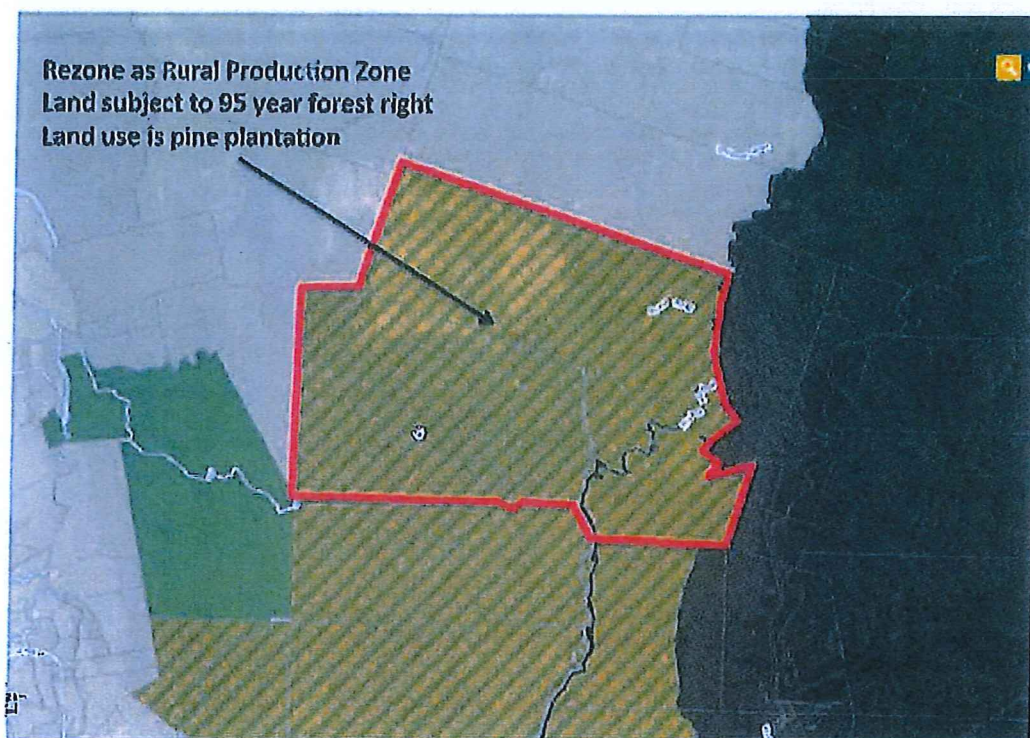
<http://maps.aucklandcouncil.govt.nz/aucklandcouncilviewer/>.

Rezone the following parcels of land from Public Open Space - Conservation to Rural Production:

Hunua Forest, 201 Moumoukai Hill Rd, Clevedon:-

1	Area m2 Legal Description PAR ID	202596 Allotment 168 PSH of Otau 4894501
2.	Area m2 Legal Description PAR ID	3417 Lot 1 DP 61276 5017045
3.	Area m2 Legal Description PAR ID	5231369 Lot 1 DP 162670 5054882
4.	Area m2 Legal Description PAR ID	0 Pt Kriripaka 4748694
5.	Area m2 Legal Description PAR ID	0 Pt Kriripaka 4797922
6	Area m2 Legal Description PAR ID	26659 Section 3 Blk XIII Wairoa SD 4696535
7	Area m2 Legal Description PAR ID	2901596 Allotment 89 PSH of Otau 4733436
8	Area m2 Legal Description PAR ID	883226 Allotment 145 PSH of Otau 5191646
9	Area m2 Legal Description PAR ID	82126 Allotment 90 PSH of Otau 4806985
10	Area m2 Legal Description PAR ID	0 Lot 2 ALLT 90 PSH of Otau 4942284
11	Area m2 Legal Description PAR ID	2134717 Allotment 91 PSH of Otau 5111173





APPENDIX C

BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

IN THE MATTER of the Resource Management Act 1991 and the Local Government
(Auckland Transitional Provisions) Act 2010

AND

IN THE MATTER of Topic 013 RPS B2.6 Public open space and recreation facilities

AND

IN THE MATTER of the submissions and further submissions set out in the Parties and
Issues Report

**STATEMENT OF REBUTTAL EVIDENCE OF ANTHONY (TONY) MICHAEL REIDY
ON BEHALF OF AUCKLAND COUNCIL
(PLANNING – REGIONAL POLICY STATEMENT – URBAN GROWTH – TOPIC 013
B2.6 PUBLIC OPEN SPACE AND RECREATION FACILITIES)**

9 DECEMBER 2014

14. ZONING OF HUNUA FOREST

- 14.1 Mr Tollemache has raised the issue of the appropriateness of the zoning of Hunua Forest on behalf of his clients Waytemore Forests Limited, Waytemore Farms Limited, Adfordston Farms Limited and Kauri Hiwi Limited.
- 14.2 The zoning of the Huna forest as Public Open Space – Conservation is an error. This has been recognised in the Council submission number 5716-2983, which seeks that the land be rezoned Rural Production. Unfortunately that submission does not refer to all the affected lots. There are four further submissions supporting the rezoning request, one supporting in part and two opposing in part.
- 14.3 The topic of Rezoning-South is set down for late 2015/early 2016. I can confirm that it is the Council's intention, as sought in its submission, that the Hunua Forest be rezoned to rural production. This should also include the lots that comprise the Hunua Forest but omitted from the Council's submission.

15. ERROR IN TRACK CHANGES

- 15.1 There is one error in the proposed track changes attached to my evidence. Reference to the CMA has been added to (renumbered) Policy 15. This should be shown as underlined, rather than strikethrough.

16. WORDING OF POLICY 15

- 16.1 The wording of (renumbered) Policy 15 in my opinion could be improved. Although this has not been raised in any submissions or evidence directly, the current wording does not read well. My suggested changes do not change the overall intent of this policy. The re-wording is:

~~13 1415.~~ *Facilitate public access and enjoyment of the margins of lakes, rivers, streams and the coast CMA while ensuring landscape and natural values are protected by:*

- a. providing areas of public open space that have high amenity values in these locations, including new parks and multi-use trails*
- b. enabling facilities that support water recreation activities to ensure provided they are appropriately located and designed e.g. boat ramps*
- c. ensuring landscape and natural values are protected.*

17. CONCLUSION

- 17.1 In my view, the IHP should recommend to Council the provisions in the Proposed Auckland Unitary Plan on section B2.6 Public open space and recreation facilities amended as I have suggested in Attachment A.

APPENDIX D

Martin Williams

From: Mark Tollemache <marktollemache@ihug.co.nz>
Sent: Tuesday, 16 December 2014 8:49 a.m.
To: Martin Williams
Cc: 'Vicki Manchester'; Richard Harwood
Subject: 013 growth hearing

Hi All

I attended the hearing yesterday. The Waytemore evidence and Council concession were understood by the Panel.

The Judge indicated to the Council that it should be undertaking an exercise of identifying sites where the zones are incorrect to bypass the submitters having to participate in a range of topics unnecessarily to cover their bases. Effectively he used Waytemore as an example whereby parties are put to unnecessary expense if these matters could be resolved early.

Cheers, Mark

APPENDIX E

BEFORE THE AUCKLAND UNITARY PLAN INDEPENDENT HEARINGS PANEL

IN THE MATTER of the Resource Management Act
1991 and the Local Government
(Auckland Transitional Provisions) Act
2010

AND

IN THE MATTER of **TOPIC 080** Rezoning and Precincts
(General)

AND

IN THE MATTER of the submissions and further
submissions set out in the Parties and
Issues Report

**JOINT EVIDENCE REPORT OF CAROL ANNE STEWART, ANTHONY MICHAEL
REIDY, LUCY CLARKE DEVERALL, JULIANA MARIE COX ON
TOPIC 080: REZONING, PUBLIC OPEN SPACE ZONES**

3 DECEMBER 2015

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1. SUMMARY

- 1.1 The purpose of this Evidence Report (**Report**) is to consider submissions and further submissions to the Proposed Auckland Unitary Plan (**PAUP**) Topic 080 Rezoning and Precincts General (**Topic 080**). This Report considers submissions and further submissions that were received by Auckland Council (**the Council**) in relation to zoning of land to or from Public Open Space (**POS**).
- 1.2 The Report identifies whether each submission should be supported or not supported, in full or in part, and what amendments, if any, should be made to address matters raised in submissions.
- 1.3 The Report also includes amendments considered out of scope of submissions, where additional zoning errors have been identified and need to be rectified.
- 1.4 Over 2000 submissions were received, of which approximately 740 were from Council. The submissions relate to common themes including:
 - (a) Recently acquired reserves not yet mapped as Public Open Space;
 - (b) Omission errors (e.g. part of a reserve not mapped as Public Open Space); and
 - (c) Incorrect zonings on public land (both public open space and publicly owned land).
- 1.5 The submissions, and other minor 'out of scope' changes suggested by internal council departments, were assessed against the purpose of the five Public Open Space zones and a set of zoning principles. Many of the requests are sensible, straightforward zone changes. However, there are a small number of significant changes recommended to the Public Open Space zones. These are addressed in greater detail in this evidence.
- 1.6 In addition, a number of changes have been requested by submitters that are not supported. Details of why these changes are not supported are provided although given the number of submissions, individual submissions have been grouped by area.

PART A: OVERVIEW AND BACKGROUND

2. INTRODUCTION

- 2.1 The purpose of this Report is to consider submissions and further submissions to Topic 080. In this Report we consider the submissions that were received by the Council in relation to zoning of public open space.
- 2.2 The Report has been prepared by Carol Stewart, Tony Reidy, Lucy Deverall and Juliana Cox. The qualifications and experience of the Report writers are attached in **Attachment A**. Mr Reidy and Ms Cox have previously provided evidence to the Panel on behalf of the Council.
- 2.3 Due to the volume of submissions, site visits were not possible to support all assessments. Site visits were made to significant sites (as listed in **Attachment B**). While many of the other sites had been visited, some were assessed using the Council's GIS system, Google Earth and the input from other staff familiar with the site (in particular Park Advisors in Local and Sports Parks).
- 2.4 The Report includes our opinion on whether to accept or reject the submissions. The proposals identify whether each submission should be supported in full or part or not supported, and what amendments, if any, should be made to address matters raised in submissions.
- 2.5 The Report includes our analysis of the out of scope submissions.

3. CODE OF CONDUCT

- 3.1 We confirm that we have read the Code of Conduct for Expert Witnesses contained in the Environment Court Practice Note 2014 and that we agree to comply with it. We confirm that we have considered all the material facts that we are aware of that might alter or detract from the opinions that we express, and that this Report is within our area of expertise, except where we state that we are relying on the evidence of another person.

4. SCOPE

- 4.1 We are providing planning evidence in response to submissions that request zone changes to or from Public Open Space.
- 4.2 In preparing this Report we have relied on:
 - (a) the Auckland-wide evidence of John Duguid for Topic 080 and Topic 081 Rezoning and Precincts Geographic (**Topic 080**) which sets out the

Hunua Ranges Regional Park

- 14.15 Waytemore Forests Limited, Waytemore Farms Limited, Adfordston Farms Limited and Kauri Hiwi Limited (879-1) seek the rezoning the land in the Hunua Ranges Regional Park (identified in Attachment 1) from POS: Conservation zone to Rural Production.
- 14.16 The submitters have a 95-year Forestry Right (with 84 years left to run) for the Hunua Forest over land within the former Manukau and Franklin Districts. Within Manukau, the land covered by this forestry right is zoned Rural 1 and in Franklin is zoned Forest Conservation. Within the Manukau District Plan production forestry is a permitted activity. Under the Franklin District Plan the zone rules apply a discretionary activity status to new forestry activities, but the plan also includes a permitted activity rule to allow the ongoing operation of existing production forestry, acknowledging the 95-year Forestry Right and the large areas of plantation forests within the zone. Forestry is proposed to be a discretionary activity in the POS: Conservation zone in the PAUP. This was introduced as part of the Council's evidence for Topic 058.
- 14.17 We acknowledge that Mr Reidy on behalf of the Council has previously given evidence that the zoning should be amended to Rural Production. However we consider having reviewed the submission in light of all other rezonings that a POS zoning is more appropriate for the following reasons:
- (a) The land is owned by Auckland Council for water supply and regional park purposes and its primary and ultimate use is for informal recreation and conservation.
 - (b) The land is part of the Hunua Ranges Regional Park and is subject to the Regional Park Management Plan 2010.
 - (c) The land is subject to a regional park designation and parts of it are subject to a Watercare designation for metropolitan water supply purposes.
 - (d) The land is subject to an agreement (Lease /Licence) between the Council and Watercare for water supply purposes. The regional rules relating to vegetation clearance and earthworks are more protective than those relating to the Rural Protection zone. This will enable more appropriate management of activities that could adversely affect water quality.
 - (e) Waytemore Forests Limited will have existing use rights for forestry established under the Franklin and Manukau District Plans.

14.18 For those reasons we do not support the relief sought by the submitter.

15. EXPLANATION OF MAPPING

15.1 **Attachment F** contains two maps for each of the significant rezoning submissions, including, for each site, the PAUP zones as notified, and as proposed by the Council, with in scope and out of scope changes identified.

15.2 There are no map changes attached to this evidence for the remaining changes. The GIS map has been updated to reflect the change.

15.3 Having regard to the requirements of section 32 and 32AA of the RMA and the other statutory criteria of the RMA outlined in the evidence of Mr Duguid and the matters raised by submitters, we consider that the proposed zoning changes are appropriate because they are:

- (a) Rectifying errors
- (b) Applying a more appropriate zone
- (c) Are updating maps to reflect recently acquired open space land
- (d) Are reflecting a wider council decision on the future of open space

15.4 The zoning of surrounding sites, not being looked at as part of Topic 080, are considered in separate pieces of evidence under Topic 081.

16. PROPOSED AMENDMENTS OUTSIDE THE SCOPE OF ZONING SUBMISSIONS

16.1 As outlined in Mr Duguid's evidence, a number of amendments are proposed which are out of scope of the submissions in order to give effect to the proposed PAUP RPS and to achieve the objectives (and policies) of the zones as proposed to be amended in the Council's closing statements on Topics 058.

16.2 The out of scope amendments for Public Open Space are included in **Attachment E**. These were largely mapping errors, where an alternative zoning was given to a site intended to be used as public open space and owned by Council. These requests related to similar themes to those raised in submissions, such as consistent zoning of access ways and esplanade reserves.

16.3 The Auckland Kindergarten Association proposed an additional 14 submission points requesting zoning of kindergarten land on public open space. These submissions have been reviewed and are provided in Attachment E.

16.4 Additionally we have proposed a number of amendments to zoning(s) to correct minor technical errors. There are no particular submissions to which these amendments respond.

17. CONCLUSIONS

17.1 We have considered the submissions received on the zoning for public open space. We consider that the zoning changes proposed by the Council as set out **Attachment B** and in the maps included within **Attachment D** most appropriately meet the purpose of the Act.

Carol Stewart, Anthony Reidy, Lucy Deverall, and Juliana Cox

3 December 2015

Before the Auckland Unitary Plan Independent Hearings Panel

Under the Resource Management Act 1991 and the
Local Government Auckland (Auckland
Transition Provisions) Amendment Act 2013
(**"the Act"**)

In the matter of submissions by Waytemore Forests Limited,
Waytemore Farms Limited, Adfordston Farms
Limited and Kauri Hiwi Limited (879-52) on the
Proposed Auckland Unitary Plan

And in the matter of Hearing on Topic 80 – Rezoning and Precincts.

**MEMORANDUM ON BEHALF OF WAYTEMORE FORESTS LIMITED
SEEKING DIRECTIONS INCLUDING THAT EVIDENCE BE STRUCK OUT**

Dated 11 December 2015

APPENDIX F

ORIGINAL

Decision No A 31/95

IN THE MATTER of the Resource Management
Act 1991

AND

IN THE MATTER of an appeal under section
120

BETWEEN

G BANKS and S
GREGORY

(Appeal RMA 497/94)

Appellants

AND

THE WAIKATO
REGIONAL COUNCIL

Respondent

AND

CARTER HOLT HARVEY
FORESTS LIMITED

Applicant

26 APR 1995

BEFORE THE PLANNING TRIBUNAL

Planning Judge DFG Sheppard (presiding)

Mr R G Bishop

Ms J D Rowan

HEARING at HAMILTON on 9 and 10 February 1995 and
at WHANGAMATA on 21 and 22 March 1995

APPEARANCES

The appellants in person

Mr J Milne for the respondent

Mr P F Majurey and Ms R A Edwards for the applicant



DECISION

INTRODUCTION

This appeal against a decision granting consent to harvest pine trees on the Whangamata Peninsula raises issues about the relevance of earlier actions authorised as permitted activities; consultation with iwi; rights of appeal after agreement signified; and the proper scope of conditions to protect waahi tapu. The appellants alleged that the conditions were not adequate to properly protect and manage waahi tapu and taonga significant to the area, and that the application had not been presented in good faith in that prior to the primary hearing some work preparatory to logging had been carried out which had damaged taonga or waahi tapu. The appeal sought either cancellation of the consent or new conditions for the protection and management of the taonga and waahi tapu. The new conditions sought were not stated in the notice of appeal.

The area of land where it was proposed to harvest pine trees comprises about 268 hectares of forest on the Whangamata Peninsula, being part of the Tairua Forest and described as Compartments 123, 124 and 125. The Tairua Forest was formerly State forest, and Carter Holt Harvey Forests Limited (CHHF) had been granted a Crown forestry licence in respect of it under the Crown Forest Assets Act 1989, by which the Crown retained ownership of the land and CHHF was entitled to harvest the trees on it. The licence provides for the Crown to give notice to CHHF of identified waahi tapu in the subject area, and to direct the licensee to observe protective covenants. There are 187 registered sites of that type recorded in the schedule to the licence. The licence also provides that if human bones or Maori artefacts are discovered by the licensee, the Crown has to be notified immediately, and any directions from the Crown for reinterment of bones must be followed.

The appellants represent the Gregory and Mare whanau, who claim status as tangata whenua in respect of 70 per cent of the area of the Tairua Forest, and on the Whangamata Peninsula claim an equal interest with Ngati Matau and Ngati Karaua. The appellants claimed that in the Tairua Forest there are many sites of meetings, sites where ancestors died, areas of earlier occupation, burial sites, and other waahi tapu and taonga, many of which are unrecorded.



The applicant is Carter Holt Harvey Forests Limited, holder of the Crown forestry licence over the Tairua Forest. The respondent is the Waikato Regional Council, which is the regional council for the Waikato region which includes the subject land.

The proposed harvesting of the trees involves earthworks, some of which (on average slopes greater than 20") would be a discretionary activity under proposed change No 3 to the transitional Waikato regional plan. Section 9(3) of the Resource Management Act prohibits use of land in a manner that contravenes a rule in a proposed regional plan unless the activity is expressly allowed by a resource consent. CHHF applied to the Waikato Regional Council (the respondent) for resource consent accordingly.

The application for resource consent was lodged with the respondent in late March 1994. It sought resource consent to "carry out forest operations, road upgrading, construction of spur roads and landings, and harvesting operations of *pinus radiata*". The application was supported by a comprehensive environmental impact assessment report

Harvesting the pine trees is to be staged progressively over a four-year period; and associated activities include construction of 4.3 kilometres of spur roads, up to 29 landing sites, and the upgrading of approximately 4 kilometres of the peninsula road.

The application was publicly notified on 30 April 1994 and submissions were lodged within the prescribed period by the appellants, by representatives of Ngati Pu (a separate iwi), each claiming tangata whenua status for the area, and by the Department of Conservation. A prehearing meeting was held on 29 June 1994 which was attended by representatives of the applicant, the appellants, the respondent and Transit New Zealand (which had lodged a late submission). The meeting resulted in agreement on a number of points.

The application and submissions were heard by a hearings committee of the respondent on 5 August 1994. At the hearing it was reported that a meeting the previous night between the applicant, the appellants, and representatives of Ngati Pu had resulted in a draft agreement about management and protection of waahi tapu. The parties at the hearing were the applicant and representatives from the Gregory family and from Ngati Pu. The committee's decision was given on 25



August 1994. It granted the application for a term to expire on 31 December 1998, and imposed a comprehensive set of conditions.

This is the only appeal that has arisen from the decision. The applicant has not challenged any of the conditions. By the notice of appeal the appellants alleged that the conditions imposed are inadequate to properly protect and manage the taonga and waahi tapu of the area, and that the application had not been presented in good faith in that some work preparatory to logging had been carried out before the hearing and had damaged taonga or waahi tapu sites. The notice of appeal seeks either cancellation of the consent or new conditions (unspecified) for the protection and management of the taonga and waahi tapu.

PREPARATORY ACTIVITIES

Prior to making its resource consent application, the applicant had undertaken construction of roads and "landings" in the subject area of the Whangamata Peninsula during the period from 3 November 1993 to 17 March 1994. That work was in preparation for the harvesting work now the subject of the resource consent application, and was described as preparatory work. It was necessary to do that work well in advance of the harvesting to allow the formations to consolidate, to provide better performance for heavy logging traffic; and the work was done in summer to take advantage of drier weather.

The applicant consulted with tangata whenua before commencing those works. To ensure that those works avoided waahi tapu as far as possible, the applicant engaged Dr N Ritchie, the Department of Conservation's regional archaeologist, who made a full survey of the routes and sites of all proposed roads and landings before the works were carried out, Dr Ritchie found six new archaeological sites. In addition, Hauraki kaumatua inspected the routes and sites to identify any other waahi tapu, but no additional waahi tapu were identified. The applicant relocated its operations from their optimum location to avoid all but two of the six sites identified by Dr Ritchie.

The applicant applied to the Historic Places Trust for permission to modify the remaining two sites, and the Trust's consent was granted under section 14 of the Historic Places Act 1993. The appellant claimed that the consent was granted without consultation with the true tangata whenua. If, as they claim, the appellants were directly affected by the Trust's decision, they had a right of appeal to the Planning Tribunal against the Trust's decision granting that consent (see section 20



of the Historic Places Act), but in the event they did not appeal. As it happened, only one of the sites was modified (a scattered shell midden) and the other was left untouched.

The preparatory earthworks were permitted activities by rule 3.3.1 of the transitional regional plan by proposed change No 3 (described below), and accordingly a resource consent was not required from the respondent for those works. However the work was monitored by the Regional Council's staff, and in particular by Mr REP Muller, a qualified forest ranger employed by it, who visited the area on fourteen occasions at various phases of the work. Mr Muller reported that a thorough professional job had been done, and that no examples of off-site adverse effects had been observed.

One of the appellants, Mr Gregory, testified that a single-lane road had been turned into a two-lane road with battered sides, the complete width being about 50 metres; that spur roads had been put down each ridge; and that several hills had been bulldozed flat. He claimed that two registered cultural sites had been destroyed. The other appellant, Mr Banks, testified that the works had resulted in wholesale destruction of important sites, and had desecrated sacred sites forever. He relied on a report by a Ms L Furey, who was not, however, called to give evidence. In cross-examination about the sites that he claimed had been destroyed, Mr Banks referred to a shell midden on the side of a road, and another midden.

To the appellants' claim that some of the work had damaged waahi tapu sites, the respondent replied that it was not a matter over which it had jurisdiction, no resource consent from it being required; and that it had understood that authority to modify certain sites had been obtained by the applicant from the Historic Places Trust.

On the evidence before us, we find that Mr Banks' description of the effect of the preparatory works as wholesale destruction of important sites was overstated. We hold that the works were carried out lawfully in terms of section 9(3) of the Resource Management Act, being activity that is permitted by proposed change No 3 to the transitional regional plan; and (to whatever extent it is relevant to these proceedings) lawfully in terms of the Historic Places Act, being the subject of authority granted by the Historic Places Trust under section 14 of the Act.



It is clear that the appellants regret that the Historic Places Trust granted that authority, and also regret that they did not appeal to the Planning Tribunal against

its decision. However it is important that the Tribunal does **not** allow this appeal against the Waikato Regional Council's decision granting resource consent for harvesting pine trees to be used as an indirect challenge to the Historic Places Trust's decision granting authority to modify the sites. The Historic Places Trust is not a party to these proceedings; the appellants have not lodged an appeal against its decision; and neither they, nor CHHF should be placed in the position they would have been in if the appellants had appealed against it.

CONSULTATION WITH IWI

Tangata Whenua

The appellant Mr Gregory stated that the applicant and the respondent knew that the Gregory and Mare whanau were tangata whenua of the block in question, and if they were unsure, they should have checked the Waitangi claims register. He complained that they had deliberately chosen to use other people as tangata whenua representation, such as the kaumatua council, who were not representative of their whanau. In answer to a question from Mr Milne, he agreed that the Waikato Regional Council had no power to decide who had the status of tangata whenua.

The evidence before the Tribunal did not support Mr Gregory's claims. On the contrary, it is clear that the reason why the applicant did not consult earlier with the Gregory and Mare whanau was that it was not aware that its interests were not represented by the Hauraki Maori Trust Board and the kaumatua council. We accept that there are competing, if not to say conflicting, claims by various iwi to tangata whenua status in respect of the Whangamata Peninsula. Neither CHHF nor the respondent has authority to resolve those conflicts.

We do not accept that reliable identification of the tangata whenua can be obtained from the Waitangi claims register. In that regard we adopt what was said by the Tribunal in *Tawa v Bay of Plenty Regional Council* (A 1 8/95) at page 11:

"It was not for the Regional Council to decide which of the competing tribes is entitled to mana whenua over the area of foreshore the subject of the coastal permit application. Our understanding is that the appropriate forum for resolving claims of that kind is the Maori Land Court - see section 30 of Te Ture Whenua Maori Act 1993 - and that the fact that the other tribes have not themselves made claims under the Treaty of Waitangi Act does not derogate from whatever validity their claims to mana whenua may have."



The Applicant

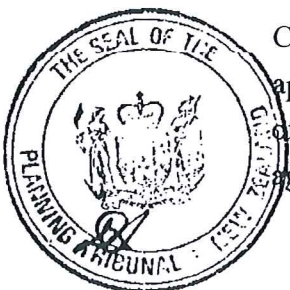
The applicant claimed that it had undertaken extensive consultation with the appellants and with others who identified as tangata whenua, beginning with hosting a kaumatua council site inspection on 6 September 1993 (before the preparatory work on the roads and landings was due to begin) at which the general operations were discussed, and followed by a further public meeting held before any operations commenced, at which the applicant's harvesting plan was presented and discussed.

The applicant tried to meet with members of the Gregory family after they advised of their concerns. The first time they were able to meet was on 29 July 1994. Attempts were also made to arrange a site visit. On 1 August 1994 a meeting was held at Auckland with members of the Gregory family. Ngati Pu were not involved. The Gregory family representatives expressed disappointment at not having been consulted earlier. There was discussion about the Gregory family interest in the land; discussion about the boundaries to be established; and conditions for the granting of consent were aired. At that meeting verbal agreements were made.

The next meeting was on the night before the council hearing, attended by five representatives of the Gregory family, sixteen Ngati Pu, and representatives of the applicant. Those present concluded an agreement which addressed concerns about waahi tapu, by agreeing on conditions to be put forward at the hearing. The focus of the consultation was on the appropriate management strategies for the protection of waahi tapu both before and after harvesting.

At the council hearing the appellant Mr Banks thanked the applicant for its efforts in working through the issues, particularly tangata whenua concerns, and commented that CHHF had been very professional and genuine in their attempt to address the issues and affirmed that he meant those words fully. He claimed in re-examination that at the time of the council hearing he had not been aware of the preparatory activities which had been carried out as permitted activities.

Consultation continued after the council hearing as the applicant has, despite this appeal, been implementing the consultation and waahi tapu protection conditions of the respondent's decision. On 11 August 1994 a joint group set up under the agreement and representatives of the applicant met and a site visit was arranged.



On 29 August 1994 there was a telephone conference between representatives of the applicant and of the Gregory family. At that stage a division between the Gregory family and Ngati Pu became apparent. CHHF has continued consulting with Ngati Pu and the Hauraki Maori Trust Board, and has continued to extend invitations to the Gregory family to be involved in ongoing consultation.

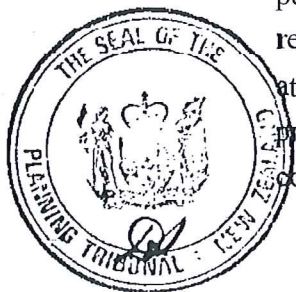
In answer to Mr Majurey, Mr Banks agreed that he had told the hearings committee that CHHF had been professional and genuine, and that he had been most impressed by the attempts to consult made by CHHF in, a short period; and that after they had lodged a submission CHHF had been very professional and had done everything possible to work with them. He agreed that it had only been when they went to the area during the appeal period that they felt what they saw was not consistent with statements made at the hearing.

A witness for the Regional Council, Mr M W Brocklesby, who is senior resource officer - consents, gave the opinion in evidence that the applicant had taken reasonable steps to identify and genuinely consult with the tangata whenua about the proposal.

We agree. It is clear that at the time of the primary hearing the appellants themselves were satisfied with the consultation that the applicant had had with them and those they represented. In our opinion, the fact that they were subsequently disappointed when they viewed the extent of the preparatory works that had previously been carried out cannot turn what had been satisfactory consultation into defective consultation. The subject matter of the consultation had been the harvesting work the subject of the resource consent application. The preparatory works had been carried out some time previously, and were not the subject of that application. The applicant had no duty to consult with the appellants about those works in relation to the resource consent application.

The Regional Council

Mr Banks claimed that the appellants' consultation with the Regional Council prior to the hearing had been somewhat lacking, and that it had been quite difficult to put their concerns across. In cross-examination he agreed that the conditions recommended in the staff report to the hearings committee had been a clear attempt to address the concerns that the Gregory family had expressed at the prehearing meeting; and that the report showed that the staff had understood those concerns and had recommended that they be taken into account by conditions.



For the Regional Council, Mr Milne submitted that there was no duty on the respondent to consult with the tangata whenua in respect of a resource consent application, and that any "consultation" undertaken by the respondent's staff was simply for the purpose of preparing a report on the application for consideration by the consent authority along with any other material, and could be the subject of challenge by any of the parties. He referred to the Tribunal decisions in *Rural Management v Banks Peninsula District Council* [1994] NZRMA 412 and *Greensill v Waikato Regional Council* (W17/95).

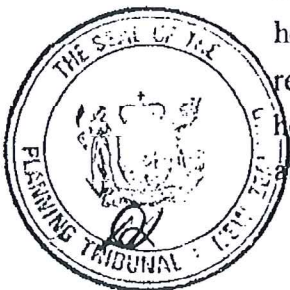
Counsel also contended that the respondent had satisfied any obligations on it for consultation in the present case by arranging the preheating meeting with the applicant and with those claiming tangata whenua status. Those claiming that status had been able to express their views about the proposal, as they had also been able to do at the primary hearing. In the event, they had freely chosen to express their agreement

In *Tawa v Bay of Plenty Regional Council* the Tribunal said (at page 7):

"The Regional Council ... was required to act in a judicial way and be evenhanded between the applicant and the submitters opposing the application. It would not have been right for the Regional Council or the members of its hearings committee to have themselves consulted unilaterally with any of the parties. However the hearings committee needed to have drawn to their attention any aspects of the proposal that would bear on any of the matters referred to in Part II, including Maori relationships with traditional lands, water, sites, waahi tapu and other taonga; kaitiakitanga; and the principles of the Treaty of Waitangi. It was therefore appropriate that a reporting officer had consulted with representatives of the iwi known to claim mana whenua in the application area, and to report on how those aspects should be addressed. That having been done, we do not consider that the primary hearing was deficient by lacking information about those issues."

We adopt that statement of the Regional Council's position in respect of consultation with tangata whenua about the present resource consent application. It is consistent with the other Planning Tribunal decisions referred to by Mr Milne.

In this case it is clear that the official preparing the staff report for the respondent's hearings committee on this application made sufficient enquiries to enable him to report to the hearings committee on the relevant aspects of the proposal, and on how those aspects should be addressed by the imposition of conditions. The attitude expressed by the appellants to the hearings committee about the



recommended conditions fully bears that out. The fact that the appellants have subsequently changed their minds and now seek amendments to those conditions does not mean that the respondent failed in its duty to obtain information about how the proposal would bear on the matters referred to in Part II. In any event, the appellants have, by this appeal, had full opportunity to adduce evidence on all of those matters. We find that neither the applicant nor the respondent has failed to have regard to the principles of the Treaty of Waitangi in dealing with the present resource consent application. We do not accept the appellants' claims to the contrary.

AGREEMENT

The appellant Mr Banks acknowledged in evidence that at the primary hearing the appellants had accepted the granting of resource consent to the applicant. He claimed that there had been conditional acceptance relying on verbal guarantees by CHHF about protection of cultural sites and ongoing consultation with the tangata whenua.

Asked in cross-examination whether there was anything in the transcript of the hearings committee proceedings indicating that their expressed satisfaction with the conditions had been conditional, he made no answer. Asked how the hearings committee could have understood that their consent was in some way conditional, he again made no answer. He agreed that he had had the opportunity to say what he had liked to the hearings committee, and when it was put to him by Mr Milne that nowhere had he said that their agreement had been conditional, he made no answer. He agreed that if they believed CHHF were still in good faith, the conditions imposed would satisfy them.

Mr Banks explained that since the council hearing, having seen the preparatory works on the site visit on 11 August 1994, the appellants had changed their minds about the appropriateness of the conditions, Mr Gregory claimed that substantial and irreversible damage had been done by the preparatory works; that the land had been pillaged, with no consideration for cultural sensitivities; and that the applicant appeared to have consciously worked outside the requirements of the law. Mr Gregory explained that they had appealed the consent until such time as proper negotiations had taken place and conditions are established that will protect their heritage in the area.

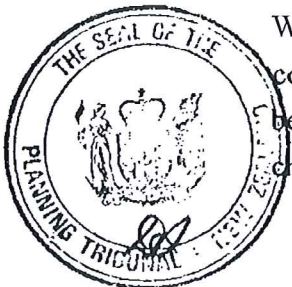


Mr Banks deposed to the opinion **that the** destruction caused by the preparatory works called in question the good faith of the applicant in the prehearing discussions, and that the whole basis on which the resource consent was granted had been undermined. He was asked whether he would maintain his view that the applicant had not been in good faith if it was found that what it had done had been what it was entitled to do. The witness replied that he would remain of the view that the applicant had not been in good faith.

The respondent submitted that there was no evidence to suggest that the application was presented other than in good faith. Counsel reminded us that the preparatory work had been disclosed at the prehearing meeting (as was recorded in the minutes of the meeting), and had been referred to in the staff report for the primary hearing; and that after that hearing it had been the applicant which took the appellants to the area for an inspection. The applicant had carried out the works openly, as it had been permitted to do, and had made no attempt at concealment. The fact that pending hearing of this appeal the applicant had not proceeded meanwhile with parts of the work that do not require resource consent was a **further** indication of its good faith.

For CHHF Ms Edwards submitted **that** the appellants' mistrust of the applicant was misplaced, due to a misunderstanding of the relationship between the preparatory works carried out as permitted activities and the work the subject of the resource consent application; and that there was no basis for the view that the applicant will not comply with the conditions of any resource consent granted to it.

In our view there is no foundation for any finding that CHHF had acted other than in good faith in carrying out the preparatory works (which were permitted under the Resource Management Act and authorised under the Historic Places Act); in consulting with the appellants prior to the hearing; in presenting its application to the respondent's hearings committee; or in dealing with the appellants after the primary hearing. Similarly, the appellants' claim that the applicant had consciously worked outside the law was not made out in any respect. We accept that there is no basis for finding that the applicant would not comply with the conditions of the resource consent.



We find that at the primary hearing the appellants genuinely approved the proposed conditions and sincerely informed the committee of their consent to the application being granted with those conditions attached. We accept that the appellants changed their attitude to the applicant and to its proposal following their visit to

the area with CHHF representatives. However there was nothing that would justify their claim that the basis for their consent to the conditions had been undermined. In *our* view the appellants' change of attitude was, as they acknowledged, a change of mind; and their appeal was designed to provide a vehicle for further negotiations to achieve more stringent conditions than they had previously agreed to. However their previous expressions to the consent authority of their consent to the application with the agreed conditions had not been contingent on there having been no preparatory works. The applicant and the respondent had taken their consent on face value, and had acted on it accordingly.

In its decision in *Ngati Kahu Trust Board v Northland Regional Council* (A 48/94) the Tribunal said (at page 10):

" The term 'vexatious' is sometimes used of proceedings which require the opposing party to defend itself again against claims that have already been disposed of; and it is sometimes used of proceedings that cannot lead to any practical result. The same approach applies whether the claims were previously disposed of by a decision of a Court or Tribunal, or by agreement between the parties. In general, Courts and Tribunals support people resolving their differences themselves if they are able to do so. The Resource Management Act encourages resolution of disputes by mediation or conciliation - see section 268. Where parties have reached agreement on the resolution of their disputes then, subject to any need for ensuring that the statutory purpose is not prejudiced, they should not be allowed to bring further proceedings that raise what in substance are the same issues. The procedures of Courts and Tribunals should not be used against people in such a way that they have to take the time and incur the cost of presenting their case in response to claims of those kinds."

In our opinion, the appellants bringing of this appeal after having told the respondent's hearings committee of their consent to the agreed conditions falls within the category of vexatious proceedings. They were free to change their minds about the conditions, but bringing this appeal raises again issues that they had already settled, even though they later regretted having done so.

TREATY CLAIM



Mr Gregory testified that the application area is the subject of a claim under the Treaty of Waitangi Act. Mr Banks agreed that the Planning Tribunal could not

deal in these proceedings with claims by iwi to tangata whenua status or with claims under the Treaty of Waitangi Act.

Mr Milne relied on the Tribunal's decisions in *Haddon v Auckland Regional Council* [1994] NZRMA 49 and *Greensill v Waikato Regional Council* as establishing that the Planning Tribunal is not an appropriate forum to determine whether vesting of land in the Crown was a breach of the Treaty of Waitangi, and submitted that any determination of disputed questions of ownership must as a matter of law go to the Waitangi Tribunal,

Although consent authorities are directed, by section 8, to take into account the principles of the Treaty of Waitangi, that does not invest them with authority to decide whether the Crown is in breach of its obligations under the Treaty in any respect; let alone to decide what redress might be appropriate. A consent authority's duty to take into account the principles of the Treaty has to be performed in a way that does not anticipate any particular outcome of any claim under the Treaty of Waitangi Act. Therefore, although we acknowledge Mr Gregory's advice that the application area is the subject a claim, we set that information aside as not bearing on the decision on this appeal.

CONDITIONS OF CONSENT

The respondent attached twenty conditions to the resource consent granted to the applicant. Thirteen of them were designed to protect soil and water values of the environment, and were not in issue in this appeal. We are satisfied that if the proposed pine tree harvesting is carried out in compliance with those conditions, any adverse effects of the activities on the environment would be avoided, remedied, or mitigated.

The following six conditions were designed to protect the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga; kaitiakitanga; and to take into account the principles of the Treaty of Waitangi.

Condition (n) provides for expert identification of any taonga and waahi tapu significant to the area and management of those sites in agreement with the tangata whenua.



Condition (o) provides for identification of sites of spiritual and archaeological significance, and development of a management plan for them, including access, in agreement with the tangata whenua.

Condition (p) provides for the grantee to establish a liaison group with tangata whenua representatives to facilitate ongoing communication and consultation.

Condition (q) provides for an independent arbitration of disagreements regarding appropriate taonga and waahi tapu management proposals.

Condition (r) provides for development of buffer-zone management policy in accordance with approved guidelines.

Condition (s) provides that exercise of the consent is subject to ongoing compliance by CHHF with its agreement with Ngati Pu and Ngati Karaua.

The final condition provides for the grantee to pay lawful charges to the Waikato Regional Council.

ACTUAL AND POTENTIAL EFFECTS

Section 104(1) provides that, subject to Part II, when considering an application for a resource consent a consent authority is to have regard to various matters listed in that subsection. We have found nothing in Part II which conflicts with our having regard to such of the matters listed in the subsection as are applicable to the circumstances, in considering the present resource consent application. The **first** of those matters is “any actual and potential effects on the environment of allowing the activity”.

On this appeal it was not contested that if the proposed work is carried out in compliance with the conditions imposed by the respondent, any actual and potential effects on the environment of allowing the activity would effectively be avoided, remedied, or mitigated. The only exception to that was the appellants’ claim that the conditions (n), (o), (p) and (q) for protection of waahi tapu and other taonga need to be strengthened. We refer to the amendments sought by the appellants to those conditions later in this decision. That aside we find that any actual and potential effects on the environment of allowing the activity would be minor.



PLANNING INSTRUMENTS

As directed by section 104(1), we now have regard to the relevant planning instruments.

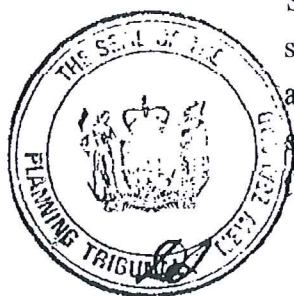
Transitional Regional Plan

By section 368 of the Resource Management Act, notices issued by the respondent under section 34 of the Soil Conservation and Rivers Control Amendment Act 1959 controlling earthworks had become part of the respondent's transitional regional plan. However, by section 369(9) those parts of the plan ceased to be operative in September 1993, before the respondent had been able to provide a new regional plan under the Resource Management Act.

To avoid a gap in control, in July 1993 the respondent published a proposed change (change No 3) to its transitional regional plan which included provisions to control land use in terms of section 9(3) of the Resource Management Act. Submissions have been lodged in respect of the proposed change, but have not yet been heard. (The failure of the respondent to hear and decide the submissions was not explained; and we commend to the respondent's attention the Tribunal's decisions in *Te Aroha Air Quality Group v Waikato Regional Council (No 2)* (1993) 2 NZRMA 574 at 580; *Heasley v Dunedin City Council* (C 90/94) at 9; and *Regular Developments v Marlborough District Council* (W 130/94) at 33 .)

The proposed change includes a rule 3.3.1 by which certain earthworks, and vegetation and land disturbance, would be permitted activities if specified conditions are met. By rule 3.3.4, earthworks that do not comply with the provisions of rule 3.3.1 would be classified as discretionary activities. The specification of tree cutting and removal activities that are permitted is confined to those activities on land having an average slope of not more than 20°, but allows for those activities on areas not more than 50 hectares in any twelve-month period where the average slope is greater than 20°. The conditions allow activities on land in classes I to VI of the Land Use Capability classification.

Some of the land the subject of the resource consent application has an average slope of not more than 20°, and the works proposed on those parts are a permitted activity if the conditions are met. However other parts of the land have average slopes greater than 20° and in respect of them resource consent is required. That is the reason for the present resource consent application.



Regional Policy Statement

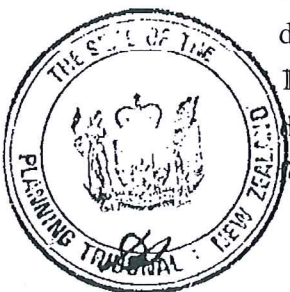
The respondent has published a proposed regional policy statement, and is currently hearing submissions lodged about its content. The proposed statement contains objectives for minimising soil erosion and contamination and for maintaining soil quality. Moisture management strategies are also provided for. There are provisions for respect for taonga and waahi tapu, for the recognition and respect for the relationship of tangata whenua with the environment, and an objective of working in partnership with tangata whenua on resource management issues. The proposed instrument also states policies on consultation, including encouraging consent holders to initiate consultation and maintain close liaison with the affected community; and a policy of stopping work and notifying relevant iwi if burial grounds or waahi tapu are inadvertently disturbed.

It was the applicant's case that the application is consistent with the objectives and policies of that proposed regional policy statement, in that it had consulted with tangata whenua about the proposed harvesting work, and in that conditions (n), (r), (p) and (q) not only protect waahi tapu, but also provide for ongoing consultation with tangata whenua on future management of the area.

The appellants claimed that the proposal is not consistent with those objectives and policies because of perceived inadequacies in the conditions to protect waahi tapu and other taonga from being harmed by works that are permitted activities. As explained below, we do not consider that the conditions of the resource consent can lawfully be extended to control activities that are authorised not by the resource consent, but by another instrument (that is, proposed change No 3 to the transitional regional plan). In our opinion, the conditions imposed by the respondent (and previously agreed to by the appellants) are appropriate for giving effect to the values described in the proposed regional policy statement about waahi tapu, taonga and the tangata whenua.

District Plan

The relevant district plan is the Thames-Coromandel District Council transitional district plan, by which the application area is designated State forest. By section 176 the requiring authority may do anything that is in accordance with the designation. The application area having been set apart in 1935 as permanent State forest under the Forests Act 1921-2, by section 18(2) of the Forests Act 1949 it



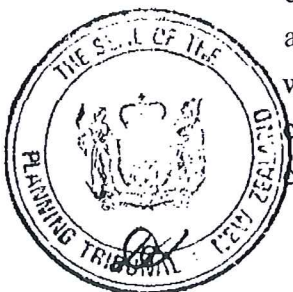
was deemed to be State forest land under that Act; and as such, by section 2(l) of the Crown Forest Asset Act 1989, it became Crown forest land. By section 14 of the latter Act the responsible Ministers were empowered to grant a Crown forestry licence in respect of it. The Crown forestry licence granted to the applicant by them authorises the applicant to harvest the trees on the land, and to undertake activities related to harvesting. We therefore conclude that the proposed activity is consistent with the designation in the transitional district plan.

PART II

By section 105(1)(b) a consent authority has a discretion to grant or refuse a resource consent for a discretionary activity. Therefore we now consider whether granting consent to the proposed pine tree harvesting, subject to conditions such as those imposed by the respondent, would serve the statutory purpose. It is implicit that the discretion is to be exercised for the purpose of the Act, as stated in section 5 and elaborated in the subsequent sections of Part II: *Re application by the Canterbury Regional Council [1995] NZRMA 110, 126.*

The only contest in that respect on this appeal was the appellants' claims that the conditions imposed do not adequately recognise and provide for the relationship of Maori and their culture and traditions with their ancestral lands, sites, waahi tapu and other taonga.

Having considered conditions (n) to (q) of the Regional Council's consent, we are satisfied that they adequately recognise and provide for those matters in respect of the work the subject of the resource consent application. We understand the appellants' concern to be that the conditions do not adequately provide for that relationship in respect of activities that are authorised, not by the resource consent the subject of this appeal, but as permitted activities by proposed change No 3 to the transitional regional plan. We remind ourselves that the duty described in section 6 is imposed on "all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources". We interpret that to apply the duty to the function being performed. In this case the function of the respondent, and of this Tribunal on appeal, is to consider and determine the application for resource consent for a discretionary activity for pine tree harvesting. The function does not extend to consideration of what might or might not properly be made a permitted activity under proposed change No 3 to the transitional regional plan. That is a question that may fall for consideration in proceedings under the First Schedule to the Act.



Therefore we do not accept the appellants' claim that the application is not consistent with Part II of the Act for failure to control activities permitted by the transitional regional plan that may affect the relationship of Maori with their waahi tapu and other taonga.

Although the appellants appeared before the Planning Tribunal in person, their notice of appeal had been signed by an experienced lawyer. He would have been able to advise them of the inability of this appeal to secure for them any restraint on the exercise of permitted activities, and of the opportunity to seek additional rules governing permitted activities by lodging a submission on proposed change No 3 to the transitional regional plan. We do not know whether the appellants lodged such a submission. However we cannot allow this appeal to be used to provide the outcome that such a submission could potentially lead to.

AMENDMENTS TO CONDITIONS

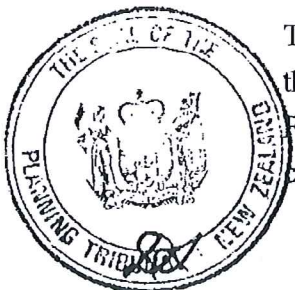
Amendments to the conditions imposed by the respondent were proposed in six respects,, We consider each in turn.

Archaeological Survey

The appellants sought a condition requiring that a full archaeological survey of the entire Tairua Forest be made.

In support, Mr Gregory explained that if any work, whether or not called preparatory work, is likely to cause damage, protection for cultural sites must be put in place before the work can proceed; and that required surveys of all sites be initiated immediately, and that all work cease until historic and sacred places are protected. In answer to a question from Mr Milne, Mr Gregory said that it was the unidentified sites that are more important to the appellants. Mr Banks explained that they had no control over preparatory earthworks that are permitted activities; that the activity was ongoing and that there was little that they could do about it; and that was why they sought the amendment to the condition.

The applicant opposed the imposition of the amended condition. It pointed out that the application area of 268 hectares is only a small portion of the Tairua Forest, which covers some 13,000 hectares; that harvesting is not expected to commence in some parts of the forest outside the application area for many years;



and that surveying parts of the forest outside the application area would not assist in identifying waahi tapu or taonga in the application area. Ms Edwards reminded us that in cross-examination Mr Banks had explained that the condition was to require a survey prior to any works outside the application area, to prevent permitted activities being undertaken by CHHF until the survey had been made. Counsel submitted that a condition for that purpose would not relate to the activity the subject of the present application, and was sought for an ulterior object. She observed that if the appellants considered that permitted activities provided for in a regional or district plan are inappropriate, the procedures provided by Parliament are to make submissions on review or change of the plan, or to seek a plan change.

Counsel for the respondent submitted that there is no jurisdiction to impose any such condition requiring a survey of land lying outside the consent area.

We accept the submission made on behalf of the applicant (citing K A Palmer *Local Government Law in New Zealand* (2nd edition, 1993) 624) that to be lawful, a condition of resource consent must fairly and reasonably relate to the particular development or activity proposed, and should not be imposed for any ulterior object - see *Newbury District Council v Secretary of State for the Environment* [1981] AC 578; [1980] 1 All ER731 (HL).

We hold that a condition such as proposed by the appellants requiring a survey of land beyond the application area would not fairly and reasonably relate to the activity proposed by the application, being the activity that would be authorised by the resource consent on which the condition would be imposed. In that respect the condition would not pass the test. The appellants' evidence showed that they did not want a full survey of the entire forest to avoid, mitigate or remedy any adverse effects on the environment of the exercise of the subject resource consent. The amendment to the condition sought by them is not designed to do that. Rather they wanted the amended condition to control activities that, by law, are permitted activities. That is an object which is outside the subject matter of the resource consent, and is an ulterior object. The amended condition sought by the appellants does not pass the test in that respect either. We therefore hold that the amended condition requiring a full archaeological survey of the entire Tairua Forest could not lawfully be imposed on the resource consent the subject of these proceedings; and we decline to make that amendment.



Preparatory Activities

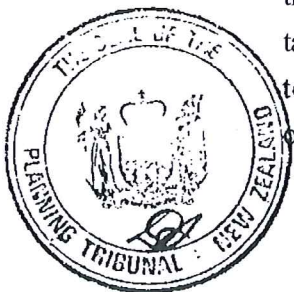
The appellants sought an amendment to condition (n) to require an archaeological survey “prior to any activity”, instead of “prior to any logging”. Mr Banks explained that the purpose was to cover preparatory activity, including road and fence-line construction and any other activity that may harm archaeological sites, as even preparatory work that does not require resource consent can cause substantial damage. The witness explained that the amendment would extend protection over sites during pre-harvest activity, to prevent work being undertaken as permitted activity.

The applicant opposed the amendment, pointing out that the purpose of it is to prevent works being undertaken that are permitted activities, until a survey has been carried out. Counsel submitted that the amendment would not relate to the activity proposed, and would be for an ulterior object. For the respondent, Mr Milne submitted that there is no jurisdiction to require anything prior to any activity which is a permitted activity, in respect of which no resource consent is required.

We accept that the object of the amendment, as explained by Mr Banks, is ulterior to the subject matter of the resource consent, and we therefore hold that the condition could not lawfully be amended as proposed. We also accept Mr Milne’s submission that a consent authority as such has no power to require something to be done prior to an activity which is a permitted activity for which resource consent is not required.

Compliance Agreement

The appellants sought amendment of condition (o) to require a formalised agreement between the applicant and themselves to ensure compliance by the applicant with the conditions of resource consent. Mr Banks explained that they felt this would protect their interests in view of past unilateral action by the applicant causing harm to archaeological sites. He claimed that the agreement should provide funding for a qualified archaeologist to undertake a full survey of the Tairua Forest; funds for ongoing consultation with cultural advisers and the tangata whenua; and the invitation of a management structure for a kaitiaki roopu to participate with the applicant in the identification, preservation and management of waahi tapu and other taonga. In cross-examination he explained that he was not



expecting the Tribunal to require that an agreement be entered into, but was hopeful that consultation would lead to some agreement.

Counsel for the applicant submitted that if the consent is granted, the applicant would have to comply with all conditions imposed on the resource consent; and if it does not, then the appellants or the respondent would be able to take enforcement action. Counsel observed that there was no evidence to suggest that the applicant would not comply with conditions of any consent; and contended that the amendment is unnecessary and does not fairly and reasonably relate to the purposes and provisions of the Resource Management Act.

The respondent submitted that there is no jurisdiction to require that any such agreement be entered into; that any such agreement could be reached independently of the consent process; and should not form part of the consent conditions. Mr Milne observed that the respondent has a statutory function under section 35 of the Resource Management Act to monitor compliance with consents within the Waikato region.

In our opinion, the proposed amendments to condition (o) are unnecessary and inappropriate. Granting resource consent is an action of a public authority exercising statutory power. If the resource consent is granted, it is granted because that serves the statutory purpose. The Resource Management Act contains powerful means for enforcing compliance with conditions imposed on such a consent. Although enforcement proceedings can be taken by anybody, the Act specifically gives that function to public authorities, in this case the Waikato Regional Council. A condition requiring a private agreement between the grantee of resource consent and others having an interest in the land is inconsistent with the statutory and public nature of a resource consent and the power to impose conditions on it (in the absence of consent - see *Radojkovich v Hauraki Catchment Board* Decision A 15/89).

We doubt whether it would be lawful to impose the condition as amended; we consider that it would not be a reasonable condition; and in any event the amendment to the condition has not, in our opinion, been justified. We decline to make the amendment sought.



Replanting

In cross-examination, Mr Banks suggested a condition about management of replanting, to decide what areas are to be replanted and to protect certain areas. He was concerned that if CHHF wanted the whole area replanted, there would be nothing that the appellants could do about it. He agreed that there are conditions in the Crown forestry licence that enable areas to be excluded by the Minister, and he agreed that the tangata whenua have the protection of being to ask the Minister to invoke that power.

In opposition, counsel for the applicant observed that CHHF had not applied to replant trees on cleared sites, and submitted that the suggested condition would bear no relation to the activities which are the subject of the consent application. Counsel also contended that the conditions imposed by the respondent (including the condition (n) for waahi tapu management) would require identification of waahi tapu and taonga and would protect those sites.

First we record that neither the appellants' submission on the resource consent application, nor their notice of appeal against the respondent's decision (which was professionally prepared), contained any indication that the appellants were seeking such a condition. It was not referred to in the prepared statements of their evidence that should have been delivered to the other parties prior to the appeal hearing. Conditions of resource consent are important, and deserve more careful consideration and response by other parties than can be given if they are raised for the first time in the course of an appeal hearing.

Secondly, we acknowledge that replanting the application area with pine trees might well be a permitted activity in terms of the relevant planning instrument. As replanting is not the subject of the application before the Tribunal, the parties are not to be criticised for not having brought to the Tribunal's attention the rules that would govern such an activity on the land. However we recognise that the rules may well provide for protection of waahi tapu and other taonga. If they do not, the appellants may have opportunity under the Resource Management Act to seek amendments to those rules in that respect - perhaps in the First Schedule process for a proposed regional plan. That opportunity would be in addition to their opportunity to make representations to the Crown in respect of the Crown forestry licence.



Thirdly, it is also possible that replanting the application area may require resource consent. If so, the conditions controlling that activity should be considered at the time application for that resource consent is made. The consent authority's judgment on such an application should not be affected by a condition made in these proceedings.

The late request in the course of the hearing of this appeal against the grant of consent for harvesting the present forest does not provide a satisfactory substitute for taking any of those opportunities. The wording of a condition that might meet the appellants' concerns has not been proffered. The other parties have not had sufficient opportunity to consider their responses. Above all, a condition about replanting would not fairly and reasonably relate to the subject matter of the application to harvest the existing trees, but would be for an ulterior object of controlling a possible future activity on the same land. For those reasons we hold that the Tribunal would not have power at law to impose the suggested condition; that in any event it would not be reasonable to impose such a condition in the circumstances; and we decline to do so.

Consultation with Tangata Whenua

Another condition suggested by the appellant Mr Banks in cross-examination was a requirement of consultation between the Regional Council and the tangata whenua.

Counsel for the applicant observed that it had agreed to, and was continuing, consultation with tangata whenua, despite the appeal; and submitted that there was no obligation for the Regional Council as consent authority to undertake consultation.

The Regional Council's role as consent authority in respect of this application is finished. If the resource consent is granted, the Regional Council's role in monitoring and enforcing compliance with the conditions of the consent would be an executive function, not that of a consent authority, and that would not preclude it from consultation with the tangata whenua in the absence of the grantee if it chose.

However we do not see any need for a condition imposing on the Regional Council a duty of such consultation. If the appellants, or any member of the public (whether tangata whenua or not) has any evidence of any failure of the grantee to



comply with the conditions of the resource consent, he or she is free to provide that evidence to the Regional Council, which is the public authority selected by Parliament to have the enforcement function.

Conditions (n), (o) and (p) would provide liberal opportunities for communication between tangata whenua and the grantee. In addition, condition (q) even provides for reference of any disagreement to arbitration (absent agreement, it is **doubtful** whether the Tribunal would have imposed such a condition).

There is no basis in the evidence before us for doubting that the Regional Council would be properly attentive to any issues that tangata whenua may wish to raise with it that are within the scope of its functions.

Finally, the purpose of conditions of resource consent is to place limits and duties on the grantee in the exercise of the consent. The imposition of a duty on the Regional Council is outside that purpose, and would not be within the Tribunal's powers.

We do not consider that an additional condition requiring consultation by the respondent with tangata whenua is needed or appropriate; and we decline to amend the Regional Council's conditions to that effect.

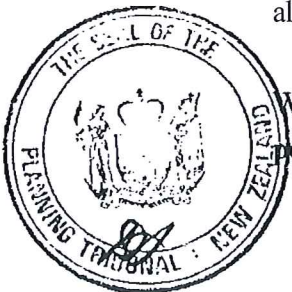
Compliance with Agreement

Condition (s) of the conditions imposed by the respondent reads:

"The exercise of this consent is subject to ongoing compliance by Carter Holt Harvey with the agreement between CHH, Ngati Pu and Ngati Karaua as tabled at the Hearings Committee hearing on 5 August 1994, or as subsequently amended or modified by agreement between these parties."

Counsel for the respondent, Mr Milne, submitted that this condition is ultra vires. Mr Brocklesby gave the opinion in evidence that it is inappropriate because the **consent** already provides for identification and protection of waahi tapu, and because the condition presumes that the Regional Council will if necessary enforce all of the provisions of the agreement.

We agree. In our opinion, condition (s) as framed is inappropriate and beyond the powers of a consent authority. We do **not** know the contents of the agreement



between CHHF and the iwi referred to. It may be that the contents could have been directly the subject of conditions. However as mentioned the power of consent authorities to impose conditions is to be used for the public purposes of the Act, not for the enforcement of private agreements. We will cancel condition (s).

DISCRETIONARY JUDGMENT

We have now considered the applicant's proposal and the various matters raised by the appellants; and we have had regard to such of the matters directed by section 104(1) as are applicable in the circumstances. We have now to exercise the discretionary judgment to grant or refuse the resource consent by reference to the statutory purpose of promoting the sustainable management of natural and physical resources.

On the evidence we heard, we are satisfied that the harvesting of the pine trees in the application area as proposed, and in compliance with the conditions imposed by the respondent (omitting condition (s)) is consistent with managing the use, development and protection of the natural and physical resources involved in a way and at a rate which would enable people and the community (including the tangata whenua) to provide for their social, economic and cultural wellbeing while meeting the goals set out in paragraphs (a), (b) and (c) of section 5(2); and in particular avoiding and mitigating any adverse effects of the activities on the environment. We are also satisfied that conditions (n), (o), (p) and (q) provide appropriately and well for the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu and other taonga; and take into account the principles of the Treaty of Waitangi.

In our judgment the statutory purpose is served by granting consent, and there is no sufficient reason for refusing it.

TERM OF CONSENT

The applicant asked that if the resource consent is granted, it should be for a term that would allow the grantee four harvesting seasons. The original expiry date was 31 December 1998, but because of the delay caused by this appeal, the applicant has already lost seven months, and the total delay would be about nine months. Counsel sought that the expiry date should be amended to 31 December 1999. We agree, and will amend the consent granted by the respondent accordingly.




DETERMINATIONS

For the foregoing reasons the Tribunal makes the following determinations:

1. The respondent's decision is amended -
 - (a) By substituting the expiry date 31 December 1999 for 31 December 1998; and
 - (b) By deleting condition (s).
2. In all other respects the respondent's decision is confirmed
3. Appeal RMA 497/94 is therefore disallowed.
4. The costs of the applicant and of the respondent incidental to this appeal are reserved.

DATED. at AUCKLAND this 20th day of April 1995.



DFG Sheppard
Planning Judge

(DE-0344.DOC)

